IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 31024

RYAN ARROWSMITH,

Petitioner and Appellant,

VS.

DEVIN ODLE,

Respondent and Appellee.

APPEAL FROM THE FOURTH JUDICIAL CIRCUIT
MEADE COUNTY, SOUTH DAKOTA

THE HONORABLE JOHN H. FITZGERALD
CIRCUIT COURT JUDGE

BRIEF OF APPELLANT

ATTORNEYS FOR APPELLANTS:

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Notice of Appeal filed on March 6, 2025

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PRELIMINARY STATEMENT

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JURISDICTIONAL STATEMENT

This Court has jurisdiction under SDCL 15-26A-3(1), (2) and/or (4).

REQUEST FOR ORAL ARGUMENT

Appellants respectfully request the privilege of appearing for oral argument before this Honorable Court.

STATEMENT OF THE ISSUES

I. **DID THE LOWER COURT COMMIT LEGAL ERROR OR ABUSE ITS DISCRETION IN GRANTING DISMISSAL FOR FAILURE TO PROSECUTE WHERE THE DEFENDANT REQUESTED THE DELAY?**

The circuit court granted the motion.

- *Schwartzle v. Austin Co.*, 429 N.W.2d 69 (S.D. 1988)
- *Chicago & Northwestern R. Co. v. Bradbury*, 129 N.W.2d 540, (S.D. 1964)
- *Simpson v. C & R Supply, Inc.*, 1999 S.D. 117, 598 N.W.2d 914

II. **DID THE CIRCUIT COURT COMMIT LEGAL ERROR OR ABUSE ITS DISCRETION IN GRANTING DISMISSAL FOR FAILURE TO PROSCECUTE WITHOUT MAKING FINDINGS OF FACT OR CONCLUSIONS OF LAW AND FAILING TO DISTINGUISH BETWEEN SDCL 15-11-11 AND 15-6-41(b)?**

The circuit court granted the motion.

- *Eischen v. Wayne Tp.*, 2008 S.D. 2, 744 N.W.2d 788
- *Dakota Cheese, Inc. v. Taylor*, 525 N.W.2d 713 (S.D. 1995)
- *Swenson v. Sanborn County Farmers Union Oil Co.*, 1999 S.D. 61, 594 N.W.2d 339

STATEMENT OF THE CASE

On July 27, 2020, Ryan Arrowsmith (Arrowsmith) filed a Summons and Complaint against Devin Odle (Defendant) in Meade County Circuit Court of the Fourth Judicial Circuit. (R. 1-2). The complaint pleaded a claim for damages resulting from the Defendant's alleged negligence arising from a motorcycle accident in 2017. (R. 3). The Meade County Sheriff served the complaint on the Defendant on July 27, 2020. (R. 7). At the Defendant's request, Arrowsmith agreed to an open-ended, indefinite extension of time to file an answer to the complaint. (R. 9, 12, 17, 46-47). However, the Defendant never filed an answer. (R. 47).

The clerk of courts issued three procedural Notices of Intent to Dismiss the Action in 2021, 2022, and 2024 due to absence of activity for more than one year. (R. 8, 11, 16). The first two were properly dismissed. (R. 9, 12). On June 24, 2024, another notice of intent to dismiss was issued by the clerk of courts. (R. 22). On August 7, 2024, Counsel for the Defendant filed a notice of appearance—the first appearance by the Defendant in the action—but still did not file any answer to the Complaint. (R. 19).

On November 20, 2024, the Defendant filed a Motion to Dismiss for Failure to Prosecute pursuant to SDCL 15-11-11 and 15-6-41(b). (R. 22). Arrowsmith filed an affidavit and brief objecting the motion to dismiss setting forth the reason for the delay and the Defendant's failure to respond to the complaint. (R. 46).

A hearing on the motion to dismiss was held before the Honorable John H. Fitzgerald, Circuit Judge, on January 9, 2025.

On January 16, 2025, the circuit court granted the motion to dismiss under both SDCL 15-11-11 and SDCL 15-6-41(b) and dismissed the Arrowsmith's complaint. (R. 55). The circuit court's one-page order included no findings of fact, conclusions of law, or legal reasoning explaining the basis for its decision. (R. 55). This appeal followed.

STATEMENT OF THE FACTS

Ryan Arrowsmith lives with his wife, Shelly, in British Columbia, Canada. (R. 2). On August 11, 2017, Arrowsmith was in Sturgis, South Dakota, for the Sturgis Motorcycle Rally. (R. 2). Around 10:00 in the morning, Arrowsmith was driving his motorcycle down the street in Sturgis, operating his vehicle safely and obeying all relevant laws and ordinances, including speed limits. (R. 2).

At the same time, Defendant Devin Odle suddenly pulled his vehicle out from a parking lot directly in front of Arrowsmith's motorcycle, which had the right of way. (R. 3). Arrowsmith attempted to avoid the collision, but was unable to do so. (R. 3). This accident, caused solely by the Defendant's negligence, resulted in substantial injuries to Arrowsmith. (R. 3).

Approximately three weeks after Complaint was filed, Arrowsmith's attorney and Defendant's insurance company had a telephone conversation. (R. 9, 46). Arrowsmith explained that there were ongoing issues with the

injuries suffered in 2017, and it remained unclear whether he would need additional surgery. (R. 9, 46). Considering this information, Defendant requested an indefinite extension to file an answer. (R. 46-47). The mutually beneficial purpose of the extension was to allow Arrowsmith to reach maximum recovery information before resuming litigation. (R. 46-47).

However, due to numerous setbacks, additional treatment, and complications with Canadian insurance, the recovery information was not available or presented to Defendant by 2024. (R. 47). Without ever filing the answer to the complaint, Defendant filed a motion to dismiss for failure to prosecute. (R. 22). Arrowsmith's attorney believed the delay in litigation was for the benefit of both parties. (R. 48). He stated that if Defendant wished to terminate the extension agreement, he would move forward with litigation immediately. (R. 48).

Arrowsmith's complaint, however, was dismissed.

STANDARD OF REVIEW

In considering dismissal of a case for failure to prosecute, this Court reviews a circuit court's findings of fact under the clearly erroneous standard, while this Court applies the de novo standard when reviewing the circuit court's conclusions of law. *See LaPlante v. GGNC Madison, South Dakota, LLC*, 2020 S.D. 13, ¶ 11, 941 N.W.2d 223, 226. This Court reviews the ultimate decision on a motion to dismiss for failure to prosecute under the abuse of discretion standard. *See id.*; *Devitt v. Hayes*, 1996 S.D. 71, ¶7, 551

N.W.2d 298, 300. An abuse of discretion occurs when the Court's decision is based on legal error or not justified by, and clearly against, reason and evidence. *See Eischen v. Wayne Tp.*, 2008 S.D. 2, ¶10 744 N.W.2d 788, 794. When the standard is met, the dismissal is reversed. *See id.*

ARGUMENT

I. THE DELAY HERE WAS GRANTED AT THE EXPRESS EXPRESSLY REQUEST OF DEFENDANT, WHICH DID NOT MEET THE PLAINTIFF "STEP BY STEP."

As this Court has cautioned repeatedly, dismissal for failure to prosecute is an extreme remedy to be used with caution. *See Moore v. Michelin Tire Co.*, 1999 S.D. 152, ¶50, 603 N.W.2d 513, 526. "The goal of the courts is justice—docket control and calendar clearance are secondary concerns." *Id.* at ¶ 49 (quoting *Chicago & N.W. Ry. Co. v. Bradbury*, 129 N.W.2d 540, 542 (S.D. 1964)); *Simkins v. Bechtol*, 192 N.W.2d 731, 732 (S.D. 1971) (explaining that the trial court's power to dismiss for failure to prosecute should be exercised cautiously and granted only in case of unreasonable and unexplained delay).

Importantly, prejudice—or lack thereof—to the defendant is a consideration when deciding a motion to dismiss for failure to prosecute. *See Duncan v. Pennington County Housing Auth.*, 382 N.W.2d 425, 427 (S.D. 1986). Thus, a motion for failure to prosecute was properly denied where the only prejudice the defendant's counsel could suggest was that the defendant would be forced to litigate the suit and dismissal of the plaintiff's claim would

be final, as the statute of limitations had run. *See Simpson v. C & R Supply, Inc.*, 1999 S.D. 117, ¶¶ 11-12, 598 N.W.2d 914, 918-19.

In determining whether to grant a motion to dismiss for failure to prosecute, this Court has outlined several well-established legal principles, including that "the plaintiff has the burden to proceed with the action. The defendant need only meet the plaintiff step by step." *Dakota Cheese, Inc. v. Taylor*, 525 N.W.2d 713, 715-16 (S.D. 1995).

And although it is so fundamental as almost to go without saying, "[d]elays granted at a defendant's request. . . will bar dismissal for failure to prosecute." *Schwartzle v. Austin Co.*, 429 N.W.2d 69, 71 (S.D. 1988) (citing *Bradbury*, 129 N.W.2d at 542).

In the present case, it is undisputed that the Defendant requested and received an indefinite extension from the Plaintiff to file its answer in this case. Without such an extension, Defendant would have been subject to default and the entry of a judgment against it on the merits of Plaintiff's claims. Without answering the complaint, however, Defendant filed a motion to dismiss for failure to prosecute, based on the delay caused by the extension it sought and received.

