

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.,

Appellant (A08-2036),

vs.

Montag Development, Inc., et al.,

Defendants,

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

Respondent,

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

Respondent,

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 APPELLANT BRADLEY J. BUSCHER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
SUMMARY OF ARGUMENT	1
ARGUMENT	3
I. CONTRACTORS MISSTATE THE EVIDENCE.....	3
II. SUMMARY JUDGMENT SHOULD BE REVERSED	6
A. Summary Judgment Is Improper Where Facts Relating To Discovery Of An Actionable Injury Are Disputed	6
B. This Case Presents Material Fact Disputes About Whether Actionable Non-Mold Problems Were Discovered In 2002.....	10
1. The 2002 Problems Were Minor	10
2. The 2002 Problems Were Readily Correctable, And Were Corrected	11
3. The 2002 Problems Did Not Recur	11
4. The 2002 Problems Were Unrelated To The 2004 Building Envelope Water Intrusion	11
5. Buscher Was Diligent In Addressing Both The 2002 And 2004 Issues.....	12
C. The Pearce Report’s Discussion Of Mold Does Not Support Summary Judgment	12
D. The District Court Lacked Sufficient Evidence Regarding The Scientific Significance Of The Pearce Report To Grant Summary Judgment	13
E. Scudder’s Carpet Cleaning Does Not Support Summary Judgment	14
III. THE SANCTIONS AWARD SHOULD BE REVERSED	15
A. The January 9 Hearing Was Improper	15
B. The District Court Abused Its Discretion By Awarding Sanctions And Costs Under Rules 56.07 and 11.03	17
1. Buscher Did Not “Bury” The Pearce Report.....	17
2. Buscher Did Not “Delete” Words From The Pearce Report.....	18

TABLE OF CONTENTS
(continued)

3.	Buscher’s Invocation of the Rule 11 Safe Harbor Cured Any Sanctionable Conduct.....	20
4.	Rule 56.07 Should Only Be Invoked When An Affidavit Is Demonstrably False Without Regard To Credibility	21
5.	The District Court Should Not Have Sanctioned Buscher Under Rule 56.07 By Denying Him An Available Safe Harbor Under Rule 11	23
C.	The District Court Abused Its “Inherent Power”	23
IV.	THE DISTRICT COURT’S AWARD OF COSTS SHOULD BE REVERSED	24
V.	THE DISTRICT COURT CORRECTLY EXCLUDED FROM THE SANCTIONS ORDER FEES RELATED TO DEMARS’ MOTION TO EXCLUDE THOMAS IRMITER	25
	CONCLUSION	25

TABLE OF AUTHORITIES

CASES

<i>Cedar Woods Ass'n v. Concord Realty Inv. & Dev., Inc.</i> , No. C7-99-218, 1999 WL 451220 (Minn. Ct. App. July 6, 1999).....	8
<i>Citation Homes, Inc. v. Felton</i> , 2002 WL 1331745 (Minn. Ct. App. June 18, 2002).....	21
<i>City of Minneapolis v. Architectural Alliance</i> , No. A05-1909, 2006 WL 2348084 (Minn. Ct. App. Aug. 15, 2006).....	7-8
<i>Cobell v. Norton</i> , 214 F.R.D. 13 (D. D.C. 2003)	22
<i>Dakota County v. BWBR Architects</i> , 645 N.W.2d 487 (Minn. Ct. App. 2002).....	8, 10-11
<i>Fuhr v. D.A. Smith Builders, Inc.</i> , No. A04-2457, 2005 WL 3371035 (Minn. Ct. App. Dec 13, 2005)	7-8
<i>Gibson v. Coldwell Banker Burnet</i> , 659 N.W.2d 782 (Minn. Ct. App. 2003).....	21
<i>Greenbrier Vill. Condo. Two Ass'n, Inc. v. Keller Inv., Inc.</i> , 409 N.W.2d 519 (Minn. Ct. App. 1987).....	9
<i>Hoffman v. Van Hook</i> , No. A06-1213, 2007 WL 1053816 (Minn. Ct. App. Apr. 10, 2007).....	9
<i>Hyland Hill N. Condo Ass'n. v. Hyland Hill Co.</i> , 549 N.W.2d 617 (Minn. 1996)	8
<i>In re Clerk of Lyon County Court's Compensation</i> , 241 N.W.2d 781 (Minn. 1976)	23
<i>Lake City Apartments v. Lund-Martin Co.</i> , 428 N.W. 2d 110 (Minn. Ct. App. 1988).....	7-8
<i>Li v. Zawadski</i> , No. A07-0604, 2008 WL 933459 (Minn. Ct. App. Apr. 8, 2008).....	7
<i>Murphy v. Country House</i> , 240 N.W. 2d 507 (Minn. 1976)	4

