STATE OF MICHIGAN

COURT OF APPEALS

RANDALL BUIST,

Plaintiff-Appellee,

V

DIGITAL MESSAGE SYSTEMS CORPORATION, d/b/a MESSAGE ON HOLD NETWORK, BYRON LANCASTER and J.B. SELIGMAN,

Defendants-Appellants.

UNPUBLISHED
December 27, 2002

No. 229256
Oakland Circuit Court
LC No. 98-004946-CZ

Before: Gage, P.J., and Cavanagh and Wilder, JJ.

PER CURIAM.

Defendants appeal as of right from the trial court's order granting summary disposition in favor of plaintiff and awarding plaintiff a judgment of $71,284.88 in this action under the Michigan Franchise Investment Law ("MFIL"), MCL 445.1501, *et seq*. We affirm.

I

In April 1994, plaintiff entered into a non-exclusive licensing agreement ("agreement") with defendants to market one of defendant Digital's products, a "Message On Hold" ("MOH") telephone recording system to provide information to callers while they are waiting on hold for businesses. Defendant Digital is a Florida corporation, and defendants Lancaster and Seligman are officers of the corporation. Plaintiff is a resident of Grand Rapids, Michigan.

The agreement grants plaintiff, in exchange for a fee, a non-exclusive license to sell the MOH system throughout the United States, with his "primary markets" being Calhoun, Kalamazoo, Allegan and Barry counties. Plaintiff also paid an additional amount for an option to acquire the Kent County market. Although the license was non-exclusive, a provision in an addendum to the agreement stated that plaintiff's market was to be his exclusively for a ninety-day period, subject to renewal every thirty days as long as plaintiff was pursuing the account. The addendum also provides for other protections of plaintiff's market share. Additionally, the agreement contains the following language:

> 14. GOVERNING LAW AND VENUE: The parties agree that the validity, construction, interpretation, and enforceability of this Agreement shall be

> governed by the laws of the State of Florida. The parties agree that the jurisdiction and venue of this Agreement shall lie in the Thirteenth Judicial Circuit Court of the State of Florida in and for Hillsborough County, or the United States District Court for the Middle District of Florida, with respect to any legal proceedings arising from or under this Agreement.

Another section of the agreement contains a provision stating that the parties were to bring legal proceedings only in a court listed in paragraph 14.

Plaintiff commenced this action in March 1998, alleging that defendants misrepresented their product, and further alleging that defendants failed to provide the disclosure (or notice) required under the MFIL, MCL 445.1508.

Defendants moved for summary disposition, relying on the contract language providing that Florida was the proper forum to bring an action and that Florida law governed the action. Plaintiff filed a cross-motion for summary disposition, alleging that defendants' disclosure did not satisfy the MFIL disclosure requirement. Following a hearing, the trial court determined that the agreement's limitation requiring that any action be brought in Florida was void and that Michigan law governed the instant dispute, notwithstanding the contract language to the contrary. The trial court also determined that defendants' disclosure did not satisfy MCL 445.1508[1] and, accordingly, granted plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(10). Following a subsequent hearing, the court awarded plaintiff damages of $71,284.88.

II

Defendants first argue that the trial court erred in refusing to dismiss the instant action or, alternatively, in failing to apply Florida law to the dispute in accordance with the express terms of the parties' agreement. We disagree.

We review a trial court's decision on a motion for summary disposition de novo. *Martino v Cottman Transmission Systems, Inc*, 218 Mich App 54, 57; 554 NW2d 17 (1996). The question whether the parties' choice of law provision is to be given legal effect is also a question of law which we review de novo. *Id*. at 60. Statutory interpretation is likewise reviewed de novo. *County Bd of Rd Comm'rs v Michigan Property & Casualty Guaranty Ass'n*, 456 Mich 590, 610; 575 NW2d 751 (1998).