When a defendant does not answer the complaint, he does not meet the plaintiff "step by step." Typically, a defendant's failure to file an answer may result in a default judgment. Here, Defendant was served with Complaint on July 27, 2020, but never filed any responsive pleading.

In other words, Defendant's reason for withholding its answer to the complaint was the very reason for the delay in prosecution. It was understood and agreed that, due to the extension agreement, prosecution would inherently be delayed at the Defendant's specific request. To argue that the extension agreement justifies withholding an answer but does not justify the delay in prosecution is logically inconsistent and undermines the rationale behind the extension itself, as both actions stem from the same underlying need to assess recovery and proceed appropriately. Put simply, a party should not be allowed to secure dismissal citing delay in prosecution when it requested an extension that inherently created the delay.

Thus, when a defendant requests a delay that serves its own interests, a dismissal for failure to prosecute is properly barred. *See Bradbury*, 129 N.W.2d at 542 (holding that dismissal for want of prosecution in 1963 of action commenced in 1951 was not proper where delay was granted at defendant's request). Here, the lower court's dismissal of the entire action based on delay granted at the Defendant's request was legal error—an abuse of discretion in the most classic, categorical sense—and expressly barred by this Court's controlling precedent. *See Schwartzle v. Austin Co.*, 429 N.W.2d at 71 (citing *Bradbury*, 129 N.W.2d at 542).

It should be reversed.

II. THE TRIAL COURT COMMITTED LEGAL ERROR AND ABUSED ITS DISCRETION IN DISMISSING THE COMPLAINT WITHOUT ANY FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FAILING TO DISTINGUISH BETWEEN SDCL 15-11-11 AND 15-6-41(b).

A dismissal for failure to prosecute may be brought under two different statutes: SDCL 15-11-11 or 15-6-41(b). Although similar in context, the statutes differ in procedure, elements, and repercussions. Dismissal under 15-11-11 does not require a motion by the opposing party. When a case is dismissed under this rule, it is generally done without prejudice. *See Rotenberger v. Burghduff*, 2007 S.D. 7, ¶14, 727 N.W.2d. 291, 295. Dismissal under 15-6-41(b) does require a motion by the opposing party. When a case is dismissed under this rule, it may be done with or without prejudice. SDCL 15-6-41(b).

A. SDCL 15-11-11

SDCL 15-11-11 "was meant to operate as a clerical tool, not a substantive dismissal. It allows a circuit court to dismiss a case that is not being prosecuted in order to clear its calendar. It was not meant to forever bar a case." *Rotenberger*, 2007 S.D. 7, ¶16 727 N.W.2d. 291, 295. A dismissal under this statute must meet two elements: (1) there must be no activity for one year and (2) no showing of good cause which excuses the inactivity. SDCL 15-11-11.

Although Arrowsmith was inactive for more than twelve months, there was good cause for the inactivity. SDCL 15-11-11 states, "The term 'record',

for purposes of establishing good cause, shall include... written evidence of agreements between the parties or counsel which justifiably result in delays in prosecution." SDCL 15-11-11. Here, there was an indefinite extension agreement between the parties to wait for maximum recovery information, which is written evidence justifying delay. The extension agreement shows good cause for inactivity not only through analogous case law discussed above, but through plain language of the statute itself.

B. SDCL 15-6-41(b)

Being an extreme measure, dismissal for failure to prosecute under SDCL 15-6-41(b) should only be granted when the plaintiff's conduct is egregious, or where there is unreasonable and unexplained delay. *See Eischen*, 2008 S.D. 2, ¶12-13 744 N.W.2d 788, 794-95. The mere passage of time is not the test. *See Dakota Cheese*, 525 N.W.2d 713, 716 (S.D. 1995).

Neither Defendant's Brief in Support of Motion to Dismiss nor the circuit court's perfunctory judgment of dismissal distinguished between SDCL 15-11-11 and 15-6-41(b). Defendant acknowledged that Arrowsmith's conduct must be egregious, but offered little to support this claim. First, Defendant stated that the claim has been pending for over seven years, yet the passage of time is not the test. Second, Defendant stated that there have been three Notices of Intent to Dismiss. This is the only evidence brought forward to show egregious conduct by Arrowsmith.

Egregious conduct is shown by a delay that is unexplained or

unreasonable. The extension of time to Answer was a mutual agreement that implied a delay of prosecution. It was well-known by each party that the extent of the injury was unclear, and that Arrowsmith potentially needed more surgeries and rehabilitation, not to mention that there were Canadian insurance complications. Arrowsmith was under the assumption that due to the extension agreement, prosecution would be delayed indefinitely. While Arrowsmith could have maintained better communication with the Defendant, who was not even represented by counsel until August of 2024, his conduct is explainable, not egregious.

In 2008, Justice Konenkamp warned of the punitive nature of 41(b) and the danger that would ensue from a mixture of the two failure to prosecute statutes. *See Eischen*, 2008 S.D. 2, ¶38 744 N.W.2d 788, 800-02 (Konenkamp, J., dissenting). In his *Eischen* dissent, Justice Konenkamp thoughtfully distinguished 15-11-11 and 15-6-41(b). *See id.* He identified that 15-11-11 was "designed to allow judges to free their dockets" and that dismissal under this rule is done without prejudice. *See id.* at ¶39. Conversely, he referred to 41(b) as a "penalty" and a "harsh remedy to be used only in extreme circumstances." *Id.* at ¶¶40, 42.

In the present case, particularly where there has been no showing of any prejudice to the Defendant other than having to respond to the civil action resulting from his negligence in causing Arrowsmith's injuries, the lower court's grant of the motion to dismiss was an abuse of discretion. The

lower court's failure to make any findings of fact, rely on any conclusions of law, or provide any legal basis in its dismissal order compounded the legal error. Considering the indefinite extension sought and secured by the Defendant, dismissing Arrowsmith's claim on the merits is an unjust penalty that is not in the best interest of justice. *See Swenson v. Sanborn County Farmers Union Oil Co.*, 1999 S.D. 61, ¶¶ 20-23, 594 N.W.2d 339, 345 (holding the lower court abused its discretion in granting motion to dismiss for failure to prosecute, explaining that "[d]ismissal is a serious remedy which these facts do not merit" and that "[u]nder the facts of this case, justice requires that the action continue").

CONCLUSION

The delay in this case was neither unreasonable nor unexplained. It was the product of a litigation tactic expressly sought and negotiated by the Defendant to advance its own interests. Due to the absence of an Answer and the Defendant's request for an indefinite delay in the litigation, Defendant should have been barred from bringing a motion to dismiss for failure to prosecute.

WHEREFORE, Scott Arrowsmith respectfully requests that this Honorable Court reverse the judgment below and remand to allow the Plaintiff's claims to proceed on their merits.

Respectfully submitted this 15th day of June, 2025.

JOHNSON, JANKLOW, & ABDALLAH LLC

BY: *<u>/s/ Ronald A. Parsons, Jr.</u>*
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Attorneys for Appellants

CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4), I 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 2,340 words, excluding the table of contents, table of cases, jurisdictional statement, and certificates of counsel. I have relied on the word and character count of the word-processing program to prepare this certificate.

Ronald A. Parsons, Jr.
Ronald A. Parsons, Jr.

CERTIFICATE OF SERVICE

The undersigned hereby certify that a true and correct copy of the foregoing BRIEF OF APPELLANT and the APPENDIX were served via Odyssey File and Serve upon the following:

Cassidy M. Stalley cassidy@nooneysolay.com

Brook D. Swier Schloss brooke@swierlaw.com

Michael Henderson mike@swierlaw.com

on this 15th day of June, 2025.

Ronald A. Parsons, Jr.
Ronald A. Parsons, Jr.

APPENDIX

Page

STATE OF SOUTH DAKOTA	) :SS	IN CIRCUIT COURT
COUNTY OF MEADE	)	FOURTH JUDICIAL CIRCUIT

RYAN SCOTT ARROWSMITH, Plaintiff, v. DEVIN M. ODLE, Defendant.	CIV. 20- 46CIV20-000224 SUMMONS

TO DEFENDANT DEVIN M. ODLE:

You are hereby summoned and required to answer the Complaint of the Plaintiff in the above-entitled action, a copy of which Complaint is hereto attached and herewith served upon you, and to serve a copy of your answer to the said Complaint within 30 days after the service of this Summons upon you, exclusive of the day of such service; and if you fail to answer the said Complaint within the time aforesaid, you are notified that judgment by default may be rendered against you as requested in the Complaint together with the costs and disbursements of this action.

Dated this 23 day of July, 2020.

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Attorneys for Plaintiff

STATE OF SOUTH DAKOTA	) :SS	IN CIRCUIT COURT
COUNTY OF MEADE	)	FOURTH JUDICIAL CIRCUIT

RYAN SCOTT ARROWSMITH, Plaintiff, v. DEVIN M. ODLE, Defendant.	CIV. 20- 46CIV20-000224 COMPLAINT

Plaintiff Ryan Scott Arrowsmith ("Arrowsmith"), for his Complaint against Defendant Devin M. Odle ("Odle"), hereby states and alleges as follows:

THE PARTIES

1. Arrowsmith is an individual residing in Courtenay, British Columbia, Canada.

2. Upon information and belief, Odle is individual residing in Meade County, South Dakota.

JURISDICTION AND VENUE

3. This Court has jurisdiction over the subject matter of this action.

4. This Court has personal jurisdiction over Odle.

5. Venue is proper in this Court pursuant to SDCL 15-5-6 (venue based on residence of defendant).

GENERAL ALLEGATIONS

6. On or about August 11, 2017, Arrowsmith was in Sturgis, South Dakota for the Sturgis Motorcycle Rally.

7. At approximately 10:00 a.m. on the day in question, Arrowsmith was driving his motorcycle down a street in Sturgis. Arrowsmith was operating his motorcycle safely and was obeying all relevant laws and ordinances, including speed limits.

