

OFFICE OF APPELLATE COURTS

Case No. A04-2338

MAR -7 2007

**STATE OF MINNESOTA  
IN SUPREME COURT**

**FILED**

**John S. Drewitz,**

Appellant,

v.

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

Respondents.

**RESPONDENTS' OPPOSITION TO APPELLANT'S  
PETITION FOR REHEARING**

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Andrew D. Walser**

## INTRODUCTION

To avoid remand on the issue of whether Motorwerks made a conforming tender for Drewitz's shares — an issue that the district court did not address or decide to begin with — Drewitz asks this court to do one of two things: (1) Either reinstate the court of appeals' stray statement that conforming tender has "not yet occurred"; or (2) engage in fact-finding (and allow briefing) so as to decide in the first instance — as would a district court — whether conforming tender was made. In either case, however, Drewitz seeks what this court has many times stated is not permitted: To have an appellate court address and decide an issue for the first time — before the district court has considered and decided it. *See, e.g., Thompson v. Barnes*, 294 Minn. 528, 536, 200 N.W.2d 921, 927 (1972) (“[A] reviewing court must limit itself to a consideration of only those issues which the record shows were, or had to be, presented an[d] considered by the trial court in deciding the matter before it.”) (cited in *Thiele v. Stich*, 425 N.W.2d 580 (Minn. 1988)). Moreover, because the decision to consider the remand issue was within the court's discretion under either Rule 117 (to grant review) or Rule 103.04 (to review any issue that the interest of justice requires), the relief Drewitz seeks first requires a ruling that the court abused its discretion in deciding the issue. Drewitz has advanced no basis for finding that the court abused its discretion. This court's ruling was proper and well within its discretion. Its order to remand on the issue of tender should stand.

Nor should this court permit Drewitz to “present arguments on the tender issue.” (Drewitz petition at 4). No amount of briefing will alter this court's fundamentally proper decision to remand, because the merits of the tender issue were never before the appellate courts by virtue of the fact that they were not considered by the district court. The district court dismissed Drewitz's claim solely on res judicata grounds. Thus, the merits of the tender issue

were and are not before either of the appellate courts, notwithstanding the court of appeals' "determination" that Motorwerks had not made conforming tender. It would be futile for the court to allow briefing on a matter that is not properly before it. Therefore, this court must also deny Drewitz's alternative request to brief the merits of the tender issue.

### **RELEVANT BACKGROUND**

Following termination of his employment in 1999, Drewitz sued Motorwerks seeking market-value buyout of his stock shares pursuant to Minn. Stat. § 302A.751. (R.A. 68-78).<sup>1</sup> Motorwerks argued that Drewitz was entitled only to book value — not market value — for his shares. It successfully moved for summary judgment on the issue, and the court of appeals affirmed. *See Drewitz v. Walser*, 2001 WL 436223 (Minn. App. May, 1, 2001) (R.A. 95-101).

After three years of negotiations as to book value, Drewitz again sued Motorwerks in 2004, resulting in the instant case. Drewitz made two claims in the district court. First, he again brought a claim for market-value buyout of his shares, asserting that Motorwerks had treated him unfairly and breached its fiduciary duty. Second, he claimed that he has a right to ongoing shareholder distributions based on his belief that he remained a shareholder because Motorwerks had failed to make a conforming tender for his shares. Pursuant to Motorwerks' preliminary Rule 12-type motion, the district court dismissed both market-value buyout and shareholder-distribution claims, ruling that they were barred by res judicata.

The court of appeals affirmed the district court's determination that Drewitz's market-value-buyout claim was barred by res judicata. *Drewitz v. Motorwerks, Inc.*, 706 N.W.2d 773, 779 (Minn. App. 2005). Therefore it did not reach the merits of that claim. It reversed the district court, however, on his claim for shareholder distributions per his alleged shareholder

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<sup>1</sup> References are to Motorwerks' brief appendix (previously submitted to this court).

status. *Id.* at 785. In doing so, the court of appeals remarked that Drewitz's ongoing shareholder status would only end when Motorwerks made a conforming tender, which — according to the court of appeals' factual determination — “has not yet occurred.” *Id.* at 787.

Both parties petitioned for review of the court of appeals' decision. In Motorwerks' timely petition for review, Motorwerks asked for several forms of relief, which included an express request for remand to the district court to resolve the fact issue of whether Motorwerks made a conforming tender. (*See* Motorwerks PFR). Motorwerks specifically sought remand because of the court of appeals' improper factual determination that a conforming tender “has not yet occurred.” (*See id.*) Contrary to Drewitz's assertions throughout his petition for rehearing, this court did not refuse to consider the issue of remand on the matter of tender. (*See* February 14, 2006 order). The court's order is silent on that point. The order did specify which of Motorwerks' issues were denied for review, and the issue of remand was not among them. (*See id.*).

