



1 THE COURT: All right. It's 2:30. Let's go ahead and  
2 go on the record. This is 41CIV.22-298, and that is In the  
3 matter of the review of the public records requests of  
4 Jessica Pollema and Cindy Meyer of the Lincoln County  
5 Auditor, Minnehaha County Auditor, and Pennington County  
6 Auditor. And we are here on I believe it's the appellees  
7 motion to dismiss and that was on an administrative appeal.

8 And then we have another, ah, case file 41CIV.22-463.  
9 We the People for the Free, Fair and Transparent Elections,  
10 LLC., versus Sheri Lund, Lincoln County Auditor and Lincoln  
11 County Auditor's Office, in and for Lincoln County, South  
12 Dakota.

13 And with that being said, may I note appearances,  
14 please.

15 MR. HIEB: David Hieb on behalf of the Minnehaha County  
16 Auditor and Pennington County Auditor, Your Honor, that's in  
17 matter 298.

18 THE COURT: Thank you.

19 MR. DEIBERT: Douglas Deibert, also, in 298, for, ah,  
20 the, ah, Lincoln County Auditor, and, if I may, Your Honor,  
21 I'd introduce to the court this is, um, Lily, um, Jasper,  
22 who's interning with us this summer.

23 THE COURT: Welcome, Ms. Jasper. And, ah --

24 MR. HAUGAARD: Yes, Your Honor, Steve Haugaard appearing  
25 along with Jessica Pollema and Cindy Meyer in regard to this

1 matter, and it was my understanding coming into this and,  
2 Jessica Pollema is seated to my right. Ah, it was my  
3 understanding coming into this matter that it was just going  
4 to be addressing the 298 issue, and the 463 I have a copy of  
5 a letter from Mr. Deibert in regard to a proposed stipulation  
6 for continuance in that, and I believe if I could pass those  
7 copies of those out to the court.

8 THE COURT: All right. I know there, there was a motion  
9 for continuance, and I also saw it was noticed for today so  
10 thank you.

11 MR. DEIBERT: Mr. Haugaard is correct, Your Honor.  
12 We're just here on 298 today.

13 THE COURT: All right. Thank you. And so, ah, great.  
14 I can get rid of a big stack of paperwork here.

15 And so just to be clear on I believe it was 41CIV.22-  
16 463, ah, the continuance was stipulated between the parties?

17 MR. DEIBERT: Yes, Your Honor.

18 THE COURT: All right. Okay. Thank you. And thank you  
19 for sharing that, Mr. Haugaard. And so I did have a chance  
20 to review the file, and so I'm prepared to, ah, hear the  
21 motion to dismiss on 41CIV.22-298. Now, you can see that we  
22 don't have a court reporter here today. We're using, it's  
23 not even courtsmart. I think it's called FTR, but I call it  
24 courtsmart. It's important that you speak into the  
25 microphone, so we make an accurate record of today's

1 proceedings. If you're not speaking into the microphone,  
2 it's more likely than not that we're not picking you up for  
3 the purpose of the record. So, please, remember to pull that  
4 microphone close and to speak into it. And so with that  
5 being said, it's your motion, I believe, Mr. Hieb, and so you  
6 can begin whenever you're ready.

7 MR. HIEB: Thank you, Your Honor. Um, I think it's  
8 first important to note what we're not here, what we're not  
9 here to hear today and that is the substitutive issue on  
10 appeal on the Office of Hearing Examiners denial, as well as  
11 the application by appellant to take additional evidence at  
12 the agency level. The only thing before this court and  
13 properly noticed at least as to Minnehaha and Pennington  
14 County, their auditors, is the motion to dismiss. And I'll  
15 give you a very brief background on how we arrived here  
16 today, Your Honor. Um, the appellant made very -- various  
17 requests to the Minnehaha County Auditor, public --  
18 Pennington County Auditor, and Lincoln County Auditor  
19 regarding certain records related to the November 2020  
20 election. All three counties denied those requests.  
21 Appellant filed the request for review with the Office of  
22 Hearing Examiners seeking to review the denial of those  
23 requests. And in May of 2022, the Office of Hearing  
24 Examiners, Judge, issued a decision upholding and affirming  
25 the three county auditors denial of the appellants records

1 request.

