

APPELLATE COURT CASE NO. A04-2338

STATE OF MINNESOTA

IN COURT OF APPEALS

JOHN S. DREWITZ,

Appellant,

vs.

MOTORWERKS, INC., A MINNESOTA CORPORATION,
R. JACK WALSER AND ANDREW D. WALSER

Respondents,

and

PAUL M. WALSER,

Respondent.

APPELLANT'S BRIEF AND APPENDIX

CHAMBERLAIN LAW FIRM
Paul W. Chamberlain (#16007)
1907 Wayzata Boulevard, Suite 130
Wayzata, MN 55391
(952) 473-8444

Attorney for Appellant John S. Drewitz

MEAGHER & GEER, PLLP
Mary M.L. O'Brien, #177404
4200 Multifoods Tower
33 South Sixth Street
Minneapolis, MN 55402
(612) 338-0661

*Attorney for Respondents
MOTORWERKS, Inc., R. Jack Walser
and Andrew D. Walser*

LAPP, LIBRA, THOMSON, STOEIBNER
& PUSCH
Mr. David C. Weinstein, #26569X
One Financial Plaza, Suite 2500
120 South Sixth Street
Minneapolis, MN 55402
(612) 338-5815

Attorney for Respondent Paul M. Walser

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STATEMENT OF LEGAL ISSUES

- I. Unrebutted testimony of the parties shows that Respondents failed to offer unconditional tender to Drewitz within 90 days of termination, a requirement under the shareholder agreement for Respondents to purchase the shares at book value. This Court has ruled the agreement between the parties must be strictly construed. Is Drewitz still a shareholder?

TRIAL COURT RULING: The trial court ruled this issue is *res judicata* and that Drewitz is not longer a shareholder.

Most Apposite Case:

Thompson v. Northern Realty, Inc., unpublished, 1997 WL 161854 (Minn. App.1997)

- II. Drewitz' shares have not been purchased by Respondents, and their 90 day window of opportunity is long since closed. No distributions have been made during the years since his termination of employment. Is this a violation of the parties' agreement combined with the requirements of the Internal Revenue Code §1377?

TRIAL COURT RULING: The trial court ruled denied Plaintiff's motion for an order directing allocation of income and losses among the shareholders until the buyout.

Most Apposite Case:

Drewitz v. Walser, et. al, 2001 WL 436223 (Minn. App. 2001) stating the terms of agreements between the parties controlled.

- III. Respondents failed to tender full payment and attempted to add oppressive conditions to tenders of payment. Respondents refused to treat Drewitz as a shareholder. Did Respondents' conduct frustrate Drewitz' reasonable expectations as a shareholder under the shareholder agreement and under Minn. Stat. § 302A.751?

TRIAL COURT RULING: Drewitz' Motion for minority shareholder buy-out was denied.

Most Apposite Case:

Gunderson v. Alliance of Computer Professionals, 628 N.W.2d 173 (Minn. App. 2001)

Most Apposite Statute:

Minn. Stat. § 302A.751

- IV. The District Court's Conclusions of Law regarding Drewitz' shareholder status, the fiduciary duty owed to him by Respondents, and the conclusions that no distributions are owed to Drewitz are contrary to Minnesota Law. Must the conclusions therefore be reversed?

TRIAL COURT RULING: Drewitz' motions were denied and his Complaint was dismissed.

Most Apposite Cases:

Maxfield v. Maxfield, 452 N.W.2d 219 (Minn. 1990)

Turner v. Alpha Phi Sorority House, 276 N.W.2d 63 (Minn. 1979)

- V. The District Court concluded that Respondents' actions since the decision in prior litigation between the parties are *res judicata*. Must this conclusion be reversed as clear error?

TRIAL COURT RULING: All issues raised have been fully litigated and *res judicata* applies.

Most Apposite Case: *Hauschildt v. Beckingham*, 668 N.W.2d 829 (Minn. 2004).

- VI. The District Court concluded that Drewitz should enforce the judgment of the Ramsey County District Court to obtain a buy-out. The order and judgment of the trial court (over four years ago) did not order a buy-out or issue a monetary judgment. Should this conclusion which is in conflict with the Minnesota Rules of Civil Procedure be reversed?

TRIAL COURT RULING: Plaintiff's Complaint is dismissed with leave to proceed to enforce the settlement in Ramsey County District Court.

Most Apposite Statute:

Minn. R. Civ. P. Rule 60.