By contrast, Drewitz's petition for review failed to state any legal issue that addressed the court of appeals' holding. Instead of addressing the court of appeals holding that his claim for market-value buyout was barred by *res judicata*, Drewitz petitioned for review on the *merits* of his claim that he was entitled to market-value buyout of his shares. (*See* Drewitz PFR). In essence, Drewitz asked this court to find, as a matter of fact, that the elements of his claim were met, had it not been barred by *res judicata*. (*See id.*) This court granted review of that issue (*see* Feb. 14, 2006 order) — but later ruled it had improvidently granted review on the merits of Drewitz's claim.<sup>2</sup>

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<sup>2</sup> Motorwerks moved to dismiss this claim because Drewitz failed to seek review on the determinative issue of *res judicata*. (Motorwerks' March 21, 2006 motion). This court then ordered that review of the merits of his claim was improvidently granted. (April 13, 2006 order).

On February 15, 2007, this court issued its decision, ruling in part that “[o]n remand, the district court must determine whether Motorwerks or any other shareholder ever made a conforming tender for Drewitz’s shares that terminated Drewitz’s shareholder status.” *Drewitz v Motorwerks, Inc.*, \_\_\_ N.W.2d \_\_\_, \_\_\_, 2007 WL 473991, at \*9 (Minn. Feb. 15, 2007). In its decision to remand, the court expressed no opinion on the merits:

*Without expressing an opinion as to the merits of Drewitz’s claim that the shareholder agreement was breached and that Motorwerks was required to repurchase his shares at fair value, we conclude that Drewitz’s shareholder status did not terminate when his employment ended and that his claims are not barred by res judicata. We remand to the district court for further proceedings consistent with this opinion.*

*Drewitz*, 2007 WL 473991, at \*1. Furthermore, the court expressly stated that “[b]ecause of the procedural posture of the case, review of the merits of Drewitz’s complaint would have been inappropriate \* \* \* .” *Drewitz*, 2007 WL 473991, at \*8. Drewitz now seeks to have this remand stricken from the court’s decision.

## ARGUMENT

### **1. Motorwerks included the issue of remand on tender, in its timely petition for review, and this court accepted review of that issue, as demonstrated by its ruling.**

As an initial matter, Motorwerks addresses Drewitz’s contention that “[t]his Court rejected [Motorwerks’] petition for review insofar as it asked for review of the Court of Appeals’ decision on tender.” (Drewitz motion at 3). Based on this, Drewitz contends that the court must either reinstate the court of appeals’ “determination” that there was no conforming tender, or it must hear and weigh facts on the tender issue — as a district court would in the first instance — and permit Drewitz to brief the merits of whether Motorwerks made conforming tender. (*See id.* at 5).

It is beyond dispute, however, that Motorwerks specified and supported this issue in its timely filed petition for review. (*See* Motorwerks PFR). Motorwerks expressly requested remand to the district court to resolve the fact issue of whether Motorwerks made a conforming tender. (*See* Motorwerks PFR). Motorwerks also specified that the court of appeals made a factual determination that tender “has not yet occurred.” (*See id.*). And in its February 14, 2006 order granting review, this court identified which of Motorwerks’ issues it had denied, and the issue of remand and tender was not among them. It’s true that the court did not expressly grant review of the remand issue, but the court rarely specifies with particularity every issue it accepts for review. Therefore, notwithstanding Drewitz’s contention to the contrary, the court did not deny review of the remand issue.

**2. This court enjoys broad discretion to hear and decide any issue it chooses.**

Regardless of whether the court was required to specify each issue accepted for review, Drewitz’s theory that this court is somehow procedurally barred from remanding the issue of tender is flawed. (*See* Drewitz motion at 1, 3-4, 6). The court’s own rules state that it may exercise its discretion to review any issue in the interest of justice. *See* Minn. R. Civ. App. P. 103.04 (stating appellate court has discretion to review any matter that the interest of justice requires); *McCormack v. Hanksraft Co.*, 278 Minn. 322, 343, 154 N.W.2d 488, 503 (1967) (“[O]nce a case has been properly brought before us on appeal we may, in our discretion, ‘review any other matter as the interests of justice may require.’”) (citation omitted). Thus, this court acted within its discretion to consider whether remand was appropriate. Drewitz has provided no grounds for a ruling that the court abused its discretion in remanding an issue that was properly presented for review and plainly subject to remand because the district court had neither considered nor decided it in the first instance. The legal basis for Drewitz’s petition — that some

impenetrable procedural barrier bars remand — does not exist.