2 Um, after that hearing the appellant filed a notice of  
3 appeal with this court on June 15<sup>th</sup> of 2022, and since there  
4 was no, there was no hearing at the agency level and that  
5 matters because under SDCL 1-26-33.1 the clock starts to tick  
6 on appellee's briefing on her appeal at the circuit court  
7 level 30 days from delivery of the transcript or 30 days  
8 after the agency record is transmit -- transmitted to this  
9 court.

10 With no record to be, sorry, with no transcript to be  
11 delivered it goes off the 30 days when an agency record is  
12 transmitted to the circuit court. And that happened on July  
13 7<sup>th</sup>, 2022, and, therefore, appellants opening brief in this  
14 appeal was due on August 8<sup>th</sup>, 2020 -- 22, sorry, 2022.

15 So, therefore, as we sit here today, appellant has not  
16 filed an opening brief. Um, it's now over nine months  
17 delinquent as of today.

18 So, as this case sits, the Minnehaha County Auditor and  
19 Pennington County Auditor have moved for a dismissal under  
20 SDCL 15-6-41(b), and that allows a party to move for  
21 dismissal of any action where the other side has failed to  
22 prosecute their matter. And the South Dakota Supreme Court  
23 has, has stated that dismissal is appropriate when the other  
24 parties conduct is egregious, and the court has explained  
25 that the circuit court should focus on whether the party has

1 met the respons to move -- responsibility to move the matter  
2 forward.

3 And here, um, the Pennington County Auditor as well as  
4 the Minnehaha County Auditor believe that appellant's conduct  
5 in not filing a brief for over nine months after it was due  
6 is egregious conduct, and that she has failed to meet her  
7 responsibility to move this matter forward.

8 There was an argument made you know there wasn't -- this  
9 issue wasn't technically briefed back by appellant, but there  
10 was an affidavit filed, um, and in that affidavit, and that's  
11 an affidavit of the appellant, it states that they believed  
12 somehow, it's not clear, that the substitutive  
13 (unintelligible) the 30 days was stayed by their application  
14 to, to, to this court to send it back down to the agency  
15 level and hear more evidence at the agency level.

16 There's simply no law to support that an application to  
17 take additional evidence operates as a stay of the  
18 requirement to brief your substitutive appeal.

19 In fact, the plain language of 1-26-33.1 says, unless  
20 otherwise ordered by the circuit court, the appellant shall  
21 serve a brief within 30 days after the agency record is  
22 transmitted, transmitted to the circuit court. There's no  
23 order here staying this matter. There's, there's no  
24 stipulation that the court has filed an order on. There's  
25 no, there's been no motion to stay, um, until that

1 application is heard that the court has filed an order on.

2 So, therefore, Your Honor, appellant has not met her  
3 responsibility of moving her appeal forward by failing to  
4 file her briefing for over nine months after it was due,  
5 therefore, the Minnehaha County Auditor and the Pennington  
6 County Auditor respectfully, respectfully move this court  
7 pursuant to SDCL 15-6-41(b) for an order granting a motion to  
8 dismiss this appeal brought by the appellant, Your Honor.  
9 Thank you.

10 THE COURT: Thank you. Mr. Deibert, are you  
11 representing Lincoln County then?

12 MR. DEIBERT: Yes, Your Honor.

13 THE COURT: And, ah, I'm assuming you join in the  
14 motion?

15 MR. DEIBERT: I do, and we have, we've also made a  
16 motion under Rule 56.

17 THE COURT: All right. And I did have a chance to  
18 review that as well and could you pull that microphone real  
19 close, sir. All right. Thank you. And, ah, do you want to  
20 be heard on the 15-6-56 at this time?