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STATEMENT OF THE CASE

Appellant John Drewitz ("Drewitz") was an employee of Respondent Motorwerks, a BMW automobile franchise, from February 1990 (Complaint, A125) until his termination on December 18, 1999 (Respondents' Memorandum of Law ("MOL") p3, A208). During the period of his employment, Drewitz purchased 30% of the shares in MOTORWERKS, Inc. In 1999, Drewitz previously litigated a minority shareholder suit under Minn. Stat. § 302A.751 in Ramsey County. This Court upheld the trial court's denial of a claim for unfair value of his 30% interest in Respondent and held his claim was limited to book value under a Shareholder Agreement. (*Drewitz v. Walser, et. al*, 2001 WL 436223 (Minn. App.).

The Shareholder Agreement required Respondents to tender certified funds within 90 days of the termination of employment. During the four years following the expiration of the employment contract, Respondents never made an unconditional tender of the discounted stock purchase price.

The main issue at the district court and on appeal is shareholder status. Under Shareholder Agreement, Respondents had 90 days to terminate Drewitz' shareholder status. There was no order in the 1999 litigation or by this Court terminating shareholder status. Respondents had the ability to force such a termination by unconditionally tendering book

value, where Drewitz would be required to transfer his shares to the Respondents. Respondents failed to do so and thereby waived their rights to purchase the shares.

In 2004, Drewitz sued Respondents in Hennepin County District Court (Case No. CT 04-008927). The new venue was required by the change of the registered office of MOTORWERKS. The suit was for a minority shareholder buyout under Minn. Stat. § 302A.751, breach of contract, breach of the implied covenant of good faith and fair dealing between shareholders, and breach of fiduciary duty. Drewitz moved for a minority shareholder buy out under Minn. Stat. § 302A.751, Subd. 2.

The Hennepin County District Court, Hon. Marilyn Brown Rosenbaum, issued Findings of Fact, Conclusions of Law, and Order dated September 29, 2004, denied Drewitz' motion and dismissed the case. The trial court did not write a memorandum of law in support of the ruling. Judgment was entered October 5, 2004.

Drewitz appeals pursuant to Minn. R. Civ. App. P. 103.03(a). The Hennepin County District Court erred as a matter of law: (1) ruling Drewitz is no longer a shareholder, (2) dismissing the action as *res judicata*, (3) ruling the right to purchase at book value remains in effect, (4) denying Drewitz' motion for distribution of profits and for buyout under Minn. Stat. § 302A.751, and (5) ruling Respondents owe Drewitz no fiduciary duty. In

the alternative, genuine issues of material fact arise from the affidavits filed in the motions which preclude summary judgment.

Drewitz requests reversal of the erroneous findings of fact and conclusions of law and a remand with instructions to the District Court to determine the amount of the shareholder distributions due to Drewitz under the Shareholder Agreement and under IRC §1377, to determine the fair value of Drewitz' shares in Respondent corporation and order a buyout, and to determine interest, costs, and attorney's fees. In the alternative, Drewitz seeks a remand to resolve questions of fact related to his claims.

STATEMENT OF FACTS

John Drewitz, a former employee and general manager of Respondent MOTORWERKS, Inc. ("Motorwerks"), a BMW automobile franchise, while employed, Drewitz purchased a 30% ownership interest in Motorwerks. Other Respondents are believed to own the remaining 70%.

Following Drewitz' involuntary termination on December 18, 1998 (Respondents' MOL p3, A208), he commenced an action against Respondents which alleged, *inter alia*, wrongful termination under an employment contract and sought a buyout of his shares in MOTORWERKS pursuant to Minn. Stat. §302A.751.¹ The Ramsey County District Court ruled on December 29, 1999 that the parties' relationship was governed by an Employment Agreement and by a Shareholder

¹ Ramsey County District Court Case No. C0-99-508.

Sale/Purchase/Redemption/Voting/Control Agreement (“Shareholder Agreement”) which allowed a repurchase of shares at book value rather than fair value. (A59).

Drewitz’ appeal was affirmed by this Court on May 1, 2001. *Drewitz v. Walser, et al.* 2001 WL 436223 (Minn. Ct. App.) (“*Drewitz I*”). The Minnesota Supreme Court denied Drewitz’ Petition for Review on June 27, 2001.

This Court strictly construed the Shareholder Agreement and concluded the buy-back provision of the Shareholder Agreement was triggered when the employment contract expired. (*Drewitz I*). The Shareholder Agreement provided for a “book value” buy-back within 90 days of termination of employment at the expiration of the Employment Contract (*Id*). According to Respondents, Drewitz was terminated December 18, 1999 (Respondents’ MOL p3, A208) and closing and purchase of shares should have occurred, by March 18, 1999. According to the employment contract, termination of Drewitz’ employment should have occurred on March 31, 1999. The closing and purchase of Drewitz’ shares should have occurred at least by June 29, 1999.

Respondents did not purchase Drewitz’ shares in Motorwerks and refused to unconditionally tender the purchase price as required by the Shareholder Agreement for over four years.

