MINNESOTA STATE LAW LIBRARY

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 & 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.

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

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2008 – BACHMAN LEGAL PRINTING – FAX (612) 337-8053 – PHONE (612) 339-9518 or 1-800-715-3582

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Argument

I. Respondents Have Failed to Respond to the Childress Firm's Legal Arguments and Have therefore Waived any Argument with Respect to those Issues.

Respondents have not replied to the vast majority of the legal arguments advanced by the Childress Firm in its Appellant's Brief. Respondents have not challenged the Childress Firm's assertion that the district court did not have authority to prosecute and assess a $10,000 penalty against the Firm, they have ignored the Childress Firm's contention that the $10,000 penalty violated the Firm's due process rights, and they have made no attempt to refute the Childress Firm's argument that the conduct the district court found objectionable does not justify any sanction, much less a $10,000 penalty. Accordingly, Respondents have waived any argument with respect to those issues. *Granville v. Minneapolis School District*, 716 N.W.2d 387, 394 (Minn. Ct. App. 2006), *rev'd on other grounds*, 732 N.W.2d 201 (Minn. 2007) ("Respondents raised due-process arguments for the first time at oral argument. Because these arguments were not made in respondents' brief, we will not consider them."); *Peterson v. BASF Corp.*, 711 N.W.2d 470, 482 (Minn. 2006) ("failure to address an issue in brief constitutes waiver of that issue").

The Childress Firm submits this Reply Brief to address several inaccuracies in Respondents' characterization of the record and recital of the law.

II. As Is Evident from the Record, this Chain of Events Was Set into Motion When Respondents' Counsel Failed to Review the Discovery Produced by Buscher, Which Caused Counsel to Miss the Pearce Report.

Respondents have attempted to depict the Childress Firm as having somehow concealed the Pearce Report from them. This could not be further from the truth. What

actually happened is that the Childress Firm identified the Pearce Report for Respondents, produced the Pearce Report to Respondents, and thereafter assumed that Respondents were aware of the Pearce Report's existence. However, because Respondents' attorneys failed to competently review Buscher's interrogatory answers and document production, they missed the Pearce Report. Respondents' counsel's carelessness set into motion a sequence of events that has culminated with this appeal. Respondents have chosen simply to ignore these central facts.

A. Buscher and his Attorneys Identified the Pearce Report for Respondents In April 2006.

Appellant Buscher and Non-party Appellant Childress unequivocally informed Respondents of the existence of the Pearce Report in April of 2006, in response to Respondents' written discovery requests The Childress Firm identified McGregor Pearce and his report, by name, <u>four separate times</u> in answering those requests. Respondents ignore these facts because they are clearly established in the record and they squarely establish the trial court's abuse of discretion in imposing sanctions against the Childress Firm.

First, Respondent Zimmerman's October 2007 Interrogatory No. 10 inquired:

> Identify each and every person who has inspected the home that is the subject matter of this litigation whether relating to issues of liability or damages, stating for each such person the name of said person, address, and date of inspection.

Affidavit of Christina Phillips, dated 10/15/07, Ex. A. In Buscher's response, the very first person Childress identified was McGregor Pearce and it specifically drew Respondents attention to his report:

a) McGregor Pearce, MPH
Mold Sampling and Diagnostic Service
Indoor Air Quality Investigations
2173 Marshall Ave.
St. Paul, MN 55104
19 air and dust samples. See Report.

Id. (emphasis added).

Second, In Buscher's response to Zimmerman's Document Request No. 10, which asked for "[a]ll estimates or bids which relate to any of the damage to Plaintiff's home or to any repairs or proposed repairs to Plaintiff's home," Childress stated:

> See documents bate stamped BLB000001-000733, Pearce report, Donnelly estimates, appraisals, and documents reflecting Plaintiffs' damages from August 2005 through December 2005. Investigation continues.

Id. (emphasis added). Buscher served Respondent DeMars with a copy of Buscher's discovery responses at the same time that Buscher served Zimmerman with those responses, on or around April 7, 2006. Had Respondents' attorneys taken the time to review Buscher's discovery responses, they would have become aware of the Pearce Report, which the Childress Firm had specifically identified for them. It is important to parse this response fairly. It identifies 5 things: 1) documents bearing the specified bates numbers, 2) the Pearce Report, 3) Donnelly estimates, 4) appraisals, and 5) the identified damage documents. Respondents and the trial court judge misread this response and incorrectly inferred that each of the specific documents listed was subsumed within the bates range, and that because the Pearce Report was not in that range, it was misleading. There is no basis for such an inference, and certainly no basis to impose a sanction on a law firm.