21 MR. DEIBERT: I do, Your Honor. It might be a little  
22 more efficient as well, and Mr. Haugaard can then just  
23 address both.

24 THE COURT: Just, just hold that thought. Mr. Haugaard,  
25 do you have any objection to that?

1 MR. HAUGAARD: No, Your Honor.

2 THE COURT: All right. Thank you. Mr. Deibert, you  
3 can begin whenever you're ready, sir.

4 MS. DEIBERT: Again, we -- Lincoln County has brought  
5 the motion under Rule 56 for summary judgment. The documents  
6 were filed as the motion, the necessary statement of facts  
7 and the brief were filed November 17, 2022. To this date as  
8 we sit here on May 11, 2023, nearly six months after the  
9 filing of the motion there has been no response to the  
10 motion. If the affidavit of Ms. Pollema is to be considered  
11 a response, we would object to that, and, specifically, Your  
12 Honor, I think this is covered in *Discover Bank versus*  
13 *Stanley*, at 757 N.W.2d 756. It's kind of interesting. The  
14 shoe is on the other foot. In that case, the moving party,  
15 the bank didn't file the necessary responsive documents in  
16 accordance with Rule 56(c). Um, so the court reversed the  
17 trial court which it granted the motion.

18 In the discussion, especially at page 764, the, ah,  
19 Supreme Court stated the party opposing, and so now we're the  
20 party making the motion, should not have to guess at what its  
21 opponent in response to the motion.

22 So, I had a number of statutes and other things  
23 addressing such things as stays, ah, the time for a brief,  
24 ah, additional evidence, and those kinds of things, but we  
25 believe that it's obvious there has been no compliance or



1 attempted compliance with Rule 56(c). I'm not sure whether  
2 the position taken by the appellants is that they are  
3 represented by counsel or if they are pro se. I addressed  
4 that issue in my submission two days ago.

5 Either way if it is, rather if appellants are  
6 represented by counsel, of course, they had the duty to  
7 comply with Rule 56(c)(2).

8 And as I also pointed out so far as pro se litigants are  
9 concerned, while courts have been at least somewhat lenient  
10 so far as pleadings go when it comes to procedure pro se  
11 litigants are deemed to know the rules just as counsel would.  
12 So, our position without arguing such things as stays, and  
13 days, and those kinds of things is that regarding our motion  
14 for summary judgment under Rule 56, this is a default  
15 situation and Lincoln County is entitled to judgment of  
16 dismissal based on that fact. Thank you.

17 THE COURT: Thank you. Mr. Haugaard, are you ready,  
18 sir?

19 MR. HAUGAARD: Yes, Your Honor. And I say that with  
20 some trepidation of the fact that I just provided notice last  
21 week and still in the process of going through the entirety  
22 of the files and reviewing a variety of cases concerning this  
23 type of thing. And one of the cases it was primarily cited  
24 was the *Eischen v. Wayne Township* case. I suspect you knew  
25 A.J. Wasson as well as I did. A.J. when he got to the end of

1 his career was not in good health and suffering from cancer  
2 and that's what precipitated change of counsel in that case  
3 and Dick Johnson picked up the slack there and I understand  
4 the, ah, arguments made by counsel, but the reality was that  
5 was more in the nature of a personal injury case or something  
6 like that, but that needed to be addressed.

7 In this situation, this is more in the nature of the  
8 public's interest, and I think that's an important aspect of  
9 this. Unfortunately, Mr. Tornow is no longer licensed to  
10 practice law, and he was -- I spoke with him about that  
11 particular issue that he felt he couldn't even file a motion  
12 to withdraw because he was no longer authorized to practice  
13 within the court. So, that's what he was telling me is for  
14 his reason not to even file a motion to withdraw.

