

**IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA**

Appeal No. 30861

COSTELLO PROPERTY MANAGEMENT,
d/b/a Ellis Court Apartments,
Petitioner and Appellee,

v.

MARISELA FLORES-TORRES,
Respondent and Appellant.

Appeal from the Circuit Court
Second Judicial Circuit
Minnehaha County, South Dakota

THE HONORABLE JUDGE JOHN R. PEKAS

APPELLANT'S BRIEF

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The *NOTICE OF APPEAL* was filed on the 30th day of September 2024

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PRELIMINARY STATEMENT

Marisela Flores-Torres is the Appellant in this brief and will be referred to as “Marisela” or “Appellant”. Costello Property Management, INC. is the Appellee in this brief and will be referred to as “Costello”.

The Order and Judgment granting Costello’s Motion to Dismiss Appeal dated September 13, 2024, is attached hereto as “Exhibit A”. The Notice of Entry of Order Granting Plaintiff’s Motion to Dismiss Appeal dated September 16, 2024, is attached hereto as “Exhibit B”. The Motions Hearing Transcript will be referred to as “MH Transcript” in this brief.

JURISDICTIONAL STATEMENT

Marisela appeals from the Order and Judgment dated September 13, 2024, granting Costello’s Motion to Dismiss Appeal. The Order and Judgment was filed on September 13, 2024, after an in-person motions hearing, then the Notice of Entry of Order was filed on September 16, 2024. The Notice of Appeal was timely filed on September 30, 2024. This Court has jurisdiction to hear this matter pursuant to SDCL § 15-26A-3(2) as an appeal from a final Order.

LEGAL ISSUE

- I. Whether the Circuit Court Erred in Granting Costello’s Motion to Dismiss the Appeal for Timeliness.**

Yes. The circuit court erred, because the judgement that is being appealed did not become a final, appealable judgment until August 8, 2024, when the attorney's fees were added to the judgment, pursuant to SDCL § 21-16-11, making it final. S.D. CODIFIED LAWS § 21-16-11

- *Harris Mfg. Co. v Walsh*, 3 N.W. 307 (S.D. 1879)
- *State v Koch*, 818 N.W.2d 793 (S.D. 2012)
- *Strand v Courier*, 434 N.W.2d 60 (S.D. 1988)
- *Nelson v Nelson Cattle Co.*, 513 N.W.2d 900 (S.D. 1994)
- SDCL § 15-6-6(a)
- SDCL § 15-38-22
- SDCL § 21-16-11

STATEMENT OF THE CASE AND FACTS

CASE HISTORY

This is an action for Forcible Entry and Detainer which was commenced by service of Summons and Complaint on July 12, 2024, in the Second Judicial Circuit, Minnehaha County, South Dakota, Hon. Warntjes presiding.

Judgment was entered after hearing, before the court, on the 22nd day of July 2024, in favor of Costello, granting the Forcible Entry and Detainer action, finding that Marisela had violated her lease. The Court also awarded attorney's fee to Costello, taxed as disbursements. The initial judgement and order granting Costello possession of the property and a monetary judgement in the amount of back rent owed was signed by the

judge at the hearing and the attestation was done the same day by the clerk. The attorney's fees, taxed as costs, were added on August 8, 2024. Marisela appealed both the initial judgement and the taxed disbursements by service and filing of a Notice of Appeal on the 20th day of August 2024, to the Circuit Court.

Costello filed a Motion to Dismiss the appeal on the grounds of timeliness, pursuant to SDCL § 15-38-22, on the 23rd day of August 2024. S.D. CODIFIED LAWS § 15-38-22. A hearing was held on the 13th day of September 2024. After hearing oral arguments and reviewing Marisela's brief objection to the Motion to Dismiss, the Court held that the action was to be dismissed as the Notice of Appeal was not timely.

STATEMENT OF FACTS

Costello drafted a Notice to Quit and Vacate for Marisela on June 11, 2024, due to late payment of rent. Marisela paid her rent in full, including late fees, on June 12, 2024. She was served the Notice to Quit and Vacate on June 13, 2024. Marisela paid the prorated amount of rent due for July 2024 on July 3, 2024. Marisela's lease was due to end on July 16, 2024. Costello initiated the Forcible Entry and Detainer action on June 26, 2024, by delivering the Summons and Complaint to Marisela via US Postal Service. Marisela attempted to complete a *pro se* Answer in this matter on July 9, 2024, by mailing the Answer to Costello's attorney as the clerk was unable to file the Answer directly, due to no case being established in Odyssey at this point. The Summons and Complaint would not be filed by Costello's attorney until July 12, 2024, along with Marisela's *pro se* Answer. The matter was scheduled for Trial on July 22, 2024, with the Notice of Trial being mailed out on July 15, 2024. Marisela vacated her apartment and

turned in her keys at the end of her lease on July 16, 2024. East River Legal Services filed their Notice of Appearance on July 19, 2024.

A hearing on this matter was held on July 22, 2024, in front of the Honorable Judge Warntjes. The court denied Marisela's Motion to Dismiss on the grounds that the Forcible Entry and Detainer Action no longer had standing, as Marisela had paid her rent in full and had already vacated the property. Marisela then made an oral Motion for Continuance to allow her attorney to amend the answer and to properly prepare for the hearing as justice so requires. This motion was also denied by the Court. The hearing proceeded with evidence and testimony being provided to the Court. The Court found that Marisela had violated her lease by paying her June rent late and the Forcible Entry and Detainer was granted. Costello's attorney asked the court to be granted attorney's fee pursuant to SDCL § 21-16-11. S.D. CODIFIED LAWS § 21-16-11. Marisela objected to the award of attorney's fees but was denied and Costello was awarded reasonable attorney's fees.

