

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,*

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.*

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JOINT BRIEF AND APPENDIX**

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## LEGAL ISSUES

### **I. Did the district court err in granting summary judgment based on the statute of limitations, Minn. Stat. § 541.051, subd. 1?**

The district court held that Buscher's construction defect claims were time-barred by the two-year statute of limitations because Buscher had discovered the following damage more than two years before suing: elevated mold levels inside the home, mold species indicative of damp building materials in fourteen rooms, water intrusion at the home's decorative columns, water intrusion at a chimney flu, water intrusion at a skylight, deteriorated stucco at the pool house, water-stained stucco on the main house, ice dams on the roof, and wet insulation in the attic.

#### Apposite Authority:

Minn. Stat. § 541.051, subd. 1

*Dakota County v. BWBR Architects*, 645 N.W.2d 487 (Minn. Ct. App. 2002)

*Hyland Hill N. Condo. Ass'n, Inc. v. Hyland Hill Co.*, 549 N.W.2d 617 (Minn. 1996)

*Greenbrier Vill. Condo. Two Ass'n, Inc. v. Keller Inv., Inc.*, 409 N.W.2d 519 (Minn. Ct. App. 1987)

*The Rivers v. Richard Schwartz/Neil Weber, Inc.*, 459 N.W.2d 166 (Minn. Ct. App. 1990)

### **II. Did the district court abuse its discretion in awarding sanctions against Buscher and Childress based on their submissions of false affidavits and assertions of legal arguments without evidentiary support?**

The district court imposed monetary sanctions against Buscher and Childress for their intentional misrepresentation of the McGregor Pearce mold report and other violations.

#### Apposite Authority:

Minn. R. Civ. P. 56.07

Minn. R. Civ. P. 11

Minn. Stat. § 549.211

*Patton v. Newmar Corp.*, 538 N.W.2d 116 (Minn. 1995)

*In re Clerk of Lyon County Court's Compensation*, 241 N.W.2d 781 (Minn. 1976)

*Cobell v. Norton*, 214 F.R.D. 13 (D.C. Cir. 2003)

*Citation Homes, Inc. v. Felton*, 2002 WL 1331745 (Minn. Ct. App. June 18, 2002)

**III. Did the district court abuse its discretion in awarding costs?**

The district court awarded DeMars and Zimmerman their expert witness fees, finding the fees to have been reasonably incurred.

Apposite Authority:

*Quade & Sons Refrigeration, Inc. v. Minnesota Min. & Mfg. Co.*, 510 N.W.2d 256 (Minn. Ct. App. 1994)

**IV. Did the district court err in denying certain attorney fees and costs DeMars incurred related to sanctionable conduct by Buscher and Childress?**

The district court found that the attorney fees incurred by DeMars relating to the motion to exclude Buscher's expert Thomas Irmiter were related to sanctionable conduct by Buscher and Childress, but the court did not include these fees as part of the sanctions award because the district court had denied the motion on its merits.

Apposite Authority:

Minn. R. Civ. P. 56.07

Minn. R. Civ. P. 11

Minn. Stat. § 549.211

*Patton v. Newmar Corp.*, 538 N.W.2d 116 (Minn. 1995)

*In re Clerk of Lyon County Court's Compensation*, 241 N.W.2d 781 (Minn. 1976)

*Cobell v. Norton*, 214 F.R.D. 13 (D.C. Cir. 2003)

*Citation Homes, Inc. v. Felton*, 2002 WL 1331745 (Minn. Ct. App. June 18, 2002)

## STATEMENT OF THE CASE

Appellant Buscher brought this residential construction defect case in Hennepin County District Court. The Honorable Thomas W. Wexler presided. Non-party Appellant Childress is a law firm located in Chicago that represented Buscher.

Respondents DeMars and Zimmerman, both of whom were contractors that performed remodeling work on Buscher's house, moved for summary judgment, arguing that Buscher's claims were barred by the two-year statute of limitations, Minn. Stat. § 541.051, subd. 1. The evidence showed that Buscher had discovered numerous defects and had his home tested for mold more than two years before he sued.