Third, on or around May 15, 2006, the Childress Firm served Respondents with Buscher's responses to DeMars's discovery requests. Again, the Childress Firm specifically identified the Pearce Report by name. Interrogatory No. 12 requested:

> With regard to all investigations, inspections, or testing of the alleged construction defects:
>
> a. List all dates such activities occurred.
>
> b. List all individuals who were present, and list each individual's employer.
>
> c. Describe any testing done and who performed the testing.
>
> e. Describe any stucco cuts, stucco removal, or any other modification to the Buscher residence following the completion of work done by Dan Demars. Provide dates these actions were taken, and who performed these actions.

A.105, 110. Again, the first person Childress identified in response to this interrogatory was McGregor Pearce, and Childress specifically instructed DeMars to see the Pearce Report:

> a) McGregor Pearce, MPH
> Mold Sampling and Diagnostic Service
> Indoor Air Quality Investigations
> 2173 Marshall Ave.
> St. Paul, MN 55104
> 19 air and dust samples. <u>See Report.</u>

Id. (emphasis added). After listing an additional ten people in response to Interrogatory No. 12, Childress repeated the earlier identified bates range to assist DeMars in locating materials relevant to the Interrogatory: "See documents bate stamped BLB000001-000733." *A.105, 112.* Childress never stated that this bates range included the Pearce Report. In response to

Interrogatory No. 18, Childress also identified McGregor Pearce as someone "with knowledge of any facts concerning the claims asserted in the complaint." *A.105, 114, 122.*

The Childress Firm included the bates number reference to assist Respondents in locating the relevant documents, which the Firm had already identified by name. Respondents' discovery requests did not request the Childress Firm to do this; the references were provided merely as a guide to assist Respondents' counsel. By mistake, personnel at the Childress Firm assumed that the Pearce Report was included in documents bates stamped BLB000001-000733, because this was where the bulk of similar reports were located. In fact, the Pearce Report was bates numbered BLB001086-001091.

Despite this clerical mistake, had counsel for Respondents reviewed the discovery responses they would have become aware of the Pearce Report, because the Childress Firm had specifically directed them to review that report. Indeed, by May 2006, the Childress Firm had expressly pointed out McGregor Pearce and the Pearce Report to Respondents' attorneys <u>four different times</u> in response to Respondents' discovery requests.

B. The Childress Firm Produced the Pearce Report to Respondents in August 2006.

In Buscher's responses to Respondents' document requests, the Childress Firm repeatedly stated: "Documents will be copied and produced at Defendant's request and expense." *A.105, 128.* The only Defendant that requested the Childress Firm to produce the documents was Pella Windows & Doors Twin Cities, Inc. ("Pella"). Thus, in early August 2006, Buscher's documents were sent by Federal Express to Pella. Included in those documents was the previously identified Pearce Report.

Because the document production was voluminous, the parties agreed that the other Defendants—including Respondents DeMars and Zimmerman—would obtain copies of the Buscher documents directly from Pella. This is in fact what happened, as both DeMars and Zimmerman utilized a number of these documents during Buscher's deposition, which took place in March 2007. Had Respondents' attorneys reviewed Buscher's discovery responses, they would have known to look for the Pearce Report in Buscher's document production, irrespective of its location in the bates numbering scheme. If they had been unable to find it due to the bates numbering mistake, they could have contacted the Childress Firm to ask where the Pearce Report was.

Respondent DeMars did not file for summary judgment until May 2007. By that time, the Childress Firm had both informed Respondents of the existence of the Pearce Report and produced a copy of that report to Respondents' attorneys. The reason Respondents "were unaware" of the Pearce Report at the time they briefed the motion for summary judgment, *see Response Br. at 6*, was because they hadn't bothered to adequately review Buscher's discovery responses, which had been in their possession for a year, or Buscher's document production, which had been in their possession for nine months.

C. Buscher Identified McGregor Pearce and the Pearce Report During his March 2007 Deposition, Yet Respondents Failed to Look for that Report or Follow Up With the Childress Firm.