A Judgement was entered on the date of the hearing, allowing Costello to take possession of the property and establishing a monetary award for rent owed that had been paid in full. This Judgement included a paragraph with a blank for an attorney's fees award that was to be filled in later once that amount had been determined. The judgement, in its entirety, was refiled on August 8, 2024, with the attorney's fees included.

Marisela filed an appeal of the judgment by filing a Notice of Appeal, on the 20th day of August 2024, to the Circuit Court. Costello filed a Motion to Dismiss the appeal

on the grounds of timeliness and a failure to post bond on the 23rd day of August 2024. A hearing was held on the 13th day of September 2024. After hearing oral arguments and reviewing Marisela's brief objection to Costello's Motion to Dismiss, the Court Granted Costello's Motion to Dismiss Appeal for Timeliness but Denied the Motion on the grounds that Marisela was required to post bond. MH TRANSCRIPT at 7-8.

ARGUMENT

I. Whether the Circuit Court Erred in Granting Costello's Motion to Dismiss the Appeal for Timeliness.

South Dakota Codified Laws section 15-38-22 states that “[e]xcept where an appeal is denied by law, there shall be a right of appeal to the circuit court from any final order or judgment of the magistrate court. Appeals from such final orders and judgments must be taken within ten days after the attestation and filing of the order or judgment appealed from.” S.D. CODIFIED LAWS § 15-38-22.

Blacks Law Dictionary defines “final order” as “an order that is dispositive of the entire case.” *Blacks Law Dictionary* 1206 (9th ed. 2009). The Supreme Court of the Territory of Dakota held in *Harris Manufacturing Co. v Walsh* that Section 1869 of the Revised Statutes of the United States (detailing the jurisdiction of territorial Supreme Court appeals) granted the court “the power to hear and determine writs of error and appeals from *final* decisions of the district courts in all cases.” *Harris Mfg. Co. v Walsh*, 3 N.W. 307 (S.D. 1879). The court continued by stating “[n]o judgment is final which does not terminate the litigation between the parties to the suit.” *Id.* This ruling was upheld again in *State v Koch*. *State v Koch*, 818 N.W.2d 793 (S.D. 2012).

While *State v Koch* is a criminal proceeding asking the court to determine if a magistrate judge granting an order to suppress is appealable to the Supreme Court, it is still precedent to the case at hand due to the nature of Magistrate Court proceedings. *Id.* In *Koch*, the State appealed a decision of the Magistrate Court granting the defendant's Motion to Suppress Evidence directly to the South Dakota Supreme Court. *Id.* at ¶ 4. The Court held, "[b]ecause the relevant order does not finally dispose of the criminal charges against Koch, the order suppressing evidence is not a final order." *Id.* at ¶ 15.

In a civil action where taxation of disbursements is authorized by statute, the clerk has the authority to add these amounts to the final judgement. *Strand v Courier* involves a contract dispute where the parties had made an oral agreement as to the scope of work Courier would be doing in Strand's apartment unit, along with his business associate Kaufman. *Strand v. Courier*, 434 N.W.2d 60 (S.D. 1988). The jury returned a verdict in favor of Kaufman for the work that he had completed, including changes that Strand had approved during the remodel. *Id.* at 63. The Court also awarded costs to Kaufman over the objection of Courier. *Id.* at 66. In *Strand v Courier*, the Court held that "[s]ince a judgement and the taxation of costs are to be entered separately, an appeal could be taken from a judgement without appealing the costs or an appeal could be taken from the order taxing costs without appealing the judgement." *Id.* (citing SDCL § 15-26-3(1) and (4)). The Court further upheld this ruling in *Nelson v Nelson Cattle Co.*, which is procedurally similar to the case at bar. *Nelson v Nelson Cattle Co.*, 513 N.W.2d 900 (S.D. 1994).

Nelson v Nelson Cattle Co. involved a personal injury claim. *Id.* The jury trial returned a judgement in the amount of \$755,000 for the plaintiffs, and the trial court taxed disbursements in favor of the plaintiff which the defendant objected to, specifically

the expert witness fees. *Id.* at 905. In *Nelson*, the jury verdict was entered on September 9, 1992, with the order taxing costs being entered on October 6, 1992. *Id.* at 906. The court stated that “[a]n appeal may be taken from the judgment without appealing taxation of costs and an appeal from taxation of costs may be taken without appealing the judgement.” *Id.* at 905-906 (citing *Strand*, 434 NW2d at 66). The Court continues by stating “Nelson Cattle Company appealed both.” *Id.* (The notice of appeal was filed on October 22, 1992). The court then held that “[t]axation of disbursements is properly before this Court.” *Id.*

In the case at bar, the magistrate court entered a judgement on the date of the Forcible Entry and Detainer hearing, July 22, 2024, regarding the amount of rent due to the petitioner. The judgement included a blank space for taxation and disbursement of attorney’s fees, despite Marisela’s objection to the award of attorney’s fees. This blank was not filled in until August 8, 2024, which was more than ten days after the attestation of the original judgement. At that time, the order became final as there were no longer any issues to be litigated between the parties. Prior to the entry of attorney’s fees, Marisela would only have had standing to appeal the judgement. If she wished to appeal the judgement and the award of costs, she was required to wait until both items were appealable or initiate sperate appeals which goes against judicial efficiency.

South Dakota Codified Laws § 15-38-22 states that “[e]xcept where an appeal is denied by law, there shall be a right of appeal to the circuit court from any final order or judgement of the magistrate court. Appeals from such final orders and judgements must be taken within ten days after the attestation and filing of the order or judgement appealed from.” S.D. CODIFIED LAWS § 15-38-22. This statute appears to be simple on

its face. In practice it creates a circular argument and prevents litigants from appealing magistrate court judgements to the circuit court when costs have been ordered as taxed disbursements, because these costs are typically entered after the date of attestation. Often, after more than ten days have passed.

