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STATE OF WASHINGTON

64841-3  
No. 82891-1

SUPREME COURT  
OF THE STATE OF WASHINGTON

SOMETHING SWEET, LLC, a Washington Limited Liability Company;  
KIRK BRANDENBURG and JILL BRANDENBURG, husband and wife,

Appellants,

v.

NICK-N-WILLY'S FRANCHISE COMPANY, LLC, a Colorado Limited  
Liability Company; MICHAEL MOORE; and PATTI MOORE;

Respondents.

REPLY BRIEF OF APPELLANTS

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## I. Introduction

This Reply is offered on behalf of Appellants Something Sweet, LLC, Kirk Brandenburg and Jill Brandenburg (collectively referred to hereinafter as the “Brandenburgs”), former Nick-N-Willy’s franchisees. Again, the case was commenced under the Franchise Investment Protection Act, Chapter 19.100 RCW (“FIPA”). The Brandenburgs allege the Respondents’ violation of FIPA’s registration provision, RCW 19.100.020(1), the failure to provide the Brandenburgs with a mandatory disclosure document in violation of RCW 19.100.080 and the omission of material facts in connection with the sale of the franchise in violation of RCW 19.100.170(2).

Only Respondents Michael Moore and Patti Moore (the “Moore’s”) have filed any brief in response to the *Brief of Appellants*. Although counsel for the Brandenburgs has been told that Respondent Nick-N-Willy’s Franchise Company, LLC (“NNW”) will be “joining” in the Moore’s brief, that has not taken place in any formal way to the best of counsel’s knowledge. But in anticipation of that eventuality, it is worth pointing out that NNW and the Moore’s have not taken uniform positions in the litigation on the facts surrounding this pivotal issue: whether the Moore’s were selling or negotiating the sale of Nick-N-Willy’s franchises.

Because they paid a fee for the Area Developer Marketing Agreement, it is not possible to argue with the conclusion that if the

Moore's were selling or negotiating the sale of franchises, they were subfranchisors. *See*, RCW 19.100.010(9) and (10). It is also undisputed that no subfranchisor registration had been submitted to the Department of Financial Institutions and that no subfranchisor disclosure document had been provided to the Brandenburgs.

As set forth on pages 12 and 13 of the *Brief of Appellants*, NNW has admitted in answer to the complaint, among other things, that Patti Moore was "offering and selling Nick-N-Willy's franchises in association with Michael Moore" and that the franchise at issue here "was negotiated, offered and sold to the Brandenburgs on NNW's behalf primarily through the efforts of Michael Moore and Patti Moore." Further, and contrary to the Moores' position, NNW had no objection to the Brandenburg's submission of the Salesperson Disclosure forms (CP 756-64) on file in Olympia regarding the Moores, and explicitly urged the trial court to consider those documents. (CP 721) In short, the Respondents have thus far been unified in their plea that this court conclude the Moores were not subfranchisors, but NNW has been more forthcoming with concessions and agreements concerning the relevant facts. At this point, it would be conceptually difficult for NNW to completely join with the Moores in their arguments.

## **II. The Moores' Arguments**

With respect to the failure to subfranchisor registration issues, the

Moore's offer the following points and arguments in their response:

1. they were not subfranchisors because they did not sell franchises;
2. subfranchisor registration is duplicative, results in immaterial disclosures and is not required by FIPA;
3. the Brandenburgs knew there had been no subfranchisor registration and disclosure;
4. the Brandenburgs cannot show any registration violation caused damage; and
5. only Michael Moore, not Patti Moore, agreed to pay NNW.

With respect to the Brandenburg's material omission claim, i.e. the Brandenburg's claim that NNW had already decided it would no longer offer the very type of franchise they were purchasing, the Moore's repeatedly point to the fact NNW had the contractual right to make the decision to terminate . They also state that the Brandenburgs failed to raise any issue of material fact to preclude entry of judgment against them.

The Brandenburgs will address each of these arguments in turn in the discussion that follows.

### III. Discussion

- A. **The Moores were subfranchisors, selling Nick-N-Willy's franchises, and were required to have a registered disclosure document that should have been provided to the Brandenburgs.**
1. **The Moores were selling or negotiating the sale of franchises and thus were subfranchisors.**

As detailed above and in *Brief of Appellants*, NNW has admitted the Moores were selling Nick-N-Willy's franchises in answer to the complaint. This is fundamental stuff; pleadings frame the issues to be decided in a case. *See, Tumelson v. Todhunter*, 105 Wn. 2d 596, 604-05, 716 P.2d 890 (1986); *Seattle Medical Center, Inc. v. Cameo Corp.*, 54 Wash.2d 188, 190, 339 P.2d 93 (1959). At the very *least*, NNW's answers undercut the Moores' position here and should have raised an issue of material fact which could not be resolved in the Respondents' favor on summary judgment. But even considering the Moores' position in isolation, their bald assertion that they had no authority to sell or negotiate the sale of franchises is simply at odds with what their Area Developer Marketing Agreement<sup>1</sup> says.