<i>NASCO, Inc. v. Calcasieu Television & Radio, Inc.</i> , 894 F.2d 696 (5th Cir. 1990)	24
<i>Oie v. Kroiss Construction, Ltd.</i> , No. A03-1135, 2004 WL 728246 (Minn. Ct. App. Apr. 6, 2004).....	9
<i>Olson v. Babler</i> , 2006 WL 851798 (Minn. Ct. App. Apr. 4, 2006).....	23
<i>Patton v. Newmar Corp.</i> , 538 N.W.2d 116 (Minn. 1995)	23
<i>Rogers v. AC Humko Corp.</i> , 56 F.Supp.2d 972 (W.D. Tenn. 1999)	22
<i>Steele v. Mengelkoch</i> , No. A07-1375, 2008 WL 2966529 (Minn. Ct. App. Aug. 5, 2008).....	23-24
<i>The Rivers v. Richard Schwarz/Neil Weber, Inc.</i> , 459 N.W.2d 166 (Minn. Ct. App. 1990).....	8
<i>Uselman v. Uselman</i> , 464 N.W.2d 130 (Minn. 1990)	20
STATUTES, RULES & REGULATIONS	
Minn. R. Civ. P. 56.03.....	16
Minn. Stat. § 541.05	6
Rule 11	Passim
Rule 11.03	20-21
Rule 56	1
Rule 56.07	Passim

SUMMARY OF ARGUMENT

With regard to summary judgment, the brief of Respondents Dan DeMars and William Zimmerman (“Contractors”) merely repeats the lower court’s principal error: reversing the presumptions required under Rule 56. Instead of viewing the evidence in the light most favorable to Buscher, Contractors give themselves the benefit of favorable inferences, make credibility determinations in their own favor, and (despite bearing the burden of proof on the summary judgment issues) claim the benefit of any absence of evidence on key points. Indeed, Contractors even go beyond arguing for favorable inferences – they take inappropriate liberties in their description of the record. This is ironic, given that they pursued sanctions by claiming that Buscher’s former counsel misstated the record below.

Factual disputes preclude summary judgment, and this case presents ample disputes of fact as to whether Buscher discovered an actionable injury outside the limitations period. The minor issues discovered by Buscher in 2002, which even the district court initially rejected as a basis for summary judgment, simply do not support the result below. Minor problems that are repaired or do not recur are insufficient to trigger the statute of limitations for a claim based on the later discovery of an unrelated major problem. At the very least, questions of fact arise regarding whether (1) the issues uncovered in 2002 were relatively minor; (2) they were successfully repaired; (3) they did not recur; and (4) they are substantially different from the water envelope intrusion that is the centerpiece of this lawsuit.

These factual disputes are readily apparent for the non-mold issues – such as common ice dams and minor stucco discoloration – which formed the basis of Contractors’ first unsuccessful summary judgment motion. It is equally apparent for the Pearce Report. A fact issue exists regarding whether the Pearce Report’s description of mostly-normal mold levels, with isolated elevated mold levels that could be fixed by changing vacuum cleaning methods, should have put Buscher on notice of the 2004 critical mold problem discovered in the building envelope of his home. In short, when the record is considered in light of the correct standard for summary judgment it becomes clear that fact disputes exist, making summary judgment improper.

Regarding sanctions, Contractors defend Judge Wexler’s order by arguing that it was procedurally proper to conduct a testimonial hearing as part of the summary judgment process, to judge Buscher’s credibility based, in part, on that hearing, to forbid Buscher from contacting his own witness before that hearing, and to sequester Buscher from the hearing itself. Clearly, this is wrong. The hearing was improper.

Next, Contractors claim that Buscher was not entitled to invoke safe harbor rights to correct any arguably sanctionable conduct. This conflicts with Rule 11. Moreover, district courts should not be invited to circumvent Rule 11 by seeking out other sources of sanctions authority – such as Rule 56.07 or a court’s “inherent power” – whenever a court believes that safe harbor rights are “bad policy.” In other words, Contractors’ argument, if accepted, would render the Rule 11 safe harbor a nullity.

Finally, Contractors argue that Buscher's conduct was sufficiently severe to justify sanctions. But Buscher cannot be sanctioned for *misquoting* the Pearce Report in his June 27 Affidavit – as he is accused of doing – since he never purported to be quoting it. And he cannot be fairly accused of omitting portions of the Pearce Report from his affidavit, or hiding the report from his opponents, since he produced the Pearce Report in its entirety, identified it in his interrogatory responses, and testified about it at his deposition. Indeed, Buscher's litigation opponents *apologized* to the district court for failing to locate the Pearce Report in Buscher's document production. Sanctions should be reversed.

ARGUMENT

I. CONTRACTORS MISSTATE THE EVIDENCE

Respondents' brief focuses on issues which even the district court *rejected* as grounds for summary judgment, *i.e.*, a series of "unrelated, minor and apparently readily correctable problems with isolated components of the home." (ADD.39-40) As explained below, the record evidence concerning those minor problems is insufficient to support summary judgment. But importantly, Contractors' characterization of that evidence is often inaccurate.

One of Contractors' inaccurate claims is that after Buscher discovered ice dams on his roof, "[h]is architect *told him* his problem resulted from faulty construction practices like improper ventilation and insulation and warned him that ice dams can lead to water infiltration." (Resp. Br. at 6 (emphasis added).) Contractors' only record support is the deposition of Michael Sharratt, an architect. (RA.116, 118.) Yet nothing in the cited

testimony refers to any communication with Buscher about ice dams. (*Id.*) Nor does it identify the cause of Buscher's ice dams. (*Id.*) What the cited testimony *does* say is that Sharratt was not on the roof, and that his testimony was based only on what another architect told him.¹ (*Id.* at RA.118 (“that’s a question better answered by Brian than me because he was there and I was not”).)

