

NO. A04-2338

State of Minnesota
In Supreme Court

John S. Drewitz,

Appellant,

v.

Motorwerks, Inc., a Minnesota Corporation,
R. Jack Walser, Paul M. Walser and Andrew D. Walser,

Respondents.

APPELLANT'S REPLY BRIEF AND APPENDIX

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Argument

Drewitz submits this Reply Brief in compliance with this Court's April 13, 2006 and April 27, 2006 Orders, and in reply to the Respondents' Brief. Drewitz also responds to the *amicus curiae* arguments of the Minnesota Automobile Dealers Association.

This Court requested Drewitz to address "whether appellant's claim to a fair value buyout of his shares is barred by the doctrine of res judicata." (April 27, 2006 Order) The fair-value buyout claim is *not* barred because it did not arise—and the underlying facts did not exist—until the close of the first lawsuit.

In their brief, Respondents make numerous misstatements and gross mischaracterizations of fact in order to argue they made proper tender to Drewitz, that Drewitz rejected valid attempts to tender, and that Drewitz was nothing more than an employee with a stock incentive who should be stripped of shareholder rights on termination of his employment. However, Respondents never made a proper tender of the re-purchase amount. Drewitz rejected the *improper* tenders Respondents did attempt. Drewitz was not a simple employee, but was made a partner in the governance of Motorwerks, Inc., and should not be stripped of shareholder rights and thereby left without recourse to recover the value of his shares.

The Minnesota Automobile Dealers Association ("MADA") argues that this Court should read an implied term into all shareholder agreements entered into between automobile dealerships and their general managers. But the auto dealers

association misses the point: a provision ending shareholder rights or share ownership at the same time as termination of employment may be inserted into any shareholder agreement if the parties so intend. In this case, the Shareholder Agreement included no such term, and its actual contents indicate no such term was intended. The MADA policy argument for auto dealership management incentives, even if valid, should not apply to full partners who invest substantially and own nearly a third of the corporation.

For the reasons outlined below, Appellant Drewitz respectfully requests this Court to (1) reverse the decision of the Court of Appeals which held that Drewitz's claim for a fair-value buyout is barred by the doctrine of *res judicata*; (2) affirm the decision of the Court of Appeals that Drewitz's claim for shareholder status and distributions is not barred by the doctrine of *res judicata* under either theory on review; and (3) affirm the decision of the Court of Appeals that Drewitz did not lose shareholder status or rights when his employment was terminated.

I. Drewitz's claim for a fair-value buyout is not barred by the doctrine of *res judicata*.

Although Appellant has brought two actions under Minn. Stat. § 302A.751, Appellant's § 302A.751 claims in this action did not exist until after the close of the first, so the doctrine of *res judicata* does not bar Appellant's claim.

Application of res judicata to preclude a claim is a question of law reviewed by this Court *de novo*. *Hauschildt v. Beckingham*, 686 N.W.2d 829, 840 (Minn. 2004).

The doctrine of res judicata (claim preclusion) prevents a party from re-litigating claims that arise from the same set of circumstances giving rise to a previous lawsuit. *Id.* at 837 (citations omitted). Res judicata should not be applied rigidly. *Id.* (citing *Wilson v. Comm’r of Revenue*, 619 N.W.2d 194, 198 (Minn. 2000)). Instead, a court should focus on whether application of the doctrine would work an injustice on the party against whom it is applied. *Id.* (citing *Johnson v. Consol. Freightways, Inc.*, 420 N.W.2d 608, 613 (Minn. 1988)). Res judicata applies—to claims that were actually brought or could have been brought—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; and (4) the estopped party had a full and fair opportunity to litigate the matter. *Id.* (citing *State v. Joseph*, 636 N.W.2d 322, 327 (Minn. 2001)). All four prongs must be met before res judicata can apply. *Id.* (citing *Joseph*, 636 N.W.2d at 327-29); *see also Care Inst. Inc.-Roseville v. County of Ramsey*, 612 N.W. 2d 443,447 (Minn. 2000) (“if the right to assert the second claim did not arise at the same time as the right to assert the first claim, then the claims cannot be considered the same cause of action.” (emphasis added and internal citation omitted)); *Petition for Imp. Of County Ditch No. 86, Branch 1 v. Phillips*, 625 N.W. 2d 813,817 (Minn. 2001).

