

NO. A06-0935

State of Minnesota
In Court of Appeals

Jennifer Thorson,

Respondent,

vs.

Zollinger Dental, P.A., d/b/a Advance Family Dental,

Appellant.

RESPONDENT'S BRIEF AND APPENDIX

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STATEMENT OF THE CASE

This is a wrongful termination lawsuit by Respondent Jennifer Thorson against her former employer, Appellant Zollinger Dental, P.A. The lawsuit was commenced on April 1, 2005, approximately 5 1/2 months after Appellant terminated Respondent. Appellant's Answer to Respondent's Complaint included an affirmative defense of insufficient service of process. Following receipt of the Answer, Respondent wrote to Appellant's counsel on several occasions seeking the factual basis of this affirmative defense, but received no response. Respondent also served an interrogatory seeking the basis for the defense, to which Appellant provided an incomplete and/or false answer, upon which Respondent relied. Only after the one-year statute of limitations on Respondent's wrongful termination claims had passed did Appellant serve an amended interrogatory answer explaining the factual basis for the affirmative defense.

Appellant subsequently moved for summary judgment on the grounds that it had not been served with process, and that the statutes of limitation on Respondent's claims had passed. The District Court denied the motion and struck Appellant's affirmative defense, finding that Respondent reasonably relied on Appellant's interrogatory answer and that fairness and the general application of the intent and spirit of the Rules of Civil Procedure supported the District Court's order.

STATEMENT OF FACTS

Respondent Jennifer Thorson was involuntarily terminated from her employment with Appellant Zollinger Dental, P.A. on or about November 16, 2004. (RA00003) On March 30, 2005, she commenced a wrongful termination lawsuit against Appellant. (RA00010) The Summons and Complaint were served by a Ramsey County Sheriff's deputy upon Heather Erickson, the receptionist at Appellant's office, who according to the deputy, stated that she was "AAFS" or an authorized agent for service. (RA00016)

On April 18, 2005, Appellant served an Answer, which included the following affirmative defense:

14. Defendant alleges improper service of the Summons and Complaint, and holds Plaintiff to her strict proof thereof.

(RA00018) Upon receiving Appellant's Answer on April 20, 2005, Respondent's counsel wrote to Appellant's counsel, as follows:

Defendant's Answer contains an affirmative defense alleging improper service of the Summons and Complaint. Enclosed for your review please find a copy of the Affidavit of Service executed by the Ramsey County Sheriff's Department. Please let me know, in writing, if you are still asserting this affirmative defense. Thank you.

(RA00020) After receiving no response, Respondent's counsel again wrote to Appellant's counsel on May 17, 2005, as follows:

I am still waiting for written confirmation that you are withdrawing the affirmative defense alleging improper service of the Summons and Complaint. Please let me know as soon as possible.

(RA00021) The May 17, 2005 letter was accompanied by discovery requests, which included the following interrogatory:

If you claim insufficiency of service of process and/or lack of personal or subject matter jurisdiction as a defense to all or part of this action, state all facts in support of such defense or defenses.

(RA00024)

Respondent's counsel again wrote to Appellant's counsel on June 13, 2005, as follows:

I have provided you with a copy of the Affidavit of Service, and I have written to you on several occasions asking about the status of your improper service defense. I am obviously concerned because of the short statutes of limitations involved in this type of case. Please provide me with the courtesy of advising whether you continue to maintain this defense. Thank you.

(RA00026) Appellant's counsel finally responded to Respondent's requests in a letter dated June 15, 2005, as follows:

[W]e acknowledge receipt of the copy of the Affidavit of Service of the Summons and Complaint served upon Heather Erickson.

(RA00027) At or around the same date, Plaintiff's counsel and Defendant's counsel spoke by telephone to discuss possible settlement of the case, and Defendant's counsel stated that he "did not want to pursue the service issue." (RA00028)

On September 22, 2005, Respondent's counsel wrote a letter to Appellant's counsel which included the following:

I reviewing my file, I note that defendant's discovery responses are now more than three months overdue. Please advise if you cannot have these responses to me within seven days. Please also consider this letter my attempt to "meet and confer" to resolve this discovery dispute short of court action.