15 But, ah, the arguments here are that this should be  
16 something in the nature of the default judgment. I don't see  
17 it that way. I think what was going on early on was that,  
18 ah, the parties, requesting parties were trying to provide  
19 information, trying to gather some information, and that's,  
20 ah, what led to this ultimately a notice for deposition that  
21 was scheduled in the past month or so trying to develop a  
22 record. And it, it seems inconsistent with the interests of  
23 justice that a record is not even allowed to be developed in  
24 this particular case.

25 There was an effort to gather information from the

1 auditor's office. I don't believe that the information  
2 requested was provided. There was an effort to seek a  
3 deposition, and I think that would have cleared the air on a  
4 whole variety of things and provided the court some  
5 assistance in determining the ultimate goals and results of  
6 this case.

7 The other thing that I think is important now, Mr.  
8 Deibert's indicated that, ah, the intention to delay the  
9 other case was shared by those other parties.

10 The Supreme Court certainly does not favor anything in  
11 the nature of a partial summary judgment. And I believe  
12 that's what this would end up being is just, ah, partly  
13 addressing the issues and, and leaving other things unclear.

14 So, for those -- that reason in particular I think it's  
15 appropriate for the court to deny the request to dismiss this  
16 portion of the case, and I think it's in the long-term best  
17 interests of the public, especially, that this case goes  
18 forward, information is gathered. Ah, the public has a, a  
19 right to know, and clearly an expressed interest to know that  
20 elections have integrity in South Dakota, and there are other  
21 cases around the country that I'm aware of, but I've not been  
22 able to look at the factual details of those cases, but it  
23 would be in the best interests of the public, and I think in  
24 the best interests of the parties in this case that, ah, some  
25 additional factual information is developed. The matter can

1 be briefed, and then the court can issue a comprehensive  
2 ruling. So, I think that's part of what we need to address.

3 Also, the fact is early on in this process, too, there  
4 was just a lack of response to the requests that were made  
5 by, ah, in both cases. In particular in regard to Ms.  
6 Pollema's request and Ms. Meyer's request, there was just a  
7 lack of response, and again certainly in the best interests  
8 of the public, that something like this be fully addressed.

9 It's not anywhere near the *Eischen* case or some of the  
10 other cases where it's a personal claim. It's a matter  
11 addressing something that can be resolved with dollars and  
12 cents, that isn't what this is. This is a matter of  
13 integrity that I think the public is entitled to know, and  
14 again just the idea that addressing one case without  
15 addressing the other I think is a disservice to all the  
16 parties not just those I'm representing, but all the parties  
17 involved because this is going to be an ongoing issue, and,  
18 again, as I mentioned even in the, ah, in the *Eischen* case at  
19 the outset Justice Gilbertson notes that, that the circuit  
20 court's granted partial summary judgment is not reviewable  
21 under 15-26A-3, and the court does not favor a piecemeal  
22 approach to these kind of cases.

23 So, for that reason or those reasons I'd ask that, ah,  
24 that we have an opportunity to fully brief this, that we be  
25 allowed an opportunity to take a deposition and, ah, we can

1 proceed forward with this case and actually get it briefed as  
2 it should be and, and make whatever other arguments the court  
3 would want to hear from us, and that's a more comprehensive  
4 way to deal with this. So, that's our request, and we'd ask  
5 for additional time to fully brief and respond to the issues  
6 that were raised.

7         Some of these, I just got back from Denver yesterday.  
8 I drove all day from Denver so I wanted to make sure I was  
9 here for this hearing, but in that same time frame I'm seeing  
10 these briefs that are coming in both yesterday and the day  
11 before yesterday, so I've not had a chance to fully respond  
12 to those, but the essence of the response would be that  
13 *Eischen* is distinguishable, and it's not in the best  
14 interests of the public or the courts to, to address this in  
15 a piecemeal fashion.

16         THE COURT: Thank you, Mr. Haugaard. And I don't know  
17 if Mr. Hieb or Mr. Deibert wants to go ahead and do your  
18 reply first.

