

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.

RESPONDENTS' SURREPLY BRIEF

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

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 Appellant John S. Drewitz

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

David L. Hashmall (#138162)
Ryan A. Olson (#340935)
FELHABER, LARSON, FENLON
& VOGT, P.A.
220 South Sixth Street, Suite 2200
Minneapolis, MN 55402
(612) 339-3621

*Attorney for Amicus Curiae
Minnesota Automobile Dealers Association*

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ARGUMENT

I. Drewitz's claim for market-value buyout is not before the court for review.

The court of appeals upheld the dismissal of Drewitz's claim for market-value buyout on two grounds: (1) that "Drewitz's current claim for a fair-value buyout * * * is * * * barred by the judgment in the original action"; and (2) that the market-value-buyout claim is barred because "if a promisor is himself the cause of the failure of performance * * * of an obligation due him * * *, he cannot take advantage of the failure." (R.A. 37 & 38) (alterations original, citation omitted). Drewitz sought review of a single issue. He asked this court to determine the *merits* of his claim for a market-value buyout.¹ By its April 13, 2006 order, this court ruled that the "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 appellant's complaint." (R.A. 169). The court did not, however, dismiss Drewitz's appeal outright, ruling that "[t]he court will decide in connection with its consideration of the merits of the appeal whether it will consider this issue" of whether Drewitz's market-value-buyout claim is barred by *res judicata*. (R.A. 170).

For two reasons this court should now decline to address Drewitz's claim for a market-value buyout. First, as a result of the court's April 13 order, the lone issue Drewitz presented for review has been dismissed. Therefore, Drewitz has literally presented no issue for review. *See Peterson v. BASF Corp.*, 675 N.W.2d 57, 67 (Minn. 2004)(ruling that parties must "bring issues ripe for review to the supreme court's

¹ Specifically, Drewitz sought review of the question, "was it erroneous for the Court of Appeals to conclude that the corporation had not acted in an unfairly prejudicial manner or breached its fiduciary duty to its minority shareholder?" (Drewitz petition, p. 1).

attention with specificity, or waive the opportunity to have them reviewed”), *vacated, remanded, and affirmed on other grounds*, 711 N.W.2d 470 (Minn. 2006). The failure to present even one viable issue for review should preclude review.

Second, even if the court were to address *res judicata* as respects Drewitz’s market-value-buyout claim, a favorable ruling for Drewitz would not result in a reversal. That is true because the court of appeals stated alternative grounds for affirmance, but Drewitz neither sought review of that issue nor addressed it in his brief to this court. *State Dep’t of Labor & Indus. v. Wintz Parcel Drivers, Inc.*, 558 N.W.2d 480, 480 (Minn. 1997)(ruling that the court will not address issues in the absence of briefing). Proper briefing demonstrates error below and includes citation to legal authority. *Schoepke v. Alexander Smith & Sons Carpet Co.*, 290 Minn. 518, 519-20, 187 N.W.2d 133, 135 (1971); *see also* Minn. R. Civ. App. P. 128.02 (providing that briefs must include citation to legal authority). Here, Drewitz did not identify the alternative grounds as an issue in his petition or in his briefs. Further, he did not even mention the issue anywhere in the argument section of his brief, nor did he demonstrate error or cite to legal authority. Therefore, the court should also refuse to address Drewitz’s claim for a market-value buyout because the court of appeals’ alternative holding requires affirmance even if this court were to consider and decide the *res judicata* issue.

II. The court of appeals correctly ruled that Drewitz’s claim for a market-value buyout is barred by the judgment in the original action.

Merged into the original judgment is the first court of appeals ruling affirming that “the terms negotiated by Drewitz and Jack Walser for the price of shares at buy-back

controlled.” (R.A. 101). In that first case, Drewitz did not ask for a remand, and none was ordered. See *Hoyt Inv. Co v. Bloomington Commerce & Trade Ctr. Assocs.*, 418 N.W.2d 173, 175-76 (Minn. 1988)(ruling that party must request remand in appellate brief; otherwise, appellate ruling controls subsequent proceedings). Granted, after the first appeal there was still the possibility of a dispute about the *amount* owing for a book-value buyout, but the valuation *method* had been litigated and decided in an action that resulted in a final judgment. Thus, in the event that a dispute developed – which it did – Drewitz’s remedy was to seek a judicial determination of the *amount* in dispute, not to seek a valuation *method* that directly attacks the first court of appeals’ holding. The district court and the court of appeals correctly ruled that Drewitz’s claim for a market-value buyout is barred by the judgment in the original action.

