

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1529**

John S. Drewitz,
Appellant,

vs.

Motorwerks, Inc., et al.,
Respondents.

**Filed April 20, 2010
Affirmed in part, reversed in part, and remanded
Klaphake, Judge**

Hennepin County District Court
File No. CV-04-8927

Paul W. Chamberlain, Ryan R. Kuhlmann, Chamberlain Law Firm, Wayzata, Minnesota
(for appellant)

Max C. Heerman, Michael H. Streater, Briggs and Morgan, P.A., Minneapolis,
Minnesota (for respondents)

Considered and decided by Shumaker, Presiding Judge; Klaphake, Judge; and
Crippen, Judge.*

UNPUBLISHED OPINION

KLAPHAKE, Judge

Appellant John S. Drewitz sued respondents Motorwerks, Inc., R. Jack Walser,
Paul M. Walser, and Andrew D. Walser (collectively, Motorwerks), claiming breaches of

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

a contract and fiduciary duty, and alleging the right to a buy-out of his Motorwerks shares under Minn. Stat. § 302A.751 (2008). Based on the jury's special verdict in the first part of a bifurcated trial, the district court dismissed his claims, concluding that Drewitz had anticipatorily breached the shareholder contract and that Drewitz was equitably estopped from asserting a breach of the contract. Further, the district court determined that Drewitz's section 302A.751 claims, which were to be tried to the court in the second half of the bifurcated trial, were barred because of the anticipatory breach and estoppel, despite the fact that Drewitz remained a shareholder in Motorwerks.

Drewitz appeals from this judgment, asserting that the district court erred by denying his motions for judgment as a matter of law (JMOL) or for a new trial. Motorwerks filed a notice of review of the district court's order refusing to permit it to offer evidence of the defense of waiver.

Because the jury's special verdict relating to anticipatory breach is manifestly against the entire evidence and because the district court erred by admitting a letter of compromise in support of Motorwerks' equitable estoppel defense, we reverse as to those two issues. Motorwerks has not directed us to an order which prevented it from submitting the defense of waiver at trial; we therefore decline to address its notice of review. In light of our decision, we remand this matter to the district court to consider Drewitz's claims under the shareholder agreement and section 302A.751.

DECISION

The disputes between Drewitz and Motorwerks began in 1999. Drewitz was hired by Motorwerks initially as a car salesperson and eventually became general manager.

Effective January 1, 1995, Drewitz and Motorwerks entered into an employment agreement and a “Shareholder Sale/Purchase/Redemption/Voting/Control Agreement” (“the shareholder agreement”). The employment agreement was for a term from January 1, 1995, to March 31, 1999. The shareholder agreement governed Drewitz’s rights to purchase stock and his obligation to sell his stock upon termination of employment. In the event of termination of Drewitz’s employment, Motorwerks was required to purchase Drewitz’s stock, or, in the alternative, other shareholders were permitted to purchase the stock if Motorwerks did not. In either case, Drewitz was required to sell. Motorwerks was obligated to purchase Drewitz’s shares at book value, less any outstanding indebtedness owed it by Drewitz, within 90 days of termination of employment; the payment was to include interest and to be made by certified or bank cashier’s check.

Motorwerks terminated Drewitz’s employment in December 1998, effective March 31, 1999, the final day of Drewitz’s employment contract. In January 1999, before the effective termination date, Drewitz sued Motorwerks, alleging breaches of the employment contract, fiduciary duty, and an implied covenant of fair dealing, and asking for an order pursuant to section 302A.751¹ requiring Motorwerks to repurchase his stock at fair value rather than at book value. The district court granted summary judgment on all claims, except the breach of the employment agreement, which was settled. We affirmed the district court’s judgment, and the supreme court denied review. *See Drewitz v. Walser*, No. C3-00-1759 (Minn. App. 2001), *review denied* (Minn. June 27, 2001)

¹ Briefly stated, this statute permits a court to order a closely held corporation that has acted in an unfairly prejudicial manner towards a shareholder to buy the shareholder’s stock at fair value.

