STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0604

John S. Drewitz,
Appellant,

vs.

Motorwerks, Inc., et al.,
Respondents.

Filed November 13, 2012
Affirmed in part, reversed in part, and remanded
Harten, Judge[*]

Hennepin County District Court
File No. 27-CV-04-8927

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

Michael H. Streater, Briggs and Morgan, P.A., Minneapolis, Minnesota; and

Richard T. Ostlund, Brooke D. Anthony, Anthony Ostlund Baer & Louwagie P.A., Minneapolis, Minnesota (for respondents)

Considered and decided by Schellhas, Presiding Judge; Kirk, Judge; and Harten, Judge.

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

U N P U B L I S H E D O P I N I O N

HARTEN, Judge

Appellant, a former employee-shareholder of respondent corporation, challenges the district court's holding on remand that (1) respondent did not engage in unfairly prejudicial behavior against appellant within the meaning of Minn. Stat. § 302A.751, subd. 1(b)(3) (1998); (2) appellant is not entitled to attorney fees under Minn. Stat. § 302A.751, subd. 4 (2010), or Minn. Stat. § 302A.467 (2010); and (3) respondent did not breach the parties' shareholder agreement. Because the district court correctly determined that there was no unfairly prejudicial behavior and that appellant is not entitled to attorney fees, we affirm in part; but because we conclude that respondent did breach the shareholder agreement, we reverse the district court's decision to the contrary and remand for calculation of appellant's damages.

FACTS

Appellant John Drewitz and his employer, respondent Motorwerks, Inc., negotiated two agreements: an employment agreement, whereby Motorwerks agreed to employ Drewitz as a vice president and general manager from January 1995 until March 1999; and a shareholder agreement, whereby Drewitz could buy up to 50% of Motorwerks's shares and, if Drewitz were terminated for any reason, Motorwerks could repurchase his shares for book value, with unspecified interest. Drewitz purchased a 30% share in Motorwerks.

In December 1998, Motorwerks informed Drewitz that his employment would end when his employment agreement expired. In March 1999, the employment agreement expired, and Motorwerks stopped making shareholder distributions to Drewitz.

In January 1999, Drewitz brought an action against Motorwerks for a fair-value buyout of his shares. The district court granted Motorwerks's motion for summary judgment, and we affirmed. *Drewitz v. Walser*, No. C3-00-1759, 2001 WL 436223 (Minn. App. 1 May 2001) (holding that shareholder agreement requires Drewitz to sell his shares to Motorwerks at book value and that judicial intervention under Minn. Stat. § 302A.751 was not warranted), *review denied* (Minn. 27 June 2001) (*Drewitz I*). The parties continued negotiating the amount of the interest due on Drewitz's shares. In 2003, Motorwerks made a settlement proposal and tendered the amount agreed to be the book value ($355,862) plus seven percent interest, but the tender was nonconforming so Drewitz returned the check.

In 2004, Drewitz brought this action, seeking ongoing shareholder distributions because withholding his distributions was a breach of the shareholder agreement and a fair-value buyout of his shares under Minn. Stat. § 302A.751 (1998), which provided that remedy for Motorwerks's alleged unfairly prejudicial behavior to Drewitz while he was a shareholder. The district court dismissed the complaint, and Drewitz appealed. In *Drewitz v. Motorwerks, Inc.*, 706 N.W.2d 773 (Minn. App. 2005), *review granted* (Minn. 14 Feb. 2006) (*Drewitz II*), we affirmed the district court's determination that res judicata barred Drewitz's claim for a fair-value buyout under Minn. Stat. § 302A.751 but reversed the determination that res judicata and lack of shareholder status barred his claim for breach of the shareholder agreement and his motion for ongoing shareholder distributions. Drewitz appealed to the supreme court.

On 23 December 2005, Motorwerks tendered the book value of Drewitz's shares with seven percent interest.

On review of *Drewitz II*, the supreme court in *Drewitz v. Motorwerks, Inc.*, 728 N.W.2d 231 (Minn. 2007) (*Drewitz III*), concluded that Drewitz's shareholder status did not end with the termination of his employment but that a conforming tender of the book value of his shares would have terminated it if such a tender had occurred and that res judicata did not bar Drewitz's claims for ongoing shareholder distributions and for a fair-value buyout of his shares. The case was remanded to the district court for determination of three issues: (1) whether Motorwerks had made a conforming tender; (2) whether Motorwerks had breached the shareholder agreement by failing to make ongoing distributions; and (3) whether Motorwerks engaged in unfairly prejudicial behavior to Drewitz while he was a shareholder.