The Brandenburgs cataloged in their opening brief the many ways in which the Moores' agreement with NNW memorialized the fact they

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<sup>1</sup> The Area Developer Marketing Agreement was attached as "Appendix 1" to *Brief of Appellant*.

were entitled and, in fact, *expected* to sell Nick-N-Willy's franchises. *Brief of Appellants* at 5-6. The Moores offer little by way of rebuttal, essentially arguing that the "sales services" they were obliged to provide did not amount to selling. They concede their receipt of commissions for these sales services and basically ignore the fact that a stated purpose of the agreement, at paragraph 1.3, is to allow them "to sell franchises for NICK-N-WILLY'S Stores".

The Moores offer other arguments as well. They point out that the authority salespeople possess can vary from industry to industry. Although everyone will probably agree with the Moores' observation that some salespersons are authorized to conclude transactions on their own authority, everyone will probably also recognize that many salespersons are not authorized to do so. It would be unusual for anyone to conclude that only the former were engaged in *selling*.

The Moores accuse the Brandenburgs of disregarding an alleged clear distinction drawn by the Legislature between "sell" and "offer to sell". That accusation misses the point; the Legislature actually made no bright-line distinction between the terms, choosing instead to illustrate (*not* limit) their meaning using broad statements of *inclusion*. Undoubtedly many or most marketing activities constitute *both* selling and offering to sell under FIPA. The Moores are advocating for a vivid line of demarcation between terms that *overlap*, a bit like arguing that multiples

of two are entirely distinct from multiples of four. No such line exists.

In reality, the Moores ignore distinctions that really were drawn by the Legislature: the distinctions between “franchisor” and “subfranchisor” and as a result, the distinction which must necessarily be drawn between “grant” and “sell or negotiate the sale”. A franchisor is defined as “a person who *grants* a franchise to another person.” RCW 19.100.010(8)(emphasis supplied). Yet in essence, the Moores have argued that a subfranchisor must have all the same authority necessary to *grant* a franchise in order to *sell* one. But the Legislature, having chosen to define a subfranchisor as “a person to whom a subfranchise is granted” at RCW 19.100.010(10), defined a subfranchise is an agreement under which a person pays a fee “for the right to grant, *sell or negotiate the sale* of a franchise.” RCW 19.100.010(9)(emphasis supplied). In short, by choosing different and additional language in RCW 19.100.010(9) vis-à-vis RCW 19.100.010(8), the Legislature did clearly indicate that the rights to sell or negotiate the sale of a franchise are different and alternative to the right to grant a franchise. *See, Spain v. Employment Sec. Dept.*, 164 Wn.2d 252, 259-60, 185 P.3d 1188 (2008)(different language demonstrates a different legislative intent).

In sum, NNW effectively *admitted* the Moores were acting as unregistered subfranchisors on its behalf while *arguing* that they were not. The Moores deny possessing the authority to act as subfranchisors, but

rely upon tortured reasoning and bald conclusory statements which cannot be harmonized with the agreement they had with NNW. That agreement explicitly gave them the right to sell franchises. They paid a fee for that right. They were subfranchisors.

**2. Subfranchisor registration is neither duplicative nor immaterial and FIPA requires it, just as the Respondents' agreement contemplated.**

The Brandenburgs have previously pointed out that the Area Developer Marketing Agreement explicitly contemplated dual registration. *Brief of Appellants* at 19. The dismay the Moores now express about this possibility and its supposed requirement of “duplicative” filings is curious. The Respondents’ agreement with one another actually expresses the fairly simple, almost effortless recognition that the Moores would only provide their own information, just as NNW would provides its information. *See*, Appendix 1, at ¶ 4.2. Of course, the Moores also ignore the fact that the Department of Financial Institutions’ personnel are always available as a resource to assist with questions and concerns about this dual registration process—or at least they are available to help when they are consulted and when FIPA’s registration requirements are complied with. The notion that this dual registration is somehow an impossibly burdensome and duplicative requirement would come as some surprise to the franchise systems that operate under dual registration in this state. The

Area Developer Marketing Agreement expresses a very clear view of the requirement and a very clear understanding that it is not duplicative.

