

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL No. 31078

A&B BUSINESS, INC.
v.
**FDJ, LLC f/k/a FLUGGE,
DETERMAN & JULIUS, LLC, AND LEANN JULIUS**

APPEAL FROM THE CIRCUIT COURT
SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

THE HONORABLE DOUGLAS E. HOFFMAN
Circuit Court Judge

BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Plaintiff/Appellant A&B Business, Inc. will be referred to as “A&B.” Defendants/Appellees FDJ, LLC and LeAnn Julius will collectively be referred to as “FDJ.” Reference to the settled record will be by the designation “R” followed by the page number(s). References to the January 15, 2025, court trial transcript will be by the designation “TT” followed by the page number(s). References to the February 28, 2025, hearing transcript will be by the designation “HT” followed by the page number(s). The Circuit Court’s April 4, 2025 Memorandum Opinion and Order will be referred to as the “Memorandum Decision.”

JURISDICTIONAL STATEMENT

A&B appeals the Circuit Court’s April 4, 2025 Memorandum Opinion and Order. R. 185-90. Notice of entry of order was filed on April 7, 2025. R. 191-98. Per SDCL §§ 15-26A-3 & 4, it is a final order subject to appeal. A&B timely filed and served its Notice of Appeal on May 7, 2025. SDCL § 15-26A-6; R. 199.

REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests the privilege of appearing before this Court for Oral Argument.

STATEMENT OF LEGAL ISSUES

I. Did the Circuit Court Improperly Act as FDJ's Advocate?

Yes. The role of a circuit court should be to act as a neutral party that adjudicates only those issues raised by the parties.

That is particularly true when dealing with a defaulting party.

While a circuit court may test the legal sufficiency of a complaint, the Circuit Court here went beyond that role and took over as FDJ's advocate. In doing so, the Circuit Court upset the balance between neutral tribunal and advocacy.

- *Ally v. Young*, 2023 S.D. 65, 999 N.W.2d 237, *reh'g denied* (Jan. 19, 2024)
- *May v. First Rate Excavate, Inc.*, 2025 S.D. 17, 19 N.W.3d 1, 8
- SDCL § 15-6-55(b)

II. Did the Circuit Court Err in Finding that the Liquidated Damages Clause was Unenforceable?

Yes. Liquidated damages clauses are, generally, enforceable.

Courts determine enforceability based on what the parties initially agreed to and the potential loss that could be determined at the date of the contract's execution. Mitigation, however, is not necessary because the nature of liquidated damages makes prediction of how to properly mitigate impossible. The Circuit Court improperly ignored the nature of the parties' contractual

relationship and incorrectly interpreted the law regarding liquidated damages.

- SDCL § 53-9-5
- SDCL § 57A-2A-504
- *Walter Motor Truck Co. v. State By & Through Dep't of Transp.*, 292 N.W.2d 321 (S.D. 1980)

III. Did the Circuit Court Abuse its Discretion in Limiting A&B's Attorneys' Fees?

Yes. Attorneys' fees are recoverable if they are provided for in a contract. The FDJ contract allowed A&B to recover its attorneys' fees if suit became necessary to enforce its rights. The Circuit Court improperly discounted A&B's attorneys' fees based on a flawed legal and factual rationale.

- *Stern Oil Co., Inc. v. Brown*, 2018 S.D. 15, 908 N.W.2d 144
- *Crisman v. Determan Chiropractic, Inc.*, 2004 S.D. 103, 687 N.W.2d 507

INTRODUCTION

FDJ entered into a contract for A&B to provide both goods and services. Approximately three years into the contract, FDJ stopped paying. A&B, in turn, filed suit. Despite initially appearing and litigating the case, FDJ's counsel withdrew, and FDJ failed to appear at trial.

The Circuit Court, initially, indicated its approval of A&B's damages. The Circuit Court later reversed course and *sua sponte* found that the contract that formed the basis for A&B's claims contained an unconscionable liquidated damages clause. In doing so, the Circuit Court exceeded its role as the neutral arbiter of claims to advocate on FDJ's behalf. Its reasoning was similarly flawed.

Finally, the Circuit Court improperly reduced A&B's award of attorneys' fees, without an adequate analysis of its reasonableness. It also based its reduction on a flawed review of the facts.

As such, reversal is warranted.

STATEMENT OF THE CASE

A&B initiated suit on May 16, 2022. R. 1-9. FDJ answered on June 3, 2022. R. 13-15. A&B filed for summary judgment on November 22, 2023. R. 19-49. FDJ resisted, and the motion was set for hearing on February 13, 2024. R. 52-86, 50. The Circuit Court denied the motion, citing a dispute of material fact regarding acceptance of the contract and damages. R. 105. On August 8,

