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NO. A04-2338

FILED

**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 PETITION FOR REHEARING
Date of Supreme Court's Decision: February 15, 2007

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Introduction

Appellant/Petitioner John Drewitz brings this Petition for Rehearing to request the Court to rehear the issue whether the Respondents made a conforming tender of the purchase price of Drewitz's shares. This Court remanded the issue of tender to trial court. However, this Court previously rejected Respondents' request for review of the tender issue. Drewitz therefore did not brief or argue the issue of tender. By remanding the tender issue to the trial court, this Court effectively considered the issue and overruled the Court of Appeals, all without giving Drewitz an opportunity to address tender before this Court.

Drewitz therefore petitions this Court (1) to delete from its opinion the paragraphs concerning tender and allow the decision of the Court of Appeals to stand, or (2) alternatively, for a rehearing so that Drewitz may be allowed to brief and argue the issue of tender.

Background

This case reached this Court following Drewitz's motion for a fair-value buyout and for his earnings as a shareholder, and on Respondents' motion for summary judgment. *Drewitz v. Motorwerks, Inc., et al.*, 706 N.W.2d 773, 777 (Minn. Ct. App. 2005). In support of its motion for summary judgment, Respondents submitted a lengthy affidavit with many documents attached describing Respondents' alleged attempts to tender. (*See generally* Fitzke Aff.)

Respondents argued they made proper tender under the shareholder agreement. (Fitzke Aff.)

Although the trial court ruled Drewitz's case was barred by res judicata and did not specifically rule on the issue of whether there was proper tender, the Court of Appeals reviewed *de novo* the issue of tender because the shareholder agreement is unambiguous. *Drewitz*, 706 N.W.2d at 783. Since no facts are in dispute and the shareholder agreement is unambiguous, whether there was proper tender is a purely legal issue, and *de novo* review by the Court of Appeals was appropriate. *See Modrow v. JP Foodservice, Inc.*, 656 N.W.2d 389, 393 (Minn. 2003) (holding a reviewing court is not bound by and need not defer to the district court on a purely legal issue).

The Court of Appeals held there was no factual issue about tender, and it unanimously ruled for Drewitz on this issue. *Drewitz*, 706 N.W.2d at 787-88. The court held that under the terms of the shareholder agreement "Motorwerks' unconditional tender to Drewitz of book value plus interest for his shares" is "an event that *has not yet occurred*["] *Id.* (emphasis added). In reaching this conclusion, the Court of Appeals analyzed the ample factual record before it for each of Motorwerks' deficient tender offers:

"The district court found that Motorwerks tendered a check for \$355,862, the agreed-upon book value of Drewitz's shares. But Drewitz correctly argues that because the tender did not include interest and was conditioned on the execution of a settlement agreement not contemplated by the buy-sell agreement, it was ineffectual.

“The record shows that Motorwerks first tendered payment for Drewitz's shares in July 1999. But the tender was for the wrong amount, the check tendered was a business check rather than a certified or cashier's check as specified in the buy-sell agreement, and the check indicated that endorsement constituted full payment for Drewitz's 495 shares.

“In July 2000 Motorwerks tendered the wrong amount once again, along with a settlement agreement that the shareholder agreement did not contemplate. A tender that is conditioned on the full discharge of the debtor's obligation is invalid, unless the parties agree otherwise. *See Balder*, 441 N.W.2d at 542 (requiring tender be unconditional and not compromise legal right to receive more). The parties did not agree otherwise.

“In June 2002 Motorwerks tendered payment, but again conditioned it on a general release that required Drewitz to waive his claimed right to two years' worth of interest. Finally, in August 2003, Motorwerks tendered the correct principal amount unconditionally but did not tender the correct interest.”

Drewitz, 706 N.W.2d at 786.

This Court rejected Respondents' petition for review insofar as it asked for review of the Court of Appeals' decision on tender. (Motorwerks' Pet. for Rev. 2; R.A. 60; Sup. Ct. Order 1-2, Feb. 14, 2006.) Relying on this Court's Order, Drewitz did not brief or argue the issue. (*See generally* App. Brief.) Respondents, however, devoted significant portions of their brief to the issue. (*See generally* Resp. Brief.) However, Respondents flipped positions, arguing to this Court that they had no chance to present evidence on the tender issue despite the Fitzke affidavit where they did just that. (Resp. Brief; *cf.* Fitzke Aff.) Drewitz moved to strike the improper arguments from Respondents' Brief. (*See generally* App. Mot. to Strike.) This Court determined that Drewitz's motion was moot. *Drewitz*

v. Motorwerks, -- N.W.2d --, 2007 WL 473991 *1, n. 2 (Minn. 2007).

Nevertheless, this Court found that “[o]n the limited record before us, we cannot determine whether or when Motorwerks made a conforming tender of the purchase price of Drewitz’s shares, and we therefore remand to the district court for that determination.” *Drewitz*, 2007 WL 473991 *6.

Argument

A. This Court should grant Drewitz’s petition for rehearing.

Rule 140 “is not intended to provide a party with one last chance to present arguments already rejected by the court.” Minn. Prac. § 140.3. It is intended to give the parties and the Court a second chance to address material issues the Court “overlooked, failed to consider, misapplied or misconceived.” Minn. R. Civ. App. P. 140.01. For example, in *Powers v. State*, 688 N.W.2d 559 (Minn. 2004), *reh. granted* (Nov. 19, 2004), this Court granted rehearing for the sole purpose of deleting a footnote from its opinion. In that footnote, this Court decided issues that were not briefed or argued. *Powers*, A04-31, Order for Rehearing, Nov. 19, 2004.