In opposition to these motions, Buscher submitted an affidavit wherein he attested that a mold inspector examined his home and told him that the mold testing results were normal. At the summary judgment hearing, it became clear that the mold inspector had issued a report detailing his findings, and the court ordered Buscher's counsel to provide the report to the court and opposing counsel under cover of affidavit. Buscher's counsel never did so. The court, based on the record before it (without the mold report), denied DeMars' and Zimmerman's motions for summary judgment.

One month later, in the midst of preparing the case for trial, counsel for DeMars located the mold report, which was mis-Bates numbered and buried in the middle of four thousand unrelated documents in one of the six bankers boxes of documents produced by Buscher. The report showed that Buscher and his counsel had misrepresented the mold data. The report specifically indicated that elevated mold levels were found inside Buscher's home, and two atypical mold species that are indicative of damp building

materials were found in fourteen rooms. DeMars promptly provided the mold report to the court. With this additional evidence, the court granted summary judgment.

Buscher then brought a motion to vacate, arguing that he was not afforded an opportunity to fully address the mold report. After reopening the record, the court concluded that Buscher's additional evidence changed nothing, and the court re-entered summary judgment.

The court then imposed sanctions on Buscher and his counsel, Childress, for misrepresenting the mold report and other violations. This appeal followed.

Buscher and Childress ask this Court to believe that the district court ran amok and "inexplicably abandoned its role as an impartial neutral and prosecuted a series of unauthorized procedures." However, the lengthy and well-documented procedural history of this case reveals that the district court took great pains to make a complete record and ensure that all parties were heard both on the substantive summary judgment issue as well as on its assessment of sanctions. The court held six hearings and issued eight orders that thoroughly explained why the statute of limitations had run, as well as why Buscher's wrongdoings warranted sanctions. Every step of the way, the court assiduously followed Minnesota law and procedure, not only with respect to establishing and preserving the record on the substantive question, but with regard to developing and documenting the significant sanctionable conduct unearthed in the process.

## STATEMENT OF FACTS

### **A. Buscher bought a house and hired contractors to remodel it.**

Buscher is a wealthy businessman who primarily owns businesses involved with finance or real estate. (A. 12.) He owns five residences in Minnesota, Wisconsin, and Colorado. (A. 9.) All of his properties, including the property at issue in this lawsuit, are held by the Revocable Trust of Bradley J. Buscher. (A. 20.)

In 1995, Buscher purchased a large cedar-sided home in Minnetonka, Minnesota, with the expectation that he would renovate it. (A. 21.) Buscher hired contractors to remodel the home, construct two additions, build a pool house, and apply stucco to the exterior. (A. 44.) The construction work was performed from 1996 through 1998. (A. 25, 48.) DeMars was a foreman on the project, and Zimmerman was the stucco installer.

### **B. In 2006, Buscher sued the contractors.**

In February of 2006, Buscher sued the contractors for breach of contract, breach of statutory warranties, and negligence. He claimed that in July of 2004, after a large rainstorm, he had discovered construction defects, moisture intrusion, and mold.

(Amended Comp. at 4, 9.)

### **C. DeMars and Zimmerman moved for summary judgment, arguing Buscher discovered an actionable injury in 2002 and that his claims were barred by the two-year statute of limitations.**

As evidence was uncovered in the discovery process, DeMars and Zimmerman learned that Buscher had discovered damage much earlier than he claimed in his Amended Complaint. DeMars and Zimmerman moved for summary judgment on the basis that Buscher's claims were not brought within the two-year statute of limitations.

(A. 1.) DeMars and Zimmerman argued that Buscher discovered the following eight instances of construction-related damage in 2002, more than two years before Buscher sued the contractors in 2006:

1. Ice Dams on Roof: In 2002, Buscher discovered ice dams on his roof. His architect told him this problem resulted from faulty construction practices like improper ventilation and insulation and warned him that ice dams can lead to water infiltration. (RA. 116, 118.)
2. Wet Insulation in Attic: In 2002, 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 and may have been caused by ice dams on the roof. (RA. 14.)
3. Mold: In 2002, Buscher was concerned about mold in his home and had his home tested by a mold inspector named McGregor Pearce. (RA. 5-13, 115.) *(At the time the parties were briefing the motion for summary judgment, DeMars and Zimmerman were unaware of the mold report by McGregor Pearce.)*
4. Water-Stained Stucco: In 2002, Buscher discovered that, due to a lack of roof flashing, water was draining from the roof onto the stucco causing water staining. He hired a contractor to install eight roof kick-out flashings to stop the problem. (RA. 6-13, 97-98, 115, 157-158.)
5. Chimney Flue Leakage: In 2002, Buscher discovered that improper flashing had allowed water to infiltrate a furnace chimney, and water was coming into a mechanical room in the home. (RA. 94, 98, 156-157, 158-159, 161.)
6. Skylight Leakage: In 2002, Buscher discovered that water had intruded through a skylight. (RA. 98.)
7. Pool House Stucco Damage: In 2002, Buscher discovered that a portion of the stucco on the pool house had cracked and broken off. (RA. 16, 97-98, 158, 166.)
8. Water Intrusion at Decorative Columns: In 2002, Buscher discovered that water was intruding into decorative columns where the stucco and the roof met on top of the columns. The finish on the columns was breaking down and the joints on the columns were cracking. (RA. 5-14, 16, 85, 95, 97-98, 114-115, 130, 143, 156.)

Buscher not only discovered these eight instances of damage in 2002, but he was so concerned about the damage that he paid his architects \$17,000 to examine them. (RA. 14-15.) He also paid contractors to repair damage, such as roof flashing that was installed to try to stop the water staining on the stucco on the main house. The record establishes that Buscher was aware that the problems related to the work done by the contractors because Buscher told his architect (in 2002) that he thought DeMars was a “crook” and was responsible for the defective work. (RA. 115.)

DeMars and Zimmerman argued that Buscher knew or should have known that his home sustained injury in 2002 and could have sued the contractors back in 2002 for all eight of these problems, for the money he spent investigating the problems, and for the money spent in repairs. Because an “actionable injury” was discovered in 2002, Buscher had until 2004 to sue the contractors, but because he waited until 2006 to sue, his claims were barred by the statute of limitations.

**D. Buscher opposed summary judgment by arguing he did not discover an actionable injury until additional damage was discovered in 2004.**

In opposition to DeMars’ and Zimmerman’s motions for summary judgment, Buscher argued that it was not until May of 2004 when he discovered additional damage that he discovered an actionable injury. According to Buscher, in May of 2004, after a major rainstorm went through the area, he noticed water leaking above a bedroom closet. He then hired a slew of experts who tore into the walls and found wet wood, wet insulation, and other wet materials. (A. 60.)

With respect to DeMars' and Zimmerman's argument that Buscher had mold concerns back in 2002, Buscher attempted to minimize this issue with the following affidavit testimony:

In April, 2002, I had my home tested for mold by McGregor Pearce, an indoor air quality investigator. Mr. Pearce told me that the results from his mold sampling were within the normal range and that he saw no evidence of a building envelope water intrusion problem.

(A. 59.) Buscher did not attach the Pearce Report to his affidavit, and Buscher never provided it to the court in his opposition submissions.

**E. The district court denied DeMars' and Zimmerman's motions for summary judgment.**

On July 17, 2007, the district court heard DeMars' and Zimmerman's motions for summary judgment. When the mold testing issue came up at the hearing, the court inquired whether the Pearce mold report had ever been produced. (T. 07/17/07 at 11.) Buscher's counsel replied that it had been produced in discovery but that Buscher had not submitted it to the court. (*Id.*) The court ordered Buscher's counsel to submit the Pearce Report to the court under cover of affidavit. (*Id.* at 11-12.)

Buscher's counsel never complied with this order. Two months went by and on September 4, 2007, the district court denied DeMars' and Zimmerman's motions for summary judgment. (ADD. 2.) Relying on Buscher's affidavit testimony, the court stated that the mold testing performed by McGregor Pearce in 2002 "did not reveal the existence of mold in the home." (ADD. 6.) The court stated, "At this point, summary judgment is inappropriate because there is a genuine issue of material fact as to when Plaintiffs knew of, or with due diligence should have discovered, and [sic] actionable

injury.” (*Id.*) The Pearce Report was not a part of the record when the district court issued its order.