2024, FDJ's counsel moved to withdraw, citing a conflict between himself and his clients. R. 96-97. FDJ also requested an indefinite continuance so that it could obtain alternative counsel. R. 98-99. The Circuit Court entered an order granting the motion to withdraw and motion for continuance, providing FDJ ninety days to obtain new counsel. R. 100. FDJ did not obtain alternate counsel, and trial was set for January 15, 2025. R. 101. FDJ failed to appear at trial, and the Circuit Court indicated that A&B was entitled to default judgment. TT 2. On January 21, 2025, A&B submitted an affidavit in support of its proposed order for default judgment and attorneys' fees. R. 109-140. A&B's proposed order was denied. R. 141-42. A&B submitted a follow-up brief supporting its requested damages. R. 143-151. A&B's requested judgment based on those damages was, likewise, denied. On February 28, 2025, the Circuit Court heard argument regarding A&B's requested damages. *See, generally*, HT. The Circuit Court denied A&B's proposed judgment and, in an April 4, 2025, memorandum decision, entered its own order regarding A&B's requested damages. R. 183-84, APP 1-6. A&B appealed on May 7, 2025. R. 199.

STATEMENT OF THE FACTS

On June 29, 2018, FDJ entered into an agreement for the lease and maintenance of various business machines, including copiers and printers, from AnaCon Leasing, Inc. R. 30. That agreement included liquidated

damages and attorneys' fee clauses. R. 33-35. AnaCon later assigned its contractual rights to A&B. R. 31.

FDJ defaulted on the agreement. R. 31. FDJ's last payment under the contract was May 10, 2021. R. 31. FDJ, however, did return A&B's equipment. R. 31. At the time of default, FDJ owed A&B \$3,186.33. R. 31. FDJ owed an additional \$17,226.60 under the contract's liquidated damages clause. R. 31; R. 35.

STANDARD OF REVIEW

ISSUES 1 & 2: **THE ROLE OF THE CIRCUIT COURT IN DEFAULT JUDGMENT PROCEEDINGS**

This Court has yet to determine a circuit court's scope of review for a defaulting party. The scope of default judgment is governed by SDCL § 15-6-55(b). South Dakota's Rule 55, while not exactly the same as its Federal counterpart, is similar. *Compare id. with* Fed. R. Civ. P. 55(b). As such, this Court may examine decisions of the federal courts for guidance. *Nooney v. StubHub, Inc.*, 2015 S.D. 102, ¶ 8 n.1, 873 N.W.2d 497, 499 n.1.

Under the Federal Rules, "facts alleged in the complaint may not be later contested" by the defaulting party. *Marshall v. Baggett*, 616 F.3d 849, 852 (8th Cir. 2010). It, however, "'remains for the [district] court to consider whether the unchallenged facts constitute a legitimate cause of action, since a party in default does not admit mere conclusions of law.'" *Id.* (quoting *Murray v. Lene*, 595 F.3d 868, 871 (8th Cir. 2010) (alteration in original) (other

citations omitted). As such, “it is incumbent upon the district court to ensure that ‘the unchallenged facts constitute a legitimate cause of action’ prior to entering final judgment.” *Id.* at 852-53 (quoting *Murray*, 595 F.3d at 871).

Whether a contract is unconscionable “is a question of law . . .” *Larson Latham Huettl LLP v. Iversen*, 2023 ND 16, ¶ 8, 985 N.W.2d 662, 668.

Additionally, “[w]hether [a] stipulated sum is an unenforceable penalty or an enforceable provision for liquidated damages is a question of law for the court to determine.” *Walter Motor Truck Co. v. State By & Through Dep't of Transp.*, 292 N.W.2d 321, 323 (S.D. 1980). “Questions of law are reviewed de novo.” *Montana-Dakota Utilities Co. v. Parkhill Farms, LLC*, 2017 S.D. 88, ¶ 9, 905 N.W.2d 334, 338. And, more importantly for the purposes of default judgment, although a court may question the enforceability of a lease agreement,¹ this Court has held that it is the burden of the party *resisting* payment of a liquidated damages clause to demonstrate its unconscionability. *Prentice v. Classen*, 355 N.W.2d 352, 355 (S.D. 1984) (citing *Walter Motor Truck Co.*, 292 N.W.2d at 323–24).

That general rule, however, should not encourage or empower courts to act as pseudo-advocates for a defaulting party. As this Court previously observed, “[e]xcept in rare instances, the court is a neutral party that adjudicates only those issues raised by the parties.” *Ally v. Young*, 2023 S.D.

¹ SDCL § 57A-2A-108 (3)

65, n.14, 999 N.W.2d 237, 254, n.14, *reh'g denied* (Jan. 19, 2024). That is because it is incumbent on the “*parties* to frame the issues for decision.” *May v. First Rate Excavate, Inc.*, 2025 S.D. 17, n.8, 19 N.W.3d 1, 8, n.8 (quoting *Ally*, 2023 S.D. 65, ¶ 50, 999 N.W.2d at 254) (emphasis added). A court that steps beyond that general neutrality, “threaten[s] the integrity of the very process it was tasked with protecting.” *Id.*

This Court should adopt a rule that a circuit court’s review of a default judgment be limited to the legal sufficiency of the pleadings, rather than to consider affirmative defenses that were or could have been proffered by a non-responsive defaulting party. Such a rule would balance the competing roles that a circuit court plays in the default judgment process. It ensures that a complaint, generally, states a sufficient legal claim upon which relief can be granted. *Paul v. Bathurst*, 2023 S.D. 56, ¶ 10, 997 N.W.2d 644, 650 (citations omitted). Meanwhile, it prevents the court from stepping in as an advocate, which threatens the impartiality of the judicial process.