On remand, the parties brought cross motions for summary judgment. On the first issue, the district court found that the 23 December 2005 tender was a conforming tender, which terminated Drewitz's shareholder status; the district court also granted Motorwerks's motion for leave to file an amended answer adding anticipatory breach to its defenses against his breach of contract claim. To resolve the second and third issues, the district court ordered a bifurcated trial: a jury trial on Drewitz's breach of contract claim, and, if breach was found, a bench trial on his claim of unfairly prejudicial behavior.

The jury found that Drewitz anticipatorily breached the shareholder agreement but retracted his breach on 23 December 2005 and that Motorwerks's failure to distribute shares as provided in the shareholder agreement was justified by equitable estoppel after

29 January 2003, the date on which Motorwerks made a settlement proposal. Based on the jury's verdict, the district court dismissed the breach of the shareholder agreement claim and concluded that Motorwerks had not engaged in unfairly prejudicial behavior and that Drewitz was not entitled to the fair value of his shares under Minn. Stat. § 302A.751. Drewitz moved for a new trial or judgment as a matter of law (JMOL). His motion was denied, and he appealed.

In *Drewitz v. Motorwerks, Inc.*, No. A09-1529, 2010 WL 1541436 (Minn. App. 20 April 2010), *review denied* (Minn. 20 July 2010) (*Drewitz IV*), we affirmed the denial of Drewitz's motion for JMOL on whether Motorwerks had made a conforming tender that terminated his shareholder status on 23 December 2005; reversed the denial of his motion for JMOL on the anticipatory breach claim, finding that the jury's verdict was manifestly contrary to the evidence, and the equitable estoppel claim, finding that evidence in support of that claim was erroneously admitted. We also remanded the remaining two issues previously remanded by the supreme court in *Drewitz III*, to-wit: whether Motorwerks breached the shareholder agreement by not making distributions to Drewitz between 1999 and 2005, and whether Motorwerks had engaged in unfairly prejudicial behavior that entitled Drewitz to a fair-value buyout under Minn. Stat. § 302A.751.

After a bench trial, the district court issued the order that is the subject of this appeal. The order was based on three conclusions: (1) Motorwerks did not engage in behavior unfairly prejudicial to Drewitz while he was a shareholder, so Drewitz is not entitled to a fair-value buyout of his shares under Minn. Stat. § 302A.751; (2) Drewitz and Motorwerks were equally guilty of the conduct on which statutory attorney fees would be

awarded, so Drewitz is not entitled to attorney fees; and (3) Motorwerks did not breach the shareholder agreement by not making shareholder distributions to Drewitz between March 1999 and December 2005, so Drewitz is not entitled to the value of those distributions.

Drewitz challenges these three conclusions.

D E C I S I O N

1. Fair-Value Purchase Under Minn. Stat. § 302A.751

The interpretation of a statute presents a question of law, which we review de novo. *Swenson v. Nickakboine*, 793 N.W.2d 738, 741 (Minn. 2011).

Drewitz argues that he is entitled to the fair-value buyout of his shares, rather than the book-value buyout he received. Minn. Stat. § 302A.751 provides in relevant part that "[a] court may grant any equitable relief it deems just and reasonable . . . [i]n an action by a shareholder when it is established that . . . those in control of the corporation have acted in a manner unfairly prejudicial toward [a shareholder]"; that, in such an action, upon a shareholder's motion, the court may "order the sale . . . of all [the shareholder's] shares of the corporation"; and that "[t]he purchase price of any shares so sold shall be the fair value of the shares . . . ." Minn. Stat. § 302A.751, subds. 1(b)(3), 2 (2010). The statute confers discretion on the district court, saying it "*may* grant any equitable relief it deems just and reasonable" and "*may* . . . order the sale" of all a shareholder's shares to the corporation, but mandates that, in such a sale, "the purchase price . . . *shall be* the fair value of the shares." *Id.* (emphasis added); *see also* Minn. Stat. § 645.44, subds. 15, 16 (providing that "may" is permissive and "shall" is mandatory).

Drewitz claims that he is entitled to equitable relief, i.e., a fair-value buyout of his shares, because Motorwerks unfairly prejudiced him by its nonconforming tender and delay in purchasing his shares and by denying him his governance rights while he was a shareholder.

