

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.

BRIEF AND APPENDIX OF RESPONDENTS

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

Attorneys for Appellant John S. Drewitz

James Schutjer (#9805X)
 Minnesota Automobile Dealers Association
 200 Lothenbach Avenue
 West St. Paul, MN 55118

*Attorney for Amicus Curiae Minnesota Automobile
 Dealers Association*

William M. Hart (#150526)
 Mary M. L. O'Brien (#177404)
 Jeffrey M. Thompson (#197245)
 Erica Gutmann Strohl (#279626)
 MEAGHER & GEER, P.L.L.P.
 33 South Sixth Street, Suite 4400
 Minneapolis, MN 55402
 (612) 338-0661

*Attorneys for Respondents
 Motorwerks, Inc., R. Jack Walser,
 Paul M. Walser and Andrew D. Walser*

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
STATEMENT OF LEGAL ISSUES	1
STATEMENT OF THE CASE.....	2
A. Introduction.....	5
B. Shareholder and employment agreements	6
C. Termination of Drewitz.....	11
D. Drewitz’s first appeal to the court of appeals	14
E. Renewed negotiations	14
I. Standard of review	16
II. Drewitz’s shareholder status ended when his Motorwerks’ employment terminated in 1999, and he had no right to shareholder profit distributions for any period of time thereafter.	16
A. The court of appeals improperly ruled on issues the district court never considered.	17
1. The court of appeals improperly made determinations on the merits of Drewitz’s claim even though the district court had never considered them or Motorwerks’ affirmative defenses.	18
2. In ruling on the merits of issues that the district court did not consider, the court of appeals made determinations that are inconsistent with the law and this state’s public policy.....	19
3. The court of appeals ignored the rules of evidence and the contract’s plain language when it erroneously determined that Motorwerks never tendered Drewitz the correct book value.	21
B. Under the plain meaning of the parties’ contract, and as a matter of public policy, Drewitz lost his shareholder status when his employment terminated.....	24

1.	The parties' contract requires shareholder status to terminate concurrently with employment status.....	25
2.	The court of appeals wrongly ignored the parties' contracting intent and failed to read the contract within the context of a closely held corporation.	28
3.	The court of appeals' adoption of <i>Stephenson</i> should be rejected because it does not fit within Minnesota's statutory framework and public policy.	33
III.	Drewitz's claim for shareholder profit distributions is barred by res judicata.	39
A.	Drewitz's claim for past and future shareholder distributions is barred by res judicata because he asserted that claim in the first action.	40
B.	Alternatively, Drewitz's claim for shareholder distributions should be barred by res judicata because he failed to supplement his complaint to allege additional facts that were known to him well before the close of discovery.....	42
	CONCLUSION	44

TABLE OF AUTHORITIES

Cases

<i>Bevilacque v. Ford Motor Co.</i> , 509 N.Y.S.2d 595 (N.Y. 1986)	33
<i>Brookfield Trade Ctr., Inc. v. County of Ramsey</i> , 584 N.W.2d 390 (Minn. 1998)	24, 29
<i>Calif. Cas. Indem. Exch v. Pettis</i> , 193 Cal. App. 3d 1597 (Cal. App. 1987)	36
<i>Coleman v. Taub</i> , 638 F.2d 628 (3d Cir. 1981)	1, 21, 32, 33, 37
<i>Employers Mut. Cas. Co. v. A.C.C.T., Inc.</i> , 580 N.W.2d 490 (Minn. 1998)	16
<i>Federated Dept. Stores, Inc. v. Moitie</i> , 452 U.S. 394 (1981)	43
<i>Hauschildt v. Beckingham</i> , 686 N.W.2d 829 (Minn. 2004).....	16, 39, 41
<i>Hauser v. Mealey</i> , 263 N.W.2d 803 (Minn. 1978)	39
<i>Hougllet v. Barra</i> , 1993 U.S.App.Lexis 27084, *5 (9th Cir. 1993).....	33
<i>Hoyt Inv. Co. v. Bloomington Commerce & Trade Ctr. Assocs.</i> , 418 N.W.2d 173 (Minn. 1988)	19
<i>Hydra-Mac, Inc. v. Onan Corp.</i> , 450 N.W.2d 913 (Minn. 1990)	22
<i>In re Objections & Defenses to Real Property Taxes</i> , 335 N.W.2d 717 (Minn. 1983).....	11
<i>In re Welfare of the Children of Coats</i> , 633 N.W.2d 505 (Minn. 2001).....	17, 22
<i>Ingelson v. Olson</i> , 199 Minn. 422, 272 N.W. 270 (1937).....	43
<i>Ingle v. Glamore</i> , 528 N.Y.S.2d 602 (N.Y. 1988)	33
<i>Kaiser v. N. States Power Co.</i> , 353 N.W.2d 899 (Minn. 1984).....	1, 39
<i>Metro. Sports Facilities Comm'n v. General Mills</i> , 470 N.W.2d 118 (Minn. 1991)	16
<i>Montana v. United States</i> , 440 U.S. 147 (1979)	39
<i>Monterey Plaza Hotel v. Local 483</i> , 215 F.3d 923 (9th Cir. 2000)	1, 44

<i>Motorsports Racing Plus, Inc., v. Arctic Cat Sales, Inc.</i> , 666 N.W.2d 320 (Minn. 2003).....	1, 16, 24
<i>Sellwood v. Equitable Ins. Co.</i> , 230 Minn. 529, 42 N.W.2d 346 (1950).....	42
<i>Stephenson v. Drever</i> , 16 Cal. 4th 1167, 69 Cal. Rptr. 2d 764, 947 P.2d 1301 (Cal. 1997).....	25, 27, 33, 34, 35, 36, 37, 38
<i>Wilson v. Comm’r of Revenue</i> , 619 N.W.2d 194 (Minn. 2000).....	41

Statutes

Minn. Stat. § 302A. 751, subds. 1(b); 2	18
Minn. Stat. § 302A.473, subd. 4(b).....	36
Minn. Stat. § 302A.751, subd. 2.....	37

Other Authorities

Daniel S. Kleinberger, <i>Why Not Good Faith? The Foibles of Fairness in the Law of Close Corporations</i> , 16 Wm. Mitchell L.Rev. 1143, 1148 (1990).....	29
---	----

Rules

Minn. R. Evid. 408	22
--------------------------	----

Regulations

8 Del. C. § 262 (k).....	37
Cal. Corp. Code § 1308.....	36

STATEMENT OF LEGAL ISSUES

1. Drewitz contracted to sell his shares to Motorwerks if his employment “terminated for any reason, whether voluntary or involuntary.” The contract states “that the date of the Event of Purchase shall be the date of termination.” For the payment, the contract states that “the closing for the purchase * * * shall occur within ninety (90) days of the occurrence of an Event of Purchase * * *.” Did Drewitz’s shareholder status end when his employment terminated?

The two-member court of appeals majority held “no” and adopted one of two lines of foreign case law. The dissent urged that the reason for adopting the competing line of authority – and thereby answering “yes” – is compelling.

Apposite Authority:

Motorsports Racing Plus, Inc., v. Arctic Cat Sales, Inc., 666 N.W.2d 320 (Minn. 2003);
Brookfield Trade Ctr., Inc. v. County of Ramsey, 584 N.W.2d 390 (Minn. 1998);
Coleman v. Taub, 638 F.2d 628, 637 (3d Cir. 1981).

2. Res judicata bars subsequent litigation of all issues litigated and of all issues that could have been litigated in a first action. Drewitz’s 1999 action, which expressly pled as damages future shareholder distributions, resulted in a judgment for Motorwerks. In this action, Drewitz again seeks shareholder distributions dating back to 1998. Moreover, at least by mid-1999, Drewitz had demanded shareholder distributions, yet he failed to seek supplementation in the first suit.

(a) Is Drewitz’s claim for shareholder status and distributions barred by res judicata because it was or could have been brought as part of the first action?

(b) Alternatively, is Drewitz’s claim for shareholder status and distributions barred by res judicata because he was required to supplement his first complaint to state such a claim but failed to do so?

As to part (a), the court of appeals held “no.” As to part (b), no Minnesota case has decided the issue. The majority held “no” and adopted one of two lines of competing foreign case law.

Apposite authority:

Hauschildt v. Beckingham, 686 N.W.2d 829 (Minn. 2004);
Kaiser v. N. States Power Co., 353 N.W.2d 899 (Minn. 1984);
Plaza Hotel v. Local 483, 215 F.3d 923, 928 (9th Cir. 2000).

STATEMENT OF THE CASE

This is the second time that Appellant John Drewitz has sued respondents for a court-ordered buyout of shares he held in Respondent Motorwerks, his former employer. First, in January 1999, Drewitz sued respondents (collectively referred to as Motorwerks) in Ramsey District Court alleging (1) a right to relief pursuant to Minn. Stat. § 302A.751, subd. 1(b)(3); (2) breach of fiduciary duty; (3) breach of employment contract; and (4) breach of implied covenant of good faith and fair dealing. After filing his complaint, Drewitz immediately brought a motion for a market-value buyout of his Motorwerks stock pursuant to Minn. Stat. § 302A.751 based on Motorwerks' allegedly unfairly prejudicial conduct toward him. The Honorable Kathleen Gearin denied this motion in May 1999. The case was later transferred to the Honorable M. Michael Monahan. In October 1999, Motorwerks brought a motion for summary judgment. Judge Monahan ordered summary judgment on Counts I, II, and IV and denied it as to Count III (breach-of-employment-contract claim). The parties then dismissed Count III by stipulated settlement agreement in August 2000. Drewitz appealed the district court decision on Counts I and II, and the court of appeals affirmed in May 2001. (R.A. 95); *Drewitz v. Walser*, C3-00-1759, 2001 WL 436223 (Minn. App. 2001), *review denied* (Minn. June 27, 2001) (R.A. 95-101). The supreme court denied Drewitz's petition for review in June 2001. (R.A.102).