In other words, if a party refuses or neglects to participate in a case, it abandons certain rights. Those rights include the ability to present affirmative defenses or competing factual claims. A defaulting party should not be rewarded by allowing the circuit court to step in and take over the defaulting party’s job. To hold otherwise would defeat the purpose of default judgment.

ISSUE 3: REVIEW OF AN ATTORNEYS' FEES AWARD

Finally, this Court reviews “a circuit court's determination as to the prevailing party and the award of costs and disbursements under an abuse of discretion standard.” *Stern Oil Co., Inc. v. Brown*, 2018 S.D. 15, ¶ 46, 908 N.W.2d 144, 157 (citing *Hewitt v. Felderman*, 2013 S.D. 91, ¶ 28, 841 N.W.2d 258, 266). “An abuse of discretion ‘is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary and unreasonable.’” *Id.* (citations omitted).

ARGUMENT

I. The Circuit Court Improperly Acted as FDJ's Advocate

As noted above, circuit courts are not permitted to be the advocate for a party. *Ally*, 2023 S.D. 65, 999 N.W.2d at 254. While FDJ, at one point, did suggest that the lease agreement was unconscionable, the Circuit Court went beyond those arguments in its Memorandum Decision. The Memorandum Decision, essentially, took the advocacy that FDJ started and elaborated, finding new theories for why A&B would not be entitled to its claimed breach of contract damages. And, the Circuit Court went even further, restricting A&B's attorneys' fees because A&B had the temerity to try and enforce the terms of its contract. That goes beyond a neutral application of the facts to the law. That steps into advocacy.

The Circuit Court's appearance of neutrality was further imperiled by its questioning of counsel. In response to A&B's counsel observing at the February 2025 hearing that the same contractual provisions have been consistently upheld by other judges, the Circuit Court responded by questioning A&B's counsel's professional integrity:

THE COURT: Look, I mean, we've got judges in this circuit that have never handled civil cases. A lawyer in their lives they have never heard of the UCC. And they until they become a judge, and, you know, it's a default. And you stick something underneath their nose, they sign it. Nobody appeals it. You know is that an ethical way to practice law? I'm not going to say that you're that a lawyer is going to get disciplined for doing that, but it's not the way I ever practiced law. It's not the way that I would teach law. It's not the kind of law practice that I was taught to practice. But, you know, I mean, people get away with what they can get away with. But that's not the law....

HT 36:14-25. The Circuit Court's statements also seemed to suggest that it was improperly considering factual elements beyond those of A&B and the complaint:

MS. [L]IMOGES: Your Honor, the formula for trying to come up with anticipated damages here is based off of the fact that the parties can't anticipate the damages at the beginning of the contract. It's too difficult.

THE COURT: Who says that besides you and your client in a case like this?

HT 23:7-12. *See Marshall*, 616 F.3d 849, 852 (8th Cir. 2010). ("facts alleged in the complaint may not be later contested").

In fact, contrary to the Circuit Court’s hypothesizing, liquidated damages are typically considered to be the kind of “sum certain” damages that do not even require an evidentiary hearing. *See, e.g., United Fire & Cas. Co. v. P & C Ins. Servs., Inc.*, 488 N.W.2d 661, 666 (S.D. 1992) (All that is required to prove damages for the purposes of default judgment is that “[t]he complaint and affidavit in support of default judgment adequately described the damages at issue”). *See also* Fed. R. Civ. P. 55(b)(1) (“When the plaintiff’s claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if the defendant has been defaulted for failure to appear and if he is not an infant or incompetent person.”).

What the Circuit Court did in this case was inconsistent with its duties under Rule 55(b). It did not limit itself to applying the legal sufficiency of A&B’s complaint. It went beyond requesting a reasonable description of the damages at issue. Instead, the Circuit Court stepped in and tried FDJ’s case after FDJ failed to appear at trial. *Prentice*, 355 N.W.2d at 355 (burden of proving unconscionability of liquidated damages clause is on the party resisting payment of those damages). That is the role for an advocate, not an impartial tribunal.

The Circuit Court appeared to initially follow its proper role, requesting that A&B lay out its contractual damages and to itemize its attorneys' fees:

MS. LIMOGES: Um, in the end, Your Honor, we do have a spreadsheet for damages that has been nicely put together by my, the CFO of A&B who is sitting next to me today, Your Honor. He was prepared to testify. We had exhibits already [sic] to show the court that the contract was accepted, um, and ratified through numerous payments by FDJ up until they refused to make any payments. Not once, Your Honor, did anybody from FDJ reach out to A&B to try to argue that there had been no contract until this lawsuit.

Um, the damages due at this point, Your Honor, not including attorney's fees. Um, it does include each interest, the full lease payoff, maintenance amounts, and an early termination fee which is all allowed pursuant to the contract. Damages total plus tax is \$25,641.93.