A. Nonconforming tender and delay

The district court stated:

> The delay in arriving at an agreed book value was caused equally by the parties and resulted in a $9,277.00 adjustment. The delay reflects the parties' fulfillment of the duty which all shareholders owe to one another to act in an "honest, fair and reasonable manner." Motorwerks had to continue its operations while the parties worked to establish agreed book value and resolve their differences as to an applicable interest rate.
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> . . . .
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> Based upon the credibility of the testimony of the parties and witnesses, although the length of delay was unfortunate . . . Drewitz [and] Motorwerks . . . at all times, acted in good faith, and in an honest, fair and reasonable manner, in attempting to resolve this matter. In good faith, the parties arrived at a revised book value but remained mistaken as to the law to determine the applicable interest rate. The good faith mutual disagreement between the parties and the added complication of protracted litigation as to the applicable interest rate [to] be applied to book value does not constitute unfairly prejudicial conduct within the meaning of Section 302A.751, subd. 1 [(b)](3) and does not rise to the level of prejudice to trigger equitable relief.

We defer to the district court's determinations as to the credibility of the parties and witnesses. *Goldman v. Greenwood*, 748 N.W.2d 279, 284 (Minn. 2008).

Drewitz argues that the district court erred in stating that both parties disputed the interest rate because "[t]he rate is determined by state statute." *See* Minn. Stat. § 334.01

(providing six percent interest on legal indebtedness). But the district court also found that, in 2002, "Drewitz . . . arranged for a meeting with Motorwerks representatives . . . in an attempt to resolve the interest rate issue. Drewitz . . . continued to request an interest rate of 7% per annum, compounded." The record supports this finding: a 29 January 2003 letter from Drewitz's attorney to Motorwerks's attorney states that the parties, without their attorneys, had "reached . . . an agreed figure . . . plus 7% interest per annum compounded. This agreement was reached on a handshake . . ." and "it is [Drewitz's] desire to resolve the entire matter with a payment using . . . 7% interest per annum compounded annually . . . ." Drewitz does not dispute the district court's findings that he sought and ultimately received 7% interest. His argument that Motorwerks unfairly prejudiced him by delaying its agreement to an interest rate greater than the 6% provided by statute is unpersuasive and does not entitle him to equitable relief for "unfairly prejudicial" acts.

B. Drewitz's governance rights

Drewitz also argues that Motorwerks unfairly prejudiced him by failing to notify him or obtain his consent when, before December 2005, it issued new shares to a new shareholder, recapitalized, and negotiated the sale of Motorwerks. He relies on *Berreman v. West Publishing Co.*, 615 N.W.2d 362, 371-72 (Minn. App. 2000), *review denied* (Minn. 26 Sept. 2000), for the proposition that a corporation has a duty to disclose material information.

Berreman noted that "[t]he term 'unfairly prejudicial' [in Minn. Stat. § 302A.751, subd. 1] should be liberally construed," 615 N.W.2d at 373, and defined the term:

"unfairly prejudicial conduct . . . is conduct that frustrates the reasonable expectations of shareholders in their capacity as . . . officers or employees of a closely held corporation." *Id.* at 374. Berreman was an employee-shareholder who, like Drewitz, purchased shares subject to an agreement that, at the termination of his employment, the corporation had the option of repurchasing the shares at book value. *Id.* at 365-66. Shortly after repurchasing Berreman's shares at book value upon his retirement, the corporation decided to accept an offer to be acquired by a corporation that paid about five times per share what Berreman had received. *Id.* at 366-67. Berreman claimed that not informing him of the imminent acquisition was an unfairly prejudicial act within the meaning of Minn. Stat. § 302A.751, subd. 1(b)(3). His claim was rejected.

> [In closely held corporations, a]t will employees who are allowed to buy stock subject to a buy-back-on-termination agreement may have lower expectations [than other shareholders.] Berreman did not have a reasonable expectation that he would be informed of any speculative discussions [the corporation's] directors had about the financial future of [the corporation.] Therefore, [the corporation's] conduct was not unfairly prejudicial to Berreman, and he is not entitled to equitable relief under [Minn. Stat. § 302A.751, subd. 1(b)(3)].