(RA00030) On or around September 23, 2005, Appellant served its Answers to Respondent's Interrogatories. (RA00031) The answers were signed by Molly Seidl, an employee of Appellant, on July 20, 2005, and were signed by Appellant's counsel on September 23, 2005. (RA00036-RA00037) The response to the interrogatory regarding insufficient service was as follows:

INTERROGATORY NO. 2: If you claim insufficiency of service of process and/or lack of personal or subject matter jurisdiction as a defense to all or part of this action, state all facts in support of such defense or defenses.

ANSWER NO. 2: Plaintiff has not pursued a claim with the EEOC or the Minnesota Human Rights Department. Discovery continues. This response will be updated.

(RA00032) On or about December 16, 2005, Respondent's counsel and Appellant's counsel again spoke by telephone. (RA00005) Appellant's counsel made a settlement offer – the first offered by Appellant in response to Respondent's pre-suit demand. (RA00040) Appellant's counsel also informed Respondent's counsel that the basis for the insufficient service defense was that Heather Erickson – the employee of Appellant served with the Summons and Complaint – was not an authorized agent for service as was indicated in the Ramsey County Sheriff's affidavit of service. (RA00005) On or

about January 17, 2006, Appellant subsequently served a supplemental response to Respondent's Interrogatory number 2, which stated:

INTERROGATORY NO. 2: If you claim insufficiency of service of process and/or lack of personal or subject matter jurisdiction as a defense to all or part of this action, state all facts in support of such defense or defenses.

ANSWER NO. 2: See attached Affidavits of Molly Seidl, Paul Zollinger, D.D.S. and Heather Erickson, with exhibits. Discovery continues.

(RA00041-RA00042) The Affidavit of Molly Seidl says in part:

3. I found the Summons and Complaint in the above-captioned matter on my desk on Monday, April 4, 2005.
4. The Summons and Complaint were received by the receptionist in the office and were left on my desk. The receptionist is not authorized to receive service of process.

(RA00043) The Affidavit of Heather Erickson states, in part:

2. I am responsible for scheduling appointments, greeting patients, checking in patients, filing insurances, and updating patient information. I am not authorized to accept service of process on behalf of Zollinger Dental, P.A., d/b/a Advance Family Dental, and I have never been given authority by Zollinger Dental, P.A. d/b/a Advance Family Dental to accept legal papers on behalf of the dental clinic.

(RA00045) Appellant's counsel also provided his own affidavit, which included the following statements:

10. My office did not undertake any investigation into the basis of insufficient service until December, 2005

when we realized that the statute of limitations on the employment discrimination claim had expired, and that Plaintiff was not responsive to our attempts to settle this matter.

11. **My office essentially did nothing on this file from summer, 2005 until the end of 2005** because we were waiting to hear back from Attorney Hintz regarding settlement.

* * *

[W]e did not explore this issue [insufficient service of process] until December, 2005 whereupon we spoke with the owner of Defendant Advance Family Dental, Dr. Paul Zollinger, his office administrator, Molly Seidl, and Heather Erickson, the clinic receptionist. Again, we didn't investigate this defense because (1) Attorney Hintz was supposed to promptly get back to me with a settlement proposal (months before the statute of limitations would have expired), and (2) Attorney Hintz knew that the insufficient service defense was being maintained by Advance Family Dental at the time of our phone conversation in June, 2005.

(RA00049-RA00050) (emphasis added)

From "summer, 2005 until the end of 2005" in which Appellant's counsel's office "essentially did nothing on the file," the following occurred:

- On August 12, 2005 Appellant filed its Answer with the Court and prepared an and filed Informational Statement. The service letter stated "[p]lease immediately respond to the Interrogatories and Request for Documents served on May 3, 2005." (RA00051)

- On September 15, 2005, Respondent served responses to Appellant's discovery requests.
- On September 19, 2005, Appellant's counsel wrote to Respondent's counsel challenging Respondent's responses to some of Appellant's discovery requests regarding medical authorizations, and threatening to bring a motion to compel discovery. The letter stated:

We are in receipt of Plaintiff's discovery responses and the objections therein. Plaintiff's Complaint in this matter alleges past and future emotional distress. As such, Plaintiff has placed her medical condition at issue and we are entitled to full disclosure of medical providers and authorizations releasing medical information.