- No tender of funds was made on or before March 18, 1999

- No tender of funds was made on or before June 29, 1999
- On July 1, 1999, Respondents sent a letter stating they anticipated having a final calculation of the purchase price within ten days (A51). According to the Shareholder Agreement, 4.04 (A24) the purchase price "shall be determined as of the last day of the month immediately preceding the month in which the termination occurs." Respondents were already in default of this obligation by February 28, 1999.
- On July 26, 1999 Respondents sent the "final calculation" (A53) which was later admitted to be in error by almost \$10,000. A business check² in this incorrect amount was tendered, and added the language "Endorsement of this check constitutes full and final compensation for purchase of 495 shares of Motorwerks, Inc. stock." (A55). No interest was included.³
- Almost one year later, on July 25, 2000, Respondent forwarded to Defendant an "Agreement" for the redemption of shares. This agreement stated an incorrect interest rate and used the same incorrect principal amount. (A70).
- Almost two additional years later, on June 7, 2002, Respondents' CFO made tender of payment conditional on a four page "General Release of All Claims," a requirement in direct conflict with the Shareholder Agreement. The principal amount was correct, but the interest due was to be waived for two and one-half years, totaling over \$48,000 in reduced unpaid interest. (A84).
- On January 29, 2003, Drewitz' attorney wrote Respondents' attorney a settlement offer for the principal and accrued interest.⁴ Respondent did not reply. (A93).

² The Shareholder Agreement specifies that payment "shall be made by certified or bank cashier's check." (Shareholder Agreement section 5.05)

³ The Shareholder Agreement specifies that "The payment shall be in the amount of the balance of indebtedness plus interest at the specified rate to the date of payment." (Shareholder Agreement section 5.05).

⁴ Drewitz settlement offer was entered into the record by Respondents (A93). It cannot be treated as an admission of Drewitz' status as a shareholder or limit the relief claimed in this case.

- On August 1, 2003, Respondents, for the first time, tendered a business check (see footnote 2) in the correct principal amount with no interest (see footnote 3). The tender was four and one-half years after the event triggering a 90 day right to buy-out at book value and failed to include interest required by the Shareholder Agreement. (A112).

In 2004, over four years after the court decision in previous litigation between the parties, Drewitz commenced the present action against Respondents based on the actions and inactions of Respondents since the order of the Ramsey County District Court on December 29, 1999 and the Court of Appeals decision on May 1, 2001. Factual allegations of the Complaint were mainly admitted in Respondents' Answer, (A125 and A192) and are incorporated by reference.

This present suit was brought in Hennepin County as required by Minn. Stat. §302A.751, Subd. 5 which requires the action to be venued in the county where the company has its registered office. (Complaint paragraph 2, admitted in Answer A192). The present suit relates solely to the events occurring after the Ramsey County action and this Court's decision affirming dated May 1, 2001.

STANDARDS OF REVIEW

The District Court considered the affidavits of the parties in addition to the pleadings. Under its own motion, the District Court dismissed the case.

Motions to dismiss are reviewed *de novo*. *Hauschildt v. Beckingham* 686 N.W.2d 829, 836 (Minn. 2004).

The District Court's denial of Drewitz' motion for buy-out and granting of summary judgment to Respondents on the basis of *res judicata* is also reviewed by this court *de novo*. *Care Inst. v. County of Ramsey*, 612 N.W. 2d 443, 446 (Minn. 2000).

On appeal, the Court must view the evidence in the light most favorable to the party against whom judgment was granted (i.e., Drewitz). *Fabio v Bellomo*, 504 N.W.2d 758 at 761 (Minn. 1993).

In addition, the District Court's judgment is based upon interpretation of the Shareholder Agreement. "[T]he construction and effect of an unambiguous contract are questions of law that we review *de novo*. *Wolfson v. City of St. Paul*, 535 N.W.2d, 384, 386 (Minn. App. 1995) (citing *Empire State Bank v. Devereaux*, 402 N.W.2d, 584, 587 (Minn. App. 1987)), *review denied* (Minn. September 28, 1995).

This Court need not give deference to the District Court's application of law to the material facts not in dispute. *Hubred v. Control Data*, 442 N.W.2d 308, 310 (Minn. 1989); *see also Frost-Benco Elec. Ass'n v. Minn. Pub. Utils. Comm'n*, 358 N.W.2d 639, 642 (Minn. 1984).

INTRODUCTION

Three major issues were presented to the trial court. None of the three issues was raised or addressed in any previous litigation between the parties.