The South Dakota Rules of Civil Procedure state that “[w]hen the period of time prescribed or allowed is less than eleven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.” S.D. CODIFIED LAWS § 15-6-6(a). Additionally, “[i]n computing any period of time prescribed or allowed by this chapter . . . the day of the act, event, or default from which the designated period of time begins to run shall not be included.” *Id.*

The final judgement in the present matter was filed on August 8, 2024. The computation of ten days would begin on August 9, 2024. Excluding Saturdays, Sundays, and legal holidays per the statute, the final day that the Notice of Appeal could be served on Plaintiff was August 22, 2024. The Notice of Appeal along with the Certificate of Service and supporting documentation was served on the plaintiff on August 20, 2024.

CONCLUSION

In conclusion, the Circuit Court erred in its ruling that the order became final at the time attestation. While the statute states that “[a]ppeals . . . must be taken within ten days after the attestation and filing of the . . . judgement appealed from,” the case law indicates that judicial efficiency requires that an order must be final before an appeal can be started. It is urged that the judgement granting Costello’s Motion to Dismiss Appeal

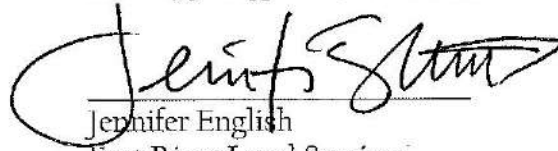
be reversed and remanded to the circuit court allowing the appeal to proceed as justice so requires.

DATED this 11th day of December, 2024.

Respectfully submitted,

JENNIFER ENGLISH

Attorney for Appellant, Marisela Flores-Torres



Jennifer English

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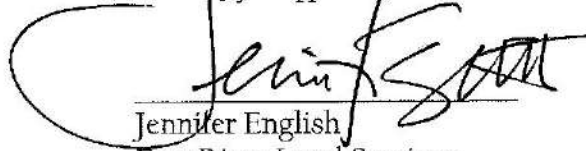
Email: jennifer@erlservices.org

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL 15-26A-66(b)(4), I hereby certify that *APPELLANT'S BRIEF* complies with the type volume limitation provided for in SDCL 15-26A-66. *APPELLANT'S BRIEF* was prepared using Times New Roman typeface in 12-point font and contains 2,747 words. I relied on the work count of our work processing system used to prepare *APPELLANT'S BRIEF* and the original and all copies are in compliance with this rule.

JENNIFER ENGLISH

Attorney for Appellant, Marisela Flores-Torres



Jennifer English

East River Legal Services

335 N. Main Ave., Suite 200

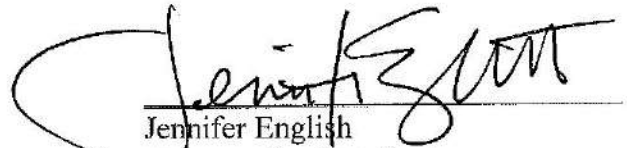
Sioux Falls, SD 57104

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 11th day of December, 2024, a true and correct copy of the above and foregoing *APPELLANT'S BRIEF* was served via Odyssey the following:

Clerk of the Supreme Court
500 East Capital Avenue
Pierre, SD 57501

Glenn Boomsma
Breit & Boomsma, P.C.
606 E Tan Tara Circle
Sioux Falls, SD 57108
Attorney for Appellee


Jennifer English
Attorney for Appellant

APPENDIX

1. Order and Judgement granting Costello's Motion to Dismiss Appeal (Exhibit A)
2. Notice of Entry of Order (Exhibit B)
3. Transcript from Motions Hearing on September 13, 2024

STATE OF SOUTH DAKOTA)

:SS

COUNTY OF MINNEHAHA)

IN CIRCUIT COURT

SECOND JUDICIAL CIRCUIT

COSTELLO PROPERTY MANAGEMENT,
INC. dba ELLIS COURT APARTMENTS,

Plaintiff,

vs.

MARISELA FLORES-TORRES,

Defendant.

CIV. 24-2878

ORDER AND JUDGMENT

Plaintiff's Motion To Dismiss Appeal was presented to the above-encaptioned Court in the City of Minnehaha, State of South Dakota, on the 13th day of September, 2024 at 10:30 a.m., the Honorable Circuit Court Judge John Pekas, presiding. The Plaintiff was represented by attorney Glenn J. Boomsma who appeared personally. The Defendant Marisela Flores-Torres was represented by Attorney Jennifer English who also appeared personally at the hearing.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Plaintiff's Motion To Dismiss Appeal is hereby granted against Defendant Marisela Flores-Torres based upon SDCL 15-38-22.
2. The Court's oral bench decision shall constitute the Court's Findings Of Fact And Conclusions Of Law pursuant to SDCL 15-6-52(a).

EXHIBIT

A



ATTEST:
ANGELIA M. GRIES, CLERK OF COURTS
BY: *Angelia M. Gries* DEPUTY
(SEAL)

BY THE COURT:

John Pekas

Honorable John Pekas
Circuit Court Judge

FILED
SEP 13 2024
Minnehaha County, S.D.
Clerk Circuit Court

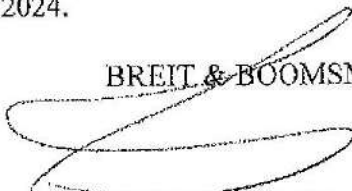
CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the Notice Of Entry Of Order Granting Plaintiff's Motion To Dismiss Appeal on this 16 day of September, 2024, by Odyssey File/Serve thereon on the following:

Jennifer English
EAST RIVER LEGAL SERVICES
335 N. Main Ave.
Sioux Falls, SD 57104
jennifer@erlservices.org

Dated this 16 day of September, 2024.

