

IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

APPEAL NO. 30743

JAMES TODD and TERI TODD,

Plaintiffs and Appellees

vs.

RICHARD W. KIEFFER,

Defendant and Appellant

Appeal from the

Fourth Judicial Circuit

Meade County, South Dakota

The Honorable Eric Strawn, Circuit Court Judge

APPELLANTS' BRIEF

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PRELIMINARY STATEMENT

For the convenience of the Court, Appellant-Defendant, Richard W. Kieffer will be referred to as “Kieffer;” Appellees will be referred to by name; reference to the trial transcript will be cited as “TT followed by the appropriate page(s); and Documents from the Appendix are cited as “APP _____;” Defendant Howie has been dismissed.

JURISDICTIONAL STATEMENT

This is an appeal from certain Findings of Fact and Conclusions of Law signed by the Court NUNC PRO TUNC March 28, 2024 and a Judgment entered on the same on May 29, 2024. The Findings, Conclusion and Judgment were dispositive as to all claims and were final orders pursuant to *SDCL § 15-26A-3(2)*. Notice of Appeal was filed in the Circuit Court on June 28, 2024. The referenced rulings are appealable and the present appeal is timely.

STATEMENT OF LEGAL ISSUES

- I. Whether the Circuit Court erred in allowing damages for periods of time that the lease was not in effect.**
- II. Whether the Circuit Court’s erred refusing to find that certain damages were an unenforceable penalty.**
- II. Whether the Circuit Court erred in granting treble damages for forcible eviction.**

STATEMENT OF THE CASE

This is an appeal of rulings from the Fourth Judicial Circuit, the Honorable Eric Strawn presiding. The case is a civil action brought by Appellee, Kieffer, arising out of a dispute over a lease for use and possession of property owned by Kieffer for the purposes of grazing livestock on said property and the alleged forcible entry and detainer by Kieffer.

STATEMENT OF THE FACTS

This matter comes before this Court for a second time. In the first appeal, referred to herein as “Kieffer I,” this Court specifically found that, based upon an uncontested Motion for Summary Judgment, the Todds had shown an entitlement to a judgment based upon actual damages incurred by them in the amount of \$207,131.11. *APP 68*. The damages were itemized by the Circuit court as follows:

Groundwork and reseeding	\$20,549.95;
Fencing	\$23,760;
Grazing – Kieffer’s cattle	\$1,000/day (for 35 days)
Sorting Kieffer cattle	\$5,000 per occurrence (\$20,000 total)
One dead cow	\$1,400
Water	\$1,588.80
Pittman Grazing	\$7,958.00 (11/1/21 to 2/1/22)
Phillipps Grazing	\$80,314.23 (6/4/21 – 1/10/22)
	\$16,432.50 (Feb/March 22)
Hay	\$27,932.63
Trucking	\$10,178
Labor	\$16,000
Additional Trucking	\$6,875
Total	\$267,988.31

This Court found any remaining damages alleged by Plaintiffs arise from their claim for liquidated damages to which the court raised questions as to whether liquidated damages would be appropriate or if they were, in fact, an unenforceable penalty. *APP 66*.

This Court further found that the Todds remained on Kieffer's property for a period of nearly 2 years after they claimed to have been forcibly evicted from the same and, as such, remanded the issue of whether Kieffer forcibly excluded Todds from the premises. This Court specifically noted "... there is no dispute in the record that Kieffer brandished a gun in the presence of the ties and made threats, the Todds presented facts showing that they continue to possess the real property thereafter did not attempt to terminate the lease for Kieffer's alleged breaches until nearly 2 years thereafter..." *Id.*

The Todds remained on Defendant's property despite not having paid rent since March 2020. In the Court's Conclusions of Law, the Court determined that Kieffer would be entitled to a credit against any judgment in the amount of \$424,000 and this finding has not been appealed by Todds. *APP 58, ¶ 73.*

On remand, the Circuit Court held a trial on March 27, 2024. Both Todds provided testimony and Kieffer did not testify. Following the trial, the court ordered that the parties simultaneously submit findings of fact and conclusions of law and the court thereafter adopted, in total, the findings and conclusions of law proposed by Todds' counsel. *APP 4-62.*

The testimony revealed that the parties entered into an Agricultural Lease (the "Lease") dated March 15, 2020. The Lease was prepared by Daniel Todd, a relative to Plaintiffs. *Trial Exhibit 84.* The scope of the lease is not in dispute and therefore the lengthy legal description will not be repeated. Of note is the fact that the lease is not a year-round lease but, instead specifically provides that the same is "... for five (5) crop years from and after the first day of March, 2020..." *Id.*

Teri Todd was the only person to testify on the lease terms and testified that the

phrase “crop year” is that period of time that the crops are planted, grown and harvested. *TT 93-94*. She stated that, in terms of their use, the lease would be from May until mid-November of any given year. *TT 93*. The specific purpose of the lease being limited to “crop years” was to allow the ground to recover without having livestock on the same. This satisfies the Lease requirement that the land be used in a good husband-like manner. *TT 93*. Based on the undisputed testimony of Teri Todd, the lease would therefore only allow the Todd cattle on the Kieffer property from May to mid-November of each year.

Because the lease only runs from May through mid-November of each year, it would also have been known to Todds that they would need to relocate the cattle each year in order to fulfil the lease requirement of use of the property in a good husband-like manner. The Lease does not place any obligation on Kieffer for cost associated with transportation of the cattle for the “non-crop” months of November through April nor does the Lease hold Kieffer responsible for feeding the Todd cattle during those months.

The Lease does call for rent payments of \$106,000 per year. The rent is to be made in two equal payments due on or before March 15 and September 15. *Trial Exhibit 84*. According to Teri Todd, Todds have made only one rent payment to the bank on Richard’s behalf. This payment was made prior to March 15, 2022. *TT 105*. Despite making only one lease payment (Todds did tender the payment due for March 2021 but it was refused by Kieffer), Todds used the Kieffer property for grazing purposes through the 2021 crop year. *TT. 167*.

The reason offered by Todds for the failure to pay rent was an alleged oral agreement they had with Kieffer. Todds allege that the agreement was based on Kieffer cattle being on the leased property during times when the lease was supposedly in effect.

Of this “agreement”, Teri Todd testified that “... *I told him* [Kieffer] a \$1,000 a day if any more got out ...” (*Emphasis added*) *TT 96*. Teri Todd did not tell Kieffer how she arrived at this number nor was there testimony that there was an acceptance of the same by Kieffer, merely that he was told that this would be the penalty/result of his cattle trespassing. *TT 96-97*. At trial Teri Todd claimed that the \$1,000 per day and \$5,000 per occurrence, was based on factors including stress on her cattle, bulls possibly breeding with her cattle or the potential of the Kieffer cattle spreading diseases among her herd. *TT 97*.

Teri Todd was forced to admit, however, that prior to trial and in support of a Motion for Summary Judgment on her damage claim, she submitted a sworn affidavit to the Court which indicated that the \$1,000 per day, was a reasonable amount for the Kieffer *cattle grazing on the leased property*. *TT 100*. The trial Court took judicial notice of this fact. *TT 99*. At trial, however, Teri Todd conceded that \$1,000 per day for grazing was unreasonable as shown by her own trial exhibits which show that she entered into arm’s length transactions with others which they paid \$1.67/day for cow/calf pairs. *TT 100*. The trial testimony was that there were approximately 89 Kieffer cattle that would get out from time to time. *TT 102*. This number would not justify the penalty being requested by Todds.

It was also admitted by Teri Todd that the basis for \$1,000 penalty and \$5,000 per time was never itemized or discussed with Kieffer. *TT 101*. In fact, it appears that the first time the plaintiffs itemized the \$1,000/day, \$5,000/occurrence was at trial when requested to do so by defense counsel. *TT 101-103*. To that end, she had to request a pen

and paper. *TT 101*. A recess was taken to allow her to calculate this “damage” for the first time. *TT 101*.

After the recess, Teri Todd stated that there was equipment used between \$500 and \$1,000, fuel in the amount of \$50 and \$75; Labor for 4 cowboys of \$1,400 and her time, at \$3,00 per day, per diem and her husband at \$1,500/day. *TT 101-102*. In stating this, she also stated that she did not know if, when or how many cattle would need to be corralled at any given time. *TT 102*. She also noted that on any given day, she could have calculated the actual cost of having to deal with Kieffer’s cattle. *TT 103*.

During her testimony, Teri Todd was also shown discrepancies in her record regarding how many Kieffer cows they had to deal with. She could not explain why there were discrepancies particularly in light of her testimony that the records were supposedly kept contemporaneously. *TT 104*. She merely stated “... quite honestly, I knew Richard was never going to pay us anything, so it wasn’t even worth adding any more to the bill...” *TT 104*.

Additional evidence of the fact that Kieffer did not agree to this arrangement was testified to by James Todd who verified that on the recording that he had made of the altercation with Kieffer, Kieffer is heard requesting his rent check. *TT 166*. There is no mention of the alleged oral contract as being the reason that the payments were not being made.

Todds ultimately left the premises in 2022. This was recognized by this Court in *Kieffer 1*, when this Court specifically noted that the Todds remained on Kieffer’s property for a period of nearly 2 years after they claimed to have been forcibly evicted from the same. At trial Todds did not provide the Court with any explanation of why they

did not return to the Kieffer property after February 2022. Todds did testify as to an incident which occurred in March of 2021 which involved a verbal altercation with Kieffer and also resulted in Todd calling law enforcement. However, they also testified that they continued to use the Kieffer property thereafter. Teri Todd testified that she observed Kieffer looking at her through the scope of a rifle in November of 2020. The incident did not result in law enforcement being notified and Todds returned to the Kieffer land in May of 2021. *TT 110-111*.

In other testimony, Todds requested money for a dead cow. Despite that this had been awarded in Kieffer I, as having been owed due to Kieffer running over the same, as testified via affidavit of Teri Todd. *TT 106-108*. At trial, Teri changed her testimony to state that, based upon her experience as a veterinarian, she believes that the cow died from overexertion after likely being chased, supposedly by Kieffer. *TT 108*. She subsequently had to acknowledge that the cow in the affidavit, killed after being struck by a vehicle, was the same as the cow she now states was harassed to death by Kieffer, and also, that she had been previously compensated for the same. Despite this, the Court awarded \$1,400 for the cow... again. *APP 12; ¶ 34*.

On the issue of whether Todds were forcibly excluded from the real property, Todds did not offer any new evidence. The findings of fact reiterated this court's previous findings that Kieffer had brandished a weapon in March of 2021. *APP 21, ¶ 43*. The only additional evidence provided at trial as the following:

Q: (from Todd's attorney): is it your opinion that Mr. Kieffer ejected you and your husband from the leased premises?

A: (from Teri Todd): Yes.

TT 92.

No other evidence was offered to show any forcible eviction or exclusion. Despite this, the court awarded treble damages for forcible exclusion.

In the findings of fact, the Circuit Court found Todd's had suffered the following damages:

Date	Item	Amount
1/22/22*	Hay	\$12,808.50
	Hay	\$7,760.00
1/24/22*	Hay	\$2,421.00
1/30/22*	Trucking expenses	\$7,450.00
2/5/22*	Hay	\$2,430.00
	Hay	\$9,220.20
	Hay	\$15,080.00
2/6/22*	Trucking	\$12,261.70
2/21/22*	Pasture/Care	\$19,063.70
3/13/22*	Hay	\$2,700.00
3/16/22*	Hay	\$2,700.00
3/20/22*	Hay	\$4,314.00
3/25/22*	Trucking	\$26,223.54
4/4/22*	Hay	\$2,332.00
4/10/22*	Hay	\$6,387.50
4/11/22*	Hay	\$3,078.75
4/16/22*	Hay	\$3,155.00

4/18/22*	Hay	\$3,056.25
4/19/22*	Hay	\$5,102.50
5/1/22*	Trucking	\$36,675.60
5/7/22	Hay	\$5,622.15
5/7/22	Hay	\$3,200.00
5/13/22	Hay	\$24,656.60
5/25/22	Hay	\$3140.80
6/30/22	Pasture rent	\$7,054.08
7/23/22	Hay	\$3,183.75
7/31/22	Pasture rent	\$16,823.58
8/2/22	Hay	\$30,635.00
8/22/22	Trucking	\$6,900.00
8/26/22	Hay	\$3,710.00
	Hay	\$4,017.95
8/27/22	Hay	\$3,925.15
8/31/22	Hay	\$3,395.00
	Hay	\$3,958.50
	Pasture rent	\$16,389.38
9/1/22	Hay	\$3,807.70
9/2/22	Hay	\$3,739.55
	Hay	\$3,872.95
9/23/22	Hay	\$2402.00
	Hay	\$2,461.00

9/27/22	Hay	\$2,773.00
	Hay	\$2,537.50
9/29/22	Hay	\$2,331.00
9/30/22	Hay	\$2,816.80
	Pasture rent	\$15,731.40
10/4/22*	Trucking	\$10,483.20
10/11/22*	Hay	\$2,776.25
10/24/22*	Hay	\$4,704.00
10/31/22*	Hay	\$3,775.00
11/2/22*	Hay	\$4,129.50
11/6/22*	Hay	\$3,426.25
11/8/22*	Hay	\$4,234.50
11/22/22*	Hay	\$9,015.00
11/25/22*	Hay	\$2,467.00
11/29/22*	Hay	\$3,976.50
12/4/22*	Hay	\$3,162.50
12/6/22*	Hay	\$4,084.50
12/7/22*	Hay	\$2,738.00
12/9/22	Hay	\$6,411.25
12/10/22*	Hay	\$3,352.50
1/26/23*	Hay	\$3,670.13
1/27/23*	Hay	\$7,670.13
5/24/23*	Trucking	\$600.00

6/30/23	Hay	\$14,540.00
7/1/23	Trucking	\$6712.00
7/20/23	Hay	\$4,200.00
7/23/23	Hay	\$8,326.50
10/8/23*	Pasture rent	\$71,555.00
	(rent was from 5/23 to 10/23 which should negate the need for hay during this time)	
10/25/23	Hay	\$6,975.15
11/15/23*	Hay	\$6,202.75
11/16/23*	Hay	\$5,356.80
11/17/23*	Hay	\$3,990.00
11/18/23*	Hay	\$4,056.00
12/3/23*	Hay	\$4,090.50
10/14/23*	Hay	\$4,4197.00
12/30/23*	Hay	\$11,420.20

APP 25-38.

The above expenses total \$635,603.19 with \$377,293.25 (indicated by *, above) of that amount consisting of expenses incurred by the Todds during periods of time that they would not have been entitled to have cattle on the Kieffer property. The damages awarded also include trucking expenses that the Todd's incurred, despite the fact that they would have had to incur trucking expenses at least twice per year when moving cattle on and off the Kieffer property. It being specifically remembered that, contrary to the written position

of Todds, the lease explicitly states that it is for “crop years” and Teri Todd testified that this would only be for the period of time between May and November. *TT 93*.

ARGUMENT

A. Standard of Review

This Court’s standard of review of Findings of Fact and Conclusions of Law, prepared by counsel and adopted by the Circuit Court is well-settled and provides that this court should scrutinize more carefully and give less weight to findings and conclusions prepared by counsel and adapted by the Circuit Court. *MacKaben v. MacKaben*, 2015 S.D. 86, 871 N.W.2d 617. Having said this, even if reviewed under the clearly erroneous standard, this matter should be reversed/are remanded for the reasons that, after a review of the evidence, it is clear that a mistake has been made. *Lindblom v. Sun Aviation*, 2015 S.D. 20, 862 N.W.2d. 549.

B. THE CIRCUIT COURT ERRED IN AWARDING DAMAGES FOR THE PERIOD OF TIME WHERE THE TODDS’ WOULD HAVE HAD TO SECURE LAND OTHER THAN THE KIEFFER PROPERTY

While it may be true that the successful party is entitled to the benefit of his version of the evidence and all favorable inferences fairly deductible there from, is equally true that a party may not rely on a better version of the facts that the one(s) that they have previously adhered to during prior sworn testimony. *Guilford v. Northwestern Public Service*, 1988 S.D. 71., 581 N.W.2d 178 (SD 1988). In addition, this court must examine the contract at issue, as a whole and give words their plain and ordinary meaning. *Gloe v. Union Ins. Co.*, 2005 S.D. 30, 694 N.W.2d. 252.

The following evidence is undisputed:

1. The parties entered into an Agricultural Lease (the “Lease”) dated March 15, 2020;
2. The Lease was prepared by Daniel Todd, a relative to Todds. *Trial Exhibit 84*;
3. The Lease specifically provides that the same is “... for five (5) crop years from and after the first day of March, 2020...;”
4. Teri Todd testified that the phrase “crop year” is that period of time that the crops are planted, grown and harvested;
5. Teri Todd further testified that the purpose of a “crop year” lease is to allow the ground to recover without having livestock on the same and that this practice satisfies the Lease requirement that the land be used in a good husband-like manner;
6. Teri Todd further testified that the lease would only allow the Todd cattle on the Kieffer property from May to mid-November of each year; and
7. The lease did not require Kieffer to provide any transportation to and from his property for the time cattle nor did it require that he provide feed for the cattle for that period of time that the cattle were not on his property.

Despite the foregoing, the court adopted the findings and conclusions prepared by Todds and awarded them damages in the amount of \$635,603.19 for expenses that they incurred, in 2022 and 2023 to transport and feed their cattle. In doing so, the Circuit Court placed an obligation on Kieffer which was not contained in the lease, that is, to feed the Todd cattle year-round. The Court further obligated Kieffer to pay for transportation of those cattle, even though that was not a contractual provision and those same expenses would have been incurred by Todds each May, when they moved the

cattle onto the Kieffer property and each November, when they moved the cattle off the Kieffer property.

In providing Todds the most favorable version of their testimony, including all reasonable inferences that may be drawn therefrom, it must be concluded that the Todds would be responsible for feeding their own cattle from November through the end of April, every year. As such, damages award against Kieffer must be limited to those incurred by Todds from mid-May through the last day of October. By the calculations set forth above, this would be limited to \$258,309.94

In addition to the foregoing, it is also noted that the court found that "... Though Todds mitigated their damages, they would have spent \$424,000 for rent to Kieffer Therefore, \$424,000 should be deducted from Todd's damage award ..." *APP 58*, ¶ 73. This finding was prepared by counsel for Todds and not appealed. As such, there should have been issued an award in favor of Kieffer in the amount of \$165,690.06, and the failure to do so was clearly erroneous. This figure is derived by crediting the amount Todds would have spent against the amount of damages they incurred during that period of time the lease would have been in force.

A request is made that this court issue such an order and also for the deduction of the \$1,400.00 awarded for the death of the cow and which was previously awarded.

C. THE CIRCUIT COURT ERRED BY NOT FINDING THE "LIQUIDATED DAMAGES" AS AN UNENFORCABLE PENALTY.

In Kieffer I, this court expressed concern regarding the liquidated damages awarded by the Circuit Court, indicating that there were both issues of law and fact which

needed to be further examined. As to the law on liquidated damages, South Dakota's interpretation is fairly straightforward and uncomplicated. *SDCL* § 53-9-5 provides:

Every contract in which amount of damage or compensation for breach of an obligation is determined in anticipation thereof is void to that extent except the parties may agree therein upon an amount presumed *to be the damage* for breach in cases where it would be impracticable or extremely difficult to fix actual damage. (*Emphasis added*).

Of the statute, this court has specifically held:

"... Whether a stipulated sum is an unenforceable penalty or an enforceable liquidated damages provision is a question of law for the court to determine based upon a consideration of the instrument as a whole, the situation of the parties, the subject matter of the contract, the circumstances surrounding its execution, and other factors. *Walter Motor Truck Co. v. State, Etc.*, 292 N.W.2d 321, 323-24 (S.D.1980). Ordinarily a provision for payment of a stipulated sum for liquidated damages will be sustained if (1) at the time the contract was made the damages in the event of breach were incapable or very difficult of accurate estimation, (2) there was a *reasonable endeavor by the parties to fix fair compensation*, and (3) the amount stipulated bears a reasonable relation to probable damages and is not disproportionate to any damages reasonably to be anticipated. (*emphasis added*) *Anderson v. Cactus Heights Country Club*, 80 S.D. 417, 125 N.W.2d 491 (1963).

Consistent with this would be interpretation that where a designated sum is inserted into a contract for the purpose of deterring one or both of the parties from breaching it, it is a penalty; but where it is inserted as the result of a bono fide effort of the parties to liquidate in advance, an agreed upon sum that should represent the damages actually sustained in the event of a breach, it will be upheld and enforceable (unless unconscionable or oppressive). *See, Damages-Liquidated Damages or Penalty-Purpose of Agreement-Florence Wagon Works v. Salmon*, 68 S.E. 866 (Ga.), Yale L.J. 153.

The clear reasonable language of South Dakota statute would require liquidated damages replace actual damages and not be awarded in conjunction with actual damages, as that would create a penalty.

The testimony establishes that there is no written agreement between the parties where Kieffer agree to pay Todds \$1,000 per day for each time his cattle were loose and an additional \$5,000 per each occurrence. This is important as our case law provides that, in order to be enforceable, liquidated damages must be negotiated "... at the time the contract was made..." Contrary to that requirement, the testimony herein shows that there was not even any discussion of liquidated damages but, instead, only Teri's testimony that "... I told him [Kieffer] a \$1,000 a day if any more got out ..." *TT 96*. Note, by the language used, it is apparent that the cattle had been out prior.

Not only does this testimony supports the fact that the liquidated damages were not agreed upon, but it also shows that there was no reasonable endeavor made by either party to fix a fair compensation for a breach associated with the Kieffer cattle trespassing on the leased property. This is also a requirement to have enforceable liquidated damages clause.

It should be stated, again, that at trial Teri Todd claimed that the \$1,000 per day and \$5,000 per occurrence, was based on factors including stress on her cattle, bulls possibly breeding with her cattle or the potential of the Kieffer cattle spreading diseases among her herd. *TT 97*. She was forced to admit, however, that prior to trial and in support of her motion for summary judgment on damages, she submitted a sworn affidavit to the which stated that the \$1,000 per day, was a reasonable amount for the Kieffer cattle grazing on the leased property. *TT 100*. The trial Court took judicial notice of this fact. *TT 99*. This is important because if the damage was in fact for grazing, then any amount over that would be a penalty and would seek to compensate the same loss.

Teri was forced to admit that \$1,000 per day for grazing was unreasonable as shown by her own trial exhibits which show that she entered into arm's length transactions with others which they paid \$1.67/day for cow/calf pairs. *TT 100*. The trial testimony was that there were approximately 89 Kieffer cattle that would get out from time to time. *TT 102*. This number would not justify the penalty being requested by Todds.

The evidence further establishes that the \$1,000 per day for each time his cattle were loose and \$5,000 per each occurrence does not bear a reasonable relation to probable damages and is disproportionate to any damages reasonably to be anticipated. This is supported by the fact that the plaintiffs did not suffer any loss that would support the penalty, namely they did not lose any cattle to disease, have any cattle impregnated by Kieffer's cattle or have cattle contract any disease from the Kieffer cattle.

Finally, it is clear that the \$1,000 per day for each time his cattle were loose and \$5,000 per each occurrence is unconscionable and oppressive under the circumstances particularly in light of the fact that none of the newly enumerated harms or damages alleged by plaintiff actually occurred and that the same includes a per diem charge of \$3000 per day for Teri Todd and \$1500 a day for her husband.

For these reasons it is requested that this court reverse any findings of the trial court and find that that the liquidated damages awarded in this action are in fact an unenforceable penalty.

**D. THE CIRCUIT COURT ERRED IN GRANTING TREBLE DAMAGES FOR
FORCIBLE EXCLUSION FROM THE PROPERTY.**

In Kieffer I, this Court held that the Circuit Court erred by entering summary judgment for the Todds and against Kieffer on the claims for treble damages alleging that Kieffer forcibly excluded them from possession of the leased property. In so finding, this court noted that there was 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 continue to possess the real property thereafter and did not attempt to terminate the lease for Kieffer's alleged breaches, until nearly 2 years thereafter. None of this changed at trial.

In the findings of fact and conclusions of law, the Todd noted the same three incidents which had been present in Kieffer I, namely that in November, 2020 Kieffer had watched Teri Todd through the scope of his rifle. The findings also note that they returned to the property the following year. Todds then states that in December 2020, Kieffer brandished a rifle outside of his truck while interacting with the Todd's ranch hands. Again, Todds return to the property the next year. Finally, in March of 2021, James Todd had a confrontation with Kieffer wherein Kieffer brandished a gun and law enforcement was called. Todds remained on the leased premises following this altercation and this was the last altercation between the parties in the findings of fact and conclusions of law.

The only additional evidence provided at the time of trial was Teri Todd responding "yes" when asked if she felt that Kieffer had evicted them from the premises.

SDCL § 21-3-6 allows for treble damages were someone has forcibly ejected or excluded a person from possession of real property. The current action, the evidence at

trial was the same as it was in the prior appeal and it is uncontradicted that there is no forcible ejection or exclusion by Kieffer prior to Todds leaving the property. In fact, as noted by this court, the evidence showed that Todd remained on the property for nearly 2 years after any act of violence or confrontation with Kieffer. There is no explanation of why it took nearly 2 years for them to abandon the property but, clearly, the same cannot be associated with any act of Kieffer. For this reason, the treble damages must be overturned.

CONCLUSION

For the reasons stated, Appellants respectfully request this Court reverse or remand this matter consistent with the arguments set forth herein.

REQUEST FOR ORAL ARGUMENT

Appellants hereby request oral argument.

Dated this 12th day of August, 2024.

CLAYBORNE, LOOS & SABERS, LLP

/s/ Courtney R Clayborne
Courtney R. Clayborne
2834 Jackson Blvd., Suite 201
PO Box 9129
Rapid City, SD 57709-9129
(605) 721-1517
Attorneys for the Appellant/Defendant

[Certificate of Service to Follow]

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 12th day of August, 22 before, he electronically filed the foregoing documents with the Clerk of the Supreme Court Odyssey File and Serve portal, and further certifies that the foregoing document was also mailed via U.S. Mail, postage prepaid thereon, to:

Kellen B. Willert
Bennett Main Gubbrud & Willert, P.C.
618 State Street
Belle Fourche, SD 57717

Ms. Shirley A. Jameson-Fergel
Clerk of the Supreme Court
State Capitol
500 East Capitol
Pierre, SD 57501

/s/ Courtney R Clayborne
COURTNEY R. CLAYBORNE

[Certificate of Compliance to Follow]

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), Courtney R Clayborne, counsel for the Appellants, does hereby submit the following:

The foregoing brief is 9 total pages in length. It is typed in proportionally spaced typeface in Times New Roman 12 point. The word processor used to prepare this brief indicates that there are a total of 4,407 words, and 21,806 characters (no spaces) in the body of the Brief.

/s/ Courtney R Clayborne

COURTNEY R CLAYBORNE

APPELLANT APPENDIX

<u>Description</u>	<u>Page Number:</u>
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SDCL § 53-9-5	70.
SDCL § 21-3-6	71.

STATE OF SOUTH DAKOTA)
)ss.
COUNTY OF MEADE)

IN CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT

JAMES TODD and TERI TODD,

Plaintiffs,

vs.

RICHARD W. KIEFFER,

Defendant.

46CIV21-163

JUDGMENT

A trial was held before the Court on March 27, 2024. Plaintiffs appeared personally along with their attorney of record, Kellen B. Willert. Defendant did not appear personally, but did appear by and through his attorney of record, Courtney Clayborne.