In March 2007, Respondents deposed Buscher. During his deposition, Buscher again brought up the mold testing conducted by McGregor Pearce, *Buscher Dep. 156:14-24, 176:17-177:5) (identifying McGregor Pearce as having performed testing in 2002)*, yet Respondents did nothing to follow up on that McGregor Pearce or his report following the deposition. Had

Respondents been concerned that they were missing the Pearce Report, they could have addressed it with the Childress Firm after Buscher's deposition. As is evident from the posture of this case, however, they did no such thing.

D. Counsel's "Cursory" Document Review Caused Respondents to Miss the Pearce Report.

Respondents readily admitted in open court that they only "cursorily" reviewed Buscher's document production prior to filing their motion for summary judgment. In fact, DeMar's lead counsel did not even bother to review the documents herself, but instead had a young associate look them over and flag documents for her to use during Buscher's deposition in March 2007. *A.168; A.171.* But they persistently refuse to acknowledge that this shortcoming caused their problems.

Contrary to counsel's admissions, the district court found that because Buscher's discovery responses directed Respondents to documents bates stamped BLB000001-000733, and because the Pearce Report was bates stamped BLB001086-001091, the Childress Firm had "facilitated" Respondents missing the report.[1] However, Respondents have never claimed that the mislabeling caused them to miss the Pearce Report. In fact, Respondents have never refuted the fact that it was counsel's "cursory" review of Buscher's document production that caused them to miss the Pearce Report. Tellingly, Respondents have not contested this fact, or even addressed it, in their Response Brief.

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[1] After the fact, during its March 5, 2008 hearing, the district court mentioned that Buscher's Answers to Interrogatories were incomplete, as those answers omitted some of the information sought by Respondents. Yet, Respondents never moved the district court to compel more complete discovery responses, nor did Respondents ever meet and confer with the Childress Firm to obtain any additional information.

Because Respondents have failed to refute the fact that it was counsel's "cursory" review of documents—and not the bates-numbering mistake—that facilitated Respondents missing the Pearce Report, Respondents are deemed to have conceded this point, and have waived any contrary position. *See Granville*, 716 N.W.2d at 394; *Peterson*, 711 N.W.2d at 482.

E. There Is No Basis For Finding that Buscher or the Childress Firm Intentionally Misquoted the Pearce Report.

Both the district court and Respondents have characterized Buscher and the Childress Firm as having "intentionally" misquoted the Pearce Report. *Respondents' Br. at 18; Add.46, 52.* There is no basis whatsoever for this characterization. At its most expansive, the allegedly sanctionable conduct consisted of filing a truthful affidavit that set forth the actual account of Buscher's memory of events that took place regarding McGregor Pearce's mold testing results. The fact that the Buscher Affidavit did not recite verbatim the entire contents of the Pearce Report does not amount to "intentionally misquoting" that report. This is especially true because the actual test report was in Respondents' possession, to submit into evidence if Respondents believed that Buscher's memory was inaccurate or incomplete. However, because Respondents' counsel did not review Buscher's discovery, the district court foisted a duty on the Childress Firm to do counsel's job for them, punishing the Childress Firm for failing to rebut the truthful testimony of its client, Buscher. Buscher and the Childress Firm's conduct constitutes a minor transgression, if any. It was wrong for the district court to conclude otherwise.

III. Invoking its Inherent Power Does Not Give the District Court "No Holds Barred" Authority to Ignore Legislative Mandates or Procedural Due Process Rights.

The district court announced, and Respondents have argued, that the district court may invoke its inherent authority to find that Rule 11's safe harbor provision "would not seem to apply" to intentional conduct. *Response Br. at 19; Add.46, 54.* But the safe harbor provision is not something trial courts have the option to ignore. Moreover, this proclamation makes no sense itself because the presence of intent or bad faith is one of the factors courts already consider when deciding whether to award sanctions under Rule 11. *Gibson v. Trustees of Minnesota State Basic Bldg. Trades Fringe Benefits Funds*, 703 N.W.2d 864, 869 (Minn. Ct. App. 2005); *e.g.*, *Kellar v. Von Holtum*, 605 N.W.2d 696, 701-02 (Minn. 2000) (imposing Rule 11 sanctions for bad faith litigation), *superseded by rule as stated in Gibson v. Coldwell Banker Burnet*, 659 N.W.2d 782 (Minn. Ct. App. 2003). In no case would the fact that the misconduct is intentional or in bad faith excuse the mandatory safe harbor provision. *Johnson ex rel. Johnson v. Johnson*, 726 N.W.2d 516, 519 (Minn. Ct. App. 2007) (declining to make an exception to Rule 11's safe harbor provision for bad faith misconduct, stating that such an exception would have to be made by the legislature, not the court). To hold otherwise improperly wrests power from the Supreme Court and ignores the clear mandate that the safe harbor provision "shall" apply to all Rule 11 sanctions. *See* Minn. R. Civ. P. 11.03. Of course, Appellant Childress also disagrees with any inference made by the court that its conduct was somehow intentional or in bad faith. The district court's finidng of intentionality represents a fit of judicial pique, not a conclusion rationally drawn from any evidence before the court.