(Drewitz I). While these matters were pending, Motorwerks tendered Drewitz payment for his shares on various occasions, but it failed to do so in accordance with the shareholder agreement: the check was not certified, interest was not included, and the parties could not agree on the book value or the appropriate interest rate. Drewitz continued to reject these defective tenders. Although *Drewitz I* is connected, it also is in a sense separate and distinct from the matter currently pending before this court.

The parties were unable, for one reason or another, to successfully resolve their disputes. Therefore, in 2004, Drewitz filed a second complaint, alleging breaches of (1) the shareholder agreement, (2) an implied covenant of good faith and fair dealing by failing to unconditionally tender payment for his stock, and (3) fiduciary duty by the other shareholders, and asking for a buyout at fair value under section 302A.751. In this complaint, Drewitz claimed that he remained a shareholder in Motorwerks because the company had failed to effectively tender payment for his stock, which would cut off his rights as a shareholder.

The district court dismissed this complaint, concluding that Drewitz's claims were settled in *Drewitz I* and thus the doctrine of res judicata barred further litigation of the issues. We affirmed the district court's decision barring Drewitz's claim of a right to fair value of the shares, but determined that Drewitz was still a shareholder and that Motorwerks had breached the shareholder agreement by refusing to make shareholder distributions to Drewitz during the years following his termination from employment. *Drewitz v. Motorwerks, Inc.*, 706 N.W.2d 773, 788 (Minn. App. 2005) (*Drewitz II*). We remanded those two issues to the district court, but the supreme court granted review.

The supreme court affirmed this court's determination as to the breach of the shareholder agreement and Drewitz's continuing status as a shareholder, but reversed our conclusion that Drewitz's claim for fair value was barred by res judicata. *Drewitz v. Motorwerks, Inc.* 728 N.W.2d 231, 241 (Minn. 2007) (*Drewitz III*). The supreme court remanded the matter to the district court, ordering the district court to determine whether (1) "Motorwerks or any other shareholder ever made a conforming tender for Drewitz's shares that terminated Drewitz's shareholder status . . ."; (2) "Motorwerks breached the shareholder agreement by failing to make distributions to Drewitz or by denying Drewitz access to Motorwerks' books and records while he remained a shareholder . . ."; and (3) "Motorwerks engaged in behavior that was unfairly prejudicial to Drewitz while he remained a shareholder, entitling Drewitz to purchase of his shares at their fair value under Minn. Stat. § 302A.751." *Id.*

Following remand, Motorwerks moved to amend its answer, alleging anticipatory breach by Drewitz because he filed the 1999 complaint asking for fair value for his stock based on the employment agreement. The district court granted leave to amend. The district court decided the first of the remanded issues on November 15, 2007, ruling that Motorwerks had made a conforming tender on December 23, 2005. The district court bifurcated trial on the remaining two remanded issues, reasoning that determination of the breach of the shareholder agreement required a jury trial and that the section 302A.751 issue was a question of law for the court, to be tried after the jury verdict.

A jury trial on the breach of contract claim was held on February 9 and 12, 2009. By special verdict, the jury found that Drewitz had anticipatorily breached the contract

but had retracted the breach on December 23, 2005, and that Motorwerks' performance under the shareholder agreement was excused by reason of equitable estoppel after January 29, 2003, because Drewitz's attorney made a settlement proposal on that date. Based on the verdict, the district court dismissed the breach of contract claim. Further, the court concluded that because Drewitz anticipatorily breached the contract, Motorwerks was excused from performance under the contract and therefore did not engage in conduct unfairly prejudicial to Drewitz. Thus, the court concluded that Drewitz was not entitled to fair value for his shares under Minn. Stat. § 302A.751.

Drewitz moved for judgment as a matter of law (JMOL) or a new trial. The district court denied this motion on July 1, 2009, and this appeal followed. Motorwerks filed a notice of review.

Standard of Review

We will not set aside a jury verdict if it can be sustained on any reasonable theory based on the record evidence. *Longbehn v. Schoenrock*, 727 N.W.2d 153, 159 (Minn. App. 2007). JMOL is granted “only in those unequivocal cases where (1) in the light of the evidence as a whole, it would clearly be the duty of the trial court to set aside a contrary verdict as being manifestly against the entire evidence or where (2) it would be contrary to the law applicable to the case.” *Jerry's Enters., Inc. v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, 711 N.W.2d 811, 817 (Minn. 2006) (quotation omitted). When a matter is remanded by an appellate court to the district court, the district court is bound by the appellate court's remand instructions. *Mattson v. Underwriters at Lloyds of London*, 414 N.W.2d 717, 720 (Minn. 1987).