After three years of on-and-off discussions regarding the input numbers to be used in calculating book value for his stock, Drewitz commenced this action in Hennepin County District Court in May 2004. He again asked the district court to compel a

market-value buyout of his Motorwerks stock, claiming that Motorwerks' alleged failure to tender book value in 1999 triggered judicial intervention under Section 302A.751. He also requested shareholder distributions dating back to 1998 and forward until completion of a buyout. In September 2004, the district court, the Honorable Marilyn Brown Rosenbaum presiding, denied his motion and dismissed his complaint in full, concluding that: (1) Drewitz is no longer a Motorwerks shareholder and Motorwerks does not owe him a fiduciary duty; (2) Motorwerks has a continuing right to purchase Drewitz's shares at book value based on *Drewitz v. Walser*, 2001 WL 436223 (Minn. App. 2001); (3) Drewitz's motion for a buyout pursuant to Minn. Stat. § 302A.751 is barred by res judicata; and (4) Drewitz should enforce the settlement of his claims in Ramsey County. (R.A. 1).

The court of appeals affirmed the district court's decision that Drewitz's claim for a market-value buyout is "barred by the judgment in the original action." *Drewitz v. Motorwerks, Inc.*, 706 N.W2.d 773, 779 (Minn. App. 2005), *review granted* (Minn. Feb. 14, 2006); (R.A. 33-46). The court went on to rule, in the alternative, that Drewitz's market-value-buyout claim is barred because "[i]t is a principle of fundamental justice that if the promisor is himself the cause of the failure of performance * * * of an obligation due him * * *, he cannot take advantage of the failure." (*Id.* at 780; (R.A. 40)) (alterations in original) (citation omitted). The court of appeals reversed the district court on the claim for shareholder status and distributions, ruling that although Drewitz had waived tender of book value, Motorwerks' failure to tender nevertheless prolonged Drewitz's status as shareholder. (*Id.* at 785).

The parties cross-petitioned for review. This court granted review to Motorwerks on three issues: (1) did Drewitz's shareholder status end when his employment terminated; (2) is Drewitz's claim for shareholder status and distributions barred by res judicata because it was or could have been brought as part of his first action; and (3) is Drewitz's claim for shareholder status and distributions barred by res judicata because he was required to amend his first complaint to state such a claim but failed to do so. (R.A. 66-67). This court granted review to Drewitz on one issue: was the court of appeals wrong to conclude that Motorwerks has not acted in an unfairly prejudicial manner or breached its fiduciary duty to Drewitz. (*Id.*).

After receiving Appellant Drewitz's supreme court brief, Motorwerks moved this court for an order striking the brief, vacating this court's order granting review to Drewitz, and dismissing his appeal. The basis of Motorwerks' motion was that Drewitz did not seek review of the court of appeals' holding that his claim for a market-value buyout is barred by res judicata or its alternative holding that his market-value buyout claim is barred by failure to pursue other available remedies. Instead, he sought and was granted review of the merits of his market-value buyout claim, on which neither the district court nor the court of appeals had ruled.

This court agreed that its grant of further review of the decision of the court of appeals was improvident to the extent that it erroneously granted review of the merits of Drewitz's complaint. Nonetheless, the court ordered Motorwerks to brief the merits of the court of appeals' holding that Drewitz's market-value-buyout claim is barred. (R.A. 167).

Motorwerks then filed a motion to clarify. This court directed Motorwerks to file a brief addressing only the issues on which it had been granted review and stated that an order regarding any remaining issues and the manner in which they should be briefed would be forthcoming.

STATEMENT OF FACTS

A. Introduction

In the 1990's, Respondents Jack Walser and his sons, Paul and Andrew, variously owned interests in local car dealerships. They often entered into incentive agreements with the on-site general managers whereby those managers could gradually purchase a stock-ownership interest in the dealership for which they worked. *Drewitz v. Walser*, C3-00-1759, 2001 WL 436223, at *1-*2 (Minn. App. May 1, 2001), *review denied* (Minn. June 27, 2001); (R.A. 95-101). The purpose of such agreements was to provide their general managers with a vested interest in the success of the dealership while they were employed there. *Id.*

Respondent Motorwerks hired Appellant John S. Drewitz as a car salesman in 1990. *Id.*, at *1. At that time, Jack Walser was Motorwerks' sole owner. *Id.* In June 1993, Walser promoted Drewitz from salesman to general manager for a six-month trial period. *Drewitz*, 2001 WL 436223, at *1. The parties, each represented by counsel, then negotiated the terms for written employment and shareholder agreements. *Id.*; (R.A. 95). The shareholder agreement allowed Drewitz to retain stock ownership in Motorwerks only for so long as he was a Motorwerks employee. (A. 4) ("If Drewitz' employment by the Company is terminated for any reason, whether voluntarily or involuntarily, the

Company shall purchase, and the terminated Shareholder shall sell to the Company, all of the Shares of the Shareholder.”). In 1996, Paul Walser, who had previously been the sole Motorwerks shareholder, returned to the company as its CEO. *Drewitz*, 2001 WL 436223, at *1.

B. Shareholder and employment agreements

The expressed purpose of the shareholder and employment agreements, as jointly drafted by the parties, with each party represented by counsel, was to create a unity of interest between Drewitz and Motorwerks during his time of employment so that Drewitz would have an incentive to act in Motorwerks’ best interest. The employment agreement recited this intent of the parties as follows:

A. R.J. Walser (“Walser”) and the Employee [defined as Drewitz] have agreed to own and operate the Company [defined as Motorwerks] pursuant to a * * * Shareholder agreement * * *; and

B. Walser is the majority Shareholder * * *and, under and subject only to the terms of the Shareholder agreement, has agreed to permit the Company to sell some shares * * * to the Employee * * *; and

C. The Employee’s commitment to be employed as Vice President and General Manager of the Company * * * is a substantial and significant inducement to Walser and the Company to enter into this Agreement and the Shareholder agreement.

(A. 3) The shareholder agreement echoed this intent as well as the intent to protect Walser’s financial interest and his reputation in the industry if the venture were to become troubled:

K. The Shareholders and the Company desire to provide for the orderly sale of Shares from the Company to Drewitz * * * as part of a manager’s equity program to **promote loyal, dutiful and successful on-site management of the Company**, preserving the benefits and rights due

Walser in light of his personal and his companies' reputation in the automotive industry, Walser and his companies' contribution to the potential success of the Company and the financial risk and commitment made by Walser permitting the continuation of this venture, and to provide for the terms and conditions of sales and redemptions of Shares * * * .

(A. 4) (emphasis added). (These recitals are incorporated into the shareholder agreement, "and shall constitute an expression of the intent of the parties." (A.15 at § 1.01)) In addition to protecting the functioning of the corporation, the shareholder agreement was also designed to protect Jack Walser's name and reputation in the industry. (*See also* A.18-19 at § 2.09).

The shareholder agreement also provided Drewitz the opportunity to become a Motorwerks shareholder by purchasing up to half its shares at book value so long as he remained an employee. (A.5 at § 1.03) ("The Company hereby sells to Drewitz and Drewitz hereby purchases from the Company 330 Shares of the Company."); A.10 at § 3.01 ("The Company hereby grants to Drewitz three (3) successive annual options to purchase one hundred sixty-five (165) shares in each of the successive years * * *.")). Generally, book value is the value at which an asset is carried on the balance sheet and is tabulated by subtracting the cost from the accumulated depreciation. *See Black's Law Dictionary* 195 (8th ed. 2004). The parties agreed to a specific, mechanical method for determining the book value for the purchase and sale of stock and agreed that that determination would be made by the certified public accountant employed by Motorwerks. (A.16; 25). The parties were not permitted to negotiate over the book value as determined by this CPA or to challenge the CPA's determination.

The agreement permitted Drewitz to purchase 20% of the Motorwerks stock immediately. (A. 15 at § 1.03). He also received three successive annual options to purchase 10% of the stock until he owned a total of 50%. (A.10 at § 3.01). Although the shareholder agreement required Drewitz to pay for the shares in full at closing, Jack Walser twice permitted him to purchase shares with promissory notes to Motorwerks. *Drewitz*, 2001 WL 436223, at *2 (R.A. 96); (A.10 at § 3.03). The company's certified public accountant determined the purchase price, or book value, for these shares by the formula set forth in the shareholder agreement. (A.10 at § 3.03, 25-27). Even though Drewitz did not pay for the shares up front — and Motorwerks was in fact financing his stock ownership — it is undisputed that Drewitz still received annual shareholder distributions. At the time Drewitz's employment contract ended, he still owed Motorwerks \$9,115, which was the purchase price for these shares that he had purchased but for which he had not paid. (A. 53). (Drewitz's repeated assertions that Motorwerks used a third of a million dollars of Drewitz's investment is unsupported by the record. He invested no money in the stock; rather, Motorwerks financed his ownership while allowing him to receive shareholder distributions from which he would pay the promissory notes.)¹

Because the very purpose of his stock-ownership rights was to promote successful management, Drewitz's right to own shares in Motorwerks was premised on his employment at the dealership. If his employment terminated for any reason, his

¹ Due to the truncated nature of the motion that was actually before the district court, there is no record evidence as to whether or how Drewitz paid for his stock.

shareholder status terminated as well. The shareholder agreement therefore states that if Drewitz's employment at Motorwerks

is terminated for any reason, whether voluntarily or involuntarily, the Company shall purchase, and the terminated Shareholder shall sell to the Company, all of the Shares of the Company issued to and outstanding in the name of the terminated Shareholder.

