IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 30761
Notice of Appeal Filed July 16, 2024

JESSICA PAULSEN,

Appellant

v.

AVERA MCKENNAN, AMBER SALOUM, MD, and
DOES 1-30,

Appellees.

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

THE HONORABLE DOUGLAS HOFFMAN

BRIEF OF APPELLANT JESSICA PAULSEN

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PRELIMINARY STATEMENT

For purposes of brevity and clarity, the Appellant, Jessica Paulsen, will be referred to as Ms. Paulsen or Plaintiff throughout this Brief.

The Appellees will collectively be referred to as Defendants, and individually as Defendant Avera McKennan and Defendant Dr. Saloum.

The Settled Record consists of Minnehaha County file 49CIV23-003567, which will be cited as "SR" followed by the page number(s) of the SR and specific lines or paragraphs cited, as appropriate.

JURISDICTIONAL STATEMENT

This is an appeal from the *Order Granting Motion for Summary Judgment and Judgment of Dismissal* entered on June 18, 2024. (SR at 252.) Appellant's Counsel filed a *Notice of Appeal* on July 16, 2024, and simultaneously perfected service upon Defendants'through their counsel of record, via the Odyssey file and serve system. (SR at 283, 288.)

Jurisdiction is proper in this Court, under SDCL § 15-26A-3, because this is an appeal from a final judgment.

STATEMENT OF LEGAL ISSUES

1. The lawsuit was improperly dismissed because it was timely commenced.

The trial court ruled that the lawsuit was not timely commenced and dismissed the case. The most relevant statutes and cases are:

A. SDCL § 15-2-14.1

B. SDCL § 15-6-6(a)

C. SDCL § 15-2-31

D. *Pitt-Hart v. Sanford USD Med. Ctr.*, 2016 S.D. 33.

2. The Circuit Court improperly granted summary judgment in favor of Defendants.

Because the trial court ruled that the lawsuit was not timely served, it granted summary judgment in favor of Defendants. The most relevant statutes and cases are:

A. SDCL § 15-6-56(f)

B. *Pitt-Hart v. Sanford USD Med. Ctr.*, 2016 S.D. 33.

STATEMENT OF THE CASE & PROCEDURAL POSTURE

On or about December 13, 2021, Plaintiff delivered her baby at Defendant Avera McKennan hospital under the care of Defendant Dr. Amber Saloum. (SR at 6, para. 14-15.) While she was there, Plaintiff suffered complications that required medical attention. (SR at 6-7, para. 15-19.) Defendant Dr. Saloum medically intervened by way of surgery. (*Id.*) Plaintiff voiced her wishes to keep her uterus intact and to not have it removed on two occasions. (*Id.*) Plaintiff's uterus, however, was removed by the Defendants against Plaintiff's wishes on December 14, 2021. (*Id.*) On December 15, 2023, Plaintiff filed a lawsuit alleging negligence, medical malpractice, breach of fiduciary duty, medical battery, respondeat superior, negligent retention, and fraud. (SR at 7-9.) Additionally, on December 15, 2023, Plaintiff's attorney delivered Plaintiff's Summons and Complaint to the Minnehaha County Sheriff and the Yankton County Sheriff with the intent that the Summons and Complaint be served on Defendants. (SR at 160-162, 166-193.) Defendant Avera McKennan's Registered Agent was served by the Yankton County Sheriff on December 29, 2023. (SR at 39.) Counsel for Defendant Dr. Saloum was served by the Minnehaha County Sheriff on January 19, 2024. (SR at 38.) On April 23, 2024, Defendants filed a Motion for Summary Judgment and a Motion for Protective Order claiming that the lawsuit was not properly filed within the time limit provided in SDCL § 15-2-14.1. (SR at 22.) The Circuit Court granted Summary Judgment in favor of Defendants based on its reading of SDCL § 15-2-14.1, adopting Defendants' position that SDCL § 15-2-14.1 conflicts with SDCL § 15-6-6(a). (SR at 252, 311-317.) Plaintiff was precluded from obtaining discovery due to the trial

court granting Defendants' Motion for Summary Judgment. (*Id.*) The trial court did not rule on Defendants' Motion for Protective Order. (SR at 301-317.)

STATEMENT OF THE FACTS

On December 13, 2021, Plaintiff, Jessica Paulsen went to Defendant Avera McKennan hospital for what she thought would be one of the happiest days of her life—to deliver her child. (SR at 6, para. 14-15.) After delivering her baby, under the medical supervision of Defendant Dr. Saloum, Ms. Paulsen suffered some complications and Defendant Dr. Saloum, noticed some bleeding. (SR at 151.) Defendant Dr. Saloum wanted to investigate the cause of the bleeding and desired to perform a hysterectomy to remedy the bleeding. (SR at 151-152.) Plaintiff told Defendants' hospital staff that she had no desire to undergo a hysterectomy. (SR at 6-7, para. 15-19.) Defendant Dr. Saloum then approached Ms. Paulsen directly. (SR at 6, para. 17.) Defendant Dr. Saloum asked Ms. Paulsen if Ms. Paulsen wanted to have more children. (*Id.*) Ms. Paulsen told Defendant Dr. Saloum that she wanted to have more children and further explained to Defendant Dr. Saloum that under no circumstances did she want to have a hysterectomy. (*Id.*)

After Ms. Paulsen told Defendant Dr. Saloum directly that she had no desire to have a hysterectomy, Defendant Dr. Saloum walked away from Ms. Paulsen without so much as a verbal response. (*Id.* at para. 18.) Despite Ms. Paulsen's repeated instruction to the contrary, Defendant Dr. Saloum performed the undesired hysterectomy on December 14, 2021. (SR at 6-7, para. 19.)

After Defendant Dr. Saloum performed Ms. Paulsen's unwanted hysterectomy, Ms. Paulsen suffered additional critical complications. (SR at 7, para. 20.) To remedy the complications, Defendant Dr. Saloum took Ms. Paulsen in for a second surgery and requested that a second surgeon perform the surgery. (*Id.* at para. 21.) When the second surgeon opened Ms. Paulsen's sutures, blood poured out of Ms. Paulsen. (*Id.* at para. 22.) Hospital personnel

reported that while standing at the operating table and discussing Defendant Dr. Saloum's decision to give Ms. Paulsen the undesired hysterectomy, it was noted that Ms. Paulsen already had other children. (*Id.* at para. 23.)

Following the first surgery, Defendant Dr. Saloum placed a device inside of Ms. Paulsen on December 14, 2021. (SR at 159, para. 8.) The device was left in Ms. Paulsen's body for four days. (SR at 195.) Defendant Dr. Saloum removed the device on December 18, 2021. (*Id.*) During that same timeframe, Ms. Paulsen was intubated. (*Id.*) Additionally, Defendant Saloum injected certain products and medications into Ms. Paulsen's body on December 14, 2021. (*Id.*) At least some of those injections were due to the hysterectomy to which Ms. Paulsen did not consent. (*Id.*) Ms. Paulsen was discharged from Defendant Avera McKennan on December 18, 2021. (SR at 164.)

On December 15, 2023, Plaintiff filed this lawsuit. (SR at 3-10.) On December 15, 2023, the Summons and Complaint were delivered to the Minnehaha County Sheriff and the Yankton County Sheriff for service on each of the Defendants. (SR. at 166-193.) Defendant Avera McKennan's Registered Agent was served by the Yankton County Sheriff on December 29, 2023. (SR at 39.) Counsel for Defendant Dr. Saloum was served by the Minnehaha County Sheriff on January 19, 2024. (SR at 38.) On January 16, 2024, Counsel for Defendants, Roger A. Sudbeck, filed a Notice of Appearance with the circuit court in Minnehaha County. (SR at 11.) On that same day, Defendants filed their Answer to the lawsuit. (SR at 13-15.) On March 4, 2024, Defendants filed a Motion for a Scheduling Order. (SR at 16.) On April 23, 2024, Defendants filed a Motion for Summary Judgment, arguing that the lawsuit was not timely filed, and that Plaintiff failed to timely file the lawsuit, based on the statute of repose, SDCL § 15-2-14.1, by one day. (SR at 22-23, 115.)

On April 11, 2024, Plaintiff served her first sets of Interrogatories, Requests for Production of Documents, and Requests for Admission on Defendants. (SR at 21.)

Defendants objected to the discovery requests and refused to answer any of Plaintiff's Interrogatories, Requests for Production of Documents, or Requests for Admission while simultaneously and inexplicably serving discovery on Plaintiff. (SR at 28, 239-241.) Defendants even went so far as to file a Motion for a Protective Order on May 7, 2024, mere days before their response deadline, to avoid responding to Plaintiff's discovery requests. (SR at 28.) Yet Plaintiff timely responded to Defendants' discovery requests. (SR at 239, para. 5.) On June 11, 2024, all parties appeared at the Minnehaha County Courthouse to be heard on Defendants' Motion for Summary Judgment and Motion for Protective Order. (SR at 252, 301.) At the hearing, the trial court granted Summary Judgment in favor of Defendants based on its reading of SDCL § 15-2-14.1. (SR at 252.) The court erroneously believed that SDCL § 15-6-6(a) only applies to those statutes found in Chapter 15-6, and that §15-6-6(a), therefore, did not apply to SDCL § 15-2-14.1. (SR at 310, lines 1-4.) The court also believed that, even if the first day was in fact December 15, 2021, then the 730th day would be December 14, 2023. (*Id.* at lines 5-12.) The court found this without actually counting the days. (*Id.*) Because the trial court granted Defendants' Motion for Summary Judgment, Plaintiff was subsequently denied any form of discovery. (SR at 310, lines 14-15.) On June 18, 2024, the circuit court entered its order granting Defendants' Motion for Summary Judgment and Notice of Entry of the same was filed on June 18, 2024. (SR at 252-255.) Plaintiff's Notice of Appeal was filed on July 16, 2024. (SR at 283-288.)

STANDARD OF REVIEW

This Court's standard of review for summary judgment, under SDCL § 15-6-56(c), is whether "the moving party demonstrated the absence of any genuine issue of material fact and showed entitlement to judgment on the merits as a matter of law." *Pitt-Hart v. Sanford U.S.D. Med. Ctr.*, 2016 S.D. 33, ¶6 (citations omitted). The evidence is viewed "most favorably to the nonmoving party" and reasonable doubts are resolved "against the moving

party." *Id.* Statutes are interpreted "under a *de novo* standard of review without deference to the decision of the trial court." *Peterson, ex rel. Peterson v. Burns*, 2001 S.D. 126, ¶7 (citations omitted).