Equally problematic is Contractors' claim that “Buscher’s architect diagnosed issues with wet insulation in the attic and informed Buscher that the problem resulted from the design and construction of the home.” (Resp. Br. at 6.) In support, Contractors cite an invoice from Buscher’s architects which merely includes the word “insulation” when describing what the architects looked at to “[d]o diagnosis of water-problem areas.” (RA.14.) But the invoice includes no description of “wet” insulation, no discussion of any cause-and-effect “diagnosis,” and no indication that anything was communicated to Buscher.

Indeed, a careful reading of the complete record reflects a dispute about whether damp insulation was even present at Buscher’s house in 2002. Novak, the architect who looked in the attic, testified that he did not see any wet insulation in the house (RA.156), and he expressly observed that the insulation in the attic was not wet. (RA.162.) Sharratt, the architect who never visited the attic, said “there may have been some

¹ Of course, summary judgment cannot be based on hearsay evidence. *See Murphy v. Country House*, 240 N.W. 2d 507, 511 (Minn. 1976).

indication of condensation” but this uncertain musing was based on a “very fuzzy” photograph he was shown at his deposition, not personal observation. (RA.117-18.)

Also incorrect is Contractors’ claim that Buscher “was so concerned about the damage [in 2002] that he paid his architect \$17,000 to examine [it].” (Resp. Br. at 7.) The architect’s invoice is, again, cited in support, even though it focuses not on examining damage, but on plans to remodel the home. The invoice includes time spent on “configuration, and program of home improvements including any Owner’s design ideas, building site constraints, space size needs, functional and spatial interrelationships, Owner’s wants, needs and desires, exterior character and approximate budget needs and desires, exterior character and approximate budget limitation.” (RA.14.) No dollar amount is broken out for inspection of any “damage.”

Perhaps most inaccurate are Contractors’ claims that in 2002 Buscher “never had his home thoroughly inspected, and never made necessary repairs.” (Resp. Br. at 30 n.9.) The “no inspection” claim is contradicted by the architect’s invoice. The “no repairs” claim is wrong for numerous reasons:

- (1) the ice dam issue was corrected by installing heating cables in 2001 (A.59);
- (2) the decorative columns had venting installed to correct a moisture issue (A.31; RA.165);
- (3) the stucco at the pool house was fixed (A.31-32; RA.158);
- (4) the skylight was repaired (A.60);

(5) the chimney issue was rectified (RA.156, 161);
(6) the stained stucco issue was corrected (RA.157-58); and
(7) the minor mold issues raised in the Pearce Report were addressed by cleaning and inspecting the carpet. (*See* Buscher Opening Br. at 7-8.)

In other words, *all* of the 2002 issues were dealt with promptly, and there is no record evidence that any of them recurred. Contractors' "no inspection" and "no repairs" claims merely emphasize how far their arguments diverge from the evidence.

II. SUMMARY JUDGMENT SHOULD BE REVERSED

A. Summary Judgment Is Improper Where Facts Relating To Discovery Of An Actionable Injury Are Disputed

Under the case law interpreting the standard for summary judgment pursuant to Minn. Stat. § 541.05, Contractors were required to prove, beyond genuine dispute, that Buscher had knowledge of an actionable injury more than two years before initiating this action. Moreover, Contractors carried the burden of accounting for the multiple ways in which fact disputes can preclude summary judgment. Contractors attempt to sidestep this burden, by arguing that *any* problem, no matter how minor, that might support *any* litigation, irrevocably triggers the statute of limitations for *all* construction defects of *all* types in *all* parts of the subject property. (*See, e.g.*, Resp. Br. at 24 ("When there are multiple construction defects, the courts do not give each defect its own statute of limitations. Instead, the courts aggregate the defects and start running the statute whenever the homeowner discovers an 'actionable injury'").)

This draconian suggestion does not reflect the law. As this Court has repeatedly recognized, not every minor construction-related problem or annoyance encountered by a homeowner requires that the homeowner sue his contractors, at the risk of being prohibited from doing so when a huge problem is discovered later. Instead, as this Court has correctly held, minor problems do not necessarily trigger the statute of limitations for major problems that may arise later. *See, e.g., Lake City Apartments v. Lund-Martin Co.*, 428 N.W. 2d 110, 112 (Minn. Ct. App. 1988) (“When reasonable minds may differ about the discovery of the injury or condition, the issue is one for the trier of fact”); *City of Minneapolis v. Architectural Alliance*, No. A05-1909, 2006 WL 2348084, at *6 (Minn. Ct. App. Aug. 15, 2006) (“The statute’s statement that ‘a cause of action accrues upon discovery of the injury’ does not mean that the limitations period begins to run when *any* injury is discovered”) (emphasis in original); *see also Li v. Zawadski*, No. A07-0604, 2008 WL 933459 (Minn. Ct. App. Apr. 8, 2008) (denying summary judgment). Even the district court, in a passage ignored by Contractors, acknowledged this case law when it initially refused to grant summary judgment based on “minor, isolated problems that were apparently remedied.” (ADD.6.)