The Court having considered the pleadings and papers on file herein, the evidence presented to the Court, the arguments of counsel, and having entered its FINDINGS OF FACT AND CONCLUSIONS OF LAW, which is hereby incorporated as if fully set forth herein, and for good cause appearing therefore, it is hereby

DAMAGES

ORDERED, ADJUDGED and DECREED that, the Supreme Court affirmed a damages award in favor of Todds and against Kieffer in the amount of \$207,131.11, which is hereby re-stated by this Court. Pending the appeal the Todds were able to collect certain monies. This Court's October 11, 2023 Order provided that \$100,000 of the collected monies be disbursed to Todds and the rest to be held pending further order of the Court. October 11, 2023 Order, p. 2. Therefore, this Court orders that the remaining amounts held be disbursed to Todds and applied to all the damages awarded herein, and that Todds file and serve an appropriate Partial Satisfaction of Judgment thereafter.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that, judgment is hereby entered for additional money damages awarded to Plaintiffs Todds and against Defendant Kieffer for damages proven at trial in the amount of \$2,351,629.50.

PREJUDGMENT INTEREST

IT IS FURTHER ORDERED, ADJUDGED and DECREED that, judgment is hereby entered for the total amount of prejudgment interest awarded to Plaintiffs Todds and against Defendant Kieffer is in the amount of \$317,542.65.

POSTJUDGMENT INTEREST

IT IS FURTHER ORDERED, ADJUDGED and DECREED that, judgment is hereby entered for the total amount of postjudgment interest awarded to Plaintiffs Todds and against Defendant Kieffer after trial is in the amount of \$79,910.61.

ATTORNEY'S FEES, COSTS, AND DISBURSEMENTS

IT IS FURTHER ORDERED, ADJUDGED and DECREED that, judgment is hereby entered for attorney's fees and related nontaxable expenses awarded to Plaintiffs Todds and against Defendant Kieffer in the amount of \$ 72,674.50.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that, judgment is hereby entered for allowable costs and disbursements awarded to Plaintiffs Todds and against Defendant Kieffer in the amount of \$ 2,658.65.


DATED NUNC PRO TUNC MARCH 28, 2024.

BY THE COURT:

Attest:
Molstad, Stephany
Clerk/Deputy



5/29/2024 12:10:17 PM


Eric Strawn
Circuit Court Judge

STATE OF SOUTH DAKOTA)
COUNTY OF MEADE)ss.
)

IN CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT

JAMES TODD and TERI TODD,

Plaintiffs,

vs.

RICHARD W. KIEFFER,

Defendant.

46CIV21-163

NOTICE OF ENTRY OF
JUDGMENT
and
CERTIFICATE OF SERVICE

TO: Defendant RICHARD W. KIEFFER and his attorney of record,
COURTNEY R. CLAYBORNE.

PLEASE TAKE NOTICE that on May 29, 2024, the Circuit Court of Meade County, South Dakota, entered a **JUDGMENT** in the above-captioned action. A true and correct copy of the said the Judgment is attached hereto and incorporated herein by this reference. The said Judgment was filed with the Clerk of Courts of Meade County, South Dakota, on the 29th day of May, 2024.

Dated this 29th day of May, 2024.

BENNETT MAIN GUBBRUD & WILLERT, P.C.
Attorneys for Plaintiffs

By: /s/ Kellen B. Willert

KELLEN B. WILLERT
618 State Street
Belle Fourche, SD 57717
Ph: (605) 892-2011

CERTIFICATE OF SERVICE

I, Kellen B. Willert, hereby certify that on the 29th day of May, 2024, I caused a full, true and complete copy of the foregoing **JUDGMENT** and this Certificate of Service to be filed and served electronically through the UJS Odyssey e-filing system upon the following named person:

Courtney R. Clayborne
Clayborne, Loos & Sabers, LLP
Attorneys for Defendants
2834 Jackson Blvd.
P.O. Box 9129
Rapid City, SD 57709-9129
(605) 721-1517
courtney@clslawyers.net

Dated this 29th day of May, 2024.

/s/ Kellen B. Willert

KELLEN B. WILLERT

STATE OF SOUTH DAKOTA)
COUNTY OF MEADE)
)ss.

IN CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT

JAMES TODD and TERI TODD,

Plaintiffs,

vs.

RICHARD W. KIEFFER,

Defendant.

46CIV21-163

**FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

This matter came on regularly to be tried before the Court on March 27, 2024 at the Lawrence County Courthouse, Deadwood, South Dakota. The trial was scheduled for two days, March 27-28, 2024. Per agreement by the parties the trial was held at the Lawrence County Courthouse. Plaintiffs James Todd ("James") and Teri Todd ("Teri") appeared personally and with counsel, Kellen B. Willert. James and Teri may also be collectively referred to as "Todds". Defendant Richard W. Kieffer ("Kieffer") failed to appear. Kieffer's counsel, Courtney Clayborne, did appear personally.

As noted above, Mr. Kieffer did not personally appear on March 27, 2024 at the trial, which had been scheduled to begin at 9:00 a.m. Giving Kieffer's counsel time to communicate with his client, the Court held off starting the hearing for thirty (30) minutes. Todds presented and rested their case by mid-afternoon on March 27, 2024. The parties and the Court agreed that Kieffer's counsel would notify the Court and Todds' counsel by email by 8:00 p.m. on March 27, 2024 as a confirmation whether Kieffer would appear on March 28, 2024 or rest his case. Kieffer's counsel emailed the Court and opposing counsel in the evening of March 27, 2024 confirming that Kieffer rested his case (this email was filed with the Court on March 28, 2024).

The Court ordered the parties to each file and serve their proposed Findings of Fact and Conclusions of Law by 5:00 p.m. on May 17, 2024. Trial Transcript ("TT") 177:9-12.

The Court takes judicial notice of the entire court file.

References to "CR" are to the Clerk's Certified Record pertaining to the previous Supreme Court Appeal in this matter.

Based upon the pleadings and papers on file in this matter, the testimony presented and the evidence admitted during the trial, and the arguments of counsel, the Court makes and enters the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Kieffer was served with the Summons and Complaint in this matter on July 7, 2021.
2. Kieffer failed to provide the Court with evidence in support of his counterclaims or in resistance to the Todd's claims and defenses.
3. Teri Todd is one of the Plaintiffs in this matter. TT 11:2-3.
4. Teri Todd is a licensed veterinarian in South Dakota. Teri graduated with her formal education Doctor of Veterinary Medicine in May 2001, and has been a practicing veterinarian since. Exhibit 101; TT 11:4-12:5.
5. Based upon Teri's testimony, mannerisms, ability to recall events, times and the consistency of her testimony, this Court finds her very credible.
6. James Todd is one of the Plaintiffs in this matter.
7. James grew up ranching and has ranched his whole life. James has also spent a significant amount of time driving truck for hauling cattle. TT 119:9-23.
8. James Todd and Teri Todd are married. TT 12:6-9.
9. In March 2020, the Todds entered into an agricultural lease with Kieffer ("Lease") to rent approximately 2,591.16 acres ("Leased Premises") legally described as follows:

Township 6 North, Range 8 East, BHM, Meade County, South Dakota:

Section 25: S $\frac{1}{2}$ N $\frac{1}{2}$, N $\frac{1}{2}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$, NE $\frac{1}{4}$ NW $\frac{1}{4}$, and parcel in N $\frac{1}{2}$ NE $\frac{1}{4}$, consisting of approximately 275 acres;

Township 6 North, Range 9 East, BHM, Meade County, South Dakota:

Section 30: Lots 2 & 3, SE $\frac{1}{4}$ NW $\frac{1}{4}$, and NE $\frac{1}{4}$ SW $\frac{1}{4}$ excepting a tract of 31.70 acres, consisting of approximately 121.96 acres;

Township 6 North, Range 8 East, BHM, Meade County, South Dakota:

- Section 13:** SW $\frac{1}{4}$ consisting of approximately 160 acres;
Section 21: SE $\frac{1}{4}$ NE $\frac{1}{4}$ and E $\frac{1}{2}$ SE $\frac{1}{4}$ consisting of approximately 120 acres;
Section 22: N $\frac{1}{2}$ NE $\frac{1}{4}$, S $\frac{1}{2}$ N $\frac{1}{2}$, N $\frac{1}{2}$ S $\frac{1}{2}$, and SW $\frac{1}{4}$ SW $\frac{1}{4}$ consisting of approximately 440 acres;
Section 23: NE $\frac{1}{4}$, and NW $\frac{1}{4}$ NW $\frac{1}{4}$ consisting of approximately 200 acres;
Section 24: NE $\frac{1}{4}$ NW $\frac{1}{4}$, and W $\frac{1}{2}$ W $\frac{1}{2}$ consisting of approximately 200 acres;
Section 25: NW $\frac{1}{4}$ NW $\frac{1}{4}$ consisting of approximately 40 acres;
Section 26: N $\frac{1}{2}$, N $\frac{1}{2}$ SW $\frac{1}{4}$ and NW $\frac{1}{4}$ SE $\frac{1}{4}$ consisting of approximately 440 acres;
Section 27: N $\frac{1}{2}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$, and N $\frac{1}{2}$ SE $\frac{1}{4}$ consisting of approximately 440 acres;

Township 7 North, Range 8 East, BHM, Meade County, South Dakota:

- Section 18:** Lots 3 and 4 and E $\frac{1}{2}$ SW $\frac{1}{4}$ consisting of approximately 154.20 acres.

Exhibit 84; TT 18:6-16.

10. Under the Lease, Kieffer was the Landlord and Todds were the Tenants.
11. The Lease included, in part, property immediately adjacent to Kieffer's residence.
12. The Lease provided Todds the use of the Leased Premises year-round, and not merely on a seasonal basis. Exhibit 84; TT 14:21-25.
13. Most of the 2,591.16 acres of the Leased Premises were contiguous. This contiguous portion was adjacent to Kieffer's residence or "home place". There are, however, approximately 154.2 acres that are not contiguous ("154.2 acres"), which is legally described as:

Township 7 North, Range 8 East, BHM, Meade County, South Dakota:

- Section 18:** Lots 3 and 4 and E $\frac{1}{2}$ SW $\frac{1}{4}$ consisting of approximately 154.20 acres.

TT 18:17-22.

14. The 154.2 acres is approximately 15 miles from the rest of the Leased Premises. TT 71:25-72:2.

15. The driving distance from Todds' house to the remaining larger portion of the Leased Premises is approximately 27.8 miles. TT 119:24-120:9.
16. The Lease provided for rent in the amount of \$106,000 per lease year. Exhibit 84, ¶ 3.
17. The rent amount in the Lease was calculated on a per-acre basis. TT 95:6-8.
18. The Todds and Kieffer had discussions about Todds' Angus cows that they breed to Akaushi bulls, which is a special breed of Angus cows that Todds were raising, and Kieffer knew about the Todds raising this special breed. TT 15:7-12, 16:1-7.
19. Akaushi cows originate in Japan and have a different fat content that is healthier than other cows, which brings a premium for the Akaushi cows. The value of Akaushi calves is higher than a typical calf. TT 15:16-25.
20. Rent payments for the Lease included \$53,000 due upon execution of the Lease for the first half of the first year payment, then \$53,000 payments due on or before September 15 and March 15 each year thereafter. Exhibit 84, ¶ 3.
21. Kieffer had an Assignment of Rents involving the Leased Premises and in favor of First National Bank in Sturgis, South Dakota. Exhibit 75.
 - a. Although not a party to the Lease, the bank was given a copy of the Lease at the bank's request. TT 94:7-9.
 - b. Although testimony given by Teri on cross-examination indicated that "there's no right of the bank to collect any payments under [the Lease]" (TT 94:15-18), that is incorrect because the document speaks for itself and the bank clearly had the right to collect rents:
 - i. In the Assignment of Rents, Kieffer "convey[ed] to Lender all of Grantor's right, title, and interest in and to the Rents from the [Leased Property]." Exhibit 75, p. 1.
 - ii. Assignment of Rents further provides that:

~~LENDER'S RIGHT TO RECEIVE AND COLLECT RENTS.~~ Lender shall have the right at any time, and even though no default shall have occurred under this Assignment, to collect and receive the Rents. For this purpose, Lender is hereby given and granted the following rights, powers

Exhibit 75, p. 2.
22. Todds paid Kieffer \$53,000 when the Lease was executed by check unequivocally made out to Kieffer and his bank, which Todds delivered directly to Kieffer's bank. Exhibit 93; TT 16:8-16, 19:23-20:22.

- a. In Kieffer's Reply to Plaintiffs' Statement of Undisputed Material Facts ISO Todds' 2024 Motion for Partial Summary Judgment (filed February 7, 2024), Kieffer asserted, in response to SUMF 7:

7. At the time the March 15, 2021 rent under the Tad Lease was due, Kieffer had assigned his rents to First National Bank ("Bank").

Response: Not disputed with the caveat, however, that the Bank was not entitled to payment of the rents unless and until the man was made for the same. See covenants contained within Assignments of Rent Agreement. Also, the prior dealing of the parties had Todd paying lease payments directly to Kieffer.

- b. Kieffer's assertion that "...the prior dealing of the parties had Todd paying lease payments directly to Kieffer" was factually false, as the March 2020 check was made out to Kieffer as well as his bank. Exhibit 93; TT 20:23-21:10, TT 114:15-20.
23. The Lease provided that "...time is of the essence in the performance of all conditions of this lease...." Exhibit 84, ¶ 3.
24. The Lease required that Kieffer's cattle were to be removed from the Leased Premises by April 1, 2020 as follows: "...[Kieffer] currently has cattle on the real property being leased herein and shall have those cattle removed on or before April 1, 2020." Exhibit 84, ¶ 6; TT 21:11-22.
- a. Beyond it being an express provision of the Lease, requiring Kieffer's livestock to be off the Leased Premises was important to the Todds for multiple reasons: 1) the ground was being grazed by Kieffer's animals when Todds were paying to graze it with their animals, 2) issues related to comingling their special breed livestock with Kieffer's created concerns relating to disease, infections, and parasites passing to Todds' cows, and 3) Kieffer's bulls breeding Todds' special breed cows would lower their value. TT 21:23-22:20.
25. The Lease was to terminate on March 1, 2025, unless the Tenants exercised their option to extend it another 2 years. Exhibit 84, ¶ 8.
26. The Lease also provided Todds with a right of first refusal for the purchase of the Leased Premises. Exhibit 84, ¶ 9.
- a. Todds were never given an opportunity to exercise their right of first refusal under the Lease. TT 23:4-9, 164:7-13.

27. Kieffer continued to have livestock on the Leased Premises after April 1, 2020, in breach of the Lease. TT 23:19-21.
28. Between April 1-15, 2020:
- a. Todds asked Kieffer multiple times when Kieffer was going to move his livestock off the Leased Premises; Kieffer ignored them. TT 23:10-18, 121:4-122:8.
 - b. James sat with Kieffer in Kieffer's house, wherein Kieffer called the sale barn on speaker phone using James' phone and Kieffer negotiated pricing for the sale of Kieffer's cows. James offered to assist Kieffer with gathering and hauling Kieffer's cows. TT 122:19-123:14.
 - c. Todds helped Kieffer sort and gather Kieffer's cows in the snow. TT 25:8-13. Todds even rented a hydraulic chute to use during the process. TT 124:5-18, 128:7-8, 129:15-17.
 - d. In an attempt to help Kieffer, Todds helped Kieffer haul Kieffer's 300 plus cows to the Philip Livestock Auction sale barn. James hauled one load of cows for Kieffer, and Kieffer arranged for the rest to be transported. Kieffer refused to sell 89 yearlings and two bulls, and had them brought back to the Leased Premises, where they caused problems for the Todds during that spring and summer. Kieffer also had a pet bull on the Leased Premises during this timeframe. TT 24:18-25:7, 123:15-126:6.
29. ON APRIL 18, 2020 (TT 126:7-18, 132:12-133:7, 135:3-137:12):
- a. James and Kieffer had a discussion about costs associated with Kieffer's cows. James could recall in detail where the two were, the weather that day, that Kieffer's dogs were in Kieffer's red Chevy pickup, and what they wore. James wore blue jeans, a blue-jean shirt, a wool vest, his black cowboy hat, and a wild rag. Kieffer wore a blue zippered sweatshirt with a hood and Levi Strauss blue jeans.
 - b. In discussing costs with Kieffer about him having cows on the Leased Premises, Kieffer would put his head down and shake his head and acknowledged that he might owe Todds more than they would owe Kieffer in rent.
 - c. Kieffer owed Todds \$12,647 for their assistance in gathering, sorting, and hauling his livestock to the sale barn (before bartered deductions), and \$10,614 (after the bartered deductions). Exhibit 104; TT 127:12-131:2.

i. Kieffer ratified and partially performed under this agreement between the parties by bartering insofar as he gave Todds 64 bales of hay weighing 28.86 tons and \$500 worth of veterinarian supplies. TT 130:1-25.

d. James offered to put up an electric fence for Kieffer, but Kieffer declined.

e. Kieffer told James that, because he didn't want the bank to find the money from selling Kieffer's cows, that the parties would "make it work or else [they] can work it out of the lease." TT 137:15-25.

30. ON JUNE 11, 2020:

a. Teri Todd reported Kieffer for animal abuse for failing to feed and water his cows during the hot summer days. During this time the Todds helped feed and water Kieffer's cows to help keep them alive because they were malnourished and full of parasites. Exhibit 89; TT 25:20-30:15.

31. Teri kept a list of incidents regarding Kieffer on her calendar, and put those entries into a written list, which was introduced at trial as Exhibit 90; The Court finds this handwritten exhibit to be credible. Exhibit 90; TT 26:5-18.

32. Kieffer never allowed Todds to exclusively run Todds' cows on the Leased Premises. TT 63:22-24, 64:11-13.

33. Sometime in the spring and prior to June 21, 2020, James and Kieffer shot prairie dogs together and were cordial. TT 140:20-141:19.

34. ON JUNE 21, 2020 (TT 32:3-37:19, 142:34-143:20):

a. Kieffer's cattle were on the Leased Premises. Exhibit 2, ¶ 5; Exhibit 90; Exhibit 92, ¶ 5.

b. Kieffer delivered a note that included a death threat; Kieffer also made verbal threats to Todds and their ranch hands. Exhibit 106; TT 32:16-33:7.

c. Teri called law enforcement relating to Kieffer's cows being out on the Leased Premises, but law enforcement took no action. Exhibit 90.

d. Kieffer was chasing his cows with his truck, and Todds told Kieffer to stop doing that for the safety of the cows on the Leased Premises. TT 32:8-12, 34:11-24.

e. Kieffer and the Todds had an interaction on the Leased Premises because Kieffer's cattle, including multiple bulls, were on the Leased Premises

and were intermixing with Todds' livestock. Exhibit 2, ¶ 6; Exhibit 90; Exhibit 92, ¶ 6; TT 32:3-35:8.

- f. During the June 21, 2020 interaction, Kieffer and the Todds discussed that Kieffer would owe them \$1,000 for each day his cattle were on the Leased Premises. TT 35:14-25; Exhibit 2, ¶ 7; Exhibit 90; Exhibit 92, ¶ 7. There was no need to itemize any calculation for the \$1,000 per occurrence because the parties discussed and agreed to the amount. TT 116:13-21.
 - i. Kieffer produced zero evidence to refute these facts.
- g. During the June 21, 2020 interaction, Kieffer and the Todds discussed that Kieffer would owe them \$5,000 each time the Todds had to sort his cattle from their own relating to cost of equipment, horse usages, labor and associated expenses. TT 36-7; Exhibit 90. There was no need to itemize any calculation for the \$5,000 per occurrence because the parties discussed and agreed to the amount. TT 116:13-21.
 - i. Kieffer produced zero evidence to refute these facts.
 - ii. The parties discussed how the \$5,000 figure was broken down. TT 103:16-18.
 - iii. When Todds had to sort Kieffer's cows it was not easy nor a quick task, and included significant amounts of time, labor, and mobilization of equipment. TT 36:22-37:12.
- h. During the June 21, 2020, discussion about Kieffer owing Todds money, the parties agreed to the \$1,000 and \$5,000 amounts, discussed above (\$1K/\$5K Agreement). Kieffer acknowledged multiple times that he may owe Todds more than Todds' rent. TT126:19-127:6, 143:21-144:5.
 - i. The agreements between the parties for Kieffer to pay Todds \$1,000 per day that his cows were on the Leased Premises and \$5,000 per occurrence when Todds had to gather and sort Kieffer's cows will be referred to as the \$1K/\$5K Agreements.
 - ii. Kieffer presented the Court with zero evidence refuting this fact.
- i. During the June 21, 2020 interaction, Todds helped Kieffer fix some fence, and a gate. Todds did put in a new gate on Kieffer's driveway. Todds also offered to install an electric fence so Kieffer's cows would quit going onto the Leased Premises, but Kieffer refused the offer. TT 143:1-20.

35. Sometime after June 21, 2020, James had his 30-30 carbine saddle gun out while James was opening a gate, and then he saw Kieffer coming to drive through the gate and held it open for Kieffer; Kieffer accused James of pulling a gun on him, but James promptly denied that and laid his gun in the dirt – after which Kieffer stopped yelling about the gun. TT 138:12-140:10.
36. Kieffer and the Todds had multiple discussions on the \$1K/\$5K Agreement. Every time this was discussed between the parties, it was when Todds were on the Leased Premises to get the parties' livestock back to where they belonged. TT 141:20-142:2.
- a. Kieffer admitted to having these discussions multiple times. *See* Kieffer's Admissions, responses 7 and 14-15; CR 264-289.
37. **ON JUNE 23, 2020:**
- a. Kieffer's cattle were on the Leased Premises. Exhibit 90. TT 39:1-4.
38. **ON JUNE 26, 2020:**
- a. Kieffer's cattle were on the Leased Premises, and Todds sorted and gathered them. Exhibit 90; TT 39:5-11.
39. **ON JUNE 27, 2020:**
- a. Kieffer's cattle were on the Leased Premises. Exhibit 90; TT 39:12-14.
 - b. Kieffer and the Todds had another discussion about the \$1K/\$5K Agreement, which Kieffer acknowledged and sated that he would end up owing them money. Exhibit 2, ¶¶ 14-15; Exhibit 90; Exhibit 92, ¶¶ 14-15; TT 39:15-24.
40. **ON JUNE 30, 2020:**
- a. Kieffer's cattle were on the Leased Premises. Exhibit 90; TT 39:25-40:2.
41. **ON JULY 7, 2020:**
- a. Kieffer's cattle were on the Leased Premises. Exhibit 90; TT 40: 3-5.
42. **ON JULY 8, 2020 (TT 40:6-22, 55:9-57:1, 105:18-25):**
- a. Kieffer's cattle were on the Leased Premises. Exhibit 2, ¶ 21; Exhibit 90; TT 40:6-8.
 - b. Kieffer was using a pickup truck to chase and sort his cattle on the Leased Premises. Exhibit 92, ¶ 22; TT 40:9-16.

- c. Teri Todd has testified as an expert witness, has practiced in the field as a licensed veterinarian for a significant amount of time, has extensive experience in the cattle industry, and is determined by the Court and by stipulation of the parties to be an expert pursuant to SDCL 19-19-703; TT 40:17-22, 53:2-18.
- d. Todds found one of their cows dead on the Leased Premises; this dead cow was killed by overexertion caused by Kieffer chasing it with his truck. TT 55:9-57:1.
- e. Teri Todd, a licensed veterinarian and expert witness in this matter, previously asserted and confirmed at trial that, after evaluating the dead cow she concluded that Kieffer had killed a cow worth \$1,400 while Kieffer was chasing his cattle with a pickup truck on July 8, 2020. Teri Todd's Affidavit in Support of Motion for Summary Judgment (filed March 30, 2022), ¶ 6.g.
- f. The \$1K/\$5K Agreement between the parties did not contemplate the actual loss or death of Todds' cattle. TT 57:14-19.
- g. At trial, Kieffer's counsel indicated that compensation for the dead cow was part of the "judgment that existed" – being the portion of the judgment affirmed by the South Dakota Supreme Court. The Court asked the parties to brief the issue (or, essentially, include it in proposed findings of fact and conclusions of law). TT 53:22-16. Todds addressed this issue in their proposed findings of fact and conclusions of law.
 - i. On August 23, 2023 Todds filed and served Plaintiffs' Motion Regarding Collection on Amount Affirmed by Supreme Court. Exhibit 51 was attached to the Motion; Exhibit 51 is the same as Exhibit 3, with the exception of adding numbered columns on the left for ease of reference. The Motion itemized the damages affirmed by the Supreme Court. The claimed damages for the dead cow were itemized on Exhibit 51 at line 13. This amount was not included in the damages affirmed by the Supreme Court.
 - ii. This Court also approved the calculations, including on interest, in its October 11, 2023 Order.
 - iii. This Court finds that the portion of the money judgment affirmed by the Supreme Court did not include damages for the dead cow. Therefore, Todds can be awarded damages at trial for the dead cow.

- 43. ON JULY 11, 2020:**
- a. Kieffer's cattle were on the Leased Premises. Exhibit 90; TT 57: 2-4.
- 44. ON JULY 14, 2020:**
- a. Kieffer's cattle were on the Leased Premises. Exhibit 90; TT 57:5-6.
- 45. ON JULY 17, 2020:**
- a. Kieffer's cattle were on the Leased Premises. Exhibit 90; TT 57:7-8.
- 46. ON JULY 18, 2020:**
- a. Kieffer's cattle were on the Leased Premises, and Todds sorted and gathered them. Exhibit 90; TT 57: 9-13, 59:8-10.
- 47. ON JULY 20, 2020:**
- a. Kieffer's cattle were on the Leased Premises. Exhibit 90; TT 57: 20-23.
- 48. ON JULY 21, 2020:**
- a. Kieffer's cattle were on the Leased Premises. Exhibit 90; TT 57:24-25.
- 49. ON JULY 27, 2020:**
- a. Kieffer's cattle were on the Leased Premises. Exhibit 90; TT 58: 1-2.
- 50. ON JULY 28, 2020:**
- a. Kieffer's cattle were on the Leased Premises. Exhibit 90; TT 58:5-7.
- 51. ON JULY 30, 2020:**
- a. Kieffer's cattle were on the Leased Premises. Exhibit 90; TT 58:8-9.
- 52. ON AUGUST 3, 2020:**
- a. Kieffer's cattle were on the Leased Premises. Exhibit 90; TT 58:10-11.
- 53. ON AUGUST 5, 2020:**
- a. Kieffer's cattle were on the Leased Premises. Exhibit 90; TT 58:12-13.
- 54. ON AUGUST 6, 2020:**
- a. Kieffer's cattle were on the Leased Premises. Exhibit 90; TT 58:14-16.
- 55. ON AUGUST 11, 2020:**
- a. Kieffer's cattle were on the Leased Premises. Exhibit 90; TT 58: 17-18.
- 56. ON AUGUST 13, 2020:**

- a. Kieffer's cattle were on the Leased Premises. Exhibit 90; TT 58: 19-20.
- 57. ON AUGUST 14, 2020:**
 - a. Kieffer's cattle were on the Leased Premises. Exhibit 90; TT 58: 21-23.
- 58. ON AUGUST 15, 2020:**
 - a. Kieffer's cattle were on the Leased Premises. Exhibit 90; TT 58: 24-59:7.
- 59. ON AUGUST 17, 2020:**
 - a. Kieffer's cattle were on the Leased Premises. Exhibit 90; TT 58: 24-59:7.
- 60. ON AUGUST 19, 2020:**
 - a. Kieffer's cattle were on the Leased Premises. Exhibit 90; TT 58: 24-59:7.
- 61. ON AUGUST 20, 2020:**
 - a. Kieffer's cattle were on the Leased Premises. Exhibit 90; TT 58: 24-59:7.
- 62. ON AUGUST 25, 2020:**
 - a. Kieffer's cattle were on the Leased Premises. Exhibit 90; TT 58: 24-59:7.
- 63. ON AUGUST 27, 2020:**
 - a. Kieffer's cattle were on the Leased Premises. Exhibit 90; TT 58: 24-59:7.
- 64. ON AUGUST 28, 2020:**
 - a. Kieffer's cattle were on the Leased Premises. Exhibit 90; TT 58: 24-59:7.
- 65. ON SEPTEMBER 2, 2020:**
 - a. Kieffer's cattle were on the Leased Premises. Exhibit 90; TT 58: 24-59:7.
- 66. ON SEPTEMBER 4, 2020:**
 - a. Kieffer's cattle were on the Leased Premises. Exhibit 90; TT 58: 24-59:7.