As *Macomb County Prosecutor v Murphy*, 464 Mich 149, 158; 627 NW2d 247 (2001) observed:

> In considering a question of statutory construction, this Court begins by examining the language of the statute. We read the statutory language in context to determine whether ambiguity exists. If the language is unambiguous, judicial construction is precluded. We enforce an unambiguous statute as written. Where ambiguity exists, however, this Court seeks to effectuate the Legislature's intent

[1] Defendants have not challenged this determination on appeal.

> through a reasonable construction, considering the purpose of the statute and the object sought to be accomplished. [Citations omitted.]

Unless defined in the statute, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used, *Phillips v Jordan*, 241 Mich App 22-23 n 1; 614 NW2d 183, citing *Western Michigan Univ Bd of Control v Michigan*, 455 Mich 531, 539, 565 NW2d 828 (1997). Further, the language must be applied as written, *Camden v Kaufman* 240 Mich App 389, 394; 613 NW2d 335 (2000); *Ahearn v Bloomfield Charter Twp*, 235 Mich App 486, 498; 597 NW2d 858 (1999), and nothing should be read into a statute that is not within the manifest intent of the Legislature as evidenced from the act itself. *In re SR, supra* at 314.

In the instant case, the disputed statutory language appears in MCL 445.1527,[2] which provides, in pertinent part:

> Each of the following provisions is void and unenforceable if contained in any documents relating to a franchise:
>
> * * *
>
> (b) A requirement that a franchisee assent to a release, assignment, novation, waiver, or estoppel which deprives a franchisee of rights and protections provided in this act. This shall not preclude a franchisee, after entering into a franchise agreement, from settling any and all claims.
>
> * * *
>
> (f) *A provision requiring that arbitration or litigation be conducted outside this state*. This shall not preclude the franchisee from entering into an agreement, at the time of arbitration, to conduct arbitration at a location outside this state. [Emphasis added.]

Thus, under the plain language of 445.1527(f), the provision requiring plaintiff to bring suit in Florida is unenforceable. See also *Martino, supra* at 59; *Banek Inc v Yogurt Ventures USA, Inc*, 6 F3d 357, 360 (CA 6, 1993). Further, defendants' reliance on MCL 600.745 is unwarranted in light of the following emphasized language in the statute:

> (3) If the parties agreed in writing that an action on a controversy shall be brought only in another state and it is brought in a court of this state, the court shall dismiss or stay the action, as appropriate, unless any of the following occur:
>
> (a) The *court is required by statute to entertain the action*. [Emphasis added.]

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[2] As discussed *infra*, we find no error in the trial court's determination that the parties' agreement was subject to the MFIL.

Accordingly, we conclude that the trial court did not err in refusing to enforce the "forum selection" clause in paragraph 14 of the parties' agreement.

We also reject defendants' argument that the trial court erred in ruling that Michigan law should govern this action. While the MFIL does not expressly prohibit a choice of law provision in a franchise agreement, we cannot conclude that the choice of law provision in the parties' contract is therefore enforceable. This Court addressed and rejected a similar argument in *Martino, supra*:

> Alternatively, defendant argues that Pennsylvania law must be followed, because the franchise agreement stated that Pennsylvania law controlled the franchise agreement.
>
> In a similar situation, the Michigan Supreme Court ruled that, when determining the applicable law, we are required to balance the expectations of the parties with the interests of the States. *Chrysler Corp v Skyline Industrial Services, Inc*, 448 Mich 113, 125; 528 NW2d 698 (1995). In doing so, the Court adopted, as guidelines, §§ 187 and 188 of the Second Restatement of Conflicts.
>
> Section 187(1) permits the application of the parties' choice of law if the issue is one the parties could have resolved by an express contractual provision. However, there are two exceptions. The parties' choice of law will not be followed if: (1) the chosen state has no substantial relationship to the parties or the transaction, or (2) there is no reasonable basis for choosing that state's law. Section 187(2)(a). Also, § 187(2)(b) bars the application of the chosen state's law when it "would be contrary to the fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue, and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties."
>
> Here, we find compelling evidence that, in this state, Michigan has a materially greater interest than Pennsylvania in applying its franchise laws. A fundamental policy may be embodied in a statute which (1) makes one or more kinds of contracts illegal or (2) which is designed to protect a person against the oppressive use of superior bargaining power. Comment g to § 187 of the Restatement 2d, p 568. As gleaned from the MFIL, Michigan's notice requirements are designed to make certain contract provisions illegal and to protect potential franchisees from the superior bargaining power of franchisors.
>
> Applying Pennsylvania, rather than Michigan, law would result in a substantial loss of protection provided by the MFIL. As franchisors under Pennsylvania law do not have to provide the notice required by the MFIL, Pennsylvania's franchise law violates the fundamental public policy of Michigan. Therefore, Michigan law, not Pennsylvania law, applies. [*Martino, supra* at 60-61.]

The trial court concluded that a similar result is warranted here, finding that applying Florida law to this case would result in a substantial loss of protections to franchisees and thus be "contrary to the fundamental policy" of the MFIL:

> While Florida has a substantial relationship to the parties and transaction, this Court find that Michigan had a materially greater interest than Florida in applying its Franchise Law. Specifically, Florida law provides limited protection to franchisees and little, if any, protection to out of state franchisees. Additionally, Florida has no disclosure requirements as required by the MFIL. Finally, co-defendants, Lancaster and Seligman, Defendants' principles, would not be subject to joint and several liability in Florida. By applying Florida law, this Court would be overlooking this State's legislative mandates as set forth in the MFIL. Therefore, the Court, this Court finds that Michigan law applies in this case.

The trial court did not err. A review of Florida law reveals that limited protection is afforded to franchisees such as plaintiff here. Specifically, Florida's Sale of Business Opportunities Act, which the parties refer to as the Florida Business Opportunities Act ("FBOA"), FSA 559.801 *et seq.*, does contain disclosure requirements designed to provide protections similar to those contained in the MFIL. FSA 559.803. Indeed, the act's definition of a "business opportunity" is more limited that the MFIL's definition of a "franchise" and, as defendants seem to acknowledge on appeal, the agreement in this case arguably does not fall within this definition. See FSA 559.801(1)(a)(4). Defendants instead maintain that the trial court neglected to consider the parties' agreement in the context of the protections afforded by Florida's Franchise and Distribution statute, also termed the Florida Franchise Act ("FFA"), FSA 817.416 *et. seq.* However, as noted by plaintiff, it is questionable whether the FFA applies to out-of-state franchisees. See Waldman, *The Florida franchise act - protection for the in-state franchisor or out-of-state franchisee?*, 73 Fla B J 42, 44 (1999); see also *Grand Kensington, LLC v Burger King Corp*, 81 F Supp 2d 834, 839 (ED Mich, 2000) (holding invalid the parties' Florida choice of law provision partly on the ground that the uncertain application of the FFA to out-of-state franchisees undermined the protections inherent in the MFIL). In addition, even if plaintiff here would receive the benefit of the protections afforded by the FFA, application of this statutory scheme would still result in a substantial loss to plaintiff of the protection provided by the MFIL. Although the FFA makes it unlawful to misrepresent or fail to disclose certain items in connection with the establishment of a franchise, FSA 817.416(2), the minimal protections afforded by the FFA do not approach those provided under MCL 445.1508. Additionally, defendants assert without providing any citation to authority that plaintiff would be able to obtain joint and several liability for his claims under either the FBOA or the FFA, as would be available to him under the MFIL. See MCL 445.1532.

In light of the foregoing considerations, we conclude that the trial court did not err in holding that Florida law would result in a substantial loss of protections provided by the MFIL and that Michigan law should therefore govern this lawsuit, notwithstanding the provision to the contrary in the parties' agreement.