Anticipatory Breach

On remand, the district court permitted Motorwerks to amend its answer to assert anticipatory breach as a defense. In its amended answer, Motorwerks claimed that Drewitz anticipatorily breached the shareholder agreement by beginning the 1999 lawsuit on the employment agreement and “refusing to sell his Motorwerks’ shares to Motorwerks for the price set forth in the Shareholder Agreement.” Without deciding whether permitting amendment of the answer was consistent with the supreme court’s remand order, we conclude that the jury’s special verdict was manifestly against the record evidence and must be set aside.

“[A]n unconditional repudiation of a contract, either by words or acts, which is communicated to the other party prior to the time fixed by the contract for . . . performance constitutes an anticipatory breach.” *In re Haugen*, 278 N.W.2d 75, 79 n. 6 (Minn. 1979). An anticipatory breach occurs when a party to a contract makes an unqualified repudiation of the contract; mere refusal does not eliminate the need to make a tender. *Space Ctr., Inc. v. 451 Corp.*, 298 N.W.2d 443, 450 (Minn. 1980). If the refusal to perform is not unconditional and if performance is still possible, there is no anticipatory breach. *State ex rel. Friends of the Riverfront v. City of Minneapolis*, 751 N.W.2d 586, 593 (Minn. App. 2008), *review denied* (Minn. Sept. 23, 2008). Further, “[w]ithout first tendering performance, a party cannot justify nonperformance by the other party’s failure to perform.” *Bell v. Olson*, 424 N.W.2d 829, 832 (Minn. App. 1988).

In the 1999 complaint, Drewitz demanded fair value rather than book value for his shares. But until a conforming tender was made, Drewitz's performance was not required under the shareholder agreement and full performance was possible. *Compare Friends of the Riverfront*, 751 N.W.2d at 593 (noting that in case involving repudiation of lease of land, a plan to repudiate is not unconditional repudiation, because performance was still possible) and *Space Ctr.*, 298 N.W.2d at 450 (stating that vendor's irrevocable loss of title precluded it from conveying marketable title and therefore performance was impossible).

Viewing the record as a whole, we conclude that the jury's special verdict was manifestly contrary to the evidence and that the district court erred by denying Drewitz's motion for JMOL on the issue of anticipatory breach.

Equitable Estoppel

The jury found that Motorwerks was excused from performance after January 29, 2003, by reason of equitable estoppel. On January 29, 2003, Drewitz's counsel sent a letter to Motorwerks's counsel, which the district court admitted into evidence. Drewitz argues that the district court erred in denying his motion for JMOL because this letter was an offer of compromise inadmissible under Minn. R. Evid. 408 and the district court erred by admitting the letter.

Rule 408 bars evidence of "furnishing or offering or promising to furnish or . . . accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount" if the evidence is used to prove liability or invalidity of the claim. The rule also bars

evidence of statements made or of conduct occurring during negotiations. *Id.* But the rule does not exclude “otherwise admissible” evidence that occurs during negotiations or evidence “offered for another purpose,” such as proof of bias or prejudice, negation of undue delay, or obstruction of a criminal investigation or prosecution. *Id.*

Because rule 408 is a rule of exclusion, the district court does not have discretion to admit evidence that falls within the purview of the rule. *C.J. Duffey Paper Co. v. Reger*, 588 N.W.2d 519, 524 (Minn. App. 1999), *review denied* (Minn. Apr. 28, 1999). “Evidence violates the rule when it (1) constitutes a compromise or an offer to compromise a claim that is disputed as to either validity or amount, (2) is offered to prove liability [or invalidity of the claim], and (3) is not offered for another legitimate purpose.” *In re Buckmaster*, 755 N.W.2d 570, 577 (Minn. App. 2008). A compromise includes elements of dispute, negotiation, and valuable consideration. *Id.* Consideration for a compromise can be found when one party “voluntarily assumes an obligation on condition that the other party act or forebear to act.” *Id.* at 578.