THE COURT: I mean there isn't anybody here to say that that's wrong. *So I'm going to approve it.*

MS. LIMOGES: Great, Your Honor. Um, I will submit to you, if the judge approves, a proposed order. I will also include an affidavit for attorney's fees and costs to pursue this action.

TT 4:13-5:8 (emphasis added).

It bears repeating that A&B's description of damages at trial spelled out all the items that the Circuit Court later took issue with. It also spelled out all the factual predicates that would demonstrate why there had been ample opportunity for FDJ to object to the terms of the contract, which FDJ never did. It also noted how, had FDJ pursued a claim for unconscionability, that claim would likely have been precluded by estoppel, including estoppel by

partial performance. *Hahne v. Burr*, 2005 S.D. 108, ¶ 13, 705 N.W.2d 867, 872. To litigate those issues, however, the *parties* would have had to present evidence regarding the conduct amounting to partial performance and whether that conduct would preclude FDJ's later objections. *Id.* The Circuit Court, in turn, would then have to weigh that evidence and determine whether estoppel would apply. *Id.*

That process, however, never occurred because the Circuit Court substituted its role for that of FDJ's. Additionally, it is unclear what happened between the time that the Circuit Court initially signaled its approval of A&B's damages and when it later changed its mind, but that shift appeared to be significant. The important part, though, is that the Circuit Court appears to have made the decision to take over FDJ's defense because FDJ decided to not participate. That is not the role of a Circuit Court, and its decision to *sua sponte* determine that the FDJ contract was unconscionable was improper.

The Circuit Court's Memorandum Decision should be reversed, and the Circuit Court should be directed to enter damages consistent with the parties' agreement.

II. The Circuit Court Erred in its Finding that the Liquidated Damages Clause was Unenforceable

Contracts, generally, are permitted to have liquidated damages provisions. SDCL § 53-9-5. That is also true for agreements governed by the Uniform Commercial Code (the "UCC"), like lease agreements. *See* SDCL §

57A-2A-504. In fact, “[t]he modern tendency, reflected in public contract cases, is not to look with disfavor upon liquidated damages provisions in contracts.” *Prentice*, 355 N.W.2d at 355 (citing *Dave Gustafson & Co. v. State*, 156 N.W.2d 185 (S.D. 1968)). Furthermore, acceleration clauses, like those present here, have been understood to be generally enforceable for decades. *See, e.g., In re Robinson’s Est.*, 251 N.W. 300, 304-05 (S.D. 1933) (quoting *Cissna Loan Company v. Gawley*, 151 P. 792, 793 (Wash. 1915) (“courts generally hold that stipulations in the contract to the effect that default in the payment of interest, or of an installment of the principal, shall accelerate the maturity of the entire debt, are not usurious, even though the contract, if enforced according to the terms of the default, will result in giving the lender a rate of interest greater than the maximum statutory rate.”)).

“A provision for payment of a stipulated sum as a liquidation of damages will ordinarily be sustained if it appears (1) that at the time the contract was made the damages in the event of a breach were incapable or very difficult of accurate estimation; (2) that there was a reasonable endeavor by the parties as stated to fix fair compensation; and (3) that the amount stipulated bears a reasonable relation to probable damages and is not disproportionate to any damages reasonably to be anticipated.” *Walter Motor Truck Co.*, 292 N.W.2d at 323 (citing *Anderson v. Cactus Heights Country Club*, 125 N.W.2d 491 (S.D. 1963)). “Courts interpret [a] liquidated damages clause

in light of the potential loss determinable at the date of the contract's execution, not at the time of breach.” *Gen. Elec. Cap. Corp., LLC v. G. Howard Assocs., Inc.*, No. 09-CV-3923 RRM JMA, 2010 WL 2346296, at *4 (E.D.N.Y. May 18, 2010), *report and recommendation adopted*, No. 09-CV-3923 RRM JMA, 2010 WL 2348640 (E.D.N.Y. June 9, 2010). Liquidated damages are also enforceable in both goods and services contracts. *Anderson*, 125 N.W.2d at 493.

The Memorandum Decision mistakenly asserted that the lack of a duty to mitigate in the FDJ agreement made the liquidated damages provision unconscionable. APP 5. Although this Court has yet to rule on this issue, “the general rule is that mitigation is not required in situations where the parties have agreed to a stipulated amount of damages. *Stein Eriksen Lodge Owners Ass'n Inc. v. MX Techs. Inc.*, 508 P.3d 138, 155 (Utah 2022) (citing 24 WILLISTON ON CONTRACTS § 65:31 (4th ed. 2020); 22 AM. JUR. 2D DAMAGES § 541). That is because “a court cannot award both liquidated and actual damages.” 24 WILLISTON ON CONTRACTS § 65:31 (4th ed. 2020). Ultimately, so long as the agreement is not “so one-sided as to oppress or unfairly surprise an innocent party,” it is enforceable. *Com. Real Est. Inv., L.C. v. Comcast of Utah II, Inc.*, 285 P.3d 1193, 1203 (Utah 2012) (citations omitted). Liquidated damages are likewise enforceable—even without a duty to mitigate—as long

as the amount of damages are not “grossly disproportionate to what might be expected to result” from the breach. 22 AM. JUR. 2D DAMAGES § 541.

