

Nos. A08-1803 and A08-2036

State of Minnesota
In Court of Appeals

Bradley J. Buscher, individually and on behalf of
the Revocable Trust of Bradley J. Buscher,

*Appellant (A08-1803),
Respondent (A08-2036),*

Childress Duffy Goldblatt, Ltd.,

Non-Party Appellant (A08-2036),

vs.

Montag Development, Inc., et al.,

Defendants,

William Zimmerman d/b/a Bill Zimmerman's Stucco Co.,

Respondent (A08-1803 and A08-2036),

Dan DeMars d/b/a Dan DeMars Construction, a/k/a DeMars/Weisz Co.,

Respondent (A08-1803 and A08-2036),

and

Dan DeMars d/b/a Dan DeMars Construction, a/k/a DeMars/Weisz Co.,

Third-Party Plaintiff,

vs.

Sharratt Design & Company, LLC,

Third-Party Defendant.

**BRIEF OF NON-PARTY APPELLANT
CHILDRESS DUFFY GOLDBLATT, LTD.**

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Statement of Legal Issues

1. Did the district court have jurisdiction to prosecute and assess a criminal penalty, a \$10,000 fine, against the Childress Firm?

The district court found that it was without jurisdiction to prosecute a criminal penalty against the Childress Firm, yet imposed a criminal penalty—a \$10,000 fine—nonetheless.

Apposite Authorities

State v. Tatum, 556 N.W.2d 541 (Minn. 1996)

Peterson v. Peterson, 278 Minn. 275, 153 N.W.2d 825 (1967)

Mackler Prod., Inc. v. Coben, 146 F.3d 126 (2d Cir. 1998)

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2. Did the district court violate the Childress Firm's due process rights when it imposed a \$10,000 *sua sponte* criminal penalty against the Childress Firm without giving the Childress Firm notice that it was considering that penalty, without providing the Childress Firm with long-established criminal procedural and constitutional protections?

The District Court imposed a fine of \$10,000 without regard to the Childress Firm's rights.

Apposite Authorities

Uselman v. Uselman, 464 N.W.2d 130 (Minn. 1990)

State v. Tatum, 556 N.W.2d 541 (Minn. 1996)

Johnson v. Johnson, 726 N.W.2d 516 (Minn. Ct. App. 2007)

Afremov v. Amplatz, No. A05-793, 2006 WL 44341 (Minn. Ct. App. Jan. 10, 2006)

3. To the extent the district court had jurisdiction or authority to impose any sanction against the Childress Firm, did it abuse its discretion by imposing a \$10,000 fine where the most expansive possible view of the conduct found objectionable is:
 - (a) identifying a document in interrogatory answers by incorrect "Bates" numbers;

- (b) filing truthful affidavits setting forth the actual account of the deponents' memory of events that took place regarding mold testing results or that differed with another witness's recollection (but which did not contain all possible information); and
- (c) failing to send a copy of an expert report to the district court when the court requested that it do so, although it had been produced in discovery and under circumstances where counsel believed that opposing counsel's belated acknowledgment of that receipt essentially resolved the issue?

The district court imposed a \$10,000 fine for this conduct.

Apposite Authorities

Uselman v. Uselman, 464 N.W.2d 130 (Minn. 1990)

L&H Airco, Inc. v. Rapistan Corp., 446 N.W.2d 377 (Minn. 1989)

Rumachik v. Rumachik, 494 N.W.2d 69 (Minn. Ct. App. 1992)

Volumetrics Med. Imaging, Inc. v. ATL Ultrasound, Inc.,
243 F.Supp.2d 386 (M.D.N.C. 2003)

Statement of the Case

Non-party Appellant Childress Duffy Goldblatt Ltd. (the “Childress Firm”), agrees with, and incorporates by this reference, the Statement of the Case contained in Appellant Buscher’s Brief. In addition, and relevant primarily to the separate fine imposed on the Childress Firm, the following points are important.

The Childress Firm has appealed the judgment imposing sanctions jointly against the Childress Firm and its client, Appellant Bradley Buscher. That judgment of the Hennepin County District Court was entered upon the direction of District Judge Thomas Wexler, imposing sanctions against the Childress Firm and its client, Bradley J. Buscher (“Buscher”). By that same order, and in addition to making the Childress Firm jointly responsible for over \$37,000 in defendants’ attorney fees as a sanction, Judge Wexler imposed a \$10,000 fine against the Childress Firm. The order did not direct entry of a civil judgment for that criminal fine, and the Childress Firm accordingly appeals from that final order.

The issue of sanctions arose when counsel for Defendant DeMars stood up in court on July 17, 2007, during a summary judgment hearing and falsely asserted that the Childress Firm had failed to produce a relevant expert report during discovery. *7/17/07 Tr.10*. In fact, the Childress Firm had produced the document early on in discovery. Respondents’ counsel had overlooked the document because she, by her own admission, did not take the time to review Buscher’s document production. *A.168*.¹ Instead, she had instructed one of her junior associates to review the document production. Because that associate only “cursorily” reviewed the production, he too missed the document. *A.171*. But from that

¹ In this brief, *A.xx* refers to the Joint Appendix, *Add.xx* refers to the Addendum to Appellant Buscher’s brief, and *Ch.Add.xx* refers to the Addendum of Non-Party Appellant Childress Firm.

point forward, this case revolved around claims for sanctions, and summary judgment imposed essentially as a sanction, and the just resolution of the underlying dispute by a trial was thereafter ignored.