(A.14 at § 4.04). This agreement was not conditional or executory in any fashion. It was automatic and mandatory on the parts of both Drewitz and Motorwerks, with only the sale price to be set and delivered. Thus, the termination itself constituted an "Event of Purchase." (A.18 at § 5.04(b) (defining termination date as event of purchase).

In order to further "promote loyal, dutiful and successful on-site management of the Company * * * " (A.4), the shareholder agreement also provided that Drewitz would be a member of the three-person board of directors, but only for so long as he remained a shareholder. (A.7 at § 2.02). Thus, the shareholder agreement contemplated that so long as Drewitz was employed as the vice president and general manager, he would be a shareholder and would have a one-third voice on the board of directors. As a member of the board, Drewitz would have veto power over several corporate actions. (A.9 at § 2.11). As a shareholder, Drewitz held veto power over other corporate actions. (*Id.* at § 2.12). On the other hand, so long as Drewitz was a shareholder, and therefore a member of the board of directors, he was barred from taking or exercising any corporate opportunities. (A.8 at § 2.06). This was true as a matter of the contract and as a matter of Drewitz's legal obligations as a director and officer. In short, only so long as Drewitz owed Motorwerks and Walser fiduciary duties was Drewitz allowed to be a shareholder.

Further evidencing the parties' intent that only an employee-officer could hold stock in the company, Drewitz was also barred from selling or transferring his shares to any third party. (A.11-13 at §§ 4.01-4.02). Indeed, the shareholder agreement precludes any involuntary transfer of Drewitz's shares to any non-employee/officer. (A.13-14 at § 4.03).

As quoted above, because the very purpose of his stock-ownership rights was to promote successful management, Drewitz's right to buy and own shares in Motorwerks was premised on his employment at the dealership, i.e., if his employment terminated, his shareholder status terminated as well. (A.14 at § 4.04). The shareholder agreement states that Drewitz's termination constitutes the "Event of Purchase." (A.18 at § 5.04(b)) ("In the event of the termination of the Selling Shareholder's employment by the Company, the date of the Event of Purchase shall be the date of termination."). The amount to be paid to Drewitz for his shares is, therefore, to be his share of the corporation's book value as of the last day of the month before his termination. (A.14 at § 4.04) ("The purchase price shall be determined as of the last day of the month immediately preceding the month in which the termination occurs.")). However, in order to allow the independent CPA time to calculate the sum to be paid, the shareholder agreement gives the corporation 90 days after the date of termination to actually make the payment. (A.18 at § 5.04) ("the closing for the purchase of a Selling Shareholder's Shares pursuant to the this Agreement shall occur within ninety (90) days of the occurrence of an Event of Purchase"). The only thing stated to be done at the "closing" is the payment to Drewitz –

not any transfer of shares. (A.18 at § 5.05) (stating that at closing, company shall pay in full, all obligations).

Because Drewitz had negotiated the shareholder agreement (with the assistance of counsel), he understood that the benefit of being a Motorwerks shareholder was the opportunity to receive shareholder distributions during the term of his employment, not that he would profit from the sale of shares when his employment ended. (A.7 at § 2.02; A.10 at § 3.01; A.14 at § 4.04).

C. Termination of Drewitz

Under the negotiated employment agreement, Motorwerks hired Drewitz to be its vice-president and general manager from January 1, 1995 until March 31, 1999. (A. 3). In December 1998, Paul Walser and a human-resources department employee investigated employee complaints regarding Drewitz's management style, specifically intimidating behavior arising out of his explosive temper. *Drewitz*, 2001 WL 436223, at *2 (R.A.. 96); (R.A. 114-21).²

After completing the investigation, Paul Walser and the human-resources employee met with Drewitz to give him feedback regarding their findings and to determine whether Drewitz was willing to remedy the problem. (R.A. 121-22). But

² Citations to the Jerich deposition are to a deposition taken in Drewitz's first lawsuit. Because Drewitz brought the motion to compel statutory buy-out in this case before discovery was taken, the district court ruled on the motion without the benefit of the Jerich deposition or any other discovery. Accordingly, that deposition is not in the record of the proceedings before this court, although it was before the court of appeals in the first Drewitz lawsuit. *See In re Objections & Defenses to Real Property Taxes*, 335 N.W.2d 717 (Minn. 1983) (recognizing criteria for appellate admission of uncontroverted evidence).

Drewitz simply denied that there was a problem. (R.A. 121). Based on this reaction, Paul Walser determined that Drewitz could no longer lead the dealership. (R.A. 122). Accordingly, Paul Walser informed Drewitz that his employment would not continue after his employment agreement expired on March 31, 1999. *Drewitz*, 2001 WL 436223, at *2, (R.A. 96). Drewitz received full compensation through the end of his term of employment on March 31, 1999. (*Id.*).

In a subsequent letter at the end of December 1998, Paul Walser explained the terms for “the severance of our partnership and separation from employment,” including paying Drewitz his salary and incentive through March 31, 1999, and repurchasing his shares at book value at a price established by the formula in the shareholder agreement as determined by Motorwerks’ certified public accountant. (*Id.*).

In January 1999, while still under contract with Motorwerks but under notice of his obligation to sell his shares upon his termination on March 31, 1999, and despite the clear terms of the shareholder agreement, Drewitz filed suit against Motorwerks in Ramsey County District Court seeking a market-value buyout of his shares pursuant to Minn. Stat. § 302A.751. (R.A. 68-78). Drewitz argued at that time that he had been treated unfairly, unreasonably, and dishonestly by Motorwerks, thereby triggering the judicial intervention allowed under the statute. (*Id.*).

On July 1, 1999, Motorwerks made a formal demand for Drewitz’s compliance with the shareholder agreement, i.e., selling his shares back to Motorwerks at book value. (R.A. 127). Drewitz immediately refused, claiming that the shareholder agreement did not require him to do so. (R.A. 128). Nevertheless, Motorwerks offered to pay Drewitz

the book value, as calculated under the formula set forth in the shareholder agreement by the independent CPA. (R.A. 129). Drewitz refused this offer, persisting in his outright refusal to accept book value. (R.A. 130-31). Despite Drewitz's refusal, Motorwerks tendered to Drewitz the book value of his shares, as calculated by its CPA, on July 26, 1999 (less Drewitz's outstanding obligation on the note used to purchase the shares). (R.A. 129).

Motorwerks moved for summary judgment in the first lawsuit. The district court granted the motion on three of the four counts. (R.A. 87-93). Following this decision, the parties settled a breach-of-employment-contract claim that is unrelated to this action. *Drewitz*, 2001 WL 436223, at *3, (R.A. 96). Although the court's order was filed in December 1999, judgment was not entered until August 2000. (R.A.132-33). Accordingly, Drewitz did not file his appeal of the district court's first decision until October 2000. In the interim, Motorwerks once again attempted to end the matter by trying to negotiate a payment to Drewitz of something in excess of the book value as found by the CPA. (R.A. 134-37). The issue of interest complicated these settlement discussions. (R.A. 138-40). Drewitz also requested that information regarding the book valuation be forwarded to *his* accountant, and Motorwerks immediately complied. (R.A. 141-42). Motorwerks did so as a show of good faith, despite the fact that the shareholder agreement clearly states that the share valuation will be determined by Motorwerks' certified public accountant and was not subject to negotiation. (A.14 at § 5.02; A.25; R.A. 141, 154). Over the next two years, all settlement negotiations were between the parties' accountants. (*Id.*).

D. Drewitz's first appeal to the court of appeals

In the midst of these negotiations, in October 2000, Drewitz appealed the district court decision, and the Minnesota Court of Appeals affirmed. *See Drewitz*, 2001 WL 436223 (R.A. 95-101). Specifically, the court of appeals found that Drewitz's employment agreement and the shareholder agreement were valid. *Id.* at * 3-*6 (R.A. 96-97). The appellate court further confirmed that there was no evidence that Motorwerks acted in an unfairly prejudicial manner toward Drewitz or breached any fiduciary duty owed him. (*Id.*). Simply, Drewitz did not establish circumstances triggering judicial intervention under Minn. Stat. § 302A.751. *Id.* at *5 (R.A. 97). The court also rejected Drewitz's argument that Motorwerks had to buy his shares back at market value rather than book value:

The Shareholder agreement clearly provides that termination of employment *for any reason* triggers the buy-back. As the district court noted, there is no doubt that once the contract expired, and employment ended, respondents had the obligation to purchase Drewitz's shares and he had the obligation to sell his shares to the corporation. Under all of the circumstances of this case, the district court did not err in concluding that the buy-back provision was triggered when the employment contract expired and the terms negotiated by Drewitz and Jack Walser for the price of shares at the buy-back controlled. Drewitz has received everything that he bargained for under the terms of the agreement with respondents.

Drewitz, 2001 WL 436223, at *5 (R.A. 97) (emphasis in original). The supreme court denied Drewitz's petition for review. *Id.*; (R.A. 102).

E. Renewed negotiations

With Drewitz's appellate options exhausted, the parties renewed their settlement negotiations. The parties' accountants met and agreed upon a price to be paid as book

value. (R.A. 143-63) Both parties compromised to reach a final number for Drewitz's shares. However, the parties were unable to resolve their dispute with regard to the interest Drewitz sought. (R.A. 146-51). The parties disagreed as to whether Drewitz should have received interest during the pendency of the lawsuit given that Drewitz was the one refusing to receive book value. (*Id.*). Drewitz's counsel re-entered the settlement negotiations in January 2003. (R.A. 155).