Additionally, the Memorandum Decision relies heavily on the first part of the third paragraph of the comment to SDCL § 57A-2A-504. APP. 5. SDCL § 57A-2A-504, however, explicitly permits the kind of liquidated damages in the FDJ contract:

Damages payable by either party for default, or any other act or omission, including indemnity for loss or diminution of anticipated tax benefits or loss or damage to lessor's residual interest, may be liquidated in the lease agreement but only at an amount or by a formula that is reasonable in light of the then anticipated harm caused by the default or other act or omission.

SDCL § 57A-2A-504(1).

Additionally, the Circuit Court’s reliance on the first sentence of the third paragraph of the commentary is misplaced. While that sentence is an *example* of a formula that would, generally, be considered enforceable, it is by no means exclusive or exhaustive. Contrary to the Circuit Court’s analysis, the commentary observes that paragraph 3 does not contain an exclusive list of acceptable methods to determine liquidated damages:

Whether these formulae are enforceable will be determined in the context of each case by applying a standard of reasonableness in light of the harm anticipated when the formula was agreed to. Whether the inclusion of these formulae will affect the classification of the transaction as a lease or a security interest is to be determined by the facts of each case.

SDCL § 57A-2A-504, cmt, ¶ 3. In fact, the commentary specifically mentions that “[s]tipulated loss or stipulated damage schedules are also common,” *id.*, which is what is present in the FDJ contract. The Circuit Court’s analysis of both liquidated damages, generally, and damage schedules in lease agreements, specifically, was flawed. The Memorandum Decision should be reversed.

III. The Circuit Court Abused its Discretion in Limiting A&B’s Attorneys’ Fees

Attorneys’ fees are “recoverable if the parties’ contract so provides.” *Stern Oil Co., Inc. v. Brown*, 2018 S.D. 15, ¶ 44, 908 N.W.2d 144, 157 (quoting *Arrowhead Ridge I, LLC v. Cold Stone Creamery, Inc.*, 2011 S.D. 38, ¶ 25, 800 N.W.2d 730, 737) (additional citations omitted). While a circuit court is afforded deference when awarding, or limiting, attorneys’ fees, that deference is not unlimited. “Unlike *statutory* costs and disbursements to a prevailing party, the terms of the contract control the consideration of attorney’s fees and costs provided for agreement between the parties.” *Id.*, 2018 S.D. 15, ¶ 51, 908 N.W.2d at 159 (citations omitted). In fact, “a trial court must comply with the term of a contract and award attorney’s fees to the prevailing party.” *Id.* (citing *DocMagic, Inc. v. Mortg. P’ship of Am., L.L.C.*, 729 F.3d 808, 812 (8th Cir. 2013)). A party requesting contractually-warranted attorneys’ fees must demonstrate, “by a preponderance of the evidence, “[t]he basis for such an award.” *Gettysburg Sch. Dist. 53-1 v. Helms & Assocs.*, 2008 S.D. 35, ¶ 26, 751

N.W.2d 266, 276, *overruled on other grounds by Casper Lodging, LLC v. Akers*, 2015 S.D. 80, ¶ 26, 871 N.W.2d 477 (quoting *Credit Collection Serv., Inc. v. Pesicka*, 2006 SD 81, ¶ 6, 721 N.W.2d 474, 476) (alteration in original) (other citations omitted).

Additionally, a trial court must “enter findings of fact and conclusions of law when ruling on a request for attorney fees.” *Crisman v. Determan Chiropractic, Inc.*, 2004 S.D. 103, ¶ 30, 687 N.W.2d 507, 514 (quoting *Hoffman v. Olsen*, 2003 SD 26 at ¶ 10, 658 N.W.2d at 793). ““The fee should not be based on any one single factor but all of these matters should be taken into consideration. The only requirement is that the fee which the court fixes in each case must be reasonable for the services rendered.”” *Id.* (quoting *Duffy v. Circuit Court Seventh Jud. Cir.*, 2004 SD 19, ¶ 16, 676 N.W.2d 126, 134).

Here, rather than enforce the parties’ agreement, the Circuit Court intervened and summarily limited A&B’s attorneys’ fees. The Circuit Court posited that, after December 31, 2022, “all of the additional attorney time incurred was due to [A&B’s] insistence upon recovering the unreasonable and unconscionable damages that bore no reasonable relation to actual harm nor could be justified under well-established governing law....” APP. 6. That statement, however, is factually incorrect. A&B pursued summary judgment in 2023. R. 19-49. That motion was not limited to just the liquidated damages clause. To the contrary, A&B’s motion was to enforce both the

existence and terms of the entire contract. R. 19-49. The Court's Order denying summary judgment even notes that summary judgment was denied because there were issues of material fact regarding "the *acceptance of the contract by [A&B]* and as to damages." R. 105.

