IN THE

Supreme Court

of the

State of South Dakota

No. 30697

LORI A. OLSON, INDIVIDUALLY, AND
AS THE PERSONAL REPRESENTATIVE OF
THE ESTATE OF SCOTT D. OLSON,
A DECEASED PERSON

APPELLANT AND PLAINTIFF

VS.

HURON REGIONAL MEDICAL CENTER, INC.,
WILLIAM J. MINER, M.D., AND THOMAS MINER

APPELLEES AND DEFENDANTS

An appeal from the Circuit Court, Third Judicial Circuit
Beadle County, South Dakota

The Hon. Patrick T. Pardy
CIRCUIT COURT JUDGE

APPELLANT'S BRIEF

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Notice of Appeal filed on May 2, 2024

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JURISDICTIONAL STATEMENT

Plaintiff appeals the Judgment entered by the Hon. Patrick Pardy on April 16, 2024, for which notice of entry was given the same day. This Court has jurisdiction, per SDCL 15-26A-3(1). Plaintiff filed a notice of appeal on May 2, 2024.

REQUEST FOR ORAL ARGUMENT

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

INTRODUCTION

This Action arises from the death of Scott Olson due to the alleged negligence of Huron Regional Medical Center, Dr. William Miner, and his brother, Thomas Miner, a physician's assistant.

The primary parties to this action are the Plaintiff/Appellant (Lori Olson, individually and as personal representative of the estate of her late husband, Scott Olson); and the Defendants/Appellees who provided medical care to Mr. Olson (Huron Regional Medical Center, William Miner, M.D., and Thomas Miner)

The case was in its discovery phase when Defendants moved to dismiss for want of prosecution. The Circuit Court granted their motion.

STATEMENT OF THE CASE & FACTS

Scott Olson arrived at the emergency room of the Huron hospital on the morning of January 24, 2020. [R.8]. He was out of breath, dizzy, and had abdominal pain. *Id.* His heart rate and blood pressure were abnormally low and continued to decline. *Id.* He experienced excruciating pain in his stomach, which Scott described to the nurses as "unbearable." [R.13]. Approximately 75 minutes after his arrival, Scott coded and experienced cardiac arrest. [R.9]. He died about ninety minutes later. [R.10].

In the emergency room, Scott was treated by Thomas Miner, a physician's assistant, and, at some point, his brother, Dr. William Miner, who was Scott's primary care physician at a Huron clinic and held privileges at the hospital. [R.8-10].

During the weeks prior to his death, Scott had made several visits to Dr. Miner at his clinic. [R.7]. On multiple occasions, Scott's lab results at the clinic indicated kidney dysfunction including *hyperkalemia* (elevated potassium). *Id.* Upon arrival at the emergency department, Scott's lab results also indicated hyperkalemia. [R.9].

High potassium, if untreated, results in dangerously low blood pressure and heartrate, and risk of cardiac arrest. [R.9]. Scott did not receive any treatment for his hyperkalemia from Dr. Miner at the outpatient clinic. In the emergency room, Scott's hyperkalemia was not treated until *after* he went into cardiac arrest. [R.9].

And, even then, the initial treatment provided to Scott was "hesitant." [R.9]. Scott did not receive "the standard treatment for severe hyperkalemia" until over an hour after his cardiac arrest. [R.9]. Once a patient suffers cardiac arrest, their chance of survival is significantly decreased. [R.9]. Scott was pronounced dead at 1:56 pm. [R.10].

His wife Lori requested an autopsy. [R.10]. Dr. Miner refused, claiming the hospital would have to pay for it. *Id.* Lori offered to pay for the autopsy. *Id.* Dr. Miner still refused to authorize an autopsy. *Id.* Lori called the Beadle County Coroner as well as a hospital in Sioux Falls to pursue an autopsy but was advised they could not proceed without a doctor's order. *Id.* Dr. Miner continued to refuse the autopsy. *Id.*

From these facts, Scott's widow brought claims against Dr. Miner, Mr. Miner, and the hospital. These included, *inter alia:*

- a wrongful death claim on behalf of Scott's widow and son Nicholas (alleging his death arose from medical malpractice),
- a claim on behalf of Scott's estate (including for the excruciating pain and suffering Scott experienced in the hours preceding his preventable death, and his funeral expenses), and
- claims relating to the Defendants' concealment of their negligence and refusal to permit an autopsy.

The lawsuit began approximately 20 months after Scott's death. The procedural life-cycle of this case can be viewed in three, distinct phases:

- **Phase 1** (September 21, 2021—February 10, 2022): a five-month period of initial pleadings, settlement efforts, and initial discovery.
- **Phase 2** (February 10, 2022—August 22, 2022): a six-month period during which the parties focused on Dr. Miner's first motion to dismiss (alleging defective service of process).
- **Phase 3** (August 22, 2022—January 8, 2022): a seventeen-month period of discovery, commencing after the Circuit Court's denial of Dr. Miner's service of process motion, and lasting up to the filing of Dr. Miner's motion to dismiss for failure to prosecute.[1]

Phase 1: Initial Pleadings & Attempted Settlement. The lawsuit was attempted to be commenced by service of a summons upon the hospital, Mr. Miner, and Dr. Miner on September 21, 2021. This was approximately 20 months after Scott's death, and, therefore 4 months *prior* to the 2-year medical malpractice statute of repose.

[1] For three months after Dr. Miner's failure-to-prosecute motion was filed, the parties engaged in some additional discovery; discussed and moved for a scheduling order; attended the motions hearing; and ultimately received the Court's dismissal decision on April 15, 2024.

The Beadle County sheriff returned a service document confirming personal service was made upon Thomas Miner and the Hospital on September 21, 2021. [R.17-18.] There were no issues with that service.

The sheriff of Pennington County issued a similar return of service, also dated September 21, 2021, stating that a deputy had served "a Summons; Complaint; [and] Demand Letter" upon "William J. Miner, M.D." at a Rapid City address. [R.19].

The Pennington County return of service was incorrect, however. As would later be revealed, the Deputy had not personally served Dr. Miner, but instead given the documents to Marlin Klingspor, a paralegal at the Rapid City hospital where Dr. Miner now worked. [R.48]. The paralegal later handed the documents to Dr. Miner after informing him what they were. [R.219].

Upon receipt of the Summons, Dr. Miner retained counsel, who served a notice of his appearance on October 5, 2021, and then served his separate Answer on October 21, 2021. [R.23, R.25]. The Answer did not contain any specific allegation that the Return of Service was erroneous. Nor did Dr. Miner's Answer claim that he had not been personally served. More generally, it listed a series of affirmative defenses, conclusory in nature with no facts, including the assertion that "Plaintiff's claims are barred by insufficiency of process and/or insufficient service of process." [R.26].

Because of the Demand Letter that had been served with the Summons and Complaint, the Plaintiff delayed filing the initial pleadings while engaging the Defendants in settlement efforts. [R.568; R.565]. Those efforts were

unsuccessful. The Summonses and Complaint were filed on December 7, 2021, at which time a civil file was opened with the Clerk's office. Dr. Miner filed his previously-served Answer two weeks later. [R.25]. The Hospital and Mr. Miner filed and served their separate Answer on December 27, 2021. [R.31].

Dr. Miner and his attorneys did not promptly alert the Pennington County Sheriff nor the Plaintiff that the Deputy's return of service was erroneous. Other than the general statement in his Answer, his only other attempt to alert anyone about the issue was his response to a discovery response on January 14, 2022, with the assertion that "Dr. Miner was not served with process." [R.165]. However, this single sentence was given in response to an Interrogatory that directed Dr. Miner to comprehensively "state the factual basis of and describe each affirmative defense, the evidence which will be offered at trial concerning any alleged affirmative defense, including the names of any witnesses who will testify in support thereof, and the descriptions of any exhibits which will be offered to establish each affirmative defense." [R.164]. Dr. Miner provided no detail as to any actual defect, nor any witnesses, nor any facts. This conclusory interrogatory answer was served on January 14, 2022, ten days prior to the two-year statute of repose.

Phase 2: Dr. Miner's first motion to dismiss. On February 10, 2022, which was now two years plus seventeen days after Scott's death, Dr. Miner filed a motion to dismiss, on the basis of defective service. In his

motion papers, Dr. Miner now alerted counsel and the Court for the first time that the Sheriff's Return was incorrect, specifically alleging that the Deputy "dropped the Summons off with a paralegal at the office of General Counsel for Monument Health, an entity that does not represent Dr. Miner and was not affiliated with Dr. Miner at the time the torts allegedly occurred." [R.47]. Unlike his interrogatory answer a month earlier, Dr. Miner now submitted the names of witnesses and the substance of their testimony, as well as a complete factual explanation about the service issue. His motion sought dismissal of all claims against Dr. Miner "because Plaintiff Olson has not commenced an action against Dr. Miner in accordance with SDCL Chapter 15-6...." [R.48].

Dr. Miner submitted a short affidavit with his motion, claiming that there had not been "delivery of a Summons to me personally". [R.54]. Dr. Miner also submitted an affidavit from the Rapid City hospital's assistant general counsel in which she claims to have contacted Dr. Miner and "informed him that [the Summons, Complaint, and Demand Letter] were available for him *to pick up at my office.*" [R.57] (emphasis added). And, Dr. Miner submitted an even shorter affidavit from the Paralegal, who recounts only the circumstances of her *receipt* of the Summons and Complaint, but which omits any discussion of her subsequent interaction in which she did in fact personally hand the Summons to Dr. Miner. [R.58]. The Paralegal and Dr. Miner conceded in their testimony that the Paralegal had indeed facilitated the delivery of the Summons to Dr. Miner personally, which was in

contradiction of paragraph 5 of Dr. Miner's affidavit. [R.219-220] (Klingspor Deposition 14:12-14; 17:9-12).

Upon receipt of Dr. Miner's motion to dismiss, Plaintiff immediately contacted the Pennington County Sheriff and sent another set of documents for service. [R.65]. The Deputy received this Summons on February 14, 2022, and served Dr. Miner personally at his residence on February 25, 2022. [R.65]. In response to this second service attempt, Dr. Miner filed another Answer, which incorporated his original Answer, but now alleged that "the claims against him are barred by the applicable statute of repose." [R.67, R.69]. Discovery proceeded on the service of process question.

At the outset of this service-of-process discovery, Dr. Miner's counsel requested that any discovery be limited to the question of service, and that all other discovery be paused. [R.566]. Dr. Miner's counsel expressly asked for other discovery to be paused because "if my motion is granted, there is no need for me and my client to go through the time and expense of discovery on matters that don't involve Dr. Miner." [R.566]. Plaintiff's counsel pushed back on this, and no agreement was reached as to pausing other discovery; but, as a practical matter, substantive discovery was put on hold during the next few months, until after the Circuit Court's decision on Dr. Miner's motion to dismiss. [R.566].[2]

[2] The notices of deposition and a stipulation did memorialize that Dr. Miner's deposition would be "limited in scope to the matters related to the service of the Summons." [R.71, R.74, R.77].

Marlin Klingspor, the paralegal, testified that she handed the Summons and other documents to Dr. Miner. Ms. Klingspor also testified in her deposition that she meets the qualifications of an "elector" as that term is used in Rule 4(c), and as that term is defined by this Court. *See,* SDCL 15-6-4(c) ("The summons may be served by the sheriff...or by any other person not a party to the action who at the time of making such service is an elector of any state."); *Gateway 2000 v. Limoges,* 1996 S.D. 81, ¶18, n.3 (explaining that "[a]n 'elector' is 'a person qualified to register as a voter, whether or not such person is registered'") (quoting SDCL 12-1-3(4). *See,* [R.219-220; Klingspor Deposition, 16:1-25 (residency, age, and citizenship); 17:2-12 (eligible to vote and not a party to this suit)].

Dr. Miner agreed in his deposition that he was personally handed the Summons by Ms. Klingspor in September 2021. [R.240]. Dr. Miner conceded that he was not impeded or prejudiced in defending this lawsuit. [R.239-240]. In between the initial date of the Deputy's service (9/21/2021) and the filing of Dr. Miner's motion (2/10/2022), Dr. Miner continued to fully engage with the litigation process. This included filing the various pleadings discussed above, as well as responding to two sets of Plaintiff's written discovery on January 14, 2022, and even serving his own written discovery. [R.158; R.169; R.178; R.189].

Dr. Miner agreed he was able to tender the claim to his malpractice carrier. [R.177; 239]. Dr. Miner also claims that he was aware from the outset of the lawsuit that the Sheriff's Return was not correct, but, that he did

nothing to try and correct the return, and, failed to alert the Deputy Sheriff or Plaintiff that the Return was incorrect. [R.239].

The Deputy Sheriff has no recollection of the first service event in September 2021. He explained that he and the other civil deputies in Pennington County regularly deliver service documents to the hospital's legal department as a courtesy to the hospital and doctors "so we don't interfere with the doctors, the hospital staff, and I don't wander around the hospital looking for doctors." [R.208] His understanding is that this practice is agreeable to the doctors and the hospital. *Id.* This is the only complaint he has ever received about his service duties. [R.207]. He recalls re-serving the Summons in February 2022 upon Dr. Miner at his home, who answered the door in his pajamas. [R.208].

From those facts, Lori resisted Dr. Miner's motion to dismiss on three theories: (i) *first*, that the undisputed facts show that Ms. Klingspor (the paralegal) is an unaffiliated elector who directly handed the summons to Dr. Miner on September 22, 2021, and effectuated valid service under Rule 4(c); or, (ii) *second*, that Dr. Miner waived his right to challenge service of process defects; or (iii) *third*, that Dr. Miner is either estopped from asserting a service of process defense, or, that the service deadline should be equitably tolled. [R.119]. The Circuit Court adopted most of this reasoning and denied Dr. Miner's service-of-process motion. [R.272-273].[3]

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3 Dr. Miner has filed a notice of review of that decision. See, #30697.

Phase 3: Discovery. The Circuit Court's decision was issued on August 22, 2022. Thereafter, the parties promptly resumed substantive discovery. Seventeen months later, Dr. Miner filed another motion to dismiss (dated January 8, 2024), this time alleging that Lori had failed to prosecute her case diligently under SDCL 15-11-11 and Rule 41(b).

As a result of the motion, Lori's counsel (and Defendants' counsel) filed affidavits which recounted the discovery activities that had transpired during the ensuing 17 months between the Circuit Court's denial of the service-of-process motion and the filing of the failure-to-prosecute motion.

There is no dispute that these discovery efforts included:

- Plaintiff completing and submitting extensive responses and documents in response to written discovery (September 2022); [R.567].
- all parties' engaging in extended and repeated efforts to assemble a complete set of Scott Olson's medical and pharmacy records, including from third-parties, a process that took at least nine or ten months and various releases and approvals (September 2022 through May 2023, or later);[4] [R.567].

[4] Defendants' pursuit of their own sets of medical records directly from third-party providers is a process which they describe in all cases as an essential step prior to depositions, as Mr. Haigh explained in his affidavit, "so that all parties are working from the same set of records," and to obviate the possibility of "oversight or misunderstandings by the providing facility." [R.568]. In fact, Defendant HRMC's counsel explained

- an informal discussion between counsel for Lori and counsel for the Hospital about causation theories (April 2023)
- plaintiff's efforts (over a six-month period) to locate additional expert witnesses and obtain draft reports from them (from April 2023 to October 2023); and
- At some point during after April 2023, all of the Defendants succeeded in obtaining a "complete" set of Scott Olson's medical records but failed to produce them to Plaintiff's counsel, despite a long-outstanding discovery request originally propounded upon Defendants in December 2021. Plaintiff's counsel, meanwhile, was operating under the assumption that the record-gathering process was taking an inordinate amount of time, and thus "waited for Defendants to provide copies of the medical records...not realizing for several months that they were holding medical records but failing to provide them." [R.568-569].[5]

After Dr. Miner filed his motion to dismiss for failure to prosecute, Lori's counsel pointed out that she was still waiting for Defendants to provide

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that it is a step that is *required* by the malpractice carriers who hire them. [R.561].

[5] Plaintiff's counsel believed that the record-gathering process was still underway and not yet completed as of late April 2023. [R.567]. Dr. Miner's lawyer advised counsel for Plaintiff on January 6, 2023, that "record collection is ongoing." [R.549]. And, the Record confirms that Dr. Miner's lawyer continued to gather medical records until at least late April 2023.

the documents. [R.398-399]. Defendants then provided the medical records in February 2024. [R.321].

As part of her response to the failure-to-prosecute motion, Lori invited opposing counsel for input on a scheduling order, and then motioned the Court to enter a scheduling order. [R.409]. She proposed trial dates of March 2025, *i.e.*, approximately a year from then. [R.409]. In response, Defendants agreed with the proposal of a scheduling order, but suggested that a trial date of May 2025 was more realistic, *i.e.*, within 14 months, rather than 12 months. [R.412]. Defendants agreed that an August 2024 expert disclosure deadline for Plaintiff was reasonable, and they anticipated they could provide their experts within 4 months after that. [R.412]. None of the Defendants argued that this proposed calendaring would cause any prejudice to them.

This seventeen-month period between August 2022 and January 2024 was also marked by a three-month period of relative dormancy. After receiving draft reports from Lori's additional expert witnesses in October 2023, Lori's counsel delayed any next steps (such as setting depositions of witnesses) until after the New Year, and, thus did not move the case forward between October 2023 and the date that Dr. Miner filed his motion to dismiss in January 2024. [R.440]. In an affidavit, Lori's counsel recounted details of his workload and schedule during those three months, which he asserted would have precluded active preparation and prosecution of depositions. *Id.* But, the affidavit conceded that his workload would not have prevented him from initiating informal communications with opposing counsel to outline a

plan for after the New Year. [R.440-442]. Nonetheless, Lori's counsel did not communicate about those plans to opposing counsel, nor about anything else until after Dr. Miner filed his motion. The case was dormant in Plaintiff's office for those three months.

In the wake of this period of dormancy, on January 8, 2024, Dr. Miner filed his failure-to-prosecute motion. [R274]. The other Defendants joined it. [R.289]. The motion alleged that the case had been inactive for more than 12 months in violation of SDCL 15-11-11, or, that Lori was failing to prosecute it under Rule 41(b). In support, Dr. Miner's attorney submitted an affidavit which (incorrectly) claimed that "Plaintiff provided a signed medical authorization on January 6, 2023. *No other activity has occurred in this file since January 6, 2023.*" [R.282] (emphasis added).

In response, Lori's counsel submitted affidavits documenting the course of the discovery process and identifying several items of "activity" that had been occurring during the previous 12 months, as well as explaining the circumstances that would indicate the case was not "inactive." [R.316; R.558].[6] Lori also asked the Circuit Court to consider lesser sanctions than dismissal. [R.428; R.555].

After a hearing, the Circuit Court issued a Memorandum Opinion granting the motion to dismiss. [R.417]. Lori filed a motion to reconsider,

[6] Lori's counsel filed another affidavit [R.436] which contained factual errors, so it was withdrawn and replaced it with a corrected version. [R.558]. The Affidavit at [R.436] should be disregarded.

submitted an additional affidavit, and offered a reply. [R.428; R.558, R.548]. The Circuit Court considered and rejected the request for reconsideration. [R.570], and then entered an order granting the motion to dismiss [R.576] and a judgment of dismissal. [R.578].

From this dismissal, Lori appeals and assigns three errors.

STATEMENT OF THE ISSUES

I. Did the Circuit Court err by dismissing the case under SDCL 15-11-11?

Yes, the Circuit Court erred. The circuit court used an incorrect rule in finding that no activity occurred, and that no good cause was shown by Plaintiff. Under the correct rule and application, Plaintiff has proven both activity and good cause meaning there was no basis for dismissal under the statute.

- SDCL 15-11-11
- *Annett v. American Honda Motor Co., Inc.*, 1996 S.D. 58
- *White Eagle v. City of Fort Pierre*, 2002 S.D. 68
- *LaPlante v. GGNSC Madison, South Dakota, LLC*, 2020 S.D. 13

II. Did the Circuit Court err by dismissing the case under SDCL 15-6-41(b)?

Yes, the Circuit Court erred. Dismissal under 41(b) is only proper when the plaintiff's conduct is egregious. Plaintiff's conduct does not reach that level, and the Circuit Court failed to find egregiousness. The Record also fails to demonstrate unexplained and unreasonable delays.

- SDCL 15-6-42(b)
- *Eischen v. Wayne Tp.*, 2008 SD 2
- *Jenco, Inc. v. United Fire Group*, 2003 S.D. 79

III. Did the Circuit Court err by failing to consider lesser sanctions than dismissal?

Yes, the Circuit Court erred. Every federal circuit and our neighboring states consider lesser sanctions prior to dismissal under Rule 41(b). In addition, all federal circuits and surrounding states employ a multifactor test that would better guide Circuit Courts in evaluating Rule 41(b) motions. This Court should adopt such a test.

- *Eischen*, 2008 SD 2
- *Hunt v. City of Minneapolis, Minn.*, 203 F.3d 524, 527 (8th Cir. 2000)
- Sepanian, A., "Cleaning House With Rule 41(b): An Empirical Study of the Multi-Factor Tests for Involuntary Dismissals," 44 SOUTHWESTERN L. REV. 411, 441-42 (2014)

STANDARD OF REVIEW

There are three standards of review implicated by a Circuit Court's dismissal for failure to prosecute: (i) its findings of fact are reviewed for clear error; (ii) its conclusions of law are reviewed *de novo;* and (iii) the "ultimate decision to dismiss a claim for failure to prosecute [is reviewed under] the abuse of discretion standard.'" *LaPlante*, 2020 S.D. 13, ¶ 11 (citing and quoting *Eischen*, 2008 S.D. 2, ¶ 10).

For this appeal, it is helpful to expand upon the definitions of *de novo* review and the 'abuse of discretion' standard.

i. De novo review

"Questions of statutory interpretation and application are reviewed under the *de novo* standard of review with no deference to the circuit court's decision." *Argus Leader v. Hagen*, 2007 S.D. 96, ¶ 7 (citations omitted).

"Though federal interpretations of federal civil and appellate procedural rules are not binding on us in an interpretation of like rules in our State's courts, it is appropriate to 'turn to the federal court decisions for guidance in their application and interpretation.'" *Sander v. Geib, Elston, Frost Professional Ass'n*, 506 N.W.2d 107, 122 (S.D. 1993) (citing *Wilson v. Great N. Ry. Co.*, 157 N.W.2d 19, 21 (S.D. 1968); *Brasel v. Myers*, 229 N.W.2d 569, 570 (S.D.1975).

ii. Abuse of Discretion

An abuse of discretion "is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable." *State v. Delehoy*, 2019 S.D. 30, ¶ 22 (quoting, *inter alia, Thurman v. CUNA Mut. In. Soc'y*, 2013 S.D. 63, ¶ 11). "[N]ot all decisions this Court reviews for an abuse of discretion are of the same nature." *State v. Abraham-Medved*, 2024 S.D. 14, ¶ 13.

A Circuit Court abuses its discretion in any of the following ways: by making errors of law; by making errors of procedure[7]; or by making errors in judgment and weighing the evidence.

Errors of Law. "By definition, a decision based on an error of law is an abuse of discretion." *Credit Collection Services, Inc. v. Pesicka*, 2006 S.D. 81, ¶ 4. *See, also, Thurman*, 2013 S.D. 63, ¶ 11 ("when it makes an error of

[7] Although not pertinent here, it is an abuse of discretion when a Circuit Court fails to follow the proper procedure for making a discretionary ruling.

law"); *State v. Jones*, 2002 S.D. 153, ¶ 23 (Gilbertson, C.J., concurring) ("failure to follow the proper law is *per se* an abuse of discretion").

Errors in applying or weighing factors and evidence. When a ruling is "dependent on the evidence in a particular record," a Circuit Court abuses its discretion by making a decision "to an end or purpose not justified by, and clearly against reason and evidence," *Abraham-Medved*, 2024 S.D. 14, ¶ 13 (quoting *State v. Reeves*, 2021 S.D. 64, ¶ 11).[8] For example, this occurs when a circuit court "fails to consider the relevant...factors...or clearly errs in weighing the...factors" that should guide its decision. *Rothluebbers v. Obee*, 2003 S.D. 95, ¶ 5 (abuse of discretion in *forum non conveniens* analysis).[9] *See, also, Dunham v. Sabers*, 2022 S.D. 65, ¶ 51 (abuse of discretion in failing to apply factors in marital property analysis). This also occurs when the review of pertinent factors "is scant or incomplete." *Beaulieu v. Birdsbill*, 2012 S.D. 45, ¶ 8 (abuse of discretion with deficient child custody analysis); *Weisser v. Jackson Tp*, 2009 S.D. 43, ¶ 4 (abuse of discretion by "mere recitation" of statutory language, rather than weighing factors for Rule 54(b) certification). This also occurs when the circuit court "fails to consider a

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[8] This particular formulation of the test is appropriate when "reviewing a ruling dependent on the evidence in a particular record." *State v. Abraham-Medved*, 2024 S.D. 14, ¶ 13.

[9] *Accord, Fletcher-Merrit v. NorAm Energy Corp.*, 250 F.3d 1174, 1179 (8th Cir. 2001) ("An abuse of discretion occurs when the district court 'commits a clear error of judgment' in weighing the relevant factors.")

relevant factor that should have received significant weight [or] gives significant weight to an improper or irrelevant factor." *U.S. v. Struzik*, 572 F.2d 484, 488 (8th Cir. 2009) (abuse of discretion in sentencing) (quotation omitted).

SUMMARY OF ARGUMENT

1.

SDCL 15-11-11 is a clerical tool to clear a circuit court's docket of inactive cases. The first prong of inquiry searches out any *activity*; the second prong looks for *good cause* if no activity is shown. The Circuit Court did not follow the proper standards to apply these two prongs, and, mistakenly added a communication requirement. The Record demonstrates activity in the twelve months prior to Dr. Miner's motion, and, also provides good cause for any alleged delays.

2.

Dismissal under 15-6-41(b) requires egregious conduct or failures by the plaintiff. The Circuit Court did not find Lori's litigation conduct or failures to be egregious. Nor does the conduct here match the egregious conduct from prior cases. In addition, dismissal is appropriate only when there are unreasonable and unexplained delays in the plaintiff's prosecution of her case. This delays in this case are neither unreasonable nor unexplained.

3.

The Rule 41(b) analysis in every federal circuit and in our surrounding states involves the application of factors to the circumstances at hand, which includes the duty of the trial court to consider lesser sanctions. This Court should adopt the factors proposed by Justice Koenenkamp in 2008, and, expressly instruct Circuit Courts to entertain less drastic sanctions prior to dismissal for failure to prosecute.

ARGUMENT

SDCL 15-6-41(b) and 15-11-11 each permit dismissal for a plaintiff's failure to prosecute a case. Even though they serve distinct purposes, much of the earlier case law of this Court tended to merge them, resulting in muddled doctrines.[10] Circuit Courts (and this Court) should be careful to address each of them separately to avoid further confusion.

"Because the purposes behind the rules are different, their uses should not be blurred." *Id.* In spite of the blurring in prior cases, there are multiple occasions where this Court has definitively established the purpose of each rule.

In 2007, a unanimous panel of this Court held that SDCL 15-11-11 "is a Supreme Court rule, not a legislative rule. The rule was meant to operate as a

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[10] *See, Eischen*, 2008 S.D. 2, ¶¶ 38-40, n.13, and n.14 (Konenkamp, J., dissenting) (offering a detailed chronicle of this Court's repeated "mistake…in failing to differentiate between the two types of dismissals" which leaves "no clear guide on how and when each should be used")

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 v. Burghduff*, 2007 S.D. 7, ¶ 16.[11] In fact, SDCL 15-11-11 has never been used to effectuate substantive (permanent) dismissals except "when combined with a [Rule 41(b)] motion." *Id.* (citing *Jenco*, 2003 S.D. 79, ¶¶ 9, 19; *Devitt v. Hayes*, 1996 S.D. 71, ¶¶ 4, 17). In turn, Rule 41(b) follows a different test and serves a different purpose.

That same unanimous panel of this Court observed in 2007 that, "[i]n contrast, [Rule 41(b)] does not specifically state a period of time, but requires plaintiff's conduct to be egregious before dismissal." *Rotenberger v. Burghduff*, 2007 S.D. 7, n.6 (citing *Swenson v. Sanborn County Farmers Union Oil Co.*, 1999 S.D. 61, ¶ 21 (citing *Devitt*, 1996 S.D. 71, ¶ 16). Rule 41(b) is likewise "a court-made rule" but which "serves as a tool for sanctioning a party for delay or disobedience in the processing of a case." *Eischen*, 2008 S.D. 2, ¶ 39 (Konenkamp, J., dissenting) (citing *Rotenberger*, 2007 S.D. 7, ¶ 17).[12]

In short, one is a clerical tool, the other is intended as a sanction for egregious behavior. "There may be some overlap in these two rules, of course, but the crucial distinction between § 15–11–11, as a court management tool,

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[11] *Accord, LaPlante*, 2020 S.D. 13, ¶ 17 (favorably quoting the "clerical tool" language from *Rotenberger*).

[12] In this 3-2 decision, Justice Konenkamp's dissent was joined by Justice Meierhenry, but the dissent was agreed with "in spirit" by Justice Sabers' concurrence.

and § 15–6–41(b), as a penalty for delay or disobedience, should be preserved." *Eischen*, 2008 S.D. 2, ¶ 40 (Konenkamp, J., dissenting).