Moreover, the court of appeals was correct in refusing to permit serial litigation based upon alternative theories advanced in support of an identical remedy. And Drewitz’s failure-to-tender theory is precisely that – an alternative theory advanced in a second suit as grounds for obtaining a remedy rejected in a first suit. *Hauschildt v. Beckingham*, 686 N.W.2d 829, 840 (Minn. 2004)(holding that parties are “required to assert all alternative theories of recovery in the initial action”). Drewitz contends that this action for identical relief is not barred because part of the basis for his claim did not happen until the first action ended, when he and Motorwerks could not agree on an amount. There are two errors in this argument. First, *res judicata* applies to the “*circumstances* giving rise to a claim and precludes subsequent litigation – regardless of whether a particular issue or legal theory was actually litigated.” *Id.* (emphasis added).

Here, the court of appeals aptly described Drewitz's second suit as just an attempt to litigate the "original claim for a fair-value buyout under a failure-to-tender theory." (R.A. 37). This case is founded on the same set of factual circumstances and connected series of transactions as the first one. True, the theory of recovery has shifted, but the case is founded upon the same set of factual circumstances, and the same series of transactions, as the first. The court system cannot bear the weight of case filings that would follow in other cases if Drewitz is allowed to pursue the identical remedy asserted in the first action by shifting his theory of relief in this action. The lower courts were correct in ruling that *res judicata* bars Drewitz's claim for a market-value buyout.²

Second, bringing the point full circle, Drewitz himself caused the failure of tender upon which he now proposes to base this second action for market-value buyout. Drewitz rejected the July 1999 tender solely because he wanted to pursue litigation instead, litigation that was dismissed as a matter of law. And, indeed, this was the

² Drewitz's opening brief in particular, and his reply brief to a lesser degree, leads the reader to believe that a minority shareholder who establishes oppression/prejudicial treatment *automatically* receives a market-value buyout. But that is not the law. Under Minn. Stat. § 302A.751, subd. 2, establishing minority-shareholder oppression merely assures the minority shareholder the right to *sell* his or her shares, not the right to a particular *method* of valuation. In fact, that section expressly requires the court to order a sale on the terms set forth in a shareholder agreement, "unless the court determines that the price or terms are unreasonable under all the circumstances of the case." In short, market-value buyout is not a remedy for shareholder oppression; it is an alternative to unreasonable buy/sell terms when a minority shareholder establishes a right to sell. Thus, even if this court were to review Drewitz's claim for a market-value buyout, and even if it were to reverse the court of appeals on that claim, the case would need to be remanded to the district court for a determination of whether the terms for buyout, which Drewitz negotiated with the assistance of legal counsel, are unreasonable under all the circumstances. If not, Drewitz would be entitled to no more than he has already received – book value plus interest.

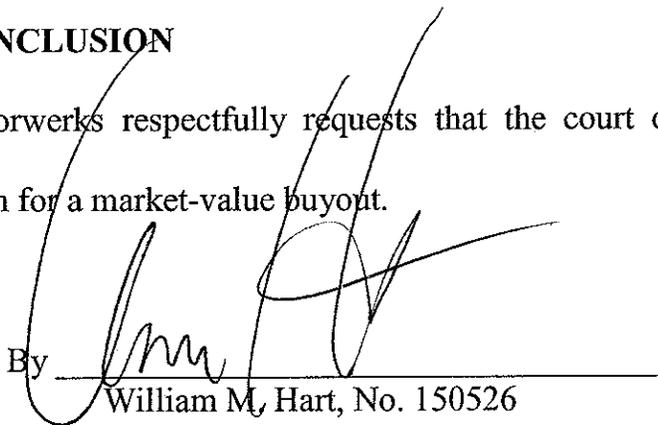
alternative ground the court of appeals announced as the basis for affirming dismissal. (R.A. 37-38). Drewitz caused the absence of a completed tender and then failed to pursue his remedy for a book-value buyout even after the litigation ended. Thus, even if Drewitz's claim were not barred by the judgment in the first action, his alternative failure-to-tender theory is subject to a defense. But it is not just a potentially viable defense, it is one that has been presented to the court below and ruled upon in Motorwerks' favor. The dismissal of Drewitz's claim for a market-value buyout should be affirmed.

CONCLUSION

For the foregoing reasons, Motorwerks respectfully requests that the court of appeals be affirmed as to Drewitz's claim for a market-value buyout.

Respectfully submitted,

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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

1338670