Still unable to resolve the issue of interest, but based on the agreement as to the book value of the shares, Motorwerks' tendered payment of the agreed-upon share value to Drewitz's counsel in August 2003 with an accompanying letter:

Enclosed please find Motorwerks BMW check no. 93928 in the amount of \$355,862.00, forwarded in payment for the principal amount owed to Mr. Drewitz for the redemption of his stock. It is my understanding that while our clients have agreed upon this amount for the redemption of stock, they have not yet resolved their dispute as to the interest that may be payable. Notwithstanding, the enclosed is forwarded in payment of the agreed upon redemption price. *Mr. Drewitz' cashing or negotiation of the enclosed check will not be construed as a waiver of his right to claim interest on the payment.*

(R.A.164) (emphasis added).³

Counsel also attempted to negotiate a settlement with Drewitz regarding his claim for interest and made numerous attempts to obtain a response from Drewitz as to whether he intended to accept the share value tendered and Motorwerks' settlement offer on the interest. (A. 112-14). Drewitz never responded. Ultimately, Drewitz returned the tendered check and commenced this litigation in Hennepin County in 2004.

³ The value of Drewitz's shares as negotiated was reduced by the \$9,115 Drewitz still owed to Motorwerks on a promissory note relating to his purchase of the shares.

ARGUMENT

I. Standard of review

Contract interpretation is a question of law that this court reviews de novo. *Employers Mut. Cas. Co. v. A.C.C.T., Inc.*, 580 N.W.2d 490, 493 (Minn. 1998). The primary goal of contract interpretation is to determine and enforce the intent of the parties. *Motorsports Racing Plus, Inc., v. Arctic Cat Sales, Inc.*, 666 N.W.2d 320, 323 (Minn. 2003). Where there is a written instrument, the intent of the parties is determined from the plain language of the instrument itself. *Metro. Sports Facilities Comm'n v. General Mills*, 470 N.W.2d 118, 123 (Minn. 1991). This court, however, reads contract terms in the context of the entire contract and will not construe the terms so as to lead to an absurd result. *Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 394 (Minn. 1998).

Additionally, the application of res judicata to preclude a claim is a question of law that this court reviews de novo. *Hauschildt v. Beckingham*, 686 N.W.2d 829, 840 (Minn. 2004).

II. **Drewitz's shareholder status ended when his Motorwerks' employment terminated in 1999, and he had no right to shareholder profit distributions for any period of time thereafter.**

The court of appeals incorrectly ruled that Drewitz's shareholder status continued after his employment with Motorwerks ended 1999. The appellate court's erroneous conclusion resulted from (1) its review of issues that the district court never considered; (2) its reliance on settlement communications to "prove" that Motorwerks did not tender the correct sum to Drewitz as book value; (3) its failure to correctly interpret the parties'

contract or to interpret it as a whole; and (4) its incomplete analysis of two lines of out-of-state authority relating to whether an employee-shareholder in a close corporation loses shareholder rights when his employment terminates. Because of these errors, the court of appeals' decision is at odds with the shareholder agreement's plain language and fundamental purpose and with this state's public policy as it relates to closely held corporations. The decision transforms what was, at best, a claim for a few hundred dollars in interest into a multimillion dollar windfall for Drewitz and would create chaos in the governance of this closely held corporation. The court of appeals' decision should be reversed and the judgment of dismissal reinstated.

A. The court of appeals improperly ruled on issues the district court never considered.

This court must first address the fact that the court of appeals ruled on issues that were not properly before it on appeal. Appellate courts do not address issues not considered or decided by the district court. *See In re Welfare of the Children of Coats*, 633 N.W.2d 505, 512 (Minn. 2001) (“an appellate court should consider only those issues that were presented and considered by the trial court.”). Yet the court of appeals considered and decided the merits of Drewitz's claims, which the district court never reached because it concluded that *res judicata* bars all his claims. Because the district court never reached the merits of Drewitz's claims, it also had no occasion to consider Motorwerks' affirmative defenses. Thus, when the court of appeals ruled on the merits of Drewitz's claim, it erred in two ways. First, because it considered the merits of Drewitz's claims at all, and second, because it did so when Motorwerks had not had the opportunity

to develop the record regarding its affirmative defenses. In doing so, the appellate court usurped the district court's authority and made rulings that are internally inconsistent with one another. The court of appeals' decision should be reversed because it is based on resolution of issues that were not properly before it on review.

1. **The court of appeals improperly made determinations on the merits of Drewitz's claim even though the district court had never considered them or Motorwerks' affirmative defenses.**

The court of appeals held that Motorwerks failed "to tender full and unconditional payment for [Drewitz's] shares." *Drewitz v. Motorwerks, Inc.*, 706 N.W.2d 773, 783 (Minn. App. 2005), *review granted* (Minn. Feb. 14, 2006)(R.A. 33-46). But the district court did not address this issue or the general merits of Drewitz's claims that Motorwerks' alleged failure to properly tender book value breached the parties' contract and gave him the right to ongoing shareholder distributions. (R.A.1-2). Instead, the district court ruled on the procedural issues before it – including a motion for a statutory buyout. (*See generally*, R.A. 3-6; *see also*, R.A.7-25). A motion related to procedural issues is the only type of motion that Drewitz could have properly presented to the district court prior to commencing discovery. *See, e.g.*, Minn. Stat. § 302A.751, subs. 1(b); 2 (allowing shareholder to seek court-ordered buyout on motion, but only where there is deadlock, fraud, or unfairly prejudicial conduct by board). It is undisputed that Drewitz did not bring a motion for summary judgment or for judgment on the pleadings. (*See generally*, R.A.3-6; *see also*, R.A. 7-25). In response to the statutory-buyout claim before it, the district court ruled that, "Plaintiff's motion [for a market-value buyout] is moot, all issues raised have been fully litigated and res judicata applies." (R.A. 2).

Critically, it did so at what amounted to a Rule 12 pleading stage of the case, on an abbreviated record, and before the parties had engaged in any discovery. Consequently, the district court did not address Motorwerks' equitable defenses, such as the extent of any waiver or estoppel arising out of Drewitz's improper refusal to sell his shares at book value in July 1999. (*See* R.A. 1-2; *see also*, 26-30).

The court of appeals agreed that Drewitz's claim for a market-value buyout is barred by res judicata. *Drewitz*, 706 N.W.2d at 780-81. But it reversed the district court's ruling that Drewitz's breach-of-contract and shareholder-distribution claims are also barred by res judicata and subsequently improperly ruled on the merits of those claims. To the extent that it disagreed with the district court's res judicata ruling on Drewitz's breach-of-contract and shareholder-distribution claims, the correct avenue was to reverse and remand to the district court so that a complete record could be established and so that the district court could rule on these matters in the first instance. *See Hoyt Inv. Co. v. Bloomington Commerce & Trade Ctr. Assocs.*, 418 N.W.2d 173, 175-76 (Minn. 1988) (noting that appellate court should have recognized from its examination of record that if it reversed district court's decision, remand to district court would also be necessary). This court should reverse the court of appeals' decision because it improperly decided issues that the district court never had the opportunity to consider.

2. **In ruling on the merits of issues that the district court did not consider, the court of appeals made determinations that are inconsistent with the law and this state's public policy.**

By ruling on issues that the district court never reached, the court of appeals also made determinations that are internally inconsistent, at odds with the doctrines of waiver

and estoppel, and usurp the district court's jurisdiction. Specifically, the court of appeals held that Drewitz is estopped from claiming that Motorwerks did not comply with the contract's tender requirements because Motorwerks was not required to perform a futile act. *Drewitz*, 706 N.W.2d at 779, 787 (R.A. 37, 44). But it also concluded that Drewitz is entitled to shareholder benefits pending resolution of these two lawsuits – including shareholder distributions – because of Motorwerks' alleged failure to tender in a technically correct manner. *Id.* at 787-88 (R.A. 44-45). These two determinations are patently inconsistent. As a result of the court appeals' decision, Drewitz claims a right to receive millions of dollars in distributions to which he would not have been entitled had he not refused to sell his stock in accord with the shareholder agreement. The court of appeals' decision not only allows Drewitz to benefit from his wrongful refusal to sell his shares at book value, it also gives him a multimillion dollar windfall. That is not in accord with equity. Under proper appellate procedure, the district court, not the court of appeals, should have been the first to address Motorwerks' equitable defenses of waiver and estoppel; the court of appeals then would have been required to give deference to the district court's determinations. The court of appeals' decision should be reversed.

The court of appeals' decision is also inconsistent because, at least in theory, it would allow Drewitz to retain his shareholder rights for other purposes. Under the parties' contract, that would mean that Drewitz could vote – indeed, he would be entitled to veto certain matters. (A.9 at § 2.12) (requiring unanimous vote of all shareholders in four instances). He would also be entitled to a seat on the three-person board of directors, where he again would hold veto power. (A.7 at § 2.02) (“The remaining member of the

Board shall be Drewitz for so long as Drewitz is a Shareholder.”). Thus, the court of appeals’ decision appears to give enormous power over corporate governance to Drewitz — a disgruntled, former employee, who was fired due to his explosive temper. This is contrary to the state’s public policy, which terminates shareholder rights after entry of an order for sale of shares. *See, e.g.,* Minn. Stat. 302A.751, subd. 2. Preventing such situations is exactly why redemption provisions like this one are in shareholder agreements and it is also why courts routinely enforce them. *See, e.g., Coleman v. Taub*, 638 F.2d 628, 637 (3d Cir. 1981) (stating that existence of buy-sell agreements creates reasonable inference that corporation intended “to avoid under all circumstances the risk of disruption from a dissident, disaffected ex-employee”). Putting a disaffected and disgruntled former employee in a position where he could disrupt corporate governance is not in accord with the agreement’s intent, with public policy, or with equity.