ARGUMENT

I. The Lawsuit was Commenced Before the Statute of Repose Expired.

Under South Dakota law, "[a] civil action is commenced as provided in §§ 15-2-30 and 15-2-31." SDCL § 15-6-3. Section 15-2-30 states that "an action is commenced as to each defendant when the summons is served on him, or on a codefendant who is a joint contractor or otherwise united in interest with him." SDCL § 15-2-30. Moreover,

> [a]n attempt to commence an action is *deemed equivalent* to the commencement thereof when the summons is delivered, with the intent that it shall be actually served, to the sheriff . . . of the county in which the defendants or one of them, usually or last resided; or if a corporation be a defendant . . . where it kept an office for the transaction of business. Such an attempt must be followed by . . . the service [of the summons] within sixty days.
>
> SDCL § 15-2-31 (emphasis added).

Although the general rule is that a lawsuit is commenced when it is served on the defendant, or on a codefendant in the matter, an exception to the rule is when the summons is delivered to the sheriff in the county were the defendant resides or the corporate defendant is located. If actual service of the summons occurs within sixty days of delivery to the sheriff, the lawsuit is deemed commenced on the date it was delivered to the sheriff.

SDCL § 15-6-6(a) provides that "[i]n computing any period of time prescribed or allowed by this chapter, by order of court, *or by any applicable statute*, the day of the act, event, or default from which the designated period of time begins to run *shall not be included*. (Emphasis added). Accordingly, discussion of when the lawsuit was filed and served is necessary.

A. The Lawsuit was Timely Filed.

Under South Dakota law, a Plaintiff has two years to file a lawsuit for medical malpractice. SDCL § 15-2-14.1 states that "an action against a physician, surgeon, . . . hospital, . . . or other practitioner of the healing arts for malpractice, error, mistake, or failure to cure, whether based on contract or tort, can be commenced only within two years *after* the alleged malpractice, error, mistake, or failure to cure shall have occurred. . . ." (emphasis added). SDCL § 15-6-6(a) provides that "in computing *any* period of time prescribed or allowed by this chapter, by order of court, or by *any applicable statute*, the day of the act, event, or default *from which the designated period of time begins* to run shall *not* be included. The last day of the period so computed shall be included unless it is a Saturday, a Sunday, or a legal holiday. . . ." (emphasis added). South Dakota law further requires "where possible, statutes should be read in harmony and construed so as to give effect to each statute." *Nat'l Farmers Union Property & Casualty Co. v. Bang*, 516 N.W.2d 313, 318 (S.D. 1994). Although counsel for Defendants claimed at the hearing on the Motion for Summary Judgment that SDCL §§ 15-2-14.1 and 15-6-6(a) conflicted with one another, counsel was unable to articulate how these two statutes conflicted other than by alluding to the trial court that to read these statues in harmony would cause an undesirable result for Defendants—denial of their motion. (SR at 309-312.) Section 15-6-6(a) does not conflict with § 15-2-14.1. It simply provides a definition for when the computation of time begins in a medical malpractice lawsuit. When reading these statutes in harmony, the proper calculation of that time period begins on the day *after* the alleged malpractice occurred. *See* SDCL §§ 15-2-14.1 and 15-6-6(a).

Here, the alleged malpractice, according to Defendants, occurred on December 14, 2021.[1] Applying the statutes, the applicable time period, assuming that Defendants are correct, starts to run on December 15, 2021. When calculating the two-year time period, "the last day of the period so computed *shall be included* unless it is a Saturday, a Sunday, or a legal holiday. . . ." Exactly two years from December 15, 2021—the date the statute of repose starts to run—is Friday, December 15, 2023. According to SDCL § 15-6-6(a), December 15, 2023, is to be included in the applicable time period. Thus, the lawsuit is timely filed so long as it filed on or before December 15, 2023.

According to Black's Law Dictionary, a year is defined as "[a] consecutive 365-day period beginning at any point." *See* Black's Law Dictionary (12th ed. 2024). Thus, two years would logically be a period of 730 days. When calculated properly, therefore, day 730 from December 15, 2021 falls on December 15, 2023.

Because the applicable period starts on December 15, 2021, and ends on December 15, 2023, the last day to file the lawsuit under SDCL § 15-2-14.1 and SDCL § 15-6-6(a) is December 15, 2023. Accordingly, because the lawsuit was filed on December 15, 2023, this lawsuit was timely commenced and dismissing the lawsuit on the grounds that it was not timely filed is reversible error.

B. The Lawsuit was Timely Served.

To be timely filed, the lawsuit must commence within the applicable time period. *See* SDCL § 15-2-30. As noted earlier, a lawsuit commences "when the summons is served on the Defendant or a codefendant who is . . . otherwise united in interest with him". SDCL § 15-2-30. Further, SDCL § 15-2-31 states in pertinent part that "an attempt to commence an action *is deemed equivalent to the commencement thereof* when the summons is delivered, *with the*

[1] It is important to note that the date of the alleged malpractice is disputed, and discovery is proper to ensure that the statute of repose time period is correct. That contention is addressed below.

intent that it shall be actually served, to the sheriff or other officer of the county in which the defendants or one of them, usually or last resided. . . . Such an attempt must be followed by . . . the service thereof, within sixty days."

Here, the lawsuit commenced on December 15, 2023. On December 15, 2023, Plaintiff's Counsel electronically delivered the Summons and Complaint to the Minnehaha and Yankton County Sheriffs. Correspondence to the respective Sherriff's Offices reads "attached please find documents *for service*." (SR at 167-168, 182-183.) The Minnehaha and the Yankton County Sheriff's Offices successfully served the lawsuits less than sixty (60) days later. (SR at 38-39.) Because the correspondence to the respective Sheriff's Offices indicated that the documents were to be served and because both of the Sheriff's offices subsequently served the Defendants, it is clear that the documents were delivered to the Sheriff with the intent that they be served. Accordingly, the lawsuit was deemed commenced on December 15, 2023, which, according to the Defendants, was the last day to file the lawsuit under SDCL §§ 15-2-14.1 and 15-6-6(a). Because the lawsuit commenced within the proper time period, the lawsuit is not time barred.

Because the lawsuit was timely served upon Defendants, the lawsuit is deemed to have commenced on December 15, 2023, which was the last day upon which Plaintiff could have commenced the lawsuit. Thus, the lawsuit was timely commenced and the Circuit Court improperly granted Summary Judgment.

For the foregoing reasons, this lawsuit was timely commenced within the meaning of SDCL §§ 15-2-30 and 15-2-31. Accordingly, this lawsuit was timely commenced, and the order granting Summary Judgment should be reversed.

C. It is Impossible to Accurately Calculate the Time Period Under SDCL § 15-2-14.1 because of Defendants' Refusal to Answer Discovery.

Defendants assert that the injury occurred on December 14, 2021, and that SDCL § 15-2-14.1 started to run on December 15, 2021. For purposes of the Motion for Summary

Judgment, Plaintiff assumes (without conceding) that the Defendants were correct in their assertion. The day that SDCL § 15-2-14.1 started to run is unknown to the Plaintiff and the court because discovery was not obtained in this case. Even if Plaintiff is wrong in her calculation of the applicable time period, granting Summary Judgment in this case on the basis that the lawsuit was not timely filed was inappropriate because the exact day that SDCL § 15-2-14.1 began to run is entirely unknown. Another way of considering the question is, what is day one of the applicable statute?

This Court noted in *Pitt-Hart* that the continuing-tort doctrine applies to SDCL § 15-2-14.1. *See Pitt-Hart v. Sanford USD Med. Ctr.*, 2016 S.D. 33, ¶ 26. The continuing-tort doctrine tolls the statute of repose and therefore impacts the day on which the statute begins to run. Based on the facts known to Plaintiff at this time, the first surgery occurred on December 14, 2021. It is unclear, however, when the subsequent surgery occurred. In addition to this, it is unclear whether, or when, a device was implanted in Plaintiff because of the surgeries to which Plaintiff did not consent. Although Plaintiff requested discovery from Defendants, Defendants failed to answer any discovery. This in spite of Defendants requesting discovery from Plaintiff, to which Plaintiff timely responded. Without all of the necessary information, because of Defendants' failure to respond to discovery, the parties and this Court are unable to accurately calculate the proper time period. Without the necessary information, the Circuit Court was not able to properly assess the timeliness of the lawsuit. Because the applicable time period cannot be accurately calculated, any argument that the lawsuit was not timely commenced cannot be seriously entertained and no court can affirmatively determine when SDCL § 15-2-14.1 began to run, which runs counter to any motion for summary judgment.

Because the time period cannot be properly calculated, it is impossible for anyone to reach a judgment that the lawsuit was not timely commenced. Therefore, this Court should reverse the Order Granting Summary Judgment.

II. The Circuit Court improperly granted Summary Judgment.

A. A Genuine Dispute of Material Fact Requires Defendants to Produce the Facts.

Even if this Court agrees with the unilateral determination of the Defendants that, under SDCL § 15-2-14.1, the clock began to run when Defendants' medical intervention of Plaintiff concluded, SDCL § 15-6-56(f) allows the trial court to refuse application for judgment or order a continuance to permit depositions to be taken or discovery to be had if the opposing party cannot present facts essential to justify their position—such as, when the medical intervention actually concluded. To fully address Defendants' Motion for Summary Judgment, the trial court needed all material facts to determine that no genuine dispute of material fact existed.

Here, by granting Summary Judgment, the trial court prevented Plaintiff from engaging in *any* discovery that would have led to material facts that would likely demonstrate a reasonable dispute. As stated above, Defendants refused to respond to *any* of Plaintiff's discovery requests and went so far as to seek a protective order to prevent Plaintiff from having the material facts to properly oppose the Motion for Summary Judgment. It is entirely improper to force the trial court to decide whether a genuine dispute as to any material facts exists when the facts have not been fully discovered. Without engaging in discovery, Defendants sought an order from the trial court based on the facts that they hand selected to provide to Plaintiff and the trial court and withheld any facts or evidence that may have been unfavorable to Defendants. Had this case proceeded to discovery, Plaintiff would have been able to uncover her verified medical records which she anticipates include facts related to a drainage tube that was implanted in Plaintiff, that Plaintiff was intubated, that Plaintiff

underwent more than one surgery, and other matters which should properly be considered in discovery.