19         MR. HIEB: I'll go very briefly, Your Honor.

20         THE COURT: Thank you, Mr. Hieb, and just let me take  
21 some notes. Please continue, Sir.

22         MR. HIEB: And, Your Honor, what appellant's counsel for  
23 is, is asking for is all regarding the substitutive appeal  
24 and her application that depositions be taken. For one, I  
25 believe that was in the other matter, the We the People that

1 we're talking about and that's for one, Minnehaha and  
2 Pennington County are not even parties to that matter.

3 Here, we're before this court on 298, the appeal by  
4 Jessica Pollema versus Pennington, and Minnehaha, and Lincoln  
5 County Auditors. So, I'm not sure what exactly that  
6 deposition has to do with not granting the auditors motion.

7 In terms of public interest, that again goes to the  
8 substitutive appeal here on the motion to dismiss, and the  
9 facts are that they haven't filed a brief in nine months  
10 after it was due, and there's really no excuse for that.

11 Former counsel or he's never filed a motion to withdraw,  
12 so as far as we're concerned, you know to get out of a case  
13 you have to file motion to withdraw or which -- and the  
14 subsequent counsel just happened last week. So, appellant  
15 has had, um, counsel with significant appellant experience.  
16 Mr. Tornow throughout the last nine months up until last  
17 week, um, when the substitution of counsel was filed, and  
18 as well as in terms of being unresponsive, and I'll give you  
19 a little bit of background as they say we're unresponsive in  
20 the application request.

21 There was a stipulation that was entered to preserve the  
22 records that they're requesting the release pursuant to this  
23 appeal should they win they wanted them preserved.

24 Um, the last we heard from Tornow, former or current  
25 counsel, I'm not sure, prior to us filing our motion was in

1 an email on August 26 where he said in relevant part also  
2 just a courtesy reminder note that we will still need to  
3 address my client's pending application as filed as well.  
4 In that regard, my office will plan to be back in touch,  
5 hopefully mid-part of next week after I return from Pierre.  
6 Thanks again. That's on August 26. We thought -- we don't  
7 hear anything. We filed our brief on that application. We  
8 filed our motion in November of -- mid-November of 2022, and  
9 the next time we hear from Tornow is to schedule this  
10 hearing.

11 It's not our duty to get a stay put in place, that's  
12 appellant counsel's job, which he failed to do, and as it  
13 sits, they're nine months late in their briefing which we  
14 think is egregious conduct, and fails to meet the  
15 responsibility to move the matter forward and is appropriate  
16 for dismissal under SDCL 41 -- and I also note that in our  
17 opening brief the Pennington County and Minnehaha County  
18 Auditors also in the alternative, if this court thought it  
19 was more appropriate than alternative motion, ah, was made  
20 for summary judgment and they stated the three material facts  
21 that a notice of appeal was filed. There was when the  
22 hearing -- when the record was transmitted and then that more  
23 than 30 days had passed without a brief from appellant. So,  
24 to the, to the extent this court finds that summary judgment  
25 is more appropriate, and that appellant has not responded to

1 any of the auditor's statement of undisputed material facts.  
2 Summary judgment is also appropriate in this matter, Your  
3 Honor.

4 THE COURT: Thank you. Mr. Deibert.

5 MR. DEIBERT: Yes, Your Honor. Mr. Haugaard raised  
6 several things. The first being the *Eischen* case, and I  
7 don't think that has much applicability to Lincoln County.  
8 I have more than a little familiarity with that case since I  
9 represented the Township. The case went to the Supreme  
10 Court, I think just once it was indeed a Rule 41(b) dismissal  
11 case. The trial court dismissed the case. The Supreme Court  
12 sent it back saying need findings and conclusions, which we  
13 did, and it might have appealed again and denied. I, I don't  
14 know, but that was it. So, and it was a fire case in the  
15 middle of a blizzard, I remember that, and the fire trucks  
16 couldn't get there. And if there was something about partial  
17 summary judgment, which I don't recall, it may have been the  
18 fact that I think we made a motion for summary judgment on  
19 the substance as well since in the middle of an eighteen-inch  
20 blizzard the fire truck simply couldn't get there, the court  
21 didn't need to address that, so that's all that needed to be  
22 said on that.