67. ON SEPTEMBER 7, 2020:

- a. Kieffer's cattle were on the Leased Premises. Exhibit 90; TT 58: 24-59:7.

68. ON SEPTEMBER 8, 2020:

- a. Kieffer's cattle were on the Leased Premises. Exhibit 90; TT 58: 24-59:7.

69. ON SEPTEMBER 13, 2020 (TT 59:11-63:20, 145:22-146:17):

- a. Kieffer's cattle were on the Leased Premises, and Todds sorted and gathered them. Todds also hauled Kieffer's cows to the Philip sale barn where Kieffer had previously asked Todds to haul them because he had consigned them to be sold there. TT 144:6-145:9.
- b. Todds could not find Kieffer on this day, but had prepared an invoice showing the amount Kieffer owed the Todds pursuant to the \$1K/\$5K Agreement. TT 144:13-18. The invoice is marked "Exhibit 103" and includes costs associated with Exhibit 104 for the first haul of Kieffer's cows to the sale barn.
 - i. Todds informed Kieffer's bank that it wouldn't be getting a check from the Todds due to the offset arrangement. The bank never tried to collect the September 2020 rent. TT 61:12-62:3, 170:13-16.
 - ii. Todds ran into Kieffer a couple days later, finding Kieffer parked off a dirt road and passed out. The Todds woke Kieffer up to see if he was okay and he was groggy and went back to sleep. TT 62:7-16.
 - iii. Kieffer bragged to James about hiding the money he made on selling cows from the bank by getting a deferral on payment from the September 13 sale. TT 146:4-7.
 - iv. Kieffer was given the invoice and James spoke with Kieffer about it. Kieffer also told James that Kieffer's cows should have brought more, but they were skinny and gaunt because they hadn't had enough feed. Kieffer admitted he should have been feeding the cows better. TT 146:11-17.
 - v. Kieffer never tried to collect a rent check from Todds for September 2020. Kieffer did not ask Todds to give him a check for the lease rent. TT 63:1-3. Kieffer's actions were an

acknowledgment, ratification, and performance of the \$1K/\$5K Agreement.

- vi. Kieffer's bank never asked Todds for the September 2020 rent check. TT 61:12-62:3, 170:13-16.
- vii. Even though Kieffer owed Todds more than Todds owed Kieffer for the September 2020 rent, the parties essentially called the September 2020 rent and the amounts Kieffer owed to Todds under the \$1K/\$5K Agreement a "wash". TT 63:11-17, 116:22-117:10, 170:4-12. This was a benefit to Kieffer.
- viii. It is not uncommon for ranchers to barter in lieu or exchange for rent, as the Todds did with renting out two of their Akaushi bulls in exchange for a deduction in rent. TT88:19-89:3. Kieffer and Todds also bartered for Kieffer to give Todds hay, veterinarian supplies, and other things to deduct from the amounts Kieffer owed to the Todds. TT 130:1-25.

70. ON SEPTEMBER 19, 2020:

- a. Kieffer had his pet bull on the Leased Premises. TT 64:4-10.

71. Between September 13 and November 6, 2020, Todds ran their cows on the Leased Premises pursuant to the Lease. TT 64:11-19.

72. IN NOVEMBER 6-8, 2020 (TT 64:18-66:20):

- a. The Todds began hauling their cattle and some equipment off of the Leased Premises to allow the grass to grow back so Todds' livestock could graze it the following spring. During this time, Kieffer watched Teri moving equipment through a scope that was mounted on a rifle. TT65:14-66:10.
- b. Kieffer regularly carried the same scoped rifle that he was watching Teri with. TT 66: 7-10, 141:13-19.
- c. Teri called James after noticing Kieffer watching her through his rifle scope. James asked a friend near the Leased Premises to make sure Teri was able to leave the Leased Premises safely. TT 147:16-148:6.
- d. After Kieffer watched Teri through his rifle scope, Teri Todd never returned to the Leased Premises for fear of her safety. TT 66: 11-20.

73. Although Todds were entitled to possess and use the Leased Premises between September 19, 2020 and March 12, 2021, they opted to leave the

Leased Premises alone as a matter of good husbandry so the grass that Kieffer's cows overgrazed could grow back. TT 64:21-65:6.

74. IN DECEMBER 2020:

- a. Kieffer was brandishing his rifle out of his truck while interacting with Todds' ranch hands. Exhibit 107.

75. ON MARCH 11, 2021:

- a. Teri Todd hand-delivered Check number 1079 made out to Kieffer and his bank (that held the assignment of rents). Exhibit 94. Check number 1079 was in the amount of \$53,000 for the rent payment due on March 15, 2021. TT 66:21-68:1.
- b. This check has never been returned to the Todds. TT 68:6-10.
- c. Teri had dealt with Dusty Morehead as Kieffer's banker. Mr. Morehead no longer works at that bank. TT 67:1-12.
- d. Although Teri had not returned to the Leased Premises after Kieffer was watching her through his rifle scope on November 8, 2020, Teri tendered the March 2021 rent check with the "hope that once Richard had his cattle completely off of there and he could settle down -- he kept telling us that he was moving to Alaska in the winter and he was going to be gone." TT 111:12-18.

76. ON MARCH 12, 2021 (TT 43:20-47:1, 148:13-163:4):

- a. James Todd had tried (and failed) to get a hold of Kieffer about why there was cattle on the Leased Premises that shouldn't be there, so James and his hired man, Josh Cornelison, drove down to the Leased Premises. TT 148:13-149:5, 154:17-23. James also wanted to check fence. TT 149:6-15.
- b. James was also intending to install an auto gate between Kieffer's residence and the Leased Premises to help avoid Kieffer continuing to leave gates open and because Kieffer previously threatened he would shoot Todds' cows if Todds' cows came onto Kieffer's home place (which is adjacent to the contiguous portion of the Leased Premises).
- c. When James arrived at the Leased Premises, Kieffer started yelling at James from the doorway of Kieffer's house. TT 148:22-25. Kieffer was belligerently wild and mad. TT 152:23-25.
- d. James recalled the confrontation clearly. On that day James was wearing the same vest he wore to trial, and Kieffer was wearing a blue zip-up sweatshirt with a hood, a white undershirt, blue Levi jeans, and cowboy

boots with little spurs; Kieffer usually wore black chaps, but was not wearing them during the confrontation. TT 151:1-24. Kieffer's hands and eyes were "wild", his eyes were bloodshot and, in James' words, "crazy eyes". TT 152:1-7.

- e. James was not able to get Kieffer to calm down. TT 152:22-25.
- f. Two audio recordings of the confrontation were made. Exhibits 73 and 74.
- g. During the confrontation, Kieffer told James "you're in my space – get out of here." At that point, James was on Kieffer's house porch just above the steps, and then James stepped down the steps onto the driveway and backed next to James' truck. Exhibit 73; TT 153:12-20.
- h. During the confrontation the parties discussed a different auto gate than what James intended to install at Kieffer's home place. There was an auto gate located at the edge of the Leased Premises that Kieffer had removed half of. TT 155:10-18. Kieffer thereafter had been driving through the fence adjacent to the auto gate for ingress and egress. James, in an attempt to restrict cows owned by third parties and moving along the public road from accessing the green grass on the Leased Premises, put up a freestanding panel along the fence line to replace the fence line section Kieffer removed. TT 155:19-156:16.
- i. During the confrontation, Kieffer admitted and acknowledged that Todds could be on the Leased Premises until March 15, 2021 by stating: "I don't give a fuck what you got, you got till the 15th. They're on here the 15th, you be here, but the day of the 16th I'll be shooting 'em." (Exhibit 74 at time hack 0:14). Kieffer's statement "you got till the 15th" meant March 15, 2021, and this Court finds it was an express ratification, acknowledgment, and performance of the \$1K/\$5K Agreement. TT 156:19-157:5.
- j. During the conversation, Kieffer's two dogs came out and rubbed James' leg. James was petting one of the dogs when Kieffer yelled: "You ever touch my fucking dogs again, either one of ya, I'll shoot your fucking head off." (Exhibit 74 at time hack 0:22). TT 157:8-20.
- k. During the confrontation, Kieffer admitted (in Exhibit 74 at time hack 1:39) that he had actual knowledge that the Todds tendered the March 2021 check and that it was waiting for him at the bank:
 - i. James Todd told Kieffer "you got a check at the bank" in relation to the March 15, 2021 payment due.

- ii. Kieffer responded "I don't give a fuck. I talked to the bank – you know what I told them to do with it? Throw it away. I'm not signing it. You can't make me, and I'm not gonna."

TT 159:4-19.

- l. During the confrontation, Kieffer threatened James Todd that he would shoot Todds' cattle multiple times, including expressly threatening "you bring them in, I'll shoot 'em". Exhibits 73 and 74.
- m. After the confrontation, James Todd spoke with law enforcement, who was provided with the two audio recordings. TT 160:6-18.
- n. Due to the confrontation the Todds became fearful for their safety, the safety of their ranch hands, and the safety of their cattle; the Todds did not return to use the Leased Premises (with the exception of use of the 154.2 acres) without the aid of law enforcement or knowing Kieffer would not be there. TT161:9-163:4, 169:18-24.
- o. Kieffer never called law enforcement on the Todds. TT 161:6-8.
- p. Kieffer historically kept firearms next to his front door at his house. TT 141:14-19.
- q. Kieffer admitted to law enforcement that he brandished a gun during the confrontation – which Kieffer was prohibited from possessing due to his status as a convicted felon. TT 48:10-12.
 - i. Although Kieffer claimed to law enforcement that Todds ranch hand showed his gun first, there is not corroborating evidence of that, and Kieffer never showed up at trial to testify about this. James credibly testified that neither James nor his hired hand pulled a gun on Kieffer during the confrontation. TT 55:1-8, 138:9-18, 160:20-161:2. This Court finds that Kieffer brandished a firearm during this confrontation, and that neither James nor his ranch hand brandished a firearm.
- r. Deputy Torres agreed that it was a safety issue for James to go back to the Leased Premises. TT 48:1-9.
- s. Kieffer admitted to having a gun during the confrontation, even though Kieffer was prohibited from possessing a firearm as he is a convicted felon. The Deputy cited Kieffer with aggravated assault and possession of a firearm by a convicted felon, and requested an arrest warrant. TT48:10-49:6.

77. IN MAY 2021:

- a. The Todds became aware that Ronnie Howie was running his cattle on the Leased Premises.
 - i. After speaking with the State's Attorney in May 2021 regarding Kieffer's criminal charges for his behavior on March 12, 2021, James believed Kieffer would not be at the Leased Premises. TT 161:17-162:2, 162:19-163:4. James travelled to the Leased Premises to see if he could have access to it and work on fixing fences and the half of the auto gate that Kieffer had previously removed. TT 163:7-10. When James arrived, he found cows owned by a third party on the Leased Premises; James was able to determine these cows belonged to Ronald Howie's by virtue of the brand on the cows. TT 163:9-19.
 - ii. Teri and James had a phone conversation with Ronald Howie, who indicated he did not know about the Todds' Lease and asked for a copy of the Lease. TT 70:8-16, 163:20-25.
 - iii. Teri sent Ronald an email with a copy of the Lease, but he did not respond, and he did not remove his cows from the property at that point. TT 70:8-19.
 - iv. By May 2021, Todds had received no notice of default from Kieffer. TT 70:20-24.

78. IN JUNE 2021:

- a. Todds first contacted their attorney, Kellen B. Willert. TT 70:25-71:5.

79. FROM JUNE 20, 2021 THROUGH AUGUST 5, 2021:

- a. Desperate to find enough grazing land and feed for their cattle and in anticipation of litigating the matter, the Todds ran 28 cows and 1 bull on the 154.2 acres. TT 71:6-15.
- b. The value of Todds' use of the 154.2 acres from June 20, 2021 through August 5, 2021 (47 days) amounts to **\$823.546**, extrapolated on a per acre per day basis as outlined, below.
 - i. The 1 year per acre price under the Lease is \$40.908 per acre (\$106,000 / 2591.16 acres).
 - ii. The daily per acre price under the Lease is \$.1136 per acre (\$40.908 / 360).
 - iii. Todds' use of the 154.2 acres for 47 days is valued at \$823.546 (\$.1136 * 154.2 acres * 47 days).

- c. Todds did not use the other portions of the Leased Premises, which were contiguous to Kieffer's house, out of fear for the safety of themselves, their hired hands, and their livestock.
- 80. Todds' Verified Complaint in this matter is dated June 22, 2021.
- 81. **ON JULY 7, 2021:**
 - a. Kieffer was served with the Summons and Complaint in this matter. Meade County Sheriff's Return, filed July 9, 2021.
- 82. **ON JULY 21, 2021:**
 - a. The Court entered a default judgment essentially directing that Todds be restored with possession of the Leased Premises.
- 83. **ON JULY 22, 2021:**
 - a. Kieffer filed and served an Answer to the Complaint.
- 84. **ON JULY 27, 2021:**
 - a. The parties, by stipulation of counsel, agreed to have the Court vacate the Default Judgment and Writ of Execution for Possession, allowing the matter to be tried on the merits.
- 85. **ON AUGUST 9, 2021:**
 - a. Todds filed and served their Answer to [Kieffer's] Counterclaim.
- 86. **ON AUGUST 25, 2021:**
 - a. Kieffer was served with Todds' Interrogatories, Requests for Production, and Requests for Admissions. CR 139-176.
- 87. **ON SEPTEMBER 27, 2021:**
 - a. Three days after Kieffer's discovery responses were due, Kieffer asked for a 2 week extension to provide the discovery responses; Todds granted an extension until October 11, 2021. CR 177.
- 88. **ON OCTOBER 19, 2021:**
 - a. After not having received Kieffer's discovery responses, the Todds sent a good-faith letter to Appellants regarding their failure to respond to the discovery and reminding them that all requests for admissions had been deemed admitted as a matter of law pursuant to SDCL § 15-6-36(a). CR 179.

89. BETWEEN OCTOBER 2021 AND MARCH 2022:

- a. The parties were unable to resolve the dispute without Court intervention. TT 72:15-17.

90. ON JANUARY 1, 2022:

- a. Despite the matter pending, Kieffer purportedly entered into a contract for deed with Nathan Howie. The Short Form Contract for Deed was NOT recorded with the Meade County Register of Deeds until March 16, 2023 as Doc#23001377. Exhibit 77. TT 72:18-74:16.
 - i. Nathan Howie is related to Ronald Howie. Ronald Howie was originally one of the defendants in this matter.
 - ii. The Short Form Contract for Deed was recorded while Plaintiffs were collecting on the initial judgment in this matter pending appeal (Defendants never filed a supersedeas bond). Exhibit 77; TT 113:24-114:1.
- b. Despite the matter pending before the Circuit Court (and prior to appeal) on January 1, 2022, Kieffer breached the Lease by not providing Todds an opportunity to exercise their first right of refusal, which states:

9. FIRST RIGHT OF REFUSAL: Tenants shall have the first right of refusal for purchase of the real property involved herein prior to Landlord final acceptance of an offer to purchase for all or any part of the real property involved herein.

Lease, ¶ 9; TT 74:10-21.

- c. Todds did not become aware of the Contract for Deed until after the Short Form was recorded. TT 164:14-20. This is further evidence that Kieffer's actions constitute an ejectment and exclusion of the Todds from the Leased Premises.
- 91.** Todds would not have incurred expenses for additional hay, trucking, care for cattle, and pasture had they been able to utilize the Leased Premises under the year-round Lease. TT 75:9-91:1.
- 92.** Exhibit 79 is evidence of damages Todds incurred in relation to hay expenses that they would not have incurred if they were not excluded from the Leased Premises. TT 75:13-76:10.

93. ON JANUARY 22, 2022:

- a. Todds incurred expenses in the amount of \$12,808.50 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 79, P096; Exhibit 97; TT 76: 11-14.
- b. Todds incurred expenses in the amount of \$7,760 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 79, P097; Exhibit 97; TT 76: 15-16.

94. ON JANUARY 24, 2022:

- a. Todds incurred expenses in the amount of \$2,421 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 79, P095; Exhibit 97; TT 76: 17-18.

95. Exhibit 82 is evidence of damages Todds incurred in relation to trucking expenses that they would not have incurred if they were not excluded from the Leased Premises. TT 76:21-78:3.

- a. The Leased Premises was approximately 27.8 miles from Todds' house. Some of the pasture ground Todds had to get after being ejected and excluded from the Leased Premises was as far as approximately 250 miles away from Todds' house. TT 119:24-120:22.

96. ON JANUARY 30, 2022:

- a. Todds incurred expenses in the amount of \$7,450 for trucking cattle that would not have otherwise been necessary if Todds' cattle were on the Leased Premises. Exhibit 82, P086; Exhibit 96; TT 78: 4-79:2.

97. ON FEBRUARY 5, 2022:

- a. Todds incurred expenses in the amount of \$2,430 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 79, P098; Exhibit 97; TT 76: 19-20.
- b. Todds also incurred expenses in the amount of \$9,220.20 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 79, P099; Exhibit 97; TT 79: 4-8.
- c. Todds also incurred expenses in the amount of \$15,080 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 79, P100; Exhibit 97; TT 79:9-10.

98. ON FEBRUARY 6, 2022:

- a. Todds incurred expenses in the amount of \$12,261.70 for trucking hay that would not have otherwise been necessary if Todds' cattle were on the Leased Premises. Exhibit 82, P093; Exhibit 96; TT 79:14-18.

99. ON FEBRUARY 21, 2022:

- a. Todds incurred expenses in the amount of \$19,063.48 for Pasture and Care (cattle care and brand inspection) that would not have otherwise been necessary if Todds' cattle were on the Leased Premises. Exhibit 82, P087; Exhibit 96; TT 79:19-21.

100. ON MARCH 13, 2022:

- a. Todds incurred expenses in the amount of \$2,700 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 79, P101; Exhibit 97; TT 79:22-24.

101. ON MARCH 16, 2022:

- a. Todds incurred expenses in the amount of \$2,700 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 79, P102; Exhibit 97; TT 81:10-11.

102. ON MARCH 20, 2022:

- a. Todds incurred expenses in the amount of \$4,314 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 79, P103; Exhibit 97; TT 79:25-80:1.

103. ON MARCH 25, 2022:

- a. Todds incurred expenses in the amount of \$26,223.54 for trucking hay that would not have otherwise been necessary if Todds' cattle were on the Leased Premises. Exhibit 82, P094; Exhibit 96; TT 80: 2-5.

104. ON MARCH 30, 2022:

- a. The Todds filed their initial documents seeking summary judgment.

105. ON APRIL 4, 2022:

- a. Todds incurred expenses in the amount of \$2,332 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 79, P104; Exhibit 97; TT 80:6-8.
- b. The parties agreed to schedule the summary judgment hearing for May 17, 2022. CR 239-242.

106. ON APRIL 10, 2022:

- a. Todds incurred expenses in the amount of \$6,387.50 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 79, P107; Exhibit 97; TT 80:9-10.

107. ON APRIL 11, 2022:

- a. Todds incurred expenses in the amount of \$3,078.75 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 79, P106; Exhibit 97; TT 80:11-12.

108. ON APRIL 16, 2022:

- a. Todds incurred expenses in the amount of \$3,155 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 79, P109; Exhibit 97; TT 80:13-14.

109. ON APRIL 18, 2022:

- a. Todds incurred expenses in the amount of \$3,056.25 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 79, P108; Exhibit 97; TT 80:15-16.

110. ON APRIL 19, 2022:

- a. Todds incurred expenses in the amount of \$5,102.50 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 79, P110; Exhibit 97; TT 80:17-18.

111. ON MAY 1, 2022:

- a. Todds incurred expenses in the amount of \$36,675.60 for trucking cattle that would not have otherwise been necessary if Todds' cattle were on the Leased Premises. Exhibit 82, P092; Exhibit 96; TT 80:19-21.

112. ON MAY 7, 2022:

- a. Todds incurred expenses in the amount of \$5,622.15 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 79, P111; Exhibit 97; TT 80:22-81:5.
- b. Todds also incurred expenses in the amount of \$3,200 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 79, P112; Exhibit 97; TT 81:6-7.

113. ON MAY 10, 2022:

- a. Although not timely, Kieffer filed responsive pleadings to the summary judgment matters.

114. ON MAY 13, 2022:

- a. Todds incurred expenses in the amount of \$24,656.60 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 79, P113; Exhibit 97; TT 81:8-9.

115. ON MAY 17, 2022:

- a. Both parties made arguments at the May 17, 2022 hearing, and the Court entered an Order on May 18, 2022 which, essentially, gave Kieffer until May 31, 2022 to serve responses to the Requests for Admissions. CR 243.

116. ON MAY 25, 2022:

- a. Todds incurred expenses in the amount of \$3,148.80 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 79, P105; Exhibit 97; TT 81:12-13.

117. Todds incurred a large amount of expenses for hay around this timeframe because they were ejected and excluded from the ground they were supposed to have from leasing the Leased Premises, and had to care for their cows while they were penned up in feedlots. TT 81:14-24.

118. ON JUNE 7, 2022:

- a. Another hearing before the Court was held on June 7, 2022, and the Court received as Exhibit 2 Kieffer's unsigned responses to the Requests for Admissions.

119. ON JUNE 8, 2022:

- a. The Court issued an Order ruling that Kieffer's Responses dated May 31, 2022, were "not complete and were not signed..." and that granting Kieffer's Motion to Permit Late Filing of Responses to Plaintiffs' Requests for Admissions to Defendants would "not subserve the presentation of the merits of the action", and that "granting the relief requested by Defendants will prejudice Plaintiffs [for various reasons]." CR 294-295.

120. ON JUNE 30, 2022:

- a. Todds incurred expenses in the amount of \$7,054.08 for pasture rent. Exhibit 81, P076; Exhibit 95; TT 82:20-23.

121. Exhibit 80 is evidence of damages Todds incurred in relation to hay expenses that they would not have incurred if they were not excluded from the Leased Premises. TT 82:24-83:10.

122. ON JULY 23, 2022:

- a. Todds incurred expenses in the amount of \$3,183.75 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 80, P114; Exhibit 97; TT 84: 2-4.

123. Exhibit 81 is evidence of damages Todds incurred in relation to pasture rent expenses that they would not have incurred if they were not excluded from the Leased Premises. TT 81:25-82:6.

124. ON JULY 31, 2022:

- a. Todds incurred expenses in the amount of \$16,823.58 for pasture rent. Exhibit 81, P077; Exhibit 95; TT 84:5-9.

125. ON AUGUST 2, 2022:

- a. Todds incurred expenses in the amount of \$3,635 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 80, P115; Exhibit 97; TT 84:10-12.

126. ON AUGUST 22, 2022:

- a. Todds incurred expenses in the amount of \$6,900 for trucking cattle that would not have otherwise been necessary if Todds' cattle were on the Leased Premises. Exhibit 82, P091; Exhibit 96; TT 84:13-18.

127. ON AUGUST 26, 2022:

- a. Todds incurred expenses in the amount of \$3,710 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 80, P116; Exhibit 97; TT 84:19-21.
- b. Todds incurred expenses in the amount of \$4,017.95 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 80, P142; Exhibit 97; TT 84:22-23.

128. ON AUGUST 27, 2022:

- a. Todds incurred expenses in the amount of \$3,925.15 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 80, P140; Exhibit 97; TT 84:24-25.

129. ON AUGUST 31, 2022:

- a. Todds incurred expenses in the amount of \$3,395 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 80, P117; Exhibit 97; TT 85: 1-2.
- b. Todds incurred expenses in the amount of \$3,958.50 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 80, P141; Exhibit 97.
- c. Todds incurred expenses in the amount of \$16,389.38 for pasture rent that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 81, P078; Exhibit 95.

130. ON SEPTEMBER 1, 2022:

- a. Todds incurred expenses in the amount of \$3,807.70 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 80, P139; Exhibit 97.

131. ON SEPTEMBER 2, 2022:

- a. Todds incurred expenses in the amount of \$3,739.55 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 80, P138; Exhibit 97.
- b. Todds incurred expenses in the amount of \$3,872.95 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 80, P151; Exhibit 97.

132. ON SEPTEMBER 10, 2022:

- a. Todds incurred expenses in the amount of \$7,005 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 80, P143; Exhibit 97.

133. ON SEPTEMBER 23, 2022:

- a. Todds incurred expenses in the amount of \$2,402 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 80, P144; Exhibit 97.

- b. Todds incurred expenses in the amount of \$2,461 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 80, P145; Exhibit 97.

134. ON SEPTEMBER 27, 2022:

- a. Todds incurred expenses in the amount of \$2,773 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 80, P147; Exhibit 97.
- b. Todds incurred expenses in the amount of \$2,537.50 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 80, P150; Exhibit 97.

135. ON SEPTEMBER 28, 2022:

- a. Todds incurred expenses in the amount of \$2,472 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 80, P146; Exhibit 97.

136. ON SEPTEMBER 29, 2022:

- a. Todds incurred expenses in the amount of \$2,331 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 80, P148; Exhibit 97.

137. ON SEPTEMBER 30, 2022:

- a. Todds incurred expenses in the amount of \$2,816.80 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 80, P149; Exhibit 97; TT 86:18-23.
- b. Todds incurred expenses in the amount of \$15,731.40 for pasture rent that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 81, P079; Exhibit 95.

138. ON OCTOBER 4, 2022:

- a. Todds incurred expenses in the amount of \$10,483.20 for trucking cattle that would not have otherwise been necessary if Todds' cattle were on the Leased Premises. Exhibit 82, P090; Exhibit 96.

139. ON OCTOBER 7, 2022:

- a. It was not until October 7, 2022 that the Court entered its Memorandum Decision and Summary Judgment. CR 300-307 and 308-309, respectively.

140. ON OCTOBER 11, 2022:

- a. Todds incurred expenses in the amount of \$2,776.75 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 80, P152; Exhibit 97.

141. ON OCTOBER 19, 2022:

- a. Kieffer filed the following: 1) Motion for Relief from Judgment (CR 322-328); 2) Motion for Reconsideration of Order Granting Summary Judgment (CR 329-331); 3) Brief in Support of Motion for Reconsideration of Order Granting Summary Judgment (CR 332-338); and, 4) Motion for Expedited Hearing on Motion for Relief from Judgment and Motion for Reconsideration (CR 339-341).

142. ON OCTOBER 24, 2022:

- a. Todds incurred expenses in the amount of \$4,704 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 80, P153; Exhibit 97.
- b. The parties scheduled an expedited hearing for October 28, 2022, with the understanding that Todds would file and serve their responsive documents on October 27, 2022 - which Todds did. CR 342-353.