In the instant case, the test is not satisfied with respect to Drewitz's fair-value buyout claim under Minn. Stat. § 302A.751. The first lawsuit (*Drewitz 1*) involved a different set of factual circumstances. In the *Drewitz 1* Complaint, Drewitz's § 302A.751 claim was based on his termination without cause, despite the provisions of his employment agreement that prohibited such termination.¹ (RA72-RA73.) That conduct by Respondents took place and was completed in December 1998. (RA72.) In the present lawsuit, Drewitz's § 302A.751 claim is based on facts that did not exist prior to the close of *Drewitz 1*. Specifically, it is based on the Respondents' failure to honor the tender requirements of the Shareholder Agreement to tender book value plus interest as required by the district court's affirmed decision in *Drewitz 1*.² (RA51-RA52.) Respondents

¹ Respondents attempt to confuse the issue by focusing on Drewitz's termination, calling his temper "explosive," and citing to deposition testimony not previously cited in this case. (Resp. Br. 11.) This statement is not cited by the trial court in *Drewitz 1* as a reason for his termination. (RA90.) The inclusion of testimony from the deposition of Barbara Jerich is improper, and that portion of Respondents' appendix should be struck. It is outside the record and conflicts with the prior decision.

² Book value was calculated and agreed on within months of this Court's denial of Drewitz's Petition for Review in *Drewitz 1*. (RA102.) As outlined in Appellant's Brief and by the Court of Appeals, Respondents never unconditionally tendered the proper amount. (App. Br. 3-4); *Drewitz 2*, 706 N.W.2d at 786. It did not take "three years of on-and-off discussions regarding the input numbers to be used," as Respondents characterize their attempts to get Drewitz to accept less money than the agreed amount, as though the dealership was dickering over a car deal rather than following a contract. (Resp. Br.2) Respondents argue that no negotiation was permitted over the book value, but cite no authority for this assertion, and no such prohibition appears in the Shareholder Agreement (*Id.* at 7.) The Shareholder Agreement provided the CPA's book value to be given ten adjustments to the book value (A25, ¶¶ 2 (a)-(j).) Moreover, this argument was never made below, and bringing it up now is improper.

failed to treat Drewitz as they should have, since Drewitz remained a shareholder, and their failures led to this litigation. Until the close of *Drewitz 1*, the issue of whether Drewitz was entitled to book value or fair value was unsettled. At the close of *Drewitz 1*, the district court determined Motorwerks was entitled to buy back Drewitz's shares at book value and rejected the claim for fair-value buyout based on a strict interpretation of the Employment Agreement and the Shareholder Agreement (RA93 (*Drewitz 1*, district court findings).) No implied terms were considered, and summary judgment was upheld based on the agreements. (*Id.*) After the close of *Drewitz 1*, the Respondents still owed a duty to shareholders of Motorwerks, which still included Drewitz. This set of facts gives rise to the instant § 302A.751 claim, which Drewitz could not have alleged at any time during the first lawsuit because the facts did not exist. Because the first prong is unsatisfied, res judicata does not apply.

The Court of Appeals erred in concluding that Drewitz is attempting to re-litigate his original claim for a fair value buyout under a failure-to-tender theory. What the Court of Appeals failed to realize is that the Appellant could not have reasonably anticipated that the Respondents would fail to pay Drewitz book value for his shares after the 2001 ruling. Drewitz could not have brought or apprehended such a claim in the first litigation itself. Drewitz could not contemplate in his first litigation that the Respondents would enter into an agreement for interest and then repudiate the agreement. Furthermore, Drewitz could not have anticipated that the Respondents would tender a settlement

agreement with unauthorized conditions and would cut off two years of interest from the amount owed to the Appellant instead of simply tendering the proper amount.