The Moores' argument that information about them was immaterial where, as in this case, the Brandenburgs had agreed to look to them to discharge duties owed them under the franchise agreement is simply at odds with common sense. It is also at odds with the Federal Trade Commission's view. Franchising is regulated at federal level as well as by several of the states, like Washington. The FTC's "Statement of Basis and Purpose" regarding its recently amended Franchise Rule, 16 C.F.R. Part 436, describes the very situation presented here as follows:

Where a person—be it subfranchisor or parent—commits to perform under the franchise agreement, *its financial information becomes material* in order to provide prospective franchisees with the opportunity to assess the person's financial stability before risking their own investment.

"Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunities; Final Rule", 72 Federal Register 61 (30 March 2007), p. 15511. (emphasis supplied). Among the disclosures FIPA plainly contemplates is that a subfranchisor will provide its financial statements. RCW 19.100.040(2). As the FTC has also concluded, such information is material.

The Moores' additional arguments concerning materiality, namely the argument that their financials would not have been meaningful because

they had just commenced their Area Developer business and the argument that they could be replaced as Area Developer are unavailing. In reality, the fact the Moores' had no significant financial history in their business would have been meaningful in and of itself. And the argument that they could be replaced as Area Developer makes them no different than NNW, who reserved the right to assign its position as franchisor "without restriction". Appendix 1, ¶ 15.1. Under the dubious reasoning offered by the Moores, there should never be any disclosure required under FIPA if any of the parties to the contract might later withdraw or be substituted. Such an exception would swallow the disclosure requirement whole.

As the Brandenburgs argued in their opening brief, dual registration is required by FIPA under circumstances such as those presented here. *See, Brief of Appellants* at 16-17. Despite the Moores' protests, they signed an agreement with NNW that explicitly acknowledged the prospect of a dual registration requirement. More importantly, it is impossible to read RCW 19.100.040(2) otherwise, i.e., there is no other way to understand the requirement that the subfranchisor's registration application "*also* include the same information concerning the subfranchisor as is required from the franchisor." (emphasis supplied). FIPA plainly provides for dual registration.

**3. The duties of pre-sale compliance with FIPA rest with the franchisor and subfranchisor.**

Based upon their own mere assumptions about what the Brandenburgs knew or realized, the Moores state that the Brandenburgs could have objected to the lack of a subfranchisor registration and disclosure by the Moores. Presumably this statement is intended to suggest that the Brandenburgs have no business complaining of these things because, allegedly, they knew about them. Setting aside the obvious problems with a lack of proof concerning what the Brandenburgs actually knew or realized, the more fundamental problem with the argument is that it is absolutely irrelevant.

The unsurpassed source of authority for Washington courts interpreting FIPA over the past 36 years is Professor Donald S. Chisum's seminal article "State Regulation of Franchising: The Washington Experience" ("Chisum").<sup>2</sup> Professor Chisum's article has repeatedly been cited with approval by this court. The article explicitly discusses registration violations and failure to deliver required disclosures, and says that in those cases "rescission is the appropriate remedy and is made available by [FIPA] *regardless of what either the defendant or the plaintiff knew or should have known.*" Chisum at 384 (emphasis supplied).

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<sup>2</sup> 48 Wash. Law Rev. 291 (1973)

The conclusion drawn by Professor Chisum is undoubtedly correct; FIPA does not provide that the franchisee's knowledge is a defense to a rescission based upon the franchisor's failure to register or provide a disclosure document, yet by contrast RCW 19.100.190(2) provides that the franchisee's knowledge may constitute a defense to a rescission based upon a violation of FIPA's anti-fraud provision. The distinction is obviously intentional. Professor Chisum's conclusion also makes sense because only the franchisor and subfranchisor have the duties to comply with the registration and disclosure provisions of FIPA. A franchisee has no duty not to buy an unregistered and improperly disclosed franchise.

The Brandenburgs' alleged knowledge of the Respondents' violations of RCW 19.100.020(1) and RCW 19.100.080 are unproven, but any such knowledge on the Brandenburgs' part would be irrelevant in any event.

**4. Registration violations yield rescission whether or not the franchisee has been damaged.**

The Moores' contention that the Brandenburgs must show damage from a registration violation in order to maintain an action for rescission is simply off the mark. The Moores cite *Morris v. International Yogurt*, 107 Wn. 2d 314, 729 P.2d 33 (1986) for this proposition, but they have plainly misread the case. In *Morris*, this court in fact concluded that rescission would normally have been the appropriate remedy for a failure to adhere

to FIPA's requirements for an exemption from registration. *Morris*, 107 Wn. 2d 319 (citing Chisum). However, the franchisees in *Morris* had previously sold their franchise, which essentially made rescission a logical impossibility. It was only *after* concluding that rescission was unavailable that the *Morris* court turned to an additional remedy available under FIPA, damages caused by FIPA violations. *Id.*

The *Morris* court did not hold that a franchisee seeking rescission under FIPA must have been damaged by the FIPA violation. RCW 19.100.190(2) provides rescission as a remedy for FIPA violations, as the *Morris* court clearly recognized. The franchisees in *Morris* were denied rescission only because they had already sold their franchise before arriving in court. By citing Chisum in this discussion, the court was plainly saying that FIPA violations involving registration or exemptions from registration normally yield rescission. In the very provision cited by the *Morris* court, Professor Chisum had explicitly recognized that the mere failure to register does not cause damage. Chisum at 384.