143. ON OCTOBER 28, 2022:

- a. The Todds, their attorney, and the attorney for Kieffer appeared at the hearing.

144. ON OCTOBER 31, 2022:

- a. Todds incurred expenses in the amount of \$3,775 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 80, P155; Exhibit 97.

145. ON NOVEMBER 2, 2022:

- a. Todds incurred expenses in the amount of \$4,129.50 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 80, P156; Exhibit 97.

146. ON NOVEMBER 6, 2022:

- a. Todds incurred expenses in the amount of \$3,426.25 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 80, P154; Exhibit 97.

147. ON NOVEMBER 7, 2022:

- a. Kieffer filed a Notice of Appeal, appealing the Memorandum Decision and Summary Judgment. CR 355. The appeal is found in South Dakota Supreme Court case #30165.

148. ON NOVEMBER 8, 2022:

- a. Todds incurred expenses in the amount of \$4,234.50 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 80, P120; Exhibit 97.

149. ON NOVEMBER 22, 2022:

- a. Todds incurred expenses in the amount of \$9,015 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 80, P159; Exhibit 97.

150. ON NOVEMBER 25, 2022:

- a. Todds incurred expenses in the amount of \$2,467 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 80, P157; Exhibit 97.

151. ON NOVEMBER 29, 2022:

- a. Todds incurred expenses in the amount of \$3,976.50 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 80, P118; Exhibit 97.

152. ON DECEMBER 4, 2022:

- a. Todds incurred expenses in the amount of \$3,162.50 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 80, P158; Exhibit 97.

153. ON DECEMBER 5, 2022:

- a. Todds incurred expenses in the amount of \$10,298 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 80, P124; Exhibit 97.

154. ON DECEMBER 6, 2022:

- a. Todds incurred expenses in the amount of \$4,084.50 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 80, P119; Exhibit 97.

155. ON DECEMBER 7, 2022:

- a. Todds incurred expenses in the amount of \$2,738 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 80, P123; Exhibit 97.

156. ON DECEMBER 9, 2022:

- a. Todds incurred expenses in the amount of \$6,411.25 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 80, P122; Exhibit 97.

157. ON DECEMBER 10, 2022:

- a. Todds incurred expenses in the amount of \$3,352.50 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 80, P121; Exhibit 97.

158. ON JANUARY 26, 2023:

- a. Todds incurred expenses in the amount of \$3,678.13 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 80, P125; Exhibit 97.

159. ON JANUARY 27, 2023:

- a. Todds incurred expenses in the amount of \$7,678.13 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 80, P126; Exhibit 97.

160. ON MARCH 16, 2023:

- a. The Short Form Contract for Deed between Kieffer and Howie was recorded. Exhibit 77.

161. The matter was considered by the South Dakota Supreme Court on the briefs during its May 2023 term of court.

162. ON MAY 24, 2023:

- a. Todds incurred expenses in the amount of \$600 for trucking cattle that would not have otherwise been necessary if Todds' cattle were on the Leased Premises. Exhibit 82, P089; Exhibit 96.

163. ON JUNE 30, 2023:

- a. Todds incurred expenses in the amount of \$14,540 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 80, P128; Exhibit 97.

164. ON JULY 1, 2023:

- a. Todds incurred expenses in the amount of \$6,712 for trucking cattle and labor that would not have otherwise been necessary if Todds' cattle were on the Leased Premises. Exhibit 82, P088; Exhibit 96.

165. ON JULY 20, 2023:

- a. Todds incurred expenses in the amount of \$4,200 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 80, P129; Exhibit 97.

166. ON JULY 23, 2023:

- a. Todds incurred expenses in the amount of \$8,326.50 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 80, P130; Exhibit 97.

167. ON JULY 31, 2023:

- a. The South Dakota Supreme Court issued its ORDER DIRECTING ISSUANCE OF JUDGMENTS OF PARTIAL AFFIRMANCE AND PARTIAL REVERSAL ("SDSC ORDER"), along with an accompanying Judgment.

168. The SDSC ORDER affirmed an award to Todds and against Kieffer in the amount of \$207,131.11 in damages. These damages against Kieffer were calculated as \$3,500 for personal property plus the following damages summarized in Exhibit 51 as follows:

- a. Lines 1-3: \$20,549.95 for "Grass seed/Planting";
- b. Line 5: \$23,760 for "Fencing";
- c. Line 38: \$1,588.80 for "Water";
- d. Lines 40-41: \$7,958 for "Pittman Grazing";
- e. Lines 43-49: \$72,356.23 for "Phillipps grazing";
- f. Lines 51-52: \$16,432.50 for "Phillipps Grazing for Feb/Mar 2022";
- g. Lines 54-58: \$27,932.63 for "Hay";
- h. Lines 60-63: \$10,178 for "Trucking/Transport (Dry Creek Trucking)";
- i. Line 65 - \$16,000 for "Labor - checking cows in WY"; and
- j. Lines 67-71: \$6,875 for "Additional Trucking".

169. Pursuant to the SDSC ORDER, Todds filed a Notice of Hearing (and an Amended Notice of Hearing reflecting a 10:00 a.m., opposed to p.m. time) for the Court to consider defense counsel's dual representation issues raised by the Supreme Court. The hearing was scheduled for August 24, 2023.

170. ON AUGUST 23, 2023:

- a. Todds filed and served a Motion Regarding Collection on Amount Affirmed by Supreme Court, along with a Notice of Hearing, for that issue to be heard by the Court on September 11, 2023.

171. ON AUGUST 24, 2023:

- a. Neither Kieffer, Ronald Howie, nor their attorney were present for the August 24, 2023 hearing, and the Court entered its Order Re: August 24, 2023 Hearing and Order to Show Cause on August 28, 2023; this Order directed the dual representation issue be considered at the September 11, 2023 hearing. The hearing for September 11, 2023 was later rescheduled to October 2, 2023 at the request of the Court.

172. ON OCTOBER 2, 2023:

- a. The Court held the October 2, 2023 hearing.

173. ON OCTOBER 8, 2023:

- a. Todds paid expenses in the amount of \$71,555 for pasture rent for renting pasture ground from May 2023 to October 2023. Exhibit 81, P075; Exhibit 102; Exhibit 95. TT 87:4-14, 88:19-91:1.

174. ON OCTOBER 11, 2023:

- a. the Court entered an Order:
 - a. granting dismissal of Defendant Ronald Dean Howie from the matter, without prejudice;
 - b. holding Todds' Motion for Attorney's Fees and Costs associated with the August 24, 2023 hearing in abeyance;
 - c. granting Todds' request to collect on certain amounts affirmed by the Supreme Court, including determination of prejudgment and post judgment awards through March 23, 2023;
 - d. Kieffer "shall cause his fully signed and executed responses to [Todds' Requests for Admissions] to be served on [Todds'] counsel no later than October 12, 2023...";

- e. that each party “file and serve a brief to the Court regarding the recovery of liquidated damages and compensatory damages no later than December 8, 2023...”;
- f. a pretrial and substantive motions hearing be held on February 21, 2024; and
- g. trial be held March 27 and 28, 2024.

175. ON OCTOBER 25, 2023:

- a. Todds incurred expenses in the amount of \$6,975.15 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 80, P127; Exhibit 97.

176. ON NOVEMBER 15, 2023:

- a. Todds incurred expenses in the amount of \$6,202.75 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 80, P134; Exhibit 97.

177. ON NOVEMBER 16, 2023:

- a. Todds incurred expenses in the amount of \$5,356.80 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 80, P133; Exhibit 97.

178. ON NOVEMBER 17, 2023:

- a. Todds incurred expenses in the amount of \$3,990 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 80, P131; Exhibit 97.

179. ON NOVEMBER 18, 2023:

- a. Todds incurred expenses in the amount of \$4,056 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 80, P132; Exhibit 97.

180. ON DECEMBER 3, 2023:

- a. Todds incurred expenses in the amount of \$4,090.50 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 80, P135; Exhibit 97.

181. ON DECEMBER 8, 2023:

- a. Todds timely filed and served their Brief, which the Court ordered both parties file and serve their respective briefs by December 8, 2023. Kieffer failed to meet this deadline. *See* October 11, 2023 Order.

182. ON DECEMBER 14, 2023:

- a. Todds incurred expenses in the amount of \$4,197 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 80, P136; Exhibit 97.

183. ON DECEMBER 30, 2023:

- a. Todds incurred expenses in the amount of \$11,420.20 for buying hay that would not have otherwise been necessary if Todds were allowed use of the Leased Premises. Exhibit 80, P137; Exhibit 97.

184. ON JANUARY 9, 2024:

- a. Kieffer, after asking the Court for permission to file the December 8, 2023 brief late (and before the Court granted permission), filed his Brief on January 9, 2024.
- b. Todds filed and served their Objection to Defendant's Brief on Damages and Motion to Strike, essentially asking the Court to not consider Kieffer's untimely Brief and strike it from the record.

185. Both parties timely filed motions for partial summary judgment to be heard at the February 21, 2024 hearing; Todds also filed a Motion to Strike and a Motion for Rule 11 Sanctions.

186. ON FEBRUARY 21, 2024:

- a. The parties made arguments at the February 21, 2024 hearing.

187. ON FEBRUARY 22, 2024:

- a. The Court entered its Order Regarding Plaintiff's Motion to Strike Defendant's Brief due December 2023.

188. ON MARCH 1, 2024:

- a. The Court entered its MEMORANDUM OF OPINION RE: PLAINTIFFS' MOTION TO STRIKE; PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT; DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT; AND PLAINTIFFS' MOTION FOR RULE 11 SANCTIONS ("March 1, 2024 Memorandum Opinion").

189. ON MARCH 20, 2024:

- a. The Court entered its 2024 PARTIAL SUMMARY JUDGMENT AND ORDER.

190. ON MARCH 27, 2024:

- a. The trial in this matter was held.

191. Todds are certain to incur substantially similar damages incurred to date through the end of the initial term of the Lease on March 15, 2025. TT 91:19-92:1.
192. Between September 15, 2020 and March 12, 2021, Kieffer did not provide any notice to Todds of his desire to terminate the Lease. TT 117: 11-15.
193. Teri testified in this matter, and her testimony was credible.
194. James Todd testified in this matter, and his testimony was credible.
195. Meade County Sheriff's Deputy Brandon Torres testified in this matter, and his testimony was credible.
196. James Todd was ejected from the Leased Premises.
197. James Todd was excluded from the Leased Premises.
198. Teri Todd was ejected from the Leased Premises. TT 92:6-8.
199. Teri Todd was excluded from the Leased Premises. TT 92: 9-11.
200. All of the Court's findings herein are based on a preponderance of the evidence. To the extent a standard higher than preponderance of the evidence applies, this Court's findings herein are based on clear and convincing evidence.

CONCLUSIONS OF LAW

1. If any foregoing Finding of Fact is a Conclusion of Law, it shall operate as such Conclusion of Law, and if any foregoing Conclusion of Law is a Finding of Fact, it shall operate as such Finding of Fact. Further, any subheadings are for organization purposes and do not limit any Finding of Fact in its applicability to Conclusions of Law found under separate subheadings.
2. This Court has jurisdiction over the parties and subject matter of this matter.
3. The applicable standard of proof is the standard applicable in civil cases, i.e., a preponderance of the evidence; preponderance of the evidence is defined as

"the greater weight of evidence." See *Pieper v. Pieper*, 2013 S.D. 98, ¶ 22, 841 N.W.2d 781, 787 (internal citation omitted).

4. Kieffer produced zero evidence for the Court to weigh against the evidence provided by the Todds. This Court finds that the Findings of fact contained herein were proven by Todds by a preponderance of the evidence.
5. In the event it is found that an enhanced standard does apply in this matter, this Court finds that the Findings of Fact contained herein were proven by Todds by clear and convincing evidence.
6. None of the damages established during trial are duplicative with the \$207,131.11 in damages already affirmed by the South Dakota Supreme Court in this matter.
7. In the March 1, 2024 Memorandum Opinion, this Court found that:
 1. There still exists a factual dispute as to when Dean Howie occupied the leased land and when and if his use of the land overlapped at the same time as Plaintiffs.
 2. Counsel for Defendant was reasonable under the circumstances as the issue of Howie's use of the property has yet to be resolved on the Merits.
 3. Counsel for Defendants actions were reasonable under the circumstances regarding positions taken as to a Contract for Deed with Howie and the legal

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ramifications as to the Contract for Deed in conjunction with property leased by Plaintiffs yet, Plaintiffs having been purportedly ejected on the leased land yet still remained upon the property. The issue of Plaintiffs' departure from the property is still a genuine issue of material fact yet to be resolved.

Memorandum of Opinion, pp. 11-12.

SEPTEMBER 2020 RENT AND THE \$1K/\$5K AGREEMENT

8. The SDSC Order stated:

...questions of fact and law exist as to...whether the Todds are seeking duplicate damages by requesting both liquidated damages

arising from the alleged oral contract and compensatory damages....

SDSC Order, p. 2; and

...there are genuine issues of material fact concerning the existence of the alleged oral agreement....

SDSC Order, p. 4.

9. The parties agreed to the \$1K/\$5K Agreement.
10. Kieffer acknowledged, ratified, and performed the \$1K/\$5K Agreement during the March 12, 2021 confrontation by acknowledging Todds had a right to be on the Leased Premises until March 15, 2021.
11. This Court restates its conclusion in its March 1, 2024 Memorandum Opinion that "...duplicative damages do not always arise through an award of liquidated damages and compensatory damages, so long as the liquidated damages request doesn't overlap the compensatory damages." March 1, 2024 Memorandum Opinion, p. 4. The Court hereby incorporates the citations from this conclusion as if fully set forth herein.
12. To the extent the \$1K/\$5K Agreement is a liquidated damage provision, it is valid and enforceable:
 - a. The Supreme Court has repeatedly held that "such a provision will be upheld if (1) at the time the contract was made the damages in the event of breach were incapable or very difficult of accurate estimation, (2) there was a reasonable endeavor by the parties to fix compensation, and (3) the amount stipulated bears a reasonable relation to probable damages and is not disproportionate to any damages reasonably to be anticipated." *Heikkila v. Carver*, 378 N.W.2d 214, 216 (S.D. 1985) (internal citation omitted).
 - i. This Court finds that at the time the parties entered into the Lease, the damages in the event of Kieffer's breach in not having his livestock off the Leased Premises after April 1, 2020 were incapable or very difficult of accurate estimation.
 - ii. This Court finds that there was a reasonable endeavor by the parties to fix the compensation. The parties had itemized compensation for Todds assisting Kieffer with gathering and hauling his cows in April 2020 to the sale barn, and the parties even bartered as to partial payments on those amounts owed to Kieffer (by Kieffer giving them hay and vet supplies). The parties

had multiple conversations about and ratifications of the arrangement.

iii. This Court finds that the \$1K/\$5K Agreement bears a reasonable relation to probable damages and is not disproportionate to any damages reasonably to be anticipated.

b. Significantly, “The burden of establishing that the liquidated damage provision is an unlawful penalty rests with the party against whom enforcement is sought.” *Heikkila v. Carver*, 378 N.W.2d 214, 216 (S.D. 1985) (internal citation omitted).

i. **Kieffer failed to meet his burden that the \$1K/\$5K Agreement was an unlawful penalty and therefore an unenforceable liquidated damages provision.**

c. The \$1K/\$5K Agreement is valid and enforceable.

13. Alteration of the Written Lease:

a. The Lease in this matter could be altered by an oral agreement by the parties to include liquidated damages. There’s no requirement in the Lease that amendments or modifications be made in writing. The law clearly allows the Todds and Kieffer to do what they did: “[A] contract in writing may be altered by a contract in writing without a new consideration or by an executed oral agreement, and not otherwise.” SDCL §53-8-7 (emphasis added).

b. \$1K/\$5K Agreement is valid, enforceable, and had been substantially executed no later than September 16, 2021.

14. Alternative Performance:

a. A stipulated sum may be treated as liquidated damages, if an agreement gives the promisor the election to do one of several acts, even though the payment of money is required if the promisor takes one course of action and not another. An agreement to perform a certain act or to pay a definite sum of money may also be considered a contract to perform the act or pay liquidated damages. 22 AmJur2d Damages, ¶ 710.

b. To the extent it is determined on appeal that the \$1K/\$5K Agreement is deemed not be a valid alteration of the Lease, this Court finds as a matter of law that the oral agreements between the parties and offsetting of the September 15, 2020 payment constitute alternative performance of the Lease.

15. Collateral Contract:

- a. To the extent it is determined on appeal that the \$1K/\$5K Agreement is deemed not to be a valid alteration of the Lease or alternative performance, the \$1K/\$5K Agreement is enforceable as a collateral contract.
 - b. In other cases involving a written contract and a subsequent oral agreement, the South Dakota courts have applied the collateral contract exception to the doctrine of merger. There are two tests to determine if the collateral contract exception applies: (1) whether the collateral contract forms an integral part of the principal purpose of the deed, namely conveyance of title and quantity of land, and (2) whether the parties intended the contract to be collateral. *Tolle v. Lev*, 2011 S.D. 65, 804 N.W.2d 440 (internal citation omitted).
 - c. In this case, the 1K/\$5K Agreement forms an integral part of the principal purpose of the Lease, i.e. Kieffer have cattle off of the leased Property, and the parties intended it to be collateral by Kieffer allowing Todds to offset what Kieffer owed them for September 2020 rent.
16. Even if the \$1K/\$5K Agreement was voidable for want of due consent, Kieffer ratified the agreement by subsequent consent during the March 12, 2022 confrontation. SDCL § 53-3-4.
17. The parties' agreement to offset the amounts Kieffer owed to Todds under the \$1K/\$5K Agreement for the September 2020 rent Todds owed Kieffer constituted a timely payment of the September 2020 rent by the Todds.
18. Todds' timely payment for the September 2020 rent by the parties' oral agreement stopped any running of interest on the obligation, and had the same effect as a performance thereof pursuant to SDCL ¶ 20-5-18.

KIEFFER DID NOT TERMINATE THE LEASE BETWEEN SEPTEMBER 15, 2020 AND MARCH 15, 2021.

19. Application of *Pier v. Lee*:

- a. It has long been the law in South Dakota that a party with the right to declare a contract forfeited waives that right if it is not exercised within a reasonable amount of time. *Pier v. Lee*, 86 NW 642 (S.D. 1901).
- b. In *Pier v. Lee*, the parties entered into an agreement whereby Defendant was to purchase certain real property from Plaintiff pursuant to the following terms and conditions:

- i. Defendant make a down payment and then make several payments thereafter and fully pay off the amount on September 1, 1891.
- ii. Upon full payment, Plaintiff would deliver the deed.
- iii. Time is considered to be of the essence.
- iv. Seller had the right to declare the contract void, without notice.

Pier v. Lee, 86 N.W.642 (S.D.1901).

c. The facts in the *Pier* case are as follows:

- i. When the payment was due, the buyer offered to pay the balance owed and demanded delivery of the deed. Seller refused to accept the payment and to deliver the deed.
- ii. Buyer tendered the money to seller's bank, "to be paid to plaintiff on delivery of the deed call for by said contract...." *Pier*, at 642.

d. In *Pier*, the Supreme Court determined that:

- i. The seller "...failed for a period of three months and over to declare a forfeiture" thereby waiving the forfeiture declaration, and that:

...it may be reasonably inferred that it was contemplated by the parties that payments might not be made promptly at the times stipulated; and the defendant had a right to infer therefrom, and from the failure of the plaintiff to promptly declare the contract terminated, he plaintiff would be satisfied with the delay and the payment of interest. We are clearly of the opinion, therefore, that the plaintiff had no right to declare the contract forfeited in December, 1891. At the time the next installment became due, the defendant offered to pay the full amount, principal and interest due upon the contract; and, upon the refusal of the plaintiff to accept the same and execute a deed for the premises, the defendant deposited the money to the credit of the plaintiff in a reputable bank, where, so far as the record discloses, it has ever since remained. The failure to pay the sum due on September 1, 1892, having, as we have seen, been waived, the payment

of the full sum due, including interest on deferred payments, on the 1st of September, 1892, and before the time fixed for the last two payments, constitutes, in our opinion, such a performance, in equity, of the contract, as entitled the defendant to a conveyance of the property from the plaintiff.

Pier, p. 644 (emphasis added).

- ii. Buyer's delivery of the monies due to seller's bank constitutes "...such performance, in equity, of the contract, as entitled [buyer] to a conveyance of the property from [seller]." *Pier*, at 644.
 - iii. "A vendee's default does not ipso facto work a forfeiture; and, unless the vendor elects to declare a forfeiture, the contract remains in force." *Pier*, at 643.
 - iv. "It is a reasonable construction of the provisions of the contract, and more in harmony with equity and good conscience, to hold that the parties intended not only that prompt payment should be made, but also that the right to forfeit, to be available, must be exercised with promptness." *Pier*, at 644 (internal citation omitted).
 - v. "...the [buyer's] failure to pay the installment due September 1, 1891, was not the result of gross negligence, but apparently resulted from a misunderstanding on his part of the nature of the contract he had entered into." *Pier*, at 645.
- e. This case is similar to the *Pier* case:
- i. The Lease had a time is of the essence provision.
 - ii. The Lease had a termination provision.
 - iii. Todds had "a right to infer therefrom, and from the failure of [Kieffer] to promptly declare the contract terminated, [Kieffer] would be satisfied with the [rent offset with amounts he owed the Todds]." *See, Pier*, at 644.
 - iv. Todds timely tendered the March 15, 2021 rent due directly to Kieffer's bank, which held an assignment of rents.
 - v. At best, Kieffer waited approximately SIX months, and after Todds timely tendered the check due March 15, 2021, to declare the Lease was terminated.

- vi. It was not until Kieffer's Answer and Counterclaim to Todds' Complaint that Kieffer finally attempted to terminate the Lease. Kieffer's Answer and Counterclaim were filed July 22, 2021 – more than 9 months after the September 15, 2020 rent due date.
20. Kieffer's argument that the equities lie with him are belied by the fact that he gave no real notice to Todds of his intent to terminate the Lease and did not give them a reasonable amount of time to complete the contract. *Endres v. Warriner*, 307 N.W.2d 146, 150 (S.D. 1981).
21. Kieffer knew the Todds were still using the Leased Premises as late as November 2020, when he was watching Teri Todd on the Leased Premises through his rifle scope.
22. Kieffer's failure to disaffirm the \$1K/\$5K Agreement between (at best) June 2020 to March 2021 ripened to a ratification and performance of the \$1K/\$5K Agreement. "[F]ailure of a party to disaffirm a contract over a period of time may, by itself, ripen into a ratification, especially if rescission will result in prejudice to the other party..." *Ziegler Furniture and Funeral v. Cicmanec*, 2006 SD 6, ¶ 31, 709 N.W.2d 350.
23. Kieffer also accepted the benefit of the 1K/\$5K Agreement; said acceptance is equivalent to consent to all the obligations arising therefrom. SDCL § 53-3-5.
24. During the confrontation between Kieffer and James Todd on March 12, 2021, Kieffer acknowledged the Todds could be on the Leased Premises unit March 15, 2021. This was an admission, acknowledgment, ratification, and performance of the parties' agreement to offset rent due September 15, 2020 with the monies Kieffer owed to Todds under the 1K/\$5K Agreement.
25. Kieffer waived any right he had to declare the Lease void as a matter of law in relation to his argument that Todds did not tender the rent payment due September 15, 2020 because he did not exercise such an election within a reasonable amount of time. *Pier v. Lee*, 86 NW 642 (S.D. 1901).

TIMELY OFFER OF MARCH 2021 PAYMENT

26. ON MARCH 11, 2021:

- a. Todds timely offered, and in fact tendered, the \$53,000 rent payment by delivering a check to Kieffer's bank, which had an assignment of rents. Exhibit 94.

27. "An offer of payment or other performance, duly made, though the title to the thing offered be not transferred to the creditor, stops the running of interest on the obligation, and has the same effect upon all its incidents as a performance thereof." SDCL ¶ 20-5-18.
28. Todds' timely offer and tender of payment for the March 2021 rent stopped any running of interest on the obligation, and had the same effect as a performance thereof pursuant to SDCL ¶ 20-5-18.

DAMAGES

29. This matter was initiated against Kieffer on July 7, 2021. Meade County Sheriff's Return, filed July 9, 2021.
30. Default Judgment was initially entered, however the parties stipulated to vacating the Default Judgment so the matter could be determined on the merits.
31. "Damages may be awarded in a judicial proceeding for detriment resulting after the commencement thereof, or certain to result in the future." SDCL ¶ 21-1-10.
32. Todds may be awarded damages they incurred after the commencement of these proceedings as well as those "certain to result in the future." SDCL ¶ 21-1-10.
33. Todds have incurred a substantial amount of damages and detriment both prior to and subsequent to commencing these proceedings.
34. In addition to the \$207,131.11 affirmed by the SDSC ORDER, Todds incurred the following base detriment/damages caused by Kieffer's actions:
 - a. \$127,553.44 for pasture rent. Exhibits 81 and 95.
 - b. \$126,369.52 for trucking expenses. Exhibits 82 and 96.
 - c. \$334,479.51 for hay expenses. Exhibits 79, 80, and 97.
 - d. \$1,400 for the loss of the cow on July 8, 2020.¹ Exhibit 99², column E.22.

¹ This Court previously explained that "...if the facts demonstrate the Oral Agreement didn't contemplate the loss of Todds cattle and expenses arising therefrom, then these damages could be considered actual damages...." March 1, 2024 Memorandum Opinion, p. 5. The Court concludes the Oral Agreement did not contemplate the loss of Todds' cattle and expenses arising therefrom. Exhibit 84; TT 57:14-19.

APPLICATION OF SDCL § 21-3-6

35. South Dakota law provides:

An action of forcible entry and detainer, or of detainer only, is maintainable:

(1) If a party has by force, intimidation, fraud, or stealth, entered upon the prior actual possession of real property or the occupied structure of another, and detains the same;

...

(3) If a party by force or by menaces and threats of violence unlawfully holds and keeps the possession of any real property, or occupied structure, whether the same was acquired peaceably or otherwise;

SDCL § 21-16-1 (in part).

36. Kieffer, on multiple occasions, judicially admitted that “[t]he undisputed facts in the record establish a sufficient basis for determining Kieffer violated SDCL § 21-16-1(1) and (3).”

The undisputed facts in the record establish a sufficient basis for determining Kieffer violated SDCL § 21-16-1(1) and (3). There is not a sufficient basis to establish Howie committed the same torts, however. The record does not

Kieffer’s Motion for Relief from Judgment (filed October 19, 2022), p. 5. Kieffer used the same sentence in his arguments before the South Dakota Supreme Court:

The undisputed facts in the record establish a sufficient basis for determining Kieffer violated SDCL § 21-16-1(1) and (3). There is not a sufficient basis to establish

² Exhibit 99 is a demonstrative exhibit, but helpful in showing the various damages incurred by Todds. Any references by the Court to Exhibit 99 also are intended to automatically reference the supporting exhibits and testimony for the individual entries therein.

Appellants' Brief, p. 10. Kieffer presented zero evidence to, at any point during the nearly three years of litigation, refute these undisputed facts.