One issue that has never been resolved by this Court, however, is the role of lesser sanctions, other than outright dismissal. All federal circuits and most of our surrounding states employ such sanctions, as well as employ a factor test. Several panels of this Court have commented favorably upon the utility of lesser sanctions. Section 3 of this brief invites this Court to adopt them and thereby give Circuit Courts the toolkit they need to better manage their dockets, including slow cases. Section 3 also proposes that this Court adopt a factor-test, similar to that used in all federal circuits and surrounding states.

1. The circuit court erred by misapplying SDCL 15-11-11.

(a) Dismissal requires failing both prongs of SDCL 15-11-11, but the Circuit Court erred by ignoring and conflating the prongs

The clerical inquiry under SDCL 15-11-11 involves two prongs: 'inactivity', and 'good cause.' "Before a circuit court may exercise its discretion and dismiss a case for want of prosecution there must be (a) no activity for one year; *and*, (b) no showing of good cause which excuses the inactivity." *Annett v. Am. Honda Motor Co.*, 1996 S.D. 58, ¶ 14 (citing SDCL 15-11-11) (emphasis added). The first prong examines the record for "activity," and, if no activity is found, the second prong searches for 'good cause' that

would excuse the inactivity.[13] *The second prong is unnecessary if 'activity' is shown in the record.* (Or, in other words, there would be no reason to show 'good cause' for an active case, no matter the pace at which is progressing.)

The Circuit Court did not apply these two prongs. In fact, the Memorandum Opinion does not recite those two prongs, and instead described "two main factors" for a motion under SDCL 15-11-11, namely, a twelve-month absence of communication with the opposing party, and, good cause for the inactivity. [R.420]. It is always advisable for lawyers to communicate, but there is no such communication requirement for SDCL 15-11-11. In the rest of the Circuit Court's analysis, it mistakenly conflates "good cause" with "inactivity."

Given the "blurring" of the case law that Justice Konenenkamp cautioned about, it is not surprising that lawyers and judges have trouble correctly applying this doctrine. What follows here is an attempt to do so.

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[13] First Prong: "The court may dismiss any civil case for want of prosecution upon written notice to counsel of record where the record reflects that there has been *no activity for one year*...." SDCL 15-11-11. Second Prong: "*unless good cause is shown to the contrary.*" *Id.*

(b)The Record demonstrates "activity that moves the case forward" during the 12 months prior to Dr. Miner's motion.

"Activity" is interpreted broadly by this Court.[14] "In considering SDCL 15-11-11 in civil cases, we have not confined the term 'activity' to court filings or a particular communication between the parties. Instead, we have placed an affirmative duty on a plaintiff to engage in *activity that moves the case forward*. Consistent with the language of SDCL 15-11-11, we have always required that the activity must be shown on record before a dismissal is entered. Our focus has always been on whether *proof* of activity was presented." *LaPlante*, 2020 S.D. 13, ¶ 18 (cleaned up; emphasis in original).

"The activity alleged must be verifiable in the record before us, regardless of whether the activity was in the form of formal motions or informal discovery." *LaPlante*, 2020 S.D. 13, ¶ 18 (quoting *White Eagle*, 2002 S.D. 68, ¶ 8) (internal citations omitted, cleaned up). Even if the record of case "activity" is not documented in the Clerk's file prior to a motion under SDCL 15-11-11, it is sufficient for the Plaintiff to make a record of the activity in response to a motion. *Id.*

In a medical malpractice lawsuit, the retention of expert witnesses and obtaining opinions from them is the *sine qua non* of "activity that moves the

[14] In prior cases, this Court has suggested all of the following are forms of "activity" under SDCL 15-11-11: informal discovery, settlement discussions, freedom of information act requests, and participation in a vocational rehab program.

case forward." Unlike most other cases, evidence of liability in medical malpractice cases "must be established by the testimony of medical experts." *Magbuhat v. Kovarik*, 382 N.W.2d 43, 46 (S.D. 1986). This requirement is so critical that this Court has found it to be an abuse of discretion *not* to extend the litigation process to allow the plaintiff to conduct discovery with additional, necessary experts. *See, Schrader v. Tjarks*, 522 N.W.2d 205, 210-211 (S.D. 1994).

Here, there is no dispute that Lori's counsel was engaged in locating and procuring additional expert witnesses between April 2023 and October 2023, which was squarely within the 12 months preceding Dr. Miner's motion. These additional experts were sought out by Plaintiff's counsel after an informal discovery discussion in April 2023 between Lori's attorney and the Hospital's attorney. [R.322]. In that call, the Hospital's attorney offered observations and theories about causation, which prompted Lori's counsel to reflect and discuss the need for additional experts on subject matters different from and in addition to those retained prior to suit. [R.322]. This included a forensic pathologist. [R.323].

The Circuit Court disregarded this activity by mistakenly invoking *Dakota Cheese, Inc. v. Taylor*, 525 N.W.2d 713, 716 (S.D. 1995) for the proposition that working with experts is not 'activity.' Instead, this Court concluded in *Dakota Cheese* that plaintiff's work with experts was insufficient to show that "the delay" in that case (*i.e.*, a multi-year delay in filing the

Complaint after hip-pocket service) was "excusable." The "excusability" of a delay relates to the *second* prong, not the activity prong.

In all cases, this Court construes "activity" broadly. Among all of its prior opinions, there isn't one which suggests that a plaintiff's active pursuit of expert opinions is not 'activity.' "Informal discovery" has expressly been recognized as 'activity,' as long as it is documented in the record. *White Eagle*, 2002 S.D. 68, ¶ 8. Obtaining critical expert witness opinions is a specific and necessary type of informal discovery. This was sufficient to satisfy the 'activity' prong.

Meanwhile, *other* activity was taking place on Defendants' side that would permit them to respond to Lori's outstanding discovery requests,[15] namely, the Defendants' own efforts to gather their own "complete" set of Scott's medical records. It is not clear from the Record when Dr. Miner finally assembled a "complete" set of Scott's medical records, but the process was still underway in late April 2023.[16]

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[15] Lori served Request for Production #24 on all of the Defendants seeking "a complete copy with Bates markings of all medical records your counsel receives from medical providers pursuant to Plaintiff's signed releases." [R.317].

[16] Dr. Miner's own lawyer's records demonstrate that he was actively engaged in gathering records during the 12 months preceding his motion, including on January 13th, February 10th, February 13th, March 31st, and April 25th of 2023. [R.320-321]. Plaintiffs' counsel was communicating with all Defendants to facilitate their record-gathering, including in January, February, and March of 2023. [R.318-319].

Dr. Miner did not provide any of the records he had gathered until *after* filing this motion. Thus, during all of 2023, Lori's original discovery requests seeking copies of any such medical record discovery remained unanswered by Dr. Miner. By definition, Dr. Miner was failing in his basic duty "to meet the Plaintiff step-by-step." *Holmoe v. Reuss,* 403 N.W.2d 30, 31 (S.D. 1987). Plaintiff's counsel mistakenly waited for voluntary production, assuming the process was not yet complete.

The Circuit Court was dismissive of Dr. Miner's role in delaying the discovery process, by pointing out that "the documents in dispute were the Plaintiff's *own* medical records from nonparty health care providers, which the Plaintiff already had access to by requesting the same." [R.422]. The Circuit Court overlooks that these Defendants insist upon gathering their *own copies* of a plaintiff's records as a matter of course in *every* case (to avoid error or omission), and, that arriving at "an agreed upon, common set of medical records" was an essential step prior to depositions, "so that all of the parties are working from the same set of records during the course of the depositions in the case." [R.348].

Given the Defendants' approach to medical records, the only way forward was to wait for Defendants to finish their gathering, so that the Defendants could then disclose them, and so that all sets can be compared for completeness. This approach meant that the discovery path led directly through Dr. Miner's counsel's office. Lori's lawyer actively engaged in assisting this process during the twelve months prior to Dr. Miner's motion.

Moreover, the Plaintiff had propounded discovery requests seeking these documents, and was awaiting Dr. Miner's response and production. In light of the circumstances, Plaintiff's efforts in assisting the record-gathering process while awaiting Dr. Miner's mandatory production qualifies as "activity" by the plaintiff to move the case forward.

(c)The Circuit Court erred by applying a non-existent "contact with the opposing party" standard to the activity prong.

Although "contact with the opposing party" is always advisable, it has never been required by this Court to prove "activity." Instead, in both of the prior opinions where such communications were discussed, it was regarding the "good cause" prong, rather than the activity prong. *See, Holmoe,* SD 1987 and, *Dakota Cheese, Inc,* 525 N.W.2d at 716. Accordingly, there has never been a rule in South Dakota that contact with opposing counsel must have occurred within the year to avoid dismissal under SDCL 15-11-11.

In fact, this Court has expressly stated that there is *not* a communication requirement to establish activity. In *LaPlante,* the circuit court made an almost identical mistake to the one made here. Specifically, "the circuit court erroneously focused on the *lack of communication* by LaPlante with Employer/Insurer in determining whether any activity occurred within one year." *LaPlante,* 2020 S.D. 13, ¶24. In reversing that dismissal, this Court noted, "[o]nce LaPlante established she was engaged in a vocational rehabilitation program, *her lack of communication was not relevant to the*

threshold question of whether she was engaged in 'activity.'" Id (emphasis added).[17]

Yet, in this case the Circuit Court again attempted to create a communication rule. In lieu of the "activity" prong, it inserted a communications requirement, mistakenly holding that:

> Under South Dakota law, there are two main factors that must be considered when deciding a motion to dismiss for failure to prosecute:
>
> (1) whether the lack of communication between Plaintiff and Defendant exceeds twelve months; and
> (2) whether there is good cause for the inactivity.

[R.420; Memorandum Decision, 4]. This is not the law. Applying the wrong law was, *per se,* an abuse of the Circuit Court's discretion. *Thurman*, 2013 S.D. 63, ¶ 11.

When SDCL 15-11-11 is properly applied, the initial inquiry relates to the first prong, *i.e.,* a search for 'activity' in the preceding 12 months. Here, the Record contained such activity.

The Circuit Court need not evaluate the activity for its intensity or frequency. Nor should a Circuit Court compare the level of activity to prior cases. Instead, the Circuit Court's clerical inquiry can end when it finds activity. (The level, intensity, and frequency of activity is the province of Rule 41(b) analysis.)

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[17] *LaPlante* extensively analyzed SDCL 15-11-11 to interpret ARSD 47:03:01:09 which "closely parallels the language of SDCL 15-11-11." *Id.*, ¶16.

Because the 'activity' prong is satisfied, there would be no reason to examine the 'good cause' prong that excuses inactivity. However, in the alternative, we offer a brief argument that Lori could meet the 'good cause' prong even if the foregoing was not 'activity.'

(d)In the alternative, the Circuit Court erred by failing to find "good cause" for inactivity

There are at least four factors which would favor a finding of good cause for purposes of the clerical inquiry under SDCL 15-11-11. Again, the purpose of a 'good cause' inquiry under SDCL 15-11-11 is simply to establish an explanation that would obviate a clerical dismissal. The time and place to evaluate the intensity or frequency of activity is under Rule 41(b).

First, if the Plaintiff's pursuit of additional experts is not "activity that moves the case forward," it certainly constitutes preparatory activity that would be necessary for later litigation efforts to move the case along. Further, the additional expert procurement arose out of actual communication between plaintiff and defense counsel, and that expert procurement attempted to evaluate the lawsuit's viability, which is an important thing for all parties to do at all stages of litigation.[18]

[18] Lori's counsel acknowledged that their office has encountered situations with medical malpractice cases where further investigation of the causation during the lawsuit meant that "the case cannot and should not proceed" and "the only reasonable next step is often dismissal." [R.559-560]. That did not end up being the case here, but it was prudent to investigate the issue without much if any burden upon the defendants. [R.561].

Second, the Record indicates that medical record procurement and interfacing with experts has been slower in the past few years after Covid, with unexpected and unexplained delays by providers in sending records, and lengthier wait times for expert reports. [R.321; R.323]. These types of delay are outside the control of the litigants.

Third, the fact that Dr. Miner failed to promptly produce or supplement his discovery responses would serve as good cause for at least some period of inactivity. He has a duty to meet the plaintiff step-by-step. Failing to do so slowed the case down. The availability of compulsory mechanisms to the plaintiff (such as Rule 37(a)(2)) does not extinguish an opposing litigant's positive duties to respond to discovery and supplement it seasonably. *See,* SDCL 15-6-34(b) ("shall serve"); 15-6-26(e) ("duty to supplement").

And fourth, the parties were in agreement that the case was suitable for entry of a scheduling order that would have brought it on for trial within 14 months.

Taken together, these four reasons may not fully excuse every delay in this case, but, they would be sufficient as good cause for the clerical inquiry as to whether this case should be classified as 'active' or 'dismissed' under SDCL 15-11-11. In short, the Record is undisputed that *all* of the parties engaged in work on this file during the twelve months prior to the motion to dismiss; in spite of their failure to fully and actively communicate about it. The Record is undisputed that Lori's counsel communicated with the Hospital's counsel about medical record discovery and expert discovery. And, the defendants'

respective counsel were communicating amongst themselves about the record gathering process. [R.347; "HRMC Defendants obtained additional records...from counsel for Dr. Willam Miner"].

This was not an inactive case, or, in the alternative, there was good cause for refusing to dismiss it.

Lori's counsel concedes that he should have communicated better and more frequently, including about the expert procurement activity. To paraphrase this Court in *LaPlante*, he "may very well have avoided two years of litigation involving this motion to dismiss by simply" communicating an update. *LaPlante*, 2020 S.D. 13, n.8. But, the absence of such communication does not merit dismissal under SDCL 15-11-11.

2. The Circuit Court erred in dismissing the case under Rule 41(b)

Unlike SDCL 15-11-11, dismissal under Rule 41(b) has no time limit. *Swenson*, 1991 S.D. 61, ¶ 21 (citing *London v. Adams*, 1998 S.D. 41, ¶ 12). Instead, inactivity is evaluated on a case-by-case basis.

To merit dismissal, the delays must be both "unreasonable and unexplained." *White Eagle*, 2002 S.D. 68, ¶ 4. Further, dismissal is restricted under SDCL 15-6-41(b) to cases when the plaintiff's conduct is "egregious." *Eischen*, 2008 S.D. 2, ¶ 12 (citing *Devitt*, 1996 S.D. 71, ¶ 16. We begin with the requirement of egregious conduct.

(a) The Circuit Court failed to make a finding that the Plaintiff's conduct here was "egregious"

Notably, the Circuit Court recognized the standard for Rule 41(b) requires "egregious" behavior, but it failed to make any finding that the Lori's litigation conduct here was "egregious." As a matter of law, the Circuit Court erred by not fully applying the standard for these cases. This was an abuse of discretion. Lori pointed out to the Circuit Court that Rule 41(b) requires egregious conduct, but to no avail. It also appears that none of the Defendants briefing to the Circuit Court argued that the situation here was "egregious."[19]

Even though the Circuit Court did not make a finding of egregiousness, this Court is permitted to evaluate the facts *de novo* in order to assess whether this is an egregious case. When a Circuit Court fails to make an essential finding, this Court may nonetheless "decide the appeal without [remanding for] further findings if the record itself sufficiently informs the Court of the basis for the trial court's decision." *Toft v. Toft*, 2006 S.D. 91, ¶ 12.

In prior South Dakota cases, 'egregious' conduct includes, for example:

- Three, four, or seven years without any activity; *Holmoe*, 403 N.W.2d 30, 32 (S.D. 1987) (three years); *Fox v. Perpetual Nat.*

[19] The Defendants also failed to seek or propose a finding of fact on egregiousness. This is a waiver. *See*, SDCL 15-6-52(a) ("failure of court to make a finding or conclusion on a material issue is not to be deemed excepted to unless such finding or conclusion has been proposed to or requested from the court").

Life Ins. Co. (S.D. 1978) (four years); *Duncan v. Pennington County Housing Authority* (S.D. 1986) (seven years)

- plaintiffs continuously failing for years to respond to correspondence from defendants and repeatedly causing postponement of hearings; *Eischen,* 2008 S.D 2, ¶ 5.
- "disregard[ing] a court order for thirty months;" *Jenco,* 2003 S.D. 79, ¶ 18.
- a "paucity" of activity for five years which led to an initial dismissal under SDCL 15-11-11; the case was then reinstated based (in part) upon counsel's statement that he would "devote considerable time to the matter in attempt to close it as soon as possible;" which was then followed by "at least two years of inactivity after the reinstatement." *Schwartzle v. Austin Co.,* 429 N.W.2d 69, 72 (S.D. 1988)

Here, Lori never failed to meet a court order, did not repeatedly ignore correspondence from Defendants, and never caused postponement of a hearing. Nor was there a three, four, or seven year period of total inactivity.

A scheduling order for discovery had not yet been entered, and, thus the case was still being handled within an agreed-upon initial discovery phase. Meanwhile, active and important activity was taking place during nearly all of the pendency of the action. The longest period of actual "inactivity" was a matter of three months (from the receipt of the second, expert report draft in October 2023, to the filing of the motion on January 8, 2024). Furthermore,

the parties were in agreement that the case could be ready for trial within 14 months, without prejudice to Defendants, and that the Defendants were prepared to disclose their own experts by December 2024. The Circuit Court failed to consider this factor at all.

Here, the dismissal was an abuse of discretion in two ways: it was procedurally erroneous because it was based upon a failure to fully apply the standard and find *egregiousness*; and the ruling is substantively erroneous because the undisputed facts here do not rise to the level of egregiousness. Without remanding for further proceedings, this Court can find that the dismissal under Rule 41(b) was incorrect based upon either or both rationales.

A review of the facts puts this case on footing similar to the facts in *Swenson,* in which a dismissal was reversed. To paraphrase the *Swenson* opinion, "it may be said that [Lori's counsel] could have been more persistent in their pursuit of trial, but we believe their actions did not rise to the level of egregiousness which should preclude this matter from proceeding, as is the test under SDCL 15–6–41(b)." *Swenson*, 1999 S.D. 61, ¶ 22.

(b)The delays in this case were not "unexplained" and "unreasonable"

The other requirement for dismissal under Rule 41(b) is a determination that there were delays which were both unexplained and unreasonable. *Duncan,* 382 N.W.2d at 427. "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." *London,* 1998 S.D. 41, ¶ 12 (quotation omitted).

A medical malpractice plaintiff could be reasonably expected to investigate and explore informal challenges to the question of causation by retaining additional experts and awaiting their opinions. It is understood to be a measured and slow process to employ and consult with such experts. This is not an unreasonable delay.

The type of case and its complexity are also relevant to the evaluation of reasonable prosecution. This Court has cautioned that punishing clients with dismissal would be less appropriate and unjust "with a case involving death or great personal injury" than with simpler or less consequential cases. *Duncan,* 382 N.W.2d at 427 (dismissing case for recovery of attorney's fees).

This is a wrongful death case arising from medical malpractice which had been pending for 28 months at the time the Rule 41(b) motion was filed. The progress of the case was interrupted by Dr. Miner's first motion to dismiss, challenging service of process. Dr. Miner himself advocated that discovery should pause during that time, which lasted six months. The gathering of records consumed much of the next year, which, again, was a feature of this lawsuit insisted upon by Dr. Miner and the other Defendants, namely directly gathering of their own set of records from providers, to arrive at a complete, common set, prior to conducting depositions.

The Defendants' right to dismissal "may be waived if there is conduct indicating a willingness on defendant's part to try the case on the merits

notwithstanding the delay, or if he is a party to or causes the delay. This is only fair considering the injustice that may result if courts, attorneys, and clients are lulled into expending time, money, and effort in maintaining actions on their merits....Our goal is justice, and the clearance of dockets and calendars is of secondary concern to the administration of justice." *London*, 1998 S.D. 41.

The progress of this case did not involve egregious, unreasonable or unexplained delays. It was not suitable for dismissal under Rule 41(b).

3. The Circuit Court should have considered lesser sanctions than the harsh remedy of dismissal

In our surrounding states, as well as in every federal circuit, the trial court must consider the availability of 'lesser sanctions' prior to invoking the harsh remedy of dismissal for failure to prosecute. It is time for South Dakota to do the same. And, in fact, a "technical" majority of this Court embraced such an approach in 2008.

(a) This Court should adopt the type of multifactor test used in federal circuits to evaluate Rule 41(b) dismissals.

The case of *Eischen* was a 3-2 decision where Justice Sabers began his special concurrence by acknowledging his agreement "with the spirit of the dissent." In that dissent, Justice Konenkamp outlined his proposal to adopt the multifactor test, including the use of lesser sanctions. *Eischen*, ¶ 33. Justice Konenkamp's proposal noted that:

> Federal courts applying [Rule 41(b)] rule use a set of criteria to determine whether dismissal on the merits is warranted. We would do well to implement these factors so as to clearly distinguish between § 15–11–11 and § 15–6–41(b) and ensure that meritorious cases are not unfairly or unnecessarily thrown out of court.
>
> Considering the public policy favoring resolution of cases on their merits, and that dismissal with prejudice is a harsh remedy to be used only in extreme circumstances, we should consider, in addition to the question of unreasonable and unexplained delay in prosecution,
>
> > (1) whether the plaintiff had received notice that further delays would result in dismissal;
> >
> > (2) whether the judge adequately assessed the efficacy of lesser sanctions before dismissal was ordered;
> >
> > (3) whether the conduct of the party or the attorney was willful or in bad faith;
> >
> > (4) the degree of actual prejudice to the opposing side or the substantial likelihood of future prejudice in the event of further delay; and
> >
> > (5) the merits of the plaintiff's claim for relief.

Eischen, 2008 S.D. 2, ¶¶ 41-42 (Konenkamp, J., dissenting) (citing *Shannon v. Gen. Elec. Co.*, 186 F.3d 186, 193–94 (2d Cir.1999); *Knoll v. Am.Tel. & Tel.Co.*, 176 F.3d 359, 363 (6th Cir.1999); *Ehrenhaus v. Reynolds*, 965 F.2d 916, 921 (10th Cir.1992); *Poulis v. State Farm Fire & Cas. Co.*, 747 F.2d 863, 868 (3d Cir.1984); *Harding v. Fed. Reserve Bank of New York*, 707 F.2d 46, 50 (2d Cir.1983)).

A three-year empirical study of the federal circuits also arrived at a similar conclusion and proposed six factors, which are essentially the same as

those proposed by Justice Konenkamp. Sepanian, A., 44 SOUTHWESTERN L. REV. 411, 441-42 (2014).[20]

That law review article also recognizes the utility in "multifactor tests," in general. "[S]cholars believe that multifactor tests potentially mitigate against cognitive errors that judges are prone to make," and improve predictability for applying standards. *Id.*, at 421. Adopting a set of factors like this "would not only ensure that defendants and the courts are protected from dilatory behavior, but that innocent plaintiffs are not deprived of their only chance to pursue the merits of their claims." *Id.*, at 442.

(b)The Circuit Court erred by failing to consider lesser sanctions than dismissal

Every federal circuit has adopted a rule that considers lesser sanctions than dismissal in a Rule 41(b) motion.[21] *Crossman v. Raytheon Long Term Disability Plan*, 316 F.3d 36, 39-40 (1st Cir.2002); *Dodson v. Runyon*, 86 F.3d 37, 39 (2d Cir. 1996); *Poulis*, 747 F.2d 863, 868 (3d Cir.1984); *Hillig v. C.I.R.*, 916 F.2d 171, 174 (4th Cir.1990); *Rogers v. Kroger Co.*, 669 F.2d 317, 320 (5th Cir. 1982); *Knoll v. American Tel. & Tel. Co.*, 176 F.3d 359, 365 (6th

[20] Those six factors include: (1) whether the plaintiff received warnings; (2) duration of inactivity or number of non-compliances; (3) whether the conduct resulted in actual prejudice to the defendant; (4) availability of lesser sanctions; (5) degree of plaintiff's personal responsibility; and (6) possible merits of plaintiff's claim.

[21] In addition to the consideration of lesser sanctions, many Circuits also consider a multitude of additional factors such as, notice given to prosecuting attorney, whether the statute of limitations has run, prejudice to defendant, etc.

Cir.1999); *Kruger v. Apfel*, 214 F.3d 784, 787 (7th Cir.1995); *Hunt v. City of Minneapolis, Minn.*, 203 F.3d 524, 527 (8th Cir. 2000) ("Even where the facts might support dismissal with prejudice, this 'ultimate sanction... should only be used when lesser sanctions prove futile.'" (citation omitted); *Henderson v. Duncan*, 779 F.2d 1421, 1424 (9th Cir.1986); *Ehrenhaus v. Reynolds*, 965 F.2d 916, 921 (10th Cir.1992); *McKelvey v. AT & T Technologies, Inc.*, 798 F.2d 1518, 1520 (11th Cir.1986); *Peterson v. Archstone Communities LLC*, 637 F.3d 416, 418 (D.C.CIR.2011); *Askan v. FARO Techs., Inc.*, 809 F. App'x 880 (Fed. Cir. 2020).

Our neighboring states have also adopted rules favoring lesser sanctions over dismissal with prejudice. *Schultz v. State*, 32 Neb. App. 59, 992 N.W.2d 779 (2023) ("Our research also indicates that the public's interest in expeditious resolution of the litigation, the court's need to manage its docket, the public policy favoring disposition of cases on their merits, and availability of less drastic sanctions are relevant considerations."); *2049 Grp. Ltd. v. Galt Sand Co.*, 526 N.W.2d 876 (Iowa Ct. App. 1994) ("It was an abuse of discretion to enter an order of dismissal given the... array of lesser sanctions available."). *Zepeda v. Cool*, 2021 ND 146, 963 N.W.2d 282 (trial court must consider several factors before dismissing, and "balance" them "against the great reluctance to impose the harsh remedy of dismissal based upon our policy favoring disposition of cases on their merits").

In short, the Circuit Court's dismissal in this case would have been considered an abuse of discretion in *every* federal circuit as well as in our

neighboring states. If Lori's pursuit of this case is deficient, a lesser sanction than dismissal is warranted.

On prior occasions, litigants have asked this Court to consider lesser sanctions. This Court has not substantively rejected them. *See, Annett v. Am. Honda Motor Co.*, 1996 S.D. 58, ¶ 32 (refusing Annetts' request because they "did not raise this contention at the trial court level").

The text of Rule 41(b) and SDCL 15-11-11 do not list other, lesser sanctions. However, because the Rule and statute are discretionary, the source of a 'lesser sanction' does not need to emanate from its text. Instead, a Circuit Court has the inherent authority to manage its docket, as well as the broad authority under Rule 1 to address any matter related to its docket. This includes the issuance of lesser sanctions.

Circuit Courts have "inherent power, authority and control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Duncan*, 382 N.W.2d at 426–27 (quoting *Link v. Wabash R. Co.*, 370 U.S. 626, 630 (1962). Two prior Chief Justices have used concurrences to explain the existence of such authority. *See Lowe v. Steele Const. Co.*, 368 N.W.2d 610, 616 (S.D. 1985) (Fosheim, C.J., concurring specially) ("In my opinion, sanction authority inherently exists where the grant or refusal by the trial court is discretionary."); *Lowe v. Steele Const. Co.*, 368 N.W.2d 610, 616 (S.D. 1985) (Wollman, J., concurring in part, dissenting in part) ("Among the considerations that compel me to conclude that the trial court

had the inherent authority to assess attorney fees and costs is the lack of any other practical sanction.").

And, in numerous analogous cases, this Court has found lesser sanctions than dismissal to be within the proper discretion of a Circuit Court. *See e.g.*, *Schwartz v. Palachuk*, 1999 S.D. 100, ¶ 23 (broad discretion to impose lesser sanctions for failure to comply with discovery orders); *Dudley v. Huizenga*, 2003 S.D. 84, ¶ 14 (broad discretion of ALJ to manage its docket includes lesser sanctions, up to and including dismissal).

> Less drastic alternatives should usually be employed before imposing the severest sanction. Judges must balance the policy of giving parties their day in court against the policies of preventing undue delay, avoiding court congestion, and preserving respect for court procedures. In deciding the appropriate sanction to be imposed, the court should consider the purposes to be served by the sanction. An [judge] has a duty to keep things moving, but moving toward a fair result on the merits, if possible. As this Court has noted, the clearing of calendars and the expeditious dispatch of cases are secondary concerns.

Dudley, 2003 S.D. 84, ¶ 14 (administrative law case) (internal cites omitted).

Here, a less drastic sanction than dismissal would be appropriate and just. For example, a simple remedy would be for the Court to enter the scheduling order requested by the Defendants; or, to issue a warning. In more serious cases, the Circuit Court could order Plaintiff to pay the Defendants' costs associated with bringing and brief their motion to related to the inactivity. Any of those would have ensured this case continued to move forward, avoided an appeal, and would have allowed Plaintiff to receive her day in court.

Plaintiff proposes that this Court adopt Justice Konenkamp's factors in the *Eischen* dissent, and if the circumstances warrant, direct the entry of a less drastic sanction than dismissal.

CONCLUSION

For the stated reasons, Plaintiff requests this Court to reverse the circuit court's decision to dismiss the case for failure to prosecute and remand for entry of a scheduling order and trial.

Dated this 5th day of September, 2024.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Appellant's Brief does not exceed the word limit set forth in SDCL § 15-26A-66, said Brief containing 9,956 words, exclusive of the Table of Contents, Table of Authorities, Statement of Legal Issues, Jurisdictional Statement, any addendum materials, and any certificates of counsel.