Following the July 17, 2007, summary judgment hearing, the district court denied summary judgment because fact issues existed. *Add.1, 6*. Respondents then actually reviewed their files and brought a Motion to Certify Question as Important and Doubtful, which the district court converted *sua sponte* into a reconsideration of his earlier denial of summary judgment. *A.92; 10/03/07 Tr.4; Add.8*. After the district court granted summary judgment for Respondents, Respondents filed a Motion for Sanctions against Buscher and the Childress Firm. *A.174*. By order dated April 22, 2008, the district court ordered the Childress Firm to show cause as to why it should not be held in constructive criminal contempt of court for “submitting false affidavits and memoranda on the summary judgment motion.” *Add.46, 48*. On May 5, 2008, Buscher’s counsel submitted a letter to the district court, informing the court that it was without authority to prosecute and assess a criminal penalty against Buscher or the Childress Firm: “[U]nder controlling case law, the prosecution of [criminal] contempt must be done by the county attorney; a jury trial must be provided; the accused cannot be compelled to produce evidence or witnesses; and the standard of proof must be ‘beyond a reasonable doubt.’” *A.229*. The district court apparently agreed with that view, as it entered an amended order removing the order to show cause as to why the Childress Firm should not be subject to sanctions for constructive criminal contempt. *Add.78*. The court’s final sanctions order, despite having previously removed its order to show cause, and despite acknowledging that it was without jurisdiction

to impose a criminal penalty, imposed a criminal sanction against the Childress Firm, requiring it to pay a \$10,000 fine to the Hennepin County Clerk of District Court. *Add.101, 102.* That order has been stayed, although the Childress Firm was required to pay \$10,000 into court in lieu of a supersedeas bond. This timely appeal ensued.

Statement of Facts

The Childress Firm agrees with, and incorporates by this reference, the Statement of Facts contained in Appellant Buscher's Brief. In addition, and directed primarily to the separate fine imposed on the Childress Firm, the following relevant facts are also contained in the record.

On February 8, 2008, Respondent DeMars filed a Motion for Sanctions, pursuant to Minnesota Rules of Civil Procedure 11, 37.02, and 56.07, based on Buscher's and the Childress Firm's alleged "misrepresentations" regarding the McGregor Pearce Report. *A.174.* Respondent DeMars requested that the court sanction Appellants by striking the "misleading" affidavits from the record, dismissing the complaint with prejudice, and awarding Respondents their costs and attorneys' fees. *A.306.* Respondents did not seek a monetary penalty to be paid into court. *Id.* Buscher and the Childress Firm opposed the motion, but at the same time availed themselves of Rule 11's safe harbor protections by amending the Buscher Affidavit to eliminate DeMars' objections. *A.177, 187.*

In its April 22, 2008, Preliminary Order for Fees and Costs and Order to Show Cause for Other Contempt Procedures ("Preliminary Sanctions Order"), the district court indicated that, in addition to imposing sanctions for attorneys' fees and costs against Buscher and the Childress Firm, it intended to exercise its authority to impose separate contempt sanctions against the Childress Firm. *Add.46.* The Order directed the Childress Firm to appear before the court on July 11, 2008, to show cause as to why it should not be held in contempt of

court. *Id.*² In its accompanying Memorandum, the district court declared that “the Court has inherent power to investigate whether a constructive criminal contempt has occurred,” *Add.62*, and specifically stated that its “[c]ontempt sanctions [against the Childress Firm] could include a penalty payment to the Court,” *Add.49*. The court elaborated:

[T]he purpose of contempt would be in the nature of criminal contempt, to punish conduct that has occurred in violation of oath to tell the truth or violating professional duties of candor to the court. Short term incarceration and/or monetary sanction would appear to be the only remaining considerations for criminal contempt, if criminal contempt is ultimately found. However, the monetary limitation under Minnesota Statutes sections 588.10 [not more than \$250] or 588.02 [not exceeding \$50] is inadequate to punish these intentional contempts or to deter future misconduct. That leaves the Court with incarceration or imposing more severe monetary sanctions under Rule 56.07, Rule 11.03(b), or under the Court’s inherent powers.”

Add. 65-66. Thus, the district court concluded that in addition to sanctions for attorneys’ fees and costs, “the Childress law firm may also be subject to penalties for constructive criminal contempt for the same submissions referenced in the preceding paragraph.”

Add.68.

Despite threatening the Childress Firm with criminal sanctions, rather than providing an opportunity to be heard, the district court explicitly barred the Childress Firm from responding to that threat. *Add.47*. The court stated that it would impose **additional** sanctions against the Buscher and the Childress firm in the form of striking the entire brief if

² The Order also required Appellant Buscher to appear on July 11, 2008 to show cause as to why he should not be held in contempt of court for violating the court’s order to have no contact with Daniel Scudder prior to the January 9, 2008, hearing. *Add.48*. The court found that Buscher had violated this order because his secretary sent Scudder a copy of Scudder’s signed affidavit and informed him that he had a right to hire an attorney to represent him at the hearing. *Add.67*.

the Childress Firm responded to that issue. *Id.* In its Order, the court made clear that it was not going to hear from either Buscher or the Childress Firm on the propriety of sanctions:

On or before May 27, 2008, Plaintiff and his counsel shall file responsive memoranda, arguing their contentions as to which fees and costs are additional to those that otherwise would have reasonably been incurred. These memoranda shall not be an opportunity to argue whether an award of fees and costs are appropriate: That determination has now been made. Reargument of that issue may result in the Court striking the memorandum.

