Nos. A06-396 and A06-397

State of Minnesota
In Court of Appeals

Susan Dunn, et al.,

Respondents (A06-396),
Appellants (A06-397),

vs.

National Beverage Corp., et al.,

Appellants (A06-396),
Respondents (A06-397),

DTM Distributing, Inc.,

Defendant (A06-396),
Respondent (A06-397).

RESPONDENTS' BRIEF (A06-396)
APPELLANTS' BRIEF (A06-397)

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ISSUES PRESENTED

1. Whether a genuine issue of material fact precluded the district court from determining as a matter of law that National Beverage Corp. did not become a party to the 1972 Franchise Agreement by virtue of its 1999 asset purchase agreement with American Citrus Products.

   The district court answered in the affirmative, denied NBC's summary judgment and judgment notwithstanding the verdict motions, and submitted the issue to the jury.

   - Modern Heating and Air Conditioning v. Loop Belden Porter, 493 N.W.2d 296 (Minn. Ct. App. 1992).
   - Turner v. Alpha Phi Sorority House, 276 N.W.2d 63 (Minn. 1979).
   - Trial Exhibit 229.
   - Trial Exhibit 230.

2. Whether the jury's answers to questions 1-4 of the special verdict form are supported by the evidence, where:

   a. There was evidence that National Beverage Corp. assumed the 1972 Franchise Agreement.
   b. There was evidence that National Beverage Corp. had actual knowledge that Dunn controlled Twin City when National Beverage Corp. breached the Franchise Agreement.
   c. As a matter of law, a franchise agreement can not be terminated orally.
   d. There was evidence that National Beverage Corp.'s breach proximately caused the damages awarded.

   The district court answered in the affirmative.

   - Trial Exhibit 229.
   - Trial Exhibit 230.
   - Trial Exhibit 201.
   - Minn. Stat. § 80C.14, subd. 14.

3. Whether the jury's answers to questions 15-21 of the special verdict form are supported by the evidence, where:

   a. There was evidence that a defamatory statement was made by National Beverage Corp.

b. The substantial accuracy of the statements was an issue of fact appropriately determined by the jury.
c. There was evidence that the statements impacted Twin City's business.
d. National Beverage Corp. was not entitled to qualified privilege.

The district court answered in the affirmative.

- Jadwin v. Minneapolis Star & Tribune Co., 390 N.W.2d 437 (Minn. Ct. App. 1996).
- Marchant Investment & Management v. St. Anthony West Neighborhood Organization, Inc., 694 N.W.2d 92 (Minn. Ct. App. 2005).
- National Refining Co. v. Benzo Gas Motor Fuel Co., 20 F.2d 763 (8th Cir. 1927).
- Lewis v. Equitable Life Assurance Society, 389 N.W.2d 876 (Minn. 1986).
- Wirig v. Kinney Shoe Corp., 461 N.W.2d 374 (Minn. 1990).

4. Whether the district court erred in failing to award Twin City its reasonable attorneys' fees.

The district court denied Twin City's post-trial motion to recover its attorneys' fees.

- Barr/Nelson, Inc. v. Tonto's, Inc., 336 N.W.2d 46 (Minn. 1983).
- Minn. Stat. § 80C.17, subd. 3.
- Martin Investors, Inc. v. Vander Bie, 269 N.W.2d 868 (Minn. 1978).

STATEMENT OF THE CASE

This is a case about corporate arrogance. Appellant/Respondent (Defendant below) National Beverage Corp. ("NBC"), of one of the country's largest beverage manufacturers and distributors, wrongfully terminated a local franchisee and its owners, Susan Dunn, Richard Newstrom, and Home Juice Citrus Products Mid-West, Inc. (collectively "Twin City" and Plaintiffs below). In the summer of 2002, Twin City's owners, who had successfully distributed Mr. Pure products for more than 30 years, attempted to sell their business assets. Although Twin City owned a Franchise Agreement with NBC's assignor, NBC took the position with Twin City's assignee, Service Distributing, Inc. ("Service Distributing"), that Twin City's franchisee rights were terminated. NBC then offered to do business with Service Distributing on a "handshake" deal in direct contravention to the Franchise Agreement and the Minnesota Franchise Act.

Following NBC's refusal to do business with Service Distributing pursuant to the terms of the Franchise Agreement, Service Distributing understandably, and with NBC's knowledge, returned the business assets and the franchise to Twin City's former owners within three months. Once Twin City's owners located another willing buyer, NBC again refused to recognize Twin City's franchise rights and began selling directly to one of Twin City's competitors, DTM Distributing, Inc. ("DTM"). As a result, the second sale did not close and Twin City was forced to bring legal action against NBC and DTM.

This appeal (A06-397) arises from post-trial motions following a jury trial in Dakota County District Court, the Honorable Rex D. Stacey presiding. The underlying litigation involved claims by Twin City for a violation of franchise rights by NBC as well as other ancillary claims, including breach of contract and business slander. (The jury found Defendant DTM not liable for any damages and Twin City does not contest those findings).

Specifically, Twin City contended that NBC breached and violated a 1972 Franchise Agreement (the "Franchise Agreement") which Twin City alleged that NBC assumed as part of its 1999 purchase of assets of American Citrus Products ("Chicago Home Juice"). (Appellant's Appendix at A-21).[1] Twin City also contended that NBC violated the Minnesota Franchise Act. (Id. at A-20-21). Additionally, Twin contended NBC committed business slander against it. (Id. at A-22-24).

On September 26, 2005, the jury returned a 43-question special verdict form finding that NBC breached the Franchise Agreement. (Id. at A-100). The jury also determined that NBC violated the Minnesota Franchise Act without good cause and committed corporate defamation by making statements to Twin City's customers that DTM was the only authorized Mr. Pure distributor. (Id. at A-101-02, 103-05). The jury awarded Twin City $288,000 in damages on the breach of contract claim (Id. at A-101) and $64,369.45 on the corporate defamation claim. (Id. at A-104).

Following trial, the parties filed cross-motions. (Id. at A-110-11; App. at R-001-02). For itself, Twin City moved, in part, for its attorneys' fees pursuant to the Minnesota Franchise Act. (App. at R-001-02). On November 18, 2005, the district court issued an Order for Judgment attaching the jury's special verdict form and denying all post-trial motion without findings, conclusions of law or a memorandum. (App. at A-98-109). On December 29, 2005, the district court entered judgment in favor of Twin City and against NBC. (Id. at A-99). Following the allowance of costs and disbursements, the final judgment entered in favor of Twin City was $360,235.34. (Id.).

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[1] Reference to Appellant's Appendix hereinafter cited as "App. at A-___." Reference to Respondent Twin City's Appendix is hereinafter cited as "App. at R-___."

Case number A06-397 is Twin City's appeal from the district court's denial of its attorneys' fees pursuant to Minn. Stat. § 80C.17, subd. 3. The district court erred in denying Twin City's motion because Twin City established that it had a franchise with NBC and that NBC violated the Minnesota Franchise Act by selling directly to DTM. The Minnesota Franchise Act allows for the recovery of attorneys' fees and on its face does not require the award of actual damages or a determination that the aggrieved party "prevail." Moreover, the jury awarded Twin City $288,000 on its breach of contract claim, the contract being the Franchise Agreement and forming the basis of Twin City's Minnesota Franchise Act claim. NBC agrees that Twin City's breach of contract claim is a breach of the Franchise Agreement. (See Appellant's Brief, at p. 1). Accordingly, the district court committed reversible error in denying Twin City's motion for attorney's fees pursuant to Minn. Stat. § 80C.17, subd. 3.

STATEMENT OF THE FACTS

American Citrus Products Grants Twin City a Franchise.

On or about August 1, 1972, Twin City entered into a Franchise Agreement with American Citrus Products ("Chicago Home Juice"). (App. at A-316-20, Ex. 201 at PL 0312-16). The Agreement provided that Twin City has "the right to use the brand names Home Juice, Mr. Pure, Dairy-Hi, Lady Caroline and Everfresh" as the brand names for its products within Twin City's exclusive marketing area. (Id. at A-318, Ex. 201 at PL 0314). Exclusivity was always recognized by both Chicago Home Juice and NBC. The Agreement also provides that Chicago Home Juice would not sell the products to any other franchise, affiliate or customer of Twin City without first obtaining written approval from Twin City. (Id. at A-319, Ex. 201 at PL 0315). On or about September 19, 1995, Chicago Home Juice extended the Franchise Agreement for an additional ten (10) years. (Id. at A-322, Ex. 209 at PL 0318). The franchise covered all or part of seventeen states. (Id. at A-323, Ex. 209 at PL 0319).

NBC's Acquisition of Chicago Home Juice.

On March 17, 1999, Chicago Home Juice announced that its division (Home Juice Co.) had entered into a contractual arrangement with NBC to become a part of the NBC family. (App. at R-003, Ex. 37 at NBEV001999). According to the announcement, Chicago Home Juice was joining NBC and "all of us should feel comfortable joining the national team, a larger and stronger family." (Id.). On March 19, 1999, Twin City received a letter from Kenneth J. Belles, the distributor division manager for Chicago Home Juice, in which Mr. Belles states: "We believe the acquisition of Home Juice Co. (Chicago Home Juice) by National Beverage Co. will be a win-win-win situation for Twin City Home Juice, Home Juice Co., and National Beverage Co. (Id. at R-004, Ex. 38 at NBEV002000). Mr. Belles also notes that he anticipates he and Mike Schott, President of Everfresh/La Croix, an NBC subsidiary, will be coming to Minneapolis in the near future so that Twin City can hear directly from Mike Schott about NBC's plans. (Id.).