/s/ Daniel K. Brendtro
One of the attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of September, 2024, I sent the original and two (2) copies of the foregoing by United States Mail, first class postage prepaid to the Supreme Court Clerk at the following address:

Shirley Jameson-Fergel
Supreme Court Clerk
500 East Capitol Avenue
Pierre, South Dakota 57501

and via email attachment to the following address:
scclerkbriefs@ujs.state.sd.us.

I also hereby certify that on this 5th day of September, 2024, I filed the foregoing via Odyssey, with presumptive service upon the parties via counsel:

Appellee:	***Appellee:***
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One of the attorneys for Appellant

APPENDIX

STATE OF SOUTH DAKOTA	IN CIRCUIT COURT
COUNTY OF BEADLE	THIRD JUDICIAL CIRCUIT
LORI A. OLSON, INDIVIDUALLY, AND, AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF SCOTT D. OLSON, A DECEASED PERSON, Plaintiffs, vs. HURON REGIONAL MEDICAL CENTER, INC., WILLIAM J. MINER, M.D., and THOMAS MINER, Defendants.	02CIV21-000230 **JUDGMENT**

This Court having considered the arguments of counsel and entered an *Order Granting Motions to Dismiss of Dr. William J. Miner, M.D. and Huron Regional Medical Center, Inc., and Thomas Miner* and further having considered the arguments of counsel and entered an *Order Denying Motion to Reconsider*, hereby enters Judgment in favor of Defendants.

LET JUDGMENT BE ENTERED ACCORDINGLY.

4/16/2024 9:06:36 AM

BY THE COURT:

Honorable Patrick T. Pardy
Circuit Court Judge

Attest:
Dykstra, Amber
Clerk/Deputy

STATE OF SOUTH DAKOTA
THIRD JUDICIAL CIRCUIT COURT

PATRICK T. PARDY
Circuit Judge
200 E. Center Street
Madison, SD 57042
605-256-5035
605-256-5012

COUNTIES
Beadle, Brookings, Clark
Codington, Deuel, Grant
Hamlin, Hand, Jerauld
Kingsbury, Lake, Miner
Moody and Sanborn

DAN FELDHAUS
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March 23, 2024

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RE: *Lori A. Olson v. HRMC, Inc., William J. Miner, M.D., and Thomas Miner;* 02CIV21-230
Defendants' Motions to Dismiss

Lori Olson (hereinafter "Plaintiff"), as the personal representative of the estate of Scott Olson, filed a Complaint on December 7, 2021, alleging negligence and wrongful death, vicarious liability, loss of consortium, intentional infliction of emotional distress, conspiracy, and fraudulent concealment against Huron Regional Medical Center, Inc., William J. Miner, M.D., and Thomas Miner (hereinafter "Defendant(s)"). On January 8, 2024, Defendant William Miner brought a Motion to Dismiss for failure to prosecute pursuant to SDCL 15-11-11 and 15-6-41(b).

On January 10, 2024, Defendants HRMC and Thomas Miner joined the motion to dismiss. A motions hearing was held on March 21, 2024. Having considered the parties' arguments, briefs, and other documentary evidence, the Court issues the following Memorandum Opinion granting Defendants' motions to dismiss for failure to prosecute.

STATEMENT OF FACTS

Plaintiff filed this wrongful death and medical negligence suit against all Defendants after her husband passed away from health complications in January 2020. The relevant time frame to this motion began in early January 2023. Plaintiff provided counsel for Defendant Dr. Miner with a signed medical authorization on January 6, 2023. On February 2, 2023, Plaintiff provided counsel for Defendant HRMC with Plaintiff's Letters of Personal Representative. On March 28, 2023, Plaintiff provided counsel for Defendant HRMC with a copy of Scott Olson's death certificate. On approximately April 5, 2023, Plaintiff's counsel had a phone call with counsel for HRMC and Thomas Miner, Mark Haigh, and then with Plaintiff herself, that led Plaintiff's counsel to believe they needed more expert witnesses. The conversation with Mr. Haigh was focused on a separate case, this case being a side-bar in the conversation. Plaintiff identified two additional experts in May 2023, and received one expert's report in October 2023 and the other expert's report in the fall of 2023. The parties have briefly communicated regarding depositions and scheduling-order dates after the Defendants filed this motion to dismiss.

Defendants allege that no efforts have been made by Plaintiffs to prosecute this case since January 6, 2023. Plaintiffs allege that since the beginning of 2023, they have been waiting for Defendants to supply them with the requested medical information, and have been actively seeking and solidifying experts to support their case. Defendants now move to have the case dismissed for failure to prosecute pursuant to SDCL 15-11-11 and SDCL 15-6-41(b).

APPLICABLE LAW

South Dakota law, specifically SDCL 15-11-11, places an affirmative duty on the plaintiff to engage in verifiable activity that keeps the case moving forward. *LaPlante v. GGNSC Madison, South Dakota, LLC*, 2020 S.D. 13, ¶ 18, 941 N.W.2d 223, 229. In *Dakota Cheese*, the Court held that the party opposing a motion to dismiss for failure to prosecute must show good cause for delay, and good cause requires: 1) contact with the opposing party *and* 2) some form of excusable conduct or activity which arises other than by negligence or inattention to pleading deadlines. *Dakota Cheese, Inc. v. Taylor*, 525 N.W.2d 713, 717 (S.D. 1995). "'Activity,' as used in the previous version of SDCL 15-11-11, has been defined as 'record activity,' 'last activity as reflected in the file,' 'settled record,' and 'court record.'" *Swenson v. Sanborn Co. Farmers Union Oil Co.*, 1999 SD 61, ¶ 14, 594 N.W.2d 339, 343. Our courts have found the following to be insufficient evidence of good cause: 1) Communication among a plaintiff and plaintiff's counsel, but not with opposing counsel, 2) Letters and settlement activity between the parties two years prior to dismissal, 3) Massive amounts of documentation and investigation, 4) Plaintiff's failure to file a summons and complaint in circuit court fourteen months after being instructed to do so by the transferring small claims court, 5) The serious nature of injuries to plaintiff, 6) Difficulty in finding an expert witness and settlement activity which expired a year prior to dismissal, and 7) Illness and death of defendant's original counsel and further inaction by defendant's counsel's law firm. *Id.* at ¶ 16. (citing *Holmoe v. Reuss*, 403 N.W.2d 30, 32 (S.D. 1987); *Dakota Cheese*, 525 N.W.2d at 716; *Devitt v. Hayes*, 1996 SD 71, 551 N.W.2d 298; *Annett v. American Honda*, 1996 SD 58, 548 N.W.2d 798, 804; *Reed v. Heath*, 383 N.W.2d 873, 874 (S.D. 1986)).

The test under SDCL 15-6-41(b) is whether the plaintiff's conduct was egregious. *Swenson*, 1999 S.D. 61, ¶ 21, 594 N.W.2d 339, 345 (citing *Devitt*, 1996 SD 71, ¶ 16, 551 N.W.2d at 301). "Dismissal of an action for failure to prosecute is an extreme remedy and should be used only when there is an unreasonable and unexplained delay (the failure to do something the party might reasonably be expected to do in proceeding with his case). *Id.* at ¶ 22. (citing *Opp v. Nieuwsma*, 458 N.W.2d 352, 356 (S.D. 1990); *Chicago & Northwestern R. Co. v. Bradbury*, 80 S.D. 610, 612, 129 N.W.2d 540, 542). A trial court's decision to dismiss a case for failure to prosecute will not be disturbed if "after considering all the facts and circumstances of the case, the plaintiff can be charged with lack of due diligence in failing to proceed with reasonable promptitude." *White Eagle v. City of Fort Pierre*, 2002 SD 68, ¶ 11, 647 N.W.2d 716, 720.

ANALYSIS

SDCL 15-11-11

Under South Dakota law, there are two main factors that must be considered when deciding a motion to dismiss for failure to prosecute: 1) whether the lack of communication between the Plaintiff and the Defendant exceeds twelve months and 2) whether there is good cause for the inactivity. In this matter, there are three Defendant's: Dr. William Miner, represented by Gregory Bernard and HRMC, and Thomas Miner, represented by Mark Haigh. It's necessary to analyze Plaintiff's communication and activity with each of the parties. Plaintiff's last communication with counsel for Defendant Dr. Miner occurred on January 6, 2023, when Plaintiff sent an updated signed medical records release. The Motion to Dismiss was

filed on January 8, 2024. The period of inactivity as it relates to Defendant Dr. Miner's motion clearly exceeds the twelve-month statutory minimum to support a motion to dismiss.[1]

Plaintiff's last communication with counsel for Defendant HRMC and Thomas Miner occurred in February and March 2023 when Plaintiff provided Defendant with a death certificate and letters of personal representative, respectively. Additionally, there was a phone call between Plaintiff's counsel and HRMC's and Thomas Miner's counsel in early April 2023 regarding a different case, in which a side-bar conversation regarding this case took place. Seemingly, the only other activity that occurred on behalf of the Plaintiff was their effort in obtaining their own expert reports. The question as it relates to Defendant HRMC and Thomas Miner is whether the Plaintiff's proffer of a death certificate and a side-bar phone conversation qualifies as "activity" under SDCL 15-11-11.

In *Swenson* the Circuit Court granted the motion to dismiss and was reversed. The South Dakota Supreme Court held that the interaction and communications between the parties constituted good cause for the delay. The case before us is distinguished from *Swenson* because the parties in *Swenson* were *working towards trial* by sending multiple letters discussing discovery, change of counsel, and most importantly, scheduling orders. Here, Plaintiff sent a single response email to a request from Defendant's counsel and engaged in one phone call with a side-bar conversation regarding counsel's opinions on this case. The level and intensity of communication in this matter is significantly less frequent than the communications in *Swenson*, and was not moving the case forward towards trial.

The court in *Jenco* found that no settlement negotiations, no discovery, or any agreements between the parties or counsel justified the delay and ultimately held in favor of

[1] The Plaintiff's attorney could not identify a single contact with Dr. Miner's attorney between January 6, 2023 and January 8, 2024 when asked at the motions hearing.

dismissal. *Jenco, Inc. v. United Fire Group*, 2003 SD 79, 666 N.W.2d 763.[2] In *Dakota Cheese*, the court granted the motion to dismiss for failure to prosecute despite plaintiffs' contention that the massive amounts of documentation that they had to research and consult an expert on constituted good cause for delay. In May-October 2023, Plaintiff identified two additional experts and worked with them to obtain the expert's reports, which Plaintiff argues constitutes "activity" in this case. However, based on the South Dakota Supreme Court's previous holding, working with experts alone is not a sufficient form of discovery that moves the case toward trial. *Dakota Cheese*, 525 N.W.2d at 717. Notably, the Plaintiff's counsel was stagnant in the several months between the time he received the expert reports and the time the Defendants filed their motions to dismiss. It was only after the motions were filed that Plaintiff began communicating with the Defendants regarding a scheduling order. The Plaintiff's communication with counsel for Defendant HRMC and Miner, and Plaintiff's work with the additional experts is insufficient to qualify as "activity" under SDCL 15-11-11. Regarding Dr. Miner, the record is void of any activity over the year in question.

Plaintiff's counsel states in his affidavit that during the period of inactivity, Plaintiff was forced to wait for the Defendants to supply him with requested medical documentation, which contributed to the delay and was good cause for the delay.[3] The Discovery documents in dispute were the Plaintiff's own medical records from nonparty health care providers, which the Plaintiff already had access to by requesting the same through the various facilities. Counsel for Defendants HRMC and Thomas Miner was taking the extra step of ensuring the Plaintiff had

[2] Counsel for the Plaintiff acknowledged during argument before this Court that the Plaintiff never issued a subpoena, never attempted to schedule a deposition, never made a motion for a scheduling order, never made a motion to compel discovery and finally that the Defendants "never put up a wall" preventing him from proceeding.
[3] Counsel for the Plaintiff acknowledged that he could not produce any authority for the argument that waiting on a defendant to produce discovery was good cause for the delay.

provided all his medical records by requesting the Plaintiff's authorization for the release of the records and then requesting directly from the various nonparty providers. Plaintiff never engaged in communication with opposing counsel to remediate the Defendant's alleged failure to comply with the discovery request nor did the Plaintiff avail itself of the rules of civil procedure to remedy the discovery dispute which plaintiffs are reasonably expected to do.

The court in *White Eagle* reasoned that there was "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. Here, the Plaintiff was reasonably expected to take action if the Defendants were not supplying requested information or documentation to them. It is well established that it is Plaintiff's burden to proceed with the action and move the case toward trial. Defendants need only meet Plaintiff step by step. The Court finds that Plaintiff failed to prosecute this matter and failed to show good cause.

SDCL 15-6-41(b)

The relevant timeline is as follows:

Jan 2020	Events giving rise to the cause of action.
Sep 2021	**Summons and Complaint served.**
Nov 2021	**Plaintiff served discovery on Defendants.**
Dec 2021	**Complaint filed.**
Dec 2021	Answer filed.
Dec 2021	Defendant served Interrogatories and Request for Production.
Feb 2022	Defendant Dr. Miner's motion to dismiss for failure to serve.
May 2022	**Plaintiff takes depositions related to motion to dismiss.**

Aug 2022	Motion to dismiss for failure to serve denied.
Sep 2022	**Plaintiff answers Defendant's Interrogatories (not request for production).**
Jan /3/2023	Dr. Miner requested updated medical release.
Jan/6/2023	**Plaintiff updated medical release to Dr. Miner.**
Feb 2023	Defendant HRMC requested, and Plaintiff provided letters of PR.
Mar 2023	Defendant HRMC requested, and Plaintiff provided death certificate.
Apr 2023	Phone call between Miners/HRMC attorney & Plaintiff (side-bar conversation).
May 5, 2023	**Plaintiff identified 2 experts.**
June 2023	**Plaintiff's expert provided a verbal report to Plaintiff.**
Fall 2023	**Plaintiff received report from Plaintiff's expert.**
Jan/8/2024	Motion to Dismiss. [4]

[4] The timeline above is a reproduction of Exhibit 1 from the 3/21/2024 hearing on the motion to dismiss. During the 3/21/2024 hearing the Defendants agreed that this exhibit correctly identified the relevant activities that had taken place. Plaintiff's counsel stated the timeline was missing the following activities: 1) The timeline failed to use activities after the motion to dismiss was filed which the court acknowledged. 2) That the June and Fall 2023 expert references should have been plural. 3) That Dr. Miner's lawyer corresponded with Lewis Drug on February 10th and 13th of 2023. 4) An April 25, 2023, conversation between Dr. Miner's law office and a non-party health care provider.

Under SDCL 15-6-41(b) the Court may dismiss an action for failure to prosecute. *Eischen v. Wayne Township*, 2008 SD 2, ¶ 12, 744 N.W.2d 788, 794-795. A dismissal is appropriate when the plaintiff's conduct is egregious. *Id.* Being an extreme measure, dismissal for failure to prosecute should only be granted when there is an unreasonable and unexplained delay. *Id.* at ¶ 13. It is the plaintiff's responsibility to move the cause of action forward. *Id.* Dismissal for failure to prosecute should be granted when, in light of all the circumstances, the plaintiff is shown to lack due diligence by failing to proceed with reasonable promptitude. *Id.*

Using the analysis that the SDSC used in *Eischen*, in this matter, approximately 21 months passed between the incident giving rise to the claim and the date the Summons and Complaint was served, and just under two years from the incident to filing the Complaint. Like *Eischen*, and its analysis of the *Holmoe* case, it has been the Defendants that have moved this matter along. The significant difference being that in both the *Eischen* and *Holmoe* cases, approximately seven years lapsed between the incident and the motion to dismiss. In this matter, the incident took place in January of 2020 and the motion to dismiss was filed approximately four years later, in January of 2024.

In *Holmoe*, the Plaintiff was wholly inactive for a period of four years and in *Eischen*, the Plaintiffs were effectively inactive for a period of three and half years. In this matter, the only acts that were wholly initiated by the Plaintiff were as follows: 1) Serving the Complaint in September 2021, 2) Serving discovery in November 2021, 3) Filing of the complaint in 2021, 4) Taking of depositions (in response to a defendant's motion) in May 2022, 5) Plaintiff identified experts in June of 2023, and 6) Plaintiff received expert reports in June of 2023. The record shows a period of inactivity on the Plaintiff's part started in September of 2022 when the

Plaintiff answered the Defendant's interrogatories, but failed to respond to the Request for Production which was served approximately ten months earlier. Like the Defendants in *Eischen*, it was the Defendants that consistently attempted to move the litigation forward. As the Supreme Court stated in *Eischen*, but for the initiative of the Defendants, there would have been no activity in this case. *Eischen*, 744 N.W.2d at 797. In September of 2022, the Plaintiff responded ten months late to a discovery request that the Defendants were not required to serve on the Plaintiff. In January of 2023, the Plaintiff updated a medical release at the request of Dr. Miner. In February of 2023 the Plaintiff provided a copy of a death certificate at the request of Defendants HRMC and Thomas Miner. Other than internal preparation with the Plaintiff's experts, the Plaintiff took no action from September of 2022 to move this matter forward. Just as the *Eischen* matter found, it is also true in the case at hand. From September of 2022 until the motion to dismiss was filed on January 8, 2024, Plaintiff's counsel served no interrogatories or other discovery, scheduled no depositions, conducted no settlement negotiations nor attempted to schedule the case for trial, and made no contact with defense counsel through any means except for responding to their request for updated medical releases, letters of personal representative, and death certificate.

Finally, the Plaintiff argues that the Defendants failed to demonstrate prejudice to obtain a dismissal. Although prejudice is a factor, it is not required to obtain a dismissal under SDCL 15-6-41(b). This Court does believe that enduring the financial and emotional difficulties that come with a lawsuit is prejudice. The Plaintiffs have the burden to advance the litigation and failed to do so with due diligence and reasonable promptitude. The record establishes that the Plaintiffs were responsible for the delay. The Plaintiff did nothing to move the case forward from September 2022 through January 2024 and certainly from January 2023 through January

2024 as required by SDCL 15-6-41(b). The Court finds that the delay was unreasonable and unexplained.

CONCLUSION

Based upon the foregoing analysis, Defendants' motions to dismiss for failure to prosecute are GRANTED.

Hon. Patrick T. Pardy
Circuit Court Judge
Third Judicial Circuit

Attest:
Dykstra, Amber
Clerk/Deputy

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 30697
Notice of Review No. 30705

LORI A. OLSON, INDIVIDUALLY, AND AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF SCOTT D. OLSON, A DECEASED PERSON,

Plaintiff/Appellant,

vs.

HURON REGIONAL MEDICAL CENTER, INC., WILLIAM J. MINER, M.D., AND THOMAS MINER,

Defendants/Appellees.

Appeal from the Circuit Court
Third Judicial Circuit
Beadle County, South Dakota

The Honorable Patrick T. Pardy, Presiding Judge

BRIEF OF APPELLEES HURON REGIONAL MEDICAL CENTER, INC., AND THOMAS MINER

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Notice of Appeal filed May 2, 2024
Notice of Review filed May 16, 2024

TABLE OF CONTENT

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PRELIMINARY STATEMENT

Citations to the Certified Record are "R." followed by the applicable page number(s) in the Clerk's Index. Appellees Huron Regional Medical Center, Inc. and Thomas Miner are referred to as the "HRMC Defendants." Appellee William J. Miner, M.D. is referred to as "Dr. Miner." Appellant Lori A. Olson is referred to as "Plaintiff."

JURISDICTIONAL STATEMENT

The Circuit Court entered Judgment on April 16, 2024, and dismissed Plaintiff's case with prejudice. Notice of Entry of Judgment was filed in Circuit Court on April 16, 2024. Appellant filed her Notice of Appeal on May 2, 2024. This Court has jurisdiction pursuant to SDCL 15-26A-3(1).

STATEMENT OF THE ISSUES

I. Whether the Circuit Court erred in dismissing Plaintiff's case pursuant to SDCL 15-11-11.

The Circuit Court's dismissal was proper. Plaintiff presented no evidence on the record of activity for a period of one year. Plaintiff failed to show good cause to the contrary for said delay. Dismissal of Plaintiff's case pursuant to SDCL 15-11-11 was warranted and properly granted.

- SDCL 15-11-11.
- *White Eagle v. City of Fort Pierre*, 2002 S.D. 68, 647 N.W.2d 716.
- *Eischen v. Wayne Twp.*, 2008 S.D. 2, 744 N.W.2d 788.
- *Annett v. Am. Honda Motor Co., Inc.*, 1996 S.D. 58, 548 N.W.2d 798.

II. Whether the Circuit Court erred in dismissing Plaintiff's case pursuant to SDCL 15-6-41(b).

The Circuit Court's dismissal was proper. The Circuit Court properly considered the factors to consider under SDCL 15-6-41(b) and found that they were met in this case. The Circuit Court found the delay caused by Plaintiff's litigation conduct, or lack thereof,

was unreasonable and unexplainable. The Circuit Court further found the lengthy delay prejudiced the Defendants. Dismissal of Plaintiff's case pursuant to SDCL 15-6-41(b) was warranted and properly granted.

- SDCL 15-6-41(b).
- *Eischen v. Wayne Twp.*, 2008 S.D. 2, 744 N.W.2d 788.
- *Dakota Cheese, Inc. v. Taylor*, 525 N.W.2d 713 (S.D. 1995).
- *Annett v. Am. Honda Motor Co., Inc.*, 1996 S.D. 58, 548 N.W.2d 798.

III. Whether the Circuit Court erred by failing to consider less sanctions upon Plaintiff than dismissal.

The Circuit Court's sanction was proper, under both SDCL 15-11-11 and SDCL 15-6-41(b). Both statutes provide dismissal of the case as their sole sanction for lack of prosecution. Adopting a multi-factor test is improper as other sanctions are not provided for in the failure to prosecute statutes. Plaintiff cites to no binding precedent that supports the use of a multi-factor test to evaluate Rule 41(b) dismissals.

- SDCL 15-11-11.
- SDCL 15-6-41(b).
- *Abdulrazzak v. Bd. of Pardons & Paroles*, 2020 S.D. 10, 940 N.W.2d 672.
- *Duncan v. Pennington Cnty. Hous. Auth.*, 382 N.W.2d 425 (S.D. 1986).

STATEMENT OF THE CASE

Plaintiff commenced this case in Circuit Court by a Summons and Complaint dated September 15, 2021. R. 1-13. HRMC and Thomas Miner (the "HRMC Defendants") initially answered Plaintiff's Complaint on November 5, 2021. R. 356. The Separate Answer of the HRMC Defendants was re-filed on December 27, 2021. R. 31-35. On November 24, 2021, Plaintiff served discovery on the HRMC Defendants which, pursuant to an extension granted by Plaintiff's counsel, was answered on January 13, 2022. R. 356. On November 24, 2021, the HRMC Defendants served their Interrogatories and Requests for Production of Documents to Plaintiff (First Set). R. 356;

These discovery requests were not answered by Plaintiff until September 21, 2022, nearly ten months after they were served. R. 356.

On February 10, 2022, Dr. William J. Miner moved to dismiss Plaintiff's Complaint based upon service of process issues. R. 45-46. Depositions were taken on the issue of the propriety of service of process upon Dr. Miner. R. 74-75. Dr. Miner's Motion to Dismiss was denied by Judge Shelton by Order dated August 22, 2022. R. 272-273. On September 21, 2022, Plaintiff responded to the HRMC Defendants' written discovery requests and attached an authorization for release of health information. R. 356. The authorization was not properly completed by Plaintiff's counsel, and multiple emails were exchanged between the parties from September 28, 2022 through December 6, 2022. R. 356; 361-365.

Once the HRMC Defendants were able to obtain a properly-completed authorization for release of health information from Plaintiff, counsel for the HRMC Defendants attempted to obtain records relevant to the case. In attempting to do so, one of Mr. Olson's treating providers, Orthopedic Institute, required counsel for the HRMC Defendants produce a copy of Mr. Olson's Death Certificate, before it would produce Mr. Olson's medical records. R. 347; 357. On March 28, 2023, paralegals for the HRMC Defendants and Plaintiff's counsel had a brief email exchange wherein the paralegal for Plaintiff's counsel provided a copy of Mr. Olson's Death Certificate to the paralegal for the HRMC Defendants. R. 357.

In November 2021 and September 2022 Plaintiff provided records from HRMC, Avera Heart Hospital, North Central Heart Hospital, Tschetter & Hohm Clinic, Orthopedic Institute, Avera McKennan, and AMG Nephrology. R. 347. Counsel for the

HRMC Defendants asked opposing counsel to provide authorizations to make certain that all medical records had been provided by Plaintiff. R. 347. This practice is not uncommon when requesting records from medical providers, as additional medical records are often obtained beyond those provided by the plaintiff, whether due to the plaintiff's failure to request all records from the provider, the request for records dating back to a certain date, and/or oversight or misunderstanding by the providing facility as to which records were being requested. R. 347. After making their own request for records using the properly-completed authorization form, the HRMC Defendants obtained additional records from Avera Heart Hospital, Avera McKennan Hospital, HRMC, and Orthopedic Institute that had not been provided by Plaintiff in discovery. R. 347.

The HRMC Defendants and Defendant Dr. Miner sought to obtain their own complete sets of the decedent's medical records through the eventually-completed authorization and intended to Bates stamp and then distribute a common set of records in advance of depositions so as to ensure the parties are working from the same set of records and to avoid confusion as to Bates numbers and record order within the set. R. 348. In the action, none of the parties had requested depositions other than the depositions related to Dr. Miner's Motion to Dismiss related to services issues, and therefore the parties had not yet exchanged a complete set of Bates stamped records to use as the case progressed. R. 348.[1]

[1] After the January 8, 2024 Motion to Dismiss was filed, Plaintiff's counsel requested a complete set of medical records. The HRMC Defendants Bates stamped all of the records they had obtained and provided a Bates stamped copy to Plaintiff's counsel. R. 348.

Prior to January 8, 2024, the date of filing of Dr. Miner's Motion to Dismiss for failure to prosecute, Plaintiff made no affirmative efforts to prosecute her case since November 24, 2021 when she served discovery upon the Defendants. R. 348. Although there was activity between May 2022 and August 2022 related to Dr. Miner's Motion to Dismiss (lack of personal service), responses to discovery requests (including attempts to obtain properly-executed medical authorizations) in late 2022, and an exchange between paralegals for the HRMC Defendants and Plaintiff's counsel on March 24, 2023 (related to the death certificate), none of these were affirmative steps taken by Plaintiff to prosecute the case. R. 348. Rather, this activity was Plaintiff's responsive efforts to actions taken by the Defendants to move the matter forward. R. 348.

On January 8, 2024, Dr. Miner filed his Motion to Dismiss for failure to prosecute pursuant to both SDCL 15-11-11 and 15-6-41(b). R. 274-275. The HRMC Defendants joined in Dr. Miner's Motion to Dismiss and filed said joinder on January 10, 2024. R. 289-291. On January 19, 2024, Judge Shelton voluntarily recused himself from presiding over this matter and Judge Pardy was appointed to preside over this matter in his place. R. 292.

On March 7, 2024, Plaintiff filed a Motion for Scheduling Order and Notice of Hearing which requested that the Circuit Court entertain Plaintiff's motion at the same time the hearing on the Motion to Dismiss was heard. R. 409-411. On March 13, 2024, the HRMC Defendants filed a Response to Plaintiff's Motion for Scheduling Order and indicated that *if the Circuit Court denied Defendants' Motion to Dismiss*, the HRMC Defendants agreed a Scheduling Order should be issued. R. 412. On March 21, 2024, a hearing was held on the Motion to Dismiss. R. 298. On March 23, 2024, the Circuit

Court issued a Memorandum Decision and granted the Defendants' Motion to Dismiss for failure to prosecute pursuant to SDCL 15-11-11 and SDCL 15-6-41(b); the dismissal was with prejudice. R. 417-427. Plaintiff subsequently moved the Circuit Court to reconsider the dismissal of her case with prejudice. R. 428.

On April 15, 2024, the Circuit Court entered an Order denying Plaintiff's Motion to Reconsider. R. 570. Subsequently, on April 15, 2024, the Circuit Court entered an Order granting the Defendants' Motions to Dismiss for failure to prosecute. R. 546-547. On April 16, 2024, the Circuit Court entered a Judgment in favor of the Defendants. R. 578. Dr. Miner filed a Notice of Entry of Judgment on April 16, 2024. R. 579. Plaintiff filed her Notice of Appeal on May 2, 2024. R. 582.

STATEMENT OF FACTS

Scott Olson had a history of chronic cardiovascular disease and chronic kidney disease. R. 5-6. Mr. Olson was hospitalized at Avera Heart Hospital from January 12, 2020 to January 14, 2020 for ongoing chronic cardiovascular disease. R. 6. On January 24, 2020, Mr. Olson presented to the Huron Regional Medical Center ("HRMC") emergency department with complaints of feeling weak and dizzy. R. 8. At the time of Mr. Olson's presentation, the HRMC emergency department was being staffed by Physician's Assistant Thomas Miner. R. 9. Shortly after Mr. Olson arrived at the HRMC emergency department, he coded. R. 9. Attempts were made to resuscitate him, but they were unsuccessful. R. 62. Mr. Olson passed away at 1356 on January 24, 2020.[2] R. 10.