Please forward the same promptly.

If you do not intend on providing this information, please call me to discuss the same so that we meet the "meet and confer" requirement of a motion to compel discovery.

(RA00052)

- On September 22, 2005, Respondent's counsel wrote to Appellant's counsel demanding responses to Respondent's discovery requests and threatening a motion to compel discovery. (RA00030)
- On September 23, 2005, Appellant served its responses to Appellant's discovery requests. (RA00031-RA00037)
- On October 7, 2005, Appellant's counsel again wrote to Respondent's counsel in response to a voicemail from Respondent's counsel regarding the dispute over

Respondent's responses to Appellant's discovery requests. The letter again threatened a motion to compel discovery, stating as follows:

You left me a voicemail that the Plaintiff may be forthcoming with our discovery requests to obtain full disclosure of Plaintiff's medical providers and authorizations releasing her medical information.

We are still awaiting your response regarding the Plaintiff's discovery responses. As previously stated, we believe the Plaintiff's Complaint in this matter alleges past and future emotional distress. As such, Plaintiff has placed her medical condition at issue and we are entitled to full disclosure of medical providers and authorizations releasing medical information.

If you do not intend on providing this information, I will then bring a motion to compel discovery. Please call me immediately to advise me of your intentions.

(RA00053)

- On November 21, 2005, Respondent produced the medical authorizations at the heart of the parties' discovery disputes. (RA00054)

ARGUMENT

I. Standard of Review.

Appellant asserts that because this case involves a denial of Appellant's motion for summary judgment, that the proper standard of review is *de novo*. The basis for the denial of the summary judgment, however, was the striking of Appellant's

insufficient service defense. This defense was stricken as a sanction for Appellant's discovery violations.¹ The court held that:

It is only fair that [Appellant] be responsible for the answers provided to the Interrogatories which did not create a need for [Respondent] to re-serve [Appellant]. Fairness and the general application of the intent and spirit of the Rules of Civil Procedure support this Court's order that the affirmative defense be stricken and summary judgment denied.

(RA00009) Because Appellant gave a false and/or incomplete discovery response upon which Respondent relied, the affirmative defense inquired about in interrogatory was stricken.

Under Minnesota law, once a discovery violation has occurred, the district court is particularly suited to determine the appropriate remedy and has wide discretion in deciding whether to impose sanctions. *In the Matter of the Welfare of D.D.R.*, 713 N.W.2d 891, 898 (Minn. 2006) (*citing State v. Lindsey*, 284 N.W.2d 368, 373 (Minn. 1979)). Absent a **clear abuse of discretion**, a reviewing court will not overturn the district court's decision. *Id.* (emphasis added) Accordingly, this court may only

¹ Appellant acknowledges that the court's order was based on a discovery sanction, stating in its brief:

In its order, the District Court fashioned a discovery sanction of sorts when it found that Respondent reasonable (sic) relied upon Appellant's interrogatory answers and struck Appellant's affirmative defense.

(Appellant's Brief at p. 15)

overturn the decision of the trial court in this case upon a finding of a clear abuse of discretion by the District Court.

II. The District Court Did Not Abuse Its Discretion In Striking Appellant's Affirmative Defense.

In denying Appellant's motion for summary judgment and striking Appellant's insufficient service defense, the District Court held as follows:

[Respondent] argues that [Appellant] did not comply with the Rules of Civil Procedure in answering interrogatories and pleading the affirmative defense of insufficient service of process. Because [Appellant] has failed to comply with the Rules, the affirmative defense should be stricken and summary judgment denied.

When the Answers to Interrogatories were submitted in September, 2005, [Respondent] reasonably relied on those answers. Since the Answer to Interrogatory No. 2 did not create a need for any further action on [Respondent's] part, none was undertaken. The fact that the answer was changed in January, 2006, after the statute of limitations has run is unfair to Plaintiff.