23 Um, the, the question -- the term partial summary  
24 judgment, they had two cases, I'm puzzled, if we're talking  
25 about 298 and 463, if that's the situation, well, these are



1 separate cases. Ah, the claims and the defenses are totally  
2 different. In 463, the defense, our defense is based on the  
3 fact that the plaintiff would never or a requester, so you  
4 don't need to hear any more about that, but this is a  
5 separate case and should be decided separately.

6 I appreciate when one gets into a case late and maybe  
7 sometimes even reluctantly what a difficult matter it could  
8 be, however, we were never asked for additional time. There  
9 was no request made to the court to continue the summary  
10 judgment hearing, rather it was simply not responded to.

11 Part of the chronology is important as well, while Mr.  
12 Tornow was involved, after I filed the motion documents on  
13 November 17, um, I received a phone call from him like, it's  
14 in my affidavit, late in November saying he wanted to take  
15 the deposition of the auditor. I wrote him saying, no, we  
16 won't stipulate, you'll need to go through the formal  
17 process.

18 Well, Mr. Tornow wrote me again on December 4<sup>th</sup>. I wrote  
19 him on December 7<sup>th</sup> and said the same thing. Nothing said for  
20 three and a half months. Late March, I get a phone message  
21 again, excuse me, yes, I got a phone message and said, I told  
22 him we can't stipulate. It's Rule 56(f), if you need a cite,  
23 counsel. So, on April 3, he noticed the deposition. Well,  
24 that led to a new fuss which we did resolve by, ah, by  
25 stipulation.

1 But part of what this is getting to regarding the  
2 complaint that we haven't had time to take this deposition.  
3 We made that motion back in July and additional evidence and  
4 all those things, it should have been apparent, it had to be  
5 to Mr. Tornow, if indeed I had to make it apparent to him,  
6 that under Rule 56 once -- 56(F), a motion for summary  
7 judgment is made, the only way a party in that case can  
8 conduct additional discovery be it written, or deposition, or  
9 whatever, is to make a Rule 56(f) motion supported by  
10 affidavit and indicate to the court the specific items and  
11 issues that need to be addressed and that would be addressed  
12 if additional evidence were taken. Well, that wasn't done  
13 either.

14 Regardless of any of this, this is a default situation.  
15 The, ah, the bank case I just cited indicated essentially  
16 that when the word *shall* is used it means *shall*. It's not  
17 like the joke about the Boston traffic in your suggestion,  
18 traffic signs, um, and it's a default situation. Rule 56(c)  
19 was not followed. There was no effort to do so and any of  
20 Mr. Haugaard's remarks and arguments, some of them being the  
21 integrity of the process and best interests of the, of the  
22 public should be stricken. They're not, they are not a  
23 proper response under Rule 56(c), um, and for all these  
24 reasons, Your Honor, we would urge that the motion for  
25 summary judgment be granted.

1 THE COURT: Thank you, Mr. Deibert. Well, these aren't  
2 easy, ah, these aren't easy matters to take up, but I'm going  
3 to go ahead and turn to 41CIV.22-298, which is, of course,  
4 what we're here discussing this afternoon. And it's  
5 interesting that, ah, there are two different ways that these  
6 matters came before the circuit court, and they've been  
7 alluded to in argument, and I do appreciate the briefing that  
8 was done because it does help the court with its  
9 understanding of the procedure of the case, and how it, how  
10 it came before the court.

11 One important matter though is that last summer there  
12 was an appeal that was made from the Office of Hearing  
13 Examiners after a decision was made in front of the Office of  
14 Hearing Examiners and that was appealed to this circuit  
15 court, and that means that there's already been a decision  
16 that was made, and this court would be sitting as an  
17 appellate court reviewing the decision of the Office of  
18 Hearing Examiners. And, ah, part of that process is a  
19 requirement that briefing schedules be complied with related  
20 to the decision that was made from the Office of Hearing  
21 Examiners, and that you have to go ahead and get that  
22 briefing done in the specified amount of time under the  
23 administrative procedures that we follow in the State of  
24 South Dakota.