The January 29, 2003 letter followed a period of negotiations between the parties about book value and interest, the amount of which the parties disputed. The letter asserts Drewitz’s status as a shareholder but states that Drewitz intends to compromise those rights by agreeing to book value and a certain rate of interest. This is a letter of compromise, including the elements of dispute, negotiation, and consideration.

Motorwerks offered the letter as substantive evidence that Drewitz waived his rights to shareholder distributions. Thus, the letter was used as substantive evidence of the invalidity of the claim, the second requirement for exclusion under Rule 408.

Finally, Motorwerks asserts that the letter was offered for another legitimate purpose, apparently to estop Drewitz from claiming a right to shareholder distributions. “Estoppel is an equitable doctrine that prevents a party from taking unconscionable advantage of his own wrong by asserting his strict legal rights.” *Dakota v. BWBR Architects, Inc.*, 645 N.W.2d 487, 493 (Minn. App. 2002) (quotation omitted), *review denied* (Minn. Aug. 20, 2002). The party asserting estoppel must show that he or she reasonably relied on statements made by the other party, to the first party’s detriment. *Id.* Thus a party who forgoes a suit in reliance on the other party’s assurances that corrective action would be taken may assert estoppel. *Id.*

It is difficult to discern how Motorwerks relied to its detriment on the statements in the January 29, 2003 letter. Motorwerks did not forego a lawsuit, or compromise its offer, and it took a leisurely seven months to reply to the letter, at which point Motorwerks offered another non-conforming tender.

Settlement evidence is “inherently prejudicial.” *Buckmaster*, 755 N.W.2d at 580. There is no basis in the record for the jury’s equitable estoppel finding other than this improperly admitted letter. When there has been an error of law, as in the admission of this evidence, JMOL is an appropriate remedy. *Jerry’s Enters.*, 711 N.W.2d at 817. We therefore conclude that the district court erred by denying Drewitz’s motion for JMOL on the issue of equitable estoppel.

Conforming Tender

Drewitz argues that the district court also erred in denying his motion for JMOL to reverse the court’s determination that a conforming tender had been made on December

23, 2005. Drewitz asserts that a conforming tender under the shareholder agreement required the tender of the proper book value amount, interest, a certified or bank check, and payment within 90 days of termination. When the supreme court remanded this matter to the district court with specific instructions to determine whether there had been a conforming tender, it was well aware that more than 90 days had passed since Drewitz's employment terminated. The remand order to determine the date of conforming tender in *Drewitz III* would be illogical unless the supreme court reasoned that tender was still possible, even if untimely. It would be a perverse result if the parties were never able to sever their relationship because the original period of time for tender had passed.

In an earlier case, the supreme court excused a technically nonconforming tender by reasoning that the plaintiff had not been prejudiced by substitution of a personal check drawn on an account with money in it for the required cashier's check. *Southgate, Inc. v. Ecklin*, 207 N.W.2d 729, 730 (Minn. 1973). The supreme court referred to "adherence to out-of-date technicalities which we believe often frustrated commercial transactions." *Id.* In this case, adherence to the 90-day tender period would render this matter insoluble.

Here, the district court's conclusion that a conforming tender was made on December 23, 2005, is supported by the evidence, and the court's denial of JMOL on this issue was not therefore error. We affirm the district court's determination that Drewitz's shareholder status ended on December 23, 2005.

Remand Order

In light of our decision, we decline to address Drewitz's claims of error in support of his motion for a new trial. Equally, we decline to address Motorwerks' claim by notice of review that it was prevented from presenting the defense of waiver, because Motorwerks has not directed us to a court order that barred Motorwerks from offering such testimony.

We reverse the district court's order denying JMOL on the issues of anticipatory breach and equitable estoppel and remand to the district court for determination of the issues set forth by the supreme court in *Drewitz III*:

Whether Motorwerks breached the shareholder agreement by failing to make distributions to Drewitz or by denying Drewitz access to Motorwerks' books and records while he remained a shareholder, and whether Motorwerks engaged in behavior that was unfairly prejudicial to Drewitz while he remained a shareholder, entitling Drewitz to purchase of his shares at their fair value under Minn. Stat. § 302A.751.

728 N.W.2d at 241.

Affirmed in part, reversed in part, and remanded.