But the court of appeals did not address these conflicts and apparently did not consider how its ruling would affect corporate actions that are being considered or have occurred. Indeed, the court of appeals specifically declined to address how its ruling would affect corporate governance. *Drewitz*, 706 N.W.2d at 782 (R.A. 39) (declining to reach any shareholder-governance issues). Again, this is exactly why the court of appeals should have remanded rather than rule upon the application and scope of equitable defenses and doctrines in the first instance.

3. **The court of appeals ignored the rules of evidence and the contract’s plain language when it erroneously determined that Motorwerks never tendered Drewitz the correct book value.**

The court of appeals’ willingness to incorrectly consider the merits of Drewitz’s

breach-of-contract and shareholder-distribution claims led it to erroneously find that Motorwerks never tendered the correct book value to Drewitz to purchase his shares. *See generally, Drewitz*, 706 N.W.2d at 781, 783; (R.A. 38, 40). In doing so, the court of appeals improperly relied entirely on the settlement negotiations between the parties to determine that the \$337,470 that Motorwerks tendered to Drewitz in July 1999 for his shares was insufficient as book value because the parties eventually compromised on a sum of \$355,862 many years later. *Id.* at 777-78, 786; (R.A. 35-36, 43) (noting that after Motorwerks prevailed in first appeal, “the parties renewed their efforts to settle.”); (R.A. 129). But it is axiomatic that compromises reached in settlement negotiations prove nothing and are therefore inadmissible. Minn. R. Evid. 408 (“Evidence of conduct or statements made in compromise negotiation is likewise not admissible”). Rather, because the district court has never considered whether Motorwerks properly calculated book value, the court of appeals had no basis to review the issue. *See In re Welfare of the Children of Coats*, 633 N.W.2d at 512 (“an appellate court should consider only those issues that were presented and considered by the trial court.”). Consequently, to the extent that book value needed to be determined, it should have been done by the district court after a remand.

Furthermore, even if the court of appeals could properly review this issue, its conclusion is still in error because it failed to apply the contract’s plain language, which calls for Motorwerks to complete all book-value calculations without Drewitz’s input or negotiation. (A.16 at § 5.02; A.25); *Hydra-Mac, Inc. v. Onan Corp.*, 450 N.W.2d 913, 916-17 (Minn. 1990) (construing and giving effect to plain meaning of contract

language). Specifically, the contract provides that Motorwerks' independent certified public accountant will calculate book value in a quick and mechanical process — not subject to litigation, challenge, or dispute — in the manner set forth in the parties' contract. (A.25) (“the purchase price of a Selling Shareholder’s Shares of the Company shall be determined as follows: (1) * * * *by the certified public accountant regularly employed by the Company.*”) (emphasis added). Despite this plain language, Drewitz wrongfully refused the initial valuation because he rejected the concept of book value outright and instead sought a court-ordered market-value buyout: “We will not meet in your office on July 16, 1999, at 10:00 a.m. to complete a formal transfer since it does not comply with the Shareholder Agreement and is not pursuant to the outcome of the litigation.” (R.A. 128). Thus, after *Drewitz I*, when Motorwerks agreed to negotiate the book-value calculation, it did so only as a good-faith accommodation to help resolve the dispute. (*See generally*, R.A. 135-38). Nonetheless, Drewitz dickered with Motorwerks for years before agreeing to a sum just \$18,392 higher than what Motorwerks' CPA originally calculated under the contract's specifications – at which time Drewitz also demanded approximately \$28,000 in “interest,” a sum that accrued only because Drewitz refused to sell his shares at book value in the first place. (R.A. 138). Put simply, if Drewitz had accepted book value, calculated in conformity with the parties' contract in July 1999, as the district and appellate courts have repeatedly stated he was required to do, there would be no dispute and no interest owing.

Accordingly, the court of appeals' finding that Motorwerks' \$337,470 book-value tender to Drewitz was “incorrect” because the parties later reached a \$355,862

compromise figure was improper for three reasons: (1) settlement negotiations are not admissible; (2) the court of appeals could not review this issue in any regard because the district court never considered it; and (3) the parties' contract clearly called for Motorwerks' CPA to calculate book value, making the original figure the one that conformed to the parties' contract. This court should reverse the court of appeals' determination on this issue.

B. Under the plain meaning of the parties' contract, and as a matter of public policy, Drewitz lost his shareholder status when his employment terminated.

The court of appeals incorrectly held that Drewitz retained his shareholder status after his employment was terminated because it supplied terms that do not exist and because it failed to read the contract as a whole. The primary goal of contract interpretation is to determine and enforce the intent of the parties. *Motorsports Racing Plus*, 666 N.W.2d at 323. In doing so, this court reads contract terms in the context of the entire contract and will not construe words or phrases in isolation. *Brookfield Trade Ctr.*, 584 N.W.2d at 394. Yet the court of appeals held that because the parties' contract required "closing" to occur within 90 days after the termination, ownership in the shares of stock also would be transferred at that same time. *Drewitz*, 706 N.W.2d at 785. In so ruling, the court of appeals not only supplied non-existent terms, it ignored the parties' intent and the fact that this was not a contract of adhesion. Rather, the parties jointly drafted the contract, as equal business partners, after lengthy negotiations during which both parties were represented by counsel. As the dissent properly concluded, when the contract is read as a whole and in context, Drewitz's right to own shares and receive

shareholder distributions terminated contemporaneously with his employment termination. *Drewitz*, 706 N.W.2d at 788 (Klaphake, J., dissenting) (R.A. 45). The court of appeals failed to apply the plain language of the contract when it (1) adopted out-of-state case law that included contractual language that is critically different than the language at issue here and arises in a very different statutory environment; and (2) failed to acknowledge that the parties' contract was written to address the unique issues that arise in a closely held corporation.

1. The parties' contract requires shareholder status to terminate concurrently with employment status.

One reason for the court of appeals' incorrect conclusion that *Drewitz's* right to own shares and receive shareholder distributions continued beyond his employment termination is that it adopted the reasoning of a California case, *Stephenson v. Drever*, 16 Cal. 4th 1167, 69 Cal. Rptr. 2d 764, 947 P.2d 1301, 1305 (Cal. 1997). *Drewitz*, 706 N.W.2d at 784; (R.A. 41). This reliance, however, does not hold up to scrutiny because the contractual language in the two cases is critically different. The contractual language in *Stephenson* is consistent with California's statutory law:

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.

Stephenson, 16 Cal. 4th at 1170. Crucially, the *Stephenson* contract language provides that the right and obligation to repurchase the stock remains indeterminate until 90 days

after termination.⁴ In contrast, the contract language here clearly provides that the actual “event of purchase” occurs on the date of termination. Specifically, the shareholder agreement not only states that if Drewitz’s employment at Motorwerks “is terminated for any reason, * * * the Company shall purchase, and the terminated Shareholder shall sell to the Company, all of the Shares of the Company * * *,” but also that “the date of the Event of Purchase shall be the date of termination.” (A.14 at § 4.04, A.18 at § 5.04). The court of appeals failed to analyze this outcome-determinative difference and incorrectly determined that ownership would not pass until the closing. *Drewitz*, 706 N.W.2d at 785 (R.A. 42).

In fact, however, the section entitled “closing” provides that the “event of purchase” is the termination. (A.18). And the section “payments of amounts due” — Section 5.05 — specifies what is to occur at closing, namely the payment of all obligations by both parties. (*Id.*). And this section says nothing about transferring stock. *Compare* (A.18 at § 5.04(b)) (“In the event of the termination of the Selling Shareholder’s employment by the Company, the date of the Event of Purchase shall be the date of termination.”) *with* (A.18 at § 5.05) (“At closing, the Company and the Selling Shareholder shall pay in full all obligations* * *.”). Nothing in the shareholder

⁴ Likewise, the contract language in *Riesett v. W.B. Donner*, 293 F.3d 164, 169 (4th Cir. 2002) also differed in an important respect from that before this court. In *Riesett*, the contract stated the corporation “will buy” and the shareholder “will sell,” with “settlement” within 90 days. The *Riesett* court determined that the use of the future tense “will” in the contract “merely obligates the employee to sell and the company to buy all of the shares the employee owns *at some point in time* after termination of employment.” *Id.* (emphasis added) But here, the parties’ contract states that Motorwerks “shall” buy and Drewitz “shall” sell, with the termination date as the event of purchase, thereby requiring the sale to occur contemporaneously with the employee’s termination.

agreement supports the notion that the closing was for any purpose other than the payment of the book value for an event of purchase that had already occurred.

Consistent with the fact that the event of purchase was the termination (not the payment 90 days later), the purchase price is based on the corporation's book value as of the end of the month *before* the termination of Drewitz's employment. (A.14 at § 4.04) ("The purchase price shall be determined as of the last day of the month immediately preceding the month in which the termination occurs."). That the contract requires payment to occur within 90 days after termination merely reflects the time it takes to calculate book value. The contractual requirement that payment occurs later has no bearing on the date that equitable ownership transfers.