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8. Odle was operating his vehicle at the same time and was seeking to exit a parking lot adjacent to the street upon which Arrowsmith was traveling.

9. Without warning, Odle pulled his vehicle out of the parking lot directly in front of Arrowsmith's motorcycle.

10. Arrowsmith attempted to avoid a collision but was unable to do so. As a result, Arrowsmith's motorcycle collided with Odle's vehicle. As a result of the collision, Arrowsmith was thrown from his motorcycle.

11. Arrowsmith suffered substantial injuries as a result of the collision.

COUNT ONE

Negligence

12. Arrowsmith re-alleges and incorporates by reference paragraphs 1 through 11 as though set forth fully herein.

13. Odle owed Arrowsmith a duty of car to operate his vehicle in a safe, reasonable, and attentive manner.

14. Odle breached his duty to Arrowsmith when he failed to operate his vehicle in a safe, reasonable, and attentive manner and when he failed to exercise due care to avoid colliding with Arrowsmith's motorcycle.

15. Odle breached his duty to Arrowsmith by operating his vehicle in a negligent manner so as to cause the accident in question, in which Arrowsmith was injured. This accident was caused solely by the negligence of Odle without any negligence or contribution on the part of Arrowsmith.

16. As a direct and proximate result of Odle's negligence, Arrowsmith suffered serious bodily injuries, pain and suffering, substantial medical expenses, pecuniary loss, and other damages. Such damages remain ongoing.

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COUNT TWO

Negligence Per Se

17. Arrowsmith re-alleges and incorporates by reference paragraphs 1 through 16 as though set forth fully herein.

18. At all relevant times, Odle owed a duty to comply with all applicable statutes, ordinances, regulations, and rules relating to the safe operation of a motor vehicle in the State of South Dakota.

19. Odle breached this duty by failing to comply with applicable statutes, ordinances, regulations, and rules pertaining to the safe operation of a motor vehicle in the State of South Dakota.

20. Odle's failure to comply with applicable statutes, ordinances, regulations, and rules created the type of collision against which the law was designed to protect.

21. Odle's failure to comply with applicable statutes, ordinances, regulations, and rules was the direct and proximate cause of Arrowsmith's injuries and damages and thus constitutes negligence per se.

DEMAND FOR JURY TRIAL

Arrowsmith demands a trial by jury on all issues so triable.

PRAYER FOR RELIEF

WHEREFORE, Arrowsmith respectfully requests that the Court enter judgment against Odle as follows:

(1) For Arrowsmith's general and special damages;

(2) For Arrowsmith's costs incurred in pursuing these claims;

(3) For pre- and post-judgment interest to the extent provided by law;

(4) For such other and further relief as the Court determines to be just, fair, and proper under the circumstances.

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Dated this 23 day of July, 2020.

SWIER LAW FIRM, PROF. LLC

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STATE OF SOUTH DAKOTA	) :SS	IN CIRCUIT COURT
COUNTY OF MEADE	)	FOURTH JUDICIAL CIRCUIT

RYAN SCOTT ARROWSMITH, Plaintiff, v. DEVIN M. ODLE, Defendant.	CIV. 20- 46CIV20-000224 NOTICE OF APPEARANCE

NOTICE IS HEREBY GIVEN that MICHAEL A. HENDERSON and BROOKE SWIER SCHLOSS will be appearing as counsel of record for Plaintiff Ryan Scott Arrowsmith in the above-captioned matter, and that all further notices and pleadings shall be served upon the undersigned as attorney for Plaintiff Ryan Scott Arrowsmith.

Dated this 23 day of July, 2020.

SWIER LAW FIRM, PROF. LLC

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FOURTH JUDICIAL CIRCUIT COURT

Return # 15757
Process # C20-01173
Docket # CIV 20-
Reference #

STATE OF SOUTH DAKOTA
COUNTY OF MEADE

46CIV20-000224

RYAN ARROWSMITH
Plaintiff,
- vs -
DEVIN MATTHEW ODLE
Defendant

MEADE COUNTY SHERIFF'S RETURN

I, **Quinn Regan** Deputy, Sheriff of Meade County, S.D. hereby certify and return that the annexed **Summons; Complaint; Notice of Appearance** came into my hand for service on the **23rd day of July, 2020**. That I served the same on **DEVIN MATTHEW ODLE** at **402 8TH ST, STURGIS, SD 57785** in Meade County, State of South Dakota on **27th day of July, 2020** at **10:48 AM**

Item	Disburse To	Amount Owed	Amount Paid
Mileage Fee	Meade County Treasurer	$2.00	$0.00
Summons	Meade County Treasurer	$50.00	$0.00
		Total Owed	**$52.00**
		Total Paid	**$0.00**
		Uncollectible	**$0.00**
		Remaining	**$52.00**

Invoice # IN20-03495
Swier Law Firm
PO BOX 256, Avon 57315

Comments

Date Returned 7/27/20

Signed

Date 07/27/20

Quinn Regan
Meade County Sheriff's Office
1400 Main Street
Sturgis, SD 57785
Phone: (605) 347-2681

STATE OF SOUTH DAKOTA COUNTY OF MEADE	)) SS)	IN CIRCUIT COURT FOURTH JUDICIAL CIRCUIT
RYAN SCOTT ARROWSMITH vs. DEVIN ODLE	)))))	46CIV20-000224 NOTICE OF INTENT TO DISMISS ACTION

The Meade County Clerk's records indicate that there has been no activity of record in this matter for more than one year. SDCL 15-11-11 permits dismissal of this action unless a party shows good cause to the contrary.

Therefore, it is ordered

1) That the Court will dismiss the above entitled action unless a written objection is filed with the Meade County Clerk of Court and served on opposing parties as required by law setting forth good cause to the contrary, on or before July 22, 2024.

Dated this 21st day of June, 2024.

/s/ John H. Fitzgerald, Circuit Court Judge

ATTEST:
/s/ Linda Keszler, Clerk of Courts
by JSST10203, Clerk/Deputy

AFFIDAVIT OF MAILING

The undersigned hereby certifies that a true and correct copy of the Notice of Intent to Dismiss Action was served on the following by placing a copy in an envelope and depositing the envelope, with sufficient postage, in the United States Mail:

BROOKE D SWIER SCHLOSS	PO BOX 256 AVON SD 57315	DEVIN ODLE	402 8TH ST STURGIS SD 57785

on this 21st day of June, 2024

/s/ Linda Keszler, Clerk of Courts
by JSST10203, Deputy

STATE OF SOUTH DAKOTA	) :SS	IN CIRCUIT COURT
COUNTY OF MEADE	)	FOURTH JUDICIAL CIRCUIT

RYAN SCOTT ARROWSMITH, Plaintiff, v. DEVIN M. ODLE, Defendant.	46CIV20-000224 OBJECTION TO NOTICE OF INTENT TO DISMIS ACTION

Plaintiff Ryan Scott Arrowsmith, by and through his attorney of record herein, hereby submits the following as his Objection to Notice of Intent to Dismiss Action. Plaintiff objects to the dismissal of this action for the following reasons:

1. Shortly after service of the Summons and Complaint in this matter, the undersigned counsel was contacted by AAA Insurance ("AAA"), the carrier for the Defendant.
2. At that time, the undersigned counsel discussed with AAA the fact that Plaintiff's recovery was ongoing and that Plaintiff was scheduled for an additional surgery. Because Plaintiff's recovery was ongoing, it was difficult at this that time to ascertain an appropriate valuation of the claim. As such, the undersigned counsel granted AAA an open extension of time to obtain counsel and answer the Complaint. That extension was confirmed by an email from counsel to AAA dated August 20, 2020.
3. Since that time, Plaintiff has continued to receive medical care for his injuries. Progress of this matter has been hindered by the fact that Plaintiff reinjured his wrist, requiring further treatment of the injury. In addition, Plaintiff resides in Canada and his medical providers and potential subrogation lienholders are also located in Canada. This has made the process of obtaining information regarding medical

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treatment and amounts paid by insurance providers more cumbersome than in a typical case.

4. Counsel for Plaintiff has been in touch with AAA to provide updates on Plaintiff's ongoing care and to assure AAA that the open extension of time to answer the Complaint remains in effect.
5. At one point, Plaintiff appeared to have reached his maximum recovery. Since then, unfortunately, Plaintiff has experienced several setbacks with respect to his injuries. As such, counsel for Plaintiff continues to work on obtaining the relevant subrogation information from several Canadian providers, as well as negotiating with those providers regarding potential compromises of those subrogation claims.
6. Counsel for Plaintiff is currently awaiting additional information from the Canadian providers. In particular, Plaintiff has recently been evaluated regarding his disability and employability prospects and his impairment rating. Once this information is all in hand, counsel believes that Plaintiff will be in a position to potentially finalize settlement of this matter.