Additionally, Plaintiff would have been able to uncover any other treatment that she received while in Defendants' care. This includes evidence that Defendant Avera McKennan negligently failing to advocate for its patient against a doctor who was performing an unwanted surgery. Producing the medical records and all other information Plaintiff sought in discovery was necessary for Plaintiff to properly argue against Defendants' Motion and for the trial court to fully determine whether a genuine dispute as to a material fact existed.

Defendants' refusal to engage in discovery and turn over any evidence required Plaintiff to blindly argue against Defendants' unilateral determination of the facts contained within the Motion for Summary Judgment. Without discovery, Plaintiff was unable to fully address Defendants' argument that the lawsuit was not timely filed. Because the trial court did not have all of the facts before it, granting summary judgment was at the very least premature, and most certainly improper. Therefore, this Court should reverse the trial court's decision and remand for this case to proceed to discovery.

B. Producing the Facts Allows Plaintiff to Fully Address the Time Period at Issue.

As noted above, SDCL § 15-6-56(f) allows a court to refuse summary judgment if the party opposing the motion is without facts that are essential to justify the opposing party's position. In *Pitt-Hart v. Sanford USD Medical Center*, this Court noted that "while the continuous-treatment rule does not apply to a statute of repose, the continuing-tort doctrine does." 2016 S.D. 33, ¶ 26. The time constraint in the statute of repose "may be *delayed from commencing*" under the continuous-tort doctrine. *Id.*

At present, Plaintiff knows that Defendants left at least one medical device in Plaintiff for several days. Since she was precluded from obtaining discovery, Plaintiff does not know whether Defendants participated in any other treatments, injections, or placed any other

devices in her without her consent. Without discovery, these facts are unknown to Plaintiff, and such facts are imperative to fully address the timeliness of this lawsuit. As noted earlier, Defendants filed a Motion for Protective Order to avoid responding to discovery in this case. Given that the Defendants admitted liability at the hearing on their motion for summary judgment and timeliness of this lawsuit hinges on just *one day*, it is entirely reasonable to believe that discovery will uncover additional facts that bear on the statute of repose and the date from which the trial court should base its calculation. Without more, Plaintiff is in a position to reasonably believe that Defendants engaged in a "continuous and unbroken course of negligent treatment that were so related as to constitute one continuing wrong." *Id.* Additionally, Plaintiff knows that she remained at Defendant Avera McKennan under Defendant Dr. Saloum's care until she was discharged on December 18, 2021. Plaintiff was undoubtedly treated between her surgery on December 14, 2021, and her discharge on December 18, 2021. Without proper discovery, it is impossible to know whether Defendants engaged in negligent and otherwise continuing tortious treatment between December 14, 2021, and December 18, 2021.

As this Court stated in *Pitt-Hart*, the continuing-tort doctrine may delay the statute of repose from commencing. To be certain that the doctrine does not apply, Plaintiff is entitled to discovery. Without discovery, the trial court should not have granted Summary Judgment. Because the trial court did not have all of the facts before it, it was entirely inappropriate to grant Summary Judgment to Defendants. Accordingly, this case should be allowed to proceed to discovery. Therefore, Plaintiff respectfully requests that this Court reverse the Order Granting Summary Judgment and remand for this case to proceed to discovery.

CONCLUSION

For the foregoing reasons, and viewed most favorably to Plaintiff, Defendants failed to establish that this lawsuit is barred by SDCL § 15-2-14.1. Moreover, Defendants failed to

establish that there were no genuine dispute as to any material facts based on Defendants' refusal to answer discovery. Therefore, granting summary judgment in this matter was improper. Thus, Plaintiff respectfully requests this Court reverse the order granting summary judgment and remand for this case to proceed to discovery.

Appellant respectfully requests that she be allowed oral argument on this matter.

Dated: October 28, 2024

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL § 15-26A-66(b)(4), I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word and contains 4,243 words from the Preliminary Statement through the Conclusion. I have relied on the word count of the word-processing program to prepare this Certificate.

Dated this 28th day of October 2024.

Michael D. Sharp, Esq.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Brief of Appellant Jessica Paulsen was served on the following individuals at their designated service email address through the Odyssey File & Serve software as follows:

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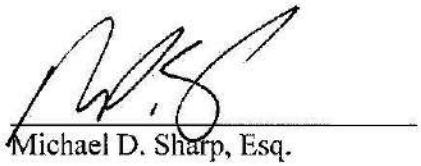
Counsel for Defendants

Dated this 28th day of October 2024.



Michael D. Sharp, Esq.

APPENDIX

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	:SS	
COUNTY OF MINNEHAHA	)	SECOND JUDICIAL CIRCUIT

* *

JESSICA PAULSEN,

Plaintiff,

v.

AVERA MCKENNAN, AMBER SALOUM, MD and DOES 1-30,

Defendants.

49CIV23-003567

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT AND JUDGMENT OF DISMISSAL

* *

The Defendants' Motion for Summary Judgment came on for hearing before the Court on June 11, 2024, with the Plaintiff represented by her attorney, Michael Sharp, and the Defendants represented by their attorneys, Roger A. Sudbeck and Matthew D. Murphy, and the Court having reviewed and fully considered the Record before it, the oral arguments of counsel made at the hearing, and South Dakota law, and based upon its analysis and conclusions made on the Record during the hearing, it is hereby

ORDERED, ADJUDGED, AND DECREED that the Defendants' Motion for Summary Judgment is granted in its entirety; and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that all of the Plaintiff's pending claims against the Defendants are dismissed on their merits and with prejudice, with the Plaintiff recovering nothing.

6/17/2024 2:18:12 PM
BY THE COURT:

Douglas Hoffman
Circuit Court Judge

Attest:
Russell, Lisa
Clerk/Deputy

PLAINTIFF'S EXHIBIT A

STATE OF SOUTH DAKOTA	) :SS	IN CIRCUIT COURT
COUNTY OF MINNEHAHA	)	SECOND JUDICIAL CIRCUIT

JESSICA PAULSEN, Plaintiff, v. AVERA MCKENNAN, AMBER SALOUM, MD, and DOES 1-30, Defendants.	49CIV23-003567 **PLAINTIFF'S RESPONSE TO *DEFENDANTS' STATEMENT OF* UNDISPUTED MATERIAL FACTS**

COMES now, Plaintiff, Jessica Paulsen, and provides this Court with her Response to Defendants' Statement of Undisputed Material Facts:

Defendants' Statement	Plaintiff's Response
1. On December 13, 2021, Plaintiff delivered her baby at about 1945 at Avera McKennan Hospital. (Affidavit of Amber Saloum, MD ("Saloum Aff."), ¶4 and Ex. A, AMcK 1337-38).	1. Undisputed.
2. After Plaintiff had ongoing bleeding after the labor, on December 14, 2021, Plaintiff underwent an exploratory laparotomy wherein a hysterectomy was completed. (Id. at ¶10 and Ex. A, AMcK 1344-46).	2. It is undisputed that Plaintiff underwent a surgery or surgeries on December 14, 2021. The remaining facts are objected to as requiring expert opinion and are disputed as there is a need for further discovery. *See,* Affidavit of M. Sharp, ¶ 9, Ex. 4 AMcK 1317.
3. On December 14, 2021, Plaintiff underwent a second surgery to investigate a suspected intraabdominal hemorrhage. (Id. at ¶13-14 and Ex. A., AMcK 1342-43).	3. It is undisputed that Plaintiff underwent a surgery or surgeries on December 14, 2021. The remaining facts are objected to as requiring expert opinion and are disputed as there is a need for further discovery. *See,* Affidavit of M. Sharp, ¶ 9, Ex. 4 AMcK 1317.
4. The second surgery stopped the bleeding and Plaintiff stabilized. (Id. at ¶14).	4. It is undisputed that Plaintiff underwent a surgery or surgeries on December 14, 2021. The remaining facts are objected

PLAINTIFF'S EXHIBIT 8

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	as requiring expert opinion and are disputed as there is a need for further discovery. *See,* Affidavit of M. Sharp, ¶ 9, Ex. 4 AMcK 1317.
5. Plaintiff was discharged home on December 18, 2021. (Id. and Ex. A, AMcK 1317).	5. It is undisputed that Plaintiff was discharged from Avera McKennan Hospital on December 18, 2021. It is disputed that Plaintiff was discharged from Defendant Dr. Saloum's care on December 18, 2021. *See,* Affidavit of M. Sharp, Ex. 1.
6. As it relates to Avera McKennan, the Summons and Complaint was delivered to the Yankton County Sheriff for service on December 20, 2023, and served upon Avera McKennan's Registered Agent on December 29, 2023. (Murphy Aff., Ex. A).	6. Disputed. As it relates to Avera McKennan, the Summons and Complaint was delivered to the Yankton County Sheriff for service on the Defendants on December 15, 2023. *See,* Affidavit of M. Sharp, Ex. 2 & 7.
7. As it relates to Amber Saloum, MD, the Summons and Complaint was delivered to the Minnehaha County Sheriff for service on December 26, 2023, and served upon Dr. Saloum's counsel on January 19, 2024. (Murphy Aff., Ex. B).	7. Disputed. As it relates to Amber Saloum, MD, the Summons and Complaint was delivered to the Minnehaha County Sheriff on December 15, 2023. *See,* Affidavit of M. Sharp, Ex. 3.
8.	8. Device installed into Plaintiff's body under the supervision of Defendant Dr. Saloum on December 14, 2021. Ex. A to Defendants' Statement of Undisputed Facts, AMcK 1344-46.
9.	9. Device removed from inside of Plaintiff's body by Defendant Dr. Saloum on December 18, 2021. *See,* Affidavit of M. Sharp, Ex. 4, AMcK 1317.

Dated: May 24, 2024

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 30761

JESSICA PAULSEN,
Plaintiff/Appellant,

v.

AVERA MCKENNAN, AMBER SALOUM, MD, And DOES 1-30,
Defendants/Appellees.