Contrary to this plain meaning and in reliance on *Stephenson* and its dissimilar contractual language, however, the court of appeals' decision supplies the contract terms for its conclusion that the transfer of ownership in Drewitz's shares did not occur until the closing:

Relying in part on the reasoning of the *Stephenson* court, we conclude that the mandatory buy-sell agreement did not automatically divest Drewitz of his shareholder status when his employment was terminated. First, although the plain language of the agreement obligates Drewitz to sell his shares back to Motorwerks upon termination of employment, it does not expressly strip Drewitz of shareholder status at termination or provide that title to Drewitz's shares passes to Motorwerks automatically or immediately upon termination. Instead, *the agreement provides that ownership of the shares would transfer at a formal closing* and gives the parties up to ninety days after termination of employment to consummate the transfer. It does not, therefore, evidence an intent to divest Drewitz of his shareholder status immediately upon termination of employment.

Drewitz, 706 N.W.2d at 784-85 (R.A. 42-43) (emphasis added). But the contract says no

such thing. (See A.14, 18 at §§ 4.04, 5.04, 5.05). The contractual language is crystalline — the closing is merely the payment date. The shareholder agreement nowhere states that the ownership of shares transfers at a formal closing. Thus, the factual predicate for the court of appeals' holding is simply wrong.

True, the contract does not use the precise words that equitable ownership passes upon termination, but it most certainly does not specify that ownership passes at the closing. Instead, the contract states that the "Event of Purchase shall be the date of termination." (A.18 at § 5.04). In short, the shareholder agreement provides for separate events that take place at separate times. The court of appeals' contrary ruling contradicts the parties' contract and wrongly relies on inapplicable foreign authority. The decision on Drewitz's shareholder status and his right to receive shareholder distributions should therefore be reversed and judgment of dismissal reinstated because Drewitz ceased being a shareholder when his contract expired on March 31, 1999.

2. The court of appeals wrongly ignored the parties' contracting intent and failed to read the contract within the context of a closely held corporation.

The court of appeals' decision should also be reversed because it failed to interpret the contract within the context in which it was written and in accordance with its purpose, i.e., to maintain an orderly governance structure within a closely held corporation when shareholder rights terminate. "Intent is ascertained, not by a process of dissection in which words or phrases are isolated from their context, but rather from a process of synthesis in which the words and phrases are given a meaning in accordance with the obvious purpose of the contract * * * as a whole." *Republic Nat'l Life Ins. Co. v.*

Lorraine Realty Corp., 279 N.W.2d 349, 354 (Minn. 1979). Put another way, this court reads contract terms in the context of the entire contract and gives meaning to all of its provisions. *Brookfield Trade Center*, 584 N.W.2d at 394. When the parties' shareholder agreement is interpreted in this light, its obvious purpose is to terminate Drewitz's shareholder status with any "event of purchase" and make mechanical calculations and payment within 90 days.

A review of the parties' stated purpose for entering into the contract only proves this point more forcefully. Specifically, it states that the parties entered into the contract to "provide for the terms and conditions of sales and redemptions of Shares among [the parties]." (A.4). Further, because a close corporation is a unique entity, for which unity of interest among the employee/shareholders is absolutely crucial, the contract further states that the parties' "respective interests can be protected only by * * * such other terms of the Company's governance as are herein set forth * * *." (*Id.*). That is because a closely held corporation is nothing like a publicly held corporation, in which different shareholders merely hold stock and it does not matter whether they have competing interests. *See generally*, Daniel S. Kleinberger, *Why Not Good Faith? The Foibles of Fairness in the Law of Close Corporations*, 16 Wm. Mitchell L.Rev. 1143, 1148 (1990). In a close corporation, the few (or only two) shareholders must see eye-to-eye and have a unity of interest or there is complete chaos and the corporation cannot function. *Id.* That is why redemption provisions are standard contract terms in close corporations. *Id.* A partner in a close corporation bargains to work closely and in harmony with the other partners in the corporation, which is why this contract states that its intent is to protect the

parties' "respective interests." (A.4). Under no circumstances can it be said that the parties bargained for Drewitz's right to disrupt the corporation as a disgruntled former employee, while retaining his shareholder status and his right to sit on the board of directors. In fact, such a holding is directly contrary to the obvious purpose of the contract.

Reading the contract as a whole, the only reasonable interpretation is that the parties intended to terminate Drewitz's shareholder status when his employment terminated. Importantly, Drewitz obtained his shares in this close corporation solely in his role as an executive employee of the company. Consequently, Drewitz's repeated and unsupported reference to a third-of-a million-dollar investment is at best rhetoric. (Appellant's br. at 12). Drewitz received his shares in the company solely due to his employment, "buying" them with promissory notes that he was supposed to pay down with subsequent shareholder earnings at Motorwerks. The employment agreement specified that he received stock only because he was vice president and owned and operated the company pursuant to the shareholder agreement. (A.3). The agreement that made Drewitz a shareholder states that its purpose for doing so is to encourage his loyalty to the corporation. (A.4) ("as part of the manager's equity program to promote loyal, dutiful and successful on-site management of the Company"). Accordingly, not only was Drewitz an officer (vice president) and a shareholder, he was also automatically a member of the three-person board of directors. (A.7 at § 2.02). He had veto power over both board and shareholders actions. (A.9 at § 2.11, 2.12). And, so long as he held shares, the contract barred him from pursuing any corporate opportunities other than on

behalf of the corporation. (A.8 at § 2.06). The shareholder agreement also barred him from transferring his shares, voluntarily or involuntarily, to any third party, i.e., from selling the stock to anyone that was not an officer of the company. (A.11-12 at §§ 4.01-4.02). Indeed, the shareholder agreement precludes any involuntary transfer of Drewitz's shares to any non-employee/officer. (A.13 at § 4.03). Accordingly, immediately after termination, the contract required him to sell (and the corporation to buy) his shares at book value. (A.14 at § 4.04). In sum, read as a whole and in context, the contract demands a mandatory and mechanical buyout. Consequently, as discussed earlier, the "event of purchase" is not the closing or payment of book value, but rather the termination of Drewitz's employment. (A.18 at § 5.04(b)). Moreover, that purchase price is based on the book value of the corporation as of the month *preceding* the event of purchase – here the termination of Drewitz's employment. (A.14 at § 4.04). At that time, the only thing to establish is the purchase price, which is also determined in a mechanical fashion. (A.25-26). In contrast, the only occurrence at closing is the payment of the purchase price, offset by any indebtedness. (A.18-19 at § 5.05).

Quite frankly, it could not have been the intent of the parties that a terminated, disgruntled, former employee would remain a shareholder, officer and director of the closely held company following his termination and have veto power over corporate actions, whether for 90 days or one day. To say the least, that would be an invitation to complete chaos in corporate governance, which again, is exactly what the parties intended to avoid by entering into this shareholder agreement. Accordingly, that is why the moment the shareholder ceases being an employee, there was a mandatory "event of

purchase,” whereby the shareholder ceases to be a shareholder. (A.18 at § 5.04(b)). That is also why, as a matter of public policy, once a shareholder in a closely held corporation dissents from corporate actions, that shareholder loses all status and standing as a shareholder under Minnesota statutory law. *See generally*, Minn. Stat. 302A.751.

The Minnesota Court of Appeals properly acknowledged this when it ruled that a shareholder who is subject to redemption loses all rights as a shareholder and the corporation becomes the equitable owner of the stock upon a notice of redemption, not upon the actual payment of the book value. *Miller Waste Mills, Inc. v. Mackay*, 520 N.W.2d 490, 494 (Minn. App. 1994). Likewise here, reading the contract as a whole and in the context of a closely held corporation, this court should reverse the court of appeals and hold that the corporation sought to “avoid under all circumstances the risk of disruption from a dissident, disaffected ex-employee.” *See Coleman*, 638 F.2d at 637.

In sum, Drewitz contracted to be a shareholder only for so long as he was employed. As the court in *Coleman* stated, the employee “bargained for the right to be a shareholder only while he remained an employee. He did not bargain for the privilege of being a dissident, litigious, outside minority stockholder and the obvious purpose of the buy-back clause was undoubtedly to avoid such a situation.” *Id.* Drewitz has no right to be a dissenting, disgruntled former employee while retaining a management position in the corporation and refusing to sell his shares with sequential, meritless litigation. The contract’s event-of-purchase provision plainly so provides. And when read in context in light of the parties’ overall intent to avoid just this situation, that conclusion is doubly reinforced. The court of appeals’ decision should be reversed and the judgment of dismissal

reinstated.

3. The court of appeals' adoption of *Stephenson* should be rejected because it does not fit within Minnesota's statutory framework and public policy.

In its opinion, the court of appeals noted that there are two conflicting out-of-state lines of authority regarding whether a terminated employee remains a shareholder after termination but before the completion of the buy-out of his or her shares. *Drewitz*, 706 N.W.2d at 783. It adopted the California decision of *Stephenson v. Drever*, 16 Cal. 4th 1167, while the dissent followed the other line of authority. *See also, Coleman*, 638 F.2d at 637; *Jenkins v. Haworth*, 572 F. Supp. 591, 601-02 (W.D. Mich. 1983); *Gallagher v. Lambert*, 549 N.Y.S.2d 945, 947 (N.Y. 1989); *Ingle v. Glamore*, 528 N.Y.S.2d 602, 604 (N.Y. 1988); *Houglet v. Barra*, 1993 U.S.App.Lexis 27084, *5 (9th Cir. 1993) (R.A. 110-13); *Bevilacque v. Ford Motor Co.*, 509 N.Y.S.2d 595, 519-20 (N.Y. 1986). This court should reverse the court of appeals and follow the dissent's reasoning.

The court of appeals summarized its reasoning for adopting *Stephenson*:

First, the [*Stephenson*] court reasoned that the claimed implication of intent was inconsistent with the express provisions of the buy-sell agreement * * *.