Similarly, one-time problems which are corrected and do not recur do not start the limitations period. *See Fuhr v. D.A. Smith Builders, Inc.*, No. A04-2457, 2005 WL 3371035, at *3 (Minn. Ct. App. Dec 13, 2005) (“summary judgment should not be granted when the homeowner initially discovers a problem and takes corrective action that is apparently appropriate to fix the defect, and then a new injury appears and there is

evidence that the new injury is different in kind, location, cause, and appropriate corrective action”); *Lake City*, 428 N.W.2d at 112 (reversing summary judgment where repairs in 1982 prevented a recurrence of leaks until 1984, at which point owner discovered major problem and sued). This is particularly true when the early, corrected problems occur in different parts of the property, or are otherwise of a different nature from the later, more serious problems that spur litigation. *Fuhr*, 2005 WL 3371035, at *3. In other words, not every ice dam requires a Minnesota homeowner to sue every contractor who worked on his or her house.²

In most of the key cases relied upon by Contractors where summary judgment was properly granted, the problems recurred repeatedly after the initial discovery, and/or were never effectively repaired. *See, e.g., Hyland Hill N. Condo Ass'n. v. Hyland Hill Co.*, 549 N.W.2d 617 (Minn. 1996) (no attempted repairs for 3-6 year period); *The Rivers v. Richard Schwarz/Neil Weber, Inc.*, 459 N.W.2d 166 (Minn. Ct. App. 1990) (no evidence initial defects were ever resolved); *Dakota County v. BWBR Architects*, 645 N.W.2d 487 (Minn. Ct. App. 2002) (25 work orders for recurring leaks over a three year period); *Cedar Woods Ass'n v. Concord Realty Inv. & Dev., Inc.*, No. C7-99-218, 1999 WL 451220 (Minn. Ct. App. July 6, 1999) (no evidence that leaking decks were repaired).

² Contractors' attack on *Lake City* because it pre-dates statutory amendments in 1988 is a red herring. (*See Resp. Br.* at 30.) The amendments, of course, did not change the law of summary judgment, nor the consequent need for undisputed evidence of discovery of injury. Cases such as *Fuhr*, *City of Minneapolis* and *Li*, all decided in the last four years, prove the continuing vitality of *Lake City's* view of the summary judgment burdens under 541.051.

In the remaining cases relied on by Contractors (*see* Resp. Br. at 25-27 & 32, n. 10), the injuries alleged in the complaint were *identical* to the injuries discovered outside the limitations period, unlike the present case. In *Greenbrier Vill. Condo. Two Ass'n, Inc. v. Keller Inv., Inc.*, 409 N.W.2d 519 (Minn. Ct. App. 1987), there were eight defects alleged in the complaint, and the plaintiff “concede[d]” that “the record conclusively establishes discovery of” two of those defects outside the limitations period. *Id.* at 524. Moreover, the other six were prominently mentioned in documents dated before the limitations period. *Id.* at 522-24.

In *Oie v. Kroiss Construction, Ltd.*, No. A03-1135, 2004 WL 728246 (Minn. Ct. App. Apr. 6, 2004), the plaintiff sued for “water problems,” including water in the basement. Yet more than two years before suing, plaintiffs had “discussed the water problems,” been “provided with two separate disclosure statements stating that there was water present in the basement of the home,” and had hired an inspector who “reported” to them “the presence of water in the basement.” *Id.* at *5. The plaintiffs even “conceded that they knew about the water and moisture in the basement.” *Id.*³

Finally, while the case law recognizes that a homeowner must be diligent in investigating apparent problems, it also establishes that a failure to investigate only results in summary judgment where it is clear that an investigation would have revealed

³ In *Hoffman v. Van Hook*, No. A06-1213, 2007 WL 1053816 (Minn. Ct. App. Apr. 10, 2007), the unpublished decision is unclear about what type of damage was alleged in the complaint. But it appears that the plaintiff’s September 2003 complaint alleged structural damage unrelated to stucco insulation, even though he was on notice of such damage by November 7, 2002, due to an inspector’s note. *Id.* at *1, *5.

the key problem. *See Dakota County*, 645 N.W.2d at 493 (summary judgment affirmed because an investigation “surely” would have “revealed” the problems discovered later). As the trial court held in the case at bar: “At some point along the continuum of discovery of successive minor nuisances, there is a duty to inspect that triggers the running of the statute *if the inspection would have in fact revealed the defects.*” (ADD.7 (emphasis added).)

B. This Case Presents Material Fact Disputes About Whether Actionable Non-Mold Problems Were Discovered in 2002

As noted above, the district court properly rejected Buscher’s discovery of minor non-mold problems in 2002 as a basis for summary judgment. And during subsequent proceedings, no additional evidence was presented regarding those issues. Importantly, Judge Wexler never changed his characterization of them: “unrelated, minor and apparently readily correctable problems with isolated components of the home.” (ADD.39-40.) This assessment remains accurate for the following reasons.

1. The 2002 Problems Were Minor.

Substantial evidence supports the conclusion that all of the non-mold issues dealt with by Buscher in 2002 were insubstantial. For example, ice dams are a common Minnesota occurrence. (ADD.40.) The flashing around the chimney, to which Contractors devote considerable attention, is a “very simple maintenance problem.” (RA.156.) Damp attic insulation – another small problem – may not have even existed. (*See supra*, Part I.) Critically, Contractors have presented no evidence that the 2002 non-

mold problems were significant, except the false claim that Buscher hired architects who spent \$17,000 investigating them. (*See id.*)

2. The 2002 Problems Were Readily Correctable, And Were Corrected.

There is also substantial evidence in the record that the 2002 issues were quickly and effectively dealt with. (*See supra*, Part I.) Contractors' contrary claim misrepresents the record, and Contractors have completely failed to meet their burden of proving that repairs were not made.