The third and fourth prongs are also unsatisfied. The third prong requires a final judgment on the merits. Although in *Drewitz 1* there was a judgment of the district court, affirmed by the Minnesota Court of Appeals, this judgment did not apply to the § 302A.751 claim in this lawsuit. The judgment in *Drewitz 1* was that as a result of his termination, Drewitz was entitled to book value for his shares under the Shareholder Agreement, but no additional sanctions. (RA88-RA93 (*Drewitz 1*, district court findings).) The judgment had nothing to do with whether Respondents breached their duty to Drewitz by continually failing to make proper tender to re-purchase his shares. So there could not have been—and there was not—a final judgment on the merits of the claims made in this lawsuit. Because of this, Drewitz had no opportunity to litigate his claims based on Motorwerks' post-appeal failure to purchase at book value in *Drewitz 1*.

Under the fourth prong, the claimant must have had a full and fair opportunity to litigate the issues in the previous action. Drewitz did not have a full and fair opportunity to litigate the present § 302A.751 claim in *Drewitz 1*. In fact, he had no chance at all, since the facts giving rise to the claim did not exist until after *Drewitz 1* was decided.

Finally, applying the doctrine of res judicata would visit an injustice on Drewitz. Drewitz came to a failing BMW dealership, Motorwerks, and turned it

into a success. (RA88--*Drewitz 1*, 1999 district court findings). As a reward for his hard work and successful practices, Jack Walser sought to bring Drewitz into the business as a full partner, and offered him a share in the ownership and control of Motorwerks, Inc., including an option to buy the entire corporation. (A4.)

In analyzing the res judicata issue as it may apply to the fair-value buyout claim, this Court must carefully distinguish the applicable time periods and note when the facts giving rise to the instant case could have existed. The nonpayment of book value according to the district court's judgment in *Drewitz 1* could not have existed until the close of *Drewitz 1*, so res judicata cannot bar Drewitz's claim for a fair-value buyout under § 302A.751.

II. Respondents failed to terminate Drewitz's shareholder status by repurchasing his shares at book value, so Drewitz remains a shareholder.

The first lawsuit settled the issue of whether or not Respondents had the right to purchase Drewitz's shares at book value regardless how he was terminated. The decision in that case left Drewitz, on the one hand, a shareholder but no longer an employee, and Respondents, on the other hand, with the right to buy back Drewitz's shares. The incentive for Respondents to re-purchase the shares was the fact that Drewitz remained a shareholder of Motorwerks, entitled to all the benefits thereof, including a proportional share of shareholder distributions. Respondents therefore had a compelling reason to re-purchase Drewitz's shares,

but astonishingly, they dragged their feet for years. In the meantime, they paid Drewitz neither distributions nor book value, leaving him with nothing to show for his third of a million dollar investment in Motorwerks.

A. This Court should adopt the California Supreme Court's reasoning from *Stephenson v. Drever* that a shareholder-employee remains a shareholder under a shareholder agreement with a buyout provision unless the shareholder agreement provides otherwise.

The Minnesota Court of Appeals rightly followed the rule from *Stephenson v. Drever* that a shareholder-employee in a close corporation remains a shareholder entitled to his share of dividends until the re-purchase of his shares is completed. 947 P. 2d 1301, 1305 (Cal. 1997). Stephenson was employed as chief financial officer of Drever Partners, Inc., a closely-held corporation. *Id.* at 1302. Stephenson and Drever Partners entered into an agreement whereby Stephenson purchased 500 shares of Drever Partners. *Id.* The agreement contained the following provision:

In the event of the termination of Stephenson's employment for any reason whatsoever, including his retirement or death, then, on or before ninety (90) days after the date of such termination, Drever Partners shall have the right and obligation to repurchase all of the Shares that it agreed to sell to [Stephenson]. *Id.*

Stephenson and Drever Partners later entered into a "buy-sell" agreement to terminate Stephenson's employment on July 1, 1994, and that his shares would be valued as of May 1, 1994. *Id.* The parties were unable to agree on the value of Stephenson's shares, and Stephenson filed the lawsuit to obtain distributions made after his termination. *Id.* at 1303.