**F. DeMars located the McGregor Pearce mold report and provided it to the court, which thereafter granted summary judgment.**

Several weeks later, while in the midst of trial preparation, DeMars’ counsel happened to come across the McGregor Pearce mold report, which was buried in the middle of four thousand unrelated documents in one of the six bankers boxes of documents produced by Buscher.<sup>1</sup> (A. 170; T. 03/05/08 at 13.) The Pearce Report was the proverbial smoking gun because it contained undeniable evidence that Buscher discovered mold problems in 2002. The report was also undeniable proof that Buscher and his counsel had deliberately misrepresented Pearce’s findings by submitting Buscher’s false affidavit, then making false arguments based on the false affidavit, and then refusing to comply with the court’s order to submit the report to the court.

Buscher’s affidavit had been carefully crafted to exclude key words and findings that were contained in the Pearce Report. For example, while Pearce indicated that the mold testing “results are *mostly* within the normal range,” Buscher deleted the word “mostly” and attested that the results “were within the normal range.” (A. 58-61; ADD. 16-21.) While Pearce indicated that he found “no *obvious* evidence of a *serious* envelope problem related to the stucco finish on your home,” Buscher deleted “obvious” and

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<sup>1</sup> Later, in the context of the sanctions motions, the court determined that Buscher’s counsel “facilitated” defense counsel overlooking the Pearce Report by “misdirect[ing]” defense counsel because the report was not identified with the correct bates number in answers to interrogatories, and the answers to interrogatories did not identify the date of the report, despite the interrogatory’s request to do so. (ADD. 50; T 03/05/08 at 13-14; ADD. 52.)

“serious” and attested that Pearce found “no evidence of a building envelope water intrusion problem.” (*Id.*)

Not only were key words deleted, but Buscher also omitted numerous findings by Pearce that indicated that Buscher did, in fact, have a mold problem at his home.

Buscher did not include Pearce’s statement that “stucco wall failure often does not produce elevated mold levels until the wall system is almost completely decayed.” (*Id.*)

Buscher did not include Pearce’s findings that elevated mold levels were found in four rooms in the home and that two atypical mold species, both of which were indicators of damp building materials, were found growing in fourteen rooms in the home, both in the upstairs and downstairs of the home. (*Id.*)

At the time the Pearce Report was uncovered, DeMars’ counsel was in the process of briefing DeMars’ motion for certification seeking an interlocutory appeal. Since the Pearce Report related to this motion, DeMars’ counsel submitted the report to the court in conjunction with that motion. At the hearing on this motion, which took place on October 3, 2007, the court began by addressing the Pearce Report that was now a part of the record:

But I want to tell you a couple of things I’m thinking about and I’m concerned about.

Number one, I think I’m going to review my order previously denying summary judgment and I may -- I may -- underline may -- reverse myself, because this McGregor Pearce report may put it over the line.

Previously I didn’t have that report. I think Ms. Eckland [DeMars’ counsel] is correct, that I asked for it [the Pearce Report]. I didn’t get it from the plaintiff but now I’ve got it. My sense is that there might be enough in there to constitute the kind of notice as a matter of law that would trigger the running of the statute.

Plaintiff's representation of what was in that report was not a complete representation of the extent to which the report addressed mold concerns . . . .

(T. 10/03/07 at 4.)

The court also expressed concern about what some of the mold data numbers meant. (*Id.* at 13.) Buscher's counsel, Michael Duffy, represented to the court that he could answer any such questions because he had been handling mold cases for twelve years and had actually tried the very first mold case in the country. (*Id.* at 14.) Duffy argued at length about mold, the Pearce Report, and whether receipt of the Pearce Report amounted to knowledge of an actionable injury. (*Id.* at 14-28.) Duffy cited to particular subsections in a mold treatise, (*Id.* at 16.), and talked about what Buscher's experts would say regarding the type and amount of molds. (*Id.* at 17.) He went into such detail about mold that both the court and Duffy joked about Duffy providing a "Mold 101" tutorial. (*Id.* at 19.) Duffy also downplayed Pearce's findings by arguing Pearce's only recommendation to Buscher was to have his carpets cleaned and inspected for the presence of mold, which Duffy claimed Buscher had done by hiring a carpet cleaner named Daniel Scudder.