37. "A judicial admission is binding on the party who makes it Judicial admissions may occur at any point during the litigation process The focus is on the statement, not on a certain stage of the litigation." *Estate of Tallman*, 1997 SD 49, ¶ 13, 562 N.W.2d 893 (internal citations omitted).
38. "...a judicial admission made in a motion to dismiss and repeated in an appellate brief is 'binding and incontrovertible'." *Id.*, citing *Prentice v. UDC Advisory Servs., Inc.*, 271 Ill.App.3d 505, 207 Ill. Dec. 690, 695, 648 N.E.2d 146, 151 (1995).
39. Kieffer is bound to his multiple prior judicial admissions made in his motion and appellate brief that the undisputed facts establish a sufficient basis for determining Kieffer violated SDCL § 21-16-1(1) and (3).
40. Even without holding Kieffer to his prior judicial admissions, the evidence produced at trial proves, as a matter of law, that Kieffer's actions violated SDCL § 21-16-1(1) and (3).
 - a. By brandishing a firearm and making express threats of violence on March 12, 2021, Kieffer's actions constitute force and intimidation to forcibly eject James from the Leased Premises, which Kieffer did with the intent of forcing Todds off the Leased Premises by March 16, 2021.
 - b. On March 12, 2021, Kieffer used menacing conduct along with express threats of violence by obtaining and holding possession of the Leased Premises despite Todds' legal entitlement to its possession; Kieffer further acknowledged that Todds were entitled to be on the property at least until March 15, 2021, and that despite Todds tendering the March rent payment directly to Kieffer's bank (which held an assignment of rents), Kieffer refused to endorse the check.
 - c. On March 12, 2021, Kieffer told James "See you in the courtroom – you bring 'em in, I'll shoot 'em." Kieffer was threatening to shoot Todds' cattle if Todds brought their cattle onto the Leased Premises. Exhibit 74.
 - d. Kieffer has threatened to shoot the Todds and their hired hands.
 - e. Kieffer has brandished a rifle multiple times in the presence of Todds and/or their hired hands.
 - f. Kieffer's actions of allowing Ronald Howie's cattle onto the Leased Premises also constitutes using "force" and "menacing conduct" to

physically exclude the Todds from using the entirety of the Leased Premises.

- g. Kieffer's actions of purportedly selling the Leased Premises to Nathan Howie on a contract for deed WHILE KIEFFER'S APPEAL WAS PENDING, and apparently backdating it to January 1, 2022, also constitutes using "force" and "menacing conduct" to exclude the Todds from using the entirety of the Leased Premises.

- 41. Kieffer used force and intimidation to enter upon and detain the Leased Premises.
- 42. Kieffer used force, menaces, and threats of violence to unlawfully hold and keep possession of the Leased Premises.
- 43. Kieffer failed to deliver and surrender peaceful possession of the Leased Premises to the Todds as of March 12, 2021.
- 44. Kieffer's actions implicate application of SDCL § 21-3-6, which provides:

For forcibly ejecting or excluding a person from the possession of real property, the measure of damages is three times such a sum as would compensate for the detriment caused to him by the act complained of.

SDCL § 21-3-6 (in its entirety).

- 45. The "measure of damages" set forth by the South Dakota Legislature under SDCL § 21-3-6 is not a discretionary decision for the Court to decide, but is an express legislative damages calculation. SDCL § 21-3-6.
- 46. Because Kieffer both forcibly ejected and excluded Todds from the possession of the Leased Premises, the measure of damages is three times such a sum as would compensate for the detriments caused to Todds (by virtue of said ejectment and exclusion). SDCL § 21-3-6. This measure of damages is different than punitive damages, and is instead a statutory calculation.
- 47. Even without holding Kieffer to his prior judicial admissions, the evidence produced at trial proves, as a matter of law and beyond preponderance of the evidence, that Kieffer's actions forcibly ejected and excluded the Todds from the Leased Premises, and application of SDCL § 21-3-6 is not only appropriate, but required.
- 48. SDCL § 21-3-6 applies in this matter, though it is not applicable to all of Todds' detriments/damages.

49. The sum that would compensate Todds for the detriments caused to them by Kieffer's actions in forcibly ejecting and excluding Todds include pasture rent expenses amounting to **\$382,660.32** (calculated as \$127,553.44 for pasture rent x 3). Exhibits 81 and 95; Exhibit 99, column E.2.
50. The sum that would compensate Todds for the detriments caused to them by Kieffer's actions in forcibly ejecting and excluding Todds include trucking expenses amounting to **\$379,108.56** (calculated as \$126,369.52 for trucking expenses x 3). Exhibits 82 and 96; Exhibit 99, column E.3.
51. The sum that would compensate Todds for the detriments caused to them by Kieffer's actions in forcibly ejecting and excluding Todds include hay expenses amounting to **\$1,003,438.53** (calculated as \$334,479.51 for hay expenses x 3). Exhibits 79, 80, and 97; Exhibit 99, column E.4.
52. Some, though not all, of the damages previously affirmed by the South Dakota Supreme Court implicate application of SDCL § 21-3-6.
 - a. Although the Supreme Court affirmed \$207,131.11 in damages, it stated that there were still questions of fact as to whether the Todds were forcibly excluded and entitled to damages under SDCL § 21-3-6.
 - b. The damages previously affirmed by the South Dakota Supreme Court that do not implicate application of SDCL § 21-3-6 are³:
 - i. Lines 1-3: \$20,549.95 for "Grass seed/Planting";
 - ii. Line 5: \$23,760 for "Fencing";
 - iii. Line 38: \$1,588.80 for "Water";
 - c. The damages previously affirmed by the South Dakota Supreme Court that do implicate application of SDCL § 21-3-6 are⁴:
 - i. Lines 40-41: \$7,958 for "Pittman Grazing";
 - ii. Lines 43-49: \$72,356.23 for "Phillipps grazing";
 - iii. Lines 51-52: \$16,432.50 for "Phillipps Grazing for Feb/Mar 2022";
 - iv. Lines 54-58: \$27,932.63 for "Hay";

³ "Lines" refer to the line number in Exhibit 51.

⁴ Todds would not have incurred expenses for additional hay, trucking, care for cattle, pasture but for Kieffer's actions. TT 75:-77:6.

- v. Lines 60-63: \$10,178 for "Trucking/Transport (Dry Creek Trucking)";
 - vi. Line 65 - \$16,000 for "Labor – checking cows in WY"; and
 - vii. Lines 67-71: \$6,875 for "Additional Trucking".
- d. Therefore, Todds are entitled to an additional **\$315,464.72** in damages relating to those already affirmed by the South Dakota Supreme Court after application of SDCL § 21-3-6, calculated as follows:⁵
- i. Lines 40-41: \$15,916 (calculated as \$7,958 x 2) for "Pittman Grazing". Exhibit 99, column E.9.
 - ii. Lines 43-49: \$144,712.46 (calculated as \$72,356.23 x 2) for "Phillipps grazing". Exhibit 99, column E.10.
 - iii. Lines 51-52: \$32,865 (calculated as \$16,432.50 x 2) for "Phillipps Grazing for Feb/Mar 2022". Exhibit 99, column E.11
 - iv. Lines 54-58: \$55,865.26 (calculated as \$27,932.63 x 2) for "Hay". Exhibit 99, column E.12.
 - v. Lines 60-63: \$20,356 (calculated as \$10,178 x 2) for "Trucking/Transport (Dry Creek Trucking)". Exhibit 99, column E.13.
 - vi. Line 65 - \$32,000 (calculated as \$16,000 x 2) for "Labor – checking cows in WY". Exhibit 99, column E.14.
 - vii. Lines 67-71: \$13,750 (calculated as \$6,875 x 2) for "Additional Trucking". Exhibit 99, column E.15.
53. Therefore, Todds proved by a preponderance of the evidence at trial that they are entitled to recover damages with application of SDCL § 21-3-6 in the total amount of **\$2,080,672.13** (calculated as \$382,660.32 (pasture) + \$379,108.56 (trucking) + \$1,003,438.53 (hay) + \$315,464.72 (applicable affirmed damages)). Exhibit 99, column E.16.
54. "Damages may be awarded in a judicial proceeding for detriment resulting after the commencement thereof, or **certain to result in the future.**" SDCL § 21-1-10 (emphasis added).
- a. The Lease was not supposed to expire until March 15, 2025.

⁵ Since the pre-application of SDCL 21-3-6 amounts were already affirmed, the award after trial is that base amount times 2, not 3. *See also*, Exhibits 1-3, 5-7, and 98-99.

- b. The damages calculated in the amount of \$2,080,672.13, above, are what Todds incurred over the course of three years. Because there is still a year left before the Lease would have terminated, Todds are also entitled to an award for damages certain to result in the future.
- c. Todds are certain to incur damages through the end of the initial term of the Lease. TT 91:19-92:1.
- d. The Court concludes an average of the damages from the last three years provides reasonable certainty to damages certain to result in the future, and Todds are entitled to an additional award in the amount of **\$693,557.38** (calculated as \$2,080,672.13 / 3) for damages certain to result in the future. Exhibit 99, column E.18.

TOTAL DAMAGES

- 55. Therefore, Todds' damages proven at trial total **\$2,775,629.51** (calculated as \$2,080,672.13 + \$693,557.38 + \$1,400 (dead cow)). Exhibit 90, column E.23.
- 56. Todds' damages have been proven by a preponderance of the evidence.
- 57. Todds' damages have been proven by clear and convincing evidence.

PREJUDGMENT INTEREST

- 58. Unlike a punitive damages statute, SDCL § 21-3-6 is a legislative formula for calculation of damages. SDCL § 21-3-6. Therefore, the prejudgment interest that accrues on any detriment/damages suffered by Todds that are subject to application of SDCL § 21-3-6 accrues based on the final (tripled) damage calculation under SDCL § 21-3-6.
- 59. Prejudgment interest that accrued on detriments for pasture rent is **\$37,600.88** (\$12,533.63 x 3). Exhibits 81 and 95, row 9; Exhibit 99, column F.2.
- 60. Prejudgment interest that accrued on detriments for trucking is **\$72,243.60** (\$24,081.20 x 3). Exhibits 82 and 96, row 13; Exhibit 99, column F.3.
- 61. Prejudgment interest that accrued on detriments for hay is **\$145,715.84** (\$48,571.95 for hay expenses x 3). Exhibits 79, 80, and 97; Exhibit 99, column F.4.
- 62. In relation to the prejudgment interest for the base damages affirmed by the South Dakota Supreme Court:
 - a. This Court entered an Order on October 11, 2023 approving the following calculations of prejudgment interest on the affirmed damages (pre-application of SDCL § 21-3-6):

i. Order, paragraph 3.a:

The Court approves the prejudgment interest calculation on the \$207,131.11 money judgment that was affirmed by the South Dakota Supreme Court in the amount of \$27,018.23;

See also, Exhibits 52-72.

b. Todds are entitled to an additional **\$34,435.06** for prejudgment interest on the damages affirmed by the South Dakota Supreme Court that are also subject to application of SDCL § 21-3-6, calculated as follows⁶:

- i. The base prejudgment interest for Pittman Grazing was \$1,285.27; because that amount is subject to application of SDCL § 21-3-6, Todds are entitled to an additional prejudgment interest amount for those damages in the amount of **\$2,570.54** (calculated as $1,285.27 \times 2$). Exhibits 52 and 56; Exhibit 99, column F.9.
- ii. The base prejudgment interest for Phillips Grazing was \$7,167.09; because that amount is subject to application of SDCL § 21-3-6, Todds are entitled to an additional prejudgment interest amount for those damages in the amount of **\$14,334.18** (calculated as $\$7,167.09 \times 2$). Exhibits 52 and 57; Exhibit 99, column F.10.
- iii. The base prejudgment interest for Phillips Grazing for Feb/Mar 2022 was \$896.25; because that amount is subject to application of SDCL § 21-3-6, Todds are entitled to an additional prejudgment interest amount for those damages in the amount of **\$1,792.50** (calculated as $\$896.25 \times 2$). Exhibits 52 and 58; Exhibit 99, column F.11.
- iv. The base prejudgment interest for Hay was \$5,152.12; because that amount is subject to application of SDCL § 21-3-6, Todds are entitled to an additional prejudgment interest amount for those damages in the amount of **\$10,304.24** (calculated as $\$5,152.12 \times 2$). Exhibits 52 and 59; Exhibit 99, column F.12.
- v. The base prejudgment interest for Trucking/Transport (Dry Creek Trucking) was \$1,308.24; because that amount is subject to application of SDCL § 21-3-6, Todds are entitled to an additional prejudgment interest amount for those damages in the amount of **\$2,616.48** (calculated as $\$1,308.24 \times 2$). Exhibits 52 and 60; Exhibit 99, column F.13.

⁶ See Exhibit 99.

- vi. The base prejudgment interest for Labor was \$903.01; because that amount is subject to application of SDCL § 21-3-6, Todds are entitled to an additional prejudgment interest amount for those damages in the amount of **\$1,806.02** (calculated as \$903.01 x 2). Exhibits 52 and 61; Exhibit 99, column F.14.
 - vii. The base prejudgment interest for Additional Trucking was \$505.55; because that amount is subject to application of SDCL § 21-3-6, Todds are entitled to an additional prejudgment interest amount for those damages in the amount of **\$1,011.10** (calculated as \$505.55 x 2). Exhibits 52 and 62; Exhibit 99, column F.15.
63. Prejudgment interest that accrued on detriments for the killing of the cow is **\$529.04**. Exhibit 91 and 99, column F.22.
64. **Therefore, the total amount of prejudgment interest awarded to Todds at trial is \$290,524.42** (calculated as \$37,600.88 (pasture rent) + \$72,243.60 (trucking) + \$145,715.84 (hay) + \$34,435.06 (on the Supreme Court's affirmed amounts) + \$529.04 (dead cow)).

POST JUDGMENT INTEREST ON AMOUNTS AFFIRMED BY THE SOUTH DAKOTA SUPREME COURT THROUGH MARCH 23, 2023

65. This Court entered an Order on October 11, 2023 approving the following calculations of postjudgment interest on the affirmed damages (pre-application of SDCL § 21-3-6):

The Court approves the postjudgment interest calculation on the \$207,131.11 money judgment that was affirmed by the South Dakota Supreme Court in the amount of \$10,490.72 through March 23, 2023;

Order, ¶ 3.B:

66. Through March 23, 2023, Todds are entitled to an additional **\$15,924.18** for postjudgment interest on the damages affirmed by the South Dakota Supreme Court that are also subject to application of SDCL § 21-3-6, calculated as follows:
- b. The base postjudgment interest for Pittman Grazing was \$424.93; because that amount is subject to application of SDCL § 21-3-6, Todds are entitled to an additional postjudgment interest amount for those damages in the amount of **\$849.86** (calculated as \$424.93 x 2). Exhibits 52 and 66; Exhibit 99, column G.9.

- c. The base postjudgment interest for Phillips Grazing was \$3,616.68; because that amount is subject to application of SDCL § 21-3-6, Todds are entitled to an additional postjudgment interest amount for those damages in the amount of **\$7,233.36** (calculated as $\$3,616.68 \times 2$). Exhibits 52 and 67; Exhibit 99, column G.10.
 - d. The base postjudgment interest for Phillips Grazing for Feb/Mar 2022 was \$789.01; because that amount is subject to application of SDCL § 21-3-6, Todds are entitled to an additional postjudgment interest amount for those damages in the amount of **\$1,578.02** (calculated as $\$789.01 \times 2$). Exhibits 52 and 68; Exhibit 99, column G.11.
 - e. The base postjudgment interest for Hay was \$1,504.68; because that amount is subject to application of SDCL § 21-3-6, Todds are entitled to an additional postjudgment interest amount for those damages in the amount of **\$3,009.36** (calculated as $\$1,504.68 \times 2$). Exhibits 52 and 69; Exhibit 99, column G.12.
 - f. The base postjudgment interest for Trucking/Transport (Dry Creek Trucking) was \$522.39; because that amount is subject to application of SDCL § 21-3-6, Todds are entitled to an additional postjudgment interest amount for those damages in the amount of **\$1,044.78** (calculated as $\$522.39 \times 2$). Exhibits 52 and 70; Exhibit 99, column G.13.
 - g. The base postjudgment interest for Labor was \$768.74; because that amount is subject to application of SDCL § 21-3-6, Todds are entitled to an additional postjudgment interest amount for those damages in the amount of **\$1,537.48** (calculated as $\$768.74 \times 2$). Exhibits 52 and 71; Exhibit 99, column G.14.
 - h. The base postjudgment interest for Additional Trucking was \$335.66; because that amount is subject to application of SDCL § 21-3-6, Todds are entitled to an additional postjudgment interest amount for those damages in the amount of **\$671.32** (calculated as $\$335.66 \times 2$). Exhibits 52 and 72; Exhibit 99, column G.15.
- 67. Therefore, Todds are entitled to additional postjudgment interest through March 23, 2023 in the amount of \$15,924.18.**

POST JUDGMENT INTEREST ON AMOUNTS AFFIRMED BY THE SOUTH DAKOTA SUPREME COURT BETWEEN MARCH 24, 2023 AND MARCH 28, 2024

68. Todds reserved the right to seek postjudgment interest after March 23, 2023. See October 11, 2023 Order, ¶ 3.c.
69. There are 371 days between March 24, 2023 and March 28, 2024.
70. Postjudgment interest after March 23, 2023 for the damages previously affirmed by the South Dakota Supreme Court that do not implicate application of SDCL § 21-3-6 are:

Category	Damages Amount	Interest between 3/23/23 and 3/28/24 (damages x .10 / 360 x 371)
Grass seed/Planting	\$20,549.95	\$2,117.79
Fencing	\$23,760	\$2,448.60
Water	\$1,588.80	\$163.73
TOTAL		\$4,730.12

Exhibit 99, Column H.

71. Postjudgment interest after March 23, 2023 for the damages previously affirmed by the South Dakota Supreme Court that do implicate application of SDCL § 21-3-6 are:

Category	Base Damages	Damages Amount (after application of SDCL 21-3-6)	Interest between 3/23/23 and 3/28/24 (damages x .10 / 360 x 371)
Pittman Grazing	\$7,958	\$23,874	\$2,460.35
Phillipps grazing	\$72,356.23	\$217,068.69	\$22,370.13
Phillipps Grazing for Feb/Mar 2022	\$16,432.50	\$49,279.50	\$5,080.38
Hay	\$27,932.63	\$83,797.89	\$8,635.84
Trucking/Transport (Dry Creek Trucking)	\$10,178	\$30,534	\$3,146.70
Labor – checking cows in WY	\$16,000	\$48,000	\$4,946.67
Additional Trucking	\$6,875	\$20,625	\$2,125.52

TOTAL			\$48,765.59
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Exhibit 99, Column H.

72. Todds are entitled to postjudgment interest for the damages previously affirmed by the South Dakota Supreme Court for March 23, 2023 to March 28, 2024 in the total amount of **\$53,495.71** (\$4,730.12 + \$48,765.59).
73. There is no question that the Todds' mitigated their damages, as they were forced to do so in order to keep their livestock alive. Though Todds mitigated their damages, they would have spent **\$424,000**, for rent to Kieffer even had Kieffer not forcibly ejected and excluded them from the Leased Premises. Therefore, **\$424,000** should be deducted from Todds' damages award, calculated as follows:

Due Date	Amount
3/15/2021	\$53,000
9/15/2021	\$53,000
3/15/2022	\$53,000
9/15/2022	\$53,000
3/15/2023	\$53,000
9/15/2023	\$53,000
3/15/2024	\$53,000
9/15/2024	\$53,000
TOTAL	\$424,000

74. Because the Court is calculating the entire rent due under the initial term of the Lease, no further deduction is justified for Todds' use of the 154.2 acres from June 20, 2021 through August 8, 2021.
75. Kieffer is not entitled to interest on the rent due March 15, 2021 because the amount was timely tendered. SDCL § 20-5-18.
76. Kieffer is not entitled to interest on the other rental amounts because they became due after Kieffer forcibly ejected and excluded Todds from the Leased Premises, necessitating initiation of this lawsuit.
77. Kieffer leased the Leased Premises to Ronald Howie, and then purportedly sold it to Nathan Howie under a contract for deed.
- The adverse inference rule provides that if a party has documentary evidence under its control, failure to provide that evidence at trial justifies an inference that the records will not support that party's claim. *Matters v. Custer Cnty*, 538 N.W.2d 533 (S.D. 1995).

- b. Although Kieffer recorded a short form contract for deed with the county register of deeds (Exhibit 77), Kieffer did not produce a copy of the actual contract for deed. Under the purported contract deed, the adverse inference rule justifies the inference by this Court that Kieffer received the same, if not more, money under the contract for deed than he would have from rents from the Todds. As such, Kieffer did not incur any damages.
78. Kieffer's Counterclaim asserts that Todds owe him \$1,000 per day for some undefined period. *See* Counterclaim, ¶ 15. Kieffer failed to prove his counterclaim. Even if Kieffer had put on a case or any evidence, he would not be able to prevail because a party cannot recover liquidated damages for a breach for which he is responsible or to which he has contributed. 22 AmJur2d Damages, ¶ 725. Kieffer was responsible for the breaches in this matter.

ATTORNEY'S FEES AND COSTS

79. "In any case of forcible entry and detainer, or detainer only, the court may tax as a part of the costs in the case, to the prevailing party, reasonable attorney fees, whether a trial is had or not, if prevailing party is represented by a licensed attorney." SDCL § 21-16-11.
80. Todds are the prevailing party in this matter pursuant to SDCL § 21-16-11.
81. Despite this case going on for nearly 3 years, Kieffer has never made a personal appearance before the Court, never filed an affidavit, and never provided any actual evidence for the Court to consider. Kieffer failed to appear at the first show cause hearing following the Supreme Court's decision, and failed to appear at the trial March 27, 2024 – which had been scheduled since October 2023. Kieffer's clear disdain for the Court and the judicial process caused Todds to incur a substantial amount of attorney's fees and costs, which Todds may recover.
82. Pursuant to SDCL § 15-6-54(d) and other applicable law, Todds may file and serve an application for taxation of allowable costs and disbursements within 30 days after entry of the Judgment in this matter. Kieffer shall have 10 days after Todds file and serve an application for taxation of costs to file and serve any response and/or objections. If no written objection to the taxation of costs is filed within 10 days of service, the clerk shall tax the costs and disbursements as set forth on the application, insert the amount in the judgment, and docket it.

83. Pursuant to SDCL § 15-6-54(d) and other applicable law, Todds may file and serve an affidavit and application for any claims for attorney's fees and related nontaxable expenses within 14 days after entry of the Judgment in this matter. Because recovery of attorney's fees is authorized by SDCL § 21-16-11, Todds need not make a motion, but simply file and serve an Affidavit and Application. Kieffer shall have 10 days after Todds file and serve an application for taxation of costs to file and serve any response and/or objections. If no written objection to the taxation of costs is filed within ten days of service, the clerk shall tax the costs and disbursements as set forth on the application, insert the amount in the judgment, and docket it.

CONCLUSION

84. Therefore, Todds are entitled to a final judgment for:

a. Affirmed Damages:

- i. This Court also reaffirms and restates the South Dakota Supreme Court's affirmation of \$207,131.11 in damages⁷.

b. Additional Damages Awarded at Trial:

- i. In addition to the damages affirmed by the Supreme Court, damages in Plaintiffs' favor and against Kieffer are in the total amount of \$2,351,629.50 (\$2,775,629.51 total damages - \$424,000 deductions) (Exhibit 99, column E.26).

c. Prejudgment Interest:

- i. This Court also reaffirms and restates the prejudgment interest calculation approved in its October 11, 2023 Order (which was not reduced to a Judgment) in the amount of \$27,018.23;
- ii. Prejudgment interest in the amount of \$290,524.42. (Exhibit 99, column F.26); and

⁷ The Supreme Court affirmed a damages award in favor of Todds and against Kieffer in the amount of \$207,131.11, which is hereby re-stated by this Court. Pending the appeal the Todds were able to collect certain monies from Kieffer. This Court's October 11, 2023 Order provided that \$100,000 of the collected monies be disbursed to Todds and the rest to be held pending further order of the Court. October 11, 2023 Order, p. 2. Therefore, the Judgment in this matter should reflect that the remaining amounts held should be disbursed to Todds and applied to the damages awarded to Todds, and that Todds file and serve an appropriate Partial Satisfaction of Judgment thereafter.

iii. **THEREFORE, JUDGMENT SHALL ENTER FOR TOTAL PREJUDGMENT INTEREST AWARDED TO TODDS AND AGAINST KIEFFER IS IN THE AMOUNT OF \$317,542.65.**

d. Postjudgment interest:

- i. This Court also reaffirms and restates the postjudgment interest calculation approved in its October 11, 2023 Order (which was not reduced to a Judgment) through March 23, 2023 in the amount of \$10,490.72;
- ii. Postjudgment interest on the damages affirmed by the Supreme Court through March 23, 2023 (after application of SDCL § 21-3-6) in the amount of \$15,924.18 (Exhibit 99, column G.26);
- iii. Postjudgment interest the damages affirmed by the Supreme Court for March 24, 2023 through March 28, 2024 in the amount of \$53,495.71 (Exhibit 99, column H.26); and
- iv. **THEREFORE, JUDGMENT SHALL ENTER FOR TOTAL POSTJUDGMENT INTEREST AWARDED TO TODDS. AND AGAINST KIEFFER IS IN THE AMOUNT OF \$79,910.61.**

e. Costs and attorney's fees as provided for herein.

f. For efficiency purposes and so the Court does not have to adjust interest calculations (since all interest in this matter is accruing at the rate of 10% per annum) these Findings of Fact and Conclusions of Law, as well as the subsequent Judgment from the Court, shall be dated NUNC PRO TUNC MARCH 28, 2024. Counsel for Todds shall prepare a judgment incorporating these findings and conclusions.

JUDGMENT SHALL ENTER ACCORDINGLY

BY THE COURT:


Eric Strawn
Circuit Court Judge

Attest:
Keszler, Linda
Clerk/Deputy



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 subserved" 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)).

APP 063

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.

#30165, Order

[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

#30165, Order

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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#30165, Order

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

#30165, Order

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.

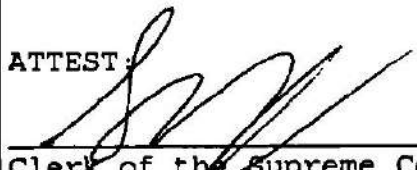
IT IS FURTHER ORDERED that defense counsel shall make a showing to the circuit court on remand, before continuing the dual representation of Kieffer and Howie in this action, why such representation is proper pursuant to South Dakota Rule of Professional Responsibility 1.7(b)(1)-(4).

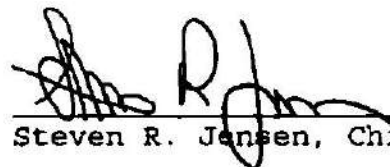
Appellees' motion for attorney fees is denied.

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

Codified Laws

[Home](#) > [Codified Laws](#) > [15](#) > [26A](#) > [3](#)[PREVIOUS](#)[NEXT](#)[Go To:\(1-1-1\)](#) or [Google Search](#)[PRINTER FRIENDLY](#)**15-26A-3. Judgments and orders of circuit courts from which appeal may be taken.**

Appeals to the Supreme Court from the circuit court may be taken as provided in this title from:

- (1) A judgment;
- (2) An order affecting a substantial right, made in any action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken;
- (3) An order granting a new trial;
- (4) Any final order affecting a substantial right, made in special proceedings, or upon a summary application in an action after judgment;
- (5) An order which grants, refuses, continues, dissolves, or modifies any of the remedies of arrest and bail, claim and delivery, injunction, attachment, garnishment, receivership, or deposit in court;
- (6) Any other intermediate order made before trial, any appeal under this subdivision, however, being not a matter of right but of sound judicial discretion, and to be allowed by the Supreme Court in the manner provided by rules of such court only when the court considers that the ends of justice will be served by determination of the questions involved without awaiting the final determination of the action or proceeding; or
- (7) An order entered on a motion pursuant to § 15-6-11.