THEREFORE, for the reasons set forth herein, Plaintiff respectfully submits that good cause exists for this matter to continue and respectfully requests that this matter not be dismissed.

Dated this 26th day of June, 2024.

SWIER LAW FIRM, PROF. LLC

/s/ Michael A. Henderson

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STATE OF SOUTH DAKOTA: SS COUNTY OF MEADE :	IN CIRCUIT COURT FOURTH JUDICIAL CIRCUIT COURT
RYAN SCOTT ARROWSMITH, Plaintiff, vs. DEVIN MATTHEW ODLE, Defendant.	Court File No. 46CIV20-000224 **NOTICE OF APPEARANCE OF CASSIDY M. STALLEY**

Please take notice that Cassidy M. Stalley, of Lynn, Jackson, Shultz & Lebrun PC, hereby makes an appearance as attorney for Devin Matthew Odle, Defendant in the above-entitled action, and requests that copies of all further pleadings, affidavits or motions in the above-entitled matter be served upon the undersigned attorney.

Dated August 7, 2024.

LYNN, JACKSON, SHULTZ & LEBRUN PC

By: */s/ Cassidy M. Stalley*
Cassidy M. Stalley
Attorneys for Defendant
909 St. Joseph St., Suite 800
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CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2024, a true and correct copy of the foregoing **Notice of Appearance of Cassidy M. Stalley** was sent to:

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/s/ Cassidy M. Stalley
Cassidy M. Stalley

STATE OF SOUTH DAKOTA : SS COUNTY OF MEADE :	IN CIRCUIT COURT FOURTH JUDICIAL CIRCUIT
RYAN SCOTT ARROWSMITH, Plaintiff, vs. DEVIN MATTHEW ODLE, Defendant.	Court File No. 46CIV20-000224 **MOTION TO DISMISS FOR FAILURE TO PROSECUTE**

Comes now the Defendant, Devin Matthew Odle, and pursuant to SDCL 15-11-11 and 15-6-41(b) moves this Court for an order dismissing the above-entitled action for failure to prosecute. This motion is supported by the accompanying Brief in Support of Motion to Dismiss for Failure to Prosecute, the exhibits thereto, and the pleadings on file in this matter.

Dated November 20, 2024.

LYNN, JACKSON, SHULTZ & LEBRUN PC

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CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2024, a true and correct copy of the foregoing **Motion to Dismiss for Failure to Prosecute** was sent to:

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/s/ Cassidy M. Stalley
Cassidy M. Stalley

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STATE OF SOUTH DAKOTA	) :SS	IN CIRCUIT COURT
COUNTY OF MEADE	)	FOURTH JUDICIAL CIRCUIT

RYAN SCOTT ARROWSMITH, Plaintiff, v. DEVIN M. ODLE, Defendant.	46CIV20-000224 PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO PROSECUTE

Plaintiff Ryan Scott Arrowsmith ("Arrowsmith"), by and through his counsel of record, Michael A. Henderson of Henderson Legal Solutions, Prof. LLC, hereby submits the following as his Brief in Opposition to Defendant's Motion to Dismiss for Failure to Prosecute.

BACKGROUND

This case was initiated by service of a Summons and Complaint on Defendant Devin M. Odle ("Odle") on July 27, 2020. *See* Affidavit of Michael A. Henderson at ¶2. On August 20, 2020, counsel for Arrowsmith had a telephone conversation with a claims representative for Odle's liability insurance carrier, AAA Insurance. *See* Affidavit of Michael A. Henderson at ¶3. The claims representative inquired as to the possibility of resolving this matter without litigation. *See* Affidavit of Michael A. Henderson at ¶3. Counsel advised the claims representative that Arrowsmith was experiencing ongoing issues relating to the hand and wrist injuries he suffered during the underlying motor vehicle accident, and that it was unclear at that time whether he would need an additional surgery. *See* Affidavit of Michael A. Henderson at ¶3. Counsel further explained that he was not in a position to properly evaluate the value of the claim because of the uncertain nature of future treatment. *See* Affidavit of Michael A. Henderson at ¶3. The claims representative inquired as to whether counsel would be willing to grant Odle an extension of time to file an Answer to the Complaint so that the matter could be reevaluated when

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Arrowsmith had reached maximum recovery from his injuries. *See* Affidavit of Michael A. Henderson at ¶3. At that point, the parties agreed that counsel would grant Odle and AAA Insurance an open-ended and indefinite extension of time to Answer the Complaint. *See* Affidavit of Michael A. Henderson at ¶3. Counsel subsequently confirmed this agreement via e-mail. *See* Affidavit of Michael A. Henderson at ¶3.

Since then, counsel for Arrowsmith has reaffirmed the agreement to grant Odle and AAA Insurance an open-ended extension to file an Answer to the Complaint on several occasions. *See* Affidavit of Michael A. Henderson at ¶4. Most recently, in July of 2024, counsel reaffirmed this agreement with a claims representative of AAA Insurance. *See* Affidavit of Michael A. Henderson at ¶4. In addition, in August of 2024, counsel for Arrowsmith had a conversation with counsel for Odle, Cassidy Stalley, who had just been retained to represent Odle in this matter. *See* Affidavit of Michael A. Henderson at ¶5. Counsel for Arrowsmith once again reaffirmed the existing agreement to grant Odle an open-ended extension of time to file an Answer the Complaint. *See* Affidavit of Michael A. Henderson at ¶5. That agreement remains in place today and consistent with that agreement, Odle has not filed an answer herein. *See* Affidavit of Michael A. Henderson at ¶5. Attorney Stalley did file a Notice of Appearance on August 7, 2024. *See* Affidavit of Michael A. Henderson at ¶5. Until the filing of Odle's Motion to Dismiss for Failure to Prosecute, counsel for Arrowsmith was operating under the assumption that the agreement for an open-ended extension of time for Odle to file an Answer to the Complaint remains in place for the benefit of both parties. *See* Affidavit of Michael A. Henderson at ¶8.

ARGUMENT

It is well settled that dismissal for failure to prosecute is an "extreme measure" that should be granted only in cases of "unreasonable and unexplained delay." *Eischen v. Wayne Township*, 2008 SD 2, ¶13, 744 N.W.2d 788, 795. In considering such a motion, the court must consider all facts and circumstances. *Id.* at ¶16, 744 N.W.2d at 796. Odle acknowledges these

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basic tenets, but then goes on to paint a remarkably incomplete picture of this this matter. In particular, Odle completely disregards the most basic and important fact in this matter: the existence of an agreement granting Odle an open-ended extension to file an Answer to Arrowsmith's Complaint. Odle does not and cannot dispute the existence of such an agreement, but rather fails to even *mention* the agreement, choosing instead to pretend that the agreement does not even exist.

There is no doubt that the existence of this agreement is of critical importance. The South Dakota Supreme Court has recognized that "Courts have held that an agreement extending the time within which to answer is a reflection of the parties intent to defer action in the case and that dismissal for failure to prosecute is, therefore, precluded." *London v. Adams*, 1998 SD 41, ¶15 n.3, 578 N.W.2d 145, 149 n.3 (citations omitted). The Court went on to explain that "[t]he courts conclude that the mutual agreement of the parties for an extension of time to answer established mutual intent 'to excuse [each] other from diligence both in answering and taking default.'" *Id.* (quoting *Wheeler v. Payless Super Drug Stores*, 193 Cal.App.3d 1292, 238 Cal.Rptr. 885, 889).

Thus, where an existing open-ended extension of time to answer is in place, dismissal for failure to prosecute is simply inappropriate. This is fundamental. While Odle suggests that Arrowsmith has not been diligent because he has not served interrogatories, taken depositions, or otherwise conducted discovery, this suggestion is disingenuous in light of the existence of an agreement for an extension of time to answer. Just as Arrowsmith would not be permitted to take a default judgment against Odle under these circumstances, Odle should not be permitted to avoid liability in this matter by disregarding an agreement that has benefitted him. If Odle wishes to terminate the agreement for an extension of time to answer, he may certainly do so and Arrowsmith is prepared to proceed immediately with discovery. But Odle should not be allowed

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to obtain dismissal by presenting an incomplete and misleading version of the facts that omits any mention of such an agreement.

CONCLUSION

For the reasons set forth herein, Arrowsmith respectfully requests that the Court deny Odle's motion and award Arrowsmith any recoverable costs associated with defending the same.

Dated this 2nd day of January, 2025.

HENDERSON LEGAL SOLUTIONS, PROF. LLC

/s/ Michael A. Henderson
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STATE OF SOUTH DAKOTA	) :SS	IN CIRCUIT COURT
COUNTY OF MEADE	)	FOURTH JUDICIAL CIRCUIT

RYAN SCOTT ARROWSMITH, Plaintiff, v. DEVIN M. ODLE, Defendant.	46CIV20-000224 AFFIDAVIT OF MICHAEL A. HENDERSON

STATE OF SOUTH DAKOTA)
:SS
COUNTY OF MINNEHAHA)

Michael A. Henderson, being first duly sworn on oath, hereby states as follows:

1. I am the attorney for Plaintiff Ryan Scott Arrowsmith ("Arrowsmith") in this matter. I have personal knowledge of the matters contained in this Affidavit unless otherwise qualified.