With respect to the court's comment about reviewing the previous order denying summary judgment, Duffy repeatedly represented that Buscher wanted to keep the current trial date. (*Id.* at 38.) In response, the court indicated it would promptly review the summary judgment issue. (*Id.*)

On October 3, 2007, with the Pearce Report now a part of the record, and after the parties had an opportunity to present their arguments regarding the report, the court

vacated its earlier order and granted DeMars' and Zimmerman's motions for summary judgment. The court stated, "In conducting analysis as to when Plaintiff discovered the injury giving rise to this lawsuit, the existence of a generalized moisture problem, and the existence of mold as a result, was important." (ADD. 12.) The court noted that the information regarding the mold testing was "supported solely by Brad Buscher's affidavit, dated June 27, 2007," which the court determined was "neither accurate nor complete." (ADD. 12, 13.) The court stated that the Pearce Report "contains additional statements that indicate the existence of a generalized moisture problem within Plaintiffs' home." (ADD. 13.)

The court provided an explanation as to why the Pearce Report, along with the other evidence of damage, constitutes discovery of an actionable injury as a matter of law:

The Pearce Report, taken in context with the other more isolated and arguably minor defects in the Buscher home, weighs in favor of a finding that Plaintiff's injury was discovered, or with due diligence, should have been discovered. See Dakota County v. BWBR Architects, 645 N.W.2d 487, 492 (Minn. Ct. App. 2002). Prior to disclosure Pearce Report's disclosure [sic], there was scant evidence before the Court of Plaintiffs' knowledge of a more generalized mold problem, the injury which forms the greatest substance of Plaintiffs' present cause of action. . . .

The Pearce Report evidences a more particularized knowledge on the part of the Plaintiffs, that they knew of a "moisture problem" in the basement. Further, the Pearce Report draws a causal connection between the moisture and mold issues in the home and the deteriorating columns, which Plaintiffs had previously argued were merely "ornamental in nature" and apart from the structure of the home itself.

(ADD. 14.)

**G. The court then reopened the record to allow additional evidence regarding the mold report and carpet cleaning.**

Despite Buscher's counsel's "Mold 101" tutorial, despite Buscher's counsel's eagerness to have the trial date remain as scheduled, and despite Buscher's counsel's never complaining at the motion to certify hearing about any procedural concerns, Buscher brought a motion to vacate the summary judgment order pursuant to Rule 60 of the Minnesota Rules of Civil Procedure.<sup>2</sup> (A. 165.) He requested that the court reopen the record on summary judgment, consider affidavits indicating that Buscher had followed the recommendations of Pearce by having Scudder clean and inspect his carpets, and then provide its ruling on a more complete record. (T. 11/29/07 at 4-5, 11-13.)

At the motion to vacate hearing, it was apparent that the court was becoming increasingly concerned about the behavior of Buscher and his counsel, Childress. The court noted its concern that Buscher's affidavit and earlier arguments amounted to a "significant misrepresentation of the content of the report . . . ." (*Id.* at 18.) The court also asked Buscher's newly retained counsel whether any bad faith should be attributed to "the failure of your predecessor [Childress law firm] to furnish the report" when the court specifically asked him to do so. (*Id.* at 17.) Buscher's new counsel acknowledged that the behavior of the Childress lawyers was "regrettable." (*Id.* at 18.)

Nevertheless, the court acknowledged the importance of having a complete record and, by order dated December 19, 2007, directed that DeMars subpoena the carpet

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<sup>2</sup> For the Rule 60 motion, Buscher hired the Dorsey law firm to represent him in addition to the Childress law firm.

cleaner, Daniel Scudder, to appear before the court to give testimony and produce documents.<sup>3</sup> (ADD. 25, 26.) The court also ordered that none of the attorneys, parties, or their agents were to have any contact with Scudder prior to his testimony. (ADD. 25.) The court explained that, given Buscher previously “misrepresented the content of the Pearce Report” and given other apparent inconsistencies in affidavits and records relating to the carpet cleaning, the court was taking measures to ensure it would receive “genuine” information regarding the carpet cleaning.<sup>4</sup> (ADD. 26-27.)