3. The 2002 Problems Did Not Recur.

As noted above, many of the cases analyzing the statute of limitations focus on whether the problems recurred after their initial discovery. Contractors present no evidence that any of the non-mold issues recurred.

4. The 2002 Problems Were Unrelated To The 2004 Building Envelope Water Intrusion.

None of the issues from 2002 relate to the discovery in 2004 of the massive water intrusion within the building "envelope" which triggered this lawsuit. In fact, two of the 2002 issues occurred in the pool house and the decorative columns, which are not even part of the same structure as the house. Of the remainder, only one of the 2002 non-mold issues – stucco discoloration – relates to the walls, and that was such an insignificant problem that it was easily corrected with flashing. (RA.157-58.)

5. Buscher Was Diligent In Addressing Both The 2002 And 2004 Issues.

In 2002, Buscher's architects looked at the issues – although they certainly did not spend \$17,000 doing so – and Buscher took action on all of the issues and resolved them. In 2004, when a more serious problem occurred, Buscher hired eight different investigative firms and, upon learning that he now had a truly serious problem, evacuated the house and promptly initiated this litigation. (*See* Buscher Opening Br. at 3-4.) That is precisely the type of due diligence and good judgment the statute requires. Buscher did not sue at the drop of a hat in 2002, nor did he sleep on his rights in 2004. He investigated and, when a serious problem arose, he brought suit.

C. The Pearce Report's Discussion Of Mold Does Not Support Summary Judgment

With regard to the discovery of mostly-normal mold levels in 2002, Contractors refuse to view the Pearce Report as it *must* be viewed on summary judgment: in the light most favorable to Buscher. Viewed in that light, the Pearce Report reassured Buscher that no serious mold problem existed. (*See* Buscher Opening Br. at 6-7; 22-26.) Thus, the Pearce Report cannot be read to negate any material fact disputes about whether Buscher discovered an actionable injury in 2002.

Contractors incorrectly claim that the Pearce Report says that “two atypical mold species, both of which were indicators of damp building materials, were found growing in fourteen rooms in the house.” (Resp. Br. at 10 (citing A.58-61, ADD.16-21).) In truth, Pearce's sampling involved only ambient and carpet samples, and his report makes no mention of any “growing” mold. (ADD.16-17.) Thus, the mold mentioned in the Pearce

Report is unrelated to Buscher's discovery in July of 2004 that mold was growing inside the walls. Indeed, the 2004 problem was different in all respects from the inconsequential mold observations made by Pearce in 2002 issue, including type of mold, location, amounts and seriousness.

Also, Contractors ignore Pearce's diagnosis that the vacuum cleaner was the likely source of the elevated mold levels, as well as his prediction that changing vacuuming practices would correct those issues. (A.133-34.) Furthermore, Contractors' blithe assertion that the Pearce Report shows a *causal* connection between the mold and construction defects is not supported anywhere in the report, which draws no such conclusion. (*Compare* Resp. Br. at 9, 34, 36 *with* A.133-34.)

D. The District Court Lacked Sufficient Evidence Regarding The Scientific Significance Of The Pearce Report To Grant Summary Judgment

Summary judgment based on the Pearce Report is unupportable because the record is devoid of evidence explaining the scientific significance of Pearce's discussion of mold. (Buscher Opening Br. at 23-24.) Indeed, Contractors chose not to present any expert testimony regarding the significance of mold discussed in the Pearce Report. Now, Contractors are unable to refute the fact that the mere presence of mold has little or no legal significance, since there are no set thresholds beyond which mold is definitely a problem. (Buscher Opening Br. at 22.) Moreover, Contractors fail to acknowledge that the most dangerous type of mold was not found by Pearce in 2002. (*Id.* at 23, n. 10.)

Finally, Contractors disregard the myriad non-construction-related causes for mold in a home. (*Id.* at 24.)

In a misguided attempt to show that evidence explaining the scientific significance of Pearce's mold inspection was presented below, Contractors point to the October 3, 2007 hearing, where one of Buscher's attorneys responded to Judge Wexler's comment that he lacked knowledge of the scientific import of the mold report by giving a "Mold 101" tutorial. (Resp. Br. at 11.) Yet statements by an attorney are not evidence, and thus Contractors cannot use them to support summary judgment.

Moreover, the "Mold 101" tutorial explained why summary judgment was improper. Buscher's counsel pointed out that there are no firm standards establishing when levels of mold constitute a problem. (T. 10/03/07 at 15; *see also* Buscher Opening Br. at 22-23.) He also argued that determining whether the presence of mold constitutes an actionable injury is a factually intensive issue, resolved on a case-by-case basis. (T. 10/03/07 at 20.) And finally, counsel stated that one of the best ways to determine whether a mold problem exists is to compare mold levels inside the house with those outside the house – an exercise that was never done in this case. (T. 10/03/07 at 16-17.)

E. Scudder's Carpet Cleaning Does Not Support Summary Judgment

Contractors also imply that Scudder's carpet cleaning and inspection negated any material fact disputes regarding the presence of an actionable mold injury in 2002. (Resp. Br. at 14-15.) Yet Scudder found no evidence of mold under the carpet. (A.195-97.) To say, as the district court did, that Scudder should have continued looking until he

found the source of mold is simply to assume, without evidence, that there was a broader mold problem to be found. (ADD.43.) No record evidence shows that there was any such mold.