In other words, the Circuit Court's only rationale for why A&B's attorneys' fees award should be limited was incorrect on its face. Beyond that single factor, *see Chrisman*, 2004 S.D. 103, ¶ 30 (no single factor should be used), the Circuit Court did no analysis into the reasonableness of A&B's attorneys' fees. Remand, at a minimum, is required to correct that error.

Ultimately, the Circuit Court's limitation on A&B's attorneys' fees was factually and legally incorrect. It applied the wrong standard and reduced fees for an incorrect reason. The Circuit Court abused its discretion. Reversal is warranted.

CONCLUSION

The Circuit Court exceeded its authority and acted as an advocate. In doing so, it improperly found that the liquidated damages clause in FDJ's contract was unconscionable. Reversal is necessary to correct that error.

The Circuit Court also failed to properly evaluate the reasonableness of A&B's attorneys' fees award. The contract explicitly provided for the imposition of attorneys' fees if suit to enforce the contract was initiated. The Circuit Court limited those fees due to a flawed understanding of the facts and

law. The limitation on A&B's award should be reversed and remand should be ordered to adequately evaluate the reasonableness of A&B's request.

Dated December 4, 2025.

HALBACH | SZWARC LAW FIRM

By: /s/ Robert D. Trzynka
Anna Limoges
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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Appellant’s Brief does not exceed the word limit set forth in SDCL § 15-26A-66, said Brief containing 3,943 words, exclusive of the table of contents, table of cases, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates of counsel.

/s/ Robert D. Trzynka
One of the attorneys for Appellant

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the below documents were electronically filed with the Clerk of the Supreme Court via Odyssey:

- Appellant’s Brief;
- Certificate of Compliance; and
- Certificate of Service

Notification of filing and service of such documents completed upon the following person:

FDJ, LLC
2510 S. Marion Rd.
Sioux Falls, SD 57106

LeAnn Julius
1001 S. Burr St., #212
Mitchell, SD 57301

The undersigned further certifies that a copy of Appellant’s Brief was mailed by First Class U.S. Mail, postage prepaid to:

Ms. Shirley A. Jameson-Fergel
Clerk of the Supreme Court
500 East Capitol Avenue
Pierre, SD 57501-5070

Dated December 4, 2025.

/s/ Robert D. Trzynka
One of the attorneys for Appellant

INDEX TO APPELLANT’S APPENDIX

<u>Tab</u>	<u>Document</u>	<u>App. Pages</u>
1.	April 4, 2025, Memorandum Opinion and Order	1-6

On May 16, 2022, Plaintiff filed a Complaint alleging breach of the lease agreement. Defendants answered on June 3, 2022 and asserted inter alia, an affirmative defense of unconscionability, specifically citing to SDCL 57A-2-302. Plaintiff filed a Motion for Summary Judgment on November 22, 2023. A hearing was held on February 13, 2024. Plaintiff was represented at the hearing by attorney Emily Maurice of Halbach | Szwarc Law Firm. Defendants were represented at the hearing by attorney Chirs McClure of McClure & Hard Prof. LLC. Plaintiffs argued that Defendants admitted they did not pay Plaintiff in full; damages were not ambiguous; and prejudgment interest must be applied to the amount owed. Defendants argued that the rental agreement was unenforceable because it was never accepted; the Agreement was unconscionable under SDCL § 57A-2-302; and Plaintiff was only entitled to actual pecuniary loss and did not provide evidence supporting such damages. The Court ruled that there were issues of disputed material fact as it related to the acceptance of the contract and as to the damages. The Court entered an Order denying Plaintiff's Motion for Summary Judgment on January 10, 2025.

A trial was scheduled for August 9, 2024. Defendants' attorney, Chris McClure, filed a Motion to Withdraw as Counsel on August 8, 2024. Attorney McClure moved to withdraw as he had a conflict of interest in representing both Defendants. On August 12, 2024, the Court entered an Order granting Attorney McClure's Motion to Withdraw as Counsel and Motion for Continuance. The Defendants were given 90 days to obtain new counsel and the trial was reset to January 15, 2025. Defendants did not obtain new counsel, did not appear at the trial, and were, thus, in default.

On January 21, 2025, Plaintiff submitted the Affidavit of Anna Limoges in Support of Default Judgment and Attorneys' Fees as well as a Proposed Order for Judgment and Order after Trial. On January 22, 2025, the Court denied the Proposed Order for Judgment and Order. A hearing was held on February 28, 2025 on allowable, reasonable damages. Plaintiff was represented at the hearing by attorney Anna Limoges. Plaintiff argued the damages provisions in its contracts with Defendant FDJ were allowable and reasonable as liquidated damages. The Court held that Plaintiff's liquidated damages and mitigation provisions were unconscionable as a matter of law. The Court further ordered Plaintiff to submit a new calculation of damages.