The California Supreme Court observed that the parties were free to include a term on the date of termination of shareholder rights in the buy-sell agreement, and it refused to imply such a term into buy-sell agreements that do not include such a term. *Id.* at 1305. The court also observed, citing the canon *expressio unius est exclusio alterius*, that the explicitness of the agreement on the legal consequences of termination of Stephenson's employment tended to negate any inference that the parties also intended another consequence—termination of shareholder rights. *Id.* (*citation omitted*).

In reaching its conclusion, the *Stephenson* court considered the valuable rights to which a shareholder is entitled, *id.* at 1306-07, as well as purported public policy considerations urged by Drever Partners, *id.* at 1310. First observing that public policy cannot trump substantive law, the court observed that public policy considerations provided no guidance, since public policy could favor protecting minority shareholders or majority shareholders. *Id.* Minnesota's remedial legislation to provide strong protection for minority shareholders should indicate a different public policy. By following the substantive law, the court gave corporations the incentive to expedite the purchase of shares of minority shareholders. *Id.* Terminating shareholder rights on termination of employment would give corporations no such incentive, and in fact, encourage delay. *Id.*

Finally, the *Stephenson* case has been used as a precedent not only in California, but the case has been widely accepted in other jurisdictions. *See, e.g.,*

Riesett v. W.B. Doner & Co., 293 F.3d 164 (4th Cir. 2002); *Allen v. Plummer*, 2002 WL 652129 (Mich. Ct. App. 2002). Additionally, the importance of *Stephenson* is shown by the fact that it has been used in various states, secondary sources and law review articles to understand and interpret buy-sell agreements and determine the status of a minority shareholder post-termination of employment. *See, e.g.*, AmJur Corporations § 1692; AmJur Corporations § 1694; 26 Pepp. L. Rev. 708; 26 DEC L.A. Law; 39, 1999 U. Ill. L. Rev. 517. Therefore, the Court of Appeals' reliance on *Stephenson* mostly for interpreting the Appellant's post-termination rights in a closely-held corporation, in the absence of any Minnesota precedent, is consistent with Minnesota statutory law, especially in light of the strong policy in favor of protecting minority shareholders. *Pedro v. Pedro*, 489 N.W. 2d 798 (Minn. App. 1992).

The Minnesota Court of Appeals considered *Stephenson* together with the opposite line of authority, discussed in greater detail below. *Drewitz v. Motorwerks, Inc.*, 706 N.W.2d 773, 783 (Minn. Ct. App. 2005). After articulating the grounds on which the California Supreme Court based its decision and analyzing them in the context of the present case, the Court of Appeals adopted the rule from *Stephenson* that a minority shareholder-employee does not lose shareholder rights on termination of employment unless the buy-sell agreement explicitly so provides. *Id.* at 784. The Court of Appeals also declined to strip a minority shareholder of all shareholder rights even though he remained a legal

owner of the shares, which would result in an unjust benefit to the corporation in the use of the minority shareholder's investment. *Id.* at 785.

In finding for Drewitz on the issue of shareholder termination, the Court of Appeals noted the absence of any provision in the Shareholder Agreement that Drewitz would be divested of his shareholder status immediately on termination of his employment. *Id.* at 784. In fact, the Court of Appeals observed, the contrary argument is inconsistent with the procedure for re-purchase of shares outlined in the Shareholder Agreement. *Id.*; A12.