Second, the court observed that the process specified in the buy-sell agreement for the valuation of the shares contemplated some delay in finalizing the repurchase of the employee's shares after termination and therefore "tend[ed] to negate any inference that the parties intended that the repurchase of the shares be consummated – and a fortiori that [the former employee's] status as a shareholder be terminated – immediately upon ... termination * * *."

Third, the court concluded that an implied intent would have the effect of stripping the employee of his right to dividends and to participate in the corporation's governance even though the employee remained the

legal and record owner of shares * * *. The court stated that “a shareholder without a shareholder’s rights is at best an anomaly” * * *.

Fourth, the court reasoned that the termination of shareholder status before valuation of the shares and tender of the purchase price would have the effect of relieving the corporation of its fiduciary duties to a terminated minority shareholder employee, even though the former employee remained the owner of the minority shares * * *.”

Drewitz, 706 N.W.2d at 784. The first two stated reasons are dependent on the contract language in *Stephenson* being analogous to the language at issue here – which it is not, as discussed previously. The second, third, and fourth reasons beg the question because they do not consider the impact of such a decision on the governance of a close corporation. The reasoning evaporates when one considers the need for immediate termination despite the need for some time for a valuation. Closely held corporations cannot survive if disgruntled former employees are able to maintain and prolong their shareholder status by, for example, commencing serial litigation that prevents contractual performance and that prolong shareholder rights. By losing in litigation, the disgruntled former employee would win valuable ongoing rights. It’s not an “anomaly” to prevent that from happening by making the event of purchase different from the closing at which the value as determined by a CPA is paid.

Far from an anomaly, in fact, Minnesota case law acknowledges that closely held corporations must be able to enforce buyout agreements in circumstances that create equitable ownership pending payment. In *Miller Waste Mills, Inc. v. MacKay*, for example, the court was confronted with a very similar situation with the same policy issues that are presented here. 520 N.W.2d 490. In *Miller Waste*, the redemption

occurred when a shareholder died and the corporation issued a notice of redemption. *Id.* The shareholder right in dispute was the right to vote rather than the right to distributions, but the issues and facts were otherwise identical to this case. *Id.*

The *Miller Waste* court ruled that upon the notice of redemption, the equitable ownership in the closely held corporation passed from the late shareholder's estate to the corporation. *Id.* at 495 ("Article XVI [of the shareholder agreement] creates a contractual obligation among Miller Waste's shareholders * * * When a corporation exercises a valid contractual repurchase option * * * the corporation becomes the equitable owner of the stock * * *").⁵ In short, while the California court in *Stephenson* was confounded by the "anomaly" of a separation between mere legal title and equitable ownership, both Minnesota statutory and decisional law accept, without reservation, the reality of a transfer of equitable ownership preceding the determination of the value of the shares and subsequent payment. Moreover, a terminated shareholder by definition neither needs nor is entitled to the benefits and protections of a shareholder. The court of appeals' reasoning that a shareholder termination did not occur because that would mean an end to shareholder status is empty reasoning that begs the question. The share price was

⁵ The notice of redemption was the triggering event in *Miller Waste* because the corporation was not obligated to buy the shares until it issued a notice of redemption. Thus, the corporation had the option to buy, but the shareholder's obligation to sell was predetermined by the contract. That is why the court analogized its situation to an option contract. Here, the situation is even more favorable to a transfer of equitable ownership upon termination. The sale of the stock is completely mechanical in that both Motorwerks and Drewitz were obligated to buy/sell the shares upon Drewitz's termination. Neither party had an option. They were both under mandatory obligations. The "Event of Purchase" was the termination date, not the date that the notice of redemption was sent – which occurred in December 1998 and again in July 1999. Upon termination, the equitable ownership passed to Motorwerks.

negotiated in advance through counsel. That is the only right that survived the event of purchase.

In addition to the fact that the appellate court applied empty reasoning to distinguishable facts, the court in *Stephenson* ruled within a specific statutory environment that is the diametrical opposite of Minnesota's. To understand both the contract language in *Stephenson* and the court's reasoning there, one must first understand the statutory environment under California law. Critically, unlike Minnesota, California is a code state, not a common law state. Thus, California courts derive public policy solely from the statutory law. *See Calif. Cas. Indem. Exch v. Pettis*, 193 Cal. App. 3d 1597, 1605 (Cal. App. 1987) (stating legislature establishes public policy of state through its statutory enactments). And California statutory law expressly provides that a dissenting shareholder in a closely held corporation seeking to be bought out retains all of the rights and powers of stock ownership until the shareholder and the corporation agree upon or determine the value of the stock:

Except as expressly limited in this chapter, holders of dissenting shares continue to have all the rights and privileges incident to their shares, until the fair market value of their shares is agreed upon or determined.

Cal. Corp. Code § 1308.

But Minnesota law provides exactly the opposite: dissenting shareholders must timely deposit their shares once they complain about a challenged corporate action and only retain their rights as shareholders until the corporate action that they are disputing takes effect. Minn. Stat. § 302A.473, subd. 4(b). After that, there is a potentially lengthy process equivalent to a lawsuit for determining the value owed for the shares. *Id.* at subd.

7. Thus, unlike California law, during the time that the dissenter is waiting for the determination of share value (let alone payment), he or she is not entitled to shareholder rights. Moreover, Delaware law, upon which the *Coleman* decision is based, is identical to Minnesota law in this respect. *Coleman*, 638 F.2d at 631 (citing 8 Del. C. § 262 (k)) (“no stockholder who has demanded appraisal rights as provided in subsection (d) of this section shall be entitled to vote such stock for any purpose or to receive payment of dividends or other distributions on the stock”). Because Minnesota and Delaware law are similar, while Minnesota’s statutory environment is the opposite of California’s on this key point, the court of appeals should have found the *Coleman* decision, rather than *Stephenson*, to be in line with Minnesota’s announced public policy.

In short, Minnesota law in regard to closely held corporations anticipates that shareholder rights will cease *before* payment for redemption of the shares is actually made and received. The statute governing minority shareholder oppression is just one example of this. Under the statute, an oppressed minority shareholder only retains shareholder rights until the court makes a finding that the shareholder is entitled to a forced buy-out and the corporation posts a bond. Minn. Stat. § 302A.751, subd. 2 (“Upon entry of an order for the sale of shares * * * the selling shareholders shall no longer have any rights or status as shareholders.”). Thereafter, there is, again, a lengthy procedure during which the value of the oppressed shareholder’s shares is determined and during which time the oppressed shareholder has no rights as a shareholder. True, this statute provides the added protection of a bond — while the parties’ contract does not — but the statute shows again that Minnesota law anticipates that shareholder rights will be

terminated during the time it takes to value the shares and make payment. Thus, the procedure called for in the parties' contract — termination of employment is the "event of purchase," while valuation and payment will occur later — is precisely consistent with Minnesota law and public policy.

While the district and appellate courts have consistently found that Motorwerks did not oppress Drewitz and his dissenter's rights have not been triggered, these statutes show that public policy favors the smooth operation of the closely held corporation, while the departing shareholder is entitled only to the value of his or her shares, even if that can be determined only after a lengthy valuation process. The departing shareholder is not entitled to future shareholder distributions, governance, or voting of the shares for the fundamental reason that the non-participating former shareholder is no longer a part of the close group of united interests that is the closely held corporation.

While the *Stephenson* court's reasoning must be understood in light of California's statutory law (and therefore its announced public policy), the court of appeals' reasoning here is fundamentally inconsistent with Minnesota's statutory law (and therefore its public policy). Minnesota's approach is much more in line with the entire purpose of a close corporation and with the close corporation's need to continue uninterrupted with its corporate governance while cashing out the dissenting shareholder or the disgruntled former employee-shareholder. Once the former shareholder's interests are at odds with the corporation, he or she has no place in the continuing governance or fortunes of the corporation. Thus, the court should reject *Stephenson* because the contract language here is distinguishable and because the intent of that language comports with Minnesota law,

with Minnesota public policy, and with the needs of a closely held corporation. Drewitz's shareholder status ended as a matter of law when an event of purchase occurred.

III. Drewitz's claim for shareholder profit distributions is barred by res judicata.

Res judicata is "a finality doctrine that mandates that there be an end to litigation." *Hauschildt v. Beckingham*, 686 N.W.2d 829, 840 (Minn. 2004) (citations omitted). One fundamental basis for the doctrine is that a "right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction * * * cannot be disputed in a subsequent suit between the same parties or their privies * * *." *Kaiser v. N. States Power Co.*, 353 N.W.2d 899, 902 (Minn. 1984) (alterations in original) (quoting *Montana v. United States*, 440 U.S. 147, 153 (1979)). The doctrine "concerns circumstances giving rise to a claim and precludes subsequent litigation — regardless of whether a particular issue or legal theory was actually litigated." *Id.* As a result, a party is "required to assert all alternative theories of recovery in the initial action." *Id.* (citation omitted). This is so because "[r]es judicata not only applies to all claims actually litigated, but to all claims that could have been litigated in the earlier action." *Hauschildt*, 686 N.W.2d at 840 (citing *Hauser v. Mealey*, 263 N.W.2d 803, 806-07 (Minn. 1978)). A claim or cause of action is "a group of operative facts giving rise to one or more bases for suing." *Hauschildt*, 686 N.W.2d at 840 (citation omitted). Application of res judicata is a question of law to be reviewed de novo. *Id.* at 840. Because Drewitz's second action (this action) asserts a claim for shareholder distribution of profit that actually was – and, regardless, could have been – asserted in the earlier

action, it is barred by res judicata.