On or about May 14, 1999, NBC acquired the assets of Chicago Home Juice. (App. at A-347-49, Ex. 230 at NBEV002060-62). The sale documents provide that NBC purchased:

> "[a]ll business, properties and assets of every kind and description, whether real, personal or mixed, tangible or intangible, wherever located, used or necessary in the operation of the Business."

(App. at A-334, Ex. 229 at NBEV002047). The sale documents also stated that NBC's purchased assets include "[a]ll other property owned or leased by the Seller (Chicago Home Juice's parent) that is used by or in connection with the business, whether or not reflected on the most recent balance sheet for the seller," (App. at A-348, Ex. 230 at NBEV002061) and "all other property owned or leased by [American Citrus] that is used by or in connection with the Business, whether or not reflected on the most recent balance sheet for [American Citrus]." (App. at A-334, Ex. 229 at NBEV002047) (parentheticals added).

Although NBC might have, and certainly should have, examined Chicago Home Juice's outstanding agreements in preparing for the asset purchase, it did not check the laws of the states in which it planned to do business to see if state statutes imposed any obligations with respect to any existing relationships. (Tr. 149-50, 1431-32, App. at R-030-31, 094-95). NBC understood, however, that some states impose such obligations. (Id.). Moreover, NBC requested and received information from Twin City about Twin City's franchise area before the closing.

H.J. Acquisition Corp.'s May 12, 1999 Letter.

Two days before the closing, on May 12, 1999, H.J. Acquisition Corporation, a wholly owned subsidiary of NBC claims it sent a letter to all of Chicago Home Juice's franchisees and distributors informing them of its intent to acquire the assets of Chicago Home Juice. (App. at A-324-25, Ex. 228 at PL 0076-0077). The letter, from an entity none of the franchisees had ever heard of, speaks to future intentions and possibilities. (Id.). The letter also contains references to establishing conditions and guidelines its distributors must fulfill. (Id.). No mention of franchises was made. In any event, no guidelines or conditions were ever established by NBC. (Tr. 334, App. at R-040 (Randy Walentowski testifying)); (Tr. 356, App. at R-047 (James Folsom testifying)); (Tr. 972-73, App. at R-083-84 (Sue Dunn testifying)).

Twin City never even received the May 12 letter. (Tr. 576, 771, App. at R-053, 078). Indeed, Twin City was not alone, as other distributors and franchisees also failed to receive the letter. (Tr. 354-55, App. at R-045-46).

NBC Conducts Business with Twin City in the Exact Manner As Chicago Home Juice.

The relationship between NBC and Twin City remained exactly the same as the relationship as Chicago Home Juice had with Twin City. (Tr. 582-84, App. at R-055-57). Other former franchisees of Chicago Home Juice who then established relationships with the NBC after the 1999 acquisition had a similar experience. (Tr. 345, App. at R-042).

Home Juice Uses Tri-County as a Sub-distributor.

On or about July 9, 2001, Twin City entered into an agreement with Tri-County Beverage and Supply, Inc. ("Tri-County") wherein Tri-County would become Twin City's sub-distributor for certain areas of Minnesota. (App. at A-356-64, Ex. 254 at PL 0810-18).

NBC considers purchasing Twin City.

In late 2001, NBC requested that Twin City enter into a confidentiality agreement to allow both parties to consider confidential information as NBC explored acquiring Twin City. (Tr. 622-625, App. at R-058-061). NBC's confidentiality agreement, however, was sent to an incorrect address and was not timely received by Twin City, which then began pursuing other sales options. (Id.). This was an interesting action for NBC, which later contended Twin City had nothing to sell.

Home Juice Sells to Service Distributing.

In late January 2002, Twin City began negotiating with Service Distributing to buy its assets. (Tr. 626-27, App. at R-062-63). The negotiations culminated in an Asset Purchase Agreement dated March 29, 2002. (App. at A-376-86, Ex. 280 at PL 0350-60). The parties also executed a Security Agreement, a Noncompete Agreement, and a Bill of Sale. (App. at A-387-91, Ex. 281, PL 0367-71); (App. at R-005-016, Exs. 83, 85, 88, PL 0361-0372). News of the sale was disclosed in an April 12, 2002, in a letter signed by Susan Dunn, Arthur Dunn and Mark Leikam, owner of Service Distributing. (App. at A-392, Ex. 287 at NBEV000163).

Service Distributing Dumps Tri-County as a Sub-distributor.

Shortly after its purchase of Twin City's assets, Service Distributing cut off Tri-County as its sub-distributor. Service Distributing asserts that it ended the relationship with Tri-County due to an insufficient funds check received by Service Distributing. (Tr. 1064-67, App at A-246-49).

DTM Becomes Service Distributing Sub-distributor.

After dumping Tri-County as its sub-distributor, Service Distributing chose DTM to help it distribute NBC's product. (Tr. 643, App. at R-064). DTM would later become NBC's sole distributor in Twin City's exclusive territory.

Service Distributing Returns Twin City to Susan Dunn.

Because of his inability to obtain product from NBC and because NBC was telling him that NBC would not honor the Franchise Agreement, on or about June 27, 2002, Mark Leikam informed Susan Dunn that he did not want to continue as owner of the company. (Tr. 428, App. at R-050 (Mike Perez testifying)); (Tr. 874-75, App. at R-080-81 (Sue Dunn testifying)); (Tr. 1098, App. at R-085 (Mark Leikam testifying)); (App. at A-311, Ex. 95 at NBEV00179). Service Distributing's problems with NBC were further documented in a letter from Twin City's counsel, dated June 28, 2002, to NBC. (Tr. 708-09, App. at R-075-76); App. at R-017-19, Ex. 96 at NBEV000128). Throughout the summer of 2002, Twin City's counsel and NBC's counsel corresponded about the problems Service Distributing encountered and Twin City's rights concerning Mr. Pure beverages. (App. at R-023-24, Exs. 101-102 at NBEV000147-48). It was only later, in

September 2002, that Twin City and Service Distributing finally got around to signing all of the necessary documents to cut ties. (App. at A-425, Ex. 300). However, Service Distributing, Dunn and NBC all understood that Twin City's assets were returned to Dunn on June 27, 2002.

DTM Meets Twin City to Discuss Purchasing Home Juice.

On July 1 and again on July 9, 2002, DTM met with Twin City to determine whether it would be interested in purchasing the assets of the company. (Tr. 644-50, App. at R-065-71). To that affect, on July 1, 2002, Defendant DTM entered into a Confidentiality Agreement with Home Juice. (App. at R-020, Ex. 98 at PL 0629). By July 2, 2002, however, Defendant DTM expressed reservations to NBC and Dunn about any such purchase and on July 9, 2002, DTM determined that there was no value in purchasing Twin City. (App. at A-311-12, Ex. 95 at NBEV00179-180). During this period, DTM was in frequent communication with NBC, expressing interest in distributing NBC products. (Id.). NBC initially told DTM that no agreement to that effect could be entered into because of Twin City's rights. (Id.). Soon after, however, NBC decided to ignore those rights.

DTM Begins Buying Directly From NBC.

Also on July 9, DTM signed a credit application offered by NBC that was necessary to become NBC's product distributor. (App. at R-021-22, Ex. 99 at NBEV00184-85). After July 9, and despite NBC's later claims that sales were deteriorating in a peak season in an important market and that it was frustrated with the situation (it created) involving Service Distributing and Twin City, NBC made absolutely no effort to visit, telephone or otherwise communicate with either Service Distributing or Twin City save one vague letter in August. (Tr. 1417, 1429-30, 1435, App. at R-091-93, 096). Meanwhile, and unbeknownst to Twin City, DTM began purchasing product directly from NBC contrary to Twin City's exclusive franchise rights.

Tri-County Arranges to Purchase Home Juice.

On August 26, 2002, Twin City and Tri-County entered into a Stock Purchase Agreement whereby Tri-County would take over as franchisee in Twin City's shoes. (App. at A-402-05, Ex. 298 at PL 0375-78). The parties also executed a Promissory Note in the amount $375,000.00 for the assets of the company. Additionally, the parties signed a Pledge Agreement, a Security Agreement and Employment Agreements with Newstrom and Dunn which would include their medical and dental insurance. (Id. at A-406-23, 427-28, Exs. 298 at PL 0379-96, 301 at PL 0409-10). The sale, which was to be closed later, never closed and the stock certificates were never transferred.