* * *

Fairness and the general application of the intent and spirit of the Rules of Civil Procedure support this Court's order that the affirmative defense be stricken and summary judgment denied

(RA00008-RA00009) While the District Court did not cite the specific Rules of Civil Procedure upon which it relied, the Rules do provide a clear basis for this holding. Rule 26.07 provides that the signature of an attorney on a discovery response

constitutes a certification that the response was made after a "reasonable inquiry." The

Rule states, in part:

The signature [on the discovery responses] constitutes a certification that the attorney or party has read the request, response, or objection, and that to the best of the signer's knowledge, information, and belief formed after a reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonably or unduly burdensome or expensive, given the needs of the case, the discovery had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

Minn. R. Civ. P. 26.07. Rule 26.07 further provides that if a certification is made in violation of the rule, the court, upon motion or upon its own initiative, may impose upon the party an appropriate sanction. Minnesota Rule of Civil Procedure 37.02(b)(3) specifically provides that the striking pleadings or parts thereof can be used as a discovery sanction. The courts have found that the district court has wide discretion in deciding whether to impose sanctions. *In the Matter of the Welfare of D.D.R.*, 713 N.W.2d 891, 898 (Minn. 2006) (citing *State v. Lindsey*, 284 N.W.2d 368, 373 (Minn. 1979)).

In this case, Respondent served a timely interrogatory upon Appellant seeking the factual basis for Appellant's insufficient service defense. Appellant served a signed and sworn interrogatory answer which read as follows:

Plaintiff has not pursued a claim with the EEOC or the Minnesota Human Rights Department. Discovery continues. This response will be updated.

(RA00032, RA00036-RA00037) In an employment discrimination case, the filing of an EEOC (Equal Employment Opportunity Commission) claim is relevant because it will toll the statute of limitations during the period in which the EEOC claim is pending. The statute begins to run from the time the EEOC action is dismissed, not from the time that the discrimination occurred. In this case (in which an EEOC claim was not filed), however, there was no need to toll the statute because the Summons and Complaint were served well before the running of the statute of limitations. Based on the remainder of the answer, Respondent determined that no further action was necessary. Respondent interpreted "discovery continues" as meaning that Appellant had made a "reasonable inquiry" into whether or not there was a factual basis for the insufficient service defense, and had not found a factual basis for it. The District Court specifically found that the answer to this interrogatory "did not create a need for any further action on [Respondent's] part" and that Respondent reasonably relied on the answer. (RA0009)

Several weeks after the statutes of limitation had run on November 16, 2005, Appellant's counsel finally chose to disclose the factual basis for the insufficient service defense. The basis, which was also set forth in an amended interrogatory answer, was that despite her representation to the Sheriff's deputy that she was an authorized agent to accept service, Heather Erickson was not, in fact, authorized to do so. Appellant

explained that the factual basis for the defense was not disclosed in the prior (pre-running of the statutes of limitation) interrogatory answer because Appellant did not investigate the issue until December 2005.² Assuming that was actually the case, then Appellant violated the discovery rules in answering Respondent's insufficient service discovery request without conducting a "reasonable inquiry." Appellant's counsel knew which employee of Appellant had been served, as he had been provided with (and had acknowledged receipt of) the affidavit of service on April 20, 2005. The factual basis could have been ascertained in a single phone call to Appellant's principals asking whether or not Ms. Erickson was an authorized agent. Appellant apparently failed to do this, and the District Court rightfully exercised its discretion and struck the affirmative defense as a sanction.

Appellant argues that the discovery sanction was not appropriate on procedural grounds - that Respondent "did not challenge Appellant's discovery responses as insufficient let alone bring a motion to compel." This argument has no merit. First, as set forth above, the Court has the power to impose discovery sanctions without a motion under Rule 26.07. Further, after the initial interrogatory answer was served,

² Appellant also claims that in December 2005 it conducted research into what constitutes proper service on a corporation. Appellant's counsel should have been well-versed on this topic well before that time as he was the attorney of record on a recent a similar case, *Fitzpatrick v. Cavalry Baptist Church*, which was decided by the Court of Appeals on April 4, 2006. See A05-564, 2006 WL 851929 (Minn. Ct. App., April 4, 2006). *Fitzpatrick*, which Appellant cites in this case, also involved a situation where someone represented to the Sheriff's deputy serving the complaint that they were authorized to accept service, when they were in fact not authorized to do so.