- Did any action by Respondents since the decision by the Court of Appeals on May 1, 2001 terminate Drewitz' shareholder status in the Respondent corporation?
- If Respondents failed to terminate Drewitz' shareholder status, what distributions do Respondents owe to Drewitz under the Shareholder Agreement and the mandatory pro rata distributions required under IRC § 1377?
- Since the period for redemption of Drewitz' shares at book value expired under *any* argument defining "within ninety (90) days of the occurrence of an Event of Purchase," have "those in control of the corporation" acted in a manner unfairly prejudicial toward one or more shareholder" under Minn. Stat. §302A.751 Subd. b(1) triggering the right to a buy-out under Minn. Stat. 302A.751?

ARGUMENT

- I. **Respondents failed to offer unconditional tender to Drewitz within ninety days of termination, a requirement under the Shareholder Agreement. The agreements between the parties must be strictly construed. Drewitz is still a shareholder.**

This Court, in a previous decision involving the terms of the agreements between the parties, stated that “[A]ny written agreements, including employment agreements and buy-sell agreements between or among shareholders . . . are presumed to reflect the parties’ reasonable expectations . . .” *Drewitz I* at 11. “[T]here is no doubt that once the contract expired, and employment ended, respondents had the obligation to purchase Drewitz shares . . .” *Id.* at 17. Because the Respondents refused to unconditionally tender the book value for Drewitz’ shares within 90 days, or even 900 days, Drewitz’ is still a shareholder of Respondent corporation.

Respondents would like to tie the current litigation to prior litigation between the parties. The trial court agreed and ruled the present action barred by *res judicata*. However, this action does not re-litigate any issues presented during prior litigation and does not raise issues that could have been raised in prior litigation, nor does it attempt to enforce any prior order to redeem Drewitz’ shares.

- July 26, 1999 – Respondents tendered the admittedly wrong amount. Even this incorrect tender may have been accepted as a partial tender had Respondents not demanded it be accepted as full settlement, Drewitz had no legal obligation to do so. (A53).

- July 25, 2000 – Respondents tendered the wrong amount and coupled this with a settlement agreement in which Drewitz would be required to accept less than the interest rate and amount required by the Shareholder Agreement. (A66).
- June 7, 2002 – Respondents tendered a four page “General Release of All Claims” which was predicated on Drewitz accepting a significantly lower interest rate and waiving his right to any interest at all for two years, contrary to the Shareholder Agreement. And *any* payment from Respondents was conditioned on Drewitz signing a release of rights Respondents had no basis to demand. This tender could have been accepted as a tender of the principal had Respondents not made it conditional on a release and waiver of interest, but Drewitz was not required to accept it. (A84).
- The first unconditional tender of the correct principal amount of \$355,862 (due 90 days after termination of employment) (Shareholder Agreement, 5.04, A28) was made in August 2003, four years after the Shareholder Agreement required it, but it was not in compliance with the duty to include interest (Shareholder Agreement, 5.05, A28), nor was it timely.

In *Thompson v. Northern Realty, Inc.*, unpublished, 1997 WL 161854 (Minn. App.) (A247) this Court affirmed the decision of the trial

court, determining that a shareholder does not lose shareholder rights when the shares were never purchased:

The district court construed the statute [§302A.751] to mean that shareholders lose rights only after the parties agree to or the court determines the fair value of the shares. Because the parties never agreed on the valuation of the shares and the court never issued an order establishing that value, the court concluded that Thompson did not lose her shareholder's rights. 1997 WL 161854 (Minn. Ct. App. 1997) (unreported case A247).

Thompson remained a shareholder in Northern Realty, Inc. because there was no valid tender of the purchase price.

Respondents argued that “[I]t seems to me the plaintiff is saying that because he didn’t get payment in 90 days, the Court should disregard the entire agreement. There is no authority for that position.” (TT 13:11-14). Plaintiff never said any such thing; the agreement is to be interpreted according to its terms. This Court in *Drewitz I* held that “Drewitz was required to abide by the terms of a contract that he negotiated . . .” *Id.* And “Minnesota law provides that written agreements, including employment agreements and buy-sell agreements are presumed to reflect the parties’ reasonable expectations.” *Id.* Respondents argue this Court’s strict construction of the language of the agreements was suitable when applied against Drewitz but should be disregarded when applied to their own responsibilities. The Shareholder Agreement in Section 5.04 states Motorwerks **shall** purchase Drewitz’ shares ninety days after termination. (A28).

Authority for Drewitz' position is also found in *Coleman v. Taub* 638 F.2d 628, (3d. Cir. 1981), cited by Respondents. In *Coleman*, there was a stock purchase agreement coupled with an employment agreement, similar to the agreements between the parties in this case. When Coleman's employment was terminated, it triggered Taub's obligation to purchase Coleman's stock. When construing the contract and determining Coleman's right to continue to participate in the business, the court determined that Coleman's right to continued participation was ended by *the determination of the value of the stock, coupled with tender of the purchase price:*

Unlike the typical minority shareholder, whose right of continued participation in the corporate enterprise continues until he either sells his stock or is merged out for a valid business purpose, Coleman will have no right to continue to hold Old Taub shares *beyond the time that a value is placed on those shares and the purchase price is tendered in accordance with the contract between Coleman and Old Taub.*" [emphasis added] (applying Delaware law).