The reason there was no closing is because NBC refused to recognize Twin City's right to assign its franchise to Tri-County and informed Tri-County that DTM was now its distributor in Minnesota. (Tr. 225-27, App. at R-032-34). This same message was being conveyed by both DTM and NBC to retail customers and others. (Tr. 260, App. at R-035); (App. at A-446, Ex. 340); (App. at A-448, Ex. 342). Since NBC was denying that Twin City had any franchise rights to assign to Tri-County and since NBC refused to sell product to Tri-County, the proposed stock transfer pursuant to the Stock Purchase

Agreement of August 26, 2002, never concluded. Likewise, the Dunn and Newstrom contracts with Tri-County were useless. NBC and DTM continued to sell the products included in Twin City's franchise, in a manner totally inconsistent with Twin City's rights under the Franchise Agreement. DTM continues to be NBC distributor in Twin City's market to the present day.

ARGUMENT

I. STANDARD OF REVIEW.

On appeal from a denial of summary judgment, the Court of Appeals reviews the record to determine whether a genuine issue of material fact exists and whether the law was correctly applied. Murphy v. Allina Health Sys., 668 N.W.2d 17, 20 (Minn. Ct. App. 2003). The record is reviewed in the light most favorable to the nonmoving party. Wright Elec., Inc. v. Ouellette, 686 N.W.2d 313, 318 (Minn. Ct. App. 2004).

Review of a district court's denial of a motion for JNOV is de novo, but the denial "must be affirmed if there is any competent evidence reasonably tending to sustain the verdict." Thompson v. Hughart, 664 N.W.2d 372, 376 (Minn. Ct. App. 2003). Unless the evidence is practically conclusive against the verdict, the appeals court will not set the verdict aside. Pouliot v. Fitzsimmons, 582 N.W.2d 221, 224 (Minn. 1998) ("[t]he evidence must be considered in the light most favorable to the prevailing party and an appellate court must not set the verdict aside if it can be sustained on any reasonable theory of the evidence.").

II. THE COURT OF APPEALS SHOULD AFFIRM BECAUSE THE DISTRICT COURT CORRECTLY RULED THAT THE EVIDENCE CREATED A GENUINE ISSUE OF MATERIAL FACT CONCERNING WHETHER NBC ASSUMED THE 1972 AGREEMENT AS A MATTER OF LAW.

NBC alleges the district court erred in denying both its motion for summary judgment and its motion for judgment notwithstanding the verdict on the issue of whether it assumed Twin City's 1972 Franchise Agreement as part of its 1999 asset purchase agreement with American Citrus Products. However, the district court correctly determined that NBC's contention was belied by the express language of the 1999 asset purchase agreement, NBC's unequivocal admissions at trial, and other evidence introduced at trial. Accordingly, the district court must be affirmed.

A. The Documents Comprising The 1999 Asset Purchase Agreement Establish That NBC Assumed The 1972 Franchise Agreement.

NBC's appeal is largely premised on the allegation that it can not be found liable for breaching the 1972 Franchise Agreement as a matter of law because NBC assumed only those enumerated contracts listed in the asset purchase agreement. Because the Franchise Agreement was not expressly listed in the schedule of contracts assumed,[2] NBC contends the district court should have dismissed Twin City's breach of contract claim as a matter of law. NBC ignores, however, the express language of the asset purchase agreement stating that all contracts necessary to operate the business were also assumed, irrespective of whether they were listed on Schedule 1(g). Moreover, the evidence clearly supports the fact

[2] Schedule 1(g) to the sale documents references a blank page and two unrelated manufacturing contracts. (App. at A-345-346, NBEV002058-59).

that NBC continued to operate under, and accept the terms of the Franchise Agreement. As a result, NBC's allegation is without merit.

The relevant documents concerning the 1999 transaction with Chicago Home Juice were offered by NBC at the summary judgment stage and were introduced at trial as Exhibits 229 and 230. (App. at A-326-349, NBEV002039-62). Schedule 1 to the sale documents unambiguously and unequivocally provides that in addition to the contracts listed on Schedule 1(g) NBC purchased "[a]ll business, properties and assets of every kind and description, whether real, personal or mixed, tangible or intangible, wherever located, used or necessary in the operation of the Business." (App. at A-334, Ex. 229 at NBEV002047). The schedule goes on to list several types of assets purchased, but it is clear that the purchased assets are not limited to those expressly listed in the sale documents. Id.

Additionally, NBC's Bill of Sale, Assignment and Assumption Agreement states that the purchased assets include "[a]ll other property owned or leased by the Seller that is used by or in connection with the business, whether or not reflected on the most recent balance sheet for the seller." (App. at A-348, Ex. 230 at NBEV002061). Schedule 1 similarly states that the purchased assets include "all other property owned or leased by [American Citrus] that is used by or in connection with the Business, whether or not reflected on the most recent balance sheet for [American Citrus]." (App. at A-334, Ex. 229 at NBEV002047).

It is axiomatic that NBC is unable to do business without the ability to distribute its product. Indeed, NBC admitted this at trial. (Tr. 1416-17, App. at R-090-91).

Additionally, NBC continued distribution of product immediately after it purchased assets on May 14, 1999. (Tr. 128, App. at R-027). It also goes without saying that a franchise agreement would be considered an asset to NBC, and not a liability, since it would constitute a violation of the franchise agreement and the Minnesota Franchise Act to distribute product in the states covered by Twin City's franchise agreement without assuming the franchise. Indeed, NBC also admitted this at trial. (Tr. 132-33, App. at R-028-29). Thus, it was reasonable for the trial court to conclude that based on the language of these documents a genuine issue of material fact existed concerning whether Twin City's franchise was assumed by NBC.

Indeed, if NBC did not assume Twin City's Franchise Agreement, NBC would be violating Twin City's exclusive right, set forth in the 1972 Franchise Agreement and extended in the 1995 Addendum, to distribute product within its geographic territory because Twin City's rights were not terminated by either Chicago Home Juice or NBC and were still operative. Accordingly, NBC had to pick its poison. If it assumed Twin City's franchise as property necessary or used by or in connection with its business, NBC's conduct violated that franchise. If NBC didn't assume the franchise, it could not distribute product in Twin City's exclusive territory without violating the franchise. In any event, NBC ended up violating that franchise.

At a minimum, Schedule 1 and the Bill of Sale are ambiguous to the extent that they fail to explain what assets are considered "used or necessary" or "used by or in connection" with the business. Accordingly, there were genuine issues of material fact for consideration by the jury concerning whether the 1972 franchise agreement was assumed by NBC. See Modern Heating and Air Conditioning v. Loop Belden Porter, 493 N.W.2d 296 (Minn. Ct. App. 1992) (a term is ambiguous if it is susceptible to more than one meaning); Turner v. Alpha Phi Sorority House, 276 N.W.2d 63, 66 (Minn. 1979) (where a contract contains ambiguous terms, its construction depends on extrinsic evidence and there arises at least a question for the jury).

For its part, NBC alleges that a breach of contract claim can not be maintained against a defendant who was not a party to the agreement at issue. In support, NBC cites to Watson's Properties, LLC v. Menard, Inc., 2002 WL 1364064 (Minn. Ct. App., June 19, 2002). However, this argument assumes that NBC did not become a party to the 1972 Franchise Agreement, which was a fact issue answered in the affirmative by the jury. In any event, Watson's Properties, LLC is distinguishable from the facts here and is therefore inapplicable.

In Watson's Properties, LLC, Watson's, the plaintiff, entered into an agreement to purchase real property from Menard, Inc in August 2000. (Appellants' Addendum at Add. 1). The purchase agreement provided, in relevant part, that Menard would pay property taxes for 1999 and a pro-rated share of taxes in 2000. (Id.). Commonwealth Land Title Insurance Co. acted as the closing agent for the sale and interpreted the purchase agreement to require Menard to pay property taxes due in 1999 and a prorated share of those due in 2000. (Id.).

Watson's alleged that the purchase agreement required Menard to pay all property taxes due in 2000 and a prorated share of 2001 taxes and brought suit against Menard alleging breach of contract, promissory estoppel and unjust enrichment. (Id. at Add. 2). Watson's also brought suit against Commonwealth alleging breach of contract, negligence and breach of fiduciary duty. (Id.). Menard moved to dismiss Watson's complaint for failure to state a claim and Commonwealth joined the motion. (Id.). The district court granted the motion and Watson's appealed. (Id.).

With respect to the breach of contract claim against Commonwealth, the Court of Appeals affirmed, holding that because Commonwealth was not a party to the purchase agreement, and because the only breach alleged is a breach of that agreement, the dismissal was not in error. (Id. at Add. 3).

Watson's Properties, LLC is inapplicable to the instant matter on multiple grounds. First, Watson's Properties, LLC involved a real estate action and, contrary to the case at bar, there was no evidence introduced that Commonwealth was purchasing any assets or stepping into the shoes of Menard. Second, contrary to the instant matter, there was no evidence in Watson's Properties, LLC to that Commonwealth was assuming any obligations or agreements necessary or used in connection with the operation of Menard's business. Third, Watson's sued Commonwealth on the theory that it misinterpreted a purchase agreement admittedly involving only Watson's and Menard. Here, Twin City's legal theory is significantly different as it alleged NBC violated the terms of a franchise agreement that was admittedly necessary to NBC's operation. Fourth, no statute, such as the Minnesota

Franchise Act, governed the parties in Watson's Properties, LLC. Accordingly, Watson's Properties, LLC, is inapplicable to the analysis here.