~~BREIT & BOOMSMA, P.C.~~



Glenn J. Boomsma
Attorney for Plaintiff
606 E. Tan Tara Circle
Sioux Falls, SD 57108
(605) 336-8234

1 THE COURT: All right. Let's go ahead then and go on
2 the record. This is 49CIV.24-2878. That's Costello Property
3 Management doing business as Ellis Courts Apartment versus, I
4 want to say this correctly. Marisela Flores-Torres. Did I
5 see that correctly?

6 THE DEFENDANT: You did.

7 THE COURT: All right. And so may I note appearances,
8 please?

9 MR. BOOMSMA: My name is Glenn Boomsma. I'm an
10 attorney. I do represent Costello Property Management, and
11 this is Civil 24-2878.

12 THE COURT: Thank you.

13 MS. ENGLISH: My name's Jennifer English and I represent
14 Marisela Flores Torres.

15 THE COURT: Thank you. And we're here on a motion to
16 dismiss the appeal from the Magistrate Court, I think in
17 relationship to an eviction action, and, ah, it's premised on
18 a couple of different matters. First is SDCL.15-38-22, ah,
19 that it wasn't timely; and then the second part of that is
20 15-38-27, and I've got the motion. I also had a chance to
21 review the brief that supported the objection to the
22 dismissal, and I think I'm up to speed, and so I'm going to
23 turn it over to you, Mr. Boomsma.

24 MR. BOOMSMA: Thank you. So, Judge, just a little bit
25 of procedural history as far as what happened in this case is

1 that this is an eviction case.

2 THE COURT: Right.

3 MR. BOOMSMA: And so there was an eviction trial and
4 that happened on July 22nd. That was before Judge Warntjes
5 and the premises consisted of an 8734 West 32nd Street #14,
6 here in Sioux Falls. So, the part -- both parties were
7 present at that eviction trial. Also, each party was
8 represented by an attorney. So, the eviction trial does
9 happen, like I said, July 22nd, Judge Warntjes, he rules from
10 the bench, and he rules against the defendant. A proposed
11 judgment was presented to Judge Warntjes in the courtroom.
12 He reviewed it. He signed it that same day and it got filed
13 that same day.

14 A little bit more history is that the defendant has
15 vacated the apartment. So, that's not an issue. But it,
16 it's worth repeating that Judge Warntjes signed that judgment
17 right there in front of Ms. English in the courtroom. Okay.

18 What happens next, a notice of entry goes out, and that
19 goes out July 25th along with the notice of entry. Ms.
20 English was served with an affidavit of disbursements and
21 then application of the tax disbursements service was made by
22 Odyssey. So, disbursements were inserted by the Clerk of
23 Court's into the judgment on August 8th.

24 In the timeline next we have August 20th. So, on August
25 20th, Ms. English files a notice of appeal and a docketing

1 statement. I then on August 23rd filed a motion to dismiss
2 appeal and I set it for hearing. A notice of hearing was
3 served.

4 So the authority that I rely upon, Judge, is SDCL 15-38-
5 22 in terms of the timeliness argument. What that statute
6 says, and it's in black and white very clear, is that when
7 there is an appeal, that appeal has to or must be taken
8 within 10 days after the attestation and filing of the order
9 or judgment, appealed from.

10 It's my position that this judgment again going back to
11 July 22nd was filed and attested to on July 22nd. That's the
12 date that the 10 days ran from. And at worst case scenario
13 it would run from the notice of entry, which was done on July
14 25th.

15 To have it any other way really ignores this statute of
16 15-38-22, um, specifically 10 days runs from the filing. The
17 filing date is right on the dot -- on the document. The
18 other thing, Judge, is that I, from my perspective, under 15-
19 38-27, a bond has to be posted, and then you go a little bit
20 further. You read 15-38-28. There is more that is talked
21 about in terms of the bond and the filing fee, but the
22 reality is, is that that bond has never been waived, and I
23 didn't waive it, and I won't waive it. And there's been no
24 order waiving it.

25 The last step, statute that I think the court needs to

1 look at is 15-38-29. I view that statute, Judge, as saying
2 that, alright, failure to timely file and serve your notice
3 of, of appeal is fatal. In other words, it's going on to say
4 that the remedy under that statute is dismissal of the
5 appeal.

6 The reality of what has happened here, Judge, is that
7 Ms. English believe she could appeal directly to the South
8 Dakota Supreme Court, and I, I believe that because in her
9 docketing statement she captions it as, as a Supreme Court
10 case. She believed that her appeal deadline was 30 days and,
11 and she was wrong. Um, 15 -- Chapter 15-38 controls here
12 because this was a, a trial done by a Magistrate Judge.

13 Long story short, we are asking for this appeal to be
14 dismissed. I think the statutes are plain and clear. That's
15 my argument.

16 THE COURT: Thank you, Mr. Boomsma. Ms. English, are
17 you ready, ma'am?

18 MS. ENGLISH: Yes. Yes, I am. Our position is that no
19 matter what we wouldn't have been able to appeal even if it
20 was 10 days from the date of the hearing because at that
21 point the judgment was not final. And Mr. Boomsma could have
22 come to the court and said, well, the court has no
23 jurisdiction to hear this appeal because it's not a final
24 judgment. Final judgment happens when there's nothing
25 further to litigate in this matter. And that didn't happen

1 until the judgment became final on August 8th when those
2 attorney's fees were added to the judgment that had been
3 signed.

4 And while, yes, I will acknowledge that in my docketing
5 statement, I am unfamiliar with a lot of the, um, judges
6 within Minnehaha County, and I thought I was appealing to the
7 Supreme Court. I will absolutely acknowledge that, but that
8 does not negate the fact that it was still within 10 days of
9 that judgment becoming finalized because I had to wait even
10 to do that for that judgment to become finalized because the
11 Supreme Court would have also stated that this appeal was not
12 ripe because the judgment hasn't been entered completely.