[2] Plaintiff, in her Statement of Facts, provides her version of the underlying facts of the case, a majority of which are not relevant to the issues before the Court. The HRMC Defendants deny many of the facts set forth by Plaintiff in her brief.

Mr. Olson's surviving spouse, Lori Olson, commenced this action against HRMC, Thomas Miner, and Dr. William Miner, on September 15, 2021. R. 1-13. Between September 21, 2022 – the date wherein Plaintiff provided months-overdue responses to the HRMC Defendants' Interrogatories and Requests for Production of Documents and Dr. Miner's Interrogatories[3] – and January 25, 2024, Plaintiff failed to *affirmatively* engage in any activity in the case.

The only verifiable activity undertaken by Plaintiff between September 1, 2022, and January 25, 2024, was purely responsive to Defendants' activity and included the following: (1) email correspondence in late 2022 between paralegals[4] for Plaintiff's counsel and paralegals for the HRMC Defendants wherein the paralegals for the HRMC Defendants requested that Plaintiff's counsel's office provide a properly completed/updated authorization for release of health information (R. 356; 361-365); (2) an email on February 2, 2023, from Plaintiff's counsel's paralegal in response to the HRMC Defendants' paralegal's request for letters of personal representation over the decedent's estate (R. 329); (3) an email on March 28, 2023, from Plaintiff's counsel's paralegal in response to the HRMC Defendants' paralegal's request for a copy of the

[3] Plaintiff failed to respond to Dr. Miner's Requests for Production of Documents on September 21, 2022, and seemingly never responded to the same. R. 278.

[4] Plaintiff's counsel provided a single, perfunctory response to Defendants' multiple requests for a properly-completed authorization. On October 17, 2022, Plaintiff's counsel responded in an email to Defendants' counsel, and stated "Will do. Adding Blythe to the cc line, and she is on this." R. 363.

death certificate (R. 332); and (4) an alleged[5] side-bar conversation regarding this case on April 5, 2023, during a phone call between Plaintiff's counsel and counsel for the HRMC Defendants regarding an entirely different case which Plaintiff's counsel contends lasted approximately one minute (R. 322; 358-359; 437; 462-463).

After April 5, 2023, Plaintiff's claims of verifiable activity became more specious. Plaintiff claims that her counsel was, after April 5, 2023, actively engaged in attempting to procure additional expert witnesses based on the revelatory case theory purportedly bestowed upon Plaintiff's counsel during a minute-long side-bar conversation.[6] This supposedly went on until October of 2023. R. 439. Plaintiff claims that her counsel was just too busy to schedule depositions in this matter during the fall of 2023. R. 324; 440-442. However, Plaintiff's counsel attended a total of eight (8) depositions in another medical malpractice case (*Walton*) involving HRMC, Dr. Miner, and counsel for the Defendants. R. 381. Said depositions (in *Walton*) took place during the fall of 2023 on October 26, November 1, and November 2. R. 324. Plaintiff further

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[5] Counsel for the HRMC Defendants has no recollection of any purported side-bar conversation with Plaintiff's counsel on or near April 5, 2023, nor does counsel's file notes or time records reflect such a conversation. R. 358-359. Plaintiff's counsel alleges that on or near April 5, 2023, counsel for the HRMC Defendants, in a conversation that lasted approximately one minute, apparently offered Plaintiff's counsel his theories on this matter that changed Plaintiff's counsel's whole outlook on this case, while discussing an entirely different case. R. 462-463.

[6] No citation to the Certified Record is proffered to support the fact that Plaintiff's counsel engaged in "crystallizing expert opinions," corresponding with prospective experts, or gathering expert reports, after April 5, 2023, because counsel for the HRMC Defendants is unaware of anything within the Certified Record which is indicative of the same aside from the several Affidavits of Plaintiff's counsel made in an effort to stave off dismissal. However, said Affidavits do not contain any attachments which provide *any* proof of the same, e.g., email correspondence with a prospective expert, the names of the prospective experts, time entries detailing phone calls with a prospective expert, or a date-stamped draft of an expert report with substantive case theories redacted.

claims that the lack of verifiable activity on her behalf from October of 2023 through January of 2024 was due to: (1) Plaintiff's counsel's very busy schedule (R. 440); (2) the fact that preparing to depose the decedent's medical providers would require much more preparation than a lay witness deposition (R. 441; 563); (3) the fact that it did not cross Plaintiff's counsel's mind that failing to prosecute an action could be "dismissible" (R. 442); and (4) the fact that Plaintiff's counsel did not treat January 6, 2023 as the last date of interaction between the parties (R. 442).

On March 21, 2024, a hearing on the Motion to Dismiss was held before the Circuit Court, the Honorable Judge Patrick T. Pardy presiding. R. 298. At the motion hearing, the Judge Pardy asked Plaintiff's counsel if he knew "of any authority – and whether it's informal or formal – that says the plaintiff is waiting on the defense to produce, that is good cause for delay?" Plaintiff's counsel responded, "[n]ot specifically, no, Judge." R. 616:17-20. Judge Pardy next asked Plaintiff's counsel if he knew of any caselaw that states "that waiting on the defense to produce something that, frankly, belongs to the plaintiff – but even if it didn't, is shown to be good cause for delay?" Plaintiff's counsel responded, "I know of no cases." R. 621:16-20. Judge Pardy then inquired to Plaintiff's counsel if there was any activity at any time during the one-year period, or even further back, wherein it could be shown that Plaintiff engaged in some activity, such as to issue a subpoena, get a court order, seek entry of a scheduling order, file a motion for anything, or send any emails to the other attorneys requesting to depose their clients. Plaintiff's counsel agreed that no such activity could be shown. R. 622:5-20.

Plaintiff's counsel pointed out that he had tried to engage in moving the case forward after the Motion to Dismiss was filed, and Judge Pardy responded that "a scurry of activities after the motion really isn't relevant." R. 622:20-623:5. Judge Pardy attempted several times to inquire into whether Plaintiff's counsel could point to something specific where the Defendants' counsel put up a wall prohibiting Plaintiff from taking depositions or conducting discovery. R. 624-626. Judge Pardy then specifically asked "[i]s there something you can point to where the Defense put a wall up and said, 'No, not doing depositions, I'm not going to' – whatever. Is there anything – an e-mail, anything?" Plaintiff's counsel responded, "[n]o, Judge, it's not a specific wall. It's just the general understanding and practice of how these cases work." R. 625:22-626:4.

On March 23, 2024, The Circuit Court issued a Memorandum Decision and granted the Defendants' Motion to Dismiss for failure to prosecute pursuant to SDCL 15-11-11 and SDCL 15-6-41(b); the dismissal was with prejudice. R. 417-427. Therein the Circuit Court found that:

> "[f]rom September of 2022 until the motion to dismiss was filed on January 8, 2024, Plaintiff's counsel served no interrogatories or other discovery, scheduled no depositions, conducted no settlement negotiations nor attempted to schedule the case for trial, and made no contact with defense counsel through any means except for responding to their request for updated medical releases, letters of personal representative, and death certificate.

R. 426.

STANDARDS OF REVIEW

A. Abuse of Discretion

The circuit court's ultimate decision to dismiss a claim for failure to prosecute is reviewed under the abuse of discretion standard. *Eischen v. Wayne Twp.*, 2008 S.D. 2, ¶ 10, 744 N.W.2d 788, 794 (citing *Jenco, Inc. v. United Fire Group*, 2003 S.D. 79, ¶ 7, 666

N.W.2d 763, 765) (string citation omitted). "An abuse of discretion 'is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable.'" *In re Jarman*, 2015 S.D. 8, ¶ 19, 860 N.W.2d 1, 9 (quoting *Thurman v. CUNA Mut. Ins. Soc'y*, 2013 S.D. 63, ¶ 11, 836 N.W.2d 611, 616). "When the decision 'is not justified by, and clearly against, reason and evidence,' the standard is met and the trial court's dismissal must fail." *Eischen*, 2008 S.D. 2, ¶ 10, 744 N.W.2d at 794 (quoting *Swenson v. Sanborn County Farmers Union Oil Co.*, 1999 S.D. 61, ¶ 9, 594 N.W.2d 339, 342). However, a circuit court's decision will stand if the reviewing court believes "a judicial mind, in view of the law and the circumstances, could reasonably have reached that conclusion." *Swenson*, 1999 S.D. 61, ¶ 9, 594 N.W.2d at 343 (quoting *Rosen's, Inc. v. Juhnke*, 513 N.W.2d 575, 576 (S.D. 1994)).

B. Clearly Erroneous

In reviewing the dismissal of a case for failure to prosecute under SDCL 15-11-11 or SDCL 15-6-41(b), the circuit court's findings of fact are reviewed under the clearly erroneous standard. *Eischen*, 2008 S.D. 2, ¶ 10, 744 N.W.2d at 794 (citing *Vander Heide v. Boke Ranch, Inc.*, 2007 S.D. 69, ¶ 17, 736 N.W.2d 824, 831) (internal citation omitted). Under the clearly erroneous standard, reversal is only permissible when the reviewing court is "left with a definite and firm conviction that a mistake has been made" after a thorough review of the evidence. *Fin-Ag, Inc. v. Feldman Bros.*, 2007 S.D. 105, ¶ 19, 740 N.W.2d 857, 862 (quoting *American Bank & Trust v. Shaull*, 2004 S.D. 40, ¶ 11, 678 N.W.2d 779, 783). In applying the clearly erroneous standard, factual issues are not to be decided de novo. *Id.*

C. De Novo

In reviewing the dismissal of a case for failure to prosecute under SDCL 15-11-11 or SDCL 15-6-41(b), the circuit court's conclusions of law are reviewed under the de novo standard. *Eischen*, 2008 S.D. 2, ¶ 10, 744 N.W.2d at 794 (citing *Vander Heide*, 2007 S.D. 69, ¶ 17, 736 N.W.2d at 831) (internal citation omitted). Statutory interpretation and application are questions of law, reviewed under the de novo standard where no deference is afforded the circuit court's decision. *Lewis & Clark Rural Water Sys., Inc. v. Seeba*, 2006 S.D. 7, ¶ 12, 709 N.W.2d 824, 830 (quoting *Block v. Drake*, 2004 S.D. 72, ¶ 8, 681 N.W.2d 460, 463). Statutes are reviewed and consequently interpreted "to discover the true intent of the legislature in enacting laws, which is ascertained primarily from the language employed in the statute." *Id.* (quoting *Sanford v. Sanford*, 2005 S.D. 34, ¶ 13, 694 N.W.2d 283, 287; *State v. Myrl & Roy's Paving, Inc.*, 2004 S.D. 98, ¶ 6, 686 N.W.2d 651, 653). "'[F]ederal interpretations of federal civil and appellate procedural rules are not binding on [the South Dakota Supreme Court]' even if the rules are the same." *Abdulrazzak v. Bd. of Pardons & Paroles*, 2020 S.D. 10, ¶ 23, n.4, 940 N.W.2d 672, 678, n.4. (quoting *Sander v. Geib, Elston, Frost Prof'l Ass'n*, 506 N.W.2d 107, 122 (S.D. 1993)).

AUTHORITY & ARGUMENT

I. THE CIRCUIT COURT PROPERLY DISMISSED PLAINTIFF'S CASE PURSUANT TO SDCL 15-11-11.

At issue is whether the Circuit Court properly dismissed Plaintiff's case pursuant to SDCL 15-11-11. SDCL 15-11-11 provides one method for disposing of a civil case due to a plaintiff's failure to move a case forward, and states as follows:

> The court may dismiss any civil case for want of prosecution upon written notice to counsel of record where the record reflects that there has been no

> activity for one year, unless good cause is shown to the contrary. The term "record," for purposes of establishing good cause, shall include, but not by way of limitation, settlement negotiations between the parties or their counsel, formal or informal discovery proceedings, the exchange of any pleadings, and written evidence of agreements between the parties or counsel which justifiably result in delays in prosecution.

Id. "SDCL 15-11-11 'has a one year limitation from the date of the last activity *as reflected by the file.*'" *White Eagle v. City of Fort Pierre*, 2002 S.D. 68, ¶ 8, 647 N.W.2d 716, 719 (quoting *Annett v. Am. Honda Motor Co., Inc.*, 1996 S.D. 58, ¶ 19, 548 N.W.2d 798, 803) (emphasis in original).

The activity alleged must be verifiable in the record before the Court regardless of whether the activity was in the form of formal motions or informal discovery. *Id.* "***It is the plaintiff's responsibility to move the cause of action forward. The defendant need only meet the plaintiff step by step.***" *Eischen*, 2008 S.D. 2, ¶ 13, 744 N.W.2d at 795 (citing *Dakota Cheese, Inc. v. Taylor*, 525 N.W.2d 713, 716 (S.D. 1995)) (internal citations omitted) (emphasis in original).

The Circuit Court's dismissal of Plaintiff's case pursuant to SDCL 15-11-11 was proper because: (1) the record reflects that there had been no activity by Plaintiff for over one year; and (2) Plaintiff failed to show good cause to the contrary for the notable inactivity.

A. <u>There was no record activity by Plaintiff for over twelve months, prior to January 8, 2024.</u>

The Circuit Court's dismissal of Plaintiff's case under SDCL 15-11-11, as set forth in its March 23, 2024, "Memorandum Decision" (R. 417-427) was correct. Therein the Circuit Court found that:

> "[f]rom September of 2022 until the motion to dismiss was filed on January 8, 2024, Plaintiff's counsel served no interrogatories or other discovery, scheduled no depositions, conducted no settlement negotiations nor

> attempted to schedule the case for trial, and made no contact with defense counsel through any means except for responding to their request for updated medical releases, letters of personal representative, and death certificate.

R. 426. The record before this Court is objectively void of any verifiable activity by Plaintiff which moved the case forward in any capacity from September of 2022 through January 8, 2024; therefore, no abuse of discretion can be found in the Circuit Court's finding of fact regarding Plaintiff's year-plus lack of record activity. *See Fin-Ag, Inc.*, 2007 S.D. 105, ¶ 19, 740 N.W.2d at 862 (quoting *Shaull*, 2004 S.D. 40, ¶ 11, 678 N.W.2d at 783) (under clearly erroneous standard, reversal is only permissible when the reviewing court is "left with a definite and firm conviction that a mistake has been made" after a thorough review of the evidence).

Plaintiff clings to correspondence between paralegals regarding an improperly executed authorization for release of health information, a death certificate, and letter of personal representation, an alleged minute-long "side-bar" conversation with HRMC's counsel, and the fact that Plaintiff's counsel *was trying* to find an expert witness[7] in an attempt to obfuscate the obvious – Plaintiff's counsel let the matter sit by idly, and did nothing to move the case forward for over a year. The Circuit Court was correct in finding that:

> Notably, the Plaintiff's counsel was stagnant in the several months between the time he received the expert reports and the time the Defendants filed their motion to dismiss. It was only after the motions were filed that Plaintiff began communicating with the Defendants regarding a scheduling order. The Plaintiff's communication with counsel for Defendant HRMC and Miner, and Plaintiff's work with the additional experts is insufficient to

[7] No proof of the same having occurred existed aside from the self-serving affidavits of Plaintiff's counsel filed in response to Defendants' Motion to Dismiss. *See* note 6, *supra*.

> qualify as "activity" under SDCL 15-11-11. Regarding Dr. Miner, the record is void of any activity over the year in question.

R. 422.

Indeed, it would be contrary to the intent behind the statute and certainly to the express language of SDCL 15-11-11 to assert that Defendants' attempts to obtain a complete set of relevant medical records or an alleged minute-long "side-bar" conversation with opposing counsel is representative of a plaintiff moving their case forward. Yet that is exactly what Plaintiff's argument asserts. Perhaps more concerning is Plaintiff's assertion that the Circuit Court's holding that Plaintiff's informal "expert work" did not constitute record activity was incorrect.[8] Indeed, this Court has "held that contact constituting activity for purposes of moving litigation forward *requires* that the contact be with opposing party[,]" and expressly disavowed the notion that a plaintiff's attempts to procure an expert witness constituted record activity which moves the case along. *Eischen*, 2008 S.D. 2, ¶ 21, n.8, 744 N.W.2d at 797, n.8 (citing *Devitt v. Hayes,* 1996 S.D. 71, ¶ 7, 551 N.W.2d 298, 300) (emphasis added) (internal citations omitted).

Such a holding is inherently logical; a plaintiff's assertion that they are prosecuting their case must be somehow verifiable, e.g., serving interrogatories or other discovery; scheduling depositions; conducting settlement negotiations; scheduling the case for trial; or making *any* sort of contact with defense counsel through *any* means. *See id.* at ¶ 21, 300. Otherwise, a plaintiff may sit idly by and *claim* that they have been

[8] Plaintiff's argument conflates her counsel's purported "attempts" to seek out an expert witness with "informal discovery," yet cites to no authority in support.

working to move the case forward and a defendant would have no meaningful ability to rebut said hollow assertions of legitimate prosecution of the case forward.

"SDCL 15-11-11 'has a one year limitation from the date of the last activity *as reflected by the file.*'" *White Eagle*, 2002 S.D. 68, ¶ 8, 647 N.W.2d at 719 (quoting *Annett,* 1996 S.D. 58, ¶ 19, 548 N.W.2d, at 803) (emphasis in original). The activity alleged must be verifiable in the record before the Court regardless of whether the activity was in the form of formal motions or informal discovery. *Id.* Plaintiff's counsel candidly admitted that no such record activity could be found. At the motion hearing Judge Pardy asked Plaintiff's counsel if there was any activity at any time during the one-year period, or even further back, wherein it could be shown that Plaintiff engaged in some activity, such as to issue a subpoena, get a court order, seek entry of a scheduling order, file a motion for anything, or send any emails to the other attorneys requesting to depose their clients. Plaintiff's counsel agreed that no such activity could be shown. R. 622:5-20.

Given the record before this Court, it is apparent that from September of 2022 through January 8, 2024, Plaintiff failed to engage in any verifiable activity that moved the case forward. Absent a showing of record activity for over one year, dismissal is proper unless good cause for the inactivity is shown. SDCL 15-11-11.

B. Plaintiff failed to demonstrate good cause for the lack of prosecution.

Just as the Circuit Court was correct in finding that there was no record activity for over one year, the Circuit Court was also correct in finding that Plaintiff failed to show good cause for the inactivity. "Good cause for delay requires 'contact with the opposing party *and* some form of excusable conduct or happening which arises other than by negligence or inattention to pleading deadlines.'" *White Eagle*, 2002 S.D. 68, ¶ 11,

647 N.W.2d at 720 (quoting *Dakota Cheese, Inc.*, 525 N.W.2d at 717 (S.D. 1995)) (emphasis in original). SDCL 15-11-11 enumerates several "record" activities which may establish good cause for delay, i.e., settlement negotiations between the parties or counsel, formal or informal discovery proceedings, the exchange of any pleadings and written evidence of agreements between counsel which justifiably result in the delay of prosecution. *Id.*

In *White Eagle*, the trial judge asked White Eagle's counsel at the hearing regarding the motion to dismiss for failure to prosecute the following questions: "Why didn't you contact the clerk's office? Why didn't you file a motion to compel, a motion for scheduling hearing, anything, between the time that the Supreme Court issued its order until the time that the motion to dismiss was filed?" His only response was that he did not want to "step on the toes of any Court process to try to get this matter set on for scheduling without the Court being specifically involved." 2002 S.D. 68, ¶ 11, n.5, 647 N.W.2d at 720, n.5. Like White Eagle's counsel, Plaintiff's counsel offered no reasonable explanation when asked by Judge Pardy about the conspicuous, unexplained lack of activity on the record from September of 2022 through January 8, 2024 and whether *any* sort of good cause existed for the lengthy delay. The following dialogue is from the Circuit Court's hearing on the Motion to Dismiss for Failure to Prosecute, on March 21, 2024:

THE COURT:	What I'm asking is a very specific question: Is there something you can point to where the Defense put a wall up and said, "No, not doing depositions, I'm not going to" – whatever. Is there anything – an email, anything?
MR. BRENDTRO:	No, Judge, it's not a specific wall. It's just the general understanding and practice of how these cases work.

(R 625:22-626:4). Appellant's counsel had no legitimate explanation regarding good cause for the year-plus stagnancy of this case because none exists.

Plaintiff proffers four arguments in an attempt to demonstrate good cause for the inactivity: (1) attempting to find expert witnesses is preparatory activity that may move litigation along down-the-road; (2) Covid-19 caused the delay; (3) Defendants caused the delay; and (4) the parties agreed to a scheduling order that would have brought the case on for trial down-the-road. All of Plaintiff's "good cause" arguments are without merit, and evince quite tellingly the lack of legitimate reasons for Plaintiff's inactivity.

First, Plaintiff seems to argue that because this is a wrongful death case predicated upon alleged medical malpractice, likely requiring medical expert testimony, Plaintiff's case should not have been dismissed due to the underlying "complexities." However, any purported issues regarding the "complex" nature of Plaintiff's action could have been remedied through proper pre-litigation and litigation conduct. Plaintiff's counsel's failures do not afford Plaintiff a second bite at the apple.

In *Annett v. American Honda Motor Co., Inc.*, the plaintiffs cited to the complexity of the case, namely the liability issues and the seriousness of the injuries to the plaintiff as good cause for delay. 1996 S.D. 58, ¶ 10, 548 N.W.2d at 802. The trial court rebutted the plaintiff's claims of good cause and stated that "those factors *only enhance the need for active prosecution of the case*" to promote a fair and efficient administration of justice. *Id.* (emphasis added). The trial court's dismissal of the plaintiff's case was affirmed, and in doing so, the court stated that "the serious nature of Corey Annett's injuries *enhanced* the need for active prosecution." *Id.* at ¶ 25, 804 (emphasis added). It is indeed axiomatic that a more complex case requires more diligent

prosecution and a party can be charged with their attorney's inaction. *See id.* ("Attorney inaction and dismissing the plaintiffs' case, however, is the very nature of a dismissal for failure to prosecute.") (citations omitted). Such is the case herein. Plaintiff's counsel cited to the complex nature of deposing medical providers as a reason for the delay. R. 441. South Dakota jurisprudence provides that such a complexity should have *enhanced* the need for active prosecution of Plaintiff's case, not diminished them. *Id. at* ¶ 10, 802.

Second, Plaintiff claims that Covid-19 caused the delay. Counsel for all parties, the Circuit Court, and this Court were all affected by Covid-19 and the various detrimental outcomes inherent with it including potential scheduling issues and delays in administrative or ministerial matters. However, Plaintiff's claim that the year-plus delay from September of 2022 to January 8, 2024 is attributable to Covid-19 is a grand reach, at best and moreover, is not supported by the record. There is simply no record evidence that Covid-19 kept Plaintiff from taking some affirmative step to move the case forward.

Third, Plaintiff asserts that Defendants were the real source of the problem. Plaintiff claims that Defendants failed to "meet the plaintiff step-by-step" by failing to voluntarily produce the decedent's complete medical record set during the disputed time period. However, such an assertion is misguided for multiple reasons. First, Plaintiff is the one who controls the authority to obtain a complete set of the decedent's medical records. At any time, Plaintiff could have procured those records using her own authorizations. Instead, Plaintiff started the lawsuit, provided incomplete medical records to the Defendants, and placed the onus on the Defendants to make certain the medical

records were complete.[9] Defendants' gathering of a complete set of the decedent's medical records was their typical practice and prerogative; producing various portions of the decedent's medical records to Plaintiff's counsel piecemeal makes little sense and is not pragmatic. Counsel for the HRMC Defendants indicated that it is common practice for him to wait until the depositions have begun to Bates stamp and distribute the records to ensure the parties are all working from the same set of records. R. 358. But no depositions were ever initiated by Plaintiff.

Second, and perhaps most important, Plaintiff's counsel never took umbrage with the same until *after* the Motion to Dismiss was filed. Plaintiff's counsel never sent a single piece of correspondence, much less a meet and confer letter, to address the way Defendants went about gathering their own complete sets of the decedent's medical records. Plaintiff never moved to compel production of the same.

At the motion hearing, Plaintiff's counsel admitted that Plaintiff's third argument for good cause was not supported by South Dakota jurisprudence. Judge Pardy asked Plaintiff's counsel if he knew "of any authority – and whether it's informal or formal – that says the plaintiff is waiting on the defense to produce, that is good cause for delay?" Plaintiff's counsel responded, "[n]ot specifically, no, Judge." R. 616:17-20. Judge Pardy next asked Plaintiff's counsel if he knew of any caselaw that states "that waiting on the defense to produce something that, frankly, belongs to the plaintiff – but even if it didn't, is shown that to be good cause for delay?" Plaintiff's counsel responded, "I know of no cases." R. 621:16-20.

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[9] The HRMC Defendants are not suggesting the Plaintiff purposefully withheld medical records, but rather assert that whatever method was used by Plaintiff to procure medical records did not result in a complete set of records.

Lastly, Plaintiff claims that after the Motion to Dismiss was filed, the parties agreed a scheduling order that would have brought the case on for trial down-the-road. However, the record reflects no evidence to show, or even suggest, that Plaintiff attempted to correspond with Defendants' counsel in any way between September of 2022 and January 8, 2024. "***It is the plaintiff's responsibility to move the cause of action forward. The defendant need only meet the plaintiff step by step.***" *Eischen*, 2008 S.D. 2, ¶ 13, 744 N.W.2d at 795 (citing *Dakota Cheese, Inc.*, 525 N.W.2d at 716 (S.D. 1995)) (internal citations omitted) (emphasis in original). Defendants could not meet Plaintiff "step-by-step" in this case quite simply because Plaintiff's case laid stagnant for over a year. Plaintiff's attempt to propose a stipulated Scheduling Order *after* the Motion to Dismiss was filed does not constitute good cause for the purposes of SDCL 15-11-11.

This Court held in *White Eagle* that the two requisite findings to establish good cause for delay are: (1) contact with the opposing party; *and* (2) some form of excusable conduct or happening which arises other than by negligence or inattention to pleading deadlines. 2002 S.D. 68, ¶ 11, 647 N.W.2d at 720 (quoting *Dakota Cheese, Inc.*, 525 N.W.2d at 717 (S.D. 1995)). Plaintiff cannot demonstrate either for the period of September 2022 through January 8, 2024. Plaintiff's inability to actually provide a demonstration of contact by her counsel with Defendants' counsel is telling. More telling is Plaintiff's inability to elucidate any legitimate conduct or happening, outside of negligence or inattention, that sufficiently excuses the year-plus, contactless delay. Therefore, the Circuit Court's dismissal pursuant to SDCL 15-11-11 was proper. *See Reed v. Heath*, 383 N.W.2d 873, 874 (S.D. 1986) (affirming dismissal for lack of

prosecution pursuant to SDCL 15-11-11 despite the plaintiffs' claims of good cause for the delay because nothing probative in the record could be found to support the plaintiffs' claims).

The Circuit Court was correct to dismiss Plaintiff's case pursuant to SDCL 15-11-11. There was no record evidence of activity by Plaintiff for the twelve-plus months prior to January 8, 2024, the date the Motion to Dismiss was filed. No good cause was demonstrated for the delay. A prima facie case for dismissal under SDCL 15-11-11 was presented before the Circuit Court and it granted the dismissal. "[A] judicial mind, in view of the law and the circumstances, could have reasonably reached that conclusion[,]" therefore the Circuit Court did not abuse its discretion, and its decision to dismiss pursuant to SDCL 15-11-11 must stand. *Swenson*, 1999 S.D. 61, ¶ 9, 594 N.W.2d at 343 (quoting *Rosen's, Inc.*, 513 N.W.2d at 576 (S.D. 1994)).

II. THE CIRCUIT COURT PROPERLY DISMISSED PLAINTIFF'S CASE PURSUANT TO SDCL 15-6-41(b).

At issue is whether the Circuit Court properly dismissed Plaintiff's case pursuant to SDCL 15-6-41(b). SDCL 15-6-41(b) provides dismissal of a civil case due to a plaintiff's failure to move a case forward and states, in relevant part, that "[f]or failure of the plaintiff to prosecute or to comply with this chapter or any order of the court, a defendant may move for dismissal of an action or of any claim against the defendant." *Id.*

Dismissal pursuant to SDCL 15-6-41(b) is appropriate when the plaintiff's conduct is "egregious." *Eischen*, 2008 S.D. 2, ¶ 12, 744 N.W.2d at 795 (citing *Rotenberger v. Burghduff*, 2007 S.D. 7, ¶ 17 n.6, 727 N.W.2d 291, 295 n.6) (internal citations omitted). Dismissal pursuant to SDCL 15-6-41(b) "should only be granted

when there is an 'unreasonable and unexplained delay.'" *Id.* at ¶ 13, 795 (quoting *Dakota Cheese, Inc.*, 525 N.W.2d at 715 (S.D. 1995)) (internal citations 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 [her] rights.'" *Dakota Cheese, Inc.*, 525 N.W.2d at 715-16 (quoting *Chicago & Northwestern R. Co. v. Bradbury*, 129 N.W.2d 540, 542 (S.D. 1964)) (internal citations omitted). The Supreme Court "will not ordinarily interfere with a circuit court's ruling in granting or denying motions to dismiss for failure to prosecute. *Eischen*, 2008 S.D. 2, ¶ 13, 744 N.W.2d at 795 (citing *Dakota Cheese, Inc.*, 525 N.W.2d at 715 (S.D. 1995)).