APPELLEES AVERA MCKENNAN AND AMBER SALOUM, M.D.'S BRIEF

Appeal from the Second Judicial Circuit
Minnehaha County, South Dakota
The Honorable Douglas Hoffman

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NOTICE OF APPEAL FILED July 16, 2024

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PRELIMINARY STATEMENT

Defendant and Appellee Avera McKennan shall be referred to as "Avera." Co-Defendant and Appellee Amber Saloum, MD, shall be referred to as "Dr. Saloum." Avera and Dr. Saloum shall be referred to collectively as "Defendants" or "the Defendants." Plaintiff and Appellant Jessica Paulsen shall be referred to as "Plaintiff."

References to the Brief of Appellants, dated October 28, 2024, shall be denoted as "Appellant's Br." or "Appellant's Brief" followed by the applicable page number citation where appropriate.

References to the paginated Circuit Court Record shall be denoted as "R.," followed by the applicable page number citation, with further specific citation provided where appropriate. Documents from the paginated Circuit Court Record can be found attached to the Brief of Appellants, however, for purposes of consistency throughout this Brief, the citations herein will be made only to the Circuit Court Record at "R." Similarly, the pertinent summary judgment hearing transcript is also part of the paginated Circuit Court Record and, for consistency, will also only be cited to herein based upon its location in the Circuit Court Record as denoted by "R."

JURISDICTIONAL STATEMENT

The Defendants do not contest this Court's appellate jurisdiction.

STATEMENT OF THE LEGAL ISSUES

I. Did the Circuit Court err in concluding that the Plaintiff's lawsuit was barred by the statute of repose.

The Circuit Court concluded that the Plaintiff's lawsuit was barred by the medical malpractice statute of repose found at SDCL 15-2-14.1.

Pitt-Hart v. Sanford USD Medical Center, 2016 S.D. 33, 878 N.W.2d 406
Toben v. Jeske, 2006 S.D. 57, 718 N.W.2d 32

Murray v. Mansheim, 2010 S.D. 18, 779 N.W.2d 379
SDCL 15-2-14.1
SDCL 2-14-2(36)

STATEMENT OF THE CASE

On the evening of December 13, 2021, Plaintiff gave birth to a healthy baby. Avera's providers later identified a birth related complication and in the early morning hours of December 14, 2021, they saved Plaintiff's life by surgically removing her uterus which was torn and bleeding in two locations.

On the evening of December 15, 2023, Plaintiff's counsel emailed a Summons and Complaint to sheriff's offices in differing counties, intending for each sheriff to serve each Defendant, Avera and Dr. Saloum, with this medical malpractice lawsuit. (R. 166-79 and 181-93). In substance, and in complete contrast to her signed informed consent, Plaintiff's Complaint claimed she did not want the lifesaving hysterectomy and asserted it was forced upon her against her wishes. (R. 6-7, ¶14-19, 23).

On April 23, 2024, the Defendants filed their Motion for Summary Judgment based upon SDCL 15-2-14.1. (R. 22-23 and 115-24). The summary judgment hearing occurred on June 11, 2024, at the Minnehaha County Courthouse in Sioux Falls, South Dakota, with the Honorable Douglas E. Hoffman presiding. (R. 252). The Circuit Court granted the Defendants' Motion for Summary Judgment in full and from the bench, concluding that Plaintiff's lawsuit was barred by the medical malpractice statute of repose found at SDCL 15-2-14.1. (R. 317, Ln. 12-16).

The summary judgment Order was signed and filed on June 17, 2024, and noticed on June 18, 2024. (R. 253-255). Plaintiff filed her Notice of Appeal and Docketing Statement on July 16, 2024. (R. 283-86).

The Defendants respectfully request that this Honorable Court affirm the Circuit Court's decision granting summary judgment in their favor.

STATEMENT OF THE FACTS

I. Background Facts Relating to Plaintiff's Medical Care

On December 13, 2021, Plaintiff delivered a healthy baby at about 1945. (R. 142-43). After labor, Plaintiff had vaginal bleeding. (R. 139-140). Based upon a physical exam and a bedside ultrasound, Avera's providers became concerned Plaintiff had a ruptured uterine artery or a rupture to her uterus itself. (R. 132, ¶6 and R. 139-40).

A CT scan was completed to investigate. (R. 132, ¶7 and R. 149-50). The radiologist noted "prominent hemorrhage," that "[t]he wall of the lower uterine segment [was] discontinuous," and that "uterine rupture [was] suspected." (Id.) Emergent care was necessary. On December 13, 2021, at about 2334, Dr. Saloum updated Plaintiff on her condition, including the suspected uterine rupture. (R. 132, ¶8). Dr. Saloum noted:

> These findings were discussed with the patient. Will proceed to the main OR for exploratory laparotomy, repair of uterus, evacuation of hemorrhage, possible hysterectomy. Discussed risks of surgery including bleeding, infection, damage to structures around the uterus, etc. All questions answered.

(R. at 137). Eight minutes later, at 2342, Plaintiff signed an informed consent agreeing to move forward with an "exploratory laparotomy, repair of uterus, evacuation of hematoma, possible hysterectomy." (R. 135-36).

In the early morning hours of December 14, 2021, Dr. Saloum, with the assistance of another Avera OB/GYN, began the exploratory laparotomy with hopes of addressing the cause of the ongoing bleeding while preserving Plaintiff's uterus. (R. 132, ¶10 and R. 146-48). The team quickly determined Plaintiff's uterus was ruptured, including having

both anterior and posterior tears. (R. 132, ¶11 and R. 147). Uterine repair was not feasible and the team performed the consented hysterectomy. (R. 132, ¶12 and R. 147).

After the procedure, Plaintiff continued to bleed. (R. 132, ¶13 and R. 144-45). The providers were unable to stabilize her and in the early hours of December 14, 2021, she was taken back to the surgical suite to explore a suspected intraabdominal hemorrhage. (R. 132, ¶14 and R. 144-45). The source of the bleed was identified and stopped on December 14, 2021. (Id. and R. 141). Plaintiff then stabilized and recovered, and she was discharged home a few days later on December 18, 2021. (R. 132, ¶14 and R. 141).

II. Undisputed Material Facts Relating to Plaintiff's Medical Care

The above Subsection provides a recitation of Plaintiff's medical care that is more detailed than necessary for a decision here. The *material* facts relating to the medical care, when measured against the claims made, are more concise. Plaintiff's claims all stem from her allegation that she did not agree to the hysterectomy and her assertion that it was forced upon her against her wishes. (R. 6-7, ¶14-19, 23; Appellant's Br., Pg. 5-6). Consequently, for purposes of this statute of repose analysis, the undisputed date the hysterectomy was performed, December 14, 2021, is the key undisputed medical care-related fact.[1] (See R. 132, ¶10 and R. 146-48 (identifying when the hysterectomy was performed); See Appellant's Br., Pg. 5 (agreeing "Plaintiff's uterus . . . was removed by the Defendants against Plaintiff's wishes on December 14, 2021."); See Appellant's Br., Pg. 6 (stating "Defendant Dr. Saloum performed the undesired hysterectomy on December 14, 2021"); See R. 155 (Plaintiff's argument at the Circuit Court level that a

[1] See also Footnote 2 below.

device "was implanted during a procedure undertaken *without Plaintiff's consent*" on December 14, 2021 (emphasis added)).

III. Undisputed Material Facts Relating to the Timing of Service

The Minnehaha County Sheriff's return of service indicates the Summons and Complaint came into the Sheriff's hands for service upon Dr. Saloum on December 26, 2023. (R. 130). Dr. Saloum was then served on January 19, 2024. (Id.) In response to these facts, Plaintiff's counsel came forward with evidence to indicate that he sent the Summons and Complaint to the Minnehaha County Sheriff's office via email at 7:06pm on Friday, December 15, 2023, for purposes of service upon Dr. Saloum. (R. 166-79). This fact is assumed true and will continue to be assumed true for purposes of this analysis as it is the earliest date of potential commencement.

The Yankton County Sheriff's return of service indicates the Summons and Complaint came into the Sheriff's hands for service upon Avera on December 20, 2023. (R. 129). Avera was then served on December 29, 2023. (Id.) In response to these facts, Plaintiff's counsel came forward with evidence to indicate that he sent the Summons and Complaint to the Yankton County Sheriff's office via email at 7:04pm on Friday, December 15, 2023, for purposes of service upon Avera. (R. 181 – 193). This fact is assumed true and will continue to be assumed true for purposes of this analysis as it is the earliest date of potential commencement.

STANDARD OF REVIEW

This Court is well aware of the standard of review applicable to a circuit court's summary judgment decision. For that reason, Defendants only submit two general points highlighted by this Court in the past. First, this Court has noted that "summary judgment

should never be viewed as 'a disfavored procedural shortcut, but rather as an integral part of [our rules] as a whole, which are designed 'to secure the just, speedy, and inexpensive determination of every action.'" *Accounts Management, Inc. v. Litchfield,* 1998 S.D. 24, ¶4, 576 N.W.2d 233, 234 (citations omitted). Summary judgment is a particularly suitable method for disposing of claims barred by a statute of repose. *Pitt-Hart v. Sanford USD Medical Center,* 2016 S.D. 33, 878 N.W.2d 406.

Second, "'[i]f there exists any basis which supports the ruling of the trial court, affirmance of a summary judgment is proper.'" *Hamilton v. Sommers,* 2014 S.D. 76, ¶17, 855 N.W.2d 855, 861 (citations omitted).

ARGUMENT

I. Plaintiff's Lawsuit is Barred by SDCL 15-2-14.1

Plaintiff's medical malpractice lawsuit is barred by SDCL 15-2-14.1 based upon: **A)** A plain meaning application of the pertinent statutes; and **B)** Persuasive South Dakota case law applying these counting statutes.

Plaintiff's arguments about additional discovery and her suggestion that it is "entirely unknown" when the SDCL 15-2-14.1 repose period began to run are futile and meritless.

The Circuit Court should be affirmed.

A. A Plain Reading of the Statutes Confirms that Commencement of Suit on December 15, 2023 was Too Late

SDCL 15-2-14.1 provides the applicable statute of repose for medical malpractice claims like this one, stating:

> An action against a physician, surgeon, dentist, hospital, sanitarium, registered nurse, licensed practical nurse, chiropractor, or other practitioner of the healing arts for malpractice, error, mistake, or failure to

> cure, whether based upon contract or tort, can be commenced only within two years after the alleged malpractice, error, mistake, or failure to cure shall have occurred . . . .