The Shareholder Agreement does not provide for divestiture on termination of employment. In fact, it provides that Drewitz shall continue to hold his shares for up to 90 days while the value of the shares is determined and tendered. (Shareholder Agreement A14.) Respondents' attempt to distinguish *Stephenson* rests on their awkward attempt to interpret the term "Event of Purchase" differently than it is defined in the shareholder agreement. (Resp. Br. 25-28.) An "Event of Purchase" is defined in the Shareholder Agreement as any of the following events: "voluntary or involuntary sale of Shares, . . . death, disability or termination of employment of a Shareholder." (A16.) Since the Event of Purchase in this case was the termination of employment of Drewitz, the date of the Event of Purchase was the date he was terminated—March 31, 1999. (A18); *Drewitz*, 706 N.W.2d at 776. The court of appeals stated in *Drewitz 2*, the litigation between the parties temporarily waived the formalities of the tender within the 90 day provision in the Shareholder Agreement pending resolution of

litigation. But the duty to tender was not waived after the case was resolved. In fact, even the dissenting opinion acknowledged Respondents breached the agreement by failing to tender payment in a timely fashion. *Drewitz 2*, at 789.

As Drever Partners did in *Stephenson*, Respondents argue that public policy favors divesting Drewitz of his shareholder rights as of the date his employment was terminated. (Resp. Br. 29-33.) Specifically, Respondents attempt to make the argument that a “disgruntled former employee” could disrupt the operation of the corporation and cause “chaos.” (*Id.* at 29-30.) But as the *Stephenson* court pointed out, public policy also favors a speedy re-purchase of a terminated employee’s shares and a return of his investment. 947 N.W.2d at 1310. In any case, the Shareholder Agreement provides a means for Motorwerks to avoid any disruption by a former employee and current shareholder: timely tender of the correct amount under the terms of the Shareholder Agreement. (A14.) Respondents instead tried to add conditions, subtract amounts to which Drewitz was entitled, and never made a clean tender as required by the Shareholder Agreement.³ *Drewitz*, 706 N.W.2d at 776-77. Additionally, any disruptive action

³ Respondents make the astonishing argument that its attempted tenders were actually attempts to settle the case, and were therefore improperly considered by the Court of Appeals. (Resp. Br. 22.) First, offers to settle are not offers to tender by definition, so Respondents’ argument disproves their assertions that they made proper tender. Second, Respondents introduced the settlement documents – which do show there was no proper tender – themselves. If Respondents did not want the documents to be considered, they should not have introduced them.

that Drewitz could take as shareholder would be likely to further reduce the value of his stockholdings⁴, so Drewitz—or a terminated employee in a similar position—would have no incentive to be disruptive.

Finally, whether or not California is a “code state” and Minnesota a “common-law state,” both the *Stephenson* court and this Court are confronted with a substantially identical shareholder agreement. (*Cf.* Resp. Br. 26) If Minnesota is a “common-law state,” this Court may adopt *Stephenson* as persuasive authority. Neither should this Court follow Respondents into an analysis of statutes not at issue in this case, such as Minn. Stat. § 302A.473 and Delaware law, both dealing with dissenters’ rights. (Resp. Br. 36-37.) These have no bearing on the instant case. Even if dissenting shareholder rights were analogous, the corporation must first pay dissenters to terminate shareholder status. Minn. Stat. 302A.473, Subd. 5(a), 5(c). Payment is also required as a precondition to terminate minority shareholder rights. Minn. Stat. 302A.751, Subd. 2. The Minnesota statutory policy is consistent—corporations may not keep a shareholder’s investment and cut off a shareholder’s rights. Those rights continue as long as the shareholder’s investment remains at risk.

⁴ Respondents state that Motorwerks does not hold more than \$350,000 of Drewitz's money, and that Drewitz invested no money in the stock. (Resp.Br. 8.) This is not the case. Drewitz paid for his stocks in part under promissory notes. (*Id.*) Whether he paid in installments or all at once, Drewitz owned his shares, and Respondents continue to hold and receive the benefit from his third-of-a-million dollar investment. He had the same per-share monetary investment as Jack Walser or Walser's sons.