The Circuit Court's dismissal of Plaintiff's case pursuant to SDCL 15-6-41(b) was proper because: (1) Plaintiff's conduct, or lack thereof, was egregious in light of all of the circumstances; and (2) the delay caused by Plaintiff was both unreasonable and unexplained.

A. Plaintiff's conduct, or lack thereof, was egregious.

The Circuit Court's dismissal of Plaintiff's case under SDCL 15-6-41(b), as set forth in its March 23, 2024 "Memorandum Decision" (R. 417-427) was correct. The record reflects that Plaintiff's litigation conduct, perhaps more properly characterized as litigation inertness, was unreasonable, unexplained, and properly characterized as

egregious.[10] The Circuit Court found that from September of 2022 until January 8, 2024, Plaintiff's counsel served no interrogatories or other discovery, scheduled no depositions, conducted no settlement negotiations, nor attempted to schedule the case for trial; Plaintiff's counsel, himself, did not even engage opposing counsel with correspondence during the year-plus period.[11] *See* R. 426. Judge Pardy further noted that "[l]ike the Defendants in *Eischen*, it was the Defendants that consistently attempted to move the litigation forward. As the Supreme Court stated in *Eischen*, but for the initiative of the Defendants, there would have been no activity in this case." R. 426.[12]

Plaintiff's own argument regarding the serious allegations involving loss of life and medical negligence supports the Circuit Court's finding that Plaintiff's stagnant litigation conduct was egregious. Here, as in *Annett*, the serious nature of the injuries *enhanced* the need for active prosecution of Plaintiff's case. 1996 S.D. 58, ¶ 25, 548 N.W.2d at 804. Plaintiff's attempts to juxtapose the facts as alleged in this case into

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[10] While the Circuit Court's Memorandum Decision addressing dismissal under SDCL 15-6-41(b) did not specifically state word "egregious," the Decision makes abundantly clear the Circuit's Court's conclusion was that Plaintiff's litigation conduct, or lack thereof, was egregious, i.e., by setting forth the standard for dismissal under SDCL 15-6-41(b) and concluding Plaintiff failed to uphold her burden of moving the litigation forward with due diligence and reasonable promptitude, listing a mere six (6) verifiable activities on the record attributable solely to Plaintiff's own action and concluding Plaintiff was responsible for the delay. R. 426.

[11] As noted by this Court in *Rotenberger v. Burghduff*, the standards for dismissal under SDCL 15-11-11 and SDCL 15-6-41(b) are different. SDCL 15-11-11 "only requires no record activity for a period of one year. In contrast 15-6-41(b) does not specifically state a period of time, but requires the plaintiff's conduct be egregious before dismissal." 2007 S.D. 7, ¶ 17 n. 6, 727 N.W.2d at 295, n. 6.

[12] The Circuit Court also addressed Plaintiff's ten-month-overdue discovery responses to both the HRMC Defendants' discovery requests and Dr. Miner's discovery requests. R. 426. Plaintiff, to this date, has never responded to Dr. Miner's Requests for Production of Documents which were served in November of 2021. R. 278.

some form of respite wholly lack sincerity. As much is evinced by the lack of *any* meaningful correspondence, negotiation, request for deposition, discovery request or response, by Plaintiff from September of 2022 through January 8, 2024.

As the Circuit Court accurately noted, "[o]ther than internal preparation with the Plaintiff's experts, the Plaintiff took no action from September of 2022 to move this matter forward. R. 426. Concluding the same is "egregious" conduct is reasonable, particularly in one such as this; the record supports the Circuit Court's conclusion. *See* R. 426 (concluding that Plaintiff had the burden to advance the litigation and failed to do so with due diligence and reasonable promptness and that Plaintiff was responsible for the delay).

B. Plaintiff's failure to do anything to proceed with the case constituted an unreasonable and unexplained delay.

Just as the Circuit Court was correct in finding that Plaintiff's conduct was egregious, the Circuit Court was also correct in finding that Plaintiff's failure to do anything to proceed with the case constituted an unreasonable and unexplained delay. As noted *supra*, in Section 1(B), no legitimate explanation can be found for Plaintiff's failure to do *anything* to move the case forward from September of 2022 through January 8, 2024.

Given the factual predicate of this case, Plaintiff could reasonably be expected to proceed with promptitude towards vindication or enforcement of her rights – yet she did not. That is, categorically, an unreasonable and unexplained delay. *See Dakota Cheese, Inc.*, 525 N.W.2d at 715-16 (quoting *Bradbury*, 129 N.W.2d at 542 (S.D. 1964)) ("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 [her] rights.'"

Plaintiff further argues that the Defendants failed to demonstrate prejudice to obtain the dismissal. The Circuit Court held as a matter of law that prejudice is not required to obtain a dismissal under SDCL 15-6-41(b). R. 426. Such a holding is correct but it *may* be considered as a factor. *Eischen*, 2008 S.D. 2, ¶ 26, 744 N.W.2d at 799. Indeed, the Circuit Court did find that Defendants' enduring the financial and emotional difficulties that come with a lawsuit is prejudice, and therefore held that the Defendants were prejudiced. R. 426.

In *Eischen*, the circuit court's decision to dismiss the plaintiffs' claim was based not on prejudice to the defendants, but rather on the manner in which the plaintiffs pursued their claim with a lack of due diligence which typified "an egregious, unexplained and unreasonable failure to proceed with promptitude." *Id.* at ¶ 27, 799. The circuit court concluded that the Eischens had the burden to advance the litigation as the plaintiffs; that they failed to do so with due diligence and reasonable promptitude; that the Eischens were responsible for the delays; that the defendants were in no way reasonable; and that the delays were unreasonable, unexplained, and egregious. *Id.* at ¶ 28, 799. The circuit court's order granting the defendants' motion to dismiss was affirmed. *Id.*

Here, as in *Eischen*, Plaintiff had the burden to advance the litigation. Similarly, Plaintiff failed to do so with due diligence and reasonable promptitude as evinced by the scintilla of actual litigation conduct *initiated* wholly by Plaintiff *since the inception of the case*. Further, Plaintiff was wholly responsible for the delays in this matter. Plaintiff's

conduct, or lack thereof, in causing the delays in this matter were egregious, unexplained, and unreasonable and Defendants were prejudiced as a result.

The Circuit Court was correct to dismiss Plaintiff's case pursuant to SDCL 15-6-41(b). The record demonstrates an egregious lack of initiative and promptitude which spanned from September of 2022 through to January 25, 2024, which cannot be reasonably explained. Moreover, the Defendants were prejudiced by the lengthy delay. A prima facie case for dismissal under SDCL 15-6-41(b) was presented before the Circuit Court and it granted the dismissal. "[A] judicial mind, in view of the law and the circumstances, could have reasonably reached that conclusion[,]" therefore the Circuit Court did not abuse its discretion and its decision to dismiss pursuant to SDCL 15-6-41(b) was proper. *Swenson*, 1999 S.D. 61, ¶ 9, 594 N.W.2d at 343 (quoting *Rosen's, Inc.*, 513 N.W.2d at 576 (S.D. 1994)).

III. THE CIRCUIT COURT'S SANCTION OF DISMISSAL WITH PREJUDICE WAS PROPER UNDER THE CIRCUMSTANCES.

A. The appropriate sanction for Plaintiff's egregious conduct was a dismissal with prejudice.

Plaintiff cites to federal cases arguing that the law required that dismissal was improper under Rule 41(b) when lesser sanctions were appropriate. Plaintiff's argument and the case relied upon are distinguishable as the federal standards for dismissal (Federal Rule of Evidence 41(b)) for failure to prosecute are different than South Dakota's standard and are not binding on this Court. *See Abdulrazzak*, 2020 S.D. 10, ¶ 23, n.4, 940 N.W.2d at 678, n.4. (quoting *Sander*, 506 N.W.2d at 122 (S.D. 1993). ("'[F]ederal interpretations of federal civil and appellate procedural rules are not binding on [the South Dakota Supreme Court]' even if the rules are the same.").

While South Dakota has a similar rule (SDCL 15-6-41(b)) to Federal Rule of Evidence 41(b), South Dakota also has a separate statute (SDCL 15-11-11) that provides for dismissal of a lawsuit for failure to prosecute. Further, South Dakota jurisprudence has established a different legal analysis for whether dismissal of a case, under South Dakota law is appropriate. The appropriate sanction under South Dakota law for a plaintiff's delay which is egregious, i.e., unexplainable and unreasonable, is that it be dismissed with prejudice. "Inexcusable delay, as witnessed here, mires cases in our court system and cheats litigants of timely and just determinations. Such delay must be extracted like an impacted molar, lest it infect the judicial jawbone." *Duncan v. Pennington Cnty. Hous. Auth.*, 382 N.W.2d 425, 428 (S.D. 1986).

While Plaintiff hangs her hat on caselaw from other jurisdictions, state or federal, it is telling that Plaintiff cannot cite to a single piece of binding authority which states that South Dakota law requires or even allows a lesser sanction than that specifically prescribed by statute be imposed before a case is dismissed; counsel for Defendants have not located the same either, likely because no such binding authority exists. Accordingly, Plaintiff's argument regarding the appropriacy of lesser sanctions is without merit and should be disregarded.

B. South Dakota jurisprudence does not permit use of a multifactor test to evaluate the propriety of Rule 41(b) dismissals.

Plaintiff cites to Justice Konenkamp's dissent in *Eischen* as the "real" law of this State regarding a court's proper analysis of a defendant's motion to dismiss; however, the same is very clearly not binding authority. In fact, the non-adoption of Justice Konenkamp's proposed "multi-factor" test in the South Dakota Supreme Court's cases addressing dismissals for failure to prosecute evinces the flaws in Plaintiff's assertion

regarding the propriety of the dissent's rationale. The standard before a court upon a defendant's motion to dismiss pursuant to SDCL 15-6-41(b) is straightforward: dismissal is appropriate when the plaintiff's conduct has been egregious. Plaintiff is free to cite to a legion of non-binding authority, if Plaintiff deems it prudent, in attempting to obfuscate the realities of their litigation conduct or lack thereof. However, the fact of the matter does not change – a multi-factor test was not used by the Circuit Court because the South Dakota statutes governing the motion to dismiss for failure to prosecute do not provide nor permit use of a multi-factor test. Plaintiff's argument regarding the appropriacy of a multi-factor test to evaluate the propriety of a dismissal under SDCL 15-6-41(b) is without merit and should be disregarded.

CONCLUSION

The Circuit Court was correct in dismissing Plaintiff's case under SDCL 15-11-11 as there was no record evidence of activity by Plaintiff for the twelve-plus months prior to January 8, 2024, the date the Motion to Dismiss was filed, and no good cause was demonstrated by Plaintiff for the delay. Further, the Circuit Court was correct in dismissing Plaintiff's case under SDCL 15-6-41(b); the record demonstrates an egregious lack of initiative and promptitude by Plaintiff spanning from September of 2022 through to January 25, 2024, which was both unreasonable and unexplained. Said lengthy delay was prejudicial to the Defendants. Plaintiff's arguments in favor of reshaping South Dakota's analytical framework of a defendant's motion to dismiss are without merit. Therefore, the HRMC Defendants respectfully request this Court affirm the Circuit Court on all issues.

Dated at Sioux Falls, South Dakota, this 21 day of October, 2024.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief of Appellees Huron Regional Medical Center, Inc., and Thomas Miner complies with the type volume limitations set forth in SDCL § 15-26A-66(b)(2). Based on the information provided by Microsoft Word 2016, this Brief contains 8,132 words, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates of counsel. This Brief is typeset in Times New Roman (12 point) and was prepared using Microsoft Word 2016.

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The undersigned hereby certifies that the foregoing Brief of Appellees Huron Regional Medical Center, Inc., and Thomas Miner was filed and served using the Court's Odyssey File and Serve system which upon information and belief will send e-mail notification of such filing to:

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

LORI A. OLSON, INDIVIDUALLY, AND AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF SCOTT D. OLSON, A DECEASED PERSON,

Appellant,

v.

HURON REGIONAL MEDICAL CENTER, INC., WILLIAM J. MINER, M.D., AND THOMAS MINER

Appellees.

Appeal Nos. 30697 and 30705

APPEAL FROM THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
BEADLE COUNTY, SOUTH DAKOTA

THE HONORABLE PATRICK T. PARDY,
CIRCUIT COURT JUDGE

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NOTICE OF APPEAL FILED
May 2, 2024
APPELLEE WILLIAM J. MINER, M.D.'S NOTICE OF REVIEW FILED
May 12, 2024

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PRELIMINARY STATEMENT

Plaintiff/Appellant Lori Olson will be referred to as "Plaintiff." Defendant/Appellee Huron Regional Medical Center, Inc. will be referred to as "HRMC." Defendants/Appellees Thomas Miner and HRMC will be collectively referred to as "HRMC Defendants." Defendant/Appellee William J. Miner, M.D. will be referred to as "Dr. Miner." References to the Certified Record on Appeal will be "*C.R.*" followed by the applicable page number(s).

JURISDICTIONAL STATEMENT

This is an appeal from a Judgment in favor of the Defendants following the Circuit Court granting Dr. Miner's Motions to Dismiss for Failure to Prosecute. The Honorable Patrick T. Pardy, Circuit Court Judge, Third Judicial Circuit, Beadle County, South Dakota, entered Judgment on April 16, 2024. *C.R. 578.* Plaintiff filed a Notice of Appeal on May 2, 2024. *C.R. 582.* The Judgment is appealable as of right pursuant to SDCL 15-26A-3(1).

Dr. Miner filed a Notice of Review on May 12, 2024. *Appendix 007.* The Order which Dr. Miner seeks review is the Honorable Kent A. Shelton's[1] *Order Denying Motion to Dismiss of Dr. William J. Miner, M.D.* dated August 22, 2022. *C.R. 272-273.* This Order is appealable pursuant to SDCL 15-26A-22

[1] After the suit was commenced, Judge Shelton recused himself due to a conflict. The case was thereafter re-assigned to Judge Pardy.

STATEMENT OF LEGAL ISSUES

I. DID THE TRIAL COURT ERR BY GRANTING DR. MINER'S MOTION TO DISMISS FOR FAILURE TO PROSECUTE PURSUANT TO SDCL 15-11-11?

No. The trial court properly granted the motion to dismiss for failure to prosecute. C.R. 576-577.

Apposite Authority:
SDCL 15-11-11
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)

II. DID THE TRIAL COURT ERR BY GRANTING DR. MINER'S MOTION TO DISMISS FOR FAILURE TO PROSECUTE PURSUANT TO SDCL 15-6-41(B)?

No. The trial court properly granted the motion to dismiss for failure to prosecute. CR. 576-577.

Apposite Authority:
SDCL 15-6-41(b)
Eischen v. Wayne Tp., 2008 S.D. 2, 744 N.W.2d 788

III. DID THE TRIAL COURT ERR BY DENYING DR. MINER'S MOTION TO DISMISS FOR INSUFFICIENT SERVICE OF PROCESS?

Yes. The trial court (Judge Shelton) erroneously denied the motion to dismiss for insufficient service of process. C.R. 272-273.

Apposite Authority:
Grajczyk v. Tasca, 2006 S.D. 55, 717 N.W.2d 624
Pitt-Hart v. Sanford USD Medical Center, 2016 S.D. 33, 878 N.W.2d 406
Bruske v. Hille, 1997 S.D. 108, 567 N.W.2d 872
White Eagle v. City of Fort Pierre, 2000 S.D. 34, 606 N.W.2d 926
SDCL 15-6-4(c), (d), (e), (g)

STATEMENT OF THE CASE AND FACTS

On January 24, 2020, Scott Olson passed away in the emergency department at Huron Regional Medical Center. Plaintiff subsequently commenced this action on behalf of herself and as Personal Representative for Mr. Olson's Estate. The claims asserted vary from professional negligence and wrongful death to conspiracy and fraudulent concealment.[2]

The manner by which Dr. Miner received the Summons and Complaint was as follows. On September 20, 2021, Plaintiff delivered the Complaint, along with the Summons and a demand letter, to the Pennington County Sheriff with instructions that they be served on "William J. Miner, M.D.-Monument Health-Rapid City Hospital." *C.R. 19.* On September 21, 2021, a Pennington County Sheriff's Deputy, Deputy Sanders, delivered the Summons and Complaint to Marlin Klingspor, a paralegal in the offices of General Counsel for Monument Health Rapid City Hospital ("Monument Health"). *See C.R. 58 ¶¶ 2–3; C.R. 56 ¶ 3.* Upon receiving the documents, Paula McInerney-Hall, Assistant General Counsel for Monument Health, contacted Dr. Miner and told him the documents were available for him to pick up. *C.R. 57 ¶ 6; C.R. 55 ¶ 8.* Dr. Miner retrieved the documents from her office on September 22, 2021. *C.R. 55 ¶ 9; C.R. 57 ¶ 7.*

In his Answer, Dr. Miner asserted the affirmative defense of insufficient service of process. *C.R. 26.* Dr. Miner additionally raised the affirmative defense of lack of

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[2] The Complaint alleges the following causes of action: (1) Negligence and Wrongful Death; (2) Decedent's Personal Injury, Medical, and Funeral Expenses; (3) Vicarious Liability; (4) Loss of Consortium; (5) Intentional Infliction of Emotional Distress; (6) Conspiracy; and (7) Fraudulent Concealment. *See C.R. 4-13.*

personal jurisdiction. *C.R. 26.* The defective service upon Appellee Miner was also the subject of discovery. Specifically, in response to Interrogatory Number 16, which concerned the bases for his affirmative defenses, Dr. Miner stated that he "was not served with process." *C.R. 164-165.*

It is not disputed that Deputy Sanders did not: (i) personally serve Dr. Miner with the Summons or Complaint in this matter; or (ii) leave the Summons or Complaint at Dr. Miner's residence with a member of his family over the age of 14, as permitted by SDCL 15-6-4(d) or (e). *C.R. 54-55 ¶¶ 5, 6.* Likewise, Dr. Miner had not authorized any person or entity to accept service of the Summons or other pleadings on his behalf. *C.R. 55 ¶ 10.* Given the defective service, Dr. Miner filed a Motion to Dismiss the claims against him on February 10, 2022. *C.R. 45.* On August 22, 2022 the Circuit Court (Judge Shelton) denied the Motion, holding that Dr. Miner was subject to the jurisdiction of the court and had been properly served. *C.R. 272-273.*

Disappointingly, in the months that followed, Plaintiff failed to move the case forward with reasonable promptitude. On December 29, 2021, Dr. Miner served discovery, including Interrogatories and Requests for Production, on Plaintiff. *C.R. 178-192.* Nearly nine months later, Plaintiff answered Dr. Miner's interrogatories on September 21, 2022. *C.R. 283 ¶ 8.* Plaintiff never answered Dr. Miner's requests for production of documents. *C.R. 283 ¶ 9.* The last communication between Plaintiff's counsel and Dr. Miner's counsel occurred on October 17, 2022. *C.R. 406.* The last communication between staff at these two attorney's offices was on January 6, 2023 when Plaintiff's Counsel's office provided updated medical record release authorizations. *C.R. 286.* Over a year later, on January 8, 2024, Dr. Miner filed a Motion to Dismiss for

Failure to Prosecute. *C.R. 274.* In his letter decision dated March 23, 2024, the Circuit Court (Judge Pardy) granted the Motion. *C.R. 417-427.* The Court entered Judgment on April 16, 2024, and Notice of Entry of Judgment was issued April 16, 2024. *C.R. 579-581.* Any other relevant facts will be discussed in the body of the brief.

STANDARD OF REVIEW

This Court reviews the circuit court's dismissal of a claim for failure to prosecute using the abuse of discretion standard. *Eischen v. Wayne Tp.*, 2008 S.D. 2, ¶ 10, 744 N.W.2d 788, 794. "An abuse of discretion 'is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable.'" *McLaren v. Sufficool,* 2015 S.D. 19, ¶ 4, 862 N.W.2d 557 (citing *Thurman v. CUNA Mut. Ins, Soc'y,* 2013 S.D. 63, ¶ 11, 836 N.W.2d 611). The Circuit Court's findings of fact are reviewed under the clearly erroneous standard, and its conclusions of law are reviewed *de novo. Eischen,* 2008 S.D. 2, ¶ 10, 744 N.W.2d 788, 794.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR BY GRANTING DR. MINER'S MOTION TO DISMISS FOR FAILURE TO PROSECUTE PURSUANT TO SDCL 15-11-11.

SDCL 15-11-11 provides as follows:

> The court may dismiss any civil case for want of prosecution upon written notice to counsel of record where the record reflects that there has been no activity for one year, unless good cause is shown to the contrary. The term 'record,' for purposes of establishing good cause, shall include, but not by way of limitation, settlement negotiations between the parties or their counsel, formal or informal discovery proceedings, the exchange of pleadings, and written evidence of agreements between the parties or counsel which justifiably result in delays in prosecution.

This statute was amended in 1998 to include the definition of "record" and has been interpreted and considered by this Court on several occasions. *See LaPlante v. GGNSC Madison, South Dakota, LLC*, 2020 S.D. 13, 941 N.W.2d 223; *Eischen v. Wayne Tp.*, 2008 S.D. 2; *Jenco, Inc. v. United Fire Group*, 2003 S.D. 79, 666 N.W.2d 763; *White Eagle v. City of Fort Pierre*, 2002 S.D. 68, 647 N.W.2d 716; *Moore v. Michelin Tire Co., Inc.*, 1999 S.D. 152, 603 N.W.2d 513; *Swenson v. Sanborn County Farmers Union Oil Co.*, 1999 S.D. 61, 594 N.W.2d 339; *London v. Adams*, 1998 S.D. 41, 578 N.W.2d 145.

A court need only consider two factors when dismissing pursuant to SDCL 15-11-11: 1) no activity for one year, and 2) no showing of good cause which excuses the inactivity. *Jenco, Inc. v. United Fire Group*, 2003 S.D. 79, ¶ 22. "Good cause for delay requires contact with the opposing party *and* some form of excusable conduct or happening which arises other than by negligence or inattention to pleading deadlines." *Dakota Cheese, Inc. v. Taylor*, 525 N.W.2d 713, 717 (S.D. 1995); *Devitt v. Hayes*, 1996 S.D. 71, ¶ 15, 551 N.W.2d 298, 301. This court has held that the "activity alleged must be verifiable in the record before us." *White Eagle v. City of Fort Pierre*, 2002 S.D. 68, ¶ 8, 647 N.W.2d 716, 719. Where there has been "an omission to do something which the party might do or might be reasonably expected to do towards vindication or enforcement of his rights," that is the "very definition of unreasonable, unexplained delay." *Id.* at ¶ 15. In *Dakota Cheese*, this Court specifically noted that "communication among a plaintiff and plaintiff's counsel" is not good cause for delay. *Id.* For more than a year Plaintiff did nothing to advance her claims.

A. Activity

It should be noted at the outset that Plaintiff's claim that the "Circuit Court did not follow the proper standards to apply" the two prongs (inactivity for one year and good cause for inactivity), "and mistakenly added a communication requirement" is incorrect. *Appellant's Brief p. 19.* It is clear from his considered Memorandum Decision that Judge Pardy understood and applied the proper two-prong test articulated by this Court. For example, Judge Pardy described the two factors as "1) whether the lack of communication between the Plaintiff and Defendant exceeds twelve months and 2) whether there is good cause for the *inactivity.*" *C.R. 420* (emphasis added). The Court went on to apply those factors and found not only that Plaintiff "could not identify a single contact with Dr. Miner's attorney between January 6, 2023 and January 8, 2024," but also, with regard to Dr. Miner, "the record is void of any activity over the year in question." Indeed, the Court noted that when given the opportunity to identify any activity whatsoever, Plaintiff's counsel acknowledged that Plaintiff "never issued a subpoena, never attempted to schedule a deposition, never made a motion for a scheduling order, never made a motion to compel discovery" and that "Defendants never put up a wall preventing [Plaintiff] from proceeding." *C.R. 422 fn. 2.* Without question, Judge Pardy understood the "inactivity" prong of the test to include more than just failure to communicate with the other side.

Additionally, this Court's precedent makes clear that "good cause" requires communication with the opposing party. *Dakota Cheese, Inc. v. Taylor*, 525 N.W.2d 713, 717; *Devitt v. Hayes*, 1996 S.D. 71, ¶ 15, 551 N.W.2d 298, 301. In *LaPlante*, this Court noted that the term "activity" is not confined to court filings or a particular communication between the parties, but that "we have placed an affirmative duty on a

plaintiff to engage in activity that moves the case forward." 2020 S.D. 13, ¶ 18. In the words of this Court, "We have always required that the activity must be shown on record" and the focus "has always been on whether *proof* of activity was presented" *Id.* Thus, the alleged activity must be verifiable on the record. *Id.* This Court has aptly noted it is problematic when the claimed activity is not communicated to the defendant. *See Holmoe v. Reuss*, 403 N.W.2d 30 (S.D. 1987) (no proof of activity in settled record, "in addition, none of this claimed activity was communicated to defendant or his counsel"). Notably, in her *Brief* Plaintiff still cannot identify any emails, letters, phone calls, discovery requests, responses to discovery, supplemental discovery, pleadings, motions, or proposed stipulations exchanged between her counsel and Dr. Miner's counsel during the year preceding Dr. Miner's Motion to Dismiss.

Instead, Plaintiff attempts to craft a new definition of "informal discovery" described as activity sufficient to withstand a motion to dismiss for failure to prosecute. For example: Plaintiff suggests her Counsel was "engaged in locating and procuring additional experts witnesses" within the 12 months preceding Dr. Miner's Motion to Dismiss, and that such activity was "informal discovery." *Appellant's Brief p. 25-26.*

Under the Rules of Civil Procedure, the methods of discovery include "depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission." SDCL 15-6-26(a). "Discovery" is essentially the exchange of information during litigation. Clearly, "informal" discovery is the exchange of discoverable information, but without first serving formal discovery requests such as interrogatories,

requests for production, requests for admissions or utilizing other formal procedural tools specified in the Rules of Civil Procedure. Indeed, "informal discovery" has been found to include the production of documents through informal requests, such as during a deposition, rather than through the formal filing of a Request for Production of Documents pursuant to SDCL 15-6-34. *See Nemec v. Deering*, 350 N.W.2d 53, 58 (S.D. 1984) (counsel engaged in informal discovery procedures regarding the production of documents during a deposition). Plaintiff's claim that their own communication with their own experts constitutes "informal discovery" is simply incorrect.

Plaintiff suggests that Dr. Miner's own efforts to gather their own set of medical records during the 12-month period preceding the *Motion to Dismiss* is "activity" contemplated by the two-prong test. *Appellant's Brief p. 26-27.* Plaintiff attempts to cast this as a failure of Dr. Miner to "meet plaintiff step-by-step" because no records were produced during the 12-month timeframe. She appears to suggest, without actually saying, that she was tricked into waiting for defendants to produce records, and Dr. Miner was the cause of her delay in discovery and this is good cause for delay. This is simply not what this Court has suggested as the meaning of meeting "step-by-step." If Plaintiff was concerned about the lack of efforts by Dr. Miner, then it was incumbent on Plaintiff to do something to move the cause of action forward. *See Eischen*, 2008 S.D. 2 at ¶ 13.

Plaintiff argues that because the Circuit Court noted communication is required as part of the "good cause" prong (see Argument B. infra) that the Circuit Court erred as a matter of law. However, the Court was clear that something of record, be it communication or something else, must occur within a one-year period pursuant to SDCL 15-11-11. *C.R. 419-423.* In this case the Circuit Court specifically found, "[t]he

period of inactivity as it relates to Defendant Dr. Miner's motion clearly exceeds the twelve-month statutory minimum to support a motion to dismiss." *C.R. 421.* It is difficult to imagine, given the definition of "record" and how "activity" has been interpreted by this Court, what record activity would not involve communication with opposing counsel.

In the end, the result is the same. Plaintiff can point to no verifiable activity in the record which occurred between Dr. Miner and Plaintiff between January 6, 2023 and January 8, 2024.

B. Good Cause

Plaintiff likewise has not demonstrated good cause for her failure to prosecute her case. Plaintiff admitted at oral argument that "I certainly could have moved this case ahead faster." *C.R. 651*$_{2\text{-}3}$. The claims for the delay were that Plaintiff was waiting on Appellees to produce medical records, and that Plaintiff hired more experts.

Any argument by the Plaintiff that the delay was due to the defendants should be disregarded. Waiting on the defense is not good cause for inactivity. It is the plaintiff's burden to move the case forward. In *LaPlante v. GGNSC Madison, South Dakota*, the Court noted, "a plaintiff has the 'duty to carry [the] case forward and to ensure verifiable activity existed to keep the case afloat.'" 2020 S.D. 13, ¶ 18 (quoting *White Eagle*, 2002 S.D. 68, ¶ 11). In its ruling, the Circuit Court noted, "[c]ounsel for the Plaintiff acknowledged that he could not produce any authority for the argument that waiting on a defendant to produce discovery was good cause for the delay." *C.R. 422 fn. 3.* And, notably, Plaintiff provides no authority for that position to this Court. Instead, Plaintiff argues that she was somehow prohibited from taking steps to advance her case because

she was allegedly waiting for Dr. Miner to gather medical records. Setting aside that Plaintiff fails to provide any legal support for the argument, this argument is factually unsound. As is readily apparent, among other things, Plaintiff could have communicated with counsel for defendants, met and conferred with defense counsel regarding the claimed delay, and, if necessary, sought to compel if such contacts were met with resistance. The blame cannot lie with defendants; the Plaintiff had an obligation to prosecute her case and failed to do so.