2. This case was initiated by service of a Summons and Complaint on Defendant Devin M. Odle ("Odle") on July 27, 2020.

3. On August 20, 2020, I had a telephone conversation with a claims representative for Odle's liability insurance carrier, AAA Insurance. My notes indicate that the name of the claims representative at the time was Chanda. Chanda inquired as to the possibility of resolving this matter without litigation. I explained to Chanda that Arrowsmith was experiencing ongoing issues relating to the hand and wrist injuries he suffered during the underlying motor vehicle accident, and that it was unclear at that time whether he would need an additional surgery. I further explained that I was not in a position to properly evaluate the value of the claim because of the uncertain nature of future treatment. Chanda inquired whether I would be willing to grant Odle an extension of time to file an Answer to the Complaint so that the matter could be

reevaluated when Arrowsmith had reached maximum recovery from his injuries. We agreed that I would grant Odle and AAA Insurance an open-ended and indefinite extension of time to Answer the Complaint. I subsequently confirmed this agreement via e-mail.

4. Since then, I have reaffirmed the agreement to grant Odle and AAA Insurance an open-ended extension to file an Answer to the Complaint on several occasions. Most recently, in July of 2024, I reaffirmed this agreement with a claims representative of AAA Insurance.

5. On August 1, 2024, I received an email from Cassidy Stalley, who advised that she had been retained to represent Odle in this matter. Attorney Stalley and I had a subsequent conversation in which I once again reaffirmed the existing agreement to grant Odle an open-ended extension of time to file an Answer the Complaint. That agreement remains in place today and consistent with that agreement, Odle has not filed an answer herein. Attorney Stalley did file a Notice of Appearance on August 7, 2024.

6. Since initiation of this action, Arrowsmith has experienced numerous setbacks and issues relating to his injuries. This includes numerous instances in which Arrowsmith aggravated or reinjured his hand/wrist, including a significant work-related reinjury. This has resulted in ongoing efforts by medical providers to treat Arrowsmith's injuries through injections and therapy, as well as further consideration of the necessity of additional surgeries. At one point, Arrowsmith suffered a significant infection relating to the injection treatments he received. There have also been ongoing attempts to craft proper accommodations to allow Arrowsmith to return to work. Despite his repeated efforts to return to work, as of July 2024, this had culminated in administrative proceedings in Arrowsmith's home country of Canada regarding Arrowsmith's employability.

7. Arrowsmith's ongoing medical issues have also caused significant difficulties in the form of coverage disputes between Arrowsmith's primary health coverage, disability insurance, and worker's compensation insurance. Because of these disputes and the vastly

different landscape of insurance coverage in Canada, this has led to challenges concerning the reimbursement and subrogation interests claimed by these carriers.

8. Until the filing of Odle's Motion to Dismiss for Failure to Prosecute, I was operating under the assumption that the agreement for an open-ended extension of time for Odle to file an Answer to the Complaint remains in place for the benefit of both parties. If Odle and his representation wishes to now terminate this agreement and file an Answer, I am prepared to move forward immediately with discovery and a scheduling order.

Dated this 2nd day of January, 2025.

Michael A. Henderson

Subscribed and sworn to before me
this 2nd day of January, 2025.

GLINPONGSA DOUGLAS
NOTARY PUBLIC SEAL
STATE OF SOUTH DAKOTA

Notary Public – State of South Dakota

My Commission Expires: April 26th, 2029

STATE OF SOUTH DAKOTA : SS COUNTY OF MEADE :	IN CIRCUIT COURT FOURTH JUDICIAL CIRCUIT
RYAN SCOTT ARROWSMITH, Plaintiff, vs. DEVIN MATTHEW ODLE, Defendant.	Court File No. 46CIV20-000224 **ORDER GRANTING DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO PROSECUTE**

This matter having come on for hearing on Thursday, January 9, 2025, before the Honorable John H. Fitzgerald on Defendant's Motion to Dismiss for Failure to Prosecute under SDCL 15-11-11 and SDCL 15-6-41(b); and the Plaintiff appearing by and through his attorney of record, Michael Henderson of Henderson Legal Solutions, Prof. LLC; and the Defendant appearing by and through his attorney of record, Cassidy M. Stalley of Lynn, Jackson, Shultz & Lebrun, P.C.; and the Court having reviewed the records and files herein, having heard and considered the arguments of counsel, now it is hereby:

ORDERED that Defendant's Motion to Dismiss for Failure to Prosecute against Plaintiff pursuant to SDCL 15-11-11 and SDCL 15-6-41(b) is GRANTED; it is further

ORDERED that Plaintiff's Complaint, as it relates to Defendant, is dismissed, with prejudice.

1/16/2025 8:36:18 AM

BY THE COURT:

Honorable John H. Fitzgerald
Circuit Court Judge

Attest:
Molstad, Stephany
Clerk/Deputy

STATE OF SOUTH DAKOTA	) :SS	IN CIRCUIT COURT
COUNTY OF MEADE	)	FOURTH JUDICIAL CIRCUIT

RYAN SCOTT ARROWSMITH, Plaintiff, v. DEVIN M. ODLE, Defendant.	46CIV20-000224 PLAINTIFF'S OBJECTION TO PROPOSED JUDGMENT

Plaintiff Ryan Scott Arrowsmith ("Arrowsmith"), by and through his counsel of record, Michael A. Henderson of Henderson Legal Solutions, Prof. LLC, hereby objects to the Proposed Judgment submitted by Defendant herein. Plaintiff has not objection to the form of the Proposed Judgment but objects to the substance of the Proposed Judgment based upon the arguments submitted in Plaintiff's Brief in Opposition to Defendant's Motion to Dismiss for Lack of Prosecution and the arguments made at the hearing in this matter.

Dated this 22nd day of January, 2025.

HENDERSON LEGAL SOLUTIONS, PROF. LLC

/s/ Michael A. Henderson

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 31024

RYAN ARROWSMITH,
Petitioner and Appellant,

vs.

DEVIN ODLE,
Respondent and Appellee.

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

The Honorable John H. Fitzgerald
Circuit Court Judge

APPELLEE'S BRIEF

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NOTICE OF APPEAL FILED ON MARCH 6, 2025

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TABLE OF AUTHORITIES

South Dakota Cases:

Statutes:

PRELIMINARY STATEMENT

This brief is in response to Plaintiff Ryan Arrowsmith's Appellant Brief. Plaintiff-Appellant will be referred to as "Arrowsmith." Defendant-Appellee, Devon Odle, will be referred to as "Odle." Reference to the record shall be designated as "SR," followed by the appropriate page number. Reference to Arrowsmith's Appellant Brief will be referred to as "Arrowsmith Br.," followed by the appropriate page number.

JURISDICTIONAL STATEMENT

Arrowsmith appeals from the Order Granting Defendant's Motion to Dismiss for Failure to Prosecute. Notice of Entry was served February 5, 2025. SR 57. Odle agrees that the Notice of Appeal was timely filed, that this Court has jurisdiction, and the Order is appealable under SDCL 15-26A-3.

STATEMENT OF THE ISSUES

I. Whether the circuit court abused its discretion in granting Odle's Motion to Dismiss for Failure to Prosecute.

The circuit court granted Odle's Motion to Dismiss for Failure to Prosecute pursuant to SDCL 15-11-11 and SDCL 15-6-41(b).

Duncan v. Pennington Cty. Hous. Auth., 382 N.W.2d 425 (S.D. 1986)

Swenson v. Sanborn Cnty. Farmers Union Oil Co., 1999 S.D. 61, 594 N.W.2d 349

Annett v. Am. Honda Motor Co., 1996 S.D. 58, 548 N.W.2d 798.

White Eagle v. City of Fort Pierre, 2002 S.D. 68, 647 N.W.2d 716

II. Whether Arrowsmith waived his right to assert good cause or lack of egregious conduct by failing to raise the issue below.

This issue was not addressed by the circuit court.

Action Mech., Inc. v. Deadwood Historic Pres. Comm'n, 2002 S.D. 121, 652 N.W.2d 742

Osdoba v. Kelley-Osdoba, 2018 S.D. 43, ¶ 23, 913 N.W.2d 496, 503

STATEMENT OF THE CASE

This civil case was brought in the Fourth Judicial Circuit, Meade County, State of South Dakota, the Honorable John H. Fitzgerald presiding. Odle moved to dismiss for failure to prosecute on November 20, 2024. SR 22. A hearing on the motion was held on January 9, 2025. SR 21. After having reviewed the record and heard argument of counsel, the Circuit Court granted Odle's Motion to Dismiss. SR 55; 92-93.

STATEMENT OF THE FACTS

This case arises from a motor vehicle accident that occurred on August 11, 2017, in Sturgis, Meade County, South Dakota. SR 2. Arrowsmith alleged that Odle pulled out in front of him while he was riding his motorcycle, and he was unable to avoid the collision, resulting in personal injuries. SR 3.

On July 27, 2020, just days before the statute of limitations expired, Arrowsmith filed and served a Summons and Complaint against Odle, alleging negligence and negligence per se arising from the August 11, 2017 accident. SR 1-7.

On August 20, 2020, Arrowsmith's attorney and a representative of Odle's liability insurer carrier had a telephone conversation. SR 46, ¶3. During that call, the carrier inquired into "the possibility of resolving the matter without litigation" – an inquiry that, in context, signaled an invitation for an early settlement demand. SR 46, ¶3. Indeed, Arrowsmith's attorney responded that "he was not a position to properly evaluate the value of the claim because of the uncertain nature of future treatment," and indicated the matter would need to be reevaluated once Arrowsmith reached maximum medical improvement. SR 46, ¶3.