In addition, inherent power is to be exercised with caution. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765 (1980) ("Because inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion."). Where a court invokes its inherent power to sanction, it must afford the party to be sanctioned procedural due process, which requires providing notice and an opportunity to be heard. *See Plaintiff's Baycol Steering Committee v. Bayer Corp.*, 419 F.3d 794, 802 (8th Cir. 2005) (holding that before a court may impose sanctions pursuant to its inherent powers, it must provide notice that sanctions are being considered and an opportunity to be heard).

Here, the district court imposed sanctions against the Childress Firm pursuant to "the inherent power of the Court, bad faith conduct in litigation (Minnesota Statutes section 549.211), and Minnesota Rules of Civil Procedure, Rules 56.07 and/or 11.03(a)(2)." *Add.101, 106.* Under both Rule 11 and Minn. Stat. 549.211, Appellants were entitled to the 21-day safe harbor provision. Minn. R. Civ. P. 11.03(a)(1); Minn. Stat. § 549.211, subd. 4. Inherent power allows the court to reach conduct that isn't specifically banned in a statute or rule, but it doesn't provide authority to provide none of the procedural protections of the statutes or rules. Regardless of the source of the district court's power to sanction, Appellants were entitled to the minimal procedural protections of due process. *See Baycol Steering*, 419 F.3d at 802. Here, the district court imposed sanctions against Buscher and the Childress Firm without providing them with either a safe harbor or procedural due process. The district court's sanctions award must therefore be reversed.

* * *

It is impossible to square the trial court's imposition of a serious criminal sanction in this case against an entire law firm with the conduct which, at worst, can fairly be viewed as a clerical error. Minnesota law does not allow it. This court's decision in *Afremov v. Amplatz*, No. A05-793, 2006 WL 44341 (Minn. Ct. App. Jan. 10, 2006), *Ch.Add. 1-4*, cited by Childress in its opening brief (and ignored by Respondents in theirs) clearly requires reversal of a sanction in this case. In no way is the Childress Firm's conduct as egregious as the misconduct in *Afremov*, where this Court reversed a non-criminal sanctions award made against an attorney who obstructed discovery, disobeyed a district court discovery order, and destroyed evidence, solely because the attorney was not provided adequate notice.

Conclusion

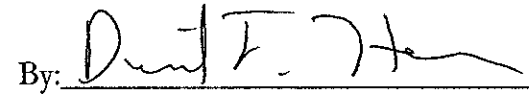
The district court acted improvidently in imposing sanctions against the Childress Firm. There was no basis for the court to infer any intentional misconduct on the part of the Childress Firm, as it had already identified the Pearce Report for Respondents in Buscher's interrogatory answers and produced the Pearce Report to Respondents during discovery. The alleged misconduct at issue—submitting a truthful affidavit of Buscher's recollection of the mold testing results—is simply not sanctionable conduct. The Childress Firm was under no affirmative duty to rebut the truthful testimony of its client. Respondents' counsel had the Pearce Report right in front of them. Their failure to conduct a competent review of Buscher's discovery responses and document production should in no way be imputed to Buscher or the Childress Firm, especially not in the form of the severe

sanctions that were imposed in this case. The district court's sanctions order must be reversed.

Respectfully submitted,

Dated: February 2, 2009.

MASLON EDELMAN BORMAN & BRAND, LLP

By: 

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CERTIFICATE OF BRIEF LENGTH

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 2,929 words. This brief was prepared using Microsoft Word 2003.

Respectfully submitted,

Dated: February 2, 2009.

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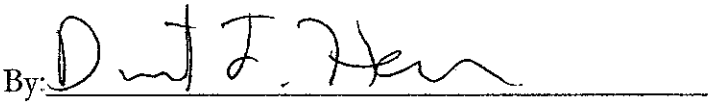
By: 

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