The *Morris* court was distinguishing between FIPA's rescission remedy, which is made available for registration violations and which requires no showing of damages, and FIPA's *additional and discrete* remedy of damages *caused by* any violations of the statute. The Moores failed to grasp the significance of the distinction being drawn in the *Morris* decision.

**5. The Respondents all admit Patti Moore was a partner in the Area Developer business.**

NNW and the Moores admit the allegations of the Moores' partnership in the Brandenburg's complaint. (CP 9, 15, 19). RCW 25.05.100(1) provides the general rule that partners are agents for their partnership. The record is devoid of any accusation by Patti Moore that Michael Moore acted without authority in signing the Area Developer agreement with NNW or in paying any fees associated with it. Such an accusation would have been surprising--the two have common representation. The Moores' observations that Patti Moore did not physically sign the agreement or pay the fees are really irrelevant. She was a partner in this business which was plainly operating as a subfranchisor, selling Nick-N-Willy's franchises, without any registration or proper disclosures.

**B. The Respondents have again failed to address the key problem they share with respect to the Brandenburgs' material omission claim: they did not meet their burden as moving party under CR 56.**

The Brandenburgs brought their material omission claim under RCW 19.100.170(2) for the Respondents' failure to *tell them* that the "Outlet" model of franchise was being eliminated at the very time the Brandenburgs were buying a Nick-N-Willy's Outlet. The Moores again focus on NNW's contractual *right* to make the decision to eliminate the

Outlet. But the Brandenburgs did not sue for breach of contract and the Moores discussion of NNW's contractual rights misses the point.

As catalogued in the Brandenburgs' opening brief, the Respondents offered *justifications* for their acts and omissions. *Brief of Appellants* at 9-10. They have never, ever denied the actual claims made by the Brandenburgs, the claims that NNW already had made the decision to eliminate the Outlet and that the Respondents failed to disclose that fact at the very time the Brandenburgs were buying an Outlet<sup>3</sup>. This was the Respondents' burden as moving parties, before any obligation could be shifted to the Brandenburgs. *See, Id.* The Moores have not ever and do not now confront that hurdle.

The Moores do raise two additional matters however. They maintain that the Brandenburgs cannot show reasonable reliance. But the Brandenburgs complain here of material *omissions*. Their reliance is presumed. *Morris v. International Yogurt*, 107 Wn. 2d at 330. The Moores also suggest that the future is somehow "off limits" when it comes to disclosure. But a decision that has been made about future actions is an *existing* fact and can be the subject of an action for misrepresentation. *Rochester Civic Theatre, Inc. v. Ramsay*, 368 F.2d 748, 754 (8<sup>th</sup> Cir. 1966); *see, Hoptowit v. Brown*, 115 Wash. 661, 667, 198 P. 370

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<sup>3</sup> The Brandenburgs' claims were actually buttressed by NNW's immediate *post-sale* letter of concern about the location they had chosen, which NNW very curiously offered in support of its motion.

(1921)(stating there is not a rule that misrepresentations regarding the future are not actionable). The Moores' arguments on these points are simply incorrect.

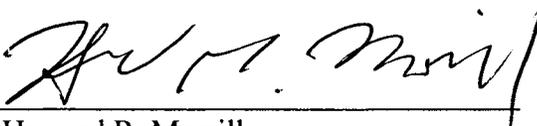
#### IV. Conclusion

For all the foregoing reasons, this court should reverse and remand with directions to enter an order declaring that NNW and the Moores violated RCW 19.100.020(1) and RCW 19.100.080, and that the Brandenburgs are entitled the remedy of rescission on account thereof. The court should further direct the trial court that the Brandenburgs have established a material omission of fact by NNW in violation of RCW 19.100.170(2) and that the matter should proceed to trial on the remaining issues with the Respondents bearing the burden of rebutting the presumption of reliance on the omitted fact(s) which favors the Brandenburgs.

Dated this 13th day of August, 2009.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

On August 13, 2009, I caused to be served, via U.S. Mail, a true and correct copy of Reply Brief of Appellants upon the following parties:

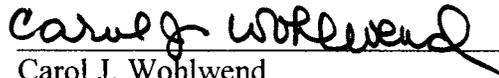
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