13 As far as the, ah, as far as the issue of the bond, if
14 you review, um, if you review the statute, um, SDCL 15-38-28,
15 that states that the bond shall be deemed waived if appellant
16 files with the clerk the written consent of each appellee,
17 and the filing, and the filing fee and bond may be waived by
18 filing an affidavit of indigency. To me that's clear. The
19 filing fee and bond can be waived by filing of that affidavit
20 of indigency which has been filed with the court. Um, the
21 court has also signed an order to the same stating that the
22 filing fee and bond additionally the services can't - service
23 can be waived due to that indigency. And so we feel as
24 though we're following -- we fall under the statute. We have
25 provided a timely appeal within that 10 days from the date of

1 the final order and filed all the necessary paperwork needed
2 to appeal or to have that bond and fees waived.

3 THE COURT: Thank you, Ms. English. Reply, Mr. Boomsma.

4 MR. BOOMSMA: Final reply. I think that the defendant's
5 arguments in the August 28th brief just missed the mark. They
6 missed the mark because they ignore the plain language of
7 SDCL 15-38-22. The only way from my perspective that the
8 court could rule in the defendant's favor here is if you just
9 ignore that statute, you just throw it out, and you pretend
10 it's not there because Ms. English is trying to make that
11 argument of final order, final judgment, final this, but no,
12 what controls here is that statute. It's, it's just crystal-
13 clear 10 days from the attestation and filing of the order or
14 judgment. Okay. Well, when was it filed? July 22nd. Notice
15 of entry, July 25th. That's the answer.

16 THE COURT: Thank you, Mr. Boomsma. Well, I'm going to
17 take these in reverse order regarding the bond under SDCL 15-
18 38-28, I do agree with Ms. English that when there is a
19 waiver, it does waive on the affidavit of indigency. Not
20 only the bond requirement but also the, ah, ah, necessary
21 fees for filing. And I do agree with, ah, with her on that.
22 In regards to the first issue, SDCL 15-38-22 regarding the
23 timeliness. On the date of the attestation, this is
24 something I've always had a question about as well. That
25 particular statute reads that it's from the attestation and

1 the signing of the judgment, but then, um, there's also a
2 statutory authority that says a judgment isn't final until
3 there is notice of entry of it. And so I, I think I have to
4 go from the notice of entry, Mr. Boomsma, which would be the
5 25th. And so with that being said, even looking at that and
6 just looking and counting the dates in question and excluding
7 the weekends, going back to the 25th, this would have started
8 from the date of the notice of entry of judgment, and I don't
9 count the date that it was done. So, we'll start on the 26th,
10 and that would be 26 would be the first day, 20 and excluding
11 weekends, 26 would be the first day. 29th would be the second
12 day. 30th the third day. 31st the fourth day. August 1st the
13 fifth day. August 7th the sixth day. And we exclude
14 weekends. 7th would be the fifth. 8th would be the sixth.
15 9th would be the seventh. 10th would be the eighth. And this
16 was when the attorney fees were inserted. I don't believe at
17 this time, Ms. English, that the inserting of the attorney's
18 fees stops or at least is the final part of the judgment.
19 Those can be actually added in after the fact, and so because
20 of that, I am going to grant the motion to dismiss at this
21 time for untimeliness, and you can prepare an order
22 accordingly, Mr. Boomsma. And, Ms. English, if you feel as
23 though you need to take this up, I completely understand.
24 And so, do you have an order, Mr. Boomsma?

25 MR. BOOMSMA: I did.

1 THE COURT: All right. You come forward, please. All
2 right, I'm going to hand this back and you can go downstairs
3 and get it filed and then you can proceed accordingly at this
4 time.

5 MR. BOOMSMA: Thank you.

6 THE COURT: Thank you.

7 MS. ENGLISH: Thank you.

8 (Proceedings concluded at 11:02 a.m.)

STATE OF SOUTH DAKOTA)
 :SS
COUNTY OF MINNEHAHA)

CERTIFICATE

This is to certify that I, Roxane Osborn, Court Recorder and Notary Public, do hereby certify and affirm that I transcribed the proceedings of the foregoing case, and the foregoing pages 1 - 9, inclusive, are a true and correct transcription from CourtSmart.

Dated at Sioux Falls, South Dakota, this 1st day of November, 2024.

/s/ Roxane R. Osborn

Roxane R. Osborn
Court Recorder
Notary Public - South Dakota
My commission expires: May 9, 2030

**IN THE SUPREME COURT
STATE OF SOUTH DAKOTA**

Appeal No. 30861

COSTELLO PROPERTY MANAGEMENT, INC.,
d/b/a Ellis Court Apartments,
Petitioner and Appellee,

v.

MARISELA FLORES-TORRES,
Respondent and Appellant.

Appeal from the Circuit Court
Second Judicial Circuit
Minnehaha County, South Dakota

THE HONORABLE JUDGE JOHN R. PEKAS PRESIDING

APPELLEE'S BRIEF

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Attorney for Appellee

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Attorney for Appellant

The *NOTICE OF APPEAL* was filed on the 30th day of September, 2024.

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PRELIMINARY STATEMENT

Costello Property Management, Inc. is the Appellee and will be referred to as "Costello". Marisela Flores-Torres is the Appellant and will be referred to as "Marisela" or "Appellant".

The September 13, 2024 Order And Judgment granting Costello's Motion To Dismiss Appeal is attached hereto as "Exhibit A." The September 16, 2024 Notice of Entry of Order Granting Plaintiff's Motion To Dismiss Appeal is attached hereto as "Exhibit B". The Motions Hearing Transcript will be referred to as "MH Transcript" in this brief.

