

STATEMENT OF THE ISSUES

- I. Did the Circuit Court err as a matter of law in holding that Arrowhead failed to mitigate its damages as to lost future rent based solely on an exclusivity restriction contained in another lease which are common and permitted under South Dakota law, despite the absence of evidentiary support for such holding and evidence of Arrowhead's exercise of reasonable diligence to locate a new tenant?

The trial court held that Arrowhead did not mitigate its damages as a matter of law due to an exclusivity provision in another lease which the trial court found substantially restricted Arrowhead's ability to relet the leased premises.

The most relevant cases, related to this issue, are as follows:

Ducheneaux v. Miller, 488 N.W.2d 902 (S.D. 1992)

Brookings Mall, Inc. v. Captain Ahab's, Ltd., 300 N.W.2d 259 (S.D. 1980)

- II. Did the Circuit Court err as a matter of law in holding that Arrowhead could not recover its reasonable attorney fees in the present action as the prevailing party, despite the provisions of SDCL 21-16-1, *et seq.* and the terms of the Lease?

The trial court held that Arrowhead was not entitled to recover its attorney fees under either the statute or the Lease.

The most relevant cases and statutes, related to this issue, are as follows:

Rindahl v. Sohler, 2003 SD 24, 658 N.W.2d 769

Credit Collection Services, Inc. v. Pesicka, 2006 SD 81, 721 N.W.2d 474

Statutes:

SDCL 21-16-1, *et seq.*

STATEMENT OF ISSUES

1. Whether there was a meeting of the minds on all material terms sufficient to form an enforceable contract and an enforceable claim to unpaid rent after the leased premises were vacated.

Trial Court: Held in the affirmative.

Vander Heide v. Boke Ranch, Inc., 736 N.W.2d 824, 832, 2007 SD 69, ¶20

Read v. McKennan Hospital, 610 N.W.2d 782, 786, 2000 SD 66, ¶23-25

Knutson v. Knutson, 80 N.W.2d 871 (S.D. 1957)

Vermilyea v. BDL Enterprises, Inc., 462 N.W.2d 885 (S.D. 1990)

2. If the Lease is enforceable, whether inconsistencies created by Arrowhead limit its enforcement.

Trial Court: Held in the negative.

- A. Arrowhead is limited to the lower of two interest rates it wrote into the lease.

Ziegler Furniture & Funeral Home, Inc. v. Cicmanec, 709 N.W.2d 350, 2006 SD 6

Tri-State Financial, LLC v. First Dakota National Bank, 538 F.3d 920 (8th Cir. 2008)

- B. The post-default duration of Cold Stone's liability is 18 months.

In re Dissolution of Midnight Star Enterprises L.P., 124 N.W.2d 334, 2006 SD 98

Kling v. Stern, 733 N.W.2d 615, 2007 SD 51

3. Whether Arrowhead is entitled to recover attorney's fees by contract or statute.

Trial Court: Held in the negative.

A. The Lease provisions do not contain an express entitlement to attorney fees on default.

Vanderwerff Implement, Inc. v. McCance, 561 N.W.2d 24, 27, 1997 SD 32, ¶¶ 17, 18

B. SDCL 15-17-38 is not a source for recovery of attorney fees without an adequate written agreement specifically referring to attorney fees.

Icehouse, Inc. v. Geissler, 636 N.W.2d 459, 2001 SD 134

C. SDCL 21-16-11 is inapplicable because the attorney fees claimed here are not for any remedy under Chapter 21-16.

SDCL 21-16-1

SDCL 21-16-11

4. Whether Arrowhead failed to meet its burden of proof that it had mitigated its damages.

Trial Court: Held in the affirmative.

Iowa-Illinois Gas & Electric Co. v. Black & Veatch, 497 N.W.2d 821 (Iowa 1993)

Frank Stinson Chevrolet, Inc. v. Connelly, 356 N.W.2d 480 (S.D. 1984)

Consolidated Credit Corp. v. Berger, 4 N.W.2d 571 (Neb. 1942)