Drewitz is not attempting to present arguments all over again. He is seeking the chance to address an issue decided by this Court without granting review. Drewitz’s brief on appeal was limited to the issues on review, not those rejected by this Court. Drewitz has been prejudiced by this Court’s order because he was never given the chance to present arguments on the tender issue.

While this Court relied on the complaint and answer in *Drewitz II* for the allegations of the parties, it overlooked the Fitzke affidavit. Since this affidavit is part of the record and was argued by both sides on appeal to the Court of Appeals, the Fitzke Affidavit should be considered along with the complaint and answer. *Cf. Drewitz*, 2007 WL 473991 *1, n. 2 (explaining this Court relied on only the complaint and answer in *Drewitz II* for the events occurring after *Drewitz I*).

Drewitz therefore requests (1) modification of this Court's order so that the Court of Appeals' determination that Respondents failed to make proper tender stands, or alternatively (2) rehearing on the tender issue if this Court now intends to address it. Not granting this request would essentially reward Respondents for defying this Court's order rejecting review of the tender issue.

B. If tender is at issue before this Court, Drewitz should be given an opportunity to brief and argue the issue.

Drewitz neither briefed nor argued the issue of tender, as this Court specifically rejected that issue. But since this Court addressed the issue of tender anyway, Drewitz is prejudiced by not having an opportunity to brief the issue. There is ample evidence on the record concerning tender, but this Court explicitly rejected the issue. This Court should not overturn the Court of Appeals' decision on this issue without allowing Drewitz to brief and argue the issue. Rather, the remedy should be to uphold the Court of Appeals' ruling on the issue, which is final because it was not granted review.

In its brief to the Court of Appeals, Respondents argued extensively that it made proper tender and urged the Court of Appeals to decide the tender issue as a matter of law. (*See generally* Resp. Brief.) The Court of Appeals agreed with Respondents and considered the issue, but determined that Respondents breached the shareholder agreement and failed to tender as a matter of law. *Drewitz*, 706 N.W.2d at 786.

Motorwerks then petitioned this Court for review of the tender issue. (Motorwerks' Pet. for Rev. 2; R.A. 60.) But this Court refused to consider the issue. (Order 1-2, Feb. 14, 2006.) Ignoring this, Respondents argued the tender issue in their brief anyway, devoting pages to the issue and arguing they had no chance to present evidence on the tender issue. (*See generally* Resp. Brief.) First, this was not true, as indicated by the affidavit and attached documents Respondents submitted to the trial court. Second, this was irrelevant given the issues accepted by this Court for review. Respondents' brief prompted a motion to strike from *Drewitz*. (*See generally* App. Mot. to Strike.)

The Court declined to review the issue of tender and only Motorwerks briefed their arguments on the issue while *Drewitz* relied on the order and did not brief his arguments. At the very least, *Drewitz* should be afforded an opportunity to brief his arguments. Additionally, when *Drewitz* moved to strike Motorwerks' arguments, this Court postponed its ruling on the motion until it would decide the case. Had the motion been denied earlier, *Drewitz* would have in his limited space responded to Motorwerks' arguments even though the issue

was denied review. But Drewitz never got that chance, and there was no reason for Drewitz to address any issue not under review.

Drewitz had very limited space to argue multiple complex issues, and it was reasonable to rely on the scope of review of issues granted by the Supreme Court's Order of February 14, 2006. Since this Court explicitly declined to consider the tender issue, Drewitz should be given an opportunity to respond to the Respondents' arguments. Drewitz therefore requests a rehearing on the issue of tender if this Court does not modify its decision to uphold the Court of Appeals' decision on tender.

C. This Court may decide the issue of tender as a matter of law.

Neither party claims the shareholder agreement was ambiguous. *Drewitz*, 2007 WL 473991 *5. Neither party contests the accuracy of the documents presented to the trial court regarding tender, either; only their effect. (Fitzke Aff.; *see generally* Resp. Br.; App. Br.) Therefore, the Court of Appeals properly determined the issue of tender as a matter of law, and so may this Court. *See Drewitz*, 706 N.W.2d at 783 (citing *Yang v. Voyageur Houseboats, Inc.*, 701 N.W.2d 783, 788-89 (Minn. 2005) (stating that effect of unambiguous contract is question of law)). This Court may consider the Fitzke affidavit along with the pleadings in making its decision on the issue of tender.

D. The law of the case will control the decision of the trial court.

Issues that are decided in the course of litigation become the law of the case and may not be relitigated in the trial court or reexamined in a second

appeal. *Sigurdson v. Isanti County*, 448 N.W.2d 62 (Minn. 1989); *Janssen v. Neal*, 256 N.W.2d 292 (Minn. 1977); *Sylvester Bros. Development Co. v. Great Cent. Ins. Co.*, 503 N.W.2d 793 (Minn. App. 1993).

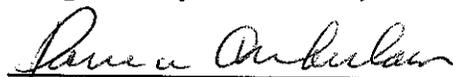
The law of the case following the decision of the Court of Appeals is that Respondents did not make proper tender to Drewitz. Since this Court did not grant review of that decision, the law of the case is unchanged. To clarify the law of the case, Drewitz requests that this Court adjust its remand instructions to let stand the Court of Appeals' purely legal determination on the tender issue.

Conclusion

This Court should grant Drewitz's Petition for Rehearing for two reasons. First, by remanding the issue of tender to the trial court, this Court effectively overruled the Court of Appeals which ruled in Drewitz's favor on an issue not granted review. Second, Drewitz was given no opportunity to present argument on the issue whether Respondents ever made proper tender. Drewitz respectfully requests this Court to grant his Petition for Rehearing of the issue of whether Respondents ever made proper tender to him.

Dated: February 26, 2007

Respectfully submitted,



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