Viewed – as it must be – in the light most favorable to Buscher, the Pearce Report showed that Buscher did not have an actionable injury relating to mold in his home in 2002. This conclusion was only confirmed by Scudder, who failed to uncover any significant evidence of mold during his carpet inspection and cleaning. As a result, the Pearce Report and Scudder inspection cannot form the basis for a summary judgment decision against Buscher.

III. THE SANCTIONS AWARD SHOULD BE REVERSED

A. The January 9 Hearing Was Improper

The January 9, 2008 hearing was inappropriate, regardless of whether it was conducted pursuant to the sanctions provisions of Rules 11 or 56.07, or the court's "inherent power." (Buscher Opening Br. at 28-39.) Contractors counter by asserting that the January 9, 2008 hearing was "not a sanctions hearing of any sort." (Resp. Br. at 37). Rather, Contractors make the surprising claim that this hearing's purpose was "to provide Buscher the opportunity to submit additional evidence relating to the cleaning and inspection of carpets by Scudder." (*Id.* at 37-38.) By implying that the hearing was for Buscher's benefit, Contractors omit that Buscher did not request the hearing, was denied the right to speak to his own witness beforehand, and was excluded from the courtroom during that witness's testimony. Nor do Contractors cite to any statement by the district court that this was the purpose of the hearing. At least with respect to taking testimony at

the hearing, the district court acted entirely *sua sponte*, apparently for the purpose of testing credibility in the summary judgment context.

The suggestion that the January 9 hearing was procedurally proper because it was part of the summary judgment process ignores the clear instruction that summary judgment be decided exclusively on “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any.” Minn. R. Civ. P. 56.03. It also ignores a serious danger: live testimony as part of summary judgment invites the weighing of evidence where it is strictly forbidden. (*See* Buscher Opening Br. at 33-34.) In short, Contractors ignore the fact that a district court should not conduct a testimonial hearing as part of the summary judgment process, particularly not for the purpose of weighing the credibility of affidavits.

Contractors defend not only the January 9 hearing itself, but also the district court’s decisions to forbid Buscher or his counsel from speaking with Scudder before the hearing, and for sequestering Buscher during Scudder’s testimony. (Resp. Br. at 38.) Contractors cite no authority stating that a court may deny a party contact with its own witness prior to a testimonial hearing. (*Contra* Buscher Opening Br. at 38.) Similarly, while Contractors claim that even individuals who are “essential to the trial process,” such as the plaintiff himself, can be sequestered (Resp. Br. at 39), they cite to no authority for that proposition. Finally, Contractors imply that Buscher’s sequestration was appropriate because it came after the court determined that he had violated the no-contact order. (Resp. Br. at 39.) In fact, Buscher was sequestered at the outset of the

hearing before any determination regarding the no-contact order was made. (*See* 1/9/2007 Tr. at 6.)

Clearly, it was not permissible for the district court to conduct a testimonial hearing as part of the summary judgment process, *and* to forbid the plaintiff from having contact with the witness prior to the hearing, *and* to sequester the plaintiff from the hearing, *and then* to judge the credibility of the plaintiff's October 15, 2007 affidavit based on the hearing testimony. Yet, according to Contractors, that is precisely what the district court did here. This is hardly an example of a court "assiduously follow[ing] Minnesota law and procedure." (Resp. Br. at 4.)

B. The District Court Abused Its Discretion By Awarding Sanctions And Costs Under Rules 56.07 and 11.03

Buscher's initial brief also showed (at 40-46) that the district court's award of sanctions was an abuse of discretion, because neither Buscher's June 27 Affidavit nor his October 27 Affidavit rise to the level of intentionally and blatantly false statements that would justify the imposition of sanctions under Rules 56.07 and 11.03. Contractors' response is unavailing.

1. Buscher Did Not "Bury" The Pearce Report.

In Contractors' view, Buscher was rightfully sanctioned because he "buried" the Pearce Report in "the middle of four thousand unrelated documents" and "facilitated DeMars and Zimmerman overlooking the Pearce report by mis-numbering the report and not identifying the date of the report in its interrogatory answer." (Resp. Br. at 9; 45.) But a four thousand page document production is not large, and the producing party is not

obligated to provide an index. Moreover, if Buscher intended to “bury” the Pearce Report, he would not have expressly identified it in his interrogatory responses or testified about it – unprompted – at his deposition. (A.44, 109-11, 133-38.)

Contractors’ current tactic to shift blame to Buscher’s then-counsel contrasts with Contractors’ attorney’s affidavit submitted during district court proceedings, which properly accepted responsibility for (i) failing to locate the Pearce Report, and (ii) her inaccurate statements to the contrary during the summary judgment hearing:

- “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.” (A.169 (emphasis added).)
- “The first time I saw the Pearce mold report was ... [when I] was preparing for trial and, as part of that process, reviewed every single piece of paper produced by every party.” (A.170.)
- “*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.*” (*Id.* (emphasis added).)

Contractors’ attempt to back peddle from this position should be rejected.