Similarly, in *Jenco*, where the plaintiff attempted to excuse its delay "claiming that at least 10 months of the delay was attributable to Judge Fitzgerald's death," this court found Jenco missed the point, that "there was no showing that Jenco even attempted to do anything whatsoever within that two and one-half year period." *Jenco, Inc. v. United Fire Group,* 2003 S.D. 79, ¶ 12-13, 666 N.W.2d 763, 766.

In *Swenson v. Sanborn County Farmers Union Oil Co.*, 1999 S.D. 61, this court discussed what constitutes "good cause" and stated:

> We have found the following to not be good cause for delay: communication among a plaintiff and plaintiff's counsel, but not with opposing counsel, letters and settlement activity between the parties two years prior to dismissal, massive amount of documentation and investigation, plaintiff's failure to file a summons and complaint in circuit court fourteen months after being instructed to do so by the transferring small claims court, the serious nature of injuries to plaintiff, difficulty in finding an expert witness and settlement activity which expired a year prior to dismissal, and illness and death of defendants' original counsel and further inaction by defendants' counsel's law firm.

Swenson, 1999 S.D. 61, ¶ 16 (internal citations omitted).[3] The *Swenson* Court noted that even if there is inactivity for a period of one year, there can be good cause for the delay,

[3] In her brief Plaintiff states that "[a]mong all of its prior opinions, there isn't one which suggests that a plaintiff's active pursuit of expert opinions is not 'activity.'" *Appellant's*

which in that case, was found when there were interactions and communications between the parties related to a number of issues including settlement and scheduling, which would have moved the case forward. *Id.* at ¶ 17. Here, however, there was no communication at all between Plaintiff's counsel and Dr. Miner's counsel for more than twelve months.

With regard to Plaintiff's argument that her Counsel's identification and consultation with additional experts amounted to informal discovery, and therefore good cause for delay, this Court in *Holmoe*, cited with approval the discussion in *F.M.C. Corp. v. Chatman*, 368 So.2d 1307 (Fla.Dist.Ct.App.1979) of the same argument. In that case, "the district court found that plaintiff's explanation of the non-record activity in the file merely reflected telephone calls, conferences, and letters between plaintiff's attorney, his client, and potential witnesses, without any contact with the defendant" and this conduct was insufficient to constitute "good cause" under the rule. *Holmoe v. Reuss,* 403 N.W.2d 30, fn. 2 (quoting *F.M.C. Corp. v. Chatman*, 368 So.2d 1307). This court further quoted the *F.M.C. Corp* case: "there may have been extensive non-record conferences with a '…necessary and vital expert witness,' but such do not prevent or hinder, compliance with the rules." *Id.*

Further, in *Annett v. American Honda Motor Co., Inc.*, 1996 S.D. 58, 548 N.W.2d 798, the Plaintiff claimed that difficulty finding an expert witness, the informal discovery activities, and settlement talks between the parties constituted good cause not to dismiss their case. However, the record demonstrated no evidence regarding the inability to

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Brief p. 26. This is incorrect. As this Court noted in *Swenson*, citing to *Annett v. American Honda Motor Co., Inc.*, 1996 S.D. 58, 548 N.W.2d 798, 804, "difficulty finding an expert witness" was not good cause.

locate an expert, "nor do Annetts explain why the lack of an expert precluded any other activity designed to move the case to completion." *Id.* at ¶ 27. Similarly, in this case, while experts are necessary in medical malpractice cases, obtaining additional experts does not preclude Plaintiff from engaging in routine discovery, proposing a scheduling order, engaging in attempts to settle, or otherwise taking any action to move the case forward.

From the foregoing, it is clear that Plaintiff's claim of contacts with necessary expert witnesses[4], while not communicating with defense counsel, or doing anything to push the case forward, is not sufficient "good cause" for the more than one year of inactivity which occurred in this case.[5]

II. THE TRIAL COURT DID NOT ERR BY GRANTING DR. MINER'S MOTION TO DISMISS FOR FAILURE TO PROSECUTE PURSUANT TO SDCL 15-6-41(b).

A. Dismissal pursuant to SDCL 15-6-41(b)[6]

[4] The only evidence to support the claim that Plaintiff was contacting expert witnesses are the statements in Counsel's Affidavit. *C.R. 323.* In discussing a plaintiff's alleged requests under the Freedom of Information Act as evidence of "activity", this Court aptly noted "if this type of activity is to be used as a means of showing 'activity,' we cannot merely assume this is true; we need proof." *White Eagle v. City of Fort Pierre*, 2002 S.D. 68, ¶ 9. "The activity alleged must be verifiable in the record before us." *Id.* at ¶ 8. Plaintiff provided no documentary or verifiable evidence to support the proposition that experts were contacted and engaged in the twelve-month period prior to the motion to dismiss.

[5] Plaintiff also argues that a proposed scheduling order, submitted by Plaintiff in March 2024 (two months after Dr. Miner filed the motion to dismiss) somehow creates good cause for delay. *Appellant's Brief p. 31.* It is not clear how this relates to "good cause." Moreover, scheduling orders are frequently amended by the parties as delays in scheduling depositions and discovery often occur. Additionally, it is notable that Plaintiff's proposed scheduling order included an additional three months for Plaintiff to disclose expert witnesses, well over three years after initiating the case. *C.R. 410.*

[6] In *Devitt v. Hayes*, this court noted that "because the dismissal was proper under SDCL 15-11-11, we need not reach the merits of dismissal under SDCL 15-6-41(b)." 1996 S.D. 71, ¶ 16. Dr. Miner would submit that this Court need not reach the merits of the Circuit Court's dismissal under Rule 41(b).

Dismissal for failure to prosecute pursuant to SDCL 15-6-41(b) is different in that it does not require any requisite period of inactivity. Rather, dismissal is appropriate when the plaintiff's conduct is egregious. *Eischen v. Wayne Tp.*, 2008 S.D. 2, ¶ 12. A dismissal granted under 15-6-41(b) operates as a dismissal with prejudice as an adjudication on the merits unless the circuit court expressly states otherwise. *Id.* Because this is an extreme measure, this Court has instructed should grant the motion only when there is an unreasonable and unexplained delay. *Id.* at ¶ 13. "The mere passage of time is not the proper test to determine whether the delay in prosecution warrants dismissal." *Id.* Because it is the plaintiff's responsibility to move the cause of action forward, and the defendant need only meet the plaintiff step by step, dismissal should be granted when "in light of all the circumstances, the plaintiff is shown to lack due diligence by failing to proceed with 'reasonable promptitude.'" *Id.* (citing *Dakota Cheese, Inc. v. Taylor*, 525 N.W.2d 713, 716 (S.D. 1995)). When granting a motion under 15-6-41(b), the Circuit Court is to consider all the facts and circumstances. *Id.* at ¶ 16.

In *Eischen*, the plaintiff offered several explanations for why their delay was reasonable and argued that no more than 18 months passed without activity, despite other earlier periods of inactivity. *Id.* at ¶ 15. The Court in *Eischen* examined *Holmoe* and noted "[i]n both cases it was the defendant who took the initiative in moving litigation forward." *Id.* at ¶ 19. In the words of this Court, "Reviewing the record in this case, it is not unreasonable to conclude that but for the initiative of defense counsel there would have been no activity in this case." *Id.* at ¶ 19.

> The circuit court found that between February 2004 and August 2005, plaintiff's counsel served no interrogatories or other discovery; scheduled no depositions despite repeated inquiries by the Township; conducted no settlement negotiations nor attempted to schedule the case for trial, and made no contact with defense counsel through any means, including telephone calls, faxes, e-mails or letters.

Id. at ¶ 21. Similarly, in this case, the circuit court found that "[l]ike in *Eischen*, and its analysis of the *Holmoe* case, it has been the Defendants that have moved this case along." *C.R. 425.* In this matter, the court found, "The record shows a period of inactivity on the Plaintiff's part started in September of 2022 when the Plaintiff answered the Defendant's interrogatories, but failed to respond to the Request for Production which was served approximately ten months earlier." *C.R. at 425-426.* "Other than internal preparation with the Plaintiff's experts, the Plaintiff took no action from September of 2022 to move this matter forward." *C.R. at 426.* "From September of 2022 until the motion to dismiss was filed on January 8, 2024, Plaintiff's counsel served no interrogatories or other discovery, scheduled no depositions, conducted no settlement negotiations nor attempted to schedule the case for trial, and made no contact with defense counsel through any means except for responding to their request for updated medical releases, letters of personal representative, and death certificate." *C.R. at 426.* Such responses to medical releases, letters of personal representative, and death certificate were communicated between staff at the various law firms, not the attorneys. *C.R. 361-365, 405-408.* The last staff communication with Dr. Miner's counsel's office was January 6, 2023. *C.R. 282, ¶ 5, 286.*

Additionally, Plaintiff claims that because Appellees "failed to seek or propose a finding of fact on egregiousness. This is a waiver." *Appellant's Brief p. 33 fn. 19.* However, none of the parties submitted proposed findings of fact and conclusions of law.

The Court issued a Memorandum Decision, followed by an Order and Judgment. *C.R. 417-427; 546-547; 548.* The Court did not request the parties submit proposed findings and none were required.[7] Here, the court's Memorandum Decision "sufficiently informs the Court of the basis for the trial court's decision." *See Toft v. Toft*, 2006 S.D. 91, ¶ 12 ,723 N.W.2d 546, 550.

This Court has said that dismissal is appropriate when there is egregious conduct. In discussing egregious conduct this Court has, emphasized that the plaintiff has the burden to advance the litigation with "due diligence and reasonable promptitude." *Eischen,* at ¶ 28. "Egregious conduct" means "an unreasonable and unexplained delay" which is "the failure to do something the party might reasonably be expected to do in proceeding with his case." *Swenson v. Sanborn County Farmers Union Oil Co.*, 1999 S.D. 61, ¶ 22. In *Swenson* this Court found the plaintiff was doing what was expected to move the case ahead, by trying to conduct discovery and schedule the trial, as well as deal with an off-shoot declaratory judgment action, and, therefore, found dismissal was not warranted. *Id.* Contrast that with the case at bar, where Plaintiff did nothing to conduct discovery or schedule the matter, or even contact opposing counsel in an effort to move the matter or follow up on medical records. Stated more directly, in this case Plaintiff did not do what should have reasonably been done to move the case forward.

Plaintiff argues that the case "was still being handled within an agreed-upon initial discovery phase." *Appellant's Brief p. 34.* It is not clear what his means. Plaintiff had not asked Appellees for a stipulation for scheduling order, nor broached the subject

[7] SDCL 15-6-52(a) states that factual findings and legal conclusions made within a court's written decision equate to formal findings of fact and conclusions of law.

after the Circuit Court denied Dr. Miner's initial motion to dismiss in August 2022. Plaintiff's actions following Dr. Miner's motion to dismiss for failure to prosecute are not relevant to whether Plaintiff was prosecuting her case at the time the motion was filed. *See London v. Adams*, 1998 S.D. 41, ¶ 17 ("a motion to dismiss for failure to prosecute may be granted despite the fact that a plaintiff is currently prosecuting his claim"). In fact, Plaintiff did not take immediate action to prosecute her case even after Dr. Miner moved to dismiss.[8]

Waiting for more than a year without following up on the status of medical records is unreasonable and is an unreasonable explanation for delay. Identifying and consulting with one's own expert witnesses does not prohibit Plaintiff from otherwise moving the case forward; certainly, one would have expected Plaintiff to request depositions from Dr. Miner, Thomas Miner, or hospital witnesses in the meantime. Plaintiff simply wasn't paying attention to the case or trying to move it forward.

Plaintiff also submits that "the type of case and its complexity are also relevant to the evaluation of reasonable prosecution." *Appellant's Brief p. 36.* However, this Court has previously found that the fact that a case is complex and/or involves significant documentation are not legitimate reasons to justify a failure to prosecute. *See Dakota Cheese, Inc. v. Taylor,* 525 N.W.2d 713, 716 (S.D. 1995). Indeed, this Court has held "the seriousness of [the Plaintiff's] injuries enhanced the need for active prosecution."

[8] Instead of moving into action upon receipt of the Motion, Plaintiff waited more than two weeks after the motion before even contacting counsel. *C.R. 397.* Plaintiff admits as much in the letter dated January 26, 2024, when counsel states, "I have been reviewing my file this week, and, I see that we are still waiting for both of your Clients to provide medical record discovery." *C.R. 398* (emphasis added). Such statements clearly indicate an inattention to the pleadings and the case as a whole.

Annett, 1996 S.D. 58, ¶ 25. It is telling that the bulk of Plaintiff's work on this case has come in response to motions to dismiss by Dr. Miner. Plaintiff initiated the case and served initial discovery requests prior to filing the Complaint with the court. Plaintiff waited approximately ten months before responding to Appellees' discovery requests, and never responded to Dr. Miner's requests for production of documents. If not for Dr. Miner twice moving to dismiss this case, requiring responses from Plaintiff, Plaintiff did virtually nothing affirmative (versus responsive) to move this case forward since filing the Complaint in December 2021.[9]

While prejudice is a factor that the Court may consider, it is not necessary for a defendant to demonstrate it. *Annett v. American Honda Motor Co.,* 1996 S.D. 58, ¶ 30. Nevertheless, the Court did find prejudice here, specifically finding "that enduring the financial and emotional difficulties that come with a lawsuit is prejudice." *C.R. 426.*

B. Dismissal was not a sanction in this case

After the Circuit Court issued its Memorandum Decision, Plaintiff advanced a new argument. Specifically, in a Motion for Reconsideration, Plaintiff argued that the less drastic remedy of sanctions should have instead been imposed. That motion was denied and, importantly, was not appealed by Plaintiff; Plaintiff made no argument in her opening brief that the Court's denial of her Motion for Reconsideration was erroneous.

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[9] Plaintiff claims that "(t)he gathering of records consumed much of the next year, which, again, was a feature of this lawsuit insisted upon by Appellee Miner and the other Defendants…." *Appellant's Brief p. 36.* Plaintiff provides no cite to the record for this proposition and he cannot. There is no evidence that Dr. Miner insisted that nothing could be done while gathering medical records. Moreover, it strains credulity to suggest that "much of the next year" was spent gathering medical records, particularly in light of Counsel's admission after the Motion to Dismiss was filed that "I have been reviewing my file this week, and, I see that we are still waiting for both of your Clients to provide medical record discovery." *C.R. 398.*

Plaintiff's understanding of dismissal pursuant to SDCL 15-6-41(b) is misguided. The statute allows for dismissal under two bases: 1) failure to prosecute, and 2) failure to comply with an order. SDCL 15-6-41(b). When courts have examined the failure to comply with an order provision, other, lesser sanctions have been discussed before moving to the sanction of dismissal. But when the South Dakota Supreme Court has discussed failure to prosecute, it is clear dismissal is not a final sanction after lesser sanctions have failed. Instead, it is the remedy available to defendants when plaintiffs do not pursue their case; there is no lesser sanction which can provide relief to defendants. *See Storm v. Durr*, 2003 S.D. 6, 657 N.W.2d 34. See also *Annett*, 1996 S.D. 58, ¶ 25 ("[A]ttorney inaction and dismissing the plaintiffs' case, however, is the very nature of a dismissal for failure to prosecute.") (citation omitted).

Plaintiff argues that this court should "adopt the type of multifactor test used in federal circuits to evaluate Rule 41(b) dismissal." *Appellants' Brief p. 37.* A review of the cases cited by Plaintiff demonstrates the federal circuits all employ differing tests, and the majority of the cases cited are in relation to dismissal when there was a failure to comply with an order either standing alone or coupled with failure to prosecute.[10] The

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[10] Federal cases cited by Plaintiff: *Shannon v. Gen. Elec. Co.,* 186 F.3d 186 (2nd Cir. 1999) (affirmed dismissal for failure to prosecute after an approximate two year delay occurred; prejudice to defendant by the delay is presumed); *Knoll v. Am.Tel. & Tel.Co.,* 176 F.3d 359 (6th Cir. 1999) (affirmed dismissal for failure to prosecute after attorney refused to proceed on day of trial; applied a four-factor test); *Ehrenhaus v. Reynolds*, 965 F.2d 916 (10th Cir. 1992) (dismissal affirmed after plaintiff failed to appear for deposition); *Poulis v. State Farm Fire & Cas. Co.,* 747 F.2d 863 (3rd Cir. 1984) (affirmed dismissal for failure to comply with order; court applied a six-factor test); *Harding v. Fed. Reserve Bank of New York*, 707 F.2d 46 (2nd Cir. 1983) (reversed dismissal for failure to comply with an order); *Crossman v. Raytheon Long Term Disability Plan*, 316 F.3d 36 (1st Cir. 2002) (reversed dismissal based on violation of scheduling order); *Dodson v. Runyon*, 86 F.3d 37 (2nd Cir. 1996) (remanded for consideration of sanctions re: failure to prosecute); *Hillig v. C.I.R.*, 916 F.2d 171 (4th Cir. 1990) (failure to comply

"three-year empirical study" contained in a law review article, which Plaintiff cites as controlling authority (*Statement of Issues, Brief p. 16*) found that "the various circuits' multi-factor tests are ill-suited to address the concern of stale cases remaining on courts' dockets for lengthy periods of time or litigants who refuse to comply with court orders." Almara Sepanian, *Cleaning House with Rule 41(b): An Empirical Study of the Multi-factor Test for Involuntary Dismissals*, 44 Sw. L. Rev. 411, 440. The article is more relevant to employing a multi-factor test when the motion to dismiss is for failure to comply with an order, not for failure to prosecute. *See Id.* Interestingly, in the federal system, all dismissals for failure to prosecute come under Rule 41(b), as the Federal Rules of Civil Procedure do not contain a counterpart to SDCL 15-11-11, and the article cited by Plaintiff argues for the adoption of such a rule with a bright-line period of inactivity for courts to *sua sponte* dismiss cases. *Id.* at 441.

This Court need not look to federal cases or cases of nearby states to determine how to interpret and apply South Dakota Codified Law when there is ample precedent regarding dismissal for failure to prosecute pursuant to SDCL 15-6-41(b). The Circuit

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with order, dismissal vacated); *Rogers v. Kroger Co.*, 669 F.2d 317 (5th Cir. 1982) (*sua sponte* dismissal for failure to prosecute under 41(b)); *Kruger v. Apfel*, 214 F.3d 784 (7th Cir. 1995) (failure to prosecute reversed; court erred in not better reviewing Magistrate's decision and there was no warning of dismissal as required by the 7th Circuit); *Hunt v. City of Minneapolis, Minn.*, 203 F.3d 524 (8th Cir. 2000) (dismissal affirmed for plaintiff's repeated violation of orders); *Henderson v. Duncan*, 779 F.2d 1421 (9th Cir. 1986) (dismissal affirmed for lack of prosecution); *McKelvey v. AT&T Technologies, Inc.*, 789 F.2d 916 (11th Cir. 1992) (dismissal method similar to SDCL 15-11-11; case was pending arbitration, which would have been good cause for delay had counsel received court notice); *Peterson v. Archstone Communities LLC*, 637 F.3d 416 (D.C. Cir. 2011) (*pro se* party failed to appear at hearing and court dismissed for lack of prosecution; reversed; case did not sit dormant); *Askan v. FARO Techs., Inc.*, 809 F. App'x 880 (Fed. Cir. 2020) (dismissal as discovery sanction under Fed.R.Civ.P. 37, affirmed).

Court's findings that Plaintiff was responsible for the delay and the delay was unreasonable and unexplained, are supported by the evidence. *C.R. 426-427.* Therefore, the Circuit Court's decision to dismiss pursuant to SDCL 15-6-41(b) was not an abuse of discretion and should be affirmed.

NOTICE OF REVIEW ARGUMENT

III. THE TRIAL COURT ERRED BY DENYING DR. MINER'S MOTION TO DISMISS FOR INSUFFICIENT SERVICE OF PROCESS.

A. Standard of Review

This Court reviews challenges to court jurisdiction *de novo*. *White Eagle v. City of Fort Pierre*, 2000 S.D. 34, ¶ 4, 606 N.W.2d 926, 928. In reviewing this matter *de novo*, this Court is not bound by any of the Circuit Court's findings of fact or conclusions of law. *R.B.O. v. Priests of the Sacred Heart*, 2011 S.D. 86, ¶ 7, 807 N.W.2d 808, 810.

B. Insufficient Service of Process

The Circuit Court, in denying Dr. Miner's Motion to Dismiss, made four erroneous holdings. The Court held:

1. That under the circumstances, Marlin Klingspor, a paralegal employed by Monument Health (a hospital in Rapid City), effectuated actual service upon Dr. William Miner on September 22, 2021.
2. That in accordance with *Grajczyk v. Tasca*, 2006 S.D. 55, 717 N.W.2d 624, Dr. Miner waived the affirmative defense of insufficient service of process by failing to make a specific objection in his first pleading (his Separate Answer) that articulated the manner in which the Plaintiff had failed to satisfy the requirements of service;
3. That under the circumstances, the limitations period ascribed by SDCL 15-2-14.1 (January 24, 2022) is equitably tolled until February 11, 2022, the date on which Deputy Sheriff Robert Sanders became aware that his attempt to serve Dr. Miner was erroneous, and for sixty days thereafter pursuant to SDCL 15-2-31; and
4. That regardless of any ineffective or insufficient service of process claims, Counts 5, 6, and 7 are not subject to the two-year statute of repose in SDCL 15-2-14.1 for medical malpractice actions.

C.R. 272-273.

The decision by the Circuit Court was a departure from Supreme Court precedent.

1. Service "on" Marlin Klingspor

Although one purpose of SDCL 15-6-4(d) is to provide notice to a defendant that an action or proceeding has been commenced against him, this Court has emphasized notice alone is not sufficient. *R.B.O. v. Priests of Sacred Heart*, 2011 S.D. 86, ¶ 13. "Actual notice will not subject defendants to personal jurisdiction absent *substantial compliance* with the governing service-of-process statute." *Id.* at ¶ 17 (quoting *Thiele v. Stich*, 425 N.W.2d 580, 584 (Minn. 1988)) (emphasis in original).

In *Nolan v. Nolan*, the Court noted that actual notice or knowledge of the proceedings does not validate defective service. 490 N.W.2d 517, 520. "Service of process vests a court with jurisdiction to act. Thus, due and legal service of process is necessary to give a court jurisdiction over a defendant." *Id.* Substitute service must be made at the dwelling house. *Carmon v. Rose*, 2011 S.D. 18, ¶5, 797 N.W.2d 336, 338; SDCL 15-6-4(e).

The evidence is undisputed that service did not occur at Dr. Miner's house, and that Deputy Sanders did not personally serve Dr. Miner on September 21, 2021. *C.R. 207.* Deputy Sanders "served" Ms. Klingspor, not a family member, but a paralegal at Dr. Miner's place of business. *C.R. 218.* By statute this was not valid substitute service.

"Leaving a copy of the summons at the defendant's place of employment, when the service of process statute requires that the server leave it at the defendant's dwelling, is not valid service of process." *Marshall v. Warwick,* 155 F.3d 1027, 1030 (8th Cir. 1998). This Court has found leaving documents with another person at a business is not

service, nor substantial compliance. *See Wagner v. Trusedell*, 1998 S.D. 9, ¶ 9, 574 N.W.2d 580, 630 (quoting *Thiele v. Stich*, 425 N.W.2d 580, 584 (Minn. 1988) (adopting *Thiele* holding that service "was not satisfied by leaving the papers with the defendant's receptionist at his place of work.").

Plaintiff directed the sheriff to serve "William J. Miner, M.D.-Monument Health-Rapid City Hospital" when the sheriff should have been directed to personally serve Dr. Miner, wherever he could be personally found. Dr. Miner's address certainly could have been located/obtained, due to the fact that the sheriff was later able to personally serve Dr. Miner at his home on February 25, 2022, after expiration of the statute of repose. *C.R. 208.* Although it is troublesome that the deputy's certificate is wrong – he testified that the common practice for service of Monument Health Doctors was to serve the counsel's office.[11] Had Plaintiff not directed the sheriff to go to the hospital to serve Dr. Miner, the entire situation could have been avoided.[12]

2. Service "by" Marlin Klingspor

This Court has said that actual notice of an action is not a substitute for service of process. Applying South Dakota law, the Eighth Circuit Court of Appeals specifically rejected second-hand service in *Marshall v. Warwick*, 155 F.3d 1027 (8th Cir. 1998).

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[11] Again, Dr. Miner was living and working in Huron when Plaintiff's claim arose. He moved to Rapid City and began working for Monument Health Rapid City Hospital afterwards. Monument Health Rapid City Hospital has never been a party to this suit and Dr. Miner did not authorize anyone to accept service on his behalf. *C.R. 55, ¶10.*

[12] Like the Plaintiff in *Lekanidis*, Plaintiff here created her own service of process problem. *See Lekanidis v. Bendetti*, 2000 S.D. 86, 613 N.W.2d 542. Here, Plaintiff directed the Pennington County Sheriff to serve Dr. Miner at his place of employment, rather than at his home address or anywhere he could be personally found.

This Court has favorably discussed *Marshall* in *Lekanidis v. Bendetti*, 2000 S.D. 86, 613 N.W.2d 542.

This Court need look no further than *Marshall* to decline Plaintiff's invitation to expand SDCL 15-6-4 and adopt second-hand service. In *Marshall*, a process server mistakenly served the defendant's mother at her place of employment rather than serving the defendant personally. *Id.* at 1029. A few days later, the mother handed the documents to her son.[13] *Id.* Following a motion to dismiss for insufficient service of process, the federal district court dismissed the lawsuit. *Id.* at 1030. On appeal, the Eighth Circuit addressed whether the mother's act of handing the documents to her son constituted service in compliance with SDCL 15-6-4. *Id.* at 1031–33. Even though the mother was an "elector" qualified to serve process and ultimately delivered the required documents to her son, the court held that the service of process was insufficient. *Id.* at 1033.

The Eighth Circuit's reasoning for this holding was sound: it observed that service of process requires "more than a mere delivery of documents." *Id.* Proper service, requires the server to produce an "affidavit of service" that reflects "the time, place, and manner of the service by affidavit or written admission." *Id.; see also* SDCL 15-6-4(g). Because the defendant's mother did not sign an affidavit listing the time, place, and manner of the service, and she ultimately did not intend to "serve process" when informally handing her son the documents, the Eighth Circuit held that the mother "did not personally serve the defendant within the meaning of South Dakota law." *Id.*

[13] Warwick admitted that he received the summons and complaint from his mother, but argued he was never "served."

Dr. Miner submits the Eighth Circuit correctly held, when predicting how this Court would rule on this issue, that a surrogate who does not file an affidavit of service, does not become a process server simply by virtue of being a non-party "elector" and passing along legal documents.

Here the Affidavit of Marlin Klingspor similarly does not address service on Dr. Miner, rather it states the sheriff delivered papers to her which were addressed to Dr. Miner. *C.R. 58.* Despite that, the Circuit Court erroneously found Marlin Klingspor served Dr. Miner. *C.R. 272.* Ms. Klingspor did not provide an affidavit stating the time, place, and manner of service on Dr. Miner, nor did she return proof of service to Plaintiff's counsel.

SDCL 15-6-4(g) identifies the items needed to show "proof" of service. "Proof of the service of the summons and complaint or of any pleading, process, or other paper must state the time, place, and manner of such service…and must be as follows: …(2) If by any other person, his affidavit thereof…." "When service is accomplished by an elector, "the service shall be made and the summons returned with proof of the service, with all reasonable diligence, to the plaintiff's attorney…." SDCL 15-6-4(c). The importance of the return of proof of service dates back to at least 1894. *Brettell v. Deffebach*, 6 S.D. 21. 60 N.W. 167 (S.D. 1894). Deposition testimony regarding service is not listed as a valid method of proof of service.

In *White Eagle*, this Court did not evaluate "pass along" service, instead holding that an extension of the doctrine of substantial compliance "would ultimately serve to eradicate service of process statutes." 2000 S.D. 34, ¶ 14. Similarly, if pass along service is allowed, the statutory requirements are undermined. Every receptionist at a

law office, every attorney, then, could effectuate this pass along service. Service on an attorney who then advises his client of the action and provides a copy (in any form, including email) of the documents to the client, then, would constitute service of process. The Circuit Court's finding was erroneous.

3. Waiver

While "[p]ersonal jurisdiction and insufficient service of process are defenses that may be waived" the defenses are preserved if they are "raised in the answer or by…. motion before the filing of a responsive pleading.'" *Grajczyk*, 2006 S.D. 55, ¶ 9, 717 N.W.2d at 627–28. Here, Dr. Miner raised the defense in his Answer, which was his first responsive pleading. *C.R. 25-28.* Plaintiff argued that the defense was facially defective and therefore waived. In his Answer, Dr. Miner stated:

> By way of affirmative defenses, Dr. Miner states and alleges as follows:
>
> * * * *
>
> 3. That Plaintiff's claims are barred by insufficiency of process and/or insufficient service of process.

C.R. 26.

The Circuit Court agreed with Plaintiff, finding that the language of Dr. Miner's affirmative defense impermissibly constitutes a general, rather than a specific, objection. *C.R. 272-273.* For support, the circuit court relied on *Grajczyk*, a decision in which this Court stated that "generally…objections to insufficient service of process must be specific" in that they must "point out in what manner the plaintiff has failed to satisfy the requirements of the service provision utilized." *Id.* ¶ 16, 717 N.W.2d at 630.