NBC also cites to several cases that purportedly hold that an asset purchaser does not assume any of the asset seller's contractual obligations or liabilities unless expressly agreed. See Wine Imports of Am., Ltd. v. Gerolmo's Liquors, Ltd., 563 F. Supp. 163,166 (E.D. Wis. 1983); Corporate Express Office Prods., Inc. v. Phillips, 847 So.2d 506 (Fla. 2003); Dominion Sports Servs., Inc. v. Bredehoft, 2005 WL 3468137 (Minn. Ct. App., Dec. 20, 2005); Mitchell Machinery, Inc. v. Ford New Holland, Inc., 918 F.2d 1366 (8th Cir. 1990); Ernst v. Ford Motor Co., 813 S.W.2d 910 (Mo. Ct. App. 1991); Phase III Marketing, Inc. v. EZ Paintr Co., 2000 WL 3252133 (W.D. Mich., Dec. 4, 2000). NBC's reliance on these cases, however, is misplaced.

First, Wine Imports of Am., Ltd., Corporate Express Office Prods., Inc., Ernst and Phase III Marketing, Inc. are decisions from courts outside of Minnesota or the Eighth Circuit and have no authoritative value to the issues before the Court.

Second, even if the merits of these decisions are considered along with Dominion Sports Servs., Inc. and Mitchell Machinery, Inc., all of these cases are distinguishable and have no application to the instant matter because NBC is unable to point to any evidence introduced or considered in any of those cases wherein the transaction documents contained a clause that the transferee assumed all assets necessary to or used in the operation of the assumed business. This is in stark contrast to the facts at bar here and is fatal to NBC's position.

B. NBC's Unequivocal Admissions At Trial Establish That It Assumed The 1972 Agreement.

In addition to the plain language of the 1999 transaction documents stating that NBC purchased all assets necessary to the operation Chicago Home Juice's business, regardless of whether they were listed in the sale documents, NBC's unequivocal admissions at trial establish that it assumed Twin City's Franchise Agreement.

Indeed, NBC's lone representative at trial, Mike Perez, testified that franchisees, such as Twin City, and distributors are necessary to the operation of NBC's business because the company had no other way to distribute its product to retailers. (Tr. 1416-17, App. at R-090-91). NBC presented no witnesses to counter this evidence. Additionally, Mr. Perez testified that franchise agreements are assets and not liabilities. (Tr. 132-33, App. at R-028-29). NBC presented no witnesses to counter this evidence either. James Folsom and Randy Walentowski, both of whom were non-party witnesses, presented additional evidence at trial that the franchise agreements were assets and not liabilities and that these relationships were necessary to the operation of NBC's business. (Tr. 350-51, App. at R-043-44 (Randy Walentowski testifying)); (Tr. 361, App. at R-048 (James Folsom testifying).

In fact, Mr. Perez testified that despite having knowledge of the language of the asset purchase agreement and the necessity of the franchisees to the operation of its business, NBC did not inquire whether Chicago Home Juice had existing contracts with its distributors and did not check the laws of the states in which it would do business to see if state statutes imposed any obligations with respect to any existing relationships. (Tr. 149-

50, 1431-32, App. at R-030-31, 094-95). However, Mr. Perez also admitted that he understood that some states did impose such obligations. (Id.).

C. NBC's Reliance On a May 12, 1999, Letter And the Discussion At the 1999 Franchisee Conference is Misplaced.

Unable to avoid the conclusion that the asset purchase documents and Mr. Perez's admissions at trial serve as ample evidence to affirm the district court and jury's determinations that NBC assumed Twin City's 1972 Franchise Agreement, NBC is left to contend that the May 12, 1999, letter from H.J. Acquisition Corp. and a later discussion among franchisees in 1999 evidences a termination of the 1972 Franchise Agreement, and an acknowledgement that Twin City no longer possessed franchisee rights. For the reasons that follow, however, NBC's contention is without merit.

On appeal, NBC does not challenge that Twin City had a valid franchise with Chicago Home Juice. However, NBC claims to have terminated that franchise by virtue of a May 12, 1999, letter sent by its subsidiary, H.J. Acquisition Corp. With respect to terminating of a franchise, the Minnesota Franchise Act Provides:

> No entity or person may terminate or cancel a franchise in Minnesota unless:
>
> 1) that person has given written notice setting forth all the reasons for the termination or cancellation at least 90 days in advance of termination or cancellation, and
>
> 2) the recipient of the notice fails to correct the reasons stated for termination or cancellation in the notice within 60 days of the receipt of the notice."

Minn. Stat. § 80C.14, subd. 3(a). While there are limited exceptions to the general rule, (see Minn. Stat. § 80C.14, subd. 3(a)) there is no evidence here to support any one of them.

In the instant case, NBC's only evidence that it has ever terminated Twin City's franchise is the May 12, 1999, letter, which was sent before the closing and therefore before any acquisition by NBC's subsidiary of any franchise rights. Additionally, the May 12 letter merely provides for declarations of future possibilities and intentions. In any event, it fails to comply with the statutory requirement to terminate a Minnesota franchise.

Unable to present evidence that its alleged termination complied with the Minnesota Franchise Act, NBC asserts that the May 12 letter rescinded and superseded Twin City's franchise. However, the May 12 letter is nothing more than a declaration of present intentions to perform actions in the future. (App. at A-324, Ex. 228 at PL 0076). It certainly does not constitute a binding agreement because NBC or its subsidiary H.J. Acquisition Corp., an entity no Chicago Home Juice franchisor or distributor had ever heard of, lacked the authority to enter into a contract with Twin City when it was drafted and allegedly mailed. The letter is dated May 12, 1999. (Id.). The asset purchase documents, however, clearly indicate that NBC did not acquire the Chicago Home Juice assets until May 14, 1999. (App. at A-347, Ex. 230 at NBEV002060). Thus, at the time it drafted and allegedly sent the May 12 letter, neither NBC nor its unknown subsidiary possessed the assets NBC alleges it terminated.

Additionally, the May 12 letter contains references to several ambiguous goals, guidelines and requirements that were never created or maintained. The letter provides:

> *National Beverage's philosophy with its distributors is quite simple and based upon the achievement of mutually defined goals*

> *as long as a Mr. Pure distributor meets reasonable guidelines established from time to time*
>
> *as long as the basic requirements mentioned above concerning growth, exclusivity, etc. are satisfied."*

(App. at A-324, Ex. 228 at PL 0076).

The evidence at trial established that NBC never created, let alone maintained, any "mutually defined goals", "reasonable guidelines", or "basic requirements." (Tr. 334, App. at R-040 (Randy Walentowski testifying)); (Tr. 356, App. at R-047 (James Folsom testifying)); (Tr. 972-73, App. at R-083-84 (Sue Dunn testifying)). NBC can not expect Twin City to meet standards that it fails to set or even convey.

Moreover, the May 12 letter doesn't even contemplate Twin City's <u>franchise</u> relationship as the letter continually references only the term "<u>distributor</u>". The language of the letter states: ". . . this letter . . . supersedes any and all <u>distributor</u> agreements." Twin City is not a distributor, as that term is used in the industry or in Minnesota Statutes; instead, Twin City, and some of its peers, are franchisees. (Tr. 578, 972 App. at R-054, 083). Indeed, testimony at trial established that, based on the identification of distributor agreements, Twin City and some of its peers did not believe the May 12 letter affected their franchise rights. (Tr. 333, App. at R-039 (Randy Walentowski testifying)); Tr. 354, 356, App. at R-045, 047 (James Folsom testifying)); (Tr. 973, App. at R-084 (Sue Dunn testifying)).

Because the language of the letter itself fails to contain the definiteness necessary to establish the elements of a contract, the May 12 letter is of no legal effect and the appeals court should reject NBC's assertion. Greenfield v. Peterson, 141 Minn. 475, 480, 170 N.W. 696, 698 (1919) (the terms of a contract must be definite and certain); Ham v. Johnson, 55 Minn. 115, 117, 56 N.W. 584, 585 (1983) (a contract can only be enforced where its terms are definite).

In addition to NBC's inability to establish that it terminated Twin City's franchise or rescinded or superseded its franchise by sending the May 12, 1999, letter, the evidence at trial established that Twin City did not even receive the May 12 letter. (Tr. 576, 771, App. at R-053, 078). Interestingly, other franchisees NBC alleges it sent the May 12 letter similarly never received it. (Tr. 354-55, App. at R-045-46 (James Folsom testifying)).

With respect to the 1999 franchisee meeting, the trial testimony establishes that the franchisees understood their franchisees were not immediately impacted. (Tr. 344-45, App. at R-041-42 (Randy Walentowski testifying)); (Tr. 381, App. at R-049 (James Folsom testifying)). Indeed, Sue Dunn testified that she did not believe the transaction had any effect on Twin City's current franchise. (Tr. 779, App. at R-079). Instead, she testified that she believed that no change would occur at least until the existing franchise expired in 2005. (Tr. 880, App. at R-082). Under Minnesota law, neither this letter nor any meeting discussion could ever terminate a franchise.

Accordingly, the evidence considered by the trial court and the jury overwhelmingly establishes that NBC assumed Twin City's 1972 Franchise Agreement. Therefore, the Court of Appeals should affirm.

