

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

* * * *

JAMES TODD and TERI TODD,)	ORDER DIRECTING ISSUANCE OF
Plaintiffs and Appellees,)	JUDGMENTS OF PARTIAL
)	AFFIRMANCE AND PARTIAL
vs.)	REVERSAL
)	
RICHARD W. KIEFFER AND)	#30165
RONALD DEAN HOWIE,)	
a/k/a Ronnie Howie,)	
Defendants and Appellants.)	

June 9, 2022 Order Denying Motion to Permit Late Filing of Responses
to Requests for Admission

The Court considered the briefs filed in the above-entitled matter, together with the appellate record, and concludes pursuant to SDCL 15-26A-87.1(C) that it is manifest on the face of the briefs and the record that the circuit court abused its discretion by entering the June 9, 2022 order, denying the motion to allow late filing of responses to requests for admission, by misapplying the two-part test from *Velocity Invs., LLC, v. Dybvig Installations, Inc.*, 2013 S.D. 41, ¶ 12, 833 N.W.2d 41, 44. The record clearly demonstrates that "the presentation of the merits of the action will be subverted" by permitting Kieffer and Howie to provide belated responses to the requests for admission and that permitting the responses will not "prejudice [the Todds] in maintaining [the] action . . . on the merits." *Id.* (second alteration in original) (quoting SDCL 15-6-36(b)).

Kieffer's and Howie's proposed responses include denials to certain requests for admission, and based on the record, there are questions of fact and law that require resolution on the merits. In particular, questions of fact and law exist as to whether Kieffer and the Todds entered into an oral contract for liquidated damages, whether the Todds' claims against Kieffer and Howie sound in contract or tort and the potential remedies available, whether the Todds are seeking duplicate damages by requesting both liquidated damages arising from the alleged oral contract and compensatory damages, whether treble damages are appropriate as to both Kieffer and Howie pursuant to SDCL 21-3-6, the date when Howie came into possession of the land and how much of it he possessed, and whether Howie can be held jointly and severally liable for the damages the Todds seek against Kieffer.

As to prejudice, the Todds failed to make a sufficient showing that any evidence or witnesses became unavailable, or that their ability to prove their claims was diminished or impacted during the period between October 11, 2021, when their requests for admission were deemed admitted, and May 10, 2022, when Appellants moved to submit late responses. Further, discovery has not closed, and a trial date has not been set. The Todds have thus failed to demonstrate on this record "that [they] would have difficulty proving [their] case [because of] the withdrawal of admissions or that the answer to requests for admissions would come too near a trial date.

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[The Todds have failed] to demonstrate the prejudice required by the [rule]." *Id.* ¶ 13, 833 N.W.2d at 45.

October 7, 2022 Summary Judgment

Based upon the erroneous denial of the motion to allow late filing of responses to requests for admission pursuant to SDCL 15-6-36, and based upon the record, we conclude pursuant to SDCL 15-26A-87.1(A) that it is manifest on the face of the briefs and the record that a portion of Kieffer's appeal of the circuit court's entry of summary judgment is without merit and should be summarily affirmed as no genuine issues of material fact exist and the Todds are entitled to judgment as a matter of law, in part, against Kieffer. The Court further concludes pursuant to SDCL 15-26A-87.1(C) that it is manifest on the face of the briefs and the record that the circuit court erred in entering summary judgment for the Todds on a portion of their claims against Kieffer individually, in entering summary judgment on Kieffer's counterclaim, and by entering summary judgment against Howie, jointly and severally with Kieffer.

Claims Against Kieffer

The circuit court entered summary judgment determining as a matter of law that the Todds sustained compensatory damages of \$423,531.11 arising from their claims against Kieffer and Howie. In their motion for summary judgment the Todds presented evidence showing that they sustained \$203,631.11 in damages as a result of Kieffer's breach of the lease and \$3,500 in personal property damages. Kieffer failed to deny the claims for breach and this

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amount of damages in his proposed responses to requests for admission or in his resistance to the motion for summary judgment as required by SDCL 15-6-56. This Court summarily affirms the entry of summary judgment for damages in favor of the Todds and against Kieffer in the total amount of \$207,131.11.