SDCL 15-2-14.1. SDCL 15-2-14.1 is an occurrence rule that begins to run when the alleged malpractice occurs, not when it is discovered. *Pitt-Hart,* 2016 S.D. 33, ¶19, 878 N.W.2d at 413 (citations omitted). As a statute of repose, SDCL 15-2-14.1 provides a "substantive grant[] of immunity based on a legislative balance of the respective rights of potential plaintiffs and defendants struck by determining a time limit beyond which liability no longer exists." *Id.* at ¶21, at 414 (citations omitted).

The first step in applying SDCL 15-2-14.1 is determining the "malpractice, error, mistake, or failure to cure" from which the claim stems. This Court has described this in terms of the alleged "culpable act or omission" of the defendant. *Pitt-Hart,* 2016 S.D. 33, ¶18, 878 N.W.2d at 413. Here, Plaintiff alleged a hysterectomy was performed upon her without her consent and against her wishes. (R. 6-7, ¶14-19, 23; See also, e.g. Appellant's Br., Pg. 5-6). Therefore, the "culpable act or omission" from which this lawsuit stems was the hysterectomy, or the consenting process preceding it.[1]

The next step is determining when the culpable act occurred. Here, the allegedly unwanted hysterectomy occurred in the early morning hours of December 14, 2021, and the consenting process preceded it and actually took place on December 13, 2021. (See R. 132, ¶10 and R. 146-48 (identifying when the hysterectomy was performed); R. 132, ¶8 and R. 135-137 (identifying when the consenting process occurred); See Appellant's Br.. Pg. 5 (agreeing "Plaintiff's uterus . . . was removed by the Defendants against Plaintiff's wishes on December 14, 2021."); See Appellant's Br., Pg. 6 (stating "Defendant Dr. Saloum performed the undesired hysterectomy on December 14, 2021");

See R. 155 (Plaintiff's argument at the Circuit Court level that a device "was implanted during a procedure undertaken *without Plaintiff's consent*" on December 14, 2021 (emphasis added)).

The third step in applying SDCL 15-2-14.1 is determining when the lawsuit was commenced. SDCL 15-2-30 provides that a lawsuit is "commenced" when it is served upon each defendant. Here, service was made upon Avera on December 26, 2023, and upon Dr. Saloum on January 19, 2024. (R. 129-30). However, Plaintiff has sought to utilize an exception to SDCL 15-2-30 by, instead of timely serving each Defendant personally, providing the Summons and Complaint to the sheriff of the county of residence of each Defendant. SDCL 15-2-31. Here, taking facts in favor of Plaintiff and assuming an email after business hours on a Friday night sufficed as getting the Summons and Complaint "delivered" as contemplated by SDCL 15-2-31, the commencement date was December 15, 2023. (R. 166-179 and 180-193).[2]

The final step is then applying SDCL 15-2-14.1's "within two year" commencement requirement to these facts. As a starting point for the two-year count, Plaintiff argues that SDCL 15-6-6(a) dictates that the count begin on the day after the

[2] At the Circuit Court level, the defense noted that SDCL 15-2-31 runs contrary to SDCL 15-2-14.1 because its application would improperly extend the two-year repose period beyond the date which "liability no longer exists." (R. 230-31). That argument is hereby preserved, however, full analysis of it is unnecessary because, even applying SDCL 15-2-31 to Plaintiff's benefit here does not save her untimely claim.

culpable act.[3] (Appellant's Br., Pg 10-11). Therefore, applying this law for the sake of argument and starting the count on and including December 15, 2021, the question then becomes, was the lawsuit timely commenced by the emails sent on December 15, 2023? In other words, is December 15, 2023, within two years of December 15, 2021?

Logically, the answer must be no. The calendar day of December 15 cannot exist more than one time in the same calendar year. Indeed, if December 15, 2023, were within two calendar years of December 15, 2021, as suggested by Plaintiff, the result would be that December 15, 2021, December 15, 2022, and December 15, 2023, were all within the same *two* calendar years. This would defy logic. Using a different date with more meaning, like January 1, further demonstrates the point. There cannot be *three* New Year's Days in the same *two* calendar years.

The statutes support this interpretation by employing the calendar year counting method. SDCL 2-14-2(36) defines a "year" for purposes of South Dakota's codified law in a very plain way - as "a calendar year." Black's Law Dictionary defines "year" with the following primary definition: "[t]welve calendar months beginning January 1 and ending December 31." *Year*, Black's Law Dictionary (12th ed. 2024). In describing this

[3] Plaintiff's Circuit Court Brief did not mention this statute. (R. 151-57). It first came up at the hearing. (R. 307). Like with SDCL 15-2-31, the defense argued at the hearing, that SDCL 15-6-6(a) is inapplicable here as it runs contrary to SDCL 15-2-14.1, as a statute of repose. Specifically, its application would improperly extend the two-year repose period beyond which "liability no longer exists." (R. 309). However, as with SDCL 15-2-31, that argument is hereby preserved but its full analysis is unnecessary because use of SDCL 15-6-6(a) to Plaintiff's benefit does not save her untimely claim.

definition, Black's also notes that the term can be referred to as "calendar year" – the same term used by SDCL 2-14-2(36). Id. (emphasis added).[4]

Under this calendar year counting method, the following steps would be followed: December 14, 2021, the day of the allegedly culpable act, would not be counted. The statute of repose would begin to run on December 15, 2021, and would close two calendar years later. Counting forward two calendar years from December 15, 2021, confirms that the repose period ended at 11:59:59 on December 14, 2023. The moment the clock changed and the day of December 15, 2023, began, a third calendar year started and, per *Pitt-Hart,* "liability no longer exist[ed]." Using this statutorily prescribed counting method, no absurd or illogical result occurs where the day of December 15 somehow exists three times in the same two-year period. Indeed, this is exactly why Black's Law Dictionary provided further explanation noting that a year is "twelve calendar months beginning January 1 and ending December 31." *Year*, Black's Law Dictionary (12th ed. 2024). Based upon this clear analysis, Plaintiff's commencement of suit on December 15, 2023 was one day too late.

Plaintiff's retort ignores the calendar year counting method dictated by SDCL 2-14-2(36), in favor of a 365-day counting method. As a basis, Appellant's Brief cited Black's Law Dictionary, ignored the primary definition noted above, and only mentioned a secondary definition which indicated that a year is "[a] consecutive 365-day period beginning at any point." (Appellant's Br., Pg. 11). Plaintiff's application of her 365-day

[4] As a secondary definition, Black's Law Dictionary also states "a consecutive 365-day period beginning at any point; a span of twelve months." Utilizing this definition changes nothing in this case. *Year*, Black's Law Dictionary (12th ed. 2024).

counting method included an error and, regardless, the 365-day counting method is legally flawed and should not be applied.

Plaintiff argued her claim was timely because, "[w]hen calculated properly," December 15, 2023, fell on the 730th day when counting forward from and including December 15, 2021. (Appellant's Br., Pg. 11). However, her 365-day count is mistaken. Starting on and including December 15, 2021, and counting each day forward, the 730th day lands on December 14, 2023. The calculation would go as follows: Dec. 15, 2021 to December 31, 2021 = 17 days; 2022 (Not a Leap Year) = 365 days; Jan. 1, 2023 – Dec. 14, 2023 = 348 days → **17 + 365 + 348 = 730 days.**

The Record evidences the basis for Plaintiff's mistaken assertion. Specifically, after the summary judgment hearing, Plaintiff's counsel insisted on submitting calendars evidencing her day-by-day count into the Record. (R. 258 - 282). The calendars spanned from December 2021 through December 2023, with a handwritten number on each day of the calendar, running from 1-730. (Id.) Plaintiff made an error, however, on the 550th day, where day 550 is double counted on June 17 and 18, 2023. (R. 276). By removing this mistake from Plaintiff's calendar, the 730th day lands on December 14, 2023 – the same result dictated by the calendar method. Therefore, even under the 365-day counting method lobbied for by Plaintiff, Plaintiff's claim is barred because it was commenced on the 731st day, at the earliest.

Alternatively, if there were some other manner by which the 365-day counting method placed the 730th day on December 15, 2023, or if the defense's calculation above was completed in error, the 365-day counting method still should not be applied for a few clear reasons. First, logic dictates use of the calendar year method. The same day cannot

occur twice in the same year. *See Rowley v. S.D. Bd. of Pardons and Paroles*, 2013 S.D. 6, ¶15, 826 N.W.2d 360, 366 ("We will not construe a statute to arrive at a strained, impractical, or illogical conclusion.") (citations omitted). Second, SDCL 2-14-2(36) prescribes use of the calendar count method, as does the primary definition of "year" and "calendar year," from Black's Law Dictionary.

Finally, as to the legally flawed nature of the 365-day method and although not true here, there are scenarios when it would come up with a different date than the calendar counting method. This is true due to Leap Years. For example, SDCL 15-2-13(1) provides a six-year statute of limitation for a breach of contract claim. Assuming a contractual breach occurred and the claim accrued on December 29, 2023, and applying SDCL 15-6-6(a), the count would begin on December 30, 2023, and the calendar counting method would dictate that the claim be barred at any point after December 29, 2029, at 11:59:59pm. In contrast, Plaintiff's 365-day counting method would start the count on December 30, 2023, and would count 2,190 days (365 days x 6 years) forward across Leap Years in 2024 and 2028. The result would be the 2,190th day landing on December 27, 2029. If less Leap Years intervened, the count would be different. This example proves that the 365-day counting method does not produce consistent outcomes. Its use would result in unnecessary confusion for claimants and practitioners, and absurd results. *See Murray v. Mansheim*, 2010 S.D. 18, ¶7, 779 N.W.2d 379, 382 ("we have an obligation to interpret law in a manner avoiding 'absurd results[.]'") (citations omitted)

The calendar year method relied upon by the Defendants produces a consistent result and is specifically dictated by South Dakota's statutory scheme. This Court should affirm this methodology.

As it relates to this case, both the calendar year count method and the flawed 365-day count method produce the same result. Plaintiff's lawsuit was untimely. The Circuit Court should be affirmed.

B. Case Law Confirms the Circuit Court's Holding

The plain meaning interpretation of the pertinent statutes settles the issue, and this Court needs to go no further. Nonetheless, to round out the analysis, case law confirms that the Circuit Court should be affirmed.