III. THE COURT OF APPEALS SHOULD AFFIRM BECAUSE THE JURY'S ANSWERS TO QUESTIONS 1-4 OF THE SPECIAL VERDICT FORM WERE SUPPORTED BY THE TRIAL EVIDENCE.

As described above, the evidence plainly contradicts NBC's allegation that the trial court erred in refusing to conclude as a matter of law that Twin City's Franchise Agreement was not assumed by NBC. As a result, NBC is left to present unsupported allegations that the evidence the jury considered is manifestly contrary to its conclusion that NBC assumed the Franchise Agreement, breached the agreement, and that the breach proximately caused Twin City damages. For the reasons that follow, however, the jury's verdict must be affirmed.

A. The Evidence Supports the Jury's Conclusion That NBC Assumed the Franchise Agreement.

As described in detail above, the 1999 transaction documents confirm that NBC purchased all assets from Chicago Home Juice that were necessary to its operation and used in connection with the business. (App. at A-326-349, NBEV002039-62). Additionally, the evidence at trial unequivocally establishes that NBC considered its franchisees to be assets, and not liabilities, and that the franchisees are necessary and essential to distribute its products. Accordingly, the evidence is not conclusively against the verdict or manifestly contrary to the law and the Court of Appeals should affirm.

B. The Evidence Supports the Jury's Conclusion That NBC Breached the Franchise Agreement.

NBC alleges Question Nos. 2 of the special verdict form (whether NBC breached the franchise agreement) is against the manifest weight of the evidence because Twin

City transferred it franchise rights to Service Distributing and Service Distributing orally consented to the termination of the franchise. However, it is NBC's allegations that are against the manifest weight of the evidence as NBC possessed actual knowledge prior to its breach that Service Distributing had returned the assets of Twin City, including the franchise, and because the Minnesota Franchise Act prohibits termination of a franchise orally.

1. The Evidence Establishes That NBC Possessed Actual Knowledge In June 2002 That Service Distributing Rescinded The March Asset Purchase Agreement.

NBC relies on testimony by Mark Leikam that he did not oppose NBC's direct sale to DTM in August 2002. NBC's reliance, however, is misplaced. At trial, there was evidence submitted to the jury that Twin City and not Leikam held the franchise rights at the time of NBC's breach. Dunn, Leikam and NBC's Perez all testified that Leikam's company, Service Distributing, returned the company to Dunn on June 27, 2002. (Tr. 428, App. at R-050 (Mike Perez testifying)); (Tr. 874-75, App. at R-080-81 (Sue Dunn testifying)); (Tr. 1098, App. at R-085 (Mark Leikam testifying)). Indeed, Perez's notes indisputably establish that NBC had actual knowledge that Dunn and not Leikam held the rights when NBC sold directly to DTM. (App. at A-311, Ex. 95 at NBEV00179). Additionally, on June 28, Dunn's counsel wrote to NBC to advise that NBC's continuous refusal to transfer Mr. Pure product to Service Distributing was intentionally causing problems with the sale. (Tr. 708-09, App. at R-075-76); (App. at R-017-19, Ex. 96 at NBEV000128-130). Further, continuing throughout the summer of 2002, Dunn's counsel and NBC's counsel traded correspondence concerning Service Distributing's return of the business and franchise and Twin City's resulting legal interest and right to distribute Mr. Pure. (App. at R-023-24, Exs. 101-102 at NBEV000147-48).

Therefore, there was evidence that Twin City and not Leikam was the holder of the franchisee relationship with NBC at the time of NBC's breach. The jury simply rejected NBC's evidence and accepted Twin City's evidence. Accordingly, the district court must be affirmed. Thompson, 664 N.W.2d at 376 (denial of JNOV "must be affirmed if there is any competent evidence reasonably tending to sustain the verdict.").

NBC cites Pine Valley Meats, Inc. v. Canal Capital Corp., 566 N.W.2d 357, 365 (Minn. Ct. App. 1997) *abrogated on other grounds by* Myers v. Hearth Technologies, Inc., 621 N.W.2d 787 (Minn. Ct. App. 2001) to contend that a breach of contract claim can not be maintained where the rights vested in the contract have been assigned to another party. However, Pine Valley Meats, Inc. is distinguishable from the case at bar because, in stark contrast to the evidence presented above, there was no evidence in Pine Valley Meats, Inc. that the assignment was rescinded prior to the breach. Accordingly, NBC's reliance on Pine Valley Meats, Inc. is erroneous.

Additionally, because Service Distributing rescinded the asset purchase, thereby returning the rights to Twin City, and because NBC had actual knowledge of this as early as June 2002, NBC's allegation that Service Distributing abandoned performance under the franchise agreement in July and August 2002 is without merit. Also without merit is NBC's allegation that Service Distributing consented to NBC's sale of product directly to DTM

Distributing, Inc. on August 27, 2002. Service Distributing simply could not abandon or consent to give away rights it did not have, and, in any event the franchise could not be terminated in a manner inconsistent with the express provisions of the Minnesota Franchise Act.

Further, NBC's allegation that Service Distributing violated Paragraph 7 of the 1972 franchise agreement by selling Very Fine juice is without merit. Upon close examination, Paragraph 7 of the 1972 agreement does not apply to any dealings with NBC. Paragraph 7 provides:

> Twin City agrees to buy its entire requirements of fruit juices, fruit juice drinks and imitation fruit drinks from Associated (Associated Citrus Enterprises, Twin City's sister company) for the ten year period this Agreement is operative at the same price and on such terms that Associated charges all other users for the same quality and quantity purchased.

(App. at A-319, Ex. 201 (PL 0315)) (parenthetical added).

The unambiguous language of Paragraph 7 establishes it was an agreement between Twin City and its sister company, Associated Citrus Enterprises, not the franchisor, American Citrus Products (referred to as "Home" in the 1972 agreement a/k/a Chicago Home Juice). (Id.). Thus, Twin City (and Service Distributing) did not agree to purchase its juice requirements from Chicago Home Juice (or NBC). Instead, Twin City was obligated to purchase juice from its sister company, who would purchase concentrate from Chicago Home Juice, mix it with water, and then sell it to Twin City to distribute. This practice ended in the late 1970s when Associated went out of business. (Tr. 757, App. at R-077).

In any event, Paragraph 7 only obligated Twin City for ten years and by the time the franchise agreement was extended in 1995, Associated had been out of business for nearly 20 years. Moreover, the provision did not require Twin City to purchase its requirements of juice from Chicago Home Juice and did not even involve Chicago Home Juice. Thus, although the jury determined NBC stepped into the shoes of Chicago Home Juice having assumed the franchise agreement, Paragraph 7 does not impact NBC's relationship with Twin City or Service Distributing. In addition, neither Chicago Home Juice nor NBC gave such termination pursuant to Minnesota Statutes and both continued to operate in a manner consistent with Twin City's franchise rights until NBC's breach.

2. As A Matter of Law, Twin City's Franchise Rights Could Not Be Terminated Orally.

NBC alleges that Leikam and Perez reached a new meeting of the minds and replaced all prior agreements during a conversation on April 17, 2002. However, Minnesota law prevents parties from terminating franchise agreements orally, or in any manner inconsistent with Minn. Stat. § 80C.14, subd. 3.[3] Thus, as a matter of law, NBC could not terminate Twin City's franchise rights by entering into a "handshake" deal with Service Distributing.

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[3] The Minnesota Franchise Act provides:

> No person may terminate or cancel a franchise unless:
> i. that person has given written notice setting forth all the reasons for the termination or cancellation at least 90 days in advance of the termination or cancellation, and
> ii. the recipient of the notice fails to correct the reasons stated for termination or cancellation in the notice within 60 days of receipt of the notice.

Minn. Stat. § 80C.14, Subd. 3(a).

At trial, NBC presented no evidence that it complied with Minnesota Statutes in terminating Twin City's Franchise Agreement and creating a new agreement with Leikam. Indeed, NBC produced no documentary evidence to support its allegation. Instead, NBC relied solely on the testimony of Leikam and Perez, which was presented to the jury. In determining that NBC indeed breached the Franchise Agreement with Twin City, the jury expressly rejected the testimony that Leikam and Perez terminated Twin City's Franchise Agreement and created a new "handshake" deal and accepted Twin City's evidence that any such termination and new agreement was void and unenforceable.

This is one of many examples of NBC's corporate arrogance. It made a conscious decision to take no action to determine what its obligations would be under Minnesota law, and then plainly ignored those legal obligations. When questioned, NBC simply relied on its oft-stated mantra that it "did not do contracts." The district court and jury understood that under the circumstances of entering into a franchise relationship and doing business with a Minnesota corporation, NBC was bound by Minnesota law.

C. The Evidence Supports the Jury's Conclusions That NBC's Breach Proximately Caused Twin City's Injury and That Twin City Consequently Suffered Damages.

NBC alleges that because the jury awarded Twin City $288,000 in damages on its breach of contract claim, the award had to involve the failed Leikam deal. NBC alleges that Twin City did not claim that the failed Leikam deal caused them any damages. It is clear that NBC misunderstands Twin City's damages claim. In this case, Twin City sought damages for the value of the business which was allegedly was lost when NBC began selling directly to DTM. (Tr. 1563-68, App. at R-097-102). Although Twin City claimed they lost approximately $1.25 million resulting from NBC's breach of the franchise agreement, the jury disagreed. Instead, the jury determined the value of what Twin City lost was $288,000. (App. at A-101).