Id. at 375 (citations omitted). The district court applied *Berreman*:

> [Like Berreman, Drewitz w]as an at-will employee who [was] 'allowed to buy stock subject to a buy-back-on-termination agreement [and] may have [had] lower expectations' and may have bargained for the right to be a shareholder only while employed. . . . Drewitz had no reasonable expectation that he would have been informed of shareholder or Board of Director meetings, . . . be involved in recapitalization of the company, be informed of shareholder transfers, or be informed of a possible sale six or more years after [his] termination. The failure of Motorwerks . . . to disclose these transactions was

> not unfairly prejudicial to Drewitz and does not entitle him to equitable relief.

Moreover, "a claim of . . . unfairly prejudicial conduct may not be predicated on the failure to fulfill a minority shareholder's subjective hopes and desires in joining the venture." *Gunderson v. Alliance of Computer Prof'ls, Inc.*, 628 N.W.2d 173, 191 (Minn. App. 2001) (quotation omitted), *review granted* (Minn. 24 July 2001), *and appeal dismissed* (Minn. 17 Aug. 2001). "That the valuation method the shareholders agreed on resulted in a contractual purchase price lower than the appraised value of [the shareholder's] stock does not, by itself, establish a claim for breach of fiduciary duty." *Id.* at 187. Like the shareholder in *Gunderson*, Drewitz received the value he had agreed on when his shares were purchased. The district court did not err in concluding that Motorwerks's failure to notify Drewitz or obtain his consent to business decisions taken as much as six years after his employment had ended was not unfairly prejudicial to him.

We agree with the district court that neither Motorwerks's delay in purchasing Drewitz's shares nor its failure to inform him of business decisions taken after his employment ended was an unfairly prejudicial act that would entitle him to relief under Minn. Stat. § 302A.751, subd. 1(b)(3).

2. Attorney Fees

Drewitz argues that he is entitled to attorney fees under Minn. Stat. § 302A.751, subd. 4 (2010) (providing that, if a court finds that a party has acted "arbitrarily, vexatiously, or otherwise not in good faith," it may award attorney fees against that party), or Minn. Stat. § 302A.467 (2010) (providing that, if a corporation violates Chapter 302A, a

court may award attorney fees against the corporation in an action brought by a shareholder). The award is within the discretion of the district court. *See* Minn. Stat. § 645.44, subd. 15 ("'May' is permissive.").

Both statutes imply that an attorney fee award is inappropriate when the parties are equally guilty of the conduct that would be the basis for the award. The district court observed that:

> [I]f it could be found that [Motorwerks] engaged in behavior unfairly prejudicial to Drewitz or which frustrated Drewitz's reasonable expectations, it must also be found that Drewitz equally engaged in behavior unfairly prejudicial to [Motorwerks] or equally engaged in conduct which frustrated [Motorwerks's] reasonable expectations. . . . Either all parties' actions in failing to reach an agreement as to book value and interest were unconscionable or none were unconscionable.

Neither the substantive evidence nor the extensive procedural history of this lawsuit indicates that the fault was all on the side of Motorwerks. The district court did not err in dismissing Drewitz's request for attorney fees.

3. Breach of Shareholder Agreement

"Absent ambiguity, the interpretation of a contract is a question of law." *Roemhildt v. Kristall Dev., Inc.*, 798 N.W.2d 371, 373 (Minn. App. 2011), *review denied* (Minn. 19 July 2011). This court reviews a question of law de novo. *In re Estate of Barg*, 752 N.W.2d 52, 63 (Minn. 2008).

The parties' Shareholder Agreement provided that:

> For as long as . . . Drewitz [is a shareholder], the Company shall annually distribute cash to each Shareholder, to the extent of Company earnings in the year under consideration, in an amount not less than the sum required for each Shareholder to

> pay the income tax liability attributable to their respective proportionate share of the Company's earnings taxable to its shareholders. Such distributions shall be made in proportion to stock ownership as of the record date of distribution . . . .

Like the supreme court and this court, the district court noted that "[t]he parties agree that the Shareholder Agreement . . . [is] not ambiguous." *Drewitz III*, 728 N.W.2d at 237; *Drewitz II*, 706 N.W. 2d at 783. When a written agreement is unambiguous, "[t]he plain and ordinary meaning of the contract language controls . . . ." *Bus. Bank v. Hanson*, 769 N.W.2d 285, 288 (Minn. 2009). The plain and ordinary meaning of the shareholder agreement is that distributions would be made to Drewitz as long as he remained a shareholder.