This Court should follow the reasoning of the California Supreme Court in *Stephenson* and the reasoning of the Minnesota Court of Appeals. Drewitz remains a shareholder in Motorwerks because the Shareholder Agreement fails to provide otherwise, and because Motorwerks never properly tendered the repurchase funds. This Court should not read an implied term into the Shareholder Agreement that Drewitz should have lost his shareholder rights on termination of his employment. Implied contract terms were not permitted in *Drewitz 1* for construction of the same contract at issue here, and the rule should stay the same.

B. This Court should not read an implied term into shareholder agreements that a shareholder-employee loses shareholder rights on termination of employment.

As the Court of Appeals recognized, there is a line of authority in opposition to the *Stephenson* decision. *Drewitz*, 706 N.w.2d at 783. Respondents—and Judge Klaphake, in his dissenting opinion—argued that an implied term should be read into the Shareholder Agreement such that Motorwerks became the equitable owner of Drewitz’s shares when his employment was terminated. (Resp. Br. 32.); *Drewitz*, 706 N.W.2d at 789. Respondents rely for support on *Miller Waste Mills, Inc., v. MacKay*, 520 N.W.2d 490, 494 (Minn. Ct. App. 1994). In *Miller Waste*, the Court of Appeals found that when a corporation exercises a valid option to repurchase stock, it becomes the equitable owner of the stock. 520 N.W.2d at 495.

The facts of the *Miller Waste* do not resemble the facts in this case. (*Cf.* Resp. Br. 34.) In *Miller Waste*, the Court of Appeals granted equitable relief to a corporation when two of its shareholders of which were attempting to usurp power from others by canceling a repurchase option and voting the shares of two deceased shareholders as their own. *Id.* at 493. Further, the buy-sell agreement in *Miller Waste* had nothing to do with employment, but was a simple restriction on the right to transfer shares without the consent of the corporation. *Id.* Finally, *Miller Waste* properly exercised its option to re-purchase shares under the buy-sell agreement in that case, *id.*, while in this case, Respondents never properly exercised their option to re-purchase Drewitz's shares after the first litigation, because Respondents never properly tendered the book value of the shares plus interest under the terms required by the Shareholder Agreement. *Drewitz*, 706 N.W.2d at 786-87 ("When a right is entirely contingent on the tender of a required performance, refusal to accept tender does not divest the parties of their interest in the property at stake") (*citing Dunn v. Hunt*, 65 N.W.2d 948, 949 (Minn. 1896)). This Court should hold that Respondents never obtained equitable title to Drewitz's shares. Where there is an adequate remedy under a contract, there is no reason to resort to an equitable remedy.

Respondents also cite *Coleman v. Taub* for the proposition that the existence of a buy-sell agreement creates a reasonable inference that a corporation intended "to avoid under all circumstances the risk of disruption from a dissident, disaffected ex-employee." 638 F.2d 628, 637 (3d Cir. 1981). First,

Coleman dealt with situations where an employee bargained for the right to remain a shareholder only so long as he remained an employee. *Id.* Second, in *Coleman*, the re-purchase clause was contained in Coleman's employment agreement, not in a separate, bargained-for shareholder agreement, indicating that Coleman's one percent share in Old Taub was merely a salesman incentive tool. *Id.* at 629. Coleman was not a typical minority shareholder. *See id.* at 637. Furthermore, the Third Circuit held that Coleman had no right to retain his shares once the shares are valued and the price tendered as required by the buy-sell clause. *Id.*

In the instant case, the Shareholder Agreement is not a simple salesman-incentive agreement, as in *Coleman*. While Coleman owned one percent of Old Taub, Drewitz had the option to acquire up to fifty percent of the company (A10) and was vested with the option to purchase the rest of Motorwerks on the death of any other shareholder(s) (A14-A15). The Shareholder Agreement states it is "establishing their mutual obligations and rights in the *ownership, operation and governance*" of Motorwerks. (A4 (emphasis added).) Drewitz also had the right of first refusal to purchase the shares of any other shareholder who attempted to transfer his shares (A12) and the right to acquire a majority of Motorwerks' shares (A8). He could transfer his own shares to a third party, subject to the right of first refusal of other shareholders.⁵ (A14.) Unlike the agreement in *Coleman*, the Shareholder Agreement never states Drewitz is to receive the benefits of share ownership only through employment.⁶ (*See generally* A1-A29.)