Ironically, the $288,000 number was presented by NBC's damage expert, who opined that the stock sale Twin City had with Tri-County Beverage was not "bona-fide." (Tr. 1304-05, App. at R-088-89). She did admit, however, that the Leikam asset purchase for $288,000 was legitimate. (Tr. 1250-51, App. at R-086-87). Based on the evidence presented by NBC's own damages expert, there was evidence considered – and apparently accepted – by the jury that the value of what Twin City lost resulting from NBC's breach was $288,000.

It is significant that just because the jury awarded damages of 288,000 does not mean that it involved the failed Leikam deal. As stated, Twin City sought damages for the value of their company. The jury determined that the value was 288,000. This determination was based on evidence submitted by NBC's own expert. The amount awarded was certainly within the range of damages supported by the evidence. Therefore, NBC's contention that there is no evidentiary support for the jury's verdict is without merit.

IV. THE COURT OF APPEALS SHOULD AFFIRM BECAUSE THE TRIAL EVIDENCE SUPPORTED THE JUDGMENT ON TWIN CITY'S DEFAMATION CLAIM.

NBC asserts that the jury's answers to Question Nos. 15-21 of the special verdict form must be reversed and that the trial court erred in not granting its motion for judgment notwithstanding the verdict. NBC contends that there was no evidence that it made a defamatory statement, that the defamatory statements were true, that the defamatory statements caused no harm to Twin City, and that the statements were protected by qualified privilege. A simple review of the record and pertinent case law, however, indicates NBC is incorrect.

A. The Evidence Established That NBC Made Defamatory Statements.

NBC alleges the jury was not asked to find, and that no evidence was presented at trial concerning whether NBC's representative made any actual statements regarding DTM's status as the authorized distributor of Mr. Pure products. First, the special verdict form required the jury to determine whether both NBC and DTM made defamatory statements. (App. at A-103). The jury answered in the affirmative.

Second, NBC's position is directly contrary to the testimony and exhibits considered by the jury. Mr. Mateer testified that on October 2, 2002, representatives from NBC and DTM made statements that DTM was the <u>only</u> authorized Mr. Pure distributor. (Tr. 260, App. at R-035). Mr. Mateer's affidavit, which was submitted by Defendant DTM to the jury as Exhibit 340, confirms that the representative from NBC was David Sanchez. (App. at A-446, Ex. 340). Similarly, Mr. Stoffel, whose affidavit was also presented to the jury by Defendant DTM as Exhibit 342, also presented testimony that NBC representative David Sanchez made statements that DTM was the only authorized distributor of Mr. Pure products in the market. (App. at A-448, Ex. 342).

Additionally, Mr. Stoffel presented testimony that Mr. Sanchez stated that it would be illegal for Twin City to sell him Mr. Pure products. (Id.).

B. Whether The Statements Were False Was A Fact Issue Answered In The Affirmative By The Jury.

Additionally, NBC makes a convoluted argument that it could not have defamed Twin City as a matter of law because Twin City's own theory of the case alleged that NBC improperly terminated its franchise and began selling Mr. Pure products to DTM Distributing. Thus, NBC argues that DTM was the authorized distributor in the summer of 2002 and that its representative's statements were therefore true. However, NBC fails to distinguish what it claims it did (terminate Twin City's franchise) from what it actually did regarding the franchise under Minnesota law, which was nothing. NBC further claims that this is a legal, and not a factual, issue.

Although whether a statement can be proven false is a question of law, such is not the issue here. Instead, in the instant matter the parties disputed who the authorized distributor of Mr. Pure products was in the summer of 2002. NBC claimed it was DTM; Twin City claimed it was the authorized distributor. Where, as here, the facts are disputed, the truth of a defamatory statement is an issue of fact to be determined by the jury. Jadwin v. Minneapolis Star & Tribune Co., 390 N.W.2d 437, 441 (Minn. Ct. App. 1996). Accordingly, the jury was specifically asked to find in Question No. 19 of the special verdict form whether the defamatory statements were true and the jury conclusively answered that question in the negative. (App. at A-103).

NBC then alleges that the statements made by its representative were mere statements of subjective opinions, interpretations and conjectures that could not be considered false as a matter of law under Schlieman v. Gannett Minn. Broad., Inc., 637 N.W.2d 297, 308 (Minn. Ct. App. 2001) and Hunter v. Hartman, 545 N.W.2d 699, 707 (Minn. Ct. App. 1996).

However, the pertinent inquiry is not whether the speaker believes it was making a subjective opinion or interpretation; instead, the issue is whether the statements present or imply a provably false assertion of fact. Marchant Investment & Management v. St. Anthony West Neighborhood Organization, Inc., 694 N.W.2d 92, 96 (Minn. Ct. App. 2005). This is determined by examining the broad context of the statements, which includes the general tenor of the entire statements, the setting and format, the specific context and content of the statements, including the use of figurative or hyperbolic language, the reasonable expectations of the audience, and whether the statements are sufficiently objective to be susceptible of being proved true or false. Id.

In the instant matter, NBC introduced no evidence that the general tenor of the statements, the setting, format, context and specific content establish that the defamatory statements by its representative were incapable of being proven false. Indeed, NBC chose not to produce its employees who made the statements. Additionally, there is no evidence that NBC's representative used any figurative or hyperbolic language to create a reasonable expectation by the audience of the statements that the statements were so subjective that they could not be proven true or false. In fact, quite the opposite was true.

At trial Mr. Mateer testified that he unequivocally understood from the statements that DTM was the only authorized distributor of Mr. Pure products. (Tr. 260, App. at R-035). His affidavit further confirms this understanding. (App. at A-446, Ex. 340). Mr. Stoffel's testimony also establishes that NBC did not equivocate in its statements that DTM was the exclusive distributor and that it would be illegal for any other entity to attempt to sell Mr. Pure products. (App. at A-448, Ex. 342).

Therefore, there can be no question that NBC intended the statements to be interpreted by its audience as being capable of being proven true. This was a disputed issue of fact that the jury determined was false based on the evidence presented. Accordingly, the verdict must be affirmed.

C. NBC Misinterprets the Harm to Twin City's Reputation.

Further, NBC claims that Twin City's defamation claim fails as a matter of law because the statements made by its representative did not disgrace or degrade Twin City, hold it up to public hatred, contempt or ridicule, harm Twin City's reputation or lower it in the estimation of the community. NBC, however, applies an incorrect personal defamation standard of harm.

Where, as here, Twin City is a corporate plaintiff, the measure of harm for purposes of defamation is whether the alleged defamatory statements directly tend to affect the credit, property, or business of the corporate plaintiff. National Refining Co. v. Benzo Gas Motor Fuel Co., 20 F.2d 763, 766 (8th Cir. 1927); Erick Bowman Remedy Co. v. Jensen Salsbery Laboratories, Inc., 17 F.2d 255, 257 (8th Cir. 1926).

In the instant matter, the evidence at trial establishes that the defamatory statements uttered by NBC's representative affected Twin City's business. Indeed, Mr. Mateer said the statements confused him and made he believe that Twin City lost the right to distribute Mr. Pure. (Tr. 260, 264, App. at R-035-36). Mr. Stoffel testified that he discontinued purchasing Mr. Pure products as a result of the confusion Mr. Sanchez's comments created, which undoubtedly impacted Twin City's business as the rightful holder of the right to distribute the product. (App. at 448-49, Ex. 342). In any event, the alleged loss of a brand would no doubt impact a customer's view of Twin City's reputation.

D. NBC's Defamatory Statements Are Not Protected By Qualified Privilege.

Finally, NBC alleges that its defamatory statements are entitled to qualified privilege. However, an entitlement to qualified privilege exists only where the claimant proves the defamatory statements were made upon a proper occasion, from a proper motive, and must be made upon probable or reasonable cause. Lewis v. Equitable Life Assurance Society, 389 N.W.2d 876, 889 (Minn. 1986).

As an initial matter, NBC introduced no evidence at trial to establish that its defamatory statements were made upon a proper occasion, from a proper motive, or that they were based upon probable or reasonable cause. In fact, NBC introduced no evidence at all in this regard. On that basis alone, the Court of Appeals should affirm.

However, even if such evidence were present, NBC's contention fails as a matter of law. To establish that a statement is based upon probable or reasonable cause, Minnesota courts require that the party seeking to invoke the qualified privilege doctrine undertake an investigation to confirm whether the statements are substantially accurate. See Wirig v. Kinney Shoe Corp., 461 N.W.2d 374 (Minn. 1990) (holding that one "who takes no steps to investigate but relies entirely on accusations" has not acted as a reasonably prudent person and lacks probable or reasonable grounds for making up a potentially defamatory statement); Keuchle v. Lights Companion P.C.A., Inc., 653 N.W.2d 214 (Minn. Ct. App. 2002) (holding qualified privilege was inapplicable because of the party's failure to conduct a complete investigation prior to making the defamatory statement); Cox v. Crown CoCo, Inc., 544 N.W.2d 490 (Minn. Ct. App. 1996) (holding that defamatory statements were not protected by the qualified privilege because the party seeking to invoke the privilege failed to adequately investigate her suspicions before she made the defamatory statements).