JURISDICTIONAL STATEMENT

Marisela appeals from the Order And Judgment dated September 13, 2024, granting Costello's Motion To Dismiss Appeal. The Order And Judgment was filed on September 13, 2024, after an in-person motions hearing. The Notice Of Entry Of Order was filed on September 16, 2024. The Notice Of Appeal was timely filed on September 30, 2024. This Court has jurisdiction to hear this matter pursuant to SDCL § 15-26A-3(2) as an appeal from a final Order.

LEGAL ISSUE

- I. Whether the Circuit Court Properly Dismissed the Appeal for Untimeliness Under SDCL § 15-38-22.**

Yes. The Circuit Court correctly dismissed the appeal because the judgment resolving all substantive disputes was final and appealable on July 22, 2024. The subsequent calculation of attorney's fees on August 8, 2024 was a collateral matter that did not reset the appeal deadline under SDCL § 15-38-22.

STATEMENT OF THE CASE AND FACTS

CASE HISTORY

This is an action for Forcible Entry and Detainer which was commenced in the Second Judicial Circuit, Minnehaha County, South Dakota, the Magistrate Judge Wade Warntjes presiding. The Summons and Complaint documents were served on July 3, 2024.

Judgment was entered on July 22, 2024 following a court trial before Judge Warntjes. The court found in favor of Costello by granting possession of the property and awarding a monetary judgment for rental arrearages. The court also awarded attorney's fees to Costello, which were taxed as disbursements. The Judgment was entered by Judge Warntjes immediately upon the conclusion of the court trial. A blank was left in the Judgment so that the amount of the disbursements could later be entered pursuant to SDCL 15-6-54(d). The Judgment was attested by the court clerk the same day. The Judgment was later updated by the court clerk on August 8, 2024 to include the specific amount of attorney's fees/court costs.

Marisela appealed the July 22, 2024 Judgment to the Circuit Court by serving and filing a Notice of Appeal on August 20, 2024. Costello subsequently filed a Motion To

Dismiss Appeal document on August 23, 2024, citing untimeliness under SDCL § 15-38-22. A hearing on the motion was held on September 13, 2024. After considering oral arguments and reviewing Marisela's objections to the Motion To Dismiss Appeal, Circuit Court Judge John Pekas held that the appeal was untimely and dismissed the action accordingly.

STATEMENT OF FACTS

Costello served its Notice to Quit and Vacate on Marisela on June 13, 2024, citing late and non-payment of rent. Costello therefore commenced the Forcible Entry and Detainer action by service of the Summons and Complaint on July 3, 2024. On July 9, 2024, Marisela submitted a pro se Answer to Costello's attorney, upon which the Summons, Complaint, and Marisela's pro se Answer were filed with the court clerk on July 12, 2024. The matter was scheduled for a court trial on July 22, 2024, with notice sent to Marisela on July 15, 2024. Jennifer English at East River Legal Services filed a Notice of Appearance on July 19, 2024 on behalf of Marisela.

At the July 22, 2024 trial, Marisela argued that the Forcible Entry and Detainer action lacked merit and jurisdiction because she had already vacated the property and brought her rent current. The trial court rejected Marisela's arguments and also her subsequent oral Motion for Continuance. After hearing testimony and evidence, the trial court found that Marisela had violated the lease agreement by late payment of June rent. The trial court granted Costello's requested relief, including possession of the property and a money judgment for rental arrearages. The trial court also authorized submittal of

an Application To Tax Disbursements under SDCL § 21-16-11. Marisela's objection to the award of attorney's fees was overruled.

The Judgment was entered on July 22, 2024, granting possession of the property and specifying the monetary award for back rent owed. A provision for attorney's fees was included, but left blank pending determination of the amount. The Judgment was updated on August 8, 2024 to include the disbursement amount.

On August 20, 2024 Marisela filed a Notice of Appeal. Costello moved to dismiss the appeal on August 23, 2024, citing untimeliness under SDCL § 15-38-22 and failure to post bond. After a hearing on September 13, 2024, the Circuit Court granted Costello's Motion To Dismiss Appeal, but denied the motion regarding bond requirements.

ARGUMENT

A. THE CIRCUIT COURT PROPERLY DISMISSED THE APPEAL AS UNTIMELY UNDER SDCL § 15-38-22 BECAUSE THE JUDGMENT WAS FINAL AND APPEALABLE ON JULY 22, 2024.

Circuit Court Judge John Pekas properly dismissed the appeal as untimely pursuant to SDCL § 15-38-22 since an appeal from magistrate court must be filed within 10 days following a final order. Specifically, SDCL § 15-38-22 establishes that "[e]xcept where an appeal is denied by law, there shall be a right of appeal to the circuit court from any final order or judgment of the magistrate court. Appeals from such final orders and judgments must be taken within ten days after the attestation and filing of the order or judgment appealed from." *Id.*

A final judgment “must finally and completely adjudicate all of the issues of fact and law involved in the case.” *Midcom, Inc. v. Oehlerking*, 722 N.W.2d 722, 725 (S.D. 2006) (citing *Griffin v. Dwyer*, 88 S.D. 357, 358, 220 N.W.2d 1 (1974) (citing *Dolan v. Hudson*, 83 S.D. 144, 156 N.W.2d 78 (1968)); see also *Riede*, 277 N.W.2d at 722). The subsequent taxation of disbursements does not impact the finality of a previous judgment on the merits for purposes of commencing the time period in which to file a notice of appeal. *Id.*

In *Midcom Inc. v. Oehlerking*, the Supreme Court of South Dakota found that inclusion of attorney fees does not extend appeal deadlines. *Id.* A judgment is final and appealable when it resolves all substantive issues, even if a blank is left for the later determination of taxable disbursements. See *id.* at ¶ 13. n.4.