In other words, shareholder status did not terminate until the purchase amount, as defined by the parties' agreements, was tendered. In this case, the agreements provide for tender of book value plus interest within 90 days.

If Respondents meant to honor the agreements between the parties but determined the parties were unable to agree on terms, they had an additional option under Minn. Stat. § 302A.751. Respondents could have

posted a bond in an adequate amount to assure the court that the purchase price of the shares would be paid. Respondents argue they were not required to do this because the court did not order the buy-out under Minn. Stat. § 302A.751. Indeed, the court did not. But had Respondents chosen to post such a bond, they would have grounds to argue that doing so terminated Drewitz' rights as a shareholder.

From the time Respondents terminated Drewitz on December 18, 1999, Respondents used \$355,862 of Drewitz' investment for their own profit-making operations. To contend Drewitz has no share in the growth and income of the corporation denies the essence of the rights of a shareholder. A shareholder invests in a company expecting to share in the income and growth of the business. If Drewitz is to be excluded from shareholder rights, Minn. Stat. § 302A.751 is clear that he must be paid or bonded over.

Since they neither posted a bond nor made an unconditional tender, Drewitz remains a shareholder. Plaintiff's investment in the business cannot be simply ignored by those in power as majority holders of the corporation's shares.

There are two conditions to purchase stock under the Shareholder Agreement:

- (1) Tender of the proper amount of money
- (2) Tender at the proper time

Respondents' first attempted tender of the purchase price occurred after the expiration of the 90-day redemption period on July 26, 1999. Respondents state: "...Motorwerks is now tendering full payment for all shares. Acceptance of this check by Mr. Drewitz will constitute full and final consideration for the purchase of the shares of Motorwerks' stock." (A53). But this tender was in the wrong amount and does not account for the statutory interest owed to Drewitz under Minn. Stat. § 334.01, which requires interest of six percent (6%) on contracts which do not otherwise specify an interest rate (as the Shareholder Agreement does not).

A tender by a debtor to a creditor (who in good faith asserts that the amount tendered is insufficient) is not good as a tender if it be coupled with such conditions that the acceptance of the same will involve an admission by the creditor that no more is due. *Moore v. Norman*, 53 N.W. 809 (Minn. 1892).

Had Drewitz accepted and cashed that check, he would not have been able to claim the amount was incorrect, as Respondents acknowledge, nor could he claim the statutory and contractual interest owed to him. Thus, under the *Moore* standard, the first tender was defective.

The next defective tender occurred July 25, 2000, again in the wrong principal amount, and used the wrong interest amount and coupled with an impermissible release.

On June 2, 2002, Respondents made a third defective tender. This time the principal was correct (\$355,862) but payment was conditional on a

reduction of \$48,000 of interest for a 2 ¼ year period. Respondents previously acknowledged a duty to pay. The tender also required a broad release of unrelated claims and demanded an indemnity by Drewitz. The punitive acts of Respondents⁵ were a clear breach of the fiduciary duty owed to Drewitz as well as a frustration of his reasonable expectations under the Shareholder Agreement, and the "tender" was not proper under the Shareholder Agreement.

Drewitz was never under an obligation to sign any kind of release; instead Respondents were permitted the enormous opportunity to purchase Drewitz' shares at book value without paying fair value for the shares. It is important to keep the context of the time elapsing in clear focus. Drewitz is not coming back after 91 days with a technicality claim. Drewitz has been forced to wait years for the majority shareholders to act on a favorable interpretation of the parties' contracts by this Court in 2001.

When did the right to purchase the shares at book value expire? The Shareholder Agreement allows only 90 days after termination, not four years. The "90 days" **did** expire, certainly before four years. That window of opportunity for Respondents is closed.

The burden of tender was always on the Respondents. While Drewitz had an absolute obligation to sell his shares, he could not do this

⁵ See letter from Respondents' CFO dated June 7, 2002 arbitrarily changing the start of the interest period from that delineated in the Shareholder Agreement from March 1999 to July 2001 (A84).

without a proper tender of money. Drewitz was obligated to tender his shares, but Respondents have always had possession of his share certificate. (A94). Respondents did not even begin to calculate the book value of Drewitz' shares until more than six months (July 1, 1999 letter, A51) after termination.