While it is true that *Grajczyk* stands for the proposition that objections to insufficient service of process should be specifically alleged, this Court ultimately held that the defendant's objection in that case met that standard. Importantly, the specific

language endorsed in the *Grajczyk* opinion is strikingly similar to the language at issue here—the *Grajczyk* defendant alleged that the court was "without jurisdiction to hear this matter because there was no service of the Summons on the Defendant." *Id.* ¶ 6, 717 N.W.2d at 627. Dr. Miner alleged both lack of jurisdiction and insufficient service of process in his Answer.

Similar to *Grajczyk*, in this case there is no question that Dr. Miner notified Plaintiff of the specific defect in service when he served the following Interrogatory answer on Plaintiff before the statute of repose expired:

> **INTERROGATORY NO. 16:** As to any affirmative defenses you allege, state the factual basis of and describe each affirmative defense, the evidence which will be offered at trial concerning any alleged affirmative defense, including the names of any witnesses who will testify in support thereof, and the descriptions of any exhibits which will be offered to establish each affirmative defense.
>
> **ANSWER:** With regard to the Plaintiffs' assertion of punitive damages, Defendant Miner has preserved his position that such an award, if any, would be violative of the state and federal constitutions. With regard to the other affirmative defenses, discovery in this case continues. This response will be seasonably updated as evidence is gathered, witnesses are selected, and exhibits are compiled. **Dr. Miner was not served with process.**

C.R. 164-165 (emphasis added). There is no meaningful difference between the objection lodged in *Grajczyk*— i.e., "there has been no service of summons on the Defendant"—and the answer provided to Interrogatory No. 16 here. For this reason, the claimed defect in the language of the Answer, if any, was perfected prior to the expiration of the statute of repose.

Plaintiff unquestionably had notice that Dr. Miner had not been served, either due to the Answer itself or through Dr. Miner's answer to Interrogatory No. 16.

i. Dr. Miner did not waive his defense with his litigation conduct.

The Circuit Court made no finding that Dr. Miner waived the defense with his litigation conduct. In certain cases, litigation conduct can result in waiver of the affirmative defense of insufficient process. Litigation conduct which has been found to have waived the defense typically involves appearing at judicial proceedings or failing to raise the defense in initial pleadings. *See State v. Fifteen Impounded Cats*, 2010 S.D. 50, 785 N.W.2d 272 (the defendant appeared at two different judicial proceedings with "no complaint or objection to the notice provided" and waived the defects by "actually participat[ing] in the hearings…without objection to personal jurisdiction or the sufficiency of notice); *In re R.P.*, 498 N.W.2d 364 (S.D. 1993) (the defendant challenged personal jurisdiction after he sought affirmative relief from the circuit court by filing motions, requesting court-appointed counsel, and participating in an adjudicatory portion of the proceedings). Here, the Circuit Court made no finding that Dr. Miner waived his defense by Litigation conduct.

This case is different. Unlike the defendants in *Fifteen Impounded Cats* and *In re R.P.*, Dr. Miner did not appear or attempt to participate in any substantive hearings prior to asserting his defense in his Answer. Simply by filing his Answer and engaging in limited discovery, Dr. Miner did not waive his defense.

This Court has previously determined that filing an Answer, requesting informal extensions, filing notices of appearance, and "other preliminary activities" are not sufficient to waive the insufficient service of process defense. *Grajczyk*, 2006 S.D. 55, ¶¶ 12–13, 717 N.W.2d at 628.

A notice of appearance is not a motion or responsive pleading within the meaning of SDCL 15-6-12(h)(1), and an attorney need not assert defenses in the notice of appearance. *Grajczyk*, 2006 S.D. 55, ¶ 11, 12. "The fact that defendant proceeded with discovery does not preclude him from asserting that service of process was insufficient because it is by way of discovery that a party determines whether a particular defense is available." *Id.* at ¶ 13 (quoting *Crouch v. Friedman*, 51 Wa.App. 731, 735, 754 P.2d 1299, 1301 (1988)). In *Grajczyk*, the Court noted that although the objection (defense) did not specifically use the phrase "substitute service," the objection to "no service" was enough to preserve the objection. *Id.* at ¶ 16. Because Dr. Miner did not actively litigate the matter prior to advising Plaintiff of his defense, and prior to his motion to dismiss, this Court should find Dr. Miner did not waive his defense.

4. Equitable tolling

The Circuit Court also determined that equitable tolling of the statute of repose was appropriate given the facts of this case. *C.R. 273.* The Circuit Court failed to recognize that the Supreme Court has rejected the applicability of equitable defenses to a statute of repose. *See Pitt-Hart v. Sanford USD Med. Ctr.*, 2016 S.D. 33, ¶ 21, 878 N.W.2d 406, 414. This was an error of law. All claims related to medical malpractice are "fixed and [their] expiration will not be delayed by estoppel or tolling." *Pitt-Hart*, 2016 S.D. 33, ¶ 20. South Dakota law is clear on this question. *See Slota v. Imhoff and Associates, P.C.*, 2020 S.D. 55, 949 N.W.2d 869. The Circuit Court's ruling should be reversed.

5. Intentional Torts

The Circuit Court also determined that the intentional torts alleged in Counts 5, 6, and 7 were not covered by the two-year medical malpractice statute of repose. *C.R. 273 ¶ 4.* This Court has previously determined that even intentional torts used to conceal medical malpractice are part and parcel of the medical malpractice claim and, therefore, subject to the two-year statute of repose.

"Misrepresentations by a physician as to treatment needed or accomplished…, whether negligently, deliberately, or fraudulently made, come within the legal purview of malpractice." *Bruske v. Hille*, 567 N.W.2d 872 (S.D. 1997).

In *Bruske v. Hille*, the plaintiff sued her oral surgeon for fraud and deceit. 1997 S.D. 108, 567 N.W.2d 872. She presented facts indicating that she was harmed by a defective jaw implant and that, although the defendant surgeon learned the dangers of the implant and disclosed the issue to other similarly situated patients, he concealed the issue from the plaintiff because she previously sued him. *Id.* Even though the Court assumed the existence of a cognizable fraud claim for purposes of its summary judgment analysis, the fraud statute of limitations was not applied, and the lawsuit was dismissed pursuant to SDCL 15-2-14.1. *Id.* at ¶11. The Court reasoned:

> Medical malpractice characterized as fraud and deceit will not sanction a shift to a more beneficial statute of limitations. . .. '[A]ny professional misconduct or any unreasonable lack of skill or fidelity in the performance of professional or fiduciary duties is 'malpractice' and comes within the professional or malpractice statute of limitations.' . . . 'Misrepresentations by a physician as to treatment needed or accomplished or as to dangers of treatment or changes in the state of the art as to such medical treatment, whether negligently, deliberately, or fraudulently made, come within the legal purview of malpractice.'

Id. at ¶13 (citations omitted).

This Court has defined "malpractice" in the context of health care as "[a]ny professional misconduct or any unreasonable lack of skill or fidelity in the performance of professional fiduciary duties...." *Martinmaas v. Engelmann,* 2000 S.D. 85, ¶ 27, 612 N.W.2d 600, 607 (citations omitted); *Bruske,* 1997 S.D. 108, ¶ 13, 567 N.W.2d at 876-77. In a footnote to *Martinmaas,* the Court added to the definition, noting that "illegal practice or immoral conduct" also fits within the definition of "malpractice." *Id.* at fn.5. Indeed, this Court applied this broad definition in *Bruske* to conclude that an oral surgeon's fraud and deceit in the provision of health care was "malpractice." Likewise, in *Martinmaas,* this definition was used to conclude that a sexual misconduct claim in the context of the provision of health care was also "malpractice."

In *Pitt-Hart,* this Court determined that if the tortious conduct falls within the terms used in SDCL 15-2-14.1 (malpractice, error, mistake, or failure to cure), SDCL 15-2-14.1 applies regardless of a nature of the claim. 2016 S.D. 33, ¶14-15, 878 N.W.2d at 412. And, to provide some helpful context for interpreting the scope of SDCL 15-2-14.1, the Court provided the following three points to consider:

- SDCL 15-2-14.1 should be applied when "there is a nexus between the injury suffered by the plaintiff and the health care" received. *Id.* at ¶15, at 412.
- SDCL 15-2-14.1 was meant to apply to a "broad range of conduct;" *Id.*
- SDCL 15-2-14.1 is to be read inclusively; "[w]hen the legislature uses inclusive language indicating a broad range of conduct, it is not required to anticipate and individually address each subdivision of that conduct a party might imagine." *Id.* at fn. 2.

This Court stated that since SDCL 15-2-14.1 is a statute of repose, even if a claim more logically fits under a different statute of *limitations,* or if two claims are intertwined, SDCL 15-2-14.1 governs to completely bar liability. *See Id.* at fn.3 (noting that although plaintiff's claim would appear to fit under the traditional negligence statute,

the SDCL 15-2-14.1 statute of repose governed). Indeed, as a statute of repose, SDCL 15-2-14.1 is a "substantive grant[] of immunity based on a legislative balance of the respective rights of potential plaintiffs and defendants struck by determining a time limit beyond which liability no longer exists." *Pitt-Hart,* 2016 S.D. 33, ¶ 21, at 414 (citations omitted).

Therefore, as clarified by *Pitt-Hart,* the key to applying SDCL 15-2-14.1 as a statute of repose is not whether a longer limitations period could apply to intertwined claims; it is not based upon gravamen analysis; and it does not require consideration of tolling. It is much simpler – are Plaintiff's claims contemplated by the terms "malpractice, error, mistake, or **failure to cure**," with further consideration of the fact that SDCL 15-2-14.1 was intended by the legislature to be read inclusively and applied to a broad range of conduct. To the extent there is a question about applicability, the question is whether there is a "nexus between the injury suffered and the health care" received. There is undoubtedly a nexus between the health care provided to Scott Olson and the claim that Dr. Miner concealed his medical negligence through a conspiracy and by causing Lori Olson emotional distress.

Further, Lori Olson's individual claims are derivative in nature; they would not exist if not for the alleged malpractice toward her husband Scott Olson. *See Titze v. Miller*, 337 N.W.2d 176, 177 (S.D. 1983). "An action for loss of consortium is derivative in nature." *Id.*. When separate actions have their origin in the same operative facts it logically follows that they both be subject to the same statute of limitations, unless a contrary legislative intent clearly appears. *Titze v. Miller*, 337 N.W.2d at 177. It's

validity depends on the validity of the main claim. *See Bitsos v. Red Owl Stores, Inc.*, 350 F.Supp. 850 (D.S.D. 1972).

Given this Court's jurisprudence, there is no doubt that Counts 5, 6, and 7 likewise expired when the statute of repose expired, and therefore would not extend the time for Dr. Miner to be served beyond January 24, 2022.

CONCLUSION

Plaintiff is asking this Court to disregard 30 years of precedent and create a new legal standard for motions to dismiss for failure to prosecute. The Circuit Court correctly reviewed the law and the facts and applied the law to the facts and did not abuse its discretion in dismissing this case for failure to prosecute. The Judgment of the Court should be affirmed.

This Court should further determine that Dr. Miner was not properly personally served with the Summons and Complaint, and should dismiss Dr. Miner from the case, as the Circuit Court lacked jurisdiction over Dr. Miner.

REQUEST FOR ORAL ARGUMENT

Oral Argument is hereby requested by Appellee Dr. William Miner.

Dated: October 21, 2024

Respectfully submitted,

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By: ***/s/ Kimberly Pehrson***
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with SDCL § 15-26A-66(4). The font is Times New Roman size 12, which includes serifs. The brief is 31 pages long and the word count is 9,587, exclusive of the Cover, Table of Contents, Table of Authorities, Certificate of Compliance, and Certificate of Service. The word processing software used to prepare this brief is Microsoft Word and the word count from that program was relied upon in determining the word count of this brief.

Dated: October 21, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of October, 2024, I mailed the foregoing *Appellee William J. Miner M.D.'s Brief* and *Appendix* to the Clerk for the South Dakota Supreme Court via first class U.S. Mail and filed a true and correct copy of the same via Odyssey File & Serve, and that such system effected service of the same on the following individuals:

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

LORI A. OLSON, INDIVIDUALLY, AND AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF SCOTT D. OLSON, A DECEASED PERSON,

Appellant,

v.

HURON REGIONAL MEDICAL CENTER, INC., WILLIAM J. MINER, M.D., AND THOMAS MINER

Appellees.

Appeal Nos. 30697 and 30705

APPELLEE WILLIAM J. MINER, M.D.'S APPENDIX

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APPENDIX

STATE OF SOUTH DAKOTA)SS COUNTY OF BEADLE	)	IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT
LORI A. OLSON, Individually, and as the PERSONAL REPRESENTATIVE OF THE ESTATE OF SCOTT D. OLSON, a deceased person, **Plaintiffs,** **vs.** **HURON REGIONAL MEDICAL CENTER, INC., WILLIAM J. MINER, M.D., and THOMAS MINER,** **Defendants.**	)	02CIV21-000230 **ORDER DENYING MOTION TO DISMISS OF DR. WILLIAM J. MINER, M.D.**

The above-captioned matter came before the Court on August 1, 2022, at 10:30 AM on the *Motion to Dismiss of Dr. William J. Miner, M.D. ("Motion")*. Daniel K. Brendtro appeared on behalf of Plaintiff Lori A. Olson, Individually, and as the Personal Representative of the Estate of Scott D. Olson. Gregory J. Bernard appeared on behalf of Defendant William J. Miner, M.D. Mark Haigh appeared telephonically on behalf of Defendants Thomas Miner and Huron Regional Medical Center, Inc. The Court having examined all the pleadings, files, and records herein, and having heard and considered the arguments of counsel hereby holds as follows:

1. That under the circumstances, Marlin Klingspor, a paralegal employed by Monument Health (a hospital in Rapid City), effectuated actual service upon Dr. William Miner on September 22, 2021;

2. That in accordance with *Grajczyk v. Tasca*, 2006 S.D. 55, 717 N.W.2d 624, Dr.

Miner waived the affirmative defense of insufficient service of process by failing to make a specific objection in his first pleading (his Separate Answer) that articulated the manner in which the Plaintiff had failed to satisfy the requirements of service;

3. That under the circumstances, the limitations period ascribed by SDCL 15-2-14.1 (January 24, 2022) is equitably tolled until February 11, 2022, the date on which Deputy Sheriff Robert Sanders became aware that his attempt to serve Dr. Miner was erroneous, and for sixty days thereafter pursuant to SDCL 15-2-31; and

4. That regardless of any ineffective or insufficient service of process claims, Counts 5, 6, and 7 are not subject to the two-year statute of repose in SDCL 15-2-14.1 for medical malpractice actions.

Therefore, it is hereby:

ORDERED that the *Motion* is **DENIED**.

8/22/2022 1:57:15 PM
BY THE COURT

Honorable Kent Shelton
Third Circuit Court Judge

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
: SS
COUNTY OF BEADLE) THIRD JUDICIAL CIRCUIT

LORI A. OLSON, INDIVIDUALLY, AND AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF SCOTT D. OLSON, A DECEASED PERSON,

Plaintiff,

-vs-

HURON REGIONAL MEDICAL CENTER, INC., WILLIAM J. MINER, M.D., AND THOMAS MINER,

Defendants.

File # 02 CIV 21-230

TRANSCRIPT OF

MOTION HEARING

ORIGINAL

Before The Honorable Kent A. Shelton
Circuit Court Judge
Beadle County Courthouse
Huron, South Dakota
August 1, 2022

APPEARANCES:

For the Plaintiff: Daniel K. Brendtro
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* *

Marie H. Bales
Official Court Reporter
450 Third Street SW
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them no service for them to do this right.

It was not done right, Your Honor. The Court does not have jurisdiction.

Thank you.

THE COURT: Okay. As I stated previously, I have read all the briefs, the reply briefs, the affidavit. I did read the cases to get a feel for everything.

It's my opinion that -- and I will take them in order so they stay in order -- that the paralegal did, in fact, effectuate service. One, she's a paralegal. Two, she handed it to Dr. Miner. And that was stated in the deposition that she specifically handed to Dr. Miner within a short period of time of her receiving it. I do find that that is service.

I also find that the Grajczyk case does apply. I just don't find that there was enough detail regarding the lack of service; and therefore, it needed to be more detail, the manner in which it was not proper service, and more specific. So again, I do find for the Plaintiffs on that side.

And I want to go down all four of these because I think it's important for whatever process you take after the hearing today.

MR. BRENDTRO: Judge, we don't take anything.

THE COURT: Right.

As for the third issue, the two-year statute of repose or subsequent equitable tolling, I am going to find in that case

for the Plaintiffs, also under 15-2-31 which I read numerous times. More than I want to say now. That this should be tolled for a period of 60 days. It's an equitable tolling. The time -- and I also find -- number four -- that Counts five, six and seven are not medical malpractice cases -- or issues per se.

I agree with Mr. Brendtro that these are injuries to another party other than Scott Olson. Now, granted, it was related to the patient care of Scott Olson, but what they're alleging in counts five, six and seven is different than a medical malpractice manner. And therefore not subject to the two year statute of limitations.

So with that being said, Mr. Brendtro, you can prepare the findings and the order.

MR. BERNARD: Your Honor, can I ask just one question. On point three, you indicate the Court's ruling is that 15-2-31, this is tolled for 60 days. From what day is the toll?

THE COURT: Mr. Brendtro?

MR. BRENDTRO: Judge, our argument was that that statute, 60 day period would be tolled and start running the moment that the Sheriff alerts us the return of service is incorrect. Which would be, I believe, the date of his affidavit.

THE COURT: Affidavit?

MR. BRENDTRO: Which I think is signed and filed on

February 10th of 2022.

THE COURT: I would agree with that.

That should be specifically within the findings and conclusions, please. I think that's, whatever date that affidavit was.

MR. BRENDTRO: Yes.

THE COURT: Anything else? Mr. Bernard?

MR. BERNARD: No, Your Honor.

THE COURT: Mr. Brendtro?

MR. BRENDTRO: No, Your Honor.

THE COURT: Mr. Haigh, anything further?

MR. HAIGH: Nothing.

THE COURT: Thank you very much. Thank you.

(Whereupon, the proceedings adjourned at 11:16 a.m.)

* * * * *

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

LORI A. OLSON, INDIVIDUALLY, AND, AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF SCOTT D. OLSON, A DECEASED PERSON, Plaintiff/Appellant, vs. HURON REGIONAL MEDICAL CENTER, INC., WILLIAM J. MINER, M.D., and THOMAS MINER, Defendants/Appellees.	Appeal No. 30697 **NOTICE OF REVIEW**

TO: **Plaintiff Lori A. Olson**, individually, and, as the personal representative of the Estate of Scott D. Olson, a deceased person, and her attorneys of record Daniel K. Brendtro and Mary Ellen Dirksen; **Defendants Huron Regional Medical Center, Inc., and Thomas Miner**, and their attorneys of record Mark Haigh and Tyler Haigh.

PLEASE TAKE NOTICE that, pursuant to SDCL 15-26A-22, Defendant/Appellee William J. Miner, M.D., respectfully seeks review from the Supreme Court of South Dakota of the *Order Denying Motion to Dismiss of Dr. William J. Miner, M.D.*, filed August 22, 2022 by the Circuit Court, based on failure to properly serve Dr. William J. Miner, M.D.

Dated this 16th day of May, 2024.

THOMAS BRAUN BERNARD & BURKE, LLP
Attorneys for Defendant William J. Miner, MD

By: */s/ Kimberly Pehrson*

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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of May, 2024, I filed the foregoing *Notice of Review* relative to the above-entitled matter via Odyssey File and Serve, and that such system separately effected service of the same on the following individuals:

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IN THE

Supreme Court

of the

State of South Dakota

No. 30697
No. 30705

LORI A. OLSON, INDIVIDUALLY AND AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF SCOTT D. OLSON, DECEASED

APPELLANT AND PLAINTIFF

VS.

HURON REGIONAL MEDICAL CENTER, INC.; WILLIAM J. MINER, M.D.; AND THOMAS MINER

APPELLEES AND DEFENDANTS

An appeal from the Circuit Court, Third Judicial Circuit
Codington County, South Dakota

The Hon. Patrick T. Pardy
CIRCUIT COURT JUDGE

APPELLANT'S REPLY BRIEF

Submitted by:
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Notice of Appeal filed on May 2, 2024

Appellees

Counsel & Parties:

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ARGUMENT-IN-REPLY

On the failure-to-prosecute issues, the appellees sidestep nearly all of the substantive arguments raised by Lori. They do not meaningfully address the importance of maintaining the distinct purposes of SDCL 15-11-11 and Rule 41(b). They cannot refute that Lori spent several months conducting important expert discovery work in the background, even though it appeared like inactivity to outsiders. They do not address the specific examples of "egregious" delays found in this Court's prior cases (collected on pages 33 and 34 of Lori's opening brief). They do not take responsibility for their contributions to any delay. And, by notice of review, Dr. Miner advances a service-of-process defense that he kept hidden from everyone until after the statute of repose had passed.

Lori asks this Court to reverse the Circuit Court's dismissal, and, to issue an opinion that clarifies, changes, and improves South Dakota's common law regarding litigation delays.

1. The appellees fail to address the "blurring" within the doctrines of SDCL 15-11-11 and Rule 41(b)

Lori's opening brief explained that many of this Court's earlier cases "muddled" the doctrines of SDCL 15-11-11 and Rule 41(b) by "failing to differentiate between the two types of dismissals." Lori's Brief, p. 20, n.10 (citing and quoting *Eischen v. Wayne Tp.*, 2008 S.D. 2, ¶¶ 38-40). Neither of

the appellees refute this, or even discuss it. Instead, the appellees continue citing to those prior (muddled) cases.

In the circuit court below, Judge Pardy committed some of these same errors, even failing to articulate the right test for SDCL 15-11-11. Rather than helping correct the law, the appellees try to excuse the error.

Ultimately the appellees do not challenge or even question the "correct" dichotomy as explained by Justice Konenkamp: that SDCL 15-11-11 is "a clerical...court management tool," while Rule 41(b) is a "court-made rule...for sanctioning a party for [egregious conduct, including] delay or disobedience." Lori's Brief., pp. 20-21. Nor do the appellees challenge the two-prong approach to SDCL 15-11-11 (activity; good cause).

This is a confusing area of the law. No matter which side wins this appeal, Lori asks for this Court's opinion to plainly explain and embrace this dichotomy, and to guide future litigants and circuit court judges.

2. Because it is merely a clerical check upon 'activity,' there is not a 'communication requirement' built into the test for SDCL 15-11-11

We begin by simply repeating the same thing that we argued in Lori's opening brief. The appellees ignored it.

"Activity" is interpreted broadly by this Court. "In considering SDCL 15-11-11 in civil cases, we have not confined the term 'activity' to court filings *or*

a particular communication between the parties. Instead, we have placed an affirmative duty on a plaintiff to engage in *activity that moves the case forward.*" *LaPlante v. GGNSC Madison, South Dakota, LLC*, 2020 S.D. 13, ¶ 18 (cleaned up; second emphasis in original). In spite of a handful of prior cases that have confused the issue, there is no communication requirement necessary to prove "activity" under SDCL 15-11-11. *Id.* Communication is always advisable and can avoid appeals like this, but "activity" without communication is still sufficient. *See, LaPlante,* 2020 S.D. 13, n.8. But an absence of communication is irrelevant to this Court's review of SDCL 15-11-11. The question as to the first prong of SDCL 15-11-11 is about *activity.*

3. Retaining and preparing expert testimony is universally regarded as a form of 'informal discovery'

On page 6 of his brief, Dr. Miner alleges that Lori has "attempt[ed] to craft a new definition of 'informal discovery.'" *See,* Dr. Miner's Brief, p. 6. He thinks that expert discovery is excluded from the category of informal discovery activities.

In an effort to prove his point, Dr. Miner offers the Rule 26 definition of *formal* discovery (*i.e.*, listing interrogatories, requests for admission, requests for production, and physical/mental examinations). *See,* Dr. Miner's Brief, p. 6 (quoting SDCL 15-6-26(a)). But without any citations or authority, Dr. Miner

proffers his *own* definition of "discovery" as "essentially the exchange of information during litigation." *Id.,* at 6. He urges a narrow definition of 'informal discovery' based upon a single sentence in a *dissenting* opinion from 1984.[1] In that dissent, Justice Wollman was not attempting to define 'informal discovery,' and, instead offers a single *example* of it: securing informal document production during a deposition. *Nemec v. Deering,* 350 N.W.2d 53,58 (S.D. 1984) (Wollman, J., dissenting).

Both federal and state jurisprudence are replete with examples of *informal discovery,* many of which do *not* involve the opposing side's participation or contact. *E.g., Filz. Mayo Foundation,* 136 F.R.D. 165, ("*ex parte* interviews" of witnesses are a "venerable" example of a tool/technique of "informal discovery"); *In re St. Jude Med., Inc., Silzone Heart Valves Prod. Liab. Litig.*, 2001 WL 1640056, at *2 (D. Minn. Aug. 21, 2001) ("informal discovery" includes "identification and location of relevant documents and witnesses"); *Rainbow Popcorn Co. v. Intergrain Specialty Prod., L.L.C.*, 2008 WL 2184116, at *2 (D. Neb. May 23, 2008) ("informal discovery" includes contact with non-party witnesses).

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[1] Dr. Miner fails to alert this Court that he is citing a *dissent*, rather than a majority opinion. He also overstates the significance of that dictum.

Likewise, in cases from across the country, informal discovery also includes 'working with experts.' A state court case from California expressly describes "retaining an expert" as an example of "informal discovery." *Mount v. Wells Fargo Bank, N.A.*, 2016 WL 537604, at *2 (Cal. Ct. App. Feb. 10, 2016). So does a California federal case. *Kabasele v. Ulta Salon, Cosms. & Fragrance, Inc.*, 2024 WL 477221, at *4 (E.D. Cal. Feb. 7, 2024). A state court case from Alabama describes "informal discovery" to include activities like "giv[ing the party's own expert] access to…non-privileged records;" the expert's work in "collecting and reviewing [documents];" and the expert's role in "interviewing [a key witness]." *Adams v. Robertson*, 676 So. 2d 1265, 1280 (Ala. 1995). In Missouri, the term "informal discovery" even includes *ex parte* communications by opposing counsel with the *other side's* expert witness. *Brown v. Hamid*, 856 S.W.2d 51, 54 (Mo. 1993).

In short, "informal discovery" is not limited to the *exchange* of information between parties. A better definition for "informal discovery" should include the act of *gathering* of information for a lawsuit. *C.f.,* BLACK'S LAW DICTIONARY, 478 (9th ed.) (defining "*discovery*" as "the act or process of finding or learning something that was previously unknown"). This includes finding, educating, and obtaining opinions from experts.

In the twelve months prior to Dr. Miner's motion, Lori was engaged in informal discovery activities relating to her experts. None of the appellees challenge the vital importance of such work for a case like this.

Could that work have occurred in parallel with other activities? Yes. Does that mean the case was inactive? No.

4. Lori adequately verified her litigation activity in the Record

Both Dr. Miner and the Hospital suggest that Lori failed to prove her expert witness efforts because "the only evidence...are the statements in Counsel's affidavit." Dr. Miner's Brief, p. 11; Hospital's Brief, p. 13-16 (the Record is "void of verifiable activity," "aside from the self-serving affidavits of Plaintiff's counsel"). Both of the appellees are implying either that Mr. Brendtro's affidavit is perjury, or, that a sworn declaration from an officer of the Court is inherently dubious unless documents are attached to it which verify the testimony in it.

This same aspersion came up at the hearing. It was dealt with at the hearing and resolved. Neither party objected at the time. It is disingenuous (and too late) to bring it up now.

On page 47 of the hearing transcript, Lori's attorney summarized their efforts, including that "we took active steps that would be necessary to move

the case ahead, which is to identify [expert] foundation for the rest of the science associated with this [claim]." [R.650; HT 47:23—48:16].

Shortly thereafter, on page 48 of the Transcript, Dr. Miner's attorney began to complain that "none of that [expert activity] is verifiable in the record." [R.651; HT 48:21-22]. Lori's attorney *immediately* responded: "So, Judge, if I'm going to be accused of lying, I would like a chance to...," at which point the Court cut him off and said, "...I don't take either of these two calling you a liar....*Everything in the affidavit is in the record, I agree.*" [R.651-52, HT48:23—49:7] (emphasis added).

Neither of the Appellees objected to the Court's statement. Neither of the Appellees filed a notice of review challenging the Circuit Court's acceptance of the affidavit. For the purposes of this appeal, Lori's attorney's affidavit is sufficient proof of the activities it describes.[2] *See, also, LaPlante,* ¶ 23 and n.3 (activity shown by affidavit).

[2] In the final minute of the hearing, Lori's attorney asked for even further confirmation of this: "But for them to say that there is 'nothing in the record,' is saying [either] that my affidavit is "a lie" or that "it doesn't count." And I'd like to know which it is before the end of this hearing." In direct response, the Court again reassured counsel that this was not an issue saying simply, "I'm not going to go there." [R.652; HT 49:12-24]. The Court then asked for anything further, and neither side voiced any further argument or objections. The hearing was then adjourned. *Id.*

In addition to challenging its veracity, the Hospital also discounts the *substance* of the affidavit, in two ways: suggesting that mere "paralegal" activities don't count; and, that a brief conversation between Lori's counsel and the Hospital's counsel about experts and causation was too short to matter. Neither objection holds merit.