In *Midcom*, the plaintiff argued that the appeal was untimely. *Id.* at ¶ 10. The plaintiff sought to enforce a covenant not to compete against its former employee and prevailed at trial. *Id.* at ¶ 1. The Court entered a judgment that resolved all substantive claims on November 8, 2004, which was filed on December 9, 2004. *Id.* at ¶12. However, the judgment left a blank for the amount of attorney’s fees, which was later filled in by an order issued on February 23, 2005. *Id.* The defendant filed a notice of appeal after entry of the order on the attorney fee dispute, contending that the judgment was not final until that point. See *id.* at ¶ 12. The Court dismissed the defendant’s appeal as untimely, holding that the judgment resolving the substantive issues became final upon its filing in December 9, 2004. *Id.* at ¶ 21. The inclusion of subsequent attorney’s fees did not restart or extend the appeal deadline. *Id.* The Court further reasoned that treating collateral

matters as affecting the finality of a judgment would undermine judicial efficiency and create unnecessary uncertainty. See *id* at ¶ 20.

The Court in *Midcom* found the United States Supreme Court's decision in *Budinich v. Becton Dickinson & Co.* instructive. See *Midcom*, 722 N.W.2d at 727, 728, (citing *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 108 S. Ct. 1717, 100 L. Ed. 2d 178 (1988)). The specific issue addressed in *Budinich* was "whether a decision on the merits is a 'final decision' as a matter of federal law under [28 U.S.C.] § 1291 when the recoverability or amount of attorney's fees for the litigation remains to be determined." *Budinich*, 486 U.S. at 199, 108 S. Ct. at 1720. The Court recognized that "generally a 'final decision' is defined as 'one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Id.* (citing *Callin v. United States*, 324 U.S. 229, 233, 65 S. Ct. 631, 633, 89 L. Ed. 911 (1945)).

A judgment or order remains final even if post-judgment issues remain, as long as those issues do not alter, moot, or revise the decisions embodied in the judgment resolving the merits. *Id.* at 199–200, 108 S. Ct. at 1720–21. The Court found that attorney fees would fit this description as "the request is generally 'collateral to' and 'separate from' the judgment on the merits." *Id.* Specifically, the Court emphasized that a claim for attorney's fees is separate from the merits of the underlying action. *Id.* at 200, 108 S. Ct. at 1721. Such an award does not address or remedy the injury that initiated the action. *Id.*

Furthermore, the Court found the analysis from the Eighth Circuit Court of Appeals of two different approaches to characterizing an attorney's fee request instructive. See *Midcom*, 722 N.W.2d at 728 (citing *Obin v. District No. 9 of the Int'l Ass'n of Machinists & Aerospace Workers*, 651 F.2d 574, 583 (8th Cir. 1981)). The court,

“[f]rom both a policy and a legal standpoint,” declared that “a claim for attorney’s fees should be treated as a matter collateral to and independent of the merits of the litigation.” *Obin*, 651 F.2d 574.

In the Eighth Circuit, the time to appeal starts from the entry of final judgment on the merits, irrespective of any later decision regarding attorney’s fees.. *Id.* The Supreme Court of South Dakota echoed these rationales in *Midcom*, stating: “We find persuasive the rationales offered by both the Supreme Court in *Budinich* and the Eighth Circuit in *Obin*, and today adopt the bright-line rule that a later decision on attorney’s fees does not affect the finality of a previous judgment on the merits.” *Midcom*, 722 N.W.2d at 726.

Here, the appeal was untimely under the plain language of SDCL § 15-38-22. The July 22, 2024, Judgment resolved the substantive issues of possession of the property and back rent owed, rendering it final and appealable. The inclusion of a blank for attorney’s fees, later determined on August 8, 2024, did not alter the judgment’s finality or reset the statutory deadline for filing an appeal. Under SDCL § 15-38-22, Marisela was required to file her appeal within 10 days of the final judgment, on or before August 8, 2024. However, Attorney English mistakenly believed that the appeal was to the South Dakota Supreme Court and assumed she had 30 days to file, rather than the 10 days required to appeal to the Circuit Court. MH TRANSCRIPT at 4-7. This misunderstanding led to her filing the appeal on August 20, 2024—12 days past the statutory deadline.

Further, Marisela’s reliance on *State v. Koch*, 818 N.W.2d 793 (S.D. 2012) in her Appellant’s Brief is misplaced. That case is a criminal matter and bears no relevance to the collateral issue of attorney fees in a civil proceeding. *State v. Koch* does not address the finality of judgments or statutory deadlines for appeals in cases involving the

inclusion or later determination of attorney fees, rendering it inapplicable to the present context.

South Dakota law clearly defines the boundaries of appellate jurisdiction. “[O]ur appellate jurisdiction is generally limited to a review of final judgments.” *MGA Ins. Co. v. Goodsell*, 2005 S.D. 118, ¶ 33, 707 N.W.2d 483, 489 (Zinter, J., concurring); see also SDCL 15-26A-3 (listing appealable orders). Most often, these judgments are final in the sense that they “end[] the litigation on the merits and leave[] nothing for the court to do but execute the judgment.” *Knecht v. Evridge*, 2020 S.D. 9, ¶ 42, 940 N.W.2d 318, 331 (quoting *Midcom, Inc. v. Oehlerking*, 2006 S.D. 87, ¶ 15, 722 N.W.2d 722, 726) *Nelson v. Estate of Campbell*, 963 N.W.2d 560, 567 (S.D. 2021). The July 22, 2024 Judgment met this definition of finality, and Marisela’s failure to appeal within the required 10-day deadline under SDCL § 15-38-22 forfeited her appellate rights.

This principle is consistent with the bright-line rule articulated in *Budinich*, *Obin*, and *Midcom*, ensuring clarity and predictability in the determination of finality. By filing her notice of appeal on August 20, 2024, Marisela failed to comply with the clear 10-day deadline established by SDCL § 15-38-22, thereby forfeiting her appellate rights.