Source: SDC 1939 & Supp 1960, § 33.0701; SDCL, § 15-26-1; SL 1971, ch 151, § 2; SL 1986, ch 160, § 2.

Codified Laws

[Home](#) > [Codified Laws](#) > [53](#) > [9](#) > [5](#)[PREVIOUS](#)[NEXT](#)[Go To:\(1-1-1\) or Google Search](#)[PRINTER FRIENDLY](#)**53-9-5. Contracts fixing damages void, exception.**

Every contract in which amount of damage or compensation for breach of an obligation is determined in anticipation thereof is void to that extent except the parties may agree therein upon an amount presumed to be the damage for breach in cases where it would be impracticable or extremely difficult to fix actual damage.

Source: CivC 1877, §§ 956, 957; CL 1887, §§ 3580, 3581; RCivC 1903, §§ 1274, 1275; RC 1919, §§ 895, 896; SDC 1939, § 10.0704.

Codified Laws

[Home](#) > [Codified Laws](#) > [21](#) > [3](#) > [6](#)[PREVIOUS](#)[NEXT](#)[Go To:\(1-1-1\) or Google Search](#)[PRINTER FRIENDLY](#)**21-3-6. Treble damages for forcible exclusion from real property.**

For forcibly ejecting or excluding a person from the possession of real property, the measure of damages is three times such a sum as would compensate for the detriment caused to him by the act complained of.

Source: CivC 1877, § 1977; CL 1887, § 4610; RCivC 1903, § 2322; RC 1919, § 1994; SDC 1939 & Supp 1960, § 37,1907.

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

* * * *

Appeal No. 30743

* * * *

JAMES TODD and TERI TODD,
Plaintiffs and Appellees,

vs.

RICHARD W. KIEFFER,
Defendant and Appellant.

* * * *

APPEAL FROM THE CIRCUIT COURT OF
THE FOURTH JUDICIAL CIRCUIT
MEADE COUNTY, SOUTH DAKOTA

* * * *

THE HONORABLE ERIC STRAWN
Circuit Court Judge

* * * *

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NOTICE OF APPEAL WAS FILED JUNE 28, 2024.

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PRELIMINARY STATEMENT

Appellant/Defendant Richard Kieffer will be referred to as “Kieffer”. References to Appellants’ Brief filed in this appeal on August 12, 2024 will be referred to as “Kieffer’s Brief”. References to Kieffer’s Appendix will be prefaced with “App”. Appellees/Plaintiffs James Todd and Teri Todd will be referred to individually by their first names, and together as “Todds”. References to the Todds’ Appendix attached to this Brief will be prefaced with “Todd App”. References to the Clerk of Court’s certified record in this case are prefaced with “CR”. References to the Trial Transcript will be prefaced with “TT”. The Trial Court’s Findings of Fact and Conclusions of Law filed by the Court on May 29, 2024 will be referred to as “Findings and Conclusions”. The Trial Court’s Judgment filed by the Court on May 29, 2024 will be referred to as “Judgment”.¹ References to the first appeal in this case, Appeal No. 30165, will be referred to as “Kieffer I”.

JURISDICTIONAL STATEMENT

Kieffer appeals the Trial Court’s Findings and Conclusions as well as the Judgment, both signed by the Court on May 29, 2024. Kieffer’s Brief, p. 1; *see also*, CR 1243-1300 and 1419-20; App 1-2 and 5-62. Kieffer’s notice of appeal was filed on June 28, 2024. CR 1425-26.

LEGAL ISSUES

1) Whether Kieffer’s assignments of error are ‘wholly insufficient’ for review.

This issue was not analyzed by the Trial Court.

Klein v. Klein, 500 N.W.2d 236, 240 (S.D. 1992)

Tovsland v. Reub, 2004 SD 93, ¶ 15, 686 N.W.2d 392

¹ It is unclear why Kieffer did not include a court file-stamped copy of the Findings and Conclusions or the Judgment in his Appendix. App 1-2, 5-62. Todds implore this Court to rely on the Trial Court’s extensive Findings and Conclusions. CR 1243-1300.

J.R. Watkins Co. v Beisel
SDCL § 15-26A-60(5)

- 2) **Whether the Trial Court correctly determined damages incurred between November and May.** The Trial Court awarded Todds damages that were incurred between November and May.
State v. Fifteen Impounded Cats, 2010 SD 50, ¶ 26, 785 N.W.2d 272
J. Clancy v. Khan Comfort, LLC, 2022 SD 68, ¶ 8
- 3) **Whether the Trial Court correctly determined the already-executed oral agreement is valid and enforceable.** The Trial Court determined that the already-executed oral agreement was valid and enforceable for four reasons.
Hamad Assam Corp. v. Novotny, 2007 SD 84, ¶ 9, 737 N.W.2d 922
Giesen v. Giesen, 2018 SD 36, ¶ 23
Heikkila v. Carver, 378 N.W.2d 214, 216 (S.D. 1985)
Osdoba v. Kelley-Osdoba, 2018 SD 43, ¶ 23, 913 N.W.2d 496
- 4) **Whether the Trial Court correctly applied SDCL § 21-3-6.** The Trial Court applied SDCL § 21-3-6 to only those damages directly related to Kieffer's forcible ejection and exclusion of Todds.
Schultz v. Scandrett, 2015 SD 52, ¶ 30, 866 N.W.2d 128
State v. Patterson, 2017 SD 64, #27736, #27738
SDCL § 21-3-6
Estate of Tallman, Matter of, 562 N.W.2d 893, 1997 SD 49, ¶ 13 (S.D. 1997)
- 5) **Whether Kieffer waived or abandoned issues on appeal.** This issue was not addressed by the Trial Court.
Giesen v. Giesen, 2018 SD 36, ¶ 23

STATEMENT OF THE CASE AND FACTS

Statement of the Case

This is the second appeal in this matter from the Fourth Judicial Circuit, the Honorable Eric Strawn, presiding.² For the statement of the case prior to Kieffer I, Todds incorporate the case history as laid out in Todds' (Appellees) Brief in Kieffer I as if set forth herein.

² The Honorable Eric Strawn did not preside over the case until after Kieffer I was remanded. Prior to Kieffer I, the Honorable Kevin Krull presided over the matter. CR 362-378.

After remand from Kieffer I, the trial for this matter was scheduled for March 27-28, 2024 per agreement of the parties at a hearing on October 2, 2023. CR 1243; *see also*, CR 660-662. Though trial had been mutually agreed to and scheduled for nearly five months, Kieffer failed to personally appear at the trial and his case was rested at 7:10 PM on March 27, 2024 via email to the Court without presenting a case.³ CR 1243 (second paragraph) and 963; Todd App 1. Aside from objections made at trial, Kieffer did not raise any issues at trial. TT 1:1-178:8; CR 964-1141.

A transcript of the trial was prepared, and the Trial Court thereafter entered its fifty-eight page Findings and Conclusions. CR 964-1165, 1243-1300; App 5-62. The Trial Court expressly found the testimony of Teri Todd, James Todd, and Sheriff Deputy Brandon Torres to be credible. CR 1277 (Findings of Fact ##193-195); App 39.

This case began on June 25, 2021 with personal service of the Summons and Verified Complaint on Kieffer on July 7, 2021.⁴ CR 35. Todds obtained a favorable Memorandum Decision and accompanying Summary Judgment on October 7, 2022. CR 300-309. On appeal, this Court issued an order and judgment in Kieffer I, affirming in part, reversing in part, and remanding the matter back to the Trial Court. CR 563-569. The Remittitur was filed July 31, 2023. CR 562.

On August 9, 2023, Todds filed and served a notice of hearing to be held August 24, 2023 in accordance with the Supreme Court's directive in Kieffer I regarding dual

³ Kieffer spoke with his attorney the day prior to trial about being present at the trial. CR 968; TT 5:13-19; Todd App 3. Kieffer has never personally appeared at any of the proceedings in this matter. CR.

⁴ Ronald Dean Howie ("Howie") was previously a defendant in this case, and the parties stipulated to dismissal of Todds' claims against Mr. Howie without prejudice. CR 660.

representation of Kieffer and Howie. CR 752-3.⁵ After no appearance was made on behalf of the defendants at the August 24, 2023 hearing, the Trial Court entered its Order Re: August 24, 2023 Hearing and Order to Show Cause, setting a new hearing for September 11, 2023 (which was later moved to October 2, 2023). CR 607-8, 633.

After the October 2, 2023 hearing, the Trial Court entered an Order dated October 11, 2023 (“October 2023 Order”). CR 660-662. Among other things, the October 2023 Order required the parties to submit briefs no later than December 8, 2023, scheduled a motions hearing for February 21, 2024, and set trial for March 27-28, 2024. CR 662.

Todds timely filed and served their Brief Regarding Damages on December 8, 2023. CR 675-685. Kieffer submitted Defendant’s Brief on Damages over a month late, on January 9, 2024. CR 692-699. The Trial Court granted [Todds’] Motion to Strike [Kieffer’s] Brief Due December 2023 by order dated February 22, 2024.⁶ CR 801. The Trial Court filed a Memorandum of Opinion on March 1, 2024, addressing issues related to duplicate damages, Kieffer’s failure to comply with SDCL § 15-6-56(c), granted [Todds’] Motion for Partial Summary Judgment⁷, denied [Kieffer’s] Motion for Partial Summary Judgment, and denied [Todds’] Motion for Rule 11 Sanctions⁸. CR 805-816.

The Trial Court held the trial on March 27, 2024, and all parties thereafter filed proposed findings of fact and conclusions of law. CR 1166-1237. Todds filed objections to

⁵ An Amended Notice of Hearing corrected the time for the hearing from “10:00 p.m.” to “10:00 a.m.” CR 574-5.

⁶ Kieffer stipulated to striking his brief. CR 801 and 808.

⁷ Intentionally left blank.

⁸ Todds’ Motion for Rule 11 Sanctions was made for factual contentions which Kieffer continues to make on appeal without evidentiary support. CR 799-800.

Kieffer's Proposed Findings of Fact and Conclusions of Law. CR 1238-1242. Kieffer did not object to any of Todds' Proposed Findings of Fact and Conclusions of Law. CR. The Trial Court entered its Findings and Conclusions as well as the Judgment in favor of Todds on May 24, 2024. CR 1243-1300; App 5-62. This appeal followed. CR 1425-26.

Statement of Facts

The Findings and Conclusions expressly state:

Kieffer produced zero evidence for the Court to weigh against the evidence provided by the Todds. This Court finds that the Findings of fact contained herein were proven by Todds by a preponderance of the evidence.

CR 1278 (Conclusion of Law #4); App 40; and

In the event it is found that an enhanced standard does apply in this matter, this Court finds that the Findings of Fact contained herein were proven by Todds by clear and convincing evidence.

CR 1278 (Conclusion of Law #5); App 40.

Todds incorporate the Trial Court's Findings and Conclusions (which thoroughly chronicles the history between the parties), yet will briefly outline specific facts pertinent to this appeal. *See*, CR 1243-1300; App 5-62.⁹ For conciseness, Todds' citations to the

⁹ It is difficult to address Kieffer's Brief because his factual citations to the record are sparse, and because he does not claim as error any particular finding of fact or conclusion of law. Kieffer Brief, pp. 2-12.

[T]he facts must be stated fairly, with complete candor, and as concisely as possible. Where it is claimed that a verdict, finding of fact, or other determination is not sustained by the evidence, the statement must set forth the particulars in which the evidence is claimed to be insufficient. Each statement of a material fact shall be accompanied by a reference to the record where such fact appears.

SDCL § 15-26A-60(5) (in part); Todd App 8.

Trial Court's Findings and Conclusions in this section are intended to incorporate the record citations made by the Trial Court.

This case involves approximately 2,591.16 acres of Meade County agricultural land owned by Kieffer, for which Todds entered into a 5 year lease beginning March 15, 2020. CR 19-23, 931-35 (Exhibit 84), 981 (TT 18:6-16), 1245 (Finding of Fact #9); App 6-7. "The Lease provided Todds the use of the Leased Premises year-round, and not merely on a seasonal basis." CR 931-35 (Exhibit 84), 976 (TT 14:21-25), and 1245 (Finding of Fact #12); App 7; Todd App 4. There is no provision in the Lease requiring Todds to move their cattle on and off the 2,591.16 acres outside of the 5 year term of the Lease. CR 931-35. The Lease expressly allows Todds to "... use and occupy said premises as crop and grazing lands and will farm and graze said premises...." CR 935 (§4). Most of the 2,591.16 acres were contiguous except for 154.2 acres located approximately 15 miles away. CR 1034 (TT 71:25-72:2), and 1245 (Finding of Fact #14); App 7. Kieffer had also granted First National Bank an Assignment of Rents for the Leased Premises. CR 843-49 (Exhibit 75), and 1246 (Finding of Fact #22); App 8.

The Lease expressly required Kieffer to have his cattle removed from the Leased Premises by April 1, 2020. CR 933 (Lease provision #6), 1247 (Finding of Fact #24); App 9. Nevertheless, Kieffer kept his livestock on the Leased Premises after April 1, 2020. CR 986 (TT 23:19-21), and 1248 (Finding of Fact #27); App 10. Between April 2020 and June 2020, the parties bartered with each other in relation to Kieffer continuing to have his cattle on the Leased Premises. CR 1248-49 (Findings of Fact ##28-29.e); App 10-11. By June 2020, the parties agreed to an arrangement whereby Kieffer would owe Todds \$1,000 each day his cattle continued to be on the Leased Premises and \$5,000 each time

the Todds had to sort Kieffer's cattle ("1K/5K Agreement"). CR 1250 (Findings of Fact ##34.f-34.h.ii); App 12-13. Kieffer presented zero evidence refuting the 1K/5K Agreement. CR.

Between June 2020 and September 2020, Kieffer's cattle were on the Leased Premises numerous times, and the Todds sorted Kieffer's cattle multiple times. CR 1249, 1251, and 1253-1255 (Findings of Fact ##34.a, 37-42.a, and 43-69.a); App 11, 13, and 15-17. Even though Kieffer owed Todds more than the rent payment due from Todds in September 2020, the parties agreed to call the rent due by Todds and the monies owed by Kieffer a "wash". CR 1256 (Finding of Fact #69.b.vii); App 18. Neither Kieffer nor his bank attempted to collect the September 2020 rent beyond the fully executed oral agreement. CR 1255-56 (Findings of Fact #69.b.v. and vi.); App 17-18.

Although Todds were entitled to exclusive possession and use of the Leased Premises between September 19, 2020 and March 12, 2021, they opted to move their cattle off the Leased Premises in November 2020 to enable the grass that Kieffer's cows overgrazed to grow back. CR 1256-57 (Findings of Fact ##72-73); App 18-19. After Kieffer watched Teri through a rifle-mounted scope as Teri moved equipment alone at the Leased Premises in November 2020, Teri never returned to the Leased Premises for fear of her safety. CR 1256 (Findings of Fact ##72.a-.d); App 18.

On March 11, 2021, the Todds tendered the check for the rent due March 15, 2021 to Kieffer's bank (the check was made payable to Kieffer and his bank).¹⁰ CR 1257 (Finding of Fact #75.a-d); App 19. On March 12, 2021, Kieffer confronted James and his

¹⁰ Todds also paid the March 2020 rent by a check made out to Kieffer and his bank. CR 1246 (Finding of Fact #22); App 8.

ranch hand with the aid of a firearm, threatened to shoot Todds' cattle if they were on the Leased Premises on March 16 (the day after Todds' next rent payment was due), and yelled at James "you ever touch my fucking dogs again, either one of ya, I'll shoot your fucking head off." CR 1258 (Findings of Fact #76.i-j and 76.q-q.i); App 20-21. As a result of Kieffer's armed threats, law enforcement cited Kieffer with aggravated assault and possession of a firearm by a convicted felon. CR 1259 (Finding of Fact #76.s); App 21.

Due to the armed confrontation on March 12, 2021, Todds feared for their safety, the safety of their ranch hands, and the safety of their cattle; the Todds did not return to use the Leased Premises (with the exception of use of the 154.2 acres) without the aid of law enforcement or knowing Kieffer would not be there. CR 1259 (Finding of Fact #76.n); App 21. Todds contacted their attorney and initiated this action. CR 1260-61 (Findings of Fact ##78.a and 80-81.a); App 22-23. By August 5, 2021, Todds also vacated the 154.2 acres. CR 1260 (Findings of Fact #79.b.); App 22.¹¹

The Leased Premises is approximately 27.8 miles from Todds' house; after Kieffer forcibly ejected and excluded Todds from the Leased Premises, Todds secured replacement ground which was as far as approximately 250 miles away from Todds' House. CR 1263 (Finding of Fact #95.a); App 25. Consequently, Todds incurred expenses for additional hay, trucking, care for cattle, and pasture rent that would not have been incurred if they had been able to utilize the Lease Premises pursuant to the Lease. CR

¹¹ Without citing to the record, the Kieffer Brief erroneously asserts "Todds ultimately left the premises in 2022." Kieffer Brief, p. 6. This is not only unsupported, but is disingenuous given Kieffer's purported contract for deed to sell the land to a third-party effective January 1, 2022. CR 850-851; *see also*, CR 782-785.

1262-1276 (Findings of Fact ##91-166, 173, and 175-183); App 24-38. The Todds were forced to mitigate their damages to keep their livestock alive. CR 1232 (Findings of Fact #73); App 58.

STANDARD OF REVIEW

Assignments of error not identified or argued are deemed abandoned on appeal.

“An assignment of error not briefed and argued is deemed abandoned.” *Giesen v. Giesen*, 2018 SD 36, ¶ 23 (internal citations omitted).

It is elemental that this Court limits its review to the arguments that are raised and briefed. *State v. Spaniol*, 2017 SD 20, ¶ 21, 895 N.W.2d 329. “It is elementary that on an appeal from a judgment assignments of error which are not discussed or argued in appellant’s brief are deemed abandoned....” *Boe v. Healy*, 168 N.W.2d 710, 715 (S.D. 1969) (internal citation omitted); *see also, Nichols & Shepard Co. v. Marshall*, 132 N.W. 791, 792 (S.D. 1911). Of the 58 pages of Findings and Conclusions, the Kieffer Brief does not assign as error a single finding of fact or conclusion of law.

Credibility

“In a bench trial, the circuit court is the finder of fact and sole judge of credibility.” *Osman v. Karlen and Associates*, 2008 SD 16, ¶ 30, 746 N.W.2d 437. “The credibility of witnesses, the import to be accorded their testimony, and the weight of the evidence must be determined by the trial court.” *Parker v. Parker*, 2017 SD 37, ¶ 12 (internal cite omitted). “This Court is not free to reweigh the evidence or gauge the credibility of the witnesses.” *Waldner v. Berglund*, 2008 SD 75, ¶ 19, 754 N.W.2d 832 (internal citations omitted).

Findings and Conclusions

In the event this Court deems it appropriate to review the Trial Court's Findings and Conclusions, the Trial Court is "...at liberty to draw all the inferences which logically and naturally follow from proven facts." *Home Inv. Co. v. Clarson*, 21 SD 72, 109 N.W. 507 (S.D. 1906) (internal citation omitted). "Findings of fact, whether based on oral or documentary evidence, may not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." SDCL § 15-6-52(a) (in part). This Court declines "to reweigh the evidence because that is within the province of the circuit court, which we only review to determine whether the court's findings are clearly erroneous." *Parker* 2017 SD at ¶ 12.

The circuit court's findings on damages will not be disturbed on appeal unless they are clearly erroneous. Doubts about whether the evidence supports the court's findings of fact are to be resolved in favor of the successful party's version of the evidence and of all inferences fairly deducible therefrom which are favorable to the court's action.

J. Clancy v. Khan Comfort, LLC, 2022 SD 68, ¶ 8 (internal citations omitted).

Kieffer incorrectly claims the law:

...is well-settled and provides that this court should scrutinize more carefully and give less weight to findings and conclusions prepared by counsel and adapted by the Circuit Court. *MacKaben v. MacKaben*, 2015 SD 86, 871 N.W.2d 617.

Kieffer Brief, p. 12.¹² A simple reading of *MacKaben* demands a conclusion directly opposite of what Kieffer asserts:

¹² Kieffer also asserts the Trial Court "...adopted, in total, the findings and conclusions of law proposed by Todds' counsel." Kieffer Brief, p. 3. This simply is not true, as the Trial Court did not adopt (among other things) Todds' proposed findings 1 and 3-5. CR 1180, 1244; App 6.

Tom asserts that the circuit court's findings of fact, conclusions of law, and divorce decree are only entitled to limited deference because they were all drafted by Annette's counsel. In support of this assertion, Tom offers a single dissenting opinion stating: "[W]e cited with approval a case suggesting that appellate courts should scrutinize more carefully and give less weight to findings prepared by counsel than those findings prepared by trial judges themselves." *Kreps v. Kreps*, 2010 SD 12, ¶ 48, 778 N.W.2d 835, 848 (Konenkamp, J., dissenting). According to Tom, the circuit court altered only a single finding of fact, added one conclusion of law, and omitted Annette's proposed conclusions of law regarding attorney fees.

We decline Tom's invitation to hold that findings and conclusions prepared by a party at the court's request are only entitled to limited deference as a general rule.

MacKaben v. MacKaben, 2015 SD 86, ¶ 11-12, 871 N.W.2d 617 (original citations)

(emphasis added). This Court in *MacKaben* expressly declined the invitation to give limited deference when the Court adopts findings and conclusions prepared by a party.

Id.

ARGUMENT

Todds restructure the issues as follows:

- 1.) **Whether Kieffer's assessments of error are 'wholly insufficient' for review** (Todds assert Kieffer's Brief does not set forth the particulars in which the evidence is claimed to be insufficient, making his brief wholly insufficient for review by this court);
- 2.) **Whether the Trial Court correctly determined damages incurred between November and May** (this correlates with Section B of the Kieffer Brief);
- 3.) **Whether the Trial Court correctly determined the already-executed oral agreement is valid and enforceable** (this correlates with Section C of the Kieffer Brief);
- 4.) **Whether the Trial Court correctly applied SDCL § 21-3-6** (this correlates with Section D of Kieffer's Brief); and
- 5.) **Whether Kieffer waived or abandoned issues on appeal.**

ISSUE 1: Kieffer's assignments of error are 'wholly insufficient' for review.

The Trial Court should be affirmed because Kieffer does not articulate any particulars in which the evidence is claimed to be insufficient. "...the burden of establishing incorrectness [is] on the appellant." *Hilde v. Flood*, 130 N.W.2d 100, 101 (S.D. 1964). Kieffer fails to assign a single finding of fact or conclusion of law made in error, fails to adequately cite to the record, and fails to establish incorrectness in this appeal.

This Court has previously warned:

We remind all appellate counsel that "[e]ach statement of a material fact shall be accompanied by a reference to the record where such fact appears." SDCL 15-26A-60(5). See also *J.R. Watkins Co. v. Beisel*, 78 S.D. 413, 103 N.W.2d 333 (1960). Failure to provide appropriate references to the record imposes an unreasonable burden on an already overburdened judicial system. The courts of this state cannot be expected to search through settled records for support for litigant's factual assertions.

Klein v. Klein, 500 N.W.2d 236, 240 (S.D. 1992) (original citations).

The party alleging error on appeal must show such error affirmatively by the record and not only must the error be demonstrated but it must also be shown to be prejudicial error.

Tovsland v. Reub, 2004 SD 93, ¶ 15, 686 N.W.2d 392 (internal citations omitted). Kieffer has not affirmatively shown any error in the record, nor does he allege any prejudicial error.

This court has held under this statute that an assignment of error need follow no stated form, but must fully and plainly point out the error alleged to exist, and if the insufficiency of the evidence to justify the decision is assigned, the assignment must state the particulars in which the evidence is claimed to be insufficient. SDC 33.0735; *Stoecker v. Stoecker*, 74 SD 415, 54 N.W.2d 171; *Loffer v. Witte*, 71 SD 626, 28 N.W.2d 698.

Assignments that merely assert error without stating the particulars in which the evidence is claimed to be insufficient and which fail to refer to the page of the transcript or portion of the record where the alleged error appears are wholly insufficient.

J. R. Watkins Co. v. Beisel, 103 N.W.2d 333, 334-5 (S.D. 1960) (original citations).

The Court in *J.R. Watkins Co.* relied on the applicable statute at the time, SDC 33.0735, which required:

‘If insufficiency of the evidence to justify the verdict, finding, or other decision is assigned, the *assignment must state the particulars in which the evidence is claimed to be insufficient.*’

Id., at 334 (quoting SDC 33.0735, in part) (emphasis added). SDCL § 15-26A-60(5)

appears to be the progeny of SDC 33.0735, requiring:

Where it is claimed that a verdict, finding of fact, or other determination is not sustained by the evidence, the *statement must set forth the particulars in which the evidence is claimed to be insufficient.* Each statement of a material fact shall be accompanied by a reference to the record where such fact appears.

SDCL § 15-26A-60(5) (emphasis added). Todd App 8.

Argument Section B of Kieffer’s Brief

Because Argument Section B of Kieffer’s Brief fails to substantively cite to the record, it is wholly insufficient for review and the Trial Court should be affirmed on the issue. Kieffer’s Brief, pp. 12-14; SDCL § 15-26A-60(5); Todd App 8.

Argument Section C of Kieffer’s Brief

This Court declines “to reweigh the evidence because that is within the province of the circuit court, which we only review to determine whether the court’s findings are clearly erroneous.” *Parker* 2017 SD at ¶ 12. *See also, Klein*, at 239 (appellate counsel has an “obligation to state the facts ‘fairly, with complete candor, and as concisely as possible.’” (citing SDCL § 15-26A-60(5)).

Argument Section C of Kieffer's Brief hinges on his assertion that Teri Todd testified that the oral agreement was unreasonable (Kieffer Brief, p. 17); Teri Todd unequivocally testified the oral agreement was reasonable and that she is experienced with leasing ground:

Q But in this litigation, you've taken the position that that's a reasonable daily amount for cattle grazing on property; correct?

A Yes, in this situation.

Q But you, in fact, know that that's not -- \$1,000 a day is not, in fact, reasonable because you're experienced with leasing grazing ground; correct?

A Yes, I am.

CR 1063 (TT 100:5-12); Todd App 5. Teri Todd's answer of "Yes, I am" to Kieffer's compound question in lines 9-11 is not an admission that the oral agreement was not reasonable and is not a fair weighing of the evidence; Teri was clearly answering the last part of the compound question about being experienced with leasing grazing ground, and she unequivocally testified that it was reasonable on the same transcript page at lines 5-7. *Id.*

Not only is Kieffer's interpretation of the testimony not supported by the testimony itself, but he failed to introduce evidence on the issue and did not preserve the issue for appeal. *Walker v. Walker*, 2006 SD 68, ¶ 26, 720 N.W.2d 67. This Court should deem the purported assignment of error in Argument Section C of Kieffer's Brief as wholly insufficient for review and affirm the Trial Court.

Argument Section D of Kieffer's Brief

Because Argument Section D of Kieffer's Brief fails to cite to the record, it is wholly insufficient for review and the Trial Court should be affirmed on the issue.

Kieffer's Brief, pp. 18-19. SDCL § 15-26A-60(5); Todd App 8.