Id. (*emphasis in original*).

On May 5, 2008, Buscher's counsel submitted a letter to the district court, requesting permission to file a motion for reconsideration of those portions of the district court's Order concerning constructive criminal contempt charges. *A.229*. The letter pointed out that "under controlling case law, the prosecution of such contempt must be done by the county attorney; a jury trial must be provided; the accused cannot be compelled to produce evidence or witnesses; and the standard of proof must be 'beyond a reasonable doubt.'" *Id.*

In response, the district court agreed that it was without jurisdiction to prosecute a constructive criminal contempt and issued an Amended Preliminary Order for Fees and Costs and for Other Contempt Procedures ("Amended Order"). *Add.78*. In the Amended Order, the district court removed the paragraph requiring the Childress Firm to show cause as to why it should not be subject to sanctions for constructive criminal contempt. *Id.*³ Yet, the district court maintained language in its accompanying Memorandum indicating that it

³ The Amended Order also removed language requiring Appellant Buscher to show cause as to why he should not be held in contempt of court and instead stated that it would refer the issue of Buscher's alleged criminal contempt to "the appropriate prosecuting authority." *Add.80*.

could impose contempt sanctions in the form of a penalty payment to the court. *Add.81, 97.*

The court stated,

Here, the purpose of contempt could be in the nature of criminal contempt, to punish conduct that has occurred in violation of oath to tell the truth or violating professional duties of candor to the court. In the alternative, civil contempt could be utilized to deter future similar conduct.

Add.97.

The Amended Order did not remove the district court's explicit instruction that the Childress Firm and Buscher were not to address the propriety of sanctions, nor did it remove its threat to impose additional sanctions if they disobeyed that order. *Add.79.*

At the July 11, 2008, hearing, the district court did not entertain argument related to the propriety of imposing attorneys' fees and costs against the Childress Firm and Buscher. *See 7/11/08 Tr.* Instead, the hearing was limited to the question of the amount of fees and costs caused by the allegedly sanctionable conduct. *Id.* During the hearing (and despite its removal of the order to show cause), the district court indicated that, in addition to attorneys' fees and costs, it would likely impose a monetary penalty against the Childress Firm, as further punishment for its conduct. *7/11/08 Tr.30.* The Childress Firm was not given any opportunity to argue against the possible imposition of this additional monetary penalty, nor notice that the court was considering other sanctions.

In the district court's Order Determining Sanctions, the court awarded judgment jointly and severally against Buscher and the Childress Firm in the sum of \$37,761.75 in attorneys' fees, pursuant to Rule 11.03(a)(2), MINN. STAT. § 549.211, Rule 56.07, and the court's "inherent authority." *Add.101, 106.* In addition, the court ordered Buscher to pay costs and disbursements in the amount of \$63,060.63 to DeMars and \$16,676.61 to

Zimmerman. *Add.120*. Finally, despite having removed its order to show cause as to why the Childress Firm should not be subject to sanctions for constructive criminal contempt, the court went ahead and imposed a criminal contempt sanction against the Childress Firm anyway, requiring it to pay a \$10,000 penalty to the Hennepin County Clerk of District Court. *Add.102*. The district court imposed this penalty “for the very substantial time that the undersigned judge and my judicial staff have devoted to the wrongful conduct.”

Add.108.

On October 8, 2008, the district court entered judgment on sanctions and fees (but not the fine), *Add.119*, and this appeal followed. Although the Childress Firm joins in Appellant Buscher’s appeal of the entirety of the district court’s sanctions award, it writes separately to address the impropriety of the \$10,000 penalty against the Childress Firm.

For the convenience of the Court, the following timeline sets forth the foregoing significant events:

TIME LINE OF RELEVANT EVENTS

Date	Event
June 3, 2002	Letter Report from McGregor Pearce to Brad Buscher <i>A.133-38</i> .
May16, 2006	Plaintiff serves Answers to DeMars’ Interrogatories and Document Requests on DeMars (identifying but citing wrong Bates numbers for Pearce Report)

August 4, 2006	Plaintiff's document production sent to Defendant Pella (for delivery to all defendants) via Federal Express; production includes the Pearce Report, bates labeled BLB001086 through BLB001091. Neither Respondent to this appeal separately requested Plaintiff's extensive document production; the parties agreed to share the production to Pella.
March 14, 2007	Deposition of Plaintiff Bradley Buscher (none of the defendants asked Buscher about the Pearce Report).
May 15, 2007	Defendant DeMars files Memorandum in support of summary judgment motion
June 27, 2007	Buscher Affidavit in opposition to summary judgment filed (discusses recollection of Pearce's 2002 investigation. <i>A.58-61</i>).
July 2, 2007	Plaintiff's opposition to summary judgment filed, including Childress Firm associate attorney Christina Phillips Affidavit. <i>A.34-37</i> .
July 17, 2007	Initial Summary Judgment Hearing
Sept. 4, 2007	Order [and Memorandum] Denying DeMars' Summary Judgment Motion based on finding of factual issues in dispute. <i>Add.1-7</i> .
Sept. 12, 2007	Defendant DeMars' Notice of Motion/Motion to Certify Question as Important and Doubtful
Undated	Plaintiff's Response to Motion to Certify Question as Important and Doubtful
Sept. 28, 2007	Defendant DeMars' Reply Memo to Certify Question as Important and Doubtful
Oct. 3, 2007	Hearing held on Motion to Certify Question as Important and Doubtful; Judge Wexler converted to summary judgment hearing <i>sua sponte</i> and without notice
Oct. 5, 2007	Order for Judgment (granting previously denied summary judgment). <i>Add.8-10</i> .
Oct. 11, 2007	Judgment Entered
Oct. 15, 2007	Bradley Buscher Affidavit re: Scudder Investigation
Oct. 16, 2007	Daniel Scudder Affidavit re: Scudder Investigation
Nov. 1, 2007	Plaintiff's Motion and Memorandum of Law in Support of Relief from Judgment