Respondent had no need to challenge the responses or bring a motion to compel. Respondent assumed that the interrogatory answer was complete and accurate and that Appellant had complied with the Rules of Civil Procedure. Again, the District Court's order specifically found that the answer "**did not create a need for any further action on Plaintiff's part**" and that the interrogatories "**did not create a need for [Respondent] to re-serve [Appellant]**". (RA00009) Further, once Appellant did finally reveal the true factual basis for the defense (after the statutes of limitation had run), the issue was moot. There was nothing to challenge and nothing to compel at that point.

In order to counter the argument that it had a duty to conduct a "reasonable inquiry" prior to answering Respondent's interrogatory, Appellant argues that the lack of inquiry was justified because the parties had somehow agreed that Appellant did not have to provide complete discovery responses. Appellant claims that Appellant's counsel did very little work, or "essentially nothing," on the case from June 2005 through December 2005 because he was waiting to hear back from Respondent's counsel regarding Appellant's settlement offer. This explanation is not credible. While it is not unusual for parties to agree to postpone taking depositions, or serving or responding to discovery while active settlement negotiations are ongoing, the idea that the parties would agree to the service and receipt of false and/or incomplete discovery responses is absurd. The completion of **any** discovery requires time and costs money, which defeats the purpose of postponing discovery while settlement is being discussed. Further, discovery responses prepared without "reasonable inquiry" are of no use, and

do not comply with the Minnesota Rules of Civil Procedure. If the information provided is not accurate, there is no benefit to the party obtaining the discovery.

Respondent also takes issue with the facts relating to the procedure as represented by Appellant. Appellant did not make a settlement offer in July 2005. The message conveyed by Appellant's counsel was that he did not think the Respondent's claims had merit, and asked if Respondent would be interested in settlement.³ As Respondent made a written pre-suit demand to Appellant, which was rejected without a counter offer, Respondent's counsel reasonably assumed that the next step would be an offer from Appellant. (RA00038-RA00040) In any event, there was no discussion of an arrangement by which the parties could serve incomplete discovery responses without making "reasonable inquiry" into the answers.

The statement that the parties had no substantive communication and that the case was on hold while settlement negotiations were ongoing is also not true. As set forth in more detail in the fact section above, the following occurred between July 2005 and December 2005:

- On August 12, 2005 Appellant filed its Answer and a Informational Statement, and threatened a motion to compel discovery.

³ On several occasions Appellant makes assertions about what Respondent's counsel "knew" or "was aware" of. Respondent disputes each and every one of these assertions. Appellant's counsel was no more capable of answering a straightforward question on the telephone than he was in writing or in answering discovery.

- On September 15, 2005, Respondent responded to Appellant's discovery requests.
- On September 19, 2005, Appellant's counsel wrote to Respondent's counsel challenging Respondent's responses to some of Appellant's discovery requests regarding medical authorizations, and threatening to bring a motion to compel discovery.
- On September 22, 2005, Respondent's counsel wrote to Appellant's counsel demanding responses to Respondent's discovery requests and again threatening a motion to compel discovery.
- On September 23, 2005, Appellant served its responses to Appellant's discovery requests.
- On October 7, 2005, Appellant's counsel again wrote to Respondent's counsel in response to a voicemail from Respondent's counsel regarding the dispute over Respondent's responses to Appellant's discovery requests. The letter again threatened a motion to compel discovery.
- On November 21, 2005, Respondent produced the medical authorizations at the heart of the parties' discovery disputes.

This exchange certainly does not constitute "no substantive communication" nor does it reflect the actions of parties who have who has put the case aside while settlement negotiations are ongoing in order to not incur expenses. Appellant simply has no

excuse for failing to conduct a "reasonable inquiry" before answering Respondent's discovery requests. Accordingly, the District Court's sanction was appropriate.