The remaining damages alleged by the Todds arise from their claim for liquidated damages, pursuant to an alleged oral agreement with Kieffer. The circuit court erred in determining as a matter of law that Todds were entitled to summary judgment on the Todds' claims for liquidated damages as there are genuine issues of material fact concerning the existence of the alleged oral agreement between the Todds and Kieffer, because Kieffer disputes ever agreeing to the liquidated damages amounts, and there are issues of fact and law whether this amounts to duplicate damages.

The circuit court also erred by entering summary judgment for the Todds against Kieffer on their claim for treble damages alleging that Kieffer forcibly excluded them from possession of the land. See SDCL 21-3-6. Although there is no dispute in the record that Kieffer brandished a gun in the presence of the Todds and made threats, the Todds presented facts showing that they continued to possess the real property thereafter and did not attempt to terminate the lease for Kieffer's alleged breaches until nearly two years thereafter. Genuine issues of material fact exist as to whether the Todds were "forcibly" excluded from the real property and are entitled to trebled damages under SDCL 21-3-6.

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The circuit court also erred in granting summary judgment, sua sponte, on Kieffer's claim for back rent of \$106,000 and other damage claims, as the Todds did not move for summary judgment on the counterclaim.

Claims Against Howie

As to the claims against Howie, jointly and severally with Kieffer, the circuit court erred in granting summary judgment against Howie as a joint tortfeasor with Kieffer, as genuine issues of material fact exist on this claim and the Todds failed to demonstrate that they are entitled to judgment as a matter of law against Howie as a joint tortfeasor. The Todds also failed to demonstrate that they have any contractual claims against Howie.

Joint Representation of Kieffer and Howie

It also appears to this Court that a concurrent conflict of interest may exist in the joint representation of Kieffer and Howie based upon the nature of the Todds' claims against them, and because the relief Howie seeks from liability as a joint tortfeasor is directly adverse to the interest of Kieffer. See SDCL chap. 16-18 Appx., South Dakota Rule of Professional Responsibility 1.7(a)(1).

Now, therefore, it is

ORDERED that a judgment reversing the June 9, 2022 order of the circuit court be entered forthwith and that Appellants' motion to allow late filing of responses to requests for admission be granted.

IT IS FURTHER ORDERED that a judgment partially affirming the circuit court's entry of summary judgment in favor of the Todds

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and against Kieffer in the amount of \$207,131.11 is entered forthwith, subject to any setoff claimed by Kieffer in his counterclaim against the Todds.

IT IS FURTHER ORDERED that a judgment reversing the remainder of the October 7, 2022 Summary Judgment Order of the circuit court, in part as to Kieffer and in full as to Howie, and remanding this case be entered forthwith.

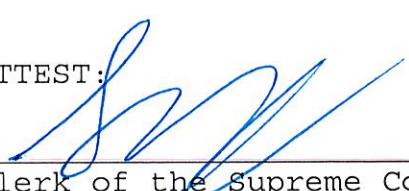
IT IS FURTHER ORDERED that defense counsel shall make a showing to the circuit court on remand, before continuing the dual representation of Kieffer and Howie in this action, why such representation is proper pursuant to South Dakota Rule of Professional Responsibility 1.7(b)(1)-(4).

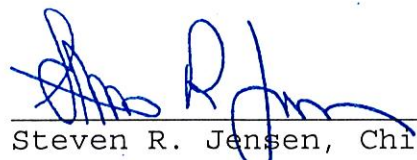
Appellees' motion for attorney fees is denied.

DATED at Pierre, South Dakota, this 6th day of July, 2023.

BY THE COURT:

ATTEST:


Clerk of the Supreme Court
(SEAL)


Steven R. Jensen, Chief Justice

PARTICIPATING: Chief Justice Steven R. Jensen and Justices Janine M. Kern, Mark E. Salter, Patricia J. DeVaney and Scott P. Myren.

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED

JUL - 6 2023


Clerk