Issue 1 Conclusion

"As the [Appellant] has wholly failed to comply with the provisions of SDC 33.0735, the judgment of the trial court is affirmed." *J. R. Watkins Co.*, 103 N.W.2d at 335. Because Kieffer's Brief lacks any of the required identification of particulars or citations to the record as required by SDCL § 15-26A-60(5), it is wholly insufficient for review and the Trial Court should be affirmed. *See, J. R. Watkins Co.*, at 335.

ISSUE 2: The Trial Court correctly determined damages incurred between November and May.

If this Court determines that Kieffer's assignments of error in Argument Section B of the Kieffer Brief are sufficient for review, the Trial Court should be affirmed on the merits because it correctly determined the damages in relation thereto.

Argument Section B of Kieffer's Brief asserts for the first time on appeal and without any citations to the record or to relevant authority that the "...damages award against Kieffer must be limited to those incurred by Todds from mid-May through the last day of October." Kieffer Brief, p. 14.¹³

This court gives due regard to the Trial Court's decisions on conflicts in evidence, credibility of witnesses, and weight of the evidence:

All conflicts in the evidence must be resolved in favor of the circuit court's determinations. The credibility of the witnesses, the weight to be accorded their testimony, and the weight of the evidence must be determined by the [circuit] court and we give due regard to the [circuit] court's opportunity to observe the witnesses and the evidence.

¹³ "[T]his Court may not review theories argued for the first time on appeal..." *Wyman v. Bruckner*, 2018 SD 17, ¶ 16, 908 N.W.2d 170.

State v. Fifteen Impounded Cats, 2010 SD 50, ¶ 26, 785 N.W.2d 272 (internal citations omitted).

The circuit court's findings on damages will not be disturbed on appeal unless they are clearly erroneous. Doubts about whether the evidence supports the court's findings of fact are to be resolved in favor of the successful party's version of the evidence and of all inferences fairly deducible therefrom which are favorable to the court's action.

J. Clancy, 2022 SD at ¶ 8 (internal citations omitted).

Argument Section B of Kieffer's Brief hinges entirely on Kieffer's unsupported claim that "Teri Todd further testified that the lease would only allow the Todd cattle on the Kieffer property from May to mid-November of each year...." Kieffer Brief, p. 13.¹⁴ Kieffer's assertion fails to cite to any evidence and directly contradicts the record, including the following testimony from Teri Todd:

Q Was this a seasonal lease or a year-round lease?

A Year-round lease.

Q And so you were entitled to possess the property year-round?

A Yes.

TT 14:21-25; CR 977; Todd App 4. Again, the Trial Court found "Teri testified in this matter, and her testimony was credible." CR 1277 (Finding of Fact #193); App 39. The Trial Court also deemed Teri Todd, a licensed veterinarian, an expert witness by agreement of the parties. CR 1016 (TT 53:2-18); Todd App 5. Kieffer presented no evidence to refute this. CR.

¹⁴ Todds take issue with many of the purported facts that are claimed in Kieffer's Brief because they do not adequately or accurately cite to the record.

Argument Section B of Kieffer’s Brief does not challenge any of the following findings made by the Trial Court (each of which the Trial Court expressly cited to the record):

1) “The Todds were entitled to the use of the Leased Premises year-round, and not merely on a seasonal basis.” CR 1245 (Finding of Fact #12).

2) “The Lease required that Kieffer’s cattle were to be removed from the Leased Premises by April 1, 2020 as follows: ‘...[Kieffer] currently has cattle on the real property being leased herein and shall have those cattle removed on or before April 1, 2020.’” CR 1247 (Finding of Fact #24); App 9;

3) “Kieffer never allowed Todds to exclusively run Todds’ cows on the Leased Premises.” CR 1249 (Finding of Fact # 32); App 11;

4) “Although Todds were entitled to possess and use the Leased Premises between September 19, 2020 and March 12, 2021, they opted to leave the Leased Premises alone as a matter of good husbandry *so the grass that Kieffer’s cows overgrazed could grow back.*” CR 1256-57 (Finding of Fact #73) (emphasis added); App 18-19.

Kieffer also does not challenge Findings of Fact ##91-105.a, 106-112.b, 114, 116-117, 120-138, 140, 142-142.b, 144-146, 148-159, 163-166, 173, 175-180, and 182-183 made by the Trial Court, each of which expressly found Todds suffered various damages between January 2022 and December 2023 that would not have been incurred “if Todds were allowed use of the Leased Premises.” CR 1262-76; App 24-38.

Argument Section B of Kieffer’s Brief only cites to his own Appendix page 58, seemingly asking this Court to affirm Conclusion of Law ¶ 73, which specifically states, in part “There is no question that the Todds’ mitigated their damages, as they were forced

to do so in order to keep their livestock alive.” Kieffer Brief, p. 14; CR 1232; App 58 (in part).

No evidence or testimony supports Kieffer’s argument that Todds had to have their cattle off of the Leased Premises between November and May. The Parties knew how to negotiate when cattle could and could not be on the Leased Premises, as evidenced by the requirement that Kieffer have his cattle removed by April 1, 2020. CR 1247 (Finding of Fact #24); App 9. The Lease provides that Todds “...will use and occupy said premises as crop and grazing lands...” with no seasonal restrictions. CR 932 (Lease ¶ 4). Nothing restricts Todds from having their cows on the Leased Premises November through April, as Kieffer asserts without any citation to supporting evidence or authority. *Supra*, n.14.

The last sentence of Argument Section B of Kieffer’s argument asks for a \$1,400 reduction in the award which Kieffer asserts was previously awarded. Kieffer Brief, p. 14. In Kieffer’s unsupported argument that damages for the dead cow were already awarded, Kieffer attempts to collaterally attack Teri Todd’s credibility on appeal (*see*, Kieffer Brief at p. 7).¹⁵ The \$1,400 damages for the dead cow were not previously affirmed by this Court in Kieffer I, and Kieffer does not appeal the Trial Court’s approval of the itemized breakdown for damages affirmed in Kieffer I. (Finding of Fact #168); App 35; *see also*, Order, ¶ 3 (October 11, 2023 Order granting motion) at CR 660-61, and Plaintiffs’ Motion Regarding Collection on Amount Affirmed by Supreme Court at CR 576-77.¹⁶

¹⁵ Kieffer cannot now collaterally attack the credibility determinations made by the Trial Court. CR 1277 (Findings of Fact ##193-195); App 39. *See also*, *Osman*, at ¶ 30.

¹⁶ Findings of fact relating to the dead cow, which Kieffer does not assign error to, are found in Findings of Fact ##42.a-42.g.iii. CR 1251-52; App 13-14.

Kieffer's request for a \$1,400 reduction in damages for the dead cow is without merit.

This Court should affirm the Trial Court in relation to Argument Section B of the Kieffer Brief.

ISSUE 3: The Trial Court correctly determined the already-executed oral agreement is valid and enforceable.

In the event this Court determines that Kieffer's assignments of error in Argument Section C of the Kieffer Brief are sufficient for review, the Trial Court correctly determined damages thereto and should be affirmed on the merits.

When the appellant does not contest any of the Trial Court's findings of fact, the sole issue on appeal is whether the facts as delineated by the Trial Court are sufficient for the conclusions of law. *Hamad Assam Corp. v. Novotny*, 2007 SD 84, ¶ 9, 737 N.W.2d 922. In this case, findings of fact as delineated by the Trial Court relating to Argument Section C of Kieffer's Brief are sufficient to determine the already-executed oral agreement is valid and enforceable.

This Court stated in Kieffer I that "...there are genuine issues of material fact concerning the existence of the alleged oral agreement...and there are issues of fact and law whether this amounts to duplicate damages." Kieffer I Order Directing Issuance of Judgments of Partial Affirmance and Partial Reversal, p. 4; App 66.¹⁷ Significantly, the

¹⁷ Something that may cause confusion is that the partially reversed Summary Judgment in Kieffer I reversed the \$266,000 award to Todds for \$1,000 per day between June 23, 2021 through March 15, 2022 – Todds did not pursue, nor did the Trial Court address, this damage theory on remand. The phrase "liquidated damages" was nonexistent in this matter until it was raised sua sponte in this Court's Order Directing Issuance of Judgments of Partial Affirmance and Partial Reversal in Kieffer I. CR 563-568. Not only

Trial Court did not award Todds any monetary damages in relation to this issue. Kieffer's argument appears to be in relation to the \$53,000 for the September 2020 Rent and the \$1K/\$5K Agreement. *See*, Kieffer's Brief, pp. 14-17 and CR 1278-81 (Conclusions of Law ##8-18); App 40-43.

The Trial Court found that the oral agreement existed¹⁸ and it did not amount to duplicate damages.¹⁹ For conciseness, Todds will not brief on duplicate damages because Kieffer abandoned that issue on appeal by not raising it – “[a]n assignment of error not briefed and argued is deemed abandoned.” *Giesen*, 2018 SD at ¶ 23 (internal citations omitted).

Kieffer does not contest any of the Trial Court's findings of fact, including the following:

Even though Kieffer owed Todds more than Todds owed Kieffer for the September 2020 rent, the parties essentially called the September 2020 rent and the amounts Kieffer owed to Todds under the \$1K/\$5K Agreement a ‘wash’.

CR 1256 (Finding of Fact #69.b.vii); App 18. Even Kieffer's bank, which had an assignment of rents, knew about the oral agreement and did not attempt to collect the September 2020 rent from Todds. CR 1255 (Finding of Fact #69.b.i); App 17.

was liquidated damages not an issue raised by Kieffer, but the only damages Kieffer ever plead in this matter were his counterclaim for \$1,000 in damages per day. CR 71 at ¶ 15.

¹⁸ *See*, CR 1250-52, 1255-56, 1258, (Findings of Fact ##34.f-h.ii, 35, 39.b, 42.f, 69.b.viii, 76.i); App 12-14, 17-18, 20. *See also*, CR 1278-84 (Conclusions of Law ##8-25); App 40-46.

¹⁹ The Trial Court expressly determined that “None of the damages established during trial are duplicative with the \$207,131.11 in damages already affirmed by the South Dakota Supreme Court in this matter.” CR 1278 (Conclusion of Law #6); App 40. *See also*, CR 1279 (Conclusion of Law #11); *See also*, CR 808.

Kieffer did not present a case at trial, but now asks (without identifying any particular finding of fact or conclusion of law) this Court to reverse “...any findings of the trial court....” Kieffer Brief, p. 17. Kieffer ignores the fact that the Trial Court expressly found that Kieffer agreed to, ratified, acknowledged, and performed the oral agreement. *See*, CR 1258 (Finding of Fact #76.i); App 20. The Trial Court made multiple other findings of fact regarding the parties discussing, agreeing to, ratifying, and performing the oral agreement – none of which are challenged by Kieffer. *See*, CR 1250-52, 1255-56, 1258, (Findings of Fact ##34.f-h.ii, 35, 39.b, 42.f, 69.b-.viii, 76.i); App 12-14, 17-18, 20. *See also*, CR 1278-84 (Conclusions of Law ##8-25); App 40-46.

The Trial Court found the agreement between the parties was valid and enforceable for four reasons:²⁰

- 1) To the extent it is a liquidated damages provision, it is valid and enforceable (CR 1279-80 (Conclusions of Law ##12-12.c); App 41-42);
- 2) Alternatively, the agreement constituted an executed oral agreement pursuant to SDCL § 53-8-7 (CR 1280 (Conclusions of Law ##13-13.b); App 42);
- 3) Alternatively, the agreement constituted alternative performance of the Lease (CR 1280 (Conclusions of Law ##14-14.b); App 42); and
- 4) Alternatively, the agreement is enforceable as a collateral contract (CR 1281 (Conclusions of Law ##15-15.c); App 43).

A. To the extent the oral agreement constitutes liquidated damages, the Trial Court correctly determined it is valid and enforceable.

²⁰ These four rationales were also briefed by Todds pursuant to the Trial Court’s Order to submit briefs by December 8, 2023. CR 675-685.

“The burden of establishing that the liquidated damage provision is an unlawful penalty rests with the party against whom enforcement is sought.” *Heikkila v. Carver*, 378 N.W.2d 214, 216 (S.D. 1985) (internal citation omitted). The Trial Court unequivocally determined that “**Kieffer failed to meet his burden that the \$1K/\$5K Agreement was an unlawful penalty and therefore an unenforceable liquidated damages provision.**” CR 1280 (Conclusion of Law #12.b.i); App 42 (original emphasis).²¹ As stated at the beginning of the Findings and Conclusions, Kieffer rested his case via email without presenting a case; further, “Kieffer failed to provide the Court with evidence in support of his counterclaims or in resistance to the Todds’ claims and defenses.” CR 1243-44 (introduction paragraph and Finding of Fact #2); App 5-6.²²

To the extent the already-executed oral agreement constitutes a liquidated damages provision, the Trial Court correctly determined it is valid and enforceable utilizing the test articulated in *Heikkila* that a liquidated damages provision:

will be upheld if (1) at the time the contract was made the damages in the event of breach were incapable or very difficult of accurate estimation, (2) there was a reasonable endeavor by the parties to fix compensation, and (3) the amount stipulated bears a reasonable relation to probable damages and is not disproportionate to any damages reasonably to be anticipated.

CR 1279 (Conclusion of Law #12.a citing *Heikkila*, 378 N.W.2d at 216); App 41.

The Trial Court also correctly delineated the following findings of fact in support

²¹ See also, CR 1277 (Conclusion of Law #1); App 39.

²² See also, CR 1278 (Conclusion of Law #4 concluding “Kieffer provided zero evidence....”); App 40.

of the conclusion (albeit they are designated as a conclusion of law)²³:

- i. This Court finds that at the time the parties entered into the Lease, the damages in the event of Kieffer's breach in not having his livestock off the Leased Premises after April 1, 2020 were incapable or very difficult of accurate estimation.
- ii. This Court finds that there was a reasonable endeavor by the parties to fix the compensation. The parties had itemized compensation for Todds assisting Kieffer with gathering and hauling his cows in April 2020 to the sale barn, and the parties even bartered as to partial payments on those amounts owed to Kieffer (by Kieffer giving them hay and vet supplies). The parties had multiple conversations about and ratifications of the arrangement.
- iii. This Court finds that the \$1K/\$5K Agreement bears a reasonable relation to probable damages and is not disproportionate to any damages reasonably to be anticipated.

CR 1279-80 (Conclusions of Law ##12.a.i-iii); App 41-42.

The facts as delineated by the Trial Court are sufficient to constitute a valid and enforceable liquidated damages provision. *See, Novotny*, 2007 SD at ¶ 9. This Court should affirm the Trial Court in this regard.

B. To the extent the oral agreement is not a valid and enforceable liquidated damages provision, it is still valid and enforceable on other grounds - which Kieffer did not appeal.

Kieffer only appeals the Trial Court's determination that the agreement is valid

²³ These determinations, designated a Conclusion of Law, are by their nature actually Findings of Fact. "...the designation of a finding of fact as a conclusion of law is not determinative of its true nature....This court has held that a fact found by the court although expressed as a conclusion of law will be treated on appeal as a finding of fact." *State ex rel. Van Loh v. Prosser*, 78 S.D. 35, 98 N.W.2d 329, 332 (S.D. 1959) (internal citations omitted). *See also*, CR 1277 (Conclusion of Law #1 stating "If any foregoing Finding of Fact is a Conclusion of Law, it shall operate as such Conclusion of Law, and if any foregoing Conclusion of Law is a Finding of Fact, it shall operate as such Finding of Fact. Further, any subheadings are for organization purposes and do not limit any Finding of Fact in its applicability to Conclusions of Law found under separate subheadings.").

and enforceable as liquidated damages. Kieffer Brief, pp. 14-17. Kieffer never objected to, nor briefed on appeal, the other grounds for enforcing the already-executed oral agreement. CR. Kieffer has therefore abandoned appeal of the other three reasons the agreement is enforceable. *Giesen*, 2018 SD at ¶ 23.

This Court "...will not review a matter on appeal unless proper objection was made before the circuit court..." *Osdoba v. Kelley-Osdoba*, 2018 SD 43, ¶ 23, 913 N.W.2d 496.²⁴

Therefore, even if this Court deems the oral agreement as not a valid and enforceable liquidated damage provision, the Trial Court should be affirmed in regards to Argument Section C of the Kieffer Brief.

ISSUE 4: The Trial Court correctly applied SDCL § 21-3-6.

In the event this Court determines that Kieffer's assignments of error in Argument Section D of the Kieffer Brief are sufficient for review, the Trial Court should be affirmed for two reasons: A) Kieffer's failure to cite authority waives the issue on appeal, and B) the Trial Court correctly applied SDCL § 21-3-6.²⁵

A. Kieffer's failure to cite authority in relation to the award pursuant to SDCL § 21-3-6 waives the issue on appeal.

²⁴ In *Osdoba* this Court found the Appellant waived an issue on appeal when he only objected to a final judgment and decree only to the extent it was inconsistent with his prior proposed findings of fact and conclusions of law; this Court held "[a]n objection must be sufficiently specific to put the circuit court on notice of the alleged error so it has the opportunity to correct it." *Osdoba*, 2018 SD at ¶ 23 (internal citation omitted).

²⁵ The Trial Court did not apply SDCL § 21-3-6 to all of Todds' damages, but only those damages specifically found to be related to Kieffer's forcible ejectment and exclusion of Todds. CR 1288-1291 (Conclusions of Law ##48-54.d); App 50-53.

Argument Section D of Kieffer’s Brief fails to cite to any supporting authority. Kieffer Brief, pp. 18-19.²⁶ This Court has repeatedly emphasized that “failure to cite authority is fatal.” *Schultz v. Scandrett*, 2015 SD 52, ¶ 30, 866 N.W.2d 128. “Failure to cite supporting authority in an appellate brief violates SDCL 15-26A-60(6) and waives the issue before this court.” *State v. Patterson*, 2017 SD 64, #27736, #27738 (internal citation omitted).

This Court should deny the relief sought in Argument Section D of the Kieffer Brief for waiving the issue on appeal. *Id.*

B. The Trial Court correctly applied SDCL § 21-3-6.

To the extent Argument Section D of the Kieffer Brief satisfies the requirements of SDCL § 15-26A-60(6), the Trial Court correctly applied SDCL § 21-3-6 and should be affirmed. “This Court reviews the issue of damages under the clearly erroneous standard.” *Weekley v. Wagner*, 2012 SD 10, ¶ 12, 810 N.W.2d 340.

For forcibly ejecting or excluding a person from the possession of real property, the *measure of damages is* three times such a sum as would compensate for the detriment caused to him by the act complained of.

SDCL § 21-3-6 (emphasis). App 71. SDCL § 21-3-6 is not a punitive damages provision, but rather a statutory measure of damages.²⁷ The Trial Court found Kieffer both forcibly ejected and excluded Todds. *See* citations, below.

²⁶ While Kieffer’s Brief references SDCL § 21-3-6, it does not actually cite to the statute or to any authority in support of his argument. Kieffer Brief, pp. 18-19.

²⁷ The word “is”, as contained in SDCL § 21-3-6, is to be understood in its ordinary sense. SDCL § 2-14-1 (“Words used are to be understood in their ordinary sense...”).

Kieffer did not challenge the Trial Court’s application of SDCL § 21-3-6 against him in Kieffer I. In fact, throughout the three plus years this case has been litigated, Kieffer has made the following judicial admission no less than three times: “The undisputed facts in the record establish a sufficient basis for determining Kieffer violated SDCL § 21-16-1(1) and (3).” CR 326 (October 19, 2022); Appellants’ Brief in Kieffer I, p. 10 (February 3, 2023), and Appellants’ Reply Brief in Kieffer I, p. 10 (March 22, 2023).²⁸ Kieffer’s judicial admissions are binding on him:

This court has held that parties are bound by their judicial admissions made in appellate briefs on at least two prior occasions. See Tuttle & Reichert, *supra*; see also Postscript Enters. v. City of Bridgeton, 905 F.2d 223, 227-28 (8th Cir.1990) (judicial admission in defendant’s appellate brief foreclosed necessity of considering certain arguments raised by plaintiff); Royko v. Griffith Co., 147 Cal.App.2d 770, 306 P.2d 36, 40 (1957) (“[T]he express or implied admissions of the briefs may be recognized as properly filling a hiatus in the transcript.”); Bannister v. State, 202 Ga.App. 762, 415 S.E.2d 912, 916 (1992) (“It is well-established that a party ... may make admissions [in a] brief [which are] binding upon the party and estops the party from denying the admission[.]”); Prentice v. UDC Advisory Servs., Inc., 271 Ill.App.3d 505, 207 Ill. Dec. 690, 695, 648 N.E.2d 146, 151 (1995) (holding that a judicial admission made in a motion to dismiss and repeated in an appellate brief is “binding and incontrovertible”).

Estate of Tallman, Matter of, 562 N.W.2d 893, 1997 SD 49, ¶ 13 (S.D. 1997) (original citations).

SDCL § 21-16-1(1) and (3) state:

An action of forcible entry and detainer, or of detainer only, is maintainable:

(1) If a party has by force, intimidation, fraud, or stealth, entered upon the prior actual possession of real property or the occupied structure of another, and detains the same;

²⁸ In Kieffer I, Kieffer admitted his actions violated SDCL § 21-3-6, and the only challenge to application of SDCL § 21-3-6 was as it was applied to Howie’s actions. Kieffer I.

...
(3) If a party by force or by menaces and threats of violence unlawfully holds and keeps the possession of any real property, or occupied structure, whether the same was acquired peaceably or otherwise;
....

SDCL § 21-16-1(1) and (3).

Because Kieffer does not challenge any particular Finding of Fact, the sole issue for this Court in relation to Argument Section D of Kieffer's Brief is to consider whether the facts as delineated by the Trial Court are sufficient to constitute the Trial Court's application of SDCL § 21-3-6. *Novotny*, at ¶ 9. A review of the uncontested Findings of Fact delineated by the Trial Court illustrates the Trial Court correctly applied SDCL § 21-3-6 in calculating Todds' damages.

The evidence produced at trial further developed the facts, and the uncontested findings delineated by the Trial Court include:

- "l. During the confrontation, Kieffer threatened James Todd that he would shoot Todds' cattle multiple times, including expressly threatening 'you bring them in, I'll shoot 'em'. Exhibit 73 and 74."
- "n. Due to the confrontation the Todds became fearful for their safety, the safety of their ranch hands, and the safety of their cattle; the Todds did not return to use the Leased Premises (with the exception of use of the 154.2 acres) without the aid of law enforcement or knowing Kieffer would not be there. TT161:9-163:4, 169:18-24."
- "r. Deputy Torres agreed that it was a safety issue for James to go back to the Leased Premises. TT 48:1-9."
- "s. Kieffer admitted to having a gun during the confrontation, even though Kieffer was prohibited from possessing a firearm as he is a convicted felon. The Deputy cited Kieffer with aggravated assault and possession of a firearm by a convicted felon, and requested an arrest warrant. TT48:10-49:6."

1259 (Findings of Fact ##76.1-.s); App 21-22. *See also*, CR 1277 (Findings of Fact ##196-199); App 39.

The Trial Court not only found Kieffer violated SDCL § 21-16-1(1) and (3) by virtue of his judicial admissions, but also as proven by the evidence presented at trial:

- “39.** Kieffer is bound to his multiple prior judicial admissions made in his motion and appellate brief that the undisputed facts establish a sufficient basis for determining Kieffer violated SDCL § 21-16-1(1) and (3).
- 40.** Even without holding Kieffer to his prior judicial admissions, the evidence produced at trial proves, as a matter of law, that Kieffer’s actions violated SDCL § 21-16-1(1) and (3).

 - a. By brandishing a firearm and making express threats of violence on March 12, 2021, Kieffer’s actions constitute force and intimidation to forcibly eject James from the Leased Premises, which Kieffer did with the intent of forcing Todds off the Leased Premises by March 16, 2021.
 - b. On March 12, 2021, Kieffer used menacing conduct along with express threats of violence by obtaining and holding possession of the Leased Premises despite Todds’ legal entitlement to its possession; Kieffer further acknowledged that Todds were entitled to be on the property at least until March 15, 2021, and that despite Todds tendering the March rent payment directly to Kieffer’s bank (which held an assignment of rents), Kieffer refused to endorse the check.
 - c. On March 12, 2021, Kieffer told James ‘See you in the courtroom – you bring ‘em in, I’ll shoot ‘em’. Kieffer was threatening to shoot Todds’ cattle if Todds brought their cattle onto the Leased Premises. Exhibit 74.

- d. Kieffer has threatened to shoot the Todds and their hired hands.
- e. Kieffer has brandished a rifle multiple times in the presence of Todds and/or their hired hands.
- f. Kieffer's actions of allowing Ronald Howie's cattle onto the Leased Premises also constitutes using "force" and "menacing conduct" to physically exclude the Todds from using the entirety of the Leased Premises.
- g. Kieffer's actions of purportedly selling the Leased Premises to Nathan Howie on a contract for deed WHILE KIEFFER'S APPEAL WAS PENDING, and apparently backdating it to January 1, 2022, also constitutes using "force" and "menacing conduct" to exclude the Todds from using the entirety of the Leased Premises."

CR 1287-88 (Conclusions of Law ##39-40.g); App 49-50. The true nature of Conclusions of Law ##40.a-g (above) are findings of fact. *Supra*, at n.23. The Trial Court further found:

- "41.** Kieffer used force and intimidation to enter upon and detain the Leased Premises.
- 42.** Kieffer used force, menaces, and threats of violence to unlawfully hold and keep possession of the Leased Premises.
- 43.** Kieffer failed to deliver and surrender peaceful possession of the Leased Premises to the Todds as of March 12, 2021.
- 44.** Kieffer's actions implicate application of SDCL § 21-3-6, which provides:

For forcibly ejecting or excluding a person from the possession of real property, the measure of damages is three times such a sum as would compensate for the detriment caused to him by the act complained of.
SDCL § 21-3-6 (in its entirety)."

CR 1288 (Conclusions of Law ##41-44); App 50. The true nature of Conclusions of Law ##41-44 (above) are findings of fact. *Supra*, at n.23. *See also*, CR 1256, 1262, 1263, 1266 (Findings of Fact ##72.a-d; 90.b-90.c, 95.a, 117); App 18, 24-25, 28.

The Trial Court then determined:

- “46. Because Kieffer both forcibly ejected and excluded Todds from the possession of the Leased Premises, the measure of damages is three times such a sum as would compensate for the detriments caused to Todds (by virtue of said ejection and exclusion). SDCL § 21-3-6. This measure of damages is different than punitive damages, and is instead a statutory calculation.
- 47. Even without holding Kieffer to his prior judicial admissions, the evidence produced at trial proves, as a matter of law and beyond preponderance of the evidence, that Kieffer’s actions forcibly ejected and excluded the Todds from the Leased Premises, and application of SDCL § 21-3-6 is not only appropriate, but required.
- 48. SDCL § 21-3-6 applies in this matter, though it is not applicable to all of Todds’ detriments/damages.”

CR 1288 (Conclusions of Law ##46-48); App 50. The true nature of Conclusions of Law ##46-48 (above) are findings of fact. *Supra*, at n.23. The Court thereafter methodically only applied SDCL § 21-3-6 to the specific damages caused by Kieffer’s actions in forcibly ejecting and excluding the Todds from the property. CR 1289-90 (Conclusions of Law ##49-53); App 51-52.

This Court should affirm the Trial Court in relation to Argument Section D of the Kieffer Brief.

ISSUE 5: Kieffer waived or abandoned issues on appeal.

Kieffer waived or abandoned issues on appeal relating to A) attorney’s fees and

costs, and B) other issues not asserted or briefed.