AUTHORITY AND DECISION

Under SDCL § 57A-2A-108, the Court can find as a matter of law that a lease contract or a clause of a lease contract relating to goods is unconscionable and refuse to enforce it. The statute provides:

- (1) If the court as a matter of law finds a lease contract or any clause of a lease contract to have been unconscionable at the time it was made the court may refuse to enforce the lease contract, or it may enforce the remainder of the lease contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) With respect to a consumer lease, if the court as a matter of law finds that a lease contract or any clause of a lease contract has been induced by unconscionable conduct or that unconscionable conduct has occurred in the collection of a claim arising from a lease contract, the court may grant appropriate relief.

(3) Before making a finding of unconscionability under subsection (1) or (2) of this section, the court, *on its own motion* or that of a party, shall afford the parties a reasonable opportunity to present evidence as to the setting, purpose and effect of the lease contract or clause thereof, or of the conduct.

(4) In an action in which the lessee claims unconscionability with respect to a consumer lease:

(a) If the court finds unconscionability under subsection (1) or (2) of this section, the court shall award reasonable attorney's fees to the lessee.

(b) If the court does not find unconscionability and the lessee claiming unconscionability has brought or maintained an action he (or she) knew to be groundless, the court shall award reasonable attorney's fees to the party against whom the claim is made.

(c) In determining attorney's fees, the amount of the recovery on behalf of the claimant under subsections (1) and (2) is not controlling.

SDCL § 57A-2A-108 (emphasis added).

Subsection 3 of Section 2A-108, and its counterpart UCC § 2A-108, allows the Court to raise the issue *sua sponte* and then task the parties with presenting evidence of the setting, purpose, and effect of the questionable provisions in connection with the unconscionability analysis. UCC Article 2A Leases is a companion chapter to UCC Article 2 Sales. UCC § 2-302 is the counterpart to SDCL § 57A-2-302. Subsection 1 of Section 2A-108 is almost verbatim to Subsection 1 of Section 2-302 except for Section 2A-108 referring to a "lease contract." Under Section 2-302:

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

SDCL § 57A-2-302.

The Eighth Circuit has analyzed the issue of whether a court can *sua sponte* raise the issue of unconscionability. The court in *Langemeier v. Nat'l Oats Co.*, 775 F.2d 975, 977 (8th Cir. 1985) stated:

National Oats next contends that because neither party raised the issue of unconscionability, it was error for the court to do so *sua sponte*. Although Langemeier did not plead unconscionability, the testimony above indicates evidence was presented which permitted the court to find that the provision, under the circumstances of this case, was an unconscionable one. Moreover, we are of the opinion that the language of U.C.C. § 2-302 permits a court to raise this issue *sua sponte*. . . .

The plain language of subsection (1) permits the court to raise this issue *sua sponte*. Moreover, subsection (2) is written in the disjunctive: “[w]hen it is claimed *or appears to the court*.” [Emphasis added.] Thus, the court may raise this issue *sua sponte*, but subsection (2) mandates that the parties be given a chance to respond.

Langemeier v. Nat'l Oats Co., 775 F.2d at 977. Comment 1 to UCC § 2-302 provides, “This section is intended to make it possible for the courts to police explicitly against contracts or clauses which they find to be unconscionable.” UCC § 2-302 cmt. 1. In the case at bar, this defense was raised by the defendants before they defaulted and the Court is only recognizing that the issue remains viable in the interests of justice to avoid an unfair result that is disproportionate to actual injury.

Under SDCL § 57A-2A-108(3), “[b]efore making a finding of unconscionability under subsection (1) or (2) of this section, the court, on its own motion or that of a party, shall afford the parties a reasonable opportunity to present evidence as to the setting, purpose and effect of the lease contract or clause thereof, or of the conduct.” SDCL § 57A-2A-108(3). As noted above, Defendants argued unconscionability in their Brief in Response to Plaintiff’s Motion for Summary Judgment, and they pled unconscionability in their Answer. As a small local accounting office, and not a large commercial business, Defendants did not negotiate the one-sided Agreement that was created by Plaintiff. Even though Defendants are in default, the Court still has a duty to ensure that the claimed damages are consistent with the manifest requirements of conscionability that have been adopted by our Legislature.

Plaintiff argued it was not required to mitigate via selling or re-leasing and were entitled to be put in the same position as if Defendant FDJ did not default, while keeping the proceeds from the repossession and releasing and/ or salvage as a windfall. There is no legal theory that justifies this litigating position. Rather,

[d]amages payable by either party for default . . . may be liquidated in the lease agreement *but only at an amount or by a formula that is reasonable in light of the then anticipated harm caused by the default*.[.]

SDCL § 57A-2A-504(1) (emphasis added). Further,

If the lease agreement provides for liquidation of damages, and *such provision does not comply with subsection (1) of this section*, or such provision is an exclusive or limited remedy that circumstances cause to fail of its essential purpose, remedy may be had as provided in this chapter.

SDCL § 57A-2A-504(2) (emphasis added). “A liquidated damages formula that is common in leasing practice provides that the sum of lease payments past due, accelerated future lease payments, and the lessor's estimated residual interest, *less the net proceeds of disposition (whether by sale or re-lease) of the leased goods* is the lessor's damages.” SDCL § 57A-2A-504 cmt. ¶3 (emphasis added).