When Respondents "requested"⁶ Drewitz sign a release form, they describe this "request" as neither inappropriate or oppressive⁷ (Res. MOL p. 17, A22). Such an argument is meaningless since strict construction of the agreements between the parties does not allow Respondents to re-write the buy-out terms.

The "insignificant" language would have Drewitz indemnify and hold Respondents harmless for any tax consequences. (Release, paragraph 7, A86). Should, for example, the IRS audit the Respondent corporation and determine, as Drewitz claims, that Respondent was a shareholder for the last five years, taxes on the deemed distributions plus penalties and interest could be millions of dollars. This is not "insignificant."

Respondents then state that "enforcing the agreement gives both parties exactly what they bargained for." (Respondents' MOL p18, A223).

To make that argument Respondents would have to convincingly show

⁶ This was not a "request" as Respondents characterize it (Respondents' MOL A222). It was a requirement before tender. See Kleckner letter "We will require a release before paying this amount..." (A84).

⁷ These requests included waiving statutory interest, indemnification by Drewitz of the Respondents for tax liabilities, a covenant not to sue for defamation, a waiver of age discrimination claim and a covenant not to apply for a job at any Walser dealership forever. None of these terms was a requirement of the agreements between the parties.

that Drewitz bargained to sell his shares at book value but not receive his payment for years.

Each time Respondents claim they tendered the purchase price, the tender was defective. The Shareholder Agreement makes the ninety-day period for the buyout mandatory: Respondents utterly failed to comply with this provision. Drewitz remains a shareholder.

- II. Drewitz remains a shareholder because of Respondents' failure to comply with the terms of the parties' agreement. No distributions have been made to Drewitz. This a violation of the parties' agreement combined with the requirements of the Internal Revenue Code § 1377 (26 USC § 1377).**

The Shareholder Agreement states as follows:

2.05 Distributions. For as long as Walser and Drewitz are Shareholders, the Company shall annually distribute cash to each Shareholder, to the extent of Company earnings in the year under consideration, in an amount not less than the sum required for each Shareholder to pay the income tax liability attributable to their respective proportionate share of the Company's earnings taxable to its shareholders. Such distributions shall be made in proportion to stock ownership as of the record date of distribution, and the amount of such distributions shall be determined assuming the highest individual income tax rates, including any minimum tax liability, under the Internal Revenue Code and Minnesota tax law.

IRC § 1377 states as follows:

[E]ach shareholder's pro rata share of any item for taxable year shall be the sum of the amounts to be determined with respect to the shareholder (A) by assigning an equal portion of such item to each day of the taxable year, and (B) then dividing that portion pro rata among the shares outstanding on that day.

Respondents have refused to comply with the requirement in disregard of the Shareholder Agreement. Each time distributions have been made since the Drewitz' employment was terminated, Respondents have failed to honor the provisions of the Shareholder Agreement and IRC § 1377. IRC § 1377 and Subchapter S rules require that distributions to shareholders must be proportionate to the percentage owned and simultaneously distributed. Drewitz' rights as a shareholder which have been denied by the majority shareholders are unfairly prejudicial actions justifying a buy out under Minn. Stat. §302A.751 and payment of the pro-rata distributions of profit.

III. Respondents' refusal to either tender full payment for his shares or to treat Drewitz as a shareholder frustrated his reasonable expectations as a shareholder under the shareholder agreement and under § 302A.751.

Respondents allege that Drewitz acted in bad faith in refusing their repeatedly defective tenders. This is simply not true. Respondent car dealers kept adding and changing terms as if they were "making a deal" instead of complying with the terms of the Shareholder Agreement. Drewitz was never under any obligation to sign any kind of release or to relinquish his right to statutory and contractual interest. Under the Shareholder Agreement, Drewitz could reasonably expect his shares to be purchased within 90 days.

Respondents have failed in their fiduciary duty by making distributions to themselves and ignoring Drewitz. During the years since the decision of this Court, Respondents failed to purchase Drewitz shares and failed to treat Drewitz as a shareholder, despite his 30% investment in the capital of the company.

“Those in control of closely held corporations have a substantive obligation, for instance, not to withhold dividends or use corporate assets preferentially.” *Gunderson v. Alliance of Computer Professionals* 628 N.W. 2d 173 (Minn. App. 2001) citing *Crosby v. Beam* 548 N.E. 2d 217 (Ohio 1989) (stating that majority shareholders breached their fiduciary duty by using their controlling power to give themselves benefits not enjoyed by the minority shareholders).

“It is substantively unfair and a breach of fiduciary duty for a controlling shareholder or group of shareholders to appropriate overmuch of the enterprise’s economic benefits” or to “freeze out” minority shareholders.” Daniel S. Kleinberger, *Why Not Good Faith? The Foibles of Fairness in the Law of Close Corporations*, 16 Wm. Mitchell L. Review, 1143 (1990).