In the instant matter, NBC's representative admitted under oath that NBC did not undertake to investigate its relationship with Twin City prior to making the defamatory statements relying on NBC's position that it "didn't do contracts." (Tr. 121, App. at R-026). Mr. Perez also admitted that NBC failed to examine the laws of the various states in which it did business or investigate whether the franchisees had statutory rights that would affect the parties' relationship. (Tr. 149-50, 1431-32 App. at R-030-31, 094-95). As a result, NBC is not entitled to qualified immunity and the Court of Appeals must affirm.

V. THE COURT OF APPEALS SHOULD REVERSE BECAUSE THE DISTRICT COURT ERRED IN DENYING TWIN CITY'S REASONABLE ATTORNEYS' FEES

Twin City appeals the district court's denial of its post-trial motion for attorneys' fees pursuant to the Minnesota Franchise Act. Because this appeal involves the interpretation of Minn. Stat § 80C.17, review is de novo. See Wilson v. Comm'r of Revenue, 619 N.W.2d 194, 197-98 (Minn. 2000) (statutory construction is a question of law subject to de novo review).

Generally, attorneys' fees are recoverable in Minnesota where they are specifically authorized by contract or statute. Barr/Nelson, Inc. v. Tonto's, Inc., 336 N.W.2d 46, 53 (Minn. 1983). In the instant matter, the special verdict form establishes that NBC violated the statute. Accordingly, Twin City's attorneys' fees are awardable pursuant Minn. Stat. § 80C.17, subd. 3 and the trial court committed reversible error in denying Twin City's post-trial motion.

A. The Jury Determined Defendant NBC Violated The Minnesota Franchise Act.

The jury's special verdict form established that Twin City had a franchise with NBC by virtue of the Minnesota Franchise Act. See App. at A-101. Specifically, the jury found that:

> 1. Twin City Home Juice was granted the right to engage in the business of offering or distributing goods or services using one of Defendant NBC's trade names, trademarks, service marks, logotypes, advertisings or other commercial symbols or related characteristics;

2. Twin City Home Juice and Defendant NBC had a community of interest in the marketing of goods or services at wholesale, retail, by lease, agreement or otherwise; and

3. Twin City Home Juice paid Defendant NBC a franchise fee.

See id. Additionally, the jury determined that NBC terminated Twin City's franchise rights without good cause in violation of the Minnesota Franchise Act. Id. at App. A-102; Minn. Stat. § 80C.14, Subd. 3 (stating no person may terminate or cancel franchise absent good cause). Accordingly, Twin City is entitled to the remedies located in Minn. Stat. § 80C.17. See Martin Investors, Inc. v. Vander Bie, 269 N.W.2d 868, 875 (Minn. 1978) (upon the establishment of the elements of a franchise and a violation of the Minnesota Franchise Act, the harmed party is entitled to the remedies in Minn. Stat. § 80C.17).

One of the remedies authorized by the Minnesota Franchise Act is the recovery of reasonable attorneys' fees. Minn. Stat. § 80C.17, Subd. 3. With respect to the recovery of attorneys' fees, the Minnesota Franchise Act provides:

> any suit authorized under this section may be brought to recover the actual damages sustained by the plaintiff together with costs and disbursements plus reasonable attorney's fees.

Minn. Stat. §80C.17, Subd. 3.

In opposing Twin City's motion for attorneys' fees, NBC alleged – and the district court apparently erroneously agreed[4] – that because the jury awarded no actual damages on Twin City's Minnesota Franchise Act claim, attorneys' fees were not awardable pursuant to the statute. However, the district court's determination constitutes reversible error because

[4] Twin City can not be entirely certain of the district court's reasoning since it wrote no separate findings or memorandum and instead simply referenced NBC's memorandum of law. (App. at A-99).

it is contrary to the plain language of the statute, unsupported by the legal authority and inconsistent with the plain language and intent of similarly-situated remedial statutes.

First, the plain language of the Minnesota Franchise Act indicates that all Twin City need establish to be entitled to attorney's fees is an authorized lawsuit. See id. An authorized lawsuit requires two elements: the existence of a franchise and a violation of the Act. See Minn. Stat. 80C.17, subd. 1 (a person who violates any provision of this chapter shall be liable to the franchisee).

In the instant matter, and as detailed above, the special verdict form establishes that Twin City had a franchise with NBC and NBC violated that franchise by selling directly to DTM in contravention of the franchise agreement's exclusivity provision. App. at A-101-02. NBC does not challenge either of these findings on appeal. The plain language of the Act does not require Twin City to be awarded actual damages or be the "prevailing party" to recover attorneys' fees, as is required by other statutes and certain other common law claims. See, Bachovchin v. Stingley, 505 N.W.2d 288, 290-91 (Minn. Ct. App. 1993) (trial court did not abuse discretion in determining automobile buyer not a prevailing party, even though jury found fraud, where jury also found buyer sustained no actual damages).[5] Accordingly, Twin City should have been awarded its reasonable attorneys' fees for establishing a franchise and a violation of that franchise and the district court erred in holding otherwise.

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[5] The jury in the instant case did award plaintiff $288,000.00 in damages on the breach of contract claim, the contract being a franchise agreement.

Second, NBC contended, and the district court apparently accepted, that Noble v. C.E.D.O., Inc., 374 N.W.2d 734 (Minn. Ct. App. 1985) and Steve Parker Supply, Inc. v. Ecolab, Inc., 1998 WL 612905 (Minn. Ct. App., Nov. 17, 1998) require an award of actual damages to be entitled attorneys' fees pursuant to the Minnesota Franchise Act. However, even a cursory examination of these decisions results in the inescapable conclusion that they do not so hold and in any event are distinguishable from the case at bar and have no application.

In Noble, the plaintiffs sought damages for a violation of the Minnesota Franchise act and other common law claims, including a claim for fraud. 374 N.W.2d at 738. The jury awarded damages on the fraud claim but declined to award damages on the statutory franchise act claim. Id. at 740. Plaintiffs alleged on appeal that the trial court erred in refusing to award attorneys fees pursuant to Minn. Stat. § 80C.17, subd. 3. Id. at 742. The Court of Appeals affirmed, but not on the basis alleged by NBC. Instead, the Noble court determined that the three year statute of limitations had expired on the franchise act claim and that, solely because of the statute of limitations issue, the application for attorneys' fees was barred. Id. Significantly, the appeals court made no mention of the jury's failure to award actual damages on the Minnesota Franchise Act claim as a bar to obtaining attorneys' fees. If NBC's reading of Noble were correct, the Noble court would not have had to reach the statute of limitations issue.

For similar reasons, Steve Parker Supply, Inc. is also inapplicable. In Steve Parker Supply, plaintiffs brought an action to recover damages for breach of contract and violations of the Minnesota Franchise Act. (Respondents Addendum at Add. 1). The issue on appeal was whether plaintiff was entitled to costs and disbursements pursuant to Minn. Stat. § 549.04 as it recovered less than it sought on the breach of contract claim and nothing on the franchise claim. (Id. at Add. 2-3). Significantly, the issue of attorneys' fees pursuant to Minn. Stat. § 80C.17, subd. 3 was not even before the Court of Appeals as the jury rejected the franchise act claim and plaintiff did not appeal it. (Id. at Add. 3). Thus, neither Noble nor Steve Parker Supply stand for the proposition that actual damages need be awarded on a Minnesota Franchise Act claim and, moreover, they have no application to the case at bar here. As a result, the district court erred in relying on them and its decision should be reversed.

Third, an analysis of other similarly-situated remedial statutes indicates that the Minnesota Franchise Act was not intended to require a person aggrieved to be awarded damages or be considered a "prevailing" party as that term of art is considered by the courts. Indeed, The Minnesota statute on termination of sales representatives provides a useful example of the prevailing party doctrine. The Sales Representative Termination Act, found at Minn. Stat. § 325E.37, provides similar to the Minnesota Franchise Act[6], that:

> A manufacturer, wholesaler, assembler, or importer may not terminate a sales representative agreement unless the person has good cause and:

[6] The Minnesota Franchise Act provides:

> No person may terminate or cancel a franchise unless:
>
> i. that person has given written notice setting forth all the reasons for the termination or cancellation at least 90 days in advance of the termination or cancellation, and
> ii. the recipient of the notice fails to correct the reasons stated for termination or cancellation in the notice within 60 days of receipt of the notice.

Minn. Stat. § 80C.14, Subd. 3(a).

1. That person is given written notice setting forth the reason(s) for the termination at least 90 days in advance in advance of the termination; and

2. The recipient of the notice fails to correct the reasons stated for termination the notice within 60 days of receipt of the notice.

Minn. Stat. § 325E.37, Subd. 2.