Combining the liquidation of damages statutes under SDCL § 57A-2A-504(1)-(2) with the unconscionability statutes under SDCL § 57A-2A-208 and SDCL § 57A-2-302, the Court finds that as a matter of law the liquidation provisions in the Agreement allowing Plaintiff to collect maintenance fees after repossession and the provisions allowing Plaintiff to waive mitigation and release the machines to other customers without applying those proceeds to the balances due herein were unconscionable at the time they were made. It was not reasonable for Plaintiff to charge maintenance fees to Defendants on equipment that was no longer being used by Defendants nor in Defendants' possession, but instead were being used by other customers for similar fees. (Plaintiff still increased the print services fees by 10% every year until July 2023 even after the repossession date of November 19, 2021.) Nor was it reasonable for Plaintiff to absolve itself of the statutory duty to mitigate and, indeed, retain a windfall in the event Defendants defaulted and Plaintiff repossessed and released or otherwise disposed of the equipment subject to the lease. As Plaintiff eventually disclosed, it re-leased two of the printers after repossession, yet still sought the entire long term lease payments from Defendants without deducting the value received for the two repossessed units after they were reclaimed and re-leased. Plaintiff also did not deduct from damages the salvage value of the printer that was repossessed but not re-leased or sold. The early termination fee was also unconscionable and not reasonable considering the anticipated harm to Plaintiff in the event of default as it was overreaching and went beyond the unpaid rent or the remaining lease payments. Rather, it was clearly a premium to be added on to the anticipated judgment in the form of a penalty.

Therefore, the Court reduces the amount of damages by deducting \$3,210.28 to account for the unconscionable maintenance fee during the period of November 20, 2021 through January 20, 2024 when the equipment was back in Plaintiff's possession. The Court reduces the amount of damages awarded to Plaintiff for the remaining lease payments by deducting \$5,602.91 for the amount Plaintiff received after re-leasing two printers and by deducting \$50.00 for the amount Plaintiff received for the salvage value of the third printer. The Court also reduces the amount of damages by deducting the \$1,000.00 unconscionable early termination fee. The total damages for the breach of the lease agreement are as follows:

1. \$3,186.33 accrued and unpaid rent
2. \$1,549.08 for interest on accrued and unpaid rent

3. \$4,812.02 for the remaining lease payments

Total: \$9,547.43

The Court also finds that reasonable attorney's fees and costs should be awarded only up until the date of December 31, 2022, in the amount of \$2,414.89. Thereafter, a review of the billing records provided under the affidavit of Attorney Limoges demonstrates that all the additional attorney time incurred was due to Plaintiff's insistence upon recovering the unreasonable and unconscionable damages that bore no reasonable relation to actual harm nor could be justified under well-established governing law, as noted above.

ORDER

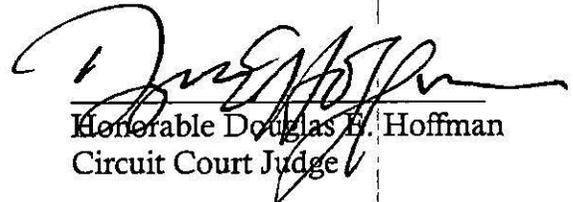
The Court, having reviewed the pleadings on file and the applicable statutes and case law, having heard the argument of counsel, and having made oral Findings of Fact and Conclusions of Law on record which are specifically incorporated herein by this reference as fully set forth herein; the Court finding that it has jurisdiction over this matter and that the venue is appropriate; and for good cause appearing, it is hereby:

ORDERED, ADJUDGED, AND DECREED that:

1. Plaintiff is awarded monetary damages in the amount of \$9,547.43.
2. Plaintiff is awarded attorneys' fees and costs in the amount of \$2,414.89.
 - a. Judgment is effective upon the filing of the Notice of Entry of this Judgment and Order.
 - b. Post-Judgment interest shall accrue on the Judgment amount at a rate of 10% per annum, per SDCL 54-3-5.1 and 54-3-16.

Dated this 4 day of April, 2025.

BY THE COURT:


Honorable Douglas B. Hoffman
Circuit Court Judge

Attest:
Traefald, Justin
Clerk/Deputy





Supreme Court of South Dakota

OFFICE OF THE CLERK
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Clerk

Amy Hudson
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Sarah L. Gallagher
Deputy Clerk

February 5, 2026

FDJ, LLC
2510 S Marion Road
Sioux Falls, SD 57106

Ms. LeAnn Julius
1001 S Burr St #212
Mitchell, SD 57301

Re: #31078, A&B Business, Inc. v.
FDJ, LLC and Julius (49CIV22-
1083)

Dear Parties:

In reviewing our file in the above-referenced action, we find that appellee brief was due for service and filing no later than January 20, 2026.

Accordingly, you are advised that the matter has been placed on ready status and will be scheduled for submission to the Court on the brief of appellant only.

Sincerely,

Supreme Court Clerk's Office

CC: Ms. Anna Limoges