IV. The District Court’s Conclusions of Law regarding Drewitz’ shareholder status, the fiduciary duty owed to him by Respondents, and the conclusion that no distributions are owed to Drewitz are contrary to Minnesota Law and therefore must be reversed.

The District Court concluded that Drewitz was not a shareholder, that no fiduciary duty was owed to him as a shareholder and that his claims were moot. (Order COL 3, 5, A245). The District Court also denied Drewitz' motion for shareholder distributions since 1999. *Id.*

These determinations are conclusions of law on summary judgment.

The conclusions of law are reviewed *de novo*:

Particularly in cases of this kind, where the trial court is weighing statutory criteria in light of the found basic facts, the trial court's conclusions of law will include determination of mixed questions of law and fact, determination of 'ultimate' facts, and legal conclusions. In such a blend, the appellate court may correct erroneous applications of the law. *Maxfield v. Maxfield*, 452 N.W.2d 219, 221 (Minn. 1990).

The district court's conclusion that Drewitz was not a shareholder is contrary to the holdings in *Thompson* and *Coleman* (both of which require determination of value and tender of the purchase price); it is also contrary to Minn. Stat. §302A.751. Because Respondents failed to calculate the purchase price and failed to validly tender the payment, Drewitz remains a shareholder in Motorwerks.

The district court's conclusion that the issues raised in this case are moot is clear error and must be reversed. Furthermore, the district court's conclusion is predicated on an interpretation of the Shareholder Agreement which invalidates the mandatory ninety (90) day period for the buyout. This is a conclusion of law in interpreting the contract and is reviewed *de novo*. *Turner v. Alpha Phi Sorority House*, 276 N.W.2d 63, 66

(Minn. 1979). A conclusion of law which ignores the law while invalidating terms of the contract is clear error and, therefore, must be reversed.

V. The District Court's Conclusions of Law and application of Res Judicata in dismissing Drewitz' Motion is clear error and must be reversed.

The determination of Drewitz' shareholder status under the Shareholder Agreement is a question of contract law, which this Court reviews *de novo*. *Turner, supra* at 66. The reviewing court need not give deference to the district court's application of law to the undisputed facts of this case. *Hubred v. Control Data Corp.* 442 N.W.2d 308, 310 (Minn. 1989); see also *Frost-Benco Elec. Ass'n v. Minn. Pub. Utils. Comm'n* 358 N.W.2d 639, 642 (Minn. 1984).

The district court ruled that Drewitz' claims for a shareholder buyout were barred by *res judicata*. The application of *res judicata* to preclude a claim is a question of law that is also reviewed by this Court *de novo*. *Care Institute, supra*.

"Neither *res judicata* nor collateral estoppel is to be rigidly applied. *Hauschildt v. Beckingham* 686 N.W.2d 829, 837 (Minn. 2004), citing *Wilson v. Comm'r of Revenue* 619 N.W.2d 194, 198 (Minn. 2000). "In particular, the United States Supreme Court has cautioned that *res judicata* should be invoked only after careful inquiry because it "may govern grounds and defenses not previously litigated" and therefore "blockades unexplored paths that may lead to truth." *Hauschildt, supra*,

citing *Brown v. Felsen* 442 U.S. 127, 132, 99 S.Ct. 2205, 60 L.Ed.2d 767 (1979). Here, the district court applied *res judicata* to bar litigation based on events which occurred after the prior decisions. This is clear error which must be reversed.

Res judicata applies as an absolute bar to a subsequent claim when (1) the earlier claim involved the same set of factual circumstances; (2) the earlier claim involved the same parties or their privies; (3) there was a final judgment on the merits; (4) the estopped party had a full and fair opportunity to litigate the matter. *Hauschildt, supra*, at 840, citing *State v. Joseph* 636 N.W.2d 322, 327 (Minn. 2001); accord *Wilson, supra*, at 198.

All four prongs must be met for *res judicata* to apply. See *Joseph*, 636 N.W.2d at 327-29.

Drewitz claims are based on Respondents' actions which post date the Ramsey County decision and this Court's decision in *Drewitz I*. The primary issue in this case is whether Respondents' failure to determine the value of Drewitz shares and tender the purchase price means that Drewitz remains a shareholder in Motorwerks. The factual circumstances of this case did not arise until after the decision in the prior litigation. Thus, the issues of this case could in no way have been litigated in the prior case. *Res judicata* cannot apply to events which occurred following the decision which is used in the attempt to bar the claim. "The "common test for determining whether a former judgment is a bar to a subsequent action is to inquire whether the same evidence will sustain both actions." *Hauschildt, supra*, at 841, citing *McMenomy v. Ryden* 276 Minn. 55, 58,

148 N.W.2d 804, 807 (1967). In addition, claims cannot be considered the same cause of action if "the right to assert the second claim did not arise at the same time as the right to assert the first claim." *Hauschildt supra*, citing *Care Institute, supra* at 447.