Dec. 19, 2007	Court's Interim Order [No-Contact Order re: witness Scudder]. <i>Add.24-27.</i>
	Letter from Attorney Tim Branson to Judge Wexler asking permission to provide some advice to Scudder concerning whether he needed to retain an attorney for the proceedings
Dec. 24, 2007	Letter from Court denying Mr. Branson's request
Jan. 9, 2008	Hearing before Judge Wexler
	Defendant Zimmerman's Memo of Law in Opposition to Plaintiff's Rule 60 Motion (submitted after the Jan. 9, 2008 hearing)
Undated	Plaintiff's Supplemental Memo in Support of Relief from Judgment (submitted in response to foregoing memorandum)
Feb. 8, 2008	Defendant DeMars' Motion and Memo of Law in Support of Motion for Sanctions, Affidavit of Attorney Deborah Eckland. <i>A.174-76; A.306-34</i>
Feb. 22, 2008	Amended Affidavits of Bradley Buscher. <i>A.177-86; A.187-92.</i>
Feb. 25, 2008	Amended Affidavit of Scudder. <i>A.193-97.</i>
March 4, 2008	Order Vacating Summary Judgment and Re-Entering Summary Judgment. <i>Add.28-29.</i>
March 22, 3008	Preliminary Order for Fees and Costs and Order to Show Cause for Other Contempt Procedures. <i>Add.46-48.</i>
	[objection to criminal proceedings]
May 19, 2008	Amended Preliminary Order for Fees and Costs and for Other Contempt Procedures. <i>Add.78-80.</i>
June 5, 2008	Supplemental Order for Hearing on Attorneys' Fees and Taxation of Costs.
	Hearing [limited by the April 22, 2008, May 19, 2008, and June 5, 2008 Orders to issue of amount of fees; parties barred from arguing entitlement or appropriateness of sanctions].
July 23, 2008	Order Determining Sanctions. <i>Add.101-02.</i>
Oct. 6, 2008	Order Taxing Costs and Disbursements and Order for Judgment. <i>Add.119-20.</i>

Summary of Argument

The Childress Firm joins in Appellant Buscher's appeal of the district court's \$37,761.75 attorneys' fees sanction but writes separately in this brief to address the

impropriety of the court's \$10,000 criminal penalty. Under Minnesota law, the district court did not have authority to prosecute that penalty against the Childress Firm. In addition, the court's imposition of that penalty violated the Childress Firm's due process rights because the court failed to give the Childress Firm notice that it was considering that penalty, and because the court failed to provide the Childress Firm with criminal procedural protections. Finally, the conduct the court found objectionable does not justify the imposition of sanctions at all, much less a \$10,000 penalty. Accordingly, the Childress Firm requests that this Court reverse the district court's unauthorized \$10,000 penalty.

Under Minnesota law, the district court did not have authority or jurisdiction first to prosecute and then assess a \$10,000 penalty against the Childress Firm. Because this penalty was (1) designed to punish the Childress Firm, (2) was ordered to be paid into court, (3) was sizeable, and (4) was unconditional with no opportunity to purge, the penalty is criminal in nature. The district court could therefore only seek its imposition by referring the matter to a state prosecutor. Because the district court did not refer the matter, but prosecuted and assessed the penalty on its own, the penalty is invalid.

In addition, the court's imposition of the \$10,000 penalty violated the Childress Firm's procedural and due process rights because the court failed to give the Childress Firm notice that it was considering that penalty and because the court failed to provide the Childress Firm with criminal procedural protections. Under Minnesota law, the Childress Firm was entitled to receive fair notice of the penalty prior to its imposition, as well as criminal protections such as referral to a state prosecutor, the ability to present evidence and

witnesses, the right to a jury trial, and proof beyond a reasonable doubt. Because the Childress Firm received none of these protections, the penalty must be reversed.

Finally, the conduct the court found objectionable does not justify the imposition of any sanction at all, let alone a \$10,000 fine. At its most expansive view, the “misconduct” involved (1) a mistake in Bates numbering; (2) filing of a truthful affidavit, setting forth a witness’s actual recollection of events; (3) filing an affidavit wherein the affiant testified to remembering something differently than another affiant; and (4) failing to send a document to the district court when the court requested that it do so, although the document had been produced in discovery and counsel believed that opposing counsel’s belated acknowledgment of receipt of the document essentially resolved the issue. This is not the type of conduct that justifies an award of sanctions, much less the severe sanction imposed by the district court.

Argument

I. The District Court’s Award of Monetary Sanctions Against Bradley Buscher and the Childress Law Firm Was Contrary to Minnesota Law for the Reasons Set Forth by Appellant Bradley Buscher.