2. Buscher Did Not “Delete” Words From The Pearce Report.

Contractors also claim that Buscher “carefully crafted” his June 27 Affidavit to “delete” and “exclude” the “key words and findings that were contained in the Pearce Report.” (Resp. Br. at 9-10.) But Buscher’s June 27 Affidavit shows what Buscher

knew, which is relevant to whether the statute of limitations was triggered by discovery of an actionable injury. The affidavit reflects Buscher's recollection of both an oral and a written communication with Pearce, and it refutes Contractors' claim that he discovered injury in 2002. As to the oral communication, there is no evidence that Buscher's affidavit is inaccurate. As to the written communication, the affidavit paraphrased the Pearce Report, without purporting to quote from it. Thus, Buscher could not have "deleted" words.

Equally unfair is Contractors' claim that Buscher's June 27 Affidavit "omitted numerous findings by Pearce that indicated that Buscher did, in fact, have a mold problem in his home." (Resp. Br. at 10.) As noted, Buscher's affidavit did not purport to include a full point-by-point description of the Pearce Report, which was unnecessary, since the report had been produced. Moreover, the Pearce Report repeatedly stated that mold was a non-issue or, at worst, a very minor one, concluding that "the mold levels in your home are not alarmingly high" and merely recommending that Buscher "have your carpets inspected and cleaned." (A.134; *see also* Buscher Opening Br. at 6-7.)

These so-called misquotes and omissions led the district court to conclude that Buscher's counsel did not engage in "fair advocacy." (ADD.84.) The conclusion is not only erroneous, it is also ironic in light of the liberties taken by Contractors' counsel when describing the record to this Court. (*See supra*, Part I.)

3. Buscher's Invocation of the Rule 11 Safe Harbor Cured Any Sanctionable Conduct.

With regard to Rule 11.03 sanctions, the district court abused its discretion by denying Buscher his safe harbor rights. The corrected affidavits and memoranda submitted by Buscher clearly did "satisfactorily correct the issues on which DeMars moved for sanctions." (*Contra* Resp. Br. at 44.) Indeed, Contractors do not bother to explain what was "[un]satisfactor[y]" about Buscher's corrections.

The corrected June 27 affidavit eliminated Contractors' concerns about the "within normal range" statement and the "no evidence of a building envelope intrusion envelope problem." (*See* Buscher Opening Br. at 43.) The corrected October 15 affidavit eliminated Contractors' concerns about Buscher's conversations with Scudder and the instructions that he gave Scudder. (*See* Buscher Opening Br. at 46.) Because the corrections removed the challenged statements, the district court was left without authority to sanction under Rule 11.

Contractors defend the district court's refusal to accept the corrected submissions because the district court believed it would be "bad policy" to do so. (Resp. Br. at 45; ADD.86.) But the policy decision was not the district court's to make. Buscher's safe harbor rights were established by the Supreme Court in *Uselman v. Uselman*, 464 N.W.2d 130 (Minn. 1990), and by Rule 11. Moreover, no authority supports Contractors' argument (at 44) that a party can still be sanctioned under Rule 11 even if the party has corrected the alleged offending submissions within the 21-day safe harbor period. The safe harbor of Rule 11 would be meaningless if it could be ignored, as

Contractors suggest. Finally, it is ironic that in *Gibson v. Coldwell Banker Burnet*, 659 N.W.2d 782 (Minn. Ct. App. 2003), cited by Contractors to support the notion that Rule 11 sanctions can be awarded “[e]ven if the offending party submits revised materials during the safe harbor period,” this Court reversed sanctions “because the Gibsons did not satisfy the 21-day safe-harbor provision of rule 11.03(a)(1).” *Id.* at 790.

4. Rule 56.07 Should Only Be Invoked When An Affidavit Is Demonstrably False Without Regard To Credibility.

Contractors contend (at 41) that it was proper to sanction Buscher under Rule 56.07 based on a credibility determination, citing *Citation Homes, Inc. v. Felton*, C0-01-2216, 2002 WL 1331745 (Minn. Ct. App. June 18, 2002), an easement case where affidavits relied on in opposition to summary judgment stated that property could only be accessed by crossing the defendant’s property. *Id.* at *1. Yet alternate access to the property had been “specifically granted to [the plaintiff’s] predecessors by the Goodhue County Highway Department on November 24, 1997.” *Id.* at *2. The district court granted Rule 56.07 sanctions (but took no live testimony).

On appeal, the sanctioned party argued that the affidavits had not been submitted in bad faith. *Id.* at *3. This Court affirmed, noting in dicta that the determination regarding intent was “based primarily on credibility.” *Id.* at *4. However, it is not clear what the *Citation Homes* Court meant by “credibility,” since there was no competing evidence about the plaintiff’s bad faith that required a credibility determination. Thus,

Citation Homes is a thin reed on which to base an argument that credibility determinations are appropriate in the Rule 56.07 context.

Moreover, Contractors' other cases underscore that Rule 56.07 is only properly invoked when an affidavit is demonstrably false based on incontrovertible contrary evidence, without regard to credibility. For example, in *Cobell v. Norton*, 214 F.R.D. 13 (D. D.C. 2003), the Interior Department submitted a summary judgment affidavit stating that the Government Accountability Office (GAO) had accounting controls in place "ensuring" that certain accounts "were accurately stated," and that the GAO had audited certain transactions "to prove their accuracy and validity." *Id.* at 17. Yet the Interior Department possessed a letter from the Office of the Comptroller General informing them that the GAO had neither conducted a final comprehensive audit of the accounts nor established any regular practice of auditing them. *Id.* at 21. And in *Rogers v. AC Humko Corp.*, 56 F.Supp.2d 972 (W.D. Tenn. 1999), an affiant stated that he did not know that the plaintiff had applied for short term disability until after she was fired, but at his deposition, testified that he did know about the short term disability application first. *Id.* at 979-80. Then, the affiant amended his deposition testimony to state that he did not recall the sequence of events, only to testify at trial that the decision to terminate came after the plaintiff applied for short term disability. *Id.* at 981.