III. Appellant Has Waived Its Right To Assert Its Insufficient Service Defense.

In addition to striking the insufficient service defense a discovery sanction, Minnesota law also permits striking of this defense as a result of the conduct of the parties during litigation. *See Patterson v. Wu Family Corporation*, 608 N.W.2d 863, 867-68 (Minn. 2000).⁴ In *Patterson*, the defendant was served prior to the to the running of the statute of limitations. *See id.* at 866. The service was insufficient, and the defendant raised an affirmative defense of insufficient service in his answer. *See id.* The defendant then waited seven and one-half months before moving for dismissal on the basis of insufficient service. *See id.* It was during this seven and one-half month period that the statute of limitations ran. *See id.* The court determined, however, that the defendant had waived its insufficient service defense by invoking the court's jurisdiction on the merits of the case before seeking a determination on the procedural issue. *See id.* at 868. The court found:

Where the party protected by a procedural rule consciously chooses to not assert the rule-based defense in an effort to avoid a determination of the issue, however, the rules do not

⁴ In *Uthe v. Baker*, a case cited by Appellant for the proposition that an equitable remedy may not be used, the court similarly considered whether the conduct of the parties was sufficient to waive the insufficient service defense. *See* 629 N.W. 2d 121 (Minn. Ct. App. 2001). Although the court cited *Patterson* approvingly, it found that the facts were distinct and that the defendant's conduct did not estop it from asserting its insufficient service defense. *See id.* at 122.

serve their protective function. Deliberate avoidance of the issue in this fashion is contrary to the spirit of the rules.

Id. at 867-868.

The present case raises similar issues. Here, although the insufficient service defense was raised in Appellant's answer, Appellant waited almost nine months before seeking a determination on the issue. During that nine-month period, the statutes of limitations ran. While unlike *Patterson*, Appellant in this case did not bring any prior motions on the merits before seeking a dismissal on the insufficient service issue, Appellant's conduct should similarly trigger a waiver of that defense. Respondent made diligent inquiries into the basis of the defense, and Appellant responded with evasive, misleading, and in the case of the interrogatory answer, incomplete and/or false responses, and did not come forward with the true factual basis of the defense or seek a determination on that defense until after the statute had run. This is unquestionably "deliberate avoidance" of this issue, and is contrary to the spirit of the rules and a clear basis to strike Appellant's affirmative defense.

IV. Appellant Should Not Benefit From Its Incomplete And/Or False Discovery Responses.

Appellant asserts that Minnesota law does not permit the court to employ an equitable remedy to estop the Appellant from asserting an insufficient service defense. This argument is moot, because as set forth above, as there are multiple legal bases for the court to strike Appellant's insufficient service defense. Under the facts of this case,

however, the District Court was well-justified in exercising its discretion, as to do otherwise would lead to an extremely unjust result.

Respondent asked Appellant a very direct question – what is the factual basis the insufficient service defense – both in informal correspondence and in formal discovery. Appellant either knew the basis for the defense and gave a knowingly false answer, or Appellant's counsel deliberately avoided ascertaining out the basis for the defense. Either way, Appellant has violated both the letter and the spirit of the Rules of Civil Procedure. To allow Appellant to benefit from this conduct also sets a terrible policy precedent: allowing parties to give false or incomplete discovery responses, and then to "investigate" and amend those answers after statutes of limitation and other deadlines have passed. It would also give Respondent, and other parties in this situation, no remedy where they had done nothing wrong. Again, in this case Respondent:

- Commenced a lawsuit promptly, with more than six months of the one-year statute of limitations remaining.
- Retained a Ramsey County Sheriff's deputy to effectuate service.
- Obtained an affidavit of service indicating that the Summons and Complaint had been served on an authorized agent for service.
- Upon receipt of Appellant's Answer, immediately wrote to Appellant's counsel seeking the basis for the insufficient service defense.
- Wrote to Appellant's counsel on several other occasions seeking the factual basis for the defense.

- Served an interrogatory on Appellant seeking the factual basis for the defense.
- Obtained a signed, sworn interrogatory answer from Appellant that the District Court found "did not create a need for further action on [Respondent's] part."

The only mistake that Respondent has made in this case was trusting that Appellant had followed the Rules of Civil Procedure. Respondent assumed that Appellant had provided a complete and accurate interrogatory answer and had conducted a "reasonable inquiry" prior to answering. That is a mistake for which Respondent should not be punished.

CONCLUSION

Based on the foregoing, the decision of the trial court denying Appellant's motion for summary judgment and striking Appellant's insufficient service defense, should be affirmed.

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Dated: 7-19-06

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).