With respect to good cause, the Sales Representative Termination Act provides similar to the Minnesota Franchise Act[7]:

> "Good cause" means a material breach of one or more provisions of a written sales representative agreement governing the relationship of the manufacturer, wholesaler, assembler or importer, or in the absence of a written agreement, failure by the sales representative to substantially comply with the material and reasonable requirements imposed by the manufacturer, wholesaler, assembler, or importer. Good cause includes, but is not limited to:
>
> 1. The bankruptcy or solvency of the sales representative;
> 2. Assignment for the benefit of creditors or similar disposition of the assets of the sales representative's business;
> 3. The voluntary abandonment of the business by the sales representative as determined by a totality of the circumstances;
> 4. Conviction or a plea of guilty or no contest to a charge of violating any law relating to the sales representative's business;
> 5. Any act of the sales representative's which materially impairs the good will associated with the manufactures, wholesalers, assemblers, or

[7] The Minnesota Franchise Act provides:

> "Good cause" means failure by the franchisee to substantially comply with the material and reasonable franchise requirements imposed by the franchisor, including but not limited, to:
>
> 1. The bankruptcy or insolvency of the franchisee;
> 2. Assignment for the benefit of creditors or similar disposition of the assets of the franchise business;
> 3. Voluntary abandonment of the franchisee;
> 4. Conviction or a plea of guilty or no contest to a charge of violating any law relating to the franchise business;
> 5. Any act by or conduct of the franchisee which materially impairs the good will associated with the franchisor's trademark, trade name, service mark, logo type or other commercial symbol.

Minn. Stat. § 80C.14, Subd. 3(b).

importer's trademark, trade name, service mark, logotype, or other commercial symbol; or

6. Failure to forward customer payments to the manufacturer, wholesaler, assembler or importer.

Minn. Stat. 325E.37, Subd. 1

In contrast with the Minnesota Franchise Act, however, the Sales Representative Termination Act provides that in addition to rescission or reinstatement of the sales representative agreement, damages, or payment of commissions due, reasonable attorneys' fees and costs are only awarded to the prevailing party. Minn. Stat. § 325E.37, Subd. 5b.

Although the drafters of the Minnesota Franchise Act could have inserted such language requiring a damaged franchisee to be the prevailing party prior to obtain an award of attorneys' fees, they obviously chose not to.

The Minnesota Agricultural Equipment Dealership Act ("MAEDA") provides additional support for Twin City's application for attorneys' fees. The MAEDA, found at Minn. Stat. § 325E.062-65, provides similarly to the Minnesota Franchise Act that:

> No farm equipment manufacturer, directly or through an officer, agent, or employee may terminate, cancel, failure to renew, or substantially change the competitive circumstances of a dealership agreement without good cause. "Good cause" means failure by a farm equipment dealer to substantially comply with the essential and reasonable requirements imposed upon the dealer by the dealership agreement, if their requirements are not different from those requirements imposed on other similarly situated dealers by their terms.

In addition, good cause exists whenever:

> (1) without the consent of the farm equipment manufacturer who shall no withhold consent unreasonably, (a) the farm equipment dealer has transferred an interest in the farm equipment dealership, or (b) there has been a withdrawal from the dealership of an individual

proprietor, partner, major shareholder, or the manager of the dealership, or (c) there has been a substantial reduction in interest of a partner or major stockholder;

(2) the farm equipment dealer has filed a voluntary petition in bankruptcy or has had an involuntary petition in bankruptcy filed against it which has not been discharged within 30 days after the filing, or there has been a closeout or sale or a substantial part of the dealer's assets related to the farm equipment business, or there has been a commencement of dissolution or liquidation of the dealer;

(3) there has been a change, without the prior written approval of the manufacturer, in the location of the dealer's principal place of business under the dealership agreement;

(4) the farm equipment dealer has defaulted under a chattel mortgage or other security agreement between the dealer and the farm equipment manufacturer, or there has been a revocation or discontinuance of a guarantee of the dealer's present or future obligations to the farm equipment manufacturer;

(5) the farm equipment dealer has failed to operate in the normal course of business for seven consecutive days or has otherwise abandoned the business; or

(6) the farm equipment dealer has pleaded guilty to or has been convicted of a felony affecting the relationship between the dealer and manufacturer;

(7) the dealer has engaged in conduct which is injurious or detrimental to the dealer's customers or to the public welfare; or

(8) the farm equipment dealer, after receiving notice from the manufacturer or its requirements for reasonable market penetration based on the manufacturer's experience in other comparable marketing areas, consistently fails to meet the manufacturer's market penetration requirements.

Minn. Stat. § 325E.062, Subd. 1.

Moreover, with respect to remedies for a violation of the MAEDA, the statute provides similar to the Minnesota Franchise Act:

> A farm equipment dealer may bring an action against the manufacturer in a court of competitive jurisdiction for damages sustained by the dealer as a consequence of the manufacturer's violation, together with the actual costs of the action, including reasonable attorneys' fees.

Minn. Stat. § 325E.965.

The Court of Appeals has held that a dealership may be awarded attorneys' fees under the MAEDA simply upon proving that a manufacturer violated the Act and without an award of actual damages. See Wadena Implement Co. v. Deere & Co., Inc., 480 N.W.2d 383 (Minn. Ct. App. 1992) (holding that an award of attorneys' fees is appropriate under MAEDA where manufacturer terminated a dealer without good cause because liability is established upon a showing of a statutory violation).

In the present case, Twin City has proven that NBC violated the Minnesota Franchise Act, which is strikingly similar in language to the MAEDA. Because Minnesota courts do not require actual damages to be awarded attorneys' fees under the MAEDA, there is no basis upon which NBC may successfully allege that an award of attorneys' fees under the Minnesota Franchise Act is dependent on a showing of actual damages. Therefore, the Court of Appeals should reverse and award Twin City its reasonable attorneys' fees.

B. The Jury Determined Defendant NBC Breached A Franchise Agreement With Plaintiffs In Violation Of The Minnesota Franchise Act.

In addition to finding a violation of the Minnesota Franchise Act, the jury determined that NBC breached a franchise agreement with Twin City, which is a violation of the Minnesota Franchise Act and awarded Plaintiffs $288,000 in damages. App. at A-101. The jury's findings establish that Twin City and NBC became parties to the Franchise Agreement by virtue of Defendant NBC purchasing the assets of American Citrus Products, that Defendant NBC breached the franchise agreement, and that Defendant NBC's breach resulted in $288,000.00 in damages to Plaintiffs. Id. at A-100-02.

Clearly, Twin City established that the 1972 contract, extended in 1995, is a franchise agreement. To begin with, the agreement itself has references to it being a franchise. App. at A-316, 319, Ex. 201 at PL 0312, PL 0315. Second, Chicago Home Juice's Michael Krauss testified without contradiction that the agreement was a franchise and that he was the executive who extended it. (Tr. 276-77, App. at R-037-38). Third, Plaintiff Sue Dunn testified without contradiction that the agreement was a franchise. (Tr. 545, App. at R-052). Fourth, those similarly situated testified without contradiction that they had franchises. (Tr. 333, App. at R-039 (Randy Walentowski testifying)); (Tr. 354, App. at R.-045 (James Folsom testifying)). Fifth, Michael Perez, NBC's only corporate witness, admitted the agreement constituted a franchise. (Tr. 119, 523 App. at R-025, 051). Finally, NBC did not produce its officer Henry Lang, any other Chicago Home Juice holdover, or any NBC official with knowledge to contest that fact.

As mentioned previously, it is a violation of the Minnesota Franchise Act for a franchisor to terminate or cancel a franchise unless:

> 1. that person is given written notice setting forth all of the reasons for the termination or cancellation at least 90 days in advance of the termination or cancellation; and
>
> 2. the recipient of the notice fails to correct the reason stated for termination or cancellation in the notice within 60 days of receipt of the notice.

Minn. Stat. § 80C.14.

Although there is a good cause exception to the prohibition on termination and cancellation of franchises, the jury here determined NBC did not act with good cause. (App. at A-102). Because the jury found that NBC breached a franchise agreement with Twin City, in violation of the Minnesota Franchise Act, Twin City is entitled to the remedies found in Minn. Stat. § 80C.17, subd. 3, which includes an award of reasonable attorneys' fees.

Presume for a moment that Twin City had been awarded damages pursuant to the Minnesota Franchise Act as well as on the breach of contract claim. NBC would likely have alleged that those damages were duplicative and would most likely have moved for remittitur. Moreover, NBC would likely have been correct. Indeed, a fair reading of the special verdict form confirms that the jury decided to not award damages duplicative to those awarded on the breach of contract claim. Therefore, to the extent that the Court of Appeals accepts NBC's contention that Twin City must prove actual damages in order to recover under Minn. Stat. § 80C.17, Twin City has presented adequate findings to support such an award.

CONCLUSION

For all of the reasons stated herein, the judgment of the district court should be affirmed, except that the district court's decision to deny Twin City's motion for reasonable attorneys' fees should be reversed.

Dated: July 5, 2006

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STATE OF MINNESOTA
IN COURT OF APPEALS

Case No. A06-396
Case No. A06-397

Susan Dunn, et. al.,

Respondents (A06-396)
Appellants (A06-397)

vs.

National Beverage Corp. et al.,

Appellants (A06-396)
Respondents (A06-397)

DTM Distributing, Inc.,

Defendant (A06-396)
Respondent (A06-397)

CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, Subd. 1 and 3, for a brief produced with a proportional font. The length of this brief is 11,246 words, and the font size is 13 point. This brief was prepared using MicrosoftWord 2003 software.

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).