Unlike Coleman, Drewitz was a partner in Motorwerks. In fact, Respondents admit this—when it suits them to do so—in their brief, observing that “the parties jointly drafted the contract, as equal business partners, after lengthy negotiations” (Resp. Br. 24.) He was meant to be a full partner, since Walser agreed to sell him half the ownership of Motorwerks under the Shareholder Agreement.

But even if this Court determines that the rule from *Coleman* should apply in this case, Respondents never tendered the purchase price of Drewitz’s shares as required by the Shareholder Agreement. Because of this, they cannot take advantage of the rule from *Coleman*, in which the Third Circuit determined a shareholder-employee’s rights may terminate before re-purchase, but only after proper tender is made. 638 F.2d at 637.

Under the terms of the shareholder agreement, Drewitz was required to “vote his Shares and take all other reasonably required actions as directed by the

⁵ Respondents again mischaracterize the evidence in their brief (Resp. Br. 10), as Drewitz was permitted to transfer his shares to a third party the same as any other shareholder, including Jack Walser (A14).

⁶ Although Respondents state Drewitz negotiated for the right – and understood he had the right – to receive distributions only during the term of his employment, the pages of the Shareholder Agreement that Respondents cite contain no such implication. (Resp. Br.11.) Nonselling Shareholder to implement [the re-purchase of the shares].” (A15.)

Thus, the parties did not intend for Drewitz’s shareholder rights to terminate until the re-purchase was completed, or he would have no reason to vote shares.

This Court should not read an implied term into the Shareholder Agreement, but it should adopt the reasoning of *Stephenson* and the Minnesota Court of Appeals in holding that a shareholder's rights do not terminate with employment, but terminate when the re-purchase of shares is completed and the shareholder's investment is not at risk and not making money for the corporation. Drewitz is still a shareholder entitled to shareholder distributions.⁷

III. Respondents' arguments, that (1) Appellant waived his right to tender and (2) that the Court of Appeals improperly reviewed issues not before the district court, are not properly before this Court and should be disregarded or struck from Respondents' brief.

In the Order granting review, this Court explicitly declined to review "the issue of whether Drewitz waived his right to tender and forfeited the formality of a closing as prerequisites to the termination of his rights as a shareholder by rejecting Motorwerks' tenders." (Order of February 14, 2006 at 2.) The Order did not grant review of the other issue for which Respondents requested review:

⁷ Respondents claim, based on evidence not in the record, that Drewitz received over \$350,000 in distributions during 1998. (Resp. Br. 40.) The amounts referred to on the cited page in the appendix are from a different year and a different amount. (RA167.) The statement is accurate (RA128), and it illustrates the extreme success of the dealership with Drewitz as general manager. whether Drewitz waived his right to proper tender, or waived his right to object to tender on any grounds other than valuation method. (RA66-RA67; RA61.) The Order also did not grant review of the court of appeals factual determination based on unambiguous documents that an unconditional tender has not

occurred. (RA66-R67; RA61.) Respondents nevertheless addressed these issues in section II(A) of their brief. (Resp. Br. 16-24.) This Court should disregard or grant Appellant's pending motion to strike those portions of Respondents' Brief, as they deal with issues not properly before this Court. (Appellant's Reply Appendix 1-7).

IV. Drewitz's claim for past and future shareholder distributions is not barred by the doctrine of res judicata.

Shareholder distributions were not at issue in *Drewitz 1*, and were not mentioned in that complaint nor part of its prayer for relief. (See RA 76-77.) Drewitz's claims in that case centered around his § 302A.751 suit for fair value for his shares of Motorwerks. Future profitability is part of a fair value calculation for a buyout, not a claim for ongoing distributions.