The award of substantial sanctions, jointly and severally against the Childress Law Firm and its client, Appellant Bradley Buscher, is deficient as to the law firm for all the reasons it is as to the client. The Childress Firm agrees with and adopts the arguments advanced in Appellant Buscher’s brief.

II. The District Court Did Not Have Authority to Prosecute and Assess the \$10,000 Penalty Against the Childress Firm.

A. The \$10,000 Fine Is Akin to a Criminal Contempt Sanction.

The district court purported to impose the \$10,000 Penalty under Minnesota Statutes Section 549.211, Minnesota Rule of Civil Procedure 56.07 or 11.03(a)(2), and the court's "inherent power," rather than as a sanction for constructive criminal contempt. *Add.106*. Regardless of how the district judge characterized it, however, this penalty is in reality criminal in nature.

This form of sanction is unprecedented in Minnesota law, so the Court may find guidance from relevant federal court decisions. Federal courts have recognized that, although the imposition of a sanction for litigation misconduct is not technically a criminal contempt, the imposition of a sufficiently substantial punitive sanction should be treated as criminal in nature. *See Bradley v. Am. Household, Inc.*, 378 F.3d 373, 378-79 (4th Cir. 2004) (determining that substantial fine was criminal in nature, despite fact that district court did not believe it was conducting criminal contempt proceedings); *F.J. Hanshaw Enter., Inc. v. Emerald River Dev., Inc.*, 244 F.3d 1128, 1138-39 (9th Cir. 2001) (concluding that substantial punitive fine paid into court was criminal in nature); *Mackler Prod., Inc. v. Cohen*, 146 F.3d 126, 129-30 (2d Cir. 1998) (finding that \$10,000 fine imposed against individual attorney was criminal).

There are several factors that courts consider in determining whether a sanction should be treated as criminal: (1) whether the fine is "punitive, to vindicate the authority of the court;" (2) whether the party being fined has an "opportunity to purge" the fine; (3) the

size of the fine; and (4) whether the fine is to be paid to the court, rather than to an injured party. See *Hanshaw Enter.*, 244 F.3d at 1137-38; *Mackler Prod.*, 146 F.3d at 129.

Applying these factors, the \$10,000 penalty imposed against the Childress Firm is a criminal sanction. First, the district court explicitly labeled the \$10,000 fine as a “penalty.” *Add.102*. Before Appellants’ counsel informed the district court that it was without jurisdiction to impose constructive criminal contempt sanctions against Buscher and the Childress Firm, the district court repeatedly stated that it was considering imposing a penalty, to be paid into court, as a sanction for *constructive criminal contempt*. *Add.49, 65-67*. Thus, the court itself recognized that the \$10,000 penalty would be punitive in nature. Second, the Childress Firm was given no opportunity to purge the fine; rather, the sanction was a flat, unconditional penalty. Third, the fine was sizeable, particularly when one considers that under Minnesota’s criminal statutes \$10,000 is roughly equivalent to five years of jail time.⁴ Finally, the sanction was not designed to compensate the aggrieved parties, but to vindicate the district court’s authority. Accordingly, the \$10,000 penalty is akin to a criminal contempt sanction.

B. Minnesota Law Does Not Authorize Courts to Prosecute and Assess Criminal Contempts.

Criminal contempts cannot be prosecuted by the court, but must be referred to the appropriate prosecuting authority for a determination of whether criminal charges should be

⁴ Under the majority of criminal sentencing statutes, a \$10,000 fine is the rough equivalent of five years of jail time. See Minn. Stat. § 609.223 (third degree assault); *Id.* § 609.22 (fifth degree assault); *Id.* § 609.2242 (domestic assault); *Id.* § 609.2325 (criminal abuse); *Id.* § 609.235 (use of drugs to injure); *Id.* § 609.225 (false imprisonment); *Id.* § 609.425 (corruptly influencing a legislator); *Id.* § 609.504 (disarming a police officer).

brought. *State v. Tatum*, 556 N.W.2d 541, 545 n.3 (Minn. 1996); *see also Peterson v. Peterson*, 278 Minn. 275, 281, 153 N.W.2d 825, 830 (1967) (“[C]onstructive criminal contempts should not be prosecuted by attorneys other than those representing the state. . . . [C]riminal contempt is not a proceeding in the action out of which the alleged contempt arose, but is collateral to it, and the parties to the action . . . have no interest in it.”). The accused is entitled to procedural safeguards, including prosecution by the state, trial by jury, and proof beyond a reasonable doubt. *Tatum*, 556 N.W.2d at 545 n.3.

Under Minnesota law, the court should have referred the matter to the appropriate prosecuting authority, rather than attempt to prosecute and then assess its own criminal fine against the Childress Firm. Because the district court exceeded the scope of its authority by imposing the \$10,000 penalty, the penalty is invalid and must be reversed.

III. The District Court’s Imposition of the \$10,000 Penalty Violated the Childress Firm’s Due Process Rights.

A. The Childress Firm Was Not Given Notice of the Possibility of a Criminal Penalty.

Even if the court had authority to charge and impose a fine in this manner, it certainly would have to extend basic procedural protections to the charged party. It is a fundamental tenet of Minnesota law that before sanctions may be imposed against a party or attorney, the court must give fair notice of both the possibility of the sanction and the reason for its proposed imposition. *Uselman v. Uselman*, 464 N.W.2d 130, 143 (Minn. 1990). This notice must also inform the party or attorney of the type of sanction the court is considering imposing. *Id.* at 144 (recognizing that an attorney must be informed of the

nature and severity of the proposed sanction in order to properly respond). In addition, the Minnesota Supreme Court has on multiple occasions recognized that:

[T]his notice should be given as early as possible during the proceedings to provide the attorney and party the opportunity to correct future conduct. A policy of deterrence is not well served by tolerating abuses during the course of an action and then punishing the offender after the trial is at an end. . . . Only in very unusual circumstances will it be permissible for the trial court to wait until the conclusion of the litigation to announce that sanctions will be considered or imposed.