25 Then we have the other related case which we're not

1 discussing today, but that was under 41CIV.22-463 which, of  
2 course, ah, that's, We the People, et al, versus, the Lund  
3 and the Lincoln County Auditor, et al, and with that, ah,  
4 that would be an original action brought before the circuit  
5 court and that has a different review as, of course, there  
6 hasn't been any sort of presentation made to the trial court  
7 regarding the substitutive issues that had to be decided,  
8 which the Office of Hearing Examiners had already undertaken  
9 under 41CIV.22-298.

10 And so we're here on essentially two different pathways  
11 before the circuit court, and they don't have the same  
12 review. The Office of Hearing Examiner's, ah, review is much  
13 more I would say strictly construed than the review, of  
14 course, from the original action brought before the circuit  
15 court under 41CIV.22-263, We the People.

16 And so I understand there was a continuance on that  
17 particular matter, but we're just here today on the appeal  
18 from the Office of Hearing Examiners. And in that the  
19 parties have argued compellingly on their particular issues.

20 And what I really have to resolve, in the court's mind,  
21 is that under the review we have to look at the failure to  
22 file the briefing in a timely manner consistent within the 30  
23 days which Mr. Hieb articulated and argued to the court.

24 And, ah, when I look at that the important consideration  
25 that this court would make is good cause. Is there good

1 cause for the court to go ahead and to grant the appellants  
2 the time to go ahead and complete the briefing as required or  
3 has there been a failure to show good cause on the part of  
4 the appellants and grant the appellees motion to dismiss.

5 The standard of review is very clear on a motion to  
6 dismiss and that would be that I have to view it in the light  
7 most favorable to the non-moving party, which of course would  
8 be the review of the request of Jessica Pollema and Cindy  
9 Meyer to the Lincoln County Auditor, and so I have to view it  
10 in the light most favorable to, ah, ah, of course, the  
11 Lincoln or, excuse me, the requestor that was requesting the  
12 information that of course was denied by the hearing examiner  
13 at the Office of Hearing Examiners that decided this before  
14 it came before this court.

15 And so with that being done, I think of the argument  
16 that was presented by Mr. Haugaard, and Mr. Haugaard, ah, no  
17 fault of his own, came on this case very recently and, ah,  
18 thanks to him for doing that. Frequently this court has been  
19 subjected to situations where because of the time constraints  
20 there has been no counsel appearing because it's so close to  
21 a hearing and, and, ah, that has been problematic for many  
22 different individuals that have come before the court, but  
23 here Mr. Haugaard did appear, and as he indicated he drove  
24 all the way from Denver to be here. And we also have his  
25 admitted struggling to get all the briefing done and review

1 everything so he can be here and make, make what this court  
2 would consider to be a good cause argument.

3 And looking back over the matter over the last almost  
4 year, I have to look at whether good cause has been shown why  
5 the briefing wasn't done by August of last year. And in  
6 weighing that, I can't find that there's good cause as to why  
7 it wasn't done. I have to view this in a light most  
8 favorable to the non-moving party, and, quite honestly, there  
9 was an affidavit that was filed, and the affidavit basically  
10 requested this court to, ah, I think part of that affidavit  
11 included a request to remand it back to the Office of Hearing  
12 Examiners. That affidavit is not a motion. That has to be a  
13 motion before the court seeking for a remand and that wasn't  
14 done in this case.

15 So, we have at this point a process and a delineated  
16 requirement to go ahead and get the briefing done within 30  
17 days, and it wasn't complied with. And good cause has to be  
18 shown to allow for that to, ah, to be overcome, and in this  
19 particular instance I don't find that there's good cause.