III

Defendants also maintain that the parties agreement did not constitute a "franchise" as defined by the MFIL. Because defendants did not raise this issue below, we review this unpreserved issue for plain error affecting defendants' substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000), citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

After reviewing MCL 445.1504 and the regulations promulgated pursuant to this statute, we conclude that defendants have not met their burden of demonstrating plain error, because the agreement between the parties constituted a "franchise" under the MFIL.

MCL 445.1504 provides, in pertinent part:

> (1) This act applies to all written or oral arrangements between a franchisor and franchisee in connection with the offer or sale of a franchise, including, though not limited to, the franchise offering, the franchise agreement, sales of goods or services, leases and mortgages of real or personal property, promises to pay, security interests, pledges, insurance, advertising, construction or installation contracts, servicing contracts, and all other arrangements in which the franchisor or subfranchisor has an interest.

MCL 445.1402(3) provides:

> (3) "Franchise" means a contract or agreement, either express or implied, whether oral or written, between 2 or more persons to which all of the following apply:
>
> (a) A franchisee is granted the right to engage in the business of offering, selling, or distributing goods or services under a marketing plan or system prescribed in substantial part by a franchisor.
>
> (b) A franchisee is granted the right to engage in the business of offering, selling, or distributing goods or services substantially associated with the franchisor's trademark, service mark, trade name, logotype, advertising, or other commercial symbol designating the franchisor or its affiliate.
>
> (c) The franchisee is required to pay, directly or indirectly, a franchise fee.

Defendants contend that the plaintiff cannot establish that the parties' agreement was conducted "under a marketing plan or system prescribed in substantial part by [defendants]", and that accordingly, the MFIL does not apply. We disagree.

As noted above, the remedial nature of the MFIL was recognized in *Martino, supra* at 61 (the notice requirements of the MFIL are designed "to protect potential franchisees from the superior bargaining power of franchisors."). See also *Geib v Amoco Oil Co*, 29 F3d 1050, 1056 (CA 6, 1994). Because this statute is a remedial one, this Court construes it liberally to achieve its intended goals. *Dudewicz v Norris-Schmid, Inc*, 443 Mich 68, 77; 503 NW2d 645 (1993).

The question whether the agreement utilized by defendants falls within the statutory definition of a franchise under the MFIL was considered in *Vaughn v Digital Message Systems Incorporated, et al*, ___ F Supp ___; 1997 WL 115821 (ED Mich, 1997), which concluded that it did. We find the decision in *Vaughn* persuasive on this point and, accordingly, choose to follow it.

Although the statute does not define "prescribe," Black's Law Dictionary includes the following definition of this term:

> To lay down authoritatively as a guide, direction, or rule; to impose as a peremptory order; to dictate; *to point*, to direct; *to give as a guide, direction, or rule of action*; to give law. To direct; define; mark out. [Black's Law Dictionary (6th ed), p 1182; emphasis added.]

This definition encompasses a situation in which a franchisee follows a set marketing plan developed by the franchisor because that plan was proffered as a suggested guide for selling the product as well as one in which the franchisee was specifically required to adopt the franchisor's marketing plan. The applicability of this broader definition to MCL 445.1402 is supported by the regulations promulgated pursuant to the MFIL:

> (4) "Prescribed in substantial part by the franchisor," as used in [MCL 445.1402 (3)(a)], shall be interpreted in light of the following:
>
> (a) A marketing plan may be determined to be prescribed if the franchise or other written or oral agreement, the nature of the franchise business, *or other circumstances permit or require the franchisee to follow an operating plan or standard operating procedure, or their substantial equivalent, promulgated by or for the franchisor. An operating plan or standard operating procedure includes required procedures, prohibitions against certain business practices, or recommended or offered practices, whether or not enforceable with economic sanctions*.
>
> (b) A marketing plan may be determined to be prescribed *without regard to whether the franchisee is an independent contractor and not the agent of the* franchisor, and notwithstanding provisions of a franchise or other agreement purporting to grant the franchisee complete freedom in operating his business.
>
> (c) *The presence of any of these factors, among others, indicates that a marketing plan or system is prescribed in substantial part by the franchisor*:
>
> (i) Representations by, or requirements of, the franchisor that the franchisee operate a business which can purchase a substantial portion of its goods solely from sources designated or approved by the franchisor.
>
> (ii) Representations by, or requirements of, the franchisor that the franchisee follow an operating plan, standard procedure, training manual, or its substantial equivalent promulgated by the franchisor in the operation of the