Scudder appeared to testify on January 9, 2008. Prior to his testimony, Scudder’s attorney informed the court that someone had secretly left litigation-related materials in his mailbox the night before. (T. 01/9/08 at 9.) Buscher’s counsel stated he was “stunned” and had “absolutely no idea whatsoever” that this had occurred. (*Id.* at 10-11.) Buscher’s counsel stated that he had informed Buscher of the court’s no-contact order. (*Id.* at 11.) The court then ordered Buscher to be sequestered in the hallway for the proceeding. (*Id.* at 6.)

Scudder then testified about the carpet cleaning services he provided to Buscher in 2002. (*Id.* at 15-78.) In contrast to Buscher’s claim that Scudder cleaned the carpets and inspected for mold pursuant to Pearce’s recommendations, Scudder testified that: (1) he

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<sup>3</sup> In the context of a later sanctions order, the court explained that the order requiring Scudder to appear and give testimony was made under Minn. R. Evid. 614 because Buscher’s credibility before the court was “impaired.” (ADD. 59-60.)

<sup>4</sup> In the context of a later sanctions order, the court explained that the no-contact order was “designed to secure un-coached testimony from Mr. Scudder,” that Buscher cited to no authority that such an order was impermissible, and that the no-contact order was “akin to sequestering witnesses.” (ADD. 60.)

was simply performing an “ordinary cleaning” of Buscher’s carpets at one of his regularly scheduled monthly appointments, (2) Buscher asked him to make sure there wasn’t mold near the sliding glass door leading to the pool where people often tracked in water, (3) Buscher didn’t say anything to him about a mold report, and (4) he had no idea that a mold inspector had found elevated mold levels in the home. (*Id.* at 54-55, 57, 62, 65-67, 76.)

Scudder also testified that Buscher’s secretary had contacted him, told him to hire an attorney, and told him to review his earlier affidavit. (*Id.* at 16-17.) Buscher’s secretary had left affidavits of Buscher and Scudder and the Pearce Report in his mailbox for him to review. (*Id.* at 19, 24-25.) Scudder also testified that Buscher’s counsel, Michael Duffy, had met with him in October to prepare the affidavit that had been submitted with Buscher’s Rule 60 motion. (*Id.* at 73-74.) Scudder had told Duffy at that time that the scope of the 2002 inspection was limited to looking near the door to the pool. (*Id.* at 74.) Scudder testified that he had no idea why Duffy had not included in the affidavit that the scope of his carpet inspection was limited to looking near the door leading to the pool outside. (*Id.*)

#### **H. The court then re-entered summary judgment.**

On March 4, 2008, the court issued its final order related to summary judgment. (ADD. 29.) The court indicated that it received and considered the additional submissions from Buscher and the oral testimony of carpet cleaner Scudder. (*Id.*) Based on the complete record, the court re-entered summary judgment. (*Id.*)

The court provided an explanation for the twists and turns leading to its final ruling on summary judgment. The court explained that “this initially seemed to be a close case, when summary judgment was originally considered, [but] it no longer seemed close after the Mold Report was made available.” (ADD. 33-34.) The court explained why it granted summary judgment after receiving the Pearce Report:

The basis for summary judgment was that Plaintiff was on notice of an actionable injury reasonably related to a construction defect. The combination of multiple water intrusion incidents and the elevated mold levels in the Mold Report and the location of some of the worst mold near the exterior columns that had leaked and discolored and had peeling paint and were noted to be indicative of a moisture problem, along with other comments in the Mold Report indicating consistency with damp building materials, was the basis for granting summary judgment.

(ADD. 31-32.)

According to the court, Buscher’s earlier representations concerning the Pearce Report were “significantly inaccurate.” (ADD. 34.) The court explained:

Once the Mold Report was produced, it clearly appears that a reasonable layperson would be on notice of an injury sufficient to start the period of limitations. There were elevated mold levels all over this house which should have caused concerns about damp building materials, construction defects and resulting moisture infiltration. Of course, in addition, there were specific notable instances of leaking into the house. At least one of those locations was specifically noted in the Mold Report to be related to a place where elevated mold levels were discovered.

(ADD. 34.)

The court noted its regret in initially denying the motion without reviewing the Pearce Report:

Plaintiff was originally ordered to produce it to the Court, did not produce it