The district court's application of *res judicata* to the events giving rise to Drewitz claims in this case was a clear error of law and therefore must be reversed.

VI. The District Court's conclusion regarding the "proper procedure" are erroneous and in conflict with the provisions of Minn. Stat. § 302A.751 and Rule 60 of the Rules of Civil Procedure.

The District Court concluded that the "proper procedure requires the parties to return to Ramsey County District Court and move for enforcement of the judgment or settlement." There was never a judgment ordering payment to be enforced nor was there a settlement to be enforced. Drewitz would have to ask for a modification of substantive issue of the prior Order. After four years, there is no procedural process available to either party to accomplish what the trial court ordered, nor is there continuing jurisdiction (Rule 60.02 Minn.R.Civ.P.).

Establishing a right to purchase under the Shareholder Agreement is not the same as an order transferring the shareholder interest. The buyout was to be conducted in accordance with the Shareholder Agreement, within 90 days and in the proper amount plus interest. They failed to do

so. Years later, after Respondents held his money for the entire period, Drewitz brought a statutory action for the buyout of his shares in Motorwerks in the proper venue under Minn. Stat. §302A.751, Subd. 5 (requiring the action to be brought in the county where the corporation has its registered office). Most importantly, failures to tender unconditional payment in 2001, 2002, and 2003 all took place after the previous case was decided and appeals were exhausted. Respondents seem to have taken that order as license to disregard both their own agreements and their fiduciary duties to a minority shareholder. Respondents argue that their own failure to pay is the fault of Drewitz for his "recalcitrance" and "refusal to cooperate." (Respondents MOL p17, A222) His "refusal to cooperate" is for:

- not agreeing to accept less than the correct principal amount,
- not agreeing to unauthorized conditions and indemnifications,
- not agreeing to waive \$48,000 in statutory interest,⁸ and
- not agreeing to reduce the statutory interest rate.

The district court's conclusions regarding the "proper procedure" are not supported by the facts of the case nor supported by the statutory authority giving Drewitz, the minority shareholder, the right to have the judicial determination of his buyout under §302A.751. Where Respondents have refused to follow the buyout procedure under the

⁸ \$355,862 at 6% for 2.25 years is \$48,041. See Appendix A84 and A90

Shareholder Agreement, it is inequitable to allow them to invoke its protections only when it is convenient for them.

Because Drewitz remained a shareholder, the district court's conclusion that "Plaintiff is no longer a shareholder of Defendant Corporation and Defendants owe no fiduciary duty to Plaintiff as a shareholder" is clearly erroneous and therefore must be reversed. (Order COL 5, A245).

VII. CONCLUSION

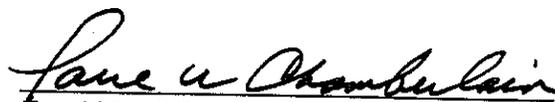
The district court improperly dismissed Drewitz case through the application of *res judicata* to facts which post date the decision invoked in barring them. The District Court also made erroneous conclusions of law when it determined that Drewitz was not a shareholder in Motorwerks and when it determined that Drewitz claims were moot. In addition, it erred in the conclusions of law in determining that Drewitz was not owed a fiduciary duty, and that his reasonable expectations under the Shareholder Agreement and Minn. Stat. §302A.751 were not frustrated by the actions and inactions of Respondents. The fact that Respondents unilaterally decided to punish Drewitz by failing to honor even their own interest agreement is a prime example of the manner in which Respondents oppressed Drewitz in the years following this Court's decision in *Drewitz I*. Respondents cannot frustrate the buyout process for three years, have possession and use of the shareholder's money for that period, and then

rely on a buyout provision which has long since lapsed to deny that Drewitz remains a shareholder in Motorwerks.

Drewitz requests this Court to reverse the decision of the District Court, and to determine as a matter of law that Respondents' failure to tender the purchase price results in Drewitz remaining a shareholder in Motorwerks. We request this Court remand with instructions to the District Court to determine the amount and value of the shareholder distributions due to Drewitz, and to determine the buyout amount. In the alternative, if this Court determines fact issues exist with respect to the shareholder status and buy-out attempts, we request remand for such factual determinations.

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CHAMBERLAIN LAW FIRM



Paul W. Chamberlain, #16007
1907 Wayzata Blvd., Suite 130
Wayzata, MN 55391
Tel: (952) 473-8444
Fax: (952) 473-3501

ATTORNEY FOR APPELLANT
JOHN S. DREWITZ

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).