20 So, because of that I am going to grant the motion to  
21 dismiss for the Pennington County and Minnehaha County.

22 And then we turn to the motion for summary judgment that  
23 was submitted on the part of Lincoln County, and that has a  
24 different perspective that would be on the motion for summary  
25 judgment and, similarly, I have to view this in the light

1 most favorable to the non-moving party, which also continues  
2 to be the same parties as before, and in this particular  
3 instance, ah, we have to look at what was submitted by the  
4 parties to over -- overcome summary judgment.

5 And in this particular instance I look at what was  
6 submitted, there's been a statement of disputed and  
7 undisputed material facts that have been filed. There's been  
8 a brief that's been submitted. There's been a motion that's  
9 been filed.

10 In going through the file, this court is very familiar  
11 with the, ah, the *Strizheus* house case that was decided at  
12 the end of last year. And, ah, in that case the South Dakota  
13 Supreme Court gave guidance to the circuit courts that  
14 indicated that there has to be a substitutive response that's  
15 made to overcome a motion for summary judgment.

16 In this particular case, we don't have a statement of,  
17 of, ah, disputed material facts, and we also don't have any  
18 sort of follow through related to the requirements that the  
19 Supreme Court has when it comes to trying to counter a motion  
20 for summary judgment. And because of that it can be overcome  
21 by, for example, the argument that Mr., ah, Mr. Deibert made  
22 by the filing of a motion under Rule 15-6-56(f) which is  
23 essentially asking for more time to go ahead and to complete  
24 discovery, and in that requirement the South Dakota Supreme  
25 Court has said it's not enough to just say you need more

1 discovery. You have to articulate with specificity as to  
2 what type of discovery has to be completed. That wasn't done  
3 in this case either despite what I've been able to glean from  
4 the record repeated requests from the appellees to state  
5 unequivocally that they have to comply with the requirements  
6 strict compliance with 56(f), and that wasn't done in this  
7 case either. And so I have to view this in a light most  
8 favorable to the non-moving party and based off the case law  
9 as well as the statutory authority under 56(f) and *Strizheus*  
10 house, ah, the most recent South Dakota Supreme Court case on  
11 unresponded to motions for summary judgment, ah, that failed  
12 to properly respond to motions for summary judgment. I have  
13 to grant the motion for summary judgment.

14 So, I'm going to ask that Mr. Hieb and Mr. Deibert, if  
15 you could prepare your orders accordingly and serve a copy on  
16 Mr. Haugaard so he can take the next steps that he thinks he  
17 needs to take.

18 MR. DEIBERT: In that respect, Your Honor, I assume we  
19 should do separate orders, and I will certainly send a draft  
20 copy to Mr. Haugaard before sending it to you.

21 THE COURT: Yes. Thank you, and I also want to continue  
22 and I need to make a record on in the reply Mr. Hieb brought  
23 up the fact that he argued in the alternative for a motion  
24 for summary judgment and, ah, that wasn't brought up in your  
25 initial argument, Mr., Mr. Hieb, and you know I don't mind



1 arguments being brought up, but when it's in the reply and  
2 the nature of the response Mr. Haugaard gave, I'm not  
3 granting your motion on a basis of summary judgment just  
4 because it wasn't properly presented, and he never had a  
5 chance to respond to that. So, I am granting it just on the  
6 motion to dismiss, and I'm denying your motion for the  
7 alternative grounds on summary judgment just because I don't  
8 think it was proper before the court because you brought it  
9 up in, in your reply.

10 And so with that being said, are there any questions?

11 MR. DEIBERT: No, Your Honor, thank you.

12 THE COURT: Mr. Hieb?

13 MR. HIEB: No, Your Honor, thank you.

14 THE COURT: Mr. Haugaard.

15 MR. HAUGAARD: Just for clarification, we're solely  
16 addressing 298?

17 THE COURT: Just 298, yes, that's correct.

18 MR. HAUGAARD: That's all for right now.

19 THE COURT: All right. We'll be in recess. Thank you.

20 (Proceedings concluded at 3:08 p.m.)