Respondents claim Drewitz asked for shareholder distributions in *Drewitz 1*, citing to language in the *Drewitz 1* complaint. (Resp. Br. 41.) The reference to lost distributions was part of the valuation claim, not for ongoing future distributions after the buyout. Drewitz did bring up outside the pleadings an unpaid distribution for the year 1998, but that was only for when he was indisputably a shareholder of Motorwerks. (RA124.) *Drewitz 1* was a lawsuit in which Drewitz asked the district court for a buyout. At no time did he ask to remain a shareholder. A calculation of fair value of his shares—the relief requested—would have necessarily taken profitability into account. Drewitz never raised the issue of

shareholder distributions because he sought to be bought out of his ownership interest in Motorwerks at the fair value of his shares because his employment was improperly terminated.

Respondents also assert Drewitz should have amended his *Drewitz 1* complaint to include a claim for shareholder distributions. But why would it make sense for him to do so? Drewitz would have had to amend his complaint after the close of litigation, wreaking havoc on trial court case management, and essentially re-starting the case. The Court of Appeals properly held that requiring an amendment in such a situation does not serve the court system's interest in judicial efficiency. *Drewitz 2*, at 782. Nor would such a rule be workable with standard scheduling orders limiting the time for discovery and amendments to pleadings. Further, amendment at any point after Respondents served their Answer would have been discretionary, and the district court could simply have refused to allow the amendment. Minn. R. Civ. P. 15.04. Any claim for shareholder distributions could not have existed when the first lawsuit was brought, and this Court should follow the majority rule.

This court should uphold the decision of the Court of Appeals that Drewitz's shareholder distribution claims are not barred by res judicata because they were not raised and could not have been raised in the first suit.

V. The MADA's arguments are unpersuasive and have little bearing on this case

The Minnesota Automobile Dealers Association argues that this Court should read an implied term into all shareholder agreements entered into between automobile dealerships and their general managers. But the MADA misses the point: a provision ending shareholder rights or share ownership at the same time as termination of employment can easily be inserted into any shareholder agreement. Even if the MADA is right in all of its concerns, it ignores the fact that its constituents already have the ability to solve this “problem:” the power to contract. As outlined above, shareholder status is not “inextricably linked to employment,” particularly not in this case. (Amicus Br. 3.)

In the case at bar, the Shareholder Agreement included no such term, and its actual contents indicate no such term was intended. Drewitz was no mere employee, but a vice president responsible for turning around the Motorwerks dealership, and his vice-president position was secured by the ownership of his shares.

The auto dealers' arguments are unpersuasive, and this Court should ignore them and hold in favor of the Appellants.

Conclusion

The Court of Appeals improperly rejected Drewitz's fair-value buy-out claims, because they are not barred by the doctrine of res judicata. The underlying facts did not exist until the close of *Drewitz 1*, so res judicata cannot be applicable.

The Court of Appeals correctly found that Drewitz remains a shareholder in Motorwerks, Inc., and he is entitled to recover his share of shareholder distributions. This Court should establish the rule that a shareholder-employee does not lose shareholder rights until re-purchase of his shares is completed unless the shareholder agreement provides otherwise.

Finally, this Court should carefully review the record in light of Respondents' many misrepresentations and mischaracterizations of the facts of this case. Equally important, Respondents' arguments for which this Court did not grant review should be ignored and struck from the Respondents' Brief.

For all the foregoing reasons, Appellant respectfully requests this Court to affirm the Court of Appeals insofar as it found Drewitz remains a shareholder in Motorwerks, Inc., reverse the Court of Appeals insofar as it found Drewitz is not entitled to fair-value buyout of his shares as his remedy under § 302A.751, and reject Respondents' arguments to the contrary.

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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).