Id. at 143; *see also Kellar v. Von Holtum*, 605 N.W.2d 696, 701 (Minn. 2000) (quoting *Uselman*).

The requirement of notice is so essential that this Court has reversed an award of sanctions for serious misconduct, based solely on the district court's failure to provide proper notice.

See Afremov v. Amplatz, No. A05-793, 2006 WL 44341 (Minn. Ct. App. Jan. 10, 2006).

Cb.Add.1-4. In *Afremov*, this Court reversed a sanctions award made against an attorney who obstructed discovery, disobeyed a district court discovery order, and destroyed evidence. In that case, the trial judge advised the attorney, who was represented by criminal defense counsel, at a November 18, 2003, hearing, of the nature of the charges and concerns of the judge. The judge then allowed a one-week adjournment before taking further evidence, after which sanctions were imposed. Despite these procedural protections, this Court reversed, finding notice still to be inadequate. *See id.* None of these protections were provided the Childress Firm.

This Court has continually emphasized the importance of fair notice and other procedural protections added by law. In *Johnson v. Johnson*, this Court reversed an award of attorneys' fees because the party waited until the conclusion of litigation to seek that sanction. 726 N.W.2d 516 (Minn. Ct. App. 2007). Recognizing that an award of sanctions

would no longer advance the purpose of deterrence, the Court concluded that the district court had failed to apply the mandatory “safe harbor” provisions of Rule 11 and MINN. STAT. § 549.211; *see also Pratt Investment Co. v. Kennedy*, 636 N.W.2d 844, 851 (Minn. Ct. App. 2001) (“The purpose behind rule 11 is deterrence, not punishment or cost shifting.”). Likewise, in *Gibson v. Coldwell Banker Burnet*, this Court found that the sanctioned party had not received fair notice because the motion for sanctions was brought after the underlying case had been resolved, denying the sanctioned party the opportunity to “withdraw the improper papers or otherwise rectify the situation.” 659 N.W.2d 782, 790 (Minn. Ct. App. 2003). The trial court decision here turns *Gibson* on its ear—the affidavits here were withdrawn during the “safe harbor” period, and the court imposed a criminal sanction.

Like the parties in the above cases, the Childress Firm was not given fair notice that the district court was considering imposition of a criminal penalty. Although the “sanctionable” conduct occurred in July 2007, the district court waited until its April 22, 2008, Preliminary Sanctions Order to mention that it was considering a criminal penalty. *Add.46, 49* (issuing an order to show cause and stating that the criminal sanction would involve “*a penalty payment to the Court.*”). Realizing that the district court did not have authority to prosecute a criminal fine, however, Buscher’s attorney sent the court a letter challenging its order to show cause. *A.229*. In response, the court agreed that it was, indeed, without authority to impose a criminal penalty, and amended its Preliminary Sanctions Order to remove the order to show cause provisions. *Add.78*.

It was not until the July 11, 2008, sanctions hearing, nearly a year after the allegedly “sanctionable” conduct had occurred and months after the underlying case had been

dismissed on summary judgment, that the district court told the Childress Firm that it intended to impose an additional penalty against the Firm to punish it for its conduct. 7/11/08 Tr.30. At that hearing, however, the parties were enjoined to address only the amount of attorneys' fees and not allowed address the appropriate sanction. See 7/11/08 Tr.

Because the district court failed to provide the Childress Firm with fair notice that it was considering the imposition of a separate, monetary penalty to be paid into court, the \$10,000 penalty must be reversed. See *Uselman*, 464 N.W.2d at 143-44.

B. The Childress Firm Was Denied Criminal Procedural Protections.

In addition to violating the Childress Firm's right to notice, the district court also violated the Childress Firm's right to the full array of criminal procedural protections.

As previously stated, persons charged with criminal sanctions are entitled to procedural safeguards, including prosecution by the state, trial by jury, and proof beyond a reasonable doubt. *Tatum*, 556 N.W.2d at 545 n.3. As explained by the Minnesota Supreme Court:

In such cases, formal proceedings are needed in any event to establish the contumacious conduct involved and to give the person accused notice and opportunity to be heard. We have often held that the trial judge, in deciding constructive contempt cases, is limited to the evidence adduced at the contempt trial and may not rely upon knowledge obtained elsewhere.

Peterson v. Peterson, 278 Minn. at 279, 153 N.W.2d at 829.

The rationale for these protections is well-articulated by federal courts that have considered similar issues involving criminal sanctions. As explained by the Second Circuit:

Whether or not a finding of contempt is involved, unfairness and abuse are possible, especially if courts were to operate without any framework of rules or cap on their power to punish. In either case, the individual bears the risk of

substantial punishment by reason of obstructive or disobedient conduct, as well as of vindictive pursuit by an offended judge.