Strict adherence to these deadlines is essential to maintaining judicial efficiency and the finality of judgments. Allowing appeals to hinge on collateral matters, such as attorney’s fees, would disrupt this framework, encouraging piecemeal litigation, and procedural uncertainty. The rules articulated in *Midcom* ensure that the legal system operates with clarity and fairness. Marisela’s argument that the August 8, 2024 inclusion of attorney’s fees reset the appeal deadline directly contravenes these established principles and misinterprets the timeline prescribed by SDCL § 15-38-22. This Court

should affirm the Circuit Court's dismissal of the appeal as untimely because Marisela did not file her appeal within 10 days of the final judgment of the case.

CONCLUSION

The Court should affirm the Circuit Court's dismissal of Marisela's appeal because she did not timely file under SDCL § 15-38-22. The judgment resolving all substantive disputes, including possession of the property and back rent, became final on July 22, 2024, upon attestation and filing. The subsequent inclusion of attorney's fees on August 8, 2024 was a collateral matter that did not reset the statutory deadline for filing an appeal. Strict adherence to SDCL § 15-38-22 is essential to preserving judicial efficiency and the finality of judgments. Allowing an untimely appeal would undermine these principles, encourage piecemeal litigation, and contradict well-established South Dakota precedent. It is urged that the judgment granting Costello's Motion to Dismiss Appeal be affirmed.

DATED this 31 day of January, 2025.

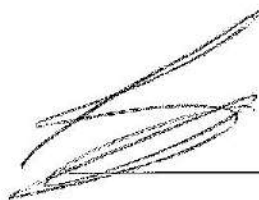
Respectfully submitted,



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(605) 336-8234

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL 15-26A-66(b)(4), I hereby certify that APPELLEE'S BRIEF complies with the type volume limitation provided for in SDCL 15-26A-66. APPELLEE'S BRIEF was prepared using Times New Roman typeface in 12-point font and contains 2,825 words. I relied on the work count of our work processing system used to prepare APPELLEE'S BRIEF and the original and all copies are in compliance with this rule.



11/24/25

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(605) 336-8234

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 24th day of January, 2025, a true and correct copy of the above and foregoing APPELLEE'S BRIEF was served via Odyssey the following:

Clerk of the Supreme Court
500 East Capital Avenue
Pierre, SD 57501

Jennifer English
East River Legal Services
335 N. Main Ave. Suite 200
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(605) 336-9230



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APPENDIX

Order And Judgment dated September 13, 2024 – Exhibit A

Notice Of Entry Of Order Granting Plaintiff's Motion To Dismiss Appeal – Exhibit

B

STATE OF SOUTH DAKOTA)
 :SS
COUNTY OF MINNEHAHA)

IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT

COSTELLO PROPERTY MANAGEMENT,
INC. dba ELLIS COURT APARTMENTS,

Plaintiff,

vs.

MARISELA FLORES-TORRES,

Defendant.

CIV. 24-2878

ORDER AND JUDGMENT

Plaintiff's Motion To Dismiss Appeal was presented to the above-encaptioned Court in the City of Minnehaha, State of South Dakota, on the 13th day of September, 2024 at 10:30 a.m., the Honorable Circuit Court Judge John Pekas, presiding. The Plaintiff was represented by attorney Glenn J. Boomsma who appeared personally. The Defendant Marisela Flores-Torres was represented by Attorney Jennifer English who also appeared personally at the hearing.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Plaintiff's Motion To Dismiss Appeal is hereby granted against Defendant Marisela Flores-Torres based upon SDCL 15-38-22.
2. The Court's oral bench decision shall constitute the Court's Findings Of Fact And Conclusions Of Law pursuant to SDCL 15-6-52(a).





ATTEST:
ANGELIA M. GRIES, CLERK OF COURTS
BY: Christy Christ, DEPUTY
(SEAL)

BY THE COURT:

John Pekas
Honorable John Pekas
Circuit Court Judge

FILED
SEP 13 2024
Minnehaha County, S.D.
Clerk Circuit Court

STATE OF SOUTH DAKOTA)
 :SS
COUNTY OF MINNEHAHA)

IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT

COSTELLO PROPERTY MANAGEMENT,
INC. dba ELLIS COURT APARTMENTS,

CIV. 24-2878

Plaintiffs,

**NOTICE OF ENTRY OF ORDER
GRANTING PLAINTIFF'S MOTION
TO DISMISS APPEAL**

vs.

MARISELA FLORES-TORRES,

Defendant.

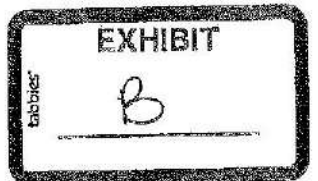
TO: Defendant Marisela Flores-Torres and her Attorney Jennifer English:

PLEASE TAKE NOTICE that an Order Granting Plaintiff's Motion To Dismiss Appeal was entered in the above-entitled action by the above-captioned Court on the 13th day of September, 2024, a copy of which Order is attached hereto and by this reference made a part hereof.

Dated this 16 day of September, 2024.

~~BRIT & BOOMSMA~~, P.C.

Glenn J. Boomsma
Attorney for Plaintiff
606 E. Tan Tara Circle
Sioux Falls, SD 57108
(605) 336-8234



CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the Notice Of Entry Of Order Granting Plaintiff's Motion To Dismiss Appeal on this 16 day of September, 2024, by Odyssey File/Serve thereon on the following:

Jennifer English
EAST RIVER LEGAL SERVICES
335 N. Main Ave.
Sioux Falls, SD 57104
jennifer@erlservices.org

Dated this 16 day of September, 2024.

BREIT & BOOMSMA, P.C.



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