In *Toben v. Jeske*, the plaintiff was injured while riding the defendant's horse on July 2, 2001. 2006 S.D. 57, ¶3, 718 N.W.2d 32, 34. On July 2, 2004, the plaintiff commenced his lawsuit. *Id.* There were multiple issues decided on appeal, one of which included the defense's assertion that the lawsuit was barred by the three-year statute of limitations. *Id.* at ¶6, at 34. In its analysis, this Court mentioned SDCL 2-14-2(36) for the definition of "year" and referenced the precise Black's Law Dictionary clarification provided above. *Id.* at ¶6-8, at 34-35. Ultimately, after applying SDCL 15-6-6(a) to not count July 2, 2001, it concluded:

> [the plaintiff] was injured on July 2, 2001. *The three years began on July 3, 2001, and ended on July 2, 2004.* Because [the plaintiff] commenced his action on July 2, 2004, within three years, the circuit court did not err when it held that Toben's claim was timely.

Id. at ¶8, at 35 (*emphasis added).* In *Toben*, the lawsuit was commenced on the last day of the statutory period before it was barred. Here, Plaintiff's lawsuit was commenced one day too late.

In *Murray v. Mansheim*, a motor vehicle accident occurred on September 13, 2003. 2010 S.D. 18, ¶2, 779 N.W.2d at 381. The plaintiff commenced his personal injury action on September 12, 2006. *Id.* The defendant then served a counterclaim on

October 9, 2006. *Id.* This Court's analysis was largely focused on the applicability of the statute of limitations to the defendant's compulsory counterclaim. However, during that analysis, it noted on separate occasions that any personal injury cause of action arising out of the motor vehicle accident that occurred on September 13, 2003, expired on September 13, 2006. *Id.* at ¶2 and ¶22, at 381 and 389. Applied here, the alleged malpractice occurred on December 14, 2021, and the two year statute of repose expired at the end of the day on December 14, 2023. Per the *Murray* analysis, like the *Toben* analysis, December 15, 2023 was a day late.

Berg v. Johnson & Johnson was a Federal products liability case where South Dakota substantive law applied to the analysis of the statute of limitations. 2010 WL 3806141 (D.S.D.) In *Berg*, the court concluded that the plaintiff's claim accrued on December 26, 2006, when her injuries became known. *Id.* at *3. It then applied SDCL 15-6-6(a) to start counting on December 27, 2006, and determined that the plaintiff needed to "commence" her suit by getting it served by December 26, 2009. *Id.* However, since December 26, 2009, fell on a Saturday, the court again utilized SDCL 15-6-6(a) to conclude the plaintiff actually had until Monday, December 28, 2009, to commence suit. *Id.* at *4. As applied in our case, the same counting methodology would hold the repose period open through December 14, 2023, which was a Thursday. Unlike *Berg*, no extension applied because the repose period here did not expire on a Saturday. Therefore, like the *Toben* and *Murray* analysis, per the *Berg* analysis, December 15, 2023 was a day late.

Finally, *Robinson v. Ewalt* must be mentioned. 2012 S.D. 1, 808 N.W.2d 123. *Robinson* involved a motor vehicle accident that occurred on April 28, 2007. *Id.* at ¶2, at

124. The key issue in the case was where a defendant "usually or last resided" for purposes of applying SDCL 15-2-31. *Id.* at ¶8, at 126. As to the three-year limitations calculation, this Court stated in passing: "In this case, the accident occurred on April 28, 2007, and the three-year statute of limitations for Robinson's personal injury action ran on April 29, 2010." *Id.* at ¶13, at 127. This is the only South Dakota law the undersigned could locate that could be, if "ran on April 29, 2010" meant a suit could still be commenced that day, interpreted to favor Plaintiff's contention that commencement on December 15, 2023, was timely.[5] It is unclear what this Court relied upon before mentioning the April 29, 2010, date in *Robinson*, and what exactly was meant by the phrase "ran on April 29, 2010." Regardless, what is clear is that this passing comment should not give this Court pause in affirming the Circuit Court for a few reasons.

First, the statement from *Robinson* was the epitome of dicta. "Dicta are pronouncements in an opinion unnecessary for a decision on the merits." *Moeller v. Weber*, 2004 S.D. 110, ¶44 n.4, 689 N.W.2d 1, 15 n.4. The issue upon which the ultimate outcome hinged in *Robinson* was whether the defendant "usually or last resided" in Yankton County because the Yankton County Sheriff was provided the summons and complaint on April 23, 2010, well before either April 28 or 29, 2010. 2012 S.D. 1, ¶13-15, 808 N.W.2d at 127. Because the pronouncement had no bearing on the outcome, it was dicta and, as dicta, should be given the following understanding:

> It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. *If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very*

[5] Plaintiff's counsel has not disclosed this case. Although the pronouncement from it that is discussed herein is non-binding dicta, the undersigned is noting it out of utmost caution for Rule 3.3(a)(2) of the South Dakota Rules of Professional Conduct.

> *point is presented for decision.* The reason for the maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

Brendtro v. Nelson, 2006 S.D. 71, ¶19 n.3, 720 N.W.2d 670, 676 n.3 (emphasis in original) (citations omitted).

Second, the defense recognizes that the portion of the *Murray* case favorable to the defense and discussed above may also be considered dicta. However, the calculations in both the *Toben* and *Berg* cases discussed above were central and dispositive to each court's decision and were, therefore, not dicta. Thus, those decisions carry far more weight as precedent than the dicta from *Robinson* and they both support affirming the Circuit Court.

Third, when applied against the plain meaning statutory analysis discussed in the preceding Subpart of this Brief, and when measured against the non-dicta from *Toben* and *Berg*, the dicta in *Robinson* is simply wrong. This Court should not feel bound by it or obligated to treat it with persuasive precedential value.

In sum, the case law, which is mostly consistent with the plain meaning statutory interpretation analyzed above, cuts heavily in favor of the Defendants' position. The Circuit Court should be affirmed.

C. Plaintiff's Assertion that this matter was not Ripe for Summary Judgment is Meritless

Appellant's Brief, at Pages 12-16, complains that further discovery was necessary for her to defend against the Defendants' Motion for Summary Judgment. She suggests that facts are in dispute and that some unidentified issue she might find in discovery could potentially demonstrate that continuing treatment should delay the commencement

of the statute of repose to on or after December 18, 2021. This argument is without merit for a few reasons.

1) Plaintiff's 56(f) Argument is Deficient

Plaintiff's alleged concerns about an inadequate evidentiary basis from which to defend against the Defendant's Motion could be redressable through SDCL 15-6-56(f). However, 56(f) has no relevant here for multiple reasons.

As a starting point, Rule 56(f) only provides relief when "essential" facts that would change the outcome remain unknown. *Stern Oil Co. v. Border States,* 2014 S.D. 28, ¶26, 848 N.W.2d, 273, 281. (citations omitted). Plaintiff has repeatedly agreed the unwanted surgery occurred on December 14, 2021. (See Appellant's Br., Pg. 5 (agreeing "Plaintiff's uterus . . . was removed by the Defendants against Plaintiff's wishes on December 14, 2021."); See Appellant's Br., Pg. 6 (stating "Defendant Dr. Saloum performed the undesired hysterectomy on December 14, 2021"); See R. 155 (Plaintiff's argument at the Circuit Court level that a device "was implanted during a procedure undertaken *without Plaintiff's consent*" on December 14, 2021 (emphasis added)). Therefore, December 14, 2021, was the "occurrence" from which the statute of repose began to run. There is no other subsequent surgery or treatment that would toll or extend the statute of repose on this singular culpable act and, therefore, no unknown "essential" fact that would warrant a 56(f) analysis. The Circuit Court recognized this. (R. 312-313, Ln. 19 – Ln. 20; R. 314, Ln. 11-15; R. 315, Ln. 11-14; R. 317, Ln. 12-13).

Moreover, Plaintiff's 56(f) showing was deficient in comparison to what the statute and case law require. SDCL 15-6-56(f) provides:

> Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his

> opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

A non-moving party relying upon 56(f) must make at least the following showing:

> the Rule 56(f) affidavit must include [ ] identification of 'the probable facts not available and what steps have been taken to obtain' those facts, 'how additional time will enable [the nonmovant] to rebut the movant's allegations of no genuine issue of material fact[,]' and 'why facts precluding summary judgment cannot be presented' at the time of the affidavit.

Id. at 281-82 (citations omitted). Here, Plaintiff's Circuit Court filings in response to the Defendants' Motion for Summary Judgment failed to meet this burden. The mandated 56(f) affidavit as described by *Stern Oil* is not in the Record in response to the Defendants' Motion for Summary Judgment. (See R. 160-209 for the Plaintiff's counsel's affidavit in response to Defendants' summary judgment filings). Even Plaintiff's counsel's affidavit addressing Defendants' Motion for Protective Order does not satisfy the 56(f) affidavit requirements. (R. 238-251). In these filings, nowhere is there a specific description of the probable facts that are not available, and how those facts would actually change the outcome. Consequently, if Plaintiff was, in fact, attempting to invoke 56(f) at the Circuit Court level, the attempt fell far short of what was required by statute and case law.

Even if the arguments made now in Appellant's Brief were considered a stand-in for the missing 56(f) showing at the Circuit Court level, they would change nothing. Substantively, as to what Appellant's Brief claims may be in the allegedly missing discovery, Appellant's Brief mentions an unknown and non-descript alleged surgery that may have occurred after December 14, 2021, and discusses the implant of a "device." (Appellant's Br., Pg. 12-13). However, to satisfy the 56(f) requirements, demonstration

of an ignorance to the facts is not enough - "[not knowing] what precise facts [the non-moving] party would find until it conducted discovery" is not availing. *Stern Oil, Id.* at ¶28, at 282. (citations omitted). Likewise, speculation about those potential facts also does not suffice: "[m]ere speculation that there is some relevant evidence not yet discovered will never suffice." *Id.* (citations omitted).

Instead, the probable facts that would be discovered and how they would refute the prima facie showing made by the moving party must be identified. The Circuit Court recognized Plaintiff's failures on this point and after Plaintiff argued at the Circuit Court level that "you can't know what the material facts are," it reasoned:

> THE COURT: Yeah, but you have to say if we did the discovery then we think we would find X, Y, Z, which would then toll the statute or push the statute out, and you haven't articulated anything. So, your argument is in favor of the classic fishing expedition.

(R. 314).

There is no unknown "essential" fact here. Plaintiff's 56(f) showing at the Circuit Court level fell short of what is required under South Dakota law. This is true even if Appellant's Brief is considered a stand-in for the missing submission. The Circuit Court should be affirmed.