Paralegal activities are direct extensions of an attorney's role. SDCL 16-18-34.2(1) (legal assistant may "assist in aspects of the attorney's representation of a client....") Here, the paralegals were assisting in the record-gathering process, which all parties to this appeal concede was a necessary next-step. It makes no difference whether the lawyers or paralegals participated.

And, the short phone conversation between Lori's counsel and the Hospital's counsel—however brief—was of major consequence. It succeeded in pointing out enough potential holes in the plaintiff's malpractice case to lead to several *months* of effort (and several thousand dollars of cost) in order to shore up the alleged weakness. It is not the *length* of the interaction but its substance that matters here.

Instead of an abbreviated conversation, the Hospital's lawyer could just as easily have made the same point in a lengthy back-and-forth email exchange; or, within a twenty-page *Daubert* motion; or, during a colloquy at a mediation

while trying to settle the case. In each instance, the end result would have been the same: immediate efforts by Lori to try and flesh out the necessary evidence to support her claims.

Here, it was only a short conversation, but one which efficiently served its purpose. It launched substantial, additional efforts by Lori to enlist the proper experts necessary to stave off the Defense. Her counsel explained that "[the Hospital's attorney] saved us all a bunch of time by outlining...what the plausible theories would be in response" to Lori's case...." [R.629; HT 26:13-15]. The work in shoring up her experts resulted in a reasonable delay because "the stuff [Lori] had to do to identify these experts and flesh them [was going to] postpone things until we figured that out." [R.650; HT 47:23—48:16].

The Record contains evidence of activity by which Lori was attempting to move her case along.[3] The inquiry about SDCL 15-11-11 can end there. But, if necessary, Lori also demonstrates good cause, for the second prong of SDCL 15-11-11.

[3] The Circuit Court found that Lori did, in fact, engage in "internal preparation with the Plaintiff's experts." R.426. This is activity. The appellees did not seek a notice of review of this finding.

5. Lori is not claiming she was "tricked," but, she is arguing that Dr. Miner, the Hospital, and third-party factors all contributed to the delay and appearance of inactivity, in addition to her own counsel's approach to this case. In sum, if there was delay, it was 'excusable.'

Lori outlined four factors that, together, constitute good cause under SDCL 15-11-11. Her argument is that the case was undisputedly being worked on by *all* parties within the 12 months prior to the motion, and, the case was reasonably far enough along that all parties believed it could be tried within 14 months later.

The Hospital sets up a straw-man argument about the Covid-19 pandemic, calling Lori's assertions a 'grand reach.' Lori is not blaming the pandemic for any particular delay, and instead, noted that *after* the pandemic, the process of "medical record procurement and interfacing with experts has been slower, with unexpected and unexplained delays by providers in sending records...." Lori's Brief, p. 31. The Hospital does not refute this. Lori is not making a "grand reach" to blame the pandemic. Instead, she is offering an explanation as to why the defendants' months-long delay in producing medical records was not immediately identified by Lori's counsel as out-of-the-ordinary. Such delays have become 'ordinary' since 2020.

According to Dr. Miner, Lori "appears to suggest...that she was tricked into waiting for defendants to produce [medical] records...." Dr. Miner's

Brief, p. 7. Lori's attorneys, however, explained that they thought the hold-up was due to delays at the medical facilities themselves, rather than Dr. Miner's subterfuge. [R.321; 323]. Meanwhile, it was indeed Dr. Miner and the Hospital who were helping to cause the delay, when they failed for months to supplement his written discovery responses as he had promised. [R.569-69]. This does not appear to be trickery by Dr. Miner, but his attorneys certainly did not fulfill their duty to seasonably supplement his responses under Rule 26(e)(1). The same was true of the Hospital's counsel, who likewise failed to supplement, as promised, and instead held onto the medical records without producing them. The Defendants were not meeting Lori "step-by-step."

Perhaps most instructive is that even with a combined total of 20,000 words available in their briefs, neither appellee takes *any* responsibility for failing to supplement their discovery.

Instead, the Hospital goes the other direction, claiming that it can choose to ignore discovery rules altogether. In particular, the Hospital says that it actively chooses *not* to supplement its discovery responses, *until* the Plaintiff asks to take a deposition. *See,* Hospital's Brief, p. 4. This is not how the supplementation provisions of Rule 26(e)(1) are worded, of course. The Defendants did not warn Lori that they were ignoring any duty to supplement

until they received a request for depositions. This is not good faith discovery practice. And, that approach contributed to the impasse.

The Defendants' collective failure to admit *any* culpability for *anything* undermines their claims of delay. Lori has agreed throughout this process that she could have moved things along differently and more responsively. So, too, could the Defendants.

These delays by all parties are part of the confluence of four factors which, taken together, suffice as good cause under the second prong of SDCL 15-11-11.

6. Dismissal under Rule 41(b) was error because the Circuit Court made no finding of egregiousness, and, the pace of the case did not involve 'unexplained' or 'unreasonable' delays

"Egregiousness" is a *very* high standard of misconduct. It is defined as "extremely or remarkably bad" behavior. BLACK'S LAW DICTIONARY, 534 (9th ed.). The Circuit Court made no express finding of egregiousness. Nor did any of the Defendants brief that issue at the Circuit Court level. Both of the appellees' briefs now attempt to retrofit and infer such a finding.[4] But, based upon how this Court uses the term in other domains, *egregiousness* is a finding of such importance that it should not be inferred. And, it should not be found in cases like this.

[4] *See,* Hospital's Brief, p. 24. n.10; Miner's Brief, p. 14.

This Court uses 'egregious' to describe conduct that is far, far beyond the accepted norm. *Hobart v. Ferebee*, 2009 S.D. 101, ¶ 28 (*pro se* litigant's repeated filings were actionable under SDCL 15-17-51 because they "abusive and egregious"); *State v. Buchhold*, 2007 S.D. 15, ¶ 38 (maximum sentences available only for "those committing the most egregious examples of the crimes"); *Reaser v. Reaser*, 2004 S.D. 116, ¶ 19 (relief under Rule 60(b) available for "the most egregious conduct involving a corruption of the judicial process itself"); *Tri Cnty. Landfill Ass'n, Inc. v. Brule Cnty.*, 2000 S.D. 148, ¶ 19 (under § 1983, a claimant must prove city acted in "a truly irrational, truly egregious manner"); *Luna v. Solem*, 411 N.W.2d 656, 662 (S.D. 1987) (for habeas relief, noting "distinction…between ordinary trial error of a prosecutor and egregious misconduct").

Egregiousness also connotes conduct that all reasonable people would recognize as improper; invasive of the rights of others; and willfully wrongful. *Hamen v. Hamlin Cnty.*, 2021 S.D. 7, ¶ 76 (Kern, J., concurring-in part) ("such a level of egregiousness that 'every reasonable official would have understood that' the actions" violated constitutional rights); *Thom v. Barnett*, 2021 S.D. 65, ¶ 14 (voting irregularities actionable only when "so egregious that the will of the voters was suppressed"); *Citibank (S.D.), N.A. v. Hauff*, 2003 S.D. 99, ¶

29 ("more egregious and unreasonable because [litigant] acted with knowledge").

Egregiousness is a finding that this Court reserves for only the most serious and extreme cases. It is therefore an abuse of discretion for a Circuit Court to dismiss a case without making a key finding on the standard itself. To paraphrase cases from other domains, *egregious* conduct does not apply to "ordinary trial error" and should be confined to cases "involving a corruption of the judicial process itself," and where "every reasonable" attorney and judge would recognize it as wholly inexcusable.

That is not the case here. This case, although admittedly slower than it could have been, was not filled with unexplained delays. The affidavit submitted by Lori's counsel explains in great detail how the case was progressing and why many of the perceived delays were both explainable and reasonable. [R.558-569].

The facts of this case are markedly different than all of the prior "egregious" cases decided by this Court. *See,* Lori's Brief, pp. 33-34 (collecting and summarizing six cases that involve multi-year periods of inactivity or contumacious behavior). This is not an egregious case.

7. This Court should embrace the *corrective* role of Rule 41(b), rather than merely its punitive function.

This is not a case of egregious inactivity nor of egregious misconduct. However, until now, a Circuit Court facing a case like this would be left with a complicated choice: to deny the Rule 41(b) motion, or, to dismiss the case.

There is nothing useful about a binary choice like this. Dismissals often lead to delays from an appeal, which further impairs the efficiency of litigation. Dismissals do not promote justice, other than the judicial value of efficiency. However, denying the motion without further intervention is also sometimes the wrong answer, leaving the Circuit Court with few tools to address delays, or encourage "promptitude" among their dockets.

There is a simple solution. This Court can clarify that circuit courts have a full toolbox of remedies when faced with Rule 41(b) motions. This is the approach in every federal circuit and in all of our surrounding states. It should be our approach, as well.

Lori's opening brief asked for the Court to implement Justice Konenkamp's factors, "and, if the circumstances warrant, direct the entry of a less drastic sanction than dismissal." Lori's Brief, p. 43. Neither appellee offered any constructive proposals in response to this. Both of them suggest we ignore any outside law, and both of them demand dismissal as the only remedy

here, and in any future case. That is an unreasonable approach, especially when all of the parties agreed that the case was within 14 months of a trial.

Lori asks for her case to be reinstated and remanded for further proceedings, including the entry of a scheduling order to bring this matter to trial.

8. Notice of Review Argument: The Circuit Court acquired jurisdiction over Dr. Miner[5]

In Section III of his brief, Dr. William Miner argues that service upon him was deficient, and that the Circuit Court erred by concluding otherwise.

Standard of Review

Dr. Miner correctly identifies that the standard of review is *de novo*. However, on questions of jurisdiction, a decision of the Circuit Court will *also* be upheld "if it reached the right result, albeit based on the wrong reason." *Edsill v. Schultz*, 2002 S.D. 44, ¶ 11 (South Dakota citation omitted).

The Circuit Court correctly found jurisdiction over Dr. Miner in several ways. And, it overlooked an even simpler route: Dr. Miner filed a written admission that the summons was delivered to him.

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[5] Lori's opening brief addressed the key facts related to the service of process issue. *See,* Lori's Brief, pp. 4-10.

(a) Dr. Miner admitted service pursuant to SDCL 15-6-4(g)(3)

The simplest way to dispense with Dr. Miner's appeal is for this Court to hold that Dr. Miner admitted service via his February 10th affidavit. *See,* [R.54]. His affidavit contains all the necessary elements of a written admission.

In lieu of personal service, South Dakota law provides that jurisdiction over a Defendant can be obtained via "the written admission of the party…upon whom service *might have been made.*" SDCL 15-6-4(g)(3). The preamble to Rule 4(g) requires that such proof "must state the time, place, and manner" of such service. SDCL 15-6-4(g).

On February 10, 2022, Dr. William Miner executed an affidavit which recited the time, place, and manner in which he received the Summons and Complaint. [R.54]. Namely, Dr. Miner admitted that on September 22, 2021, he personally received the Summons and Complaint in the office of Monument Health's legal counsel in Rapid City. [R.55].

Dr. Miner's affidavit is indistinguishable in content from a typical admission of service. Nothing in Rule 4(g)(3) defines the format of such a written admission. Nor does Rule 4(g)(3) provide a time-frame for the authorship of the written admission by a defendant.

A written admission of service is not a complicated or technical device. "An admission is merely another way of proving that a summons was delivered

to and left with a defendant." *Erickson v. Robison*, 282 A.D. 574, 577 (N.Y.App. Div. 1953) (applying New York rule of procedure). *Accord, Haggerty v. Sherburne Mercantile Co.,* 186 P.2d 884, 889 (Mont. 1947) (a letter confirming "delivery" of summons "has the same legal effect as personal service of the summons").

South Dakota's Rule 4(g)(3) is equally non-technical. It is clear that our admission-of-service provision does not envision *actual* service, because it contains the phrase "upon whom service *might* have been made." SDCL 15-6-4(g)(3). This provision must be read in connection with all of the other components of Rule 4, namely:

- under Rule 4(d), "service" of the summons means "*delivering* a copy thereof..."
- under Rule 4(d)(8), the delivery of the summons must be "to the defendant personally;"
- under Rule 4(g)(3), proof of the delivery of the summons must be by "written admission of the party"
- and, under Rule 4(g), the proof "must state the time, place, and manner" of the delivery.

Or, in other words, when each of these provisions are harmonized, we can conclude that:

> the admission occurs *in lieu of* service which "*might* [otherwise] have been made" by a constable, and, that such admission is sufficient if it is in writing, signed by the defendant, and states "the time, place, and

manner" by which "a copy" of the summons was "deliver[ed]...to the defendant personally."

See, SDCL 15-6-4(g)(3); SDCL 15-6-4(g); SDCL 15-6-4(d); SDCL 15-6-4(d)(8).

Dr. Miner's affidavit meets these criteria. He cannot pick and choose phrases from the Rules, while ignoring others. Instead, "South Dakota's statutory scheme governing service of process must be contemplated in concert, not as a set of unrelated pronouncements." *Spade v. Branum*, 2002 S.D. 43, ¶ 11. *See, also, Mueller v. Zelmer*, 525 N.W.2d 49, 51 (S.D. 1994) (defendant bound by document in which he "acknowledge[d] *receipt* of the summons" and which listed time, place, and manner of such receipt) (emphasis added).

Lori asked for a finding on this issue, [R.403-404], but the Circuit Court did not reach it.[6] However, a Circuit Court's rulings as to jurisdiction can be upheld for any reason, including those it failed to consider. *Edsill*, 2002 S.D. 44, ¶ 11.

Lori asks for this Court to hold that Dr. Miner admitted timely delivery of the summons to him.

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[6] The Settled Record shows that a proposed order was submitted by Lori on 8/5/2022 via email and Odyssey. [R.403-04]. But, that proposed document itself does not appear within the record at this time. The proposed order stated in pertinent part that: "Dr. Miner filed an affidavit on February 10, 2022,...which the Court concludes meets the requirements of SDCL 15-6-4(g)(3)." The circuit court entered its own Order on 8/22/2022. [R.272-73].

(b) Marlin Klingspor (a paralegal) and Paula McInerney-Hall (her supervising attorney) served Dr. Miner

In the alternative, the Court can hold that Marlin Klingspor, a paralegal employed by Monument Health (a hospital in Rapid City), and her supervising attorney effectuated actual service upon Dr. William Miner on September 22, 2021.

In support of this, the following are undisputed: (a) Klingspor is an elector of this State and unaffiliated with any party, (b) she is a legal assistant regulated by SDCL 16-18-34, *et seq.,* who was under the direct supervision and direction of Paula McInerney-Hall, a licensed, practicing South Dakota attorney who is an officer of this Court; (c) Klingspor received a Summons, Complaint, and demand letter from the Deputy Sheriff, at the Rapid City hospital, as part of an ongoing agreement made as a courtesy to the hospital and its doctors, for times when service is necessary upon doctors, and, as part of this agreement Klingspor agreed to promptly convey the documents to Dr. Miner; (d) Klingspor, acting as an agent of her supervising attorney, promptly and personally conveyed the documents to Dr. Miner, the next day, on September 22, 2021, knowing of their legal significance and intending to deliver them to Dr. Miner at the direction of her supervising attorney; (e) at no time did either Klingspor or her supervising attorney ever alert the Deputy, the Sheriff's

department, or counsel for the Plaintiff that there was a problem with service or with their agreement to convey the documents; and (f) Klingspor's delivery of the Summons and Complaint was subsequently memorialized by her (and her supervising attorney) within affidavits giving the time, place, and manner of their delivery of the Summons to Dr. Miner.

Dr. Miner argues this is impermissible "second-hand service," and he claims this type of service was "specifically rejected" by *Marshall v. Warwick,* 155 F.3d. 1027 (8th Cir. 1988). But in *Marshall,* the 8th Circuit's rejection of second-hand service was *solely* because the defendant's mother "submitted neither an affidavit nor written admission stating the time, place, or manner in which she delivered the summons and complaint to her son." *Id.* at 1032.

Here, McInerney-Hall and Klingspor submitted affidavits that collectively stated all of those elements, including that, "On September 22, 2021, Dr. Miner came to my office and retrieved the Summons...." [R.57]. Klingspor's affidavit appears purposefully crafted in such a way as to avoid many of the details. However, her supervisor's affidavit spells out the rest, and, as an officer of the Court, her affidavit can be presumed to be made upon personal knowledge. Taken together, their affidavits confirm service on Dr. Miner.

The concerted effort of this paralegal and attorney is not functionally different than a sheriff and deputy sheriff. *See, Meisel v. Piggly Wiggly Corp.*, 418 N.W.2d 321, 324 (S.D. 1988) ("When the deputy is acting under an appointment made by the sheriff, the deputy's services are binding on third parties and even though a deputy may serve the process, in the contemplation of the law, the process is served by the sheriff....").

The Court can find that the *Marshall* holding is inapplicable here because affidavits were filed here by the second-hand servicers. The affidavits of Klingspor and McInerney-Hall either directly comply with Rule 4(g)(2), or, their affidavits substantially comply[7] with its provisions.

(c) Dr. Miner waived his service of process defense by failing to promptly and specifically assert his rights.

Every other service-of-process case that Dr. Miner cites is inapposite to the most critical fact of this case: Lori received a return from the Pennington County Sheriff that confirmed personal service had been made upon Dr. Miner. Specifically, the return stated "that on the 21st day of September, 2021, at 3:00 pm, in [Pennington] County, [Deputy Robert Sanders] served the [Summons]

[7] *Peterson v. Hohm*, 2000 S.D. 27, ¶ 12 (doctrine of substantial compliance is used when the purpose and objective of the statute has been met, but some defect has occurred to prevent total compliance)

on: William J. Miner, M.D., at 353 Fairmont Blvd., Rapid City, SD 57701." [R.19].

Insufficient service of process is a defense that may be waived if not timely and specifically asserted. *Grajczyk v. Tasca*, 2006 S.D. 55, ¶ 9. Dr. Miner waived his defense in two ways: *first,* by failing to immediately challenge the Sheriff's return of service that had been filed with the Clerk; and *second,* by failing to clearly and specifically assert the defense, even when asked for details via discovery.

(i) A litigant waives a service of process defense when he fails to challenge a facially valid sheriff's return declaring valid service upon him

Lori (and all litigants) have a right to rely upon the accuracy of a sheriff's return. This has long been the public policy of courts nationwide. "At common law, the 'verity rule' provided that a sheriff's return of process was conclusive proof of proper service and, absent a showing of fraud, could not be impeached by parol evidence." *Wise v. Ludlow*, 346 P.3d 1, 8 (Wyo. 2015). Most states, including South Dakota, have relaxed the verity rule, but the presumption is still great, especially on matters within the sheriff's personal knowledge. "Where a sheriff returns that he served a summons by handling to and leaving with the defendant a copy of such summons at a certain time and place, while not absolutely conclusive, there is a strong presumption that such return is true, and it can be impeached only by clear and conclusive proof."

Hays v. Alway, 166 N.W. 139, 140 (S.D. 1917) (and noting evidentiary distinctions between returns of personal service versus substituted service).

Here, Dr. Miner did not promptly challenge the sheriff's return, despite claiming it was false. Proper procedures to challenge an erroneous return of service include filing a motion to quash, or, by seeking amendment of the return. *See,* SDCL 15-6-4(h); *Jacobs v. Queen Ins. Co. of Am.,* 213 N.W. 14, 14 (S.D. 1927) (motion to quash summons); *Le Roy Sargent & Co. v. McHarg*, 174 N.W. 742, 743 (S.D. 1919) (motion to quash service of process).

Lori urges this Court to find that Dr. Miner waived his service of process defense by not promptly and actively challenging the sheriff's return. Instead, he let the document remain in the Clerk's file for over two months, despite knowing all along that it was wrong. Finding a waiver under circumstances like this will encourage litigants to immediately challenge erroneous sheriff's returns, and, thus maintain the confidence that all litigants should have in proof-of-service documents.

(ii) Dr. Miner waived his service of process defense by failing to specifically assert it in his Answer and then evading Lori's discovery inquiries

In order to raise a defense about service of the summons, the Defendant must raise it in the Answer (or in Defendant's first motion preceding a responsive pleading prior to the Answer). *Grajczyk v. Tasca*, 2006 S.D. 55, ¶ 9, 717 N.W.2d

624, 628 (citing *Photolab Corp. v. Simplex Specialty Co.*, 806 F.2d 807, 810 (8th Cir. 1986).

"The objection must be specific and must point out in what manner the plaintiff has failed to satisfy the requirements of the service provision utilized." *Grajcyyk,* (quoting *Photolab Corp*, 806 F.2d at 810) (emphasis added). *See, also*, *Travelers Ins. Co. v. Panama-Williams*, Inc., 424 F. Supp. 1156, 1158 (N.D. Okla. 1976). "[W]here a defendant generally raises a service of process contention in its answer, that contention will be deemed waived if the defendant fails to adequately develop it in a reasonably prompt manner." *Patterson v. Whitlock*, 392 F. App'x 185, 193 (4th Cir. 2010)

In this case, Dr. Miner raised only a general objection in his Answer, which stated that "Plaintiff's claims are barred by insufficiency of process and/or insufficient service of process." *See,* [R.26; Separate Answer of William J. Miner, p. 2, ¶ 3.]

At the time he submitted that Answer, however, Dr. Miner was in full possession of all the facts needed to assert a more specific objection. He acknowledged that he already had the concern that "I wasn't served," at the time he was "drafting his Answer" in "October [2021]." [R.237-240; Miner Deposition, p. 10, line 21 to p. 11, line 3.]

Two months later, Dr. Miner responded to written discovery in this case, including Interrogatory 16 which inquired about "the factual basis" for "any affirmative defenses you allege." [*See,* R.164-65; Interrogatory Answers, pp. 31-32.] In response, Dr. Miner stated "discovery in this case continues;" that "this response will be seasonably updated as evidence is gathered;" and that "Dr. Miner was not served with process." *Id.* No details were given.

Nor did he identify any witnesses, even though Dr. Miner himself was a key witness who knew nearly all of the details related to "service." The other key witnesses were the lawyer and paralegal at his own hospital. His private attorney was already aware of the issue. Yet Dr. Miner persisted for months in concealing all facts and witnesses known to him. Dr. Miner needed no further discovery to explain what he knew. [*See,* R.238; Miner Deposition, pp. 10-13.]

When asked about his failure to provide a detailed Interrogatory answer, Dr. Miner stated, "I don't know." Miner Deposition, p. 12, line 22 to p. 13, line 6. Dr. Miner gave this same response when asked why he didn't include any specifics in his Answer. Miner Deposition, p. 11, lines 11-22. In short, even though Dr. Miner knew the facts, he failed to give them.

"[A]ctual participation in legal proceedings waives irregularities in notice and service procedures...." *State v. Fifteen Impounded Cats*, 2010 S.D. 50, ¶ 31, 785 N.W.2d 272, 282. Here, Dr. Miner participated in the legal proceedings just

long enough for the 2-year statute of repose to expire on January 24, 2022, and, then filed his motion. By his litigation participation, Dr. Miner waived any objection to the service upon him.

Dr. Miner also waited too long to raise this issue. "Generally, questions over personal jurisdiction, venue and notice must be raised *at the first reasonable opportunity or they are waived.*" *Id.* at ¶ 31 (emphasis added). Dr. Miner did not specifically raise these questions "at the first reasonable opportunity," *i.e.,* his Answer. Instead, he waited until the moment was opportune for his own interests, namely, in a motion brought after it was too late for Lori to fix the problem.

Meanwhile, Dr. Miner had actual notice of these proceedings; he participated in them; and he only belatedly sought to raise the issue of service in a motion. Dr. Miner waived his right to object to service of process. *See, In re R.P.,* 498 N.W.2d 364, 367 (S.D. 1993) ("an objection to sufficiency of process is waived if the party fails to object at the appropriate time").

Dr. Miner cites to *Grajczyk* to argue that his Answer properly preserved the issue of insufficient service of process. *Grajczyk* held that defendant's statement of "no service" in his Answer was sufficient to preserve the issue. However, the facts in *Grajczyk* are much different from the facts here.

In *Grajczyk*, the Sheriff's Return stated that the summons was "left with girlfriend." ¶ 5. There, the defendant was challenging the validity of substituted service via the girlfriend, so it would have been immediately clear to the plaintiff as to why the defendant was claiming he had not been personally served. Here, in contrast, the Sheriff's Return indicated that Dr. Miner had been personally served at his place of work. Dr. Miner's conclusory statements in his Answer did not clarify or illustrate how that service was deficient.

In addition, the motion to dismiss filed by the defendant in *Grajczyk*, was filed immediately after the Answer ("the next day"). ¶ 6. In contrast, Dr. Miner waited almost four months after his Answer to file the motion. Meanwhile, Dr. Miner participated in the discovery process, both by serving interrogatories and answering them, all the while withholding any of the details of the alleged improper service.

All of this constitutes a waiver.

(d) Under the unique circumstances here, equitable tolling applies to the sixty-day period for constructive service found in SDCL 15-2-31.

This Court can also find jurisdiction by applying equitable tolling principles to SDCL 15-2-31.

"When a summons is delivered to the sheriff or other authorized officer with the intent that it be served on the defendant, SDCL 15-2-31 effectively

extends the time for service 60 days." *R.B.O. v. Congregation of Priests of Sacred Heart, Inc.*, 2011 S.D. 87, ¶ 20, 806 N.W.2d 907, 913 (citing *Meisel,* 418 N.W.2d at 323).

Even though the doctrine of equitable tolling does not apply to statutes of repose, the doctrine *can still* be applied to the "sixty days" provision within SDCL 15-2-31. *C.f., Pitt-Hart,* 2016 S.D. 33, ¶ 27 ("the analysis of our previous malpractice cases remains largely undisturbed"). Our statutory scheme for service embraces a 60-day constructive service extension in *all* cases, whether governed by a statute of repose or a statute of limitations. Nothing in *Pitt-Hart* changes this. Nothing in SDCL 15-2-31 restricts its application to particular types of cases.

Accordingly, this Court remains free to apply equitable principles to the 60-day constructive service extension in SDCL 15-2-31.

"The threshold for consideration of equitable tolling is inequitable circumstances not caused by the plaintiff that prevent the plaintiff from timely filing." *Zahrbock v. Star Brite Inn Motel*, 2010 S.D. 73, ¶ 16, 788 N.W.2d 822, 827.

Lori delivered the Summons to the Pennington County Sheriff over four months prior to the running of the statute of repose. Within days, she received a return of service verifying that service had been successful. There is no question

in this case that the Deputy Sheriff's failure to serve Dr. Miner, and, his erroneous Return of Service, were beyond the control of Lori.

Further, when Lori attempted to inquire about the facts that formed the basis of Dr. Miner's defense, he avoided giving any specifics. There was nothing in the Record that gave Lori any basis to doubt the Sheriff's return until Dr. Miner filed his motion and affidavits on February 10, 2022, after which the statute of repose date had already passed. Lori promptly re-delivered a Summons to the Sheriff, which was promptly served.

Lori asks that the 60-day provision in SDCL 15-2-31 be tolled, in the same manner as if Lori had delivered the documents to the sheriff for service on January 24, 2022. The Deputy's completed service attempt in February 2022 can be recognized as valid, falling within the 60-day deadline for constructive service.

(e) Counts 5, 6, and 7 are not subject to the two-year statute of repose in SDCL 15-2-14.1 for medical malpractice actions.

Finally, Lori asks this Court to affirm the Circuit Court's holding that Counts 5, 6, and 7 arose out of actions and injuries that occurred after Scott Olson's death. [*See,* R.13-15]. Although *somewhat* factually connected to Mr. Olson's medical care, these claims are legally and factually distinct from his actual care and comprise wrongdoing that was directed at altogether different parties, after his care had concluded. These counts include claims for intentional

infliction of emotional distress; conspiracy; and fraudulent concealment. As standalone torts, they are subject to either a three- or six-year statute of limitations, see, SDCL 15-2-13(5); SDCL 15-2-13(6), and SDCL 15-2-14(3), or, a ten-year statute of limitations (see, SDCL 15-2-8(4) ("an action for relief not otherwise provided for").

CONCLUSION

Lori asks this Court to reverse the Circuit Court's dismissal. She asks for day in Court. And she asks for this Court to issue an opinion that clarifies, changes, and improves South Dakota's common law regarding SDCL 15-11-11 and Rule 41(b), with the goal of carrying out the objective of the Rules of Civil Procedure: "to secure the just, speedy, and inexpensive determination of every action." SDCL 15-6-1.

Dated this 27th day of November, 2024.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Appellant's Reply Brief does not exceed the word limit of 7,500 words as requested via Motion, with said Brief containing approximately 6,790 words, exclusive of the Table of Contents, Table of Authorities, any addendum materials, and any certificates of counsel.

/s/ Daniel K. Brendtro
One of the attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of November, 2024, I electronically filed the foregoing via the Odyssey File and Serve system with the Supreme Court Clerk, which will send notice to Appellee's Counsel and counsel for interested parties.

I also hereby certify that on this 27th day of November, 2024, I sent a bound copy of the foregoing to the Supreme Court Clerk at the following address:

Shirley Jameson-Fergel
Supreme Court Clerk
500 East Capitol Avenue
Pierre, South Dakota 57501

/s/ Daniel K. Brendtro
One of the attorneys for Appellants