A. Abandonment of the attorney's fees and costs issue.

Kieffer abandoned the issue of attorney's fees and costs. An issue initially asserted by an appellant is deemed abandoned when the appellant fails to brief the issue. *Giesen*, 2018 SD at ¶ 23.

One of the issues Kieffer's Docketing Statement claimed to appeal is "[w]hether the trial Court [sic] erred in allowing plaintiff attorney fees?" CR 1429. Because Kieffer's Brief did not identify this issue nor brief it, he has abandoned the issue on appeal. *Id.*

B. Kieffer waives any issues not asserted or briefed.

Any other issues to potentially appeal in this matter include, but are not limited to, damages awarded pursuant to SDCL § 21-1-10 and the March 1, 2024 Memorandum of Opinion (CR 805-816); these issues have been abandoned in this appeal by Kieffer for failure to assert or brief them. *Id.*

CONCLUSION

Todds ask this Court to affirm the Trial Court and put a final resolution to this case.

Dated this 26th day of September, 2024.

BENNETT MAIN GUBBRUD & WILLERT, P.C.
Attorneys for James Todd and Teri Todd

By: /s/ Kellen B. Willert

Kellen B. Willert
618 State Street
Belle Fourche, SD 57717
Telephone: (605) 892-2011
Email: kellen@bellelaw.com

CERTIFICATE OF COMPLIANCE

COME NOW, the Appellees, James Todd and Teri Todd, by and through their attorney of record, Kellen B. Willert, of Bennett Main Gubbrud & Willert, P.C., 618 State Street, Belle Fourche, South Dakota 57717, and pursuant to SDCL § 15-26A-66(4), hereby certifies that he has complied with the type volume limitation of SDCL § 15-26A-66(4) in that Appellees' Brief is double-spaced and proportionally spaced in Times New Roman, 12-point, with a total word count of 8,657 and a total character count of 43,499. The Appellees' Brief and all copies are in compliance with this rule.

Dated this 26th day of September, 2024.

BENNETT MAIN GUBBRUD & WILLERT, P.C.
Attorneys for James Todd and Teri Todd

By: /s/ Kellen B. Willert

Kellen B. Willert
618 State Street
Belle Fourche, SD 57717
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[CERTIFICATE OF SERVICE AND FILING TO FOLLOW]

CERTIFICATE OF SERVICE AND FILING

I, Kellen B. Willert, attorney for James Todd and Teri Todd, do hereby certify that on the 26th day of September, 2024, I caused a full, true, and complete copy of APPELLEES' BRIEF to be served *electronically* through the Odyssey electronic filing system:

Courtney R. Clayborne
Clayborne, Loos & Sabers, LLP
P.O. Box 9129
Rapid City, SD 57709
Telephone: (605) 721-1517
Email: courtney@clslawyers.net

I further certify that on the same day I caused the APPELLEES' BRIEF to be filed *electronically* through the Odyssey electronic filing system and the original APPELLEES' BRIEF to be filed by U.S. Mail with:

Shirley Jameson-Fergel
Clerk of the Supreme Court
State of South Dakota
500 East Capitol Avenue
Pierre, SD 57501-5070
Email: SCClerkBriefs@ujs.state.sd.us

by depositing said copy in envelope securely sealed with first class postage thereon fully prepaid in the U.S. Mail in Belle Fourche, South Dakota, and addressed as shown above.

Dated 26th day of September, 2024.

BENNETT MAIN GUBBRUD & WILLERT, P.C.
Attorneys for James Todd and Teri Todd

By: /s/ Kellen B. Willert
Kellen B. Willert

APPENDIX

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Karlson, Stephany

From: Donovan, Kirsten
Sent: Thursday, March 28, 2024 2:28 PM
To: Karlson, Stephany
Subject: FW: [EXT] Trial tomorrow

From: Strawn, Judge Eric <Eric.Strawn@uds.state.sd.us>
Sent: Wednesday, March 27, 2024 8:09 PM
To: Kellen Willert <kellen@bellelaw.com>
Cc: Courtney Clayborne <courtney@clslawyers.net>; Latuseck, Carol <Carol.Latuseck@uds.state.sd.us>
Subject: Re: [EXT] Trial tomorrow

Received. I am instructing the clerk of courts to file this email chain in odyssey for posterity purposes. Deadlines for proposed findings and conclusions of law have been previously set on the record.

Judge Strawn

Sent from my iPhone

On Mar 27, 2024, at 7:14 PM, Kellen Willert <kellen@bellelaw.com> wrote:

Received-thank you.

V/r,

Kellen B. Willert

I apologize for any incorrect spelling or grammar as this message is being sent from my mobile device.

From: Courtney Clayborne <courtney@clslawyers.net>
Sent: Wednesday, March 27, 2024 7:10:47 PM
To: eric.strawn@uds.state.sd.us <eric.strawn@uds.state.sd.us>; Kellen Willert <kellen@bellelaw.com>
Subject: Trial tomorrow

I have received no communication from my client and will therefore rest the defendant's case. Please confirm the receipt of this.

Courtney

1
Todd App 1

FILED

MAR 28 2024

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
 4TH CIRCUIT CLERK OF COURT

By CR963

1 but I've invested a substantial amount of time preparing
2 for this trial today, and it's been scheduled since October
3 of last year, so we're ready to go forward.

4 **THE COURT:** All right. Thank you. We'll be in recess for
5 just a moment.

6 (An off-the-record discussion was held in
7 chambers.)

8 **THE COURT:** We are back on the record. After convening
9 with counsel, the Court is going to allow both parties to
10 make their final positions, and then the Court will make a
11 decision.

12 So, Mr. Clayborne, what is your request?

13 **MR. CLAYBORNE:** Your Honor, at this time, having attempted
14 to contact my client and having conversations with him
15 yesterday where he was aware and did at least indicate that
16 he would be here today, but with uncertainty, we would
17 request a continuance as his testimony is essential to my
18 being able to not only proceed today but to represent him
19 in the future.

20 **THE COURT:** All right. Thank you, Mr. Clayborne.

21 Mr. Willert?

22 **MR. WILLERT:** Thank you, Your Honor.

23 We oppose and object to the motion, Your Honor. We've
24 invested a substantial amount of time and effort in
25 preparing for today.

1 Q Okay. And was all of that acreage together or contiguous?

2 A Not all of it.

3 Q Okay. How much was not contiguous?

4 A About 154 acres.

5 Q Are you familiar with how Mr. Kieffer obtained this
6 property?

7 A We were told by him that it was passed down from his
8 father.

9 Q Okay. So under the lease, who was the landlord?

10 A Richard Kieffer.

11 Q And who were the tenants?

12 A James and Teri Todd.

13 Q And so you live in Butte County, but this land is in what
14 county?

15 A Meade County.

16 Q And did the lease include any property that was adjacent to
17 Mr. Kieffer's residence?

18 A Yes.

19 Q And was that the 154 acres or the other chunk?

20 A The other, larger piece.

2 Q Was this a seasonal lease or a year-round lease?

22 A Year-round lease.

23 Q And so you were entitled to possess the property
24 year-round?

25 A Yes.

1 oath.

2 Now, Mr. Willert, the last we left with your direct
3 examination as to Ms. Todd was qualifying her as an expert.
4 I will just simply ask, Mr. Clayborne, are you going to be
5 objecting to her as an expert? Should we proceed with the
6 Daubert?

7 **MR. CLAYBORNE:** I'm not sure the topic that the --

8 **THE COURT:** I assume that this is about the dead cow and
9 causation; is that correct, Mr. Willert?

10 **MR. WILLERT:** That's correct, Your Honor.

11 **THE COURT:** Okay.

12 **MR. CLAYBORNE:** I don't have any problem with that.

13 **THE COURT:** Okay. If there's no objection to her being
14 qualified as an expert, the Court will deem her an expert
15 by agreement by the parties.

16 We will now move into the testimony. Mr. Willert, you
17 may proceed on your continued direct examination of Ms.
18 Todd.

19 **THE WITNESS:** Your Honor, may I get my glasses?

20 **MR. WILLERT:** I'll bring them to you.

2 **THE WITNESS:** Thank you. I'm sorry.

22 **MR. CLAYBORNE:** Just for the record, I'd note I think the
23 dead cow was compensated as part of the judgment that
24 existed.

25 **MR. WILLERT:** I don't believe it was.

1 grazing on the leased property?

2 **A** You asked me if we told Richard that that was a reasonable
3 amount for grazing on there. I never used those words with
4 Richard Kieffer.

5 **Q** But in this litigation, you've taken the position that
6 that's a reasonable daily amount for cattle grazing on
7 property; correct?

8 **A** Yes, in this situation.

9 **Q** But you, in fact, know that that's not -- \$1,000 a day is
10 not, in fact, reasonable because you're experienced with
11 leasing grazing ground; correct?

12 **A** Yes, I am.

13 **Q** And so just for example, if we go to the first page of
14 Exhibit 81, that would show you that 30 days of grazing per
15 90 head. And I assume those are pairs; is that correct?

16 **A** Correct.

17 **Q** And that would be a \$1.67 a day; correct?

18 **A** Correct.

19 **Q** And that's what you paid on an arm's-length transaction
20 with somebody to lease property; correct?

21 **A** That is what we paid to have our own animals grazing
22 uninhibited by anyone else's.

23 **Q** You also, if we go back to Exhibit 90, it says that you
24 have, in addition to \$1,000 a day, "\$5,000 if we gather."
25 Did you itemize that amount for Richard?

1 STATE OF SOUTH DAKOTA.)
2 COUNTY OF LAWRENCE) SS. CERTIFICATE

3
4 I, LYNNEL R. BRUEMMER, an Official Court Reporter and
5 Notary Public in the State of South Dakota, Fourth Judicial
6 Circuit, do hereby certify that I reported in machine
7 shorthand the proceedings in the above-entitled matter and
8 that Pages 1 through 178, inclusive, are a true and correct
9 copy, to the best of my ability, of my stenotype notes of
10 said proceedings had before the HONORABLE ERIC J. STRAWN,
11 Circuit Court Judge.

12 Dated at Deadwood, South Dakota, this 22nd day of
13 April, 2024.

14
15
16
17
18 /s/ Lynnel R. Bruemmer
19 LYNNEL R. BRUEMMER
20 My Commission Expires: 8/12/25
21
22
23
24
25

15-26A-60. Brief of appellant--Contents.

The brief of the appellant shall contain under appropriate headings and in the order here indicated:

- (1) A table of contents, with page references.
- (2) A table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the brief where they are cited.
- (3) A jurisdictional statement setting forth the date and form of the judgment or order sought to be reviewed, and the date when the notice of appeal was filed. This statement must make it appear, in cases of appeal, that the order sought to be reviewed is appealable.
- (4) A concise statement of the legal issue or issues involved, omitting unnecessary detail. Each issue shall be stated as an appellate court would state the broad issue presented. Each issue shall be followed by a concise statement of how the trial court decided it, and a list of the most relevant cases not to exceed four, and the most relevant constitutional and statutory provisions.
- (5) A statement of the case and the facts. A statement of the case shall first be presented identifying the trial court and the trial judge and indicating briefly the nature of the case and its disposition in the trial court. There shall follow a statement of facts relevant to the grounds urged for reversal, modification, or other relief. The facts must be stated fairly, with complete candor, and as concisely as possible. Where it is claimed that a verdict, finding of fact, or other determination is not sustained by the evidence, the statement must set forth the particulars in which the evidence is claimed to be insufficient. Each statement of a material fact shall be accompanied by a reference to the record where such fact appears.
- (6) An argument. The argument shall contain the contentions of the party with respect to the issues presented, the reasons therefore, and the citations to the authorities relied on. Each issue shall be separately presented. Needless repetition shall be avoided.
- (7) A short conclusion stating the precise relief sought.
- (8) An appendix. The appendix shall include:
 - (a) the judgment, order or decision in question and any relevant written findings of fact and conclusions of law and memorandum decision;
 - (b) the statements of material facts and record citations required in § 15-6-56(c)(1) and (2);
 - (c) any relevant portions of the pleadings, instructions, and transcripts;
 - (d) items enumerated in § 15-26A-65; and
 - (e) any other parts of the record to which the parties wish to direct the particular attention of the Court.

Any portion of a transcript or deposition included in the appendix shall be accompanied by a copy of the cover sheet which indicates the date(s) of the proceedings and the participants. Summaries, abstracts or narratives shall not be used. The pages of the appendix shall be separately numbered and the appendix shall contain a table of contents with page references. Sections of the appendix shall be tabbed and salient information highlighted.

- (9) One copy of the brief filed by the appellant in any appeal from a judgment or order pursuant to chapter 26-8A shall be signed by the appellant and his or her attorney. The appellant's signature shall be omitted from the other copies of the brief that are served or filed. The copy of the brief signed by the appellant shall be filed under seal by the clerk of the Supreme Court and shall be subject to inspection only as permitted by the Court in keeping with the best interests of the child.

Source: Supreme Court Rule 79-1, Rule 12 (1); SDCL Supp, § 15-26A-42; SL 1993, ch 391 (Supreme Court Rule 93-8); SL 2003, ch 261 (Supreme Court Rule 03-02), eff. July 1, 2003; SL 2004, ch 315 (Supreme Court Rule 03-14), eff. Jan. 1, 2004; SL 2007, ch 309 (Supreme Court Rule 06-77), eff. Jan. 1, 2007.

IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA
APPEAL NO. 30743

JAMES TODD and TERI TODD,

Plaintiffs and Appellees

vs.

RICHARD W. KIEFFER,

Defendant and Appellant

Appeal from the

Fourth Judicial Circuit

Meade County, South Dakota

The Honorable Eric Strawn, Circuit Court Judge

APPELLANTS' REPLY BRIEF

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ISSUES RAISED BY APPELLEE AND RESPONSES

1. Whether Kieffer's assessments of error are wholly insufficient for review.

The first issues raised by Todds is that Kieffer did not raise arguments with enough particularity to allow for sufficient review. In stating this, Todds correctly state the South Dakota law that an assignment of error need not follow a stated form but must, instead, fully and plainly point out the alleged error and state the particulars upon which the evidence is claimed to be insufficient. *Stoecker v. Stoecker*, 74 SD 415, 54 N.W.2d 171. Todds then proceed to simply restate the standard of review. Any argument that the brief of Kieffer does not state with specificity, the findings and evidence which is insufficient, is completely without merit. A simple review of Kieffer's brief which shows that Kieffer sets forth, with particularity and reference to the transcripts and exhibits, all findings and evidence, sufficient for review including, but not limited to: details of the contractual arrangement between the parties; details of conversations between the parties; past and current representations made by the parties in pleadings and otherwise; specific damages awarded by the court (specifying the date of the alleged damages, the nature of the alleged damages, and the fact that the same war outside of the contractual period); and actions or inactions of the parties.

It appears that the real arguments that Todds is offering is that since Kieffer did not testify, Todds have free reign to interpret all testimony and evidence as they see fit. This concept is fundamentally wrong as cross-examination can yield sufficient facts and evidence to be considered on appeal. *State v. Sprik*, 10 N.W.3d 202 (SD 2024), 2024 S.D. 41. In this matter, as pointed out in Kieffer's original brief, cross examination revealed

specific facts which led to subsequent argument, all of which allow for meaningful review.

One of the central issues that was skirted or otherwise unaddressed by the Todd brief was the issue of the terms of the lease agreement. While Todds argue that Kieffer failed “... to cite any evidence...” of the terms of the lease, one is left to wonder whether Todd’s reviewed the Kieffer brief, at all. This is stated, specifically, because of the fact that the only person to testify as to the terms of the contract was Teri Todd. As stated in the original brief, her testimony revealed that the parties entered into an Agricultural Lease dated March 15, 2020. The Lease was prepared by Daniel Todd, a relative to Plaintiffs. *Trial Exhibit 84*. Further, the lease is not a year-round lease but, instead specifically provides that the same is “... for five (5) *crop years* from and after the first day of March, 2020...” (emphasis added) *Id.* Teri Todd testified that the phrase “crop year” is that period of time that the crops are planted, grown and harvested. *TT 93-94*. She also testifies that, in terms of their use, the lease would be from May until mid-November of any given year and that the specific purpose of the lease being limited to “crop years” was to allow the ground to recover without having livestock on the same. *TT 93*. This is consistent with the lease provisions that require the land be used in a good husband-like manner. *TT 93*.

Given this undisputed testimony, the lease allowed Todd’s to use the property from May through November, thereby requiring them to make other arrangements for the feeding and wintering of their cattle, neither of which was a obligation of Kieffer.

2. Whether the trial court correctly determined damages incurred between November and May.

The above argument becomes very significant when examining the court award of damage and it is clear that Todds understand the significance of same. To that end, Todds completely ignore and do not refute the arguments of Kieffer that the evidence is undisputed that the lease agreement provides no obligations on Kieffer to transport or feed the Todd cattle for that period of time which they would not have been on the Kieffer property pursuant to the lease, specifically, from November through May. Despite this unrefuted finding, the court awarded damages to Kieffer's for transporting and feeding their cattle between November and May. The specific testimony elicited from Teri Todd was as follows:

Q "... It seemed like he removed the cattle from the premises about the middle of November; is that correct? "

A Yes, just short of the middle of November.

Q And then you -- and then you would bring them back when?

A We monitored the growth of the grass, so we would have wanted to bring them back in about May 2021.

Q And I think you said having them off there was working the property in a good husband -like manner; correct?

A Yes.

Q And that would be consistent with the lease that called for -- it actually uses the term "five crop years," which if I understand, a crop year is basically that period of time that the crop is planted, grows, harvested; correct?

A Yes. TT 93-94

There is no dispute, whatsoever, that the lease was, based on its clear and unequivocal terms, for “crop years” and not just years. It is also undisputed that the term “crop year” as testified to by Teri Todd means that period of time were crops are planted, grown and harvested. This term was specifically included in the contract drafted by Todd’s attorney.

It is also clear from the above testimony that not only did the terms of the lease require the removal of the Todds cattle from the leased premises during non-growing season, but it was also the practice of the Todds to remove their cattle from the property to allow for sufficient grass growth, and that they would also monitor the grass before bringing the cattle back to the property. This was consistent with the lease requirement that the property was for a crop year and was to be used in a good, husband -like manner.

Again, nothing in the agreement would require Kieffer to be responsible for any cost associated with moving the cattle from the leased premises or feeding the cattle for that period of time which all parties contemplated the cattle would not be on the Kieffer property. In fact, it was clearly contemplated that Todd would move and winter the cattle, elsewhere as testified to by Teri Todd who indicated that they would “...*monitored the growth of the grass, so we would have wanted to bring them back in about May 2021...*” As such, damages awarded for this period of time are wholly inappropriate.

In the initial brief, Kieffer also raised the issue of the \$1400 awarded for a dead cow. This issue was raised, not only to show the award was inappropriate as it was previously awarded and paid (*see* Kieffer I damages itemization affirmed by this court), but also to point out the shifting testimony of Teri Todd, who, in a previous affidavit, executed under oath, testified that the cow was struck by a vehicle. TT 107. And who, at

trial, testifying under the same oath applicable to the affidavit, testified that the same cow had died from trauma due to being chased/harassed. At least one, and potentially both, of these statements were perjured.

Additional perjured testimony was offered by Teri Todd on the issue of the penalty that she sought to enforce against Kieffer of \$1000 each day that his cattle escaped to the leased premises and \$5000 for each occurrence. On this issue, Teri Todd previously testified, under oath, that the amount was a reasonable amount for the Kieffer *cattle grazing on the leased property*. TT 100. At trial, however, Teri Todd changed her testimony to state that the \$1,000 per day and \$5,000 per occurrence, was based on factors including stress on her cattle, bulls possibly breeding with her cattle or the potential of the Kieffer cattle spreading diseases among her herd. TT 97. It is clear that the second explanation was in fact materially false and likely the result of the fact that Todd knew that any assertion of \$1000 a day and \$5000 per occurrence would be blatantly unreasonable for cattle grazing upon leased property. Simply put, Teri Todd was not a credible witness.

3. The liquidated damages of \$1000 per day and \$5000 per occurrence is unenforceable.

Teri Todd was the party who testified as to the imposition of the \$1000 per day/\$5000 per occurrence penalty against Kieffer and, in doing so, offers the perjured testimony regarding how these numbers were calculated. Of this concept, it is important to remember the law associated with the enforceability of liquid damages provisions and which states "... Whether a stipulated sum is an unenforceable penalty or an enforceable liquidated damages provision is a question of law for the court to determine based upon a

consideration of the instrument as a whole, the situation of the parties, the subject matter of the contract, the circumstances surrounding its execution, and other factors. *Walter Motor Truck Co. v. State, Etc.*, 292 N.W.2d 321, 323–24 (S.D.1980). Ordinarily a provision for payment of a stipulated sum for liquidated damages will be sustained if (1) at the time the contract was made the damages in the event of breach were incapable or very difficult of accurate estimation, (2) there was a *reasonable endeavor by the parties to fix fair compensation*, and (3) the amount stipulated bears a reasonable relation to probable damages and is not disproportionate to any damages reasonably to be anticipated. (*emphasis added*) *Anderson v. Cactus Heights Country Club*, 80 S.D. 417, 125 N.W.2d 491 (1963).

The above language is clear in its requirement that the calculation of liquidated damages meet all the criteria set forth above. In this matter, none of those criteria are met.

To begin, the first requirement states that the damages are incapable or very difficult of accurate estimation. In her perjured testimony, Teri Todd single-handedly defeats this notion by having calculated those precise damages. Once she realized that the damages would not be sustainable as being imposed for grazing, Teri Todd, for the first time at trial, calculated how the damages were reasonable. To that end, she had to request a pen and paper. And a recess was taken to allow her to calculate this “damage” for the first time. *TT 101*.

Following the recess, Teri Todd stated that there was equipment used between \$500 and \$1,000, fuel in the amount of \$50 and \$75; Labor for 4 cowboys of \$1,400 and her time, at \$3,00 per day, per diem and her husband at \$1,500/day. *TT 101-102*. In stating this, she also stated that she did not know if, when or how many cattle would need

to be corralled at any given time. *TT 102*. She also testified that on any given day, she could have calculated the actual cost of having to deal with Kieffer's cattle. *TT 103*. This process, even though made after the fact, shows that the damages were capable of being reasonably determined.

The next requirement for enforceability would require a reasonable endeavor by the parties to fix the compensation. There was no such endeavor made in this action. In fact, of this "agreement", Teri Todd testified that "... *I told him* [Kieffer] a \$1,000 a day if any more got out ..." (*Emphasis added*) *TT 96*. Teri Todd did not tell Kieffer how she arrived at this number nor was there testimony that there was an acceptance of the same by Kieffer, instead Todd clearly states that all she did was "told" Kieffer that this would be the penalty/result of his cattle trespassing. *TT 96-97*. Though at trial Teri Todd claimed that the \$1,000 per day and \$5,000 per occurrence, was based on factors including stress on her cattle, bulls possibly breeding with her cattle or the potential of the Kieffer cattle spreading diseases among her herd, this was not shared with Kieffer (remembering that the first affidavit stated that the costs were for grazing, which was likewise not shared with Kieffer). *TT 97, 103*. Todds unilateral attempt to impose the penalty is not sufficient to sustain its enforceability.

Finally, the liquidated damage which is attempted to be enforced must bear some reasonable association with the actual damages and not be disproportionate. Neither of those criteria are met even by the alleged factors included by Teri Todd in her calculations which included her time at \$3,000 per day and her husband's time at \$1,500 per day. This is in addition to labor for four cowboys of \$1,400. Teri Todd did not testify to even assisting or participating in any effort to round up the Kieffer cattle.

These damages, on their face, are disproportionate and this was known to Todds. In the first affidavit, Todd claimed that the amount was imposed for grazing, however, either shortly before, or during trial, Todds realized that this argument was unsustainable. This was shown by the testimony of Teri Todd who specifically testified that she was familiar with ranch leases, having entered into arm's length transactions regarding the same. TT 100. In those transactions, Todds paid \$1.67 per day for a cow calf pair. TT 100. Kieffer had 89 yearlings which would get out. TT 102. Applying the amount to be charged for grazing under an arm's length daily rate would therefore yield a daily rate of \$148.63, nowhere near the \$1,000 per day and \$5,000 per occurrence that was initially claim by Todds to be a reasonable amount for grazing, with grazing being the purported reason for the imposition of the penalty. It was only after realizing that this amount was unconscionable, did Teri Todd change her sworn testimony to attempt to include other costs incurred. This is in direct contradiction to the well-settled law of the state of South Dakota that a party cannot claim a better version of facts been they testified to previously, with respect to damages. *Winterton v. Elverson*, 389 N.W.2d 633 (SD 1986). This is precisely what Todds' are attempting to do by changing the rationale for the clearly unconscionable and penal liquidated damages.

4. The trial court incorrectly applied SDCL § 21-3-6.

This issue was addressed in Kieffer's initial brief and is not overly complicated. *SDCL § 21-3-6* allows for treble damages were someone has forcibly ejected or excluded a person from possession of real property. As with all other relief, forcible ejection or exclusion is determined from the evidence.

In this action, the evidence at trial was the same as it was in the prior appeal and it is uncontradicted that there is no forcible ejection or exclusion by Kieffer prior to Todds leaving the property. Todds reasserted allegations which had previously been made that in November 2020, Teri Todd states that Kieffer was watching her through the scope of a rifle. The incident did not concern her enough to have called law enforcement or even her husband. TT 110-111. Despite this event, Todds returned to the leased premises the following year.

There is also testimony that in March 2021, there was a verbal altercation between Kieffer and Todd which resulted in law enforcement being called. At some point Kieffer threatened to shoot Todds if they touched his dog and also brandished a weapon. Again, despite this event, Todds returned to the leased premises and continued to use the property.

In Kieffer I, this Court specifically found that the Todds remained on Kieffer's property for a period of nearly 2 years after they claimed to have been forcibly evicted from the same, using the same instances above. This Court specifically found "... 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 continue to possess the real property thereafter did not attempt to terminate the lease for Kieffer's alleged breaches until nearly 2 years thereafter..." *Id.* Nothing changed in this circumstance at the trial. Therefore, given the mandates of SDCL § 21-3-6 there are no grounds which would support treble damages for forcible eviction.

CONCLUSION

For the reasons stated, Appellants respectfully request this Court reverse or remand this matter consistent with the arguments set forth herein.

REQUEST FOR ORAL ARGUMENT

Appellants hereby request oral argument.

Dated this 28th day of October, 2024.

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[Certificate of Service to Follow]

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 28th day, of October, 2024 before, he electronically filed the foregoing documents with the Clerk of the Supreme Court Odyssey File and Serve portal, and further certifies that the foregoing document was also mailed via U.S. Mail, postage prepaid thereon, to:

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[Certificate of Compliance to Follow]

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), Courtney R Clayborne, counsel for the Appellants, does hereby submit the following:

The foregoing brief is 10 total pages in length. It is typed in proportionally spaced typeface in Times New Roman 12 point. The word processor used to prepare this brief indicates that there are a total of 2,727 words, and 13,425 characters (no spaces) in the body of the Brief.

/s/ Courtney R Clayborne

COURTNEY R CLAYBORNE

APPELLANT APPENDIX

South Dakota Statutes:

SDCL § 21-3-6 Kieffer 0001

21-3-6. Treble damages for forcible exclusion from real property.

For forcibly ejecting or excluding a person from the possession of real property, the measure of damages is three times such a sum as would compensate for the detriment caused to him by the act complained of.

Source: CivC 1877, § 1977; CL 1887, § 4610; RCivC 1903, § 2322; RC 1919, § 1994; SDC 1939 & Supp 1960, § 37.1907.