Mackler Prod., 146 F.3d at 130. As articulated by the Ninth Circuit:

[I]t is the inherent *potential* for abuse and unfairness that mandates affording the accused party—as a matter of procedural structure—the due process rights normally guaranteed to criminal defendants. . . . [D]ue process guarantees need to be observed when a court resorts to its inherent powers to punish misconduct simply because those powers are enormous; the procedural guarantees are the restraint that protects against intended or unintended abuse of that power.

Hanshaw Enter., 244 F.3d at 1139.

Here, the Childress Firm was not given any of the procedural due process rights guaranteed to criminal defendants. The criminal charge was not referred to a state prosecutor, it did not receive notice of the charges against it, was not given any meaningful hearing, was not allowed to present evidence and witnesses on its behalf, and was not given a trial by jury at which the state had to prove its case beyond a reasonable doubt. Instead, the district court acted as Inquisitor, prosecuting and assessing its own criminal penalty against the Childress Firm, relying solely on the court's own knowledge and opinions about the merits of its charges and, apparently, its own assessment of conflicting evidence. Under Minnesota law, this "procedure" is far from acceptable and violated the Childress Firm's due process rights.

For this reason, too, the Childress Firm is entitled to reversal of the district court's \$10,000 penalty.

IV. The Conduct the Court Found Objectionable Does Not Justify the Imposition of Sanctions at All, Much Less a \$10,000 Penalty.

The Minnesota Supreme Court has directed that courts should impose the least severe sanction necessary to effectuate deterrence. *Uselman v. Uselman*, 464 N.W.2d at 145. The level of sanctions should be commensurate with the conduct at issue, so that “legitimate claims not be discouraged.” *Rumachik v. Rumachik*, 494 N.W.2d 69, 71 (Minn. Ct. App. 1992). “[W]hile some sanctionable conduct might escape discipline, that is preferable to deterring legitimate or arguably legitimate claims.” *Uselman*, 464 N.W.2d at 145. A party or attorney may not be sanctioned merely for failure to succeed on the merits. *Rumachik*, 494 N.W.2d at 70. As stated in *Uselman*, “[a] rule 11 sanction should not be imposed when counsel has an objectively reasonable basis for pursuing a factual or legal claim or when a competent attorney could form a reasonable belief a pleading is well-grounded in fact and law.” 464 N.W.2d at 143. The district court ignored that mandate by imposing a \$10,000 penalty.

First, the fact that the Childress Firm made a mistake in responding to DeMars’ interrogatory requests by accidentally identifying the McGregor Pearce Report by the wrong Bates numbers is a *de minimus* offense, at worst. The district court made no finding that the mistake was purposeful or intended to prevent Respondents from finding the McGregor Pearce Report and, of course, could not properly make such a finding on a summary judgment motion. In fact, the district court’s statement that the mislabeling “facilitated Defendants missing [the McGregor Pearce] report” was made of its own surmise— Respondents never argued that the Bates number mistake caused them to miss the Report. *See Add.50*. Rather, Respondents readily admitted that they missed the Report because they

performed only a cursory review of the documents Buscher produced.⁵ This alleged “misconduct” on the part of the Childress Firm is not sanctionable.

Second, Minnesota law is clear that an attorney has no duty to point an opposing party toward relevant facts. *L&H Airco, Inc. v. Rapistan Corp.*, 446 N.W.2d 377, 379 (Minn. 1989) (“Any duty imposed upon an attorney to protect an interest of the client’s adversary would necessarily conflict with the duty owed by the attorney to his or her client . . . It would undermine the attorney’s duty to zealously represent the client”); *see also* MINN. R. PROF. COND. 4.1 *cmf.* 1 (stating that a lawyer “has no affirmative duty to inform an opposing party of relevant facts”). The consequences of Respondents’ attorneys only “cursorily” reviewing documents should be borne by Respondents; under no cognizable theory can it become the basis for sanctions against the party producing those documents.

Here, the Childress Firm and its client turned over all relevant documents to its opponents. It was entitled to assume that its opponents would review the documents, including the McGregor Pearce Report. The Childress Firm argued zealously on behalf of

⁵ DeMars’ counsel confessed to her failure to review Buscher’s document production:

I scheduled Brad Buscher’s deposition for March 14, 2007. To prepare me to take Buscher’s deposition, my associate, Dan Singel, performed a cursory review of the documents produced. He selected those documents he thought I would need for the deposition. . . . I apologize to the Court for not having performed a more thorough review of the documents produced by Buscher during discovery and for misstating that the Pearce report had not been produced. . . . Certainly, if I had known we had the Pearce report, considering its contents, I would have made it the #1 exhibit to DeMars’ Motion for Summary Judgment.

A.168, 169-70. Despite this admission, the district court determined that it was the Childress Firm’s and Buscher’s fault that Respondents failed to discover the McGregor Pearce Report.

its client, and submitted truthful affidavits attesting to its client's understanding of the McGregor Pearce Report, based on the client's conversations with McGregor Pearce. The Childress Firm did not have a duty to make Respondents' arguments for them by submitting the actual McGregor Pearce Report. If Respondents' wanted to argue that Buscher's understanding of the McGregor Pearce testing results was inaccurate or unreasonable, it could have and should have questioned Buscher about the Report during his deposition and cited to the Report in its summary judgment briefing.