franchise, violations of which may, under the terms of the agreement, permit the franchisor to terminate or refuse to renew the agreement.

(iii) *Representations by, or requirements of, the franchisor that the franchisee is limited as to type, quantity, or quality of any product or service the franchisee may sell, or that limit the franchisee as to the persons or accounts to which he may sell the franchisor's product or service.*

(iv) *Representations by, or requirements of, the franchisor that the franchisor aid or assist the franchisee in training or in obtaining locations or facilities for operation of the franchisee's business, or in marketing the franchisor's product or service.* [1979 AC, R 445.101; emphasis added.]

Comparing these definitions with the provisions of the parties' agreement leads us to conclude that the agreement is within the purview of the MFIL. Significantly, § 2 of the agreement provides:

MARKETING ASSISTANCE. Upon execution of this Agreement, Supplier agrees to provide Licensee with certain marketing/operating supplies as previously agreed upon, a training/operating manual, as well as reasonable quantities of selling supplies, brochures, demonstration tapes, supply order/price forms, and such other materials as the Supplier shall, from time to time, make available to its Licensees. Supplier shall provide Licensee with up-to-date pricing, leasing and warranty information regarding Product as is reasonably necessary to assist Licensee in selling product.

In addition, § 3 of the agreement provides:

ADVERTISING. *Supplier reserves the right to approve all promotional and advertising methods and materials used by Licensee in connection with Licensee's activities* and discharge by Licensee of its obligations created by this Agreement, such approval to be not unreasonably withheld by Supplier. [Emphasis added.]

Also, § 5 of the agreement states:

PURCHASE. Licensee herewith tenders the cash sum of Nineteen Thousand Five Hundred and 00/100 Dollars ($19,500.00) as the total consideration agreed upon between Supplier and Licensee for Supplier to enter this Agreement. In exchange therefor, Supplier agrees that *it will timely provide Licensee with all operating materials, marketing materials, and supplies . . .* [Emphasis added.]

Finally, § 6 of the agreement provides, in pertinent part:

The following representations made by Licensee are acknowledged by Supplier as being material inducements for Supplier to enter this Agreement.

> Licensee represents and agrees that during the term of this Agreement, Licensee shall at all times:
>
> * * *
>
> (3) *abide by such reasonable rules, regulations and policies as the Supplier may from time to time establish*[.] [Emphasis added.]

In addition to these provisions, the restrictions with regard to marketing the MOH system contained in § 1 of the agreement and § A of the addendum clearly point to defendants' attempt to restrict the marketing activities of plaintiff in a manner contemplated by 1979 AC, R 445.101(c)(3).

Accordingly, the trial court did not err in finding that the parties' agreement was subject to the MFIL.

IV

Lastly, defendants argue that the trial court erred in its award of damages under MCL 445.1531. Defendants assert that the court improperly awarded damages for expenses incurred in running the franchise rather than simply awarding the fee paid for the procurement of the franchise itself. Given defendants' cursory treatment of this issue in their brief, and their failure to cite any authority supporting their position, we find that this issue has been abandoned. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999); *Schellenberg v Rochester Elks*, 228 Mich App 20, 49; 577 NW2d 163 (1998).

Affirmed.

/s/ Hilda R. Gage
/s/ Mark J. Cavanagh
/s/ Kurtis T. Wilder