2) Plaintiff's Allegations about an Implanted Device Change Nothing

At the Circuit Court level, Plaintiff's tolling arguments focused upon the implantation of a "device" in an attempt to avoid SDCL 15-2-14.1. The substance of that argument will be addressed in the paragraphs below. However, first, it should be noted that at the Circuit Court level, there was very little discussion of the new, non-descript and unknown surgery argument mentioned in Appellant's Brief. Other than by the blanket and unsupported statement at the start of her Circuit Court Brief that "Plaintiff

disputes the date(s) of the tortious surgery(ies)," (R. 152), Plaintiff's arguments were always focused on the device. That is true because, like here, Plaintiff's Circuit Court Brief admitted what is undisputed - that the December 14, 2021, surgery was the surgery allegedly committed without Plaintiff's consent. (See, R. 155 (arguing that a device "was implanted during a procedure undertaken *without Plaintiff's consent*" on December 14, 2021 (emphasis added)). Similarly, the oral argument for tolling made by Plaintiff's counsel at the summary judgment hearing was based upon extending the statute start date due to implantation of a device, not some unknown non-descript surgery. (R. 312, Ln. 19-25; R. 314-315, Ln. 11 – Ln. 18).

Finally, as to this vague unknown surgery argument, the Record contains no affidavit from Plaintiff or any other person familiar with her hospital stay, or any other evidence (even though Plaintiff's counsel has Plaintiff's hospital medical records), claiming Plaintiff had some *other* more recent surgery from which this lawsuit stems. A party resisting summary judgment cannot create a fact issue based upon "inferences that require 'speculation, conjecture, or fantasy.'" *Godbe v. City of Rapid City,* 2022 S.D. 1, ¶28, 969 N.W.2d 208, 215. And, although this Court must resolve factual disputes in favor of the nonmoving party, the inferences the nonmoving party seeks to rely upon must be reasonable. *Koenig v. London,* 2021 S.D. 69, ¶40-42, 968 N.W.2d 646, 657-58. Plaintiff's unknown surgery argument has absolutely no support in the Record and is a factual fantasy that has been repeatedly undermined by the other admissions throughout Plaintiff's filings and arguments. It provides no basis to remand this case for more discovery.

As to the substance of the device argument, the records Plaintiff pointed to at the Circuit Court level indicated that the "device" was a JP Drain removed prior to Plaintiff's discharge. (See R. 159, ¶8-9 (citing records found at R. 141 and 146-48)). A JP Drain is a surgical suction drain that is placed for the purpose of drawing blood and fluid away from a surgical wound or surgically repaired area. (R. 210-11, ¶3). It helps with recovery and avoiding infection. (Id.) It serves a similar purpose to gauze, which also draws fluid away from a wound. (Id.) At discharge, JP Drain removal is commonly performed by staff and entails simply clipping one or two stitches, removing the tube, and bandaging the entry point. (Id.) The removal process takes 30 to 60 seconds and is part of the standard discharge process which includes things like removing IVs, removing gauze and bandages and replacing them if necessary, removing stitches if wounds have healed, etc. (Id.) As it relates to Plaintiff's care, a JP Drain would have been used regardless of if the Avera team completed the allegedly unwanted hysterectomy on December 14, 2021, or if they were able to save the ruptured uterus and stabilize Plaintiff in some other way during the December 14, 2021, procedure. (Id.)

The first reason this device argument does not preserve Plaintiff's claim is that it runs directly contrary to SDCL 15-2-14.1 itself. Plaintiff's claim, per her own pleadings, is that she had an unwanted hysterectomy. This was the distinct and identifiable culpable act from which her claim stems, and its occurrence is when the repose period commenced. The claim could not be tolled to some later date when drains, IVs, gauze, and stitches were removed so Plaintiff could go home, as these were not the culpable act from which the claim stemmed. Regardless of her attempt to label this assertion a continuing tort, Plaintiff's JP Drain argument is nothing more than an attempt to utilize

the continuous treatment doctrine, which has been explicitly rejected in this context. 2016 S.D. 33, ¶24, 878 N.W.2d at 415.

Further, this Court is obligated to not interpret statutes in a manner that creates absurd results. *E.g., Klein v. Sanford,* 2015 S.D. 95, ¶13, 872 N.W.2d 802, 806 (citations omitted). Under Plaintiff's theory, the repose period from SDCL 15-2-14.1 would be tolled to unknown dates in many medical cases and in almost every surgery case. For example, in the context of almost any surgery, if a surgeon is negligent and injures his or her patient, Plaintiff's theory would toll the statute of repose on that claim until the staples or stitches from the negligent procedure were later removed, potentially weeks after the procedure. This result would create inconsistent and unclear results. It gets even more unclear when certain variables are adjusted – what if dissolvable stitches were used? What if a different provider, like the patient's primary care provider, who was totally unaffiliated with the surgeon, removed the stitches or drain weeks later? In a non-surgery case, what if a patient is being treated on a critical care floor and a medication dosage error occurred 3 weeks before discharge? Plaintiff's theory would toll the statute of repose until discharge at which time the IV that delivered the negligent dosage was removed.

The hypotheticals and resulting absurd results are not difficult to imagine. In contrast to this mental exercise, 15-2-14.1's plain language, and this Court's interpretation of it, dictates a much simpler, clearer, and more predictable outcome – the repose period runs from the "last culpable act or omission" of the defendant. In a surgery malpractice case, the culpable act is the surgery. In a scenario like that presented by this case, removing stitches, gauze, and drains, along with numerous other post-surgical steps

taken before discharge or thereafter, cannot be considered culpable acts in relation to the negligent or improper surgery performed days before.

The Circuit Court specifically understood this, reasoning:

> THE COURT: Yeah, but that was a drain tube from what I gathered from the defendants' statements of undisputed material facts, so that's not malpractice to put a drain tube in.
>
> MR. SHARP: Without consent though, Your Honor, it would be.
>
> THE COURT: Well, I mean if you're going to do the surgery, you gotta put the drain tube in. If they didn't put the drain tube in, then you would have another malpractice action, but, of course, the statute on that would run on the 14th, too, because the surgery was on the 14th , so the drain tube needed to be put in on the 14th , but your suit's based on the uterus being taken out on the 14th of December of 2021. So, and the Supreme Court's been clear, I think, that there's no continuing treatment doctrine, unless the subsequent procedures that you're mentioning were also errant, they're irrelevant.

(R. 313).

Ultimately, no amount of discovery or other information Plaintiff implies may exist will impact the facts material to this Motion. Plaintiff's uterus was removed on December 14, 2021. Her lawsuit wholly stems from that procedure and the consenting process prior to it.

When the material facts are not in dispute on a timeliness question like this one, summary judgment is the proper and efficient method to dispose of the claim. This case need not drag on any longer. The Circuit Court should be affirmed.

3) The Implication that Information was Improperly Withheld from Plaintiff or her Counsel is a Fallacy

Plaintiff's arguments at the Circuit Court implied records were hidden from her or her counsel. (R, 152, 154-55). Now, even though Plaintiff's counsel was provided the pertinent medical records more than once, and has admitted to when the hysterectomy

occurred, Appellant's Brief suggests the Defendants' Motion was granted by the Circuit Court based only upon only the "hand selected" facts disclosed by the defense, and after the defense "withheld facts or evidence that may have been unfavorable" to the defense's position. (Appellant's Br., Pg. 14).

As a starting point, the date of the hysterectomy is the culpable act, and its occurrence on December 14, 2021, is not in dispute. Consequently, it is wholly unclear what unfavorable fact Plaintiff thinks has been withheld and how it would change anything and this Court has noted: "[m]ere speculation that there is some relevant evidence not yet discovered will never suffice." *Stern Oil*, 2014 S.D. 28, ¶28, 848 N.W.2d at 282 (citations omitted).

Ignoring the above, the undersigned is compelled to provide some further discussion to clear up any confusion or implication that the Defendants acted improperly. In contrast to the implication above, in September of 2022, nearly 14 months before the statute of repose ran, Plaintiff's counsel sought medical records from Avera McKennan Hospital. (R. 212, ¶2 and R. 214-18).[6] After the litigation commenced *and* before the defense responded to any discovery, Plaintiff's counsel demonstrated he had, in fact,

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[6] While not mentioned on this appeal, at the Circuit Court level, Plaintiff asserted that "Dr. Saloum's medical practice inexplicably claimed in October of 2022 that the patient had not been seen at their facility." (R. 155; R. 161, ¶9). The Avera clinic to which the pertinent medical request went - Avera Medical Group Internal Medicine (R. 197) - does not, in fact, have Plaintiff listed as a patient. She was, instead, a patient of Avera Medical Group Women's Health, among other Avera entities like Avera McKennan Hospital. More importantly, based upon Plaintiff's own discovery disclosures, Plaintiff's counsel had the pertinent records long before they were re-disclosed in the lawsuit, including the hysterectomy surgery note. (R. 212, ¶3 and R. 219-222). Even if a clerical error was made by *one* of Avera's clinics in responding to the records request Plaintiff points to (it was not), it would have been irrelevant and immaterial to the defense's summary judgment motion, due to that motion being based solely on the timing of the hysterectomy and the timing of the commencement of the lawsuit.

obtained the Avera records when he disclosed Avera McKennan hospital records, plus records from other Avera entities like Avera Medical Group Women's Health, to the defense in discovery. (R. 212, ¶3 and R. 219-222). The records in Plaintiff's counsel's possession specifically documented, and thereby informed, Plaintiff's counsel of when the hysterectomy occurred. (R. 219-221). They also specifically documented the use of a JP drain on December 14, 2021, (R. 221) and its removal on December 18, 2021. (R. 222).