In order to sanction the Childress Firm, this Court would have to impose a duty that has never before existed in Minnesota. This duty would either (1) require a witness to seek out and acquire all relevant facts in order to present an affidavit to the court or (2) require an attorney to do that research and essentially put those facts into the witness's mind, so that they would appear in the affidavit of the witness. These duties are heretofore unknown in Minnesota law. The first "duty," requiring a witness to learn and report all relevant facts in an affidavit, would eviscerate an affiant's ability to testify as to his or her own understanding. Instead of relying on memory, witnesses would have to quote relevant documents. The second "duty" would seriously infringe on the rights of parties to obtain the witness's recollections, free of the suborning information of counsel. In effect, it would require an attorney to impart to the witness any information that might be in a file. Either of these "duties" would be detrimental to the proper functioning of the legal system.

Third, as argued by Buscher in his Brief to this Court, affidavits are not sanctionable "merely because they conflict with the testimony of another person." *Buscher Brief* at 35 (quoting *Volumetrics Med. Imaging, Inc. v. ATL Ultrasound, Inc.*, 243 F.Supp.2d 386, 395 (M.D.

N.C. 2003)). Indeed, this is the essence of many fact issues that squarely require denial of summary judgment. Any difference in memory between Buscher's affidavit and Scudder's affidavit is therefore not sanctionable.

Finally, the Childress Firm's failure to provide a copy of the McGregor Pearce Report to the district court, while regrettable in retrospect, does not justify a \$10,000 penalty. The Childress Firm had already produced the Report to Respondents in discovery. During the July 17, 2007, summary judgment hearing, DeMars' counsel claimed that the Report had never been produced. In an effort to correct the record, one of the Childress attorneys advised the district court that the Report had in fact been produced in the original document production. In response, the district court asked that attorney to tender a copy of the Report under cover of an affidavit. Thereafter, the Childress Firm submitted an affidavit setting forth how and when the Report had been produced, and DeMars' counsel conceded that she had, in fact, been given a copy of the Report. Perhaps unfairly, the Childress Firm assumed this non-issue was resolved by counsel's late admission that she had, in fact, received the report. A reasonable judicial reaction to this would not be the imposition of a \$10,000 fine on the out-of-town counsel for one side, while excusing the lawyer for the other side who had admitted to only conducting a "cursory" review.

The Childress Firm's failure to tender the Report to the court was not undertaken as part of a contrived effort to thwart discovery. Indeed, discovery was not thwarted at all, since the Report had previously been produced to Respondents. Under Minnesota law, the district court was required to advise the Childress Firm that it found the Firm's failure to produce the report objectionable; and it could have cured the problem at the time by

informing the Firm that unless it produced the report, the court would impose sanctions. While the Childress Firm erred in not tendering the Report to the court, that error is not grounds for sanctions, and certainly not for the imposition of a \$10,000 penalty to be paid into court over a year after the alleged misconduct occurred.

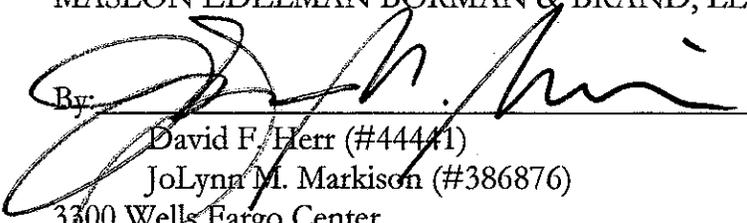
Conclusion

Because (1) the district court failed to give the Childress Firm notice and the opportunity to respond to the potential imposition of the \$10,000 penalty; (2) the district court was without jurisdiction to impose that penalty, but instead should have referred the matter to a prosecuting authority for possible jury trial wherein the allegations against the Childress Firm would have to be proven beyond a reasonable doubt; and (3) the amount of the penalty is not justified by the allegedly "sanctionable" conduct at issue, the district court's imposition of the \$10,000 penalty against the Childress Firm must be reversed.

Respectfully submitted,

Dated: December 22, 2008.

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Nos. A08-1803 & A08-2036

STATE OF MINNESOTA

IN COURT OF APPEALS

Bradley J. Buscher, individually and on
behalf of the Revocable Trust of Bradley J.
Buscher,

*Appellant (A08-1803),
Respondent (A08-2036),*

Childress Duffy Goldblatt, Ltd.,

Non-Party Appellant (A08-2036),

**CERTIFICATE OF
BRIEF LENGTH**

vs.

Montag Development, Inc., et al.,

Defendants,

William Zimmerman d/b/a Bill
Zimmerman's Stucco Co.,

Respondent (A08-1803 & A08-2036),

Dan DeMars d/b/a Dan DeMars
Construction, a/k/a DeMars/Weisz Co.,

Respondent (A08-1803 & A08-2036),

and

Dan DeMars d/b/a Dan DeMars
Construction, a/k/a DeMars/Weisz Co.,

Third-Party Plaintiff,

vs.

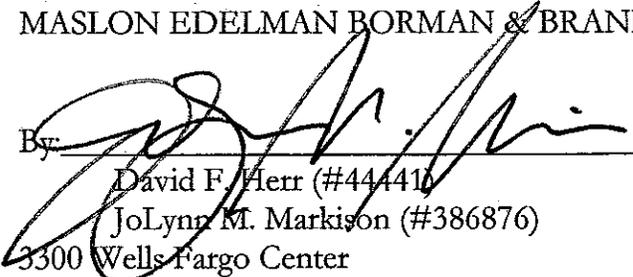
Sharratt Design & Company, LLC,

Third-Party Defendant.

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. By automatic word count, the length of this brief is 6,998 words. This brief was prepared using Microsoft Word 2003.

Dated: December 22, 2008.

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