A. Drewitz's claim for past and future shareholder distributions is barred by res judicata because he asserted that claim in the first action.

Drewitz bases his claim for shareholder distributions on Section 2.05 of the Shareholder Agreement, which outlines details for annual shareholder distributions that would be based on "the extent of Company earnings." (A.7). The court will recall that Drewitz's employment contract expired on March 31, 1999, resulting in an "event of purchase" under the shareholder agreement. (A. 18 at § 5.04). For the year 1998, Drewitz received shareholder distributions of \$326,538. (R.A. 167).⁶ According to Drewitz's sworn testimony (given on May 27, 1999), that amount was the full distribution owed him with the exception of approximately \$40,000 in 1998 shareholder distributions, which he claimed his accountant told him should have been, but were not, made. (R.A. 124). During that deposition, Drewitz's counsel expressly referred to the \$40,000 alleged discrepancy as damages. (R.A. 125). Drewitz also testified that other than the disputed \$40,000 in shareholder distributions, there was no amount due him that he did not receive before March 31, 1999, the expiration date of his employment contract and the "event of purchase." (R.A. 124). Thus, the only amount ever in dispute for past shareholder profit distributions was \$40,000, a claim and an amount that Drewitz directly put into issue in the first action.

As for future distributions of profit, Drewitz's *first* complaint alleged that the defendants had acted through "their own desire to take for themselves the future profits

⁶ See footnote 2, *supra*.

and capital appreciation *which would have gone to Drewitz as a result of his shareholder interest in Motorwerks BMW.*” (R.A. 72)(emphasis added). Therefore, Drewitz’s *first* complaint alleged that he had “sustained damages including, but not limited to, loss of compensation, benefits and remuneration incident to his employment, loss of his business interests, *loss of rights in Motorwerks BMW’s future profitability and other damages.*” (R.A. 74)(emphasis added). He sought damages in excess of \$50,000. (R.A. 75).

In short, Drewitz’s first action directly asserted a claim for past and future shareholder distributions of profit based upon his shareholder status. As such, the operation of res judicata could not be more clear. Indeed, if he claims to be a shareholder in 2006, surely Drewitz claimed to be a shareholder in 1999, a status that plainly would have entitled him to seek ongoing shareholder distributions, even if he had not expressly done so. And it matters not what legal theory Drewitz would advance to support his claim, for “res judicata prevents either party from relitigating claims arising from the original circumstances, even under new legal theories.” *Hauschildt*, 686 N.W.2d at 837 (citing *Wilson v. Comm’r of Revenue*, 619 N.W.2d 194, 198 (Minn. 2000)). Drewitz distinctly put into issue his right to future shareholder distributions in a prior suit between the identical parties, that resulted in a final judgment on the merits, after full opportunity for all parties to litigate. Res judicata therefore bars Drewitz’s shareholder-distribution claim as a matter of law. *Hauschildt*, 686 N.W.2d at 840. The court of appeals’ contrary ruling should be reversed, and the district court’s judgment of dismissal with prejudice should be reinstated.

B. Alternatively, Drewitz's claim for shareholder distributions should be barred by res judicata because he failed to supplement his complaint to allege additional facts that were known to him well before the close of discovery.

The premise of the claim for shareholder status and distributions is that Drewitz unilaterally extended his rights as a shareholder – including the valuable right to receive shareholder distributions – by commencing litigation that prevented payment for his shares under the parties' negotiated shareholder agreement. Indeed, when Motorwerks demanded that Drewitz accept book value as payment for his shares – just three months after the March 31, 1999 expiration of his employment contract, which was the event of purchase – he refused to do so because it would not be “pursuant to the outcome of the litigation.” (R.A. 127-28).⁷ In short, Drewitz stonewalled the payment for his shares by commencing meritless litigation, yet he now claims that this unilateral postponement allowed damages to accrue – in the form of ongoing shareholder distributions – thus providing grounds for a second suit. This can't be the law, not only because he actually

⁷ Drewitz's contention that Motorwerks' July 26, 1999 tender was “for the wrong amount” is without merit. The shareholder agreement did not allow for a protracted negotiation over book value, a value that has no precisely calculable and indisputably “correct” amount. Instead, it provided for book value to be calculated by Motorwerks' regularly employed CPA, using an agreed-upon formula. (A. 16, 25). That occurred. True, Motorwerks did not tender book value until about three weeks after the 90-day post-event-of-purchase period had expired, but by then Drewitz had already repudiated the tender, not only by commencing suit seeking market value, but also by letter expressly stating that he would not accept a forthcoming tender of book value. (R.A. 128). And after he received the July 1999 tender, Drewitz expressly rejected it again, not on the ground that the amount was “wrong” or that it did not include three weeks of interest, but on the ground that it was based upon book value, not market value. (R.A. 131). See, *Sellwood v. Equitable Ins. Co.*, 230 Minn. 529, 539, 42 N.W.2d 346, 353 (1950). (holding that objection to tender on specific grounds waives all others). The notion that Motorwerks did something wrong in attempting to immediately pay Drewitz for his shares is unsupported.

claimed shareholder distributions in the first action, but because he should have been required, at a minimum, to seek such distributions in that action or not at all.

Res judicata “is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, ‘of public policy and private peace,’ which should be cordially regarded and enforced by our courts * * *.” *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981) (citation omitted). The doctrine “not only puts an end to strife which otherwise would be endless, but produces certainty as to individual rights and gives dignity and respect to judicial proceedings.” *Ingelson v. Olson*, 199 Minn. 422, 430, 272 N.W. 270, 275 (1937)(citation omitted). Here, the court of appeals’ application of the doctrine to Drewitz’s claim for ongoing shareholder rights defeats its very purposes. The factual foundation for the survival of Drewitz’s shareholder-rights claim is the unsuccessful first action. In other words, by commencing litigation, Drewitz claims to have created the factual basis for ongoing rights for more litigation. In that way, he claims to have created a situation from which the strife could not be resolved in one action, from which certainty in the parties rights and obligations could not have been resolved in one action (remember, res judicata applies to all matters that *could have* been brought in the first action), and through which he could use the courts to create success through litigation regardless of the merits of the claim asserted. In short, Drewitz claims that the very existence of his first suit created the damages for his second suit by prolonging his shareholder status and the valuable rights attendant thereto.

A party should not be permitted to use the courts to create or prolong rights. A party seeking ongoing rights should be required to state them as part of a first action – as Drewitz did – or be required to seek supplementation of his complaint to allege such circumstances if they come into existence before the close of discovery. *See Monterey Plaza Hotel v. Local 483*, 215 F.3d 923, 928 (9th Cir. 2000)(holding that res judicata bars relitigation of all events that occur prior to entry of judgment).⁸ Here, by at least August 1999, Drewitz was *renewing* his demand, through counsel, for payment of shareholder profit distributions. (A.57)(“We renew our demand for this distribution * * *”). While this is undisputed evidence that Drewitz was seeking shareholder profit distributions in his first suit, at a minimum it demonstrates that he should have been required to pursue it in the first case or be barred from commencing serial litigation to enforce it later. Allowing a second suit in these circumstances would defeat the parties’ right to have an end to litigation, and it would encourage use of the court system as leverage to create and prolong rights that would otherwise terminate by contract. The court of appeals’ decision should be reversed and the judgment of dismissal with prejudice reinstated.

CONCLUSION

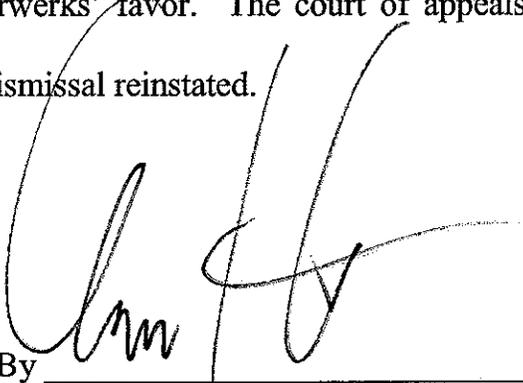
The court of appeals’ decision on the issue of Drewitz’s right to ongoing shareholder status and distributions cannot be sustained for several reasons. First, the

⁸ The rule stated in *Monterey Plaza* is the minority rule. The court of appeals’ decision cites to many contrary cases stating the majority view on this issue that need not be cited again here. None, however, involve a plaintiff who attempts to use the judicial system to create and prolong his rights through serial litigation. These facts justify upholding the district court’s decision regardless of whether the court adopts a more broadly based general rule.

court exceeded the scope of review and decided issues that were neither presented to nor decided by the district court. At a minimum, therefore, Motorwerks is entitled to a remand for a determination of the merits of that claim. Second, as a matter of law the parties' contract provides that Drewitz's shareholder status ended when the "event of purchase" — termination of his employment contract — occurred. Therefore, Drewitz has no shareholder rights to assert in this action. Finally, as a matter of law Drewitz's claim for shareholder profit distributions is barred by res judicata because he actually made — and even if he hadn't, he could have made — that claim in the first action, which ended with a judgment on the merits in Motorwerks' favor. The court of appeals' decision should be reversed and the judgment of dismissal reinstated.

Respectfully submitted,

Dated: 27 April 2006

By 

William M. Hart, No. 150526
Mary M.L. O'Brien, No. 177404
Jeffrey M. Thompson, No. 197245
Erica Gutmann Strohl, No. 279626
Meagher & Geer, P.L.L.P.
33 South Sixth Street, Suite 4400
Minneapolis, MN 55402
Telephone: (612) 338-0661

Attorneys for Respondents

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).