On the latter point, remand was particularly appropriate given that the court of appeals improperly stated that tender had not taken place, even though the district court never reached that issue. *See Thiele v. Stich*, 425 N.W.2d 580 (Minn. 1988) (holding appellate courts must consider “only those issues that the record shows were presented and considered by the trial court in deciding the matter before it”). It is axiomatic that this court is not — indeed, cannot be — bound by something wrongly decided by the court of appeals. *See McClain v. Begley*, 465 N.W.2d 680, 682 (Minn. 1991) (“This court is not bound by the decision of the court of appeals.”).

Moreover, it is hard to imagine that Drewitz would argue that this court lacks discretion to have reviewed this issue, given the wide latitude the court showed in granting his cross-petition for review. Drewitz’s cross-petition sought review of the merits of his market-value-buyout claim — a claim that was undisputedly never reached by the court of appeals (or the district court). (*See* Drewitz PFR). In fact, Drewitz’s cross-petition failed to even present the determinative res judicata issue for review. (*See id.*). Yet the court reached that issue and ruled in Drewitz’s favor on it:

Because of the procedural posture of the case, review of the merits of Drewitz’s complaint would have been inappropriate, and we agreed with Motorwerks that such review was improvidently granted. But because Motorwerks raised the question of res judicata in its cross-petition for review, in the interest of judicial economy we instructed the parties to brief whether Drewitz’s claim for a fair value buyout under Minn. Stat. § 302A.751 is also barred by res judicata. *We address the claim here under our inherent authority under Minn. R. Civ. App. P. 103.04* (“The appellate courts may take any other action as the interest of justice may require.”).

*Drewitz*, 2007 WL 473991, at \*8 (emphasis added). That Drewitz would now base his petition for rehearing on the ground that the court abused its discretion is ironic, considering that he has

been the beneficiary of the court's discretion to review an issue on which he presented no petition for review.

Additionally, when Drewitz sought review of the merits of his market-value-buyout claim, the court granted the petition for review, even though it had actually presented no reviewable issue. When this court later dismissed this market-value-buyout issue as improvidently granted — because it would have involved review of the merits — the court expressly stated that it “shall not consider the merits of [Drewitz’s] complaint.” (April 13, 2006 order at 2). And the court specifically stated this again in the holding of its February 15, 2007 opinion. *See Drewitz*, 2007 WL 473991, at \*8 (“Because of the procedural posture of the case, review of the merits of Drewitz’s complaint would have been inappropriate, and we agreed with Motorwerks that such review was improvidently granted.”). Yet review of the merits of his complaint is precisely what Drewitz seeks in his petition for rehearing. His current request for a review of the merits is just as improper as the one he made the first time.

In sum, nothing constrains this court from ordering a remand to the district court on the merits of the issue of tender. No legal, procedural, or factual basis exists to support Drewitz’s contention that the court’s remand should be stricken from its opinion.

**3. Remand to the district court on the merits of the tender issue is mandated by well-established Minnesota precedent.**

In any event, the correctness of this court’s remand is beyond reasonable debate because it is undisputed that, as a matter of appellate procedure, an appellate court does not review issues not considered and decided *first* by the district court. *Thiele*, 425 N.W.2d at 582; *see also Hoyt Inv. Co. v. Bloomington Commerce & Trade Ctr. Assocs.*, 418 N.W.2d 173, 175 (Minn. 1988) (stating that “an undecided question is not usually amenable to review.”).

Here, the district court dismissed Drewitz’s case on the basis that it was barred by res

judicata. In fact, the district court made its res judicata determination on a limited record, as the dismissal was postured as a Rule 12 motion would be. This court acknowledged as much, observing in a footnote that “[b]ecause of the posture of the case, we have only the procedural history and a limited factual record before us.” *Drewitz*, 2007 WL 473991, at \*1 n.2. As a result, the district court never had the occasion to address the merits of the issue of conforming tender. Given that the district court never considered the tender issue, it was improper for the court of appeals to determine as a fact that a conforming tender “has not yet occurred,” because this court has made clear in numerous cases that “an appellate court should consider only those issues that were presented and considered by the trial court.” *In re Welfare of the Children of Coats*, 633 N.W.2d 505, 512 (Minn. 2001).