As noted in Buscher's initial brief, it is paramount that the application of Rule 56.07 be limited to situations where a summary judgment affidavit has been shown to be false by incontrovertible contrary evidence without regard to credibility. If the Rule were

not so limited, the courts' freedom to judge credibility under Rule 56.07 would swallow the overarching principal that credibility cannot be weighed during summary judgment proceedings.

5. The District Court Should Not Have Sanctioned Buscher Under Rule 56.07 By Denying Him An Available Safe Harbor Under Rule 11.

Rule 56.07 sanctions were also inappropriate because the procedural safeguards of Rule 11 – including the safe harbor – should have also applied to the Rule 56.07 sanctions. A district court should not be able to sanction a party under one source of sanctions authority if the party has been denied an available safe harbor under another source of sanctions authority. *See Steele v. Mengelkoch*, No. A07-1375, 2008 WL 2966529, at *3 (Minn. Ct. App. Aug. 5, 2008).

C. The District Court Abused Its “Inherent Power”

Several of the cases Contractors cite in support of their assertion that a district court's has “inherent power” to issue sanctions are inapposite. For example, *Patton v. Newmar Corp.*, 538 N.W.2d 116 (Minn. 1995) involved sanctions for spoliation of evidence, and *In re Clerk of Lyon County Court's Compensation*, 241 N.W.2d 781 (Minn. 1976) was about whether a court had inherent power to set a minimum salary for its clerk.

At any rate, Contractors argue that a district court's inherent sanctions power is properly invoked where “conduct is not within the reach of rule or statute.” (Resp. Br. at 46-48 (citing *Olson v. Babler*, A05-395, 2006 WL 851798, at *7 (Minn. Ct. App. Apr. 4, 2006) among other case law.) But this rule has no application to the present case,

because here it was unnecessary to resort to “inherent power,” since Buscher’s alleged sanctionable activity – submitting purportedly false affidavits – fits squarely “within the reach” of Rule 11. The district court should have followed Rule 11.

Indeed, in one of Contractors’ cases, *NASCO, Inc. v. Calcasieu Television & Radio, Inc.*, 894 F.2d 696, 702 (5th Cir. 1990), the court took pains to “express no opinion whether, when the conduct is within the reach of either [*i.e.*, a sanctions rule or statute], the court may exceed those boundaries under the auspices of its inherent power.” *Id.* at 702. Thus, the *NASCO* decision implicitly acknowledged the distinction between exercising “inherent” sanctions power when no statute or rule-based sanctions power is available, and exercising “inherent” sanctions power despite the availability of rule or statute-based sanctions. As noted in Buscher’s initial brief, in *Steele v. Mengelkoch*, this Court acknowledged the same distinction, holding that a district court has no “inherent authority independent of rule 11” to order sanctions notwithstanding the plaintiff’s Rule 11 safe harbor rights. 2008 WL 2966529, at *3. Indeed, if a district court could sidestep the protections of Rule 11 by invoking its “inherent” authority to issue sanctions, Rule 11 would be rendered meaningless.

IV. THE DISTRICT COURT’S AWARD OF COSTS SHOULD BE REVERSED

As noted in our initial brief, it was also plain error for the district court to award Contractors fees and costs relating to preparation of expert reports, when none of the experts ever submitted a report, was deposed, or testified at an evidentiary hearing.

V. THE DISTRICT COURT CORRECTLY EXCLUDED FROM THE SANCTIONS ORDER FEES RELATED TO DEMARS' MOTION TO EXCLUDE THOMAS IRMITER

Contrary to Contractors' argument (at 49), the district court did not err by excluding fees and costs incurred by moving to exclude Buscher's expert, Thomas Irmiter, from the sanctions award. The district court denied the motion to exclude, and it was clearly within the court's discretion to determine that it would be unfair to tax Buscher for Contractors' fees and costs in bringing that unsuccessful motion.

CONCLUSION

Neither the minor construction-related issues that Buscher encountered in 2002, nor the Pearce Report, nor the Scudder carpet cleaning and inspection, comes close to demonstrating beyond dispute that Buscher was aware of an actionable construction-related injury more than two years before he initiated this lawsuit. Thus, there is a disputed issue of material fact, and summary judgment should be reversed.

The sanctions dispute has resulted from overreacting to a commonplace litigation issue, *i.e.*, whether a late-discovered document produced in discovery was sufficiently highlighted by the producing party, or whether the party who received the production was sufficiently diligent in its document review. If this dispute had been properly handled by the district court – rather than exacerbated by conducting an improper hearing, making judgments about credibility during summary judgment, and other errors – it would never

have become a major issue. Clearly, placing all of the blame on Buscher for this dispute was an abuse of discretion. The sanctions order should be reversed.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for appellant, certifies that this brief complies with the requirements of Minn. R. App. P. 132.01 in that it is printed in 13 point, proportionately spaced typeface utilizing Microsoft Word Word 2003 and contains 6,432 words, including headings, footnotes and quotations.

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