Drewitz was a 30% shareholder until Motorwerks's conforming tender ended his shareholder status on 23 December 2005. *Drewitz IV*, 2010 WL 1541436 at *6. He argues that Motorwerks breached the shareholder agreement by excluding him from shareholder distributions before that date and that he is entitled to 30% of the distributions made between 1999 and 2005.[1]

The district court concluded that Drewitz was not entitled to distributions after 1999. This conclusion was based in part on *Miller Waste Mills, Inc. v. Mackay*, 520 N.W.2d 490 (Minn. App. 1994), *review denied* (Minn. 14 Oct. 1994). *Miller* advanced the principle supporting a corporation's "equitable ownership" of shares it had a contractual right to repurchase, but had not yet repurchased. *Id*. at 495. But *Miller* is distinguishable.

[1] Shareholder distributions during this period were $13,202,201; Drewitz's 30% share is $3,376,590. He also seeks $3,509,288 in interest accrued at 6% by 30 June 2012 plus $1,085.11 per day after 30 June 2012. *See* Minn. Stat. § 334.01 (providing 6% interest on legal indebtedness).

In that case, after two shareholders died, the corporation scheduled a closing date for its purchase of their shares from their estates. *Id.* at 493. Two weeks before the closing date, two other shareholders attempted to enter into a voting agreement with the deceased shareholders' estates and vote the combined shares contrary to the corporation's interests. *Id.* "When a corporation exercises a valid contractual repurchase option, . . . the corporation becomes the equitable owner of the stock, and the shares can not then be voted contrary to the equitable owner's interests." *Id.* at 495. In the instant case, there is no evidence that Drewitz attempted to join any other shareholder and vote their combined shares contrary to Motorwerks's interests or to vote his own shares contrary to Motorwerks's interests. Thus, *Miller* does not preclude the distributions to Drewitz during the time he remained a shareholder.

Another basis for the district court's conclusion that Motorwerks did not breach the shareholder agreement was its finding that Drewitz did not have a reasonable expectation of post-termination distributions. To make that finding, the district court relied on Minn. Stat. § 302A.751, subd. 3a: "any written agreements, including . . . buy-sell agreements, between . . . shareholders and the corporation are presumed to reflect the parties' reasonable expectations concerning matters dealt with in the agreements."

But this language was taken out of context. The subdivision does not concern the construction of the parties' written agreements; it concerns whether the parties are entitled to equitable, not contractual, relief. In its entirety, it reads:

> In determining whether to order equitable relief, dissolution, or a buy-out, the court shall take into consideration the duty which all shareholders in a closely held corporation owe one

> another to act in an honest, fair, and reasonable manner in the operation of the corporation and the reasonable expectations of all shareholders as they exist at the inception and develop during the course of the shareholders' relationship with the corporation and with each other. For purposes of this section, any written agreements, including employment agreements and buy-sell agreements, between or among shareholders or between or among one or more shareholders and the corporation are presumed to reflect the parties' reasonable expectations concerning matters dealt with in the agreements.

Id. Thus, the parties' reasonable expectations are to be inferred from their written agreements; the meanings of the agreements are not to be inferred from the parties' expectations, reasonable or otherwise. *See Bus. Bank*, 769 N.W.2d at 288 (when the language of a contract is not ambiguous, its plain meaning controls). Even if Drewitz did not expect to receive distributions after his termination, that expectation is irrelevant to applicable provisions of the shareholder agreement.

Moreover, the language of the shareholder agreement supports the contrary inference, i.e., that Drewitz did expect to receive shares as long as he remained a shareholder: it said that, for as long as Drewitz was a shareholder, Motorwerks would "annually distribute cash" to him. While the shareholder agreement could have provided that employee-shareholders would not receive distributions after termination, it did not do so.[2] The shareholder agreement provided that shareholders would receive annual distributions, and it was breached by Motorwerks's failure to make distributions to Drewitz while he was a shareholder.

[2] The employment agreement, in contrast, provided that a terminated employee's option to purchase shares "or in any other manner to acquire any additional Shares . . . shall be forever forfeited and of no further force or effect."

The district court correctly concluded that Drewitz is not entitled to an equitable fair-value buyout or to attorney fees, but erred in concluding that the shareholder agreement was not breached by excluding him from distributions. We affirm the denial of equitable relief and attorney fees, but reverse the conclusion that Drewitz was not entitled to distributions from 1999 to 2005 and remand for a calculation of his associated damages.

Affirmed in part, reversed in part, and remanded.