Based on that representation – that Arrowsmith's counsel needed more time to develop his case – the parties agreed to an open extension of time for Odle to file an answer. SR 46-47, ¶3. Contrary to Arrowsmith's contention on appeal, this extension was not for Odle's sole benefit, and was certainly not to "inherently" delay prosecution indefinitely; it was to give Arrowsmith's counsel time to obtain records, evaluate the case, and prepare a demand, in order to pursue early informal resolution. SR 46, ¶3; *see also* Arrowsmith Br. at 8.

But that demand never came. And while waiting for Arrowsmith's counsel to obtain the information he claimed was needed, the circuit court issued three Notices of Intent to Dismiss Action in 2021, 2022, and in 2024. SR 8, 11, 16. Each time, Arrowsmith objected, repeating nearly identical promises that counsel would soon be in a position to proceed. SR 9-10, 12-14, 17-18.

These objections echoed the original representation to Odle's carrier in 2020: that counsel was not yet in a position to properly evaluate the case due to the uncertain nature of future treatment and the need to await maximum medical improvement, but that "once this information is all in hand, counsel believes that Plaintiff will be in a position to discuss potential settlement[.]" SR 9, ¶2; 10, ¶5; 12, ¶2; 13, ¶5; 17, ¶2; 18, ¶6. Notably, none of the objections included any evidence supporting the continued excuses, delays, or claimed efforts. *Id.* And despite repeated assurances – both to the circuit court and carrier – Arrowsmith failed to take any substantive steps to prosecute this case. It remains today exactly where it was in August 2020.

STANDARD OF REVIEW

The Court "ordinarily . . . will not interfere with the trial court's rulings on a motion to dismiss for failure to prosecute." *Duncan v. Pennington Cty. Hous. Auth.*, 382 N.W.2d 425, 426 (S.D. 1986) (citation omitted). However, "in reviewing the grant or denial of such a motion, the Court's inquiry is whether the circuit court abused its discretion when acting thereon." *Id.* "An abuse of discretion has been defined by this Court as a decision which is not justified by, and clearly against reason and evidence." *Dakota Cheese v. Taylor*, 525 N.W.2d 713, 715 (S.D. 1995) (citation omitted). It "is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable." *Olson v. Huron Reg'l Med.*

Ctr., Inc., 2025 S.D. 34, ¶ 18 (citation omitted). This Court will not reverse a decision if "[it] believe[s] a judicial mind, in view of the law and the circumstances, could reasonably have reached that conclusion." *Dakota Cheese v. Taylor*, 525 N.W.2d 713, 715 (S.D. 1995) (citation omitted).

ARGUMENT

In South Dakota, "the circuit court's power to dismiss an action for lack of prosecution is unquestioned." *Duncan*, 382 N.W.2d 425, 426-27 (S.D. 1986); *Dakota Cheese*, 525 N.W.2d at 715. This power is generally founded upon "an inherent power governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Chicago & N.W. Ry. Co.. v. Bradbury, 80 S.D. 610, 612, 129 N.W.2d 540, 542* (1964) (citation omitted) (cleaned up).

In addition to this inherent authority, circuit courts also possess statutory authority under both SDCL 15-11-11 and SDCL 15-6-41(b) (Rule 41(b)) to dismiss for lack of prosecution. The Court recently clarified that "despite similar subject matter and overlapping considerations, the two rules are distinct." *Olson*, 2025 S.D. 34 ¶20.

The Court explained, "SDCL 15-11-11 is meant to operate as a clerical tool that helps a court to clear its docket after a quota of inactivity is met." *Id.* at ¶21 (citation omitted). By comparison, "Rule 41(b) is a tool for sanctioning a party for delay or disobedience in the

processing of a case." *Id.* at ¶22 (citation omitted).

Given its function as a sanctioning tool, Rule 41(b) carries the severe consequence of dismissal with prejudice, an outcome the Court has emphasized "should only be used when there is an unreasonable and unexplained delay." *Id.* (citation omitted). "An unreasonable and unexplained delay has been defined as an omission to do something which the party might do and might reasonably be expected to do towards vindication or enforcement of his rights." *White Eagle v. City of Fort Pierre*, 2002 S.D. 68, ¶ 4, 647 N.W.2d 716, 718 (internal citation omitted).

The Court has further explained that under Rule 41(b), "the mere passage of time is not the test . . . but whether, under all the facts and circumstances of the particular case, the plaintiff is chargeable with want of due diligence in failing to proceed with reasonable promptitude." *Opp v. Nieuwsma*, 458 N.W.2d 352, 356 (S.D. 1990) (citation omitted); *see also Olson*, 2025 S.D. 34, ¶22.

Underlying all of these rules, however, is the fundamental principle that "the plaintiff has the burden" to move the case forward. *Swenson v. Sanborn Cnty. Farmers Union Oil Co.*, 1999 S.D. 61, ¶10, 594 N.W.2d 339, 343 (citation omitted). "The defendant need only meet the plaintiff step by step." *Id.* (quotation omitted). As this Court explained in *Schwartzle*:

> It is true that the defendant may bring about a trial of the case, but he is under no legal duty to do so. His presence in the case is involuntary, and his attitude toward it is quite different from that of the plaintiff; he is put to a defense only, and can be charged with no neglect for failing to do more than meet the plaintiff step by step[.]

429 N.W.2d at 71 (S.D. 1988).

In this case, the circuit court properly considered all the facts and circumstances and properly dismissed Arrowsmith's case for failing to advance it, even minimally.

I. ODLE DID NOT REQUEST AN EXTENSION TO DELAY THE CASE INDEFINETLY, JUSTIFYING ARROWSMITH'S MULTI-YEAR DELAY IN PROSECUTION

Arrowsmith claims – for the first time on appeal – that Odle did not meet Arrowsmith "step by step." Arrowsmith Br. at 7. He further contends that "it was understood and agreed that, due to the extension agreement, prosecution would inherently be delayed at Defendant's specific request." Arrowsmith Br. at 8. This account mischaracterizes the extension and, more importantly, attempts to deflect attention from Arrowsmith's own burden to prosecute the case. As the plaintiff, it was Arrowsmith's burden to move the case forward. *Swenson*, 1999 S.D. 61, ¶10, 594 N.W.2d at 343. Odle had no duty to initiate – only meet Arrowsmith step by step – and he did so. *Id.* Arrowsmith's attempt to shift blame onto Odle finds no support in the record and cannot excuse Arrowsmith's years of total inaction.

To be sure, Odle never understood or agreed that an extension of time to answer would serve as a license for years of prosecutorial

inaction by Arrowsmith. Nor was the extension simply granted to allow Odle to file an answer, a procedural step that is straightforward and requires no special accommodation. Rather, the record makes clear that the extension was granted as a practical accommodation to Arrowsmith – specifically so his counsel could obtain medical records, assess the claim, and perhaps resolve it at its inception. SR 46, ¶3. It was never intended to "inherently" create, let alone justify, an indefinite postponement of prosecution or to absolve Arrowsmith of his duty to move this case forward. Indeed, Arrowsmith has never explained how this extension to Odle "precluded any other activity designed to move the case to completion." *Annett v. Am. Honda Motor Co.*, 1996 S.D. 58, ¶ 27, 548 N.W.2d 798, 804.

Even if one were to accept Arrowsmith's theory, such a rationale might carry some weight if Arrowsmith had taken meaningful steps to advance the case, specifically the steps he previously promised to take. *LaPlante v. GGNSC Madison, S. Dakota, LLC*, 2020 S.D. 13 ¶18, 941 N.W.2d 223, 229. But he admittedly did nothing. Arrowsmith Br. at 9. The case remains in the exact same posture as when the extension was first granted in 2020. No demand has been made. No medical records or bills have been exchanged. No evidence of damages has been submitted. The only filings from Arrowsmith are unsupported objections to – not one, but three – notices of dismissal. There is no verifiable record activity, only repeated, unfulfilled assurances from Arrowsmith that he

will soon be able to move the case forward. *White Eagle*, 2002 S.D. 68, ¶8, 647 N.W.2d at 719.

Odle has met Arrowsmith step by step. But Odle has been waiting nearly five years for Arrowsmith to take a single step forward. There is and has been no step for Odle to take. To be clear, it is Arrowsmith's inaction – not the extension to answer – that has stalled the case for years. As the Court has made clear, "it is unquestionably the plaintiff's duty to ensure that the case proceeds; this duty should not be placed on the defendant." *Id.*, at ¶ 4.

Nonetheless, Arrowsmith attempts to excuse his prolonged inaction by relying on *Chicago & N.W.R. Co. v. Bradbury*, claiming under the Court's controlling precedent that dismissal for lack of prosecution is inappropriate when the defendant requests the delay. Arrowsmith Br. at 11 (citing *Bradbury*, 80 S.D. 610, 129 N.W.2d. 540, 542 (1964). However, *Bradbury* does not support his position and was neither cited nor argued below. SR 42–45. Because Arrowsmith raises it for the first time on appeal, it is generally forfeited. *State v. Olson-Lame*, 2001 S.D. 51, ¶ 6, 624 N.W.2d 833, 834 (citation omitted) ("Generally, this Court will not address issues raised for the first time on appeal and not presented to the trial court."). Even if considered, Arrowsmith's reading of *Bradbury* overly narrowly and overlooks key aspects of the Court's reasoning.