*Drewitz*, however, would have this court ignore decades of established precedent, and instead make the decision regarding tender in the first instance. *Drewitz* would have this court act as though it were the district court, reviewing the record and making the first decision on this point. But consistent with *Thiele*, this court rightly refrained from usurping the role of the district court: “Without expressing an opinion as to the merits of *Drewitz*’s claim,” this court properly remanded to the district court the issue of “whether Motorwerks \* \* \* ever made a conforming tender.” *Drewitz*, 2007 WL 473991, at \*1 & \*9.

Likewise, this court rightly prevented the court of appeals from doing the same. By remanding the matter of tender to the district court, this court set right what the court of appeals improperly stated. If the issue of tender is to be addressed, it must be done so in the *first instance* by the district court — not the appellate courts. And it must be addressed in the district court on a complete record after full discovery — not on a preliminary ruling, as before the district court here. In short, only the issue of res judicata was before this court, and the court

ruled on that issue. Therefore, this court's decision to remand the issue of tender to the district court must stand, and Drewitz's petition for rehearing must be denied.

**4. Drewitz suffers no prejudice by not briefing to this court the merits of the issue of tender because that issue was never before the appellate courts.**

Drewitz alternatively argues that if the court does not reinstate the court of appeals' ruling on tender, then this court must afford Drewitz the opportunity to brief the merits of this issue, and function as would a district court by deciding in the first instance whether conforming tender was made. But as already discussed under the *Thiele* line of cases, this court will refrain from considering an issue — particularly an issue of fact — not yet passed on by the district court. So regardless of whether Drewitz had or has an opportunity to address the merits of the tender issue in briefing to this court, he will have a full opportunity to do so in the proper court — the district court. It is beyond dispute that no amount of briefing by either party could justify having this court — or the court of appeals — act as the district court and decide issues for the first time in violation of the principle set forth in *Thiele*. Thus, Drewitz needs no opportunity to brief the merits to this court, nor is he in any way prejudiced by this court not hearing the merits of the tender issue.

### CONCLUSION

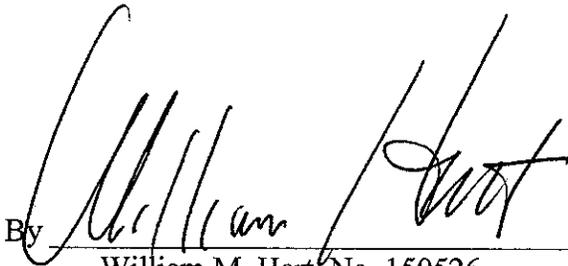
This court properly remanded, given that the district court never considered the issue of whether Motorwerks made conforming tender to Drewitz for his company shares. Established precedent unanimously holds that the district court, as a first-level tribunal, has the exclusive function to decide the merits of an issue for the first time, thus providing a record and a basis for the appellate courts to *review* that ruling on that record. In the absence of a ruling, however, there is nothing for an appellate court to review. But the court's April 13, 2006 Order perhaps sums it up best — the court “shall not consider the merits of Drewitz's complaint.” (Order, p.2).

This court properly limited its decision to the issue of res judicata because that was the only issue presented to and decided by the district court. The petition for rehearing should be denied in all respects.

Respectfully submitted,

Dated: March 5, 2007

By

A handwritten signature in black ink, appearing to read "William M. Hart", written over a horizontal line.

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**AFFIDAVIT OF SERVICE AND FILING**

STATE OF MINNESOTA )  
 ) ss.  
COUNTY OF HENNEPIN )

Robyn E. Setzer-Hegerle, being first duly sworn, deposes and states that on the 5th day of March, 2007, she served a copy of Respondents' Opposition to Appellant's Petition for Rehearing, by depositing same in the United States mail, with the proper postage prepaid thereon, at Minneapolis, Minnesota, in a(an) envelope(s) properly addressed to the following person(s)/attorney(s):

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She also states that she filed the original and 13 copies of Respondents' Opposition to Appellant's Petition for Rehearing, and this original Affidavit of Service and Filing, by depositing same in the United States mail, with the proper postage prepaid thereon, at Minneapolis, Minnesota, in a(an) envelope(s) properly addressed to:

Mr. Frederick K. Grittner  
Clerk of Appellate Courts  
305 Minnesota Judicial Center  
25 Rev. Dr. Martin Luther King, Jr. Blvd.  
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Robyn E. Setzer-Hegerle

Subscribed and sworn to before me  
this 5th day of March, 2007.

  
Notary Public

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