Moving forward, in or about early April of 2024, the defense made Plaintiff's counsel aware that the defense intended to move for summary judgment on the statute of repose issue and, at a scheduling hearing on April 4, 2024, a summary judgment hearing was set for June 11, 2024. (R. 35, ¶4). A week later, Plaintiff served extremely voluminous discovery that included 88 interrogatories, 65 document requests, and five requests for admissions to Avera McKennan, and 83 interrogatories, 59 document requests, and five requests for admissions to Dr. Saloum. (R. 35, ¶6 and R. 40-102). The defense sought to reach an agreement, for the sake of efficiency, to restrict down the discovery to that which Plaintiff's counsel could identify as being pertinent to the narrow statute of repose issue. (R. 35-36). Plaintiff's counsel refused, and an agreement was not reached through the meet and confer process. The defense then filed its motion for protective order. (R. 28 - 112). However, and even though Plaintiff's counsel had already obtained records, to avoid any more allegations that Plaintiff's counsel did not have the medical records, copies of the defense's sets of Avera Medical Group Maternal Fetal Medicine, Avera Medical Group Women's Health, and Avera McKennan Hospital records were provided to Plaintiff's counsel on May 1, 2024, about six weeks before the

summary judgment hearing. (R. 111). The letter from defense counsel with those records also offered to investigate any other concerns from Plaintiff's counsel about allegedly missing records. (Id.)

Plaintiff's Circuit Court Brief later made the following allegation in relation to the complaints about missing records: "*due to the recent disclosure* of said records, it appears that the tortious act was complete on December 18, 2021." (R. 155 (emphasis added)). This assertion was in reference to the meritless continuing tort/JP drain argument described above. As to the implication made that Plaintiff's counsel never knew about the JP drain use prior to the defense re-disclosing records in May of 2022, Plaintiff's own conduct completely undermined it. Specifically, Plaintiff's counsel's discovery disclosure included the same records documenting the use of the JP Drain and the date of its removal as Plaintiff claimed were contained in the "recent disclosure." (See R. 212, ¶3 and R. 219-222) (documenting records the plaintiff disclosed to the defense in discovery in February of 2024)). These records were not new, were not hidden, and were not withheld. The implication of improper conduct was wholly unwarranted.

Plaintiff's missing discovery argument is attempting to create confusion in hopes of surviving the Defense's meritorious Motion based upon conjecture and fantasy. This cannot save her claim. And any implication or express assertion that the Defendants or their counsel did anything improper is demonstrably untrue. The Circuit Court should be affirmed.

Although inapplicable, one last point is worth note. If Plaintiff's debunked assertion about missing records as to what was provided to her counsel pre-suit was true, and fraud had been committed (it has not), such activity would not toll SDCL 15-2-14.1.

As a statute of repose, SDCL 15-2-14.1 cannot be estopped or tolled by fraudulent concealment. *Pitt-Hart*, 2016 S.D. 33, ¶20, 878 N.W.2d at 413 (citations omitted). Therefore, even under such a scenario, the Circuit Court would be affirmed.

CONCLUSION

Plaintiff claims Defendants performed an unwanted hysterectomy on her on December 14, 2021. Pursuant to SDCL 15-2-14.1, liability no longer existed for that claim at the end of the day on December 14, 2023. Plaintiff's subsequent commencement of her lawsuit on December 15, 2023 was untimely.

Wherefore, the Defendants respectfully request that this Honorable Court affirm the Circuit Court's decision granting summary judgment in their favor.

Dated this 11th day of December, 2024.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief does not exceed the number of words permitted under SDCL 15-26A-66(b)(2), said Brief totaling 7177 words, which count excludes the Preliminary Statement, Jurisdictional Statement, Statement of the Legal Issue Sections, Certificates, and the signature blocks as permitted by SDCL 15-26A-66(b)(3). I have relied on the word and character count of the word-processing system used to draft this Brief in preparing this certificate as permitted under SDCL 15-26A-66(b)(4).

Dated this 11th day of December, 2024.

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CERTIFICATE OF SERVICE

I, Matthew D. Murphy, do hereby certify that I am a member of Boyce Law Firm, L.L.P. attorneys for Appellee/Defendants and that on the 11th day of December, 2024, I served a true and correct copy of the within and foregoing Appellees Avera McKennan and Amber Saloum's Brief via email upon:

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 30761
Notice of Appeal Filed July 16, 2024

JESSICA PAULSEN,

Appellant

v.

AVERA MCKENNAN, AMBER SALOUM, MD, and DOES 1-30,

Appellees.

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

THE HONORABLE DOUGLAS HOFFMAN

REPLY BRIEF OF APPELLANT JESSICA PAULSEN

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Filed: 1/17/2025 9:36 AM CST Supreme Court, State of South Dakota #30761

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PRELIMINARY STATEMENT

For purposes of brevity and clarity, the Appellant, Jessica Paulsen, will be referred to as Ms. Paulsen or Plaintiff throughout this Reply Brief.

The Appellees will be collectively referred to as Defendants, and individually as Defendant Avera McKennan and Defendant Amber Saloum.

References to the Brief of Appellees, dated December 11, 2024, shall be cited as "Appellees' Br." or "Appellees' Brief" followed by the applicable page number where appropriate.

The Settled Record consists of Minnehaha County file 49CIV23-003567, which will be cited as "SR" followed by the page number(s) of the SR and the specific lines or paragraphs cited, as appropriate.

STATEMENT OF LEGAL ISSUES

1. The lawsuit was improperly dismissed because it was timely commenced.

The trial court ruled that the lawsuit was not timely commenced and dismissed the case. The most relevant statutes and cases are:

A. SDCL § 15-2-14.1

B. SDCL § 15-6-6(a)

C. SDCL § 15-2-31

D. *Pitt-Hart v. Sanford Med. Ctr.*, 2016 SD 33.

2. The Circuit Court improperly granted Summary Judgment in favor of Defendants.

Because the trial court ruled that the lawsuit was not timely served, it granted Summary Judgment in favor of Defendants. The most relevant statutes and cases are:

A. SDCL § 15-6-56(f)

B. *Pitt-Hart v. Sanford Med. Ctr.*, 2016 SD 33.

STANDARD OF REVIEW

This Court's standard of review for summary judgment, under SDCL § 15-6-56(c) is whether "the moving party demonstrated the absence of any genuine issue of material fact and showed entitlement to judgment on the merits as a matter of law." *Pitt-Hart v. Sanford U.S.D. Med. Ctr.*, 2016 SD 33, ¶ 6 (citations omitted). The evidence is viewed "most favorably to the nonmoving party" and reasonable doubts are resolved "against the moving party." *Id.* Statutes are interpreted "under a *de novo* standard of review without deference to the decision of the trial court." *Peterson ex rel. Peterson v. Burns*, 2001 SD 126, ¶ 7 (citations omitted).

REPLY

Under the Facts as They Currently Exist in the Record, This Court is Unable to Correctly and Accurately Calculate the Time Period Under SDCL § 15-2-14.1.

As an initial matter in this Reply Brief, it is important to note that Plaintiff's arguments are limited to replying to the issue of needing discovery to accurately calculate the two-year statue of repose period found in SDCL § 15-2-14.1.

The Defendants assert in their brief that the hysterectomy performed on December 14, 2021 "is the key undisputed date medical care-related fact." Appellee's Br., Pg. 4. Thus, the Defendants argue that because it is agreed between the parties that the unwanted hysterectomy was performed on December 14, 2021, then December 14, 2021, is the date of the occurrence and this Court should start the statute of repose on that date. This assertion misunderstands the nature of the Plaintiff's argument. While the Plaintiff agrees that an unwanted hysterectomy was performed on Ms. Paulsen on December 14, 2021, no one in this action can be certain

(or even confident) in the assertion that the statute of repose is to start running on a particular date until the parties engage in discovery.

In *Pitt-Hart*, this Court noted that SDCL § 15-2-14.1 is a statute of repose. *Pitt-Hart v. Sanford Med. Ctr.*, 2016 S.D. 33, ¶ 19. This Court also noted that doctrines such as equitable tolling, estoppel, and fraudulent concealment do not apply to statutes of repose. *Id* at ¶ 24 (stating "while the rule applies to a period of limitation, it does not apply to a period of repose like SDCL 15-2-14.1). However, this Court also noted that "[w]hile the continuous-treatment rule does not apply to a statute of repose, the continuing-tort doctrine does." *Id* at ¶ 26. The continuing tort doctrine provides that where there is a continuing wrong, "the cause of action accrues and the statute of limitations commences when the *wrong terminates*. *Id* at ¶ 25. Thus, a continuing tort will delay a period under a statute of repose from commencing. *Id* at ¶ 26.

Here, it appears that Ms. Paulsen's hysterectomy was performed without informed consent on December 14, 2021, and she was not discharged from the hospital until December 18, 2021. During that time, Ms. Paulsen likely received medical care and treatment that is unknown to the Plaintiff. Questions remain as to when the surgery was concluded, when Ms. Paulsen recovered from anesthesia, when Ms. Paulsen was capable of even understanding what had occurred to her body. It is clear from the record that a JP drain tube was placed in Ms. Paulsen's body during the procedure that was performed without informed consent. That tube remained in Plaintiff's body for four days and was removed prior to her discharge on December 18, 2021. While we know that a JP drain tube was placed in her body, there is nothing in the record that indicates what other treatments, drugs, injections, etc. that Ms. Paulsen received during her time at the hospital. Those treatments are part of a single

transaction related to the unwanted hysterectomy and knowing what treatments Plaintiff received and when she received them will conceivably (and likely) change the date on which the statute of repose starts. The problem here is that it is unknown to the Plaintiff what she received and when she received any further treatments without discovery.

The facts as presented by the Defendants here indicate that a single day will change the outcome of the Circuit Court decision. The Defendants assert (and the Circuit Court agreed) that Plaintiff's action was filed just one day late. Because the parties to this action are arguing over what should be day one, then discovery is necessary to ensure that the Court and the parties arrive at the proper conclusion as to when the statute of repose period actually would have expired. Instead of engaging in simple and routine fact discovery, the Defendants refused to engage in discovery and instead proceeded to file a motion for summary judgment and present their *version* of the facts as the only facts in the case. Discovery will allow the parties to fully develop the facts and ensure that an injustice does not prevail on the limited facts in this action.

CONCLUSION

For the foregoing reasons, granting summary judgment in this matter was improper and discovery is needed to properly calculate the statute of repose period. Thus, Plaintiff respectfully requests this Court reverse the order granting summary judgment and remand for this case to proceed to discovery.

Appellant respectfully requests that she be allowed oral argument on this matter.

Dated: January 17, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL § 15-26A-66(b)(4), I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft word and contains 1,087 words from the Preliminary Statement through the Conclusion. I have relied on the word count of the word-processing program to prepare this certificate.

Dated this 17th day of January, 2025.

Michael D. Sharp, Esq.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Reply Brief of Appellant Jessica Paulsen was served on the following individuals at their designated service email address through the Odyssey File & Serve software as follows:

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