In *Bradbury*, the defendant requested a delay, pending a ruling of the Interstate Commerce Commission, which was expected to be decisive. 129 N.W.2d at 541. Eight years later, the plaintiff learned the ruling was unfavorable to the defendant and contacted the defendant to suggest settlement or trial. *Id.* The parties then actively negotiated for three years. *Id.* at 542. After the case was set for trial, the defendant moved to dismiss for lack of prosecution. *Id.* The motion was granted. *Id.*

On appeal, the Court acknowledged that the case had long been delayed, but found that the "defendant either requested or acquiesced" in the delay and conceded it served his interest *Id.* at 542. The Court concluded "under the circumstances it would be inequitable to allow the party accommodated to charge the other with lack of due diligence during such period."

But – and this is what Arrowsmith fails to acknowledge – the Court did not stop there. It emphasized that once the basis for delay resolved, the plaintiff resumed prosecution – engaging in settlement negotiations, preparing a stipulated record, and successfully moving to set the case for trial. The Court noted this conduct "removed any presumption of abandonment." *Id.* Considering the entirety of the circumstances, the Court held "a dismissal was not warranted and plaintiff should have its day in court." *Id.*

This case is markedly different. Unlike in *Bradbury*, Odle did not request an extension to delay prosecution or stall litigation. The

extension was granted as a courtesy, in large part, to Arrowsmith so that his counsel could gather medical records, evaluate the claim, and potentially pursue early resolution. Moreover, in stark contrast to the plaintiff in *Bradbury* who actively prosecuted the case once the basis for delay resolved, here, that basis never resolved because Arrowsmith has never acted. He has made no demand, disclosed no evidence, nor took a single step to move the case forward, despite receiving three notices of intent to dismiss. The case remains frozen in the same posture it occupied when the extension was first granted five years ago. The "presumption of abandonment" is not rebutted here; it is confirmed – which is why, after the third notice of dismissal, Odle moved to dismiss for failure to prosecute. This case is not *Bradbury*.

Likewise, this case is not *London v. Adams*, 1998 S.D. 41, 578 N.W.2d 145, 149, a case Arrowsmith relied on below but has now abandoned on appeal, presumably because it, too, underscores the weakness of his position. *See* SR 44; *see also* SR 50-51. In *London*, the Court reversed a dismissal for lack of prosecution because, despite an open extension to answer, the record showed "extensive" file activity and meaningful efforts by the plaintiff to actively move the case toward resolution. *Id.* ¶¶ 1, 6, 9, 14-16. On appeal, the Court detailed the "extensive" and "substantial" work undertaken by the plaintiff to move the case forward despite the extension, including plaintiff's counsel providing medical records, submitting documents related to plaintiff's

lost income, and attempting to arrange mediation. *Id.* ¶¶14-16. Given that record, the Court concluded dismissal was an abuse of discretion and described it as "unconscionable" under the circumstances. *Id.* ¶14.

Unlike the plaintiffs in *Bradbury* and *London*, who took meaningful steps to advance their cases despite extensions to file answers, Arrowsmith did nothing. The Court has repeatedly made clear, a defendant need only "meet the plaintiff step by step." *Schwartzle*, 429 N.W.2d at 71. Odle has done just that. He has waited nearly five years for Arrowsmith to follow through on the very action he identified as necessary to evaluate the claim. Odle reasonably expected Arrowsmith to act and did not push the case forward because the burden did not lie with him.

In view of the law and the circumstances of this particular case, the circuit court's decision was plainly justified. Dismissal for failure to prosecute "should be granted when, after considering all the facts and circumstances of the particular case, the plaintiff can be charged with lack of due diligence in failing to proceed with reasonable promptitude." *Dakota Cheese*, 525 N.W.2d at 716. "Permitting a case to remain idle for years without a single confirmable activity demonstrates a lack of diligence" and the extension to file an answer cannot be used to justify a multi-year delay in prosecution. *White Eagle*, 2002 S.D. 68, ¶ 11, 647 N.W.2d at 720.

II. ARROWSMITH WAIVED HIS RIGHT TO ASSERT GOOD CAUSE OR LACK OF EGREGIOUS CONDUCT BY FAILING TO RAISE THE ISSUE BELOW

When Arrowsmith responded to Odle's Motion to Dismiss for Failure to Prosecute, the only argument he advanced was that dismissal for failure to prosecute was inappropriate based on the parties' agreed upon extension of time to answer. SR 42-45. Arrowsmith did not address, let alone cite, to either SDCL 15-11-11 or SDCL 15-6-41(b). However, Arrowsmith now asserts that the circuit court committed legal error and abused its discretion in dismissing under SDCL 15-11-11 and SDCL 15-6-41(b). Arrowsmith Br. at 9-12. These arguments were not preserved for appeal and are waived.

As the Court is well aware, "[a]n issue not raised at the trial court level cannot be raised for the first time on appeal." *Action Mech., Inc. v. Deadwood Historic Pres. Comm'n*, 2002 S.D. 121, ¶ 50, 652 N.W.2d 742, 755 (citation omitted). An "appellant must affirmatively establish a record on appeal that shows the existence of error. He or she must show that the trial court was given an opportunity to correct the grievance he or she complains about on appeal." *Husky Spray Serv., Inc. v. Patzer*, 471 N.W.2d 146, 153-54 (S.D. 1991) (citation omitted). "Objections must be made to the trial court to allow it to correct its mistakes." *Id.* at 154 (S.D. 1991) (citation omitted). "An objection must be sufficiently specific to put the circuit court on notice of the alleged error so it has the

opportunity to correct it." *Osdoba v. Kelley-Osdoba*, 2018 S.D. 43, ¶ 23, 913 N.W.2d 496, 503 (citation omitted).

> Raising a legal argument for the first time in an appellate brief limits the opposing party's ability to respond. Had the issue been specifically raised below, "the parties would have had an opportunity to consider whether additional evidence was needed to decide the issue and certainly would have had an opportunity to brief the issue for the trial court's consideration."

Gabriel v. Bauman, 2014 S.D. 30, ¶ 23, 847 N.W.2d 537, 544 (citing *Hall v. State ex rel. S. Dakota Dep't of Transp.*, 2006 S.D. 24, ¶ 12, 712 N.W.2d 22, 27 (collecting cases)). *See also S.D. Bd. of Nursing v. Jones*, 1997 S.D. 78, ¶ 25, 566 N.W.2d 142 ("Having failed to make an argument regarding excessive bond during the hearing, in her motion for reconsideration, or at any time during the proceedings, the issue is deemed waived.").

The settled record confirms that Arrowsmith never argued that the extension agreement established good cause under SDCL 15-11-11, nor that it negated his egregious conduct under SDCL 15-6-41(b). *See* SR 42-45, 56, 85-90. While Arrowsmith filed an Objection to Proposed Judgment, that objection merely referred back to the arguments submitted in his brief and those made at the hearing. SR 56. As a result, Odle was denied the opportunity to assess whether additional evidence or briefing was necessary. More importantly, the circuit court was denied the opportunity to correct itself – though, notably, there was

no error to correct. These theories appear for the first time on appeal and are deemed waived under the Court's well-established precedent.

A. THE EXTENSION IS NOT GOOD CAUSE FOR INACTIVITY UNDER SDCL 15-11-11

Even if Arrowsmith had raised this good cause issue below – he did not – he has not shown how the extension "justifiably results in delays in prosecution" and constitutes good cause under SDCL 15-11-11. Arrowsmith Br. at 10 (citing SDCL 15-11-11). Certainly there was a written agreement between the parties, but Odle never understood the extension to answer as blanket permission for Arrowsmith to entirely ignore his responsibility to move the case forward.

Good cause requires "contact with the opposing party and some form of excusable conduct or happening other than negligence or inattention." *White Eagle*, 2002 S.D. 68, ¶11, 647 N.W.2d 716, 720 (citation omitted). "This good cause provision allows the court to evaluate the time frame of inactivity *in light of the circumstances surrounding the case.*" *Annett*, 1996 S.D. 58, ¶ 22, 548 N.W.2d at 804 (emphasis added) (cleaned up).

Here, Arrowsmith argues that that the "indefinite extension agreement between the parties to wait for maximum recovery information" is "written evidence justifying delay." Arrowsmith Br. at 10. This position in untenable. How does an indefinite extension justify five years of complete inaction?

Even if Arrowsmith was still treating, why were medical records or bills not provided to Odle as they were received? Why was discovery never initiated? Why was no demand ever made? As outlined in his affidavit, Arrowsmith's counsel clearly had information about Arrowsmith's injuries, treatment, setbacks, damages, and even an administrative hearing. Yet no documents or correspondence was ever provided.

And if counsel was truly attempting to move the case forward, one would reasonably expect the affidavit to include specific details – dates, times, communications, or other concrete efforts – to show that progress was being made. Yet the affidavit, like the prior objections to the three notices of intent to dismiss, is completely devoid of the factual support necessary to establish actual diligence, let alone verifiable proof of any activity. *See LaPlante*, 2020 S.D. 13, ¶ 18, 941 N.W.2d at 229. That absence speaks volumes.

Moreover, Arrowsmith still fails to explain how the extension "precluded" him providing this information, evaluating his case, or otherwise advancing the case. *Annett*, 1996 S.D. 58, ¶27, 548 N.W.2d at 804.

Arrowsmith's reliance on the extension as justification for years of complete inactivity cannot reasonably constitute "good cause" to excuse such a delay. The circuit court correctly found that Arrowsmith failed to prosecute his case and offered no legally sufficient reason for the delay.

Considering all the facts and circumstances of this case, Arrowsmith is plainly "charge[able] with lack of due diligence in failing to proceed with reasonable promptitude." *Dakota Cheese*, 525 N.W.2d at 716 (citation omitted). The extension is not good cause to excuse Arrowsmith's prolonged inactivity.

B. ARROWSMITH'S CONDUCT IS EGREGIOUS, UNREASONABLE, AND UNEXPLAINED

As noted above, Arrowsmith never cited nor argued Rule 41(b) and that issue is thus waived. *Action Mech., Inc.*, 2002 S.D. 121, ¶ 50, 652 N.W.2d at 755. But even if Arrowsmith had raised it below, he did not, Arrowsmith has further failed to cite any legal authority supporting his claim that his conduct was "explainable, not egregious," as required by SDCL 15-26A-60(6). Arrowsmith Br. at 11. This issue is waived for this additional reason. *Annett*, 1996 S.D. 58, ¶ 22, 548 N.W.2d at 804.

More importantly, under this Court's guiding precedent: Arrowsmith's conduct squarely meets the definition of egregious delay. As stated in *White Eagle*, "here, there has been an omission to do something which the party might do and might reasonably be expected to do towards vindication or enforcement of his rights, which is the very definition of unreasonable, unexplained delay." 2002 S.D. 68, ¶ 4, 647 N.W.2d at 718; *see also Olson*, 2025 S.D. 34, ¶34.

As argued ad nauseum above, Arrowsmith took no meaningful steps to advance his case for years and has offered no explanation for

how the extension precluded him from taking any meaningful steps to move the case forward. In 2020, Arrowsmith stated that he needed to obtain medical records and bills to evaluate the case, yet to this day no medical records or bills have been provided, or perhaps even obtained. One would reasonably expect that step to have been taken long ago – especially after multiple inactivity warnings from the circuit court. Indeed, the circuit court pointedly observed:

> [I]f this is [the] third time around that the court has sent you notices, didn't you think it would have been important to then send out some discovery requests intervening, or like interrogatories, or take somebody's deposition because three times you've been notified by the court that somebody administratively is saying that there's no action in this case?

SR 90. *See Olson*, 2025 S.D. 34, ¶40 (identifying this as a factor to consider under Rule 41(b)).

Arrowsmith's contention that the agreed extension justified an indefinite postponement of prosecution is not only unsupported by law but also fundamentally unreasonable. Were this Court to accept that position, it would effectively allow a plaintiff to indefinitely stall litigation without consequence, defeating the very purpose of procedural rules designed to ensure timely resolution of cases. Such a result would be unfair to defendants and contrary to the interests of judicial efficiency.

In short, Arrowsmith's years-long inaction – without any recorded effort to move the case forward – constitutes precisely the kind of egregious delay the Court has condemned. This case is not like *Bradbury*, *London*, or even *Olson*, where there were substantial ongoing

efforts to move the case forward despite delays requested by the defense. Given these facts, the circuit court acted well within its discretion when it dismissed Arrowsmith's claim for failure to prosecute.

CONCLUSION

Based on all of the above, Odle respectfully requests that this Court affirm the circuit court's order granting Odle's motion to dismiss for failure to prosecute.

Dated this 31st day of July, 2025.

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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), I certify that this Appellee's Brief complies with the type volume limitation provided for in the South Dakota Codified Laws. This Brief contains 4,366 words and 22,508 characters ***with no spaces***. I have relied on the word and character count of our word processing system used to prepare this Brief.

IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

RYAN ARROWSMITH, Petitioner and Appellant, vs. DEVIN ODLE, Respondent and Appellee.	APPEAL NO. 31024 **CERTIFICATE OF SERVICE**

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 31024

RYAN ARROWSMITH,

Petitioner and Appellant,

VS.

DEVIN ODLE,

Respondent and Appellee.

APPEAL FROM THE FOURTH JUDICIAL CIRCUIT
MEADE COUNTY, SOUTH DAKOTA

THE HONORABLE JOHN H. FITZGERALD
CIRCUIT COURT JUDGE

REPLY BRIEF OF

APPELLANT RYAN ARROWSMITH

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Notice of Appeal filed on March 6, 2025

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REPLY ARGUMENT

1. In its recent opinion, *Olson v. Huron Regional Medical Center, Inc.*, 2025 S.D. 34, 24 N.W.2d 405, this Court distinguished dismissals for failure to prosecute under SDCL 15-11-11 and SDCL 15-6-41(b), providing a welcome clarification aligned with arguments presented in Appellant's initial brief. This Court emphasized that SDCL 15-11-11 functions purely as a clerical tool and that dismissals under this rule are without prejudice. To warrant dismissal under this statute, two elements must be met: (1) there must be inactivity for one year, and (2) no showing of "good cause." Here, such cause was established through the defendant's requested and agreed-upon indefinite extension to answer the complaint. Because only one of the two elements was satisfied, dismissal under SDCL 15-11-11 was a "a choice outside the range of permissible choices" and constituted an abuse of discretion by the trial court. The same outcome is warranted here.

2. Regarding SDCL 15-6-41(b), this Court reaffirmed an even higher threshold for the "extreme remedy" of dismissal, citing the strong preference to adjudicate cases based on the merits. For Rule 41(b) dismissal to be proper, the plaintiff's conduct must rise to the level of egregiousness. This Court cited *Jenco, Inc. v. United Fire Group*, 2003 S.D. 79, 666 N.W.2d 763, and *Eischen v. Wayne Township*, 2008 S.D. 2, 744 N.W.2d 788, as examples where such conduct justified dismissal under Rule 41(b). Like the plaintiff in *Olson*, the conduct of the appellant in the present case does not reach that level.

a. In *Jenco*, as this Court noted in *Olson*, egregiousness was established where it was clear that there were "no agreements between opposing counsel to justify the delay." 2025 S.D. 35, ¶ 35, 24 N.W.3d at 416. That is the opposite of the present situation, where it is undisputed that the parties expressly agreed to open-ended delay at the defendant's request so that the defendant could avoid retaining counsel to make an appearance and indefinitely postpone its statutory obligation to file an answer.

b. In *Eischen*, egregious conduct was demonstrated where "plaintiff's counsel 'repeatedly caused the postponement of hearings or failed to deliver responsive pleadings in a timely manner as agreed.'" *Olson*, 2025 S.D. 35, ¶ 35, 24 N.W.3d at 416 (quoting *Eischen*, 2008 S.D. 2, ¶ 20, 744 N.W.2d at 797). Here, in contrast, it was the *defendant* who failed to deliver the required responsive pleading and failed even to make an appearance until its motion for default judgment was filed.

3. That is where the Appellee brief primarily gets it wrong. It refers to the extension requested by Odle's insurer, (R. 17, 42-43), in a call initiated by Odle's insurer, (R. 17, 42-43), and granted by Arrowsmith as confirmed in a written email to Odle's insurer, (R. 17, 42-43), by which *Odle* was indefinitely excused from *his* obligation to file the required answer under the rules, as merely "a practical accommodation to *Arrowsmith*." (Brief at 8). It further suggests "the extension was granted as a courtesy, in large part, to Arrowsmith,"

(Brief at 11), where in reality it is undisputed that the extension was granted by Arrowsmith to Odle.

And regarding this Court's requirement that a defendant must meet the plaintiff's advancement of an action "step by step," the Appellee brief asserts, curiously, that "[t]here is and has been no step for Odle to take." (Brief at 9), notwithstanding the fundamental obligation codified in SDCL 15-6-12(a) that "[a] defendant shall serve the answer within thirty days after the service of the complaint upon defendant, except when otherwise provided by statute or rule," and concurrent rule that "[a]verments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading." SDCL 15-6-8(d).

4. The fallback argument outlined in the Appellee brief suggesting "waiver" is similarly unpersuasive. Arrowsmith's brief filed in opposition to Odle's motion fairly encompasses the arguments and asserted basis for reversal set forth in his opening brief. (R. 43-45). And Arrowsmith has cited the relevant authority supporting that reversal, including, now, the *Olson* decision, released shortly after his opening brief was filed.

5. While Odle's brief is brimming with questions for Arrowsmith, it neglects to respond to the fundamental query posed by this appeal. Why was no answer filed? Odle filed no answer then and it has no answer now. The record, however, reveals the solution: Odle's insurer had secured an agreement for the very indefinite delay that it later sought to turn to its advantage at the expense

of Arrowsmith's case and irrespective of the merits of his claims. That posture belies any assertion that the delay sought by the defendant's insurance company lacked "good cause" within the meaning of this Court's construction of that term or that Arrowsmith's conduct was egregious, unreasonable, or unexplained under the circumstances.

CONCLUSION

WHEREFORE, Appellant Ryan Arrowsmith respectfully requests that this Honorable Court *reverse* the judgement below and remand to allow the Plaintiff's claims to proceed on their merits.

Respectfully submitted this 2nd day of September, 2025.

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4), I 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 831 words, excluding the table of contents, table of cases, jurisdictional statement, and certificates of counsel. I have relied on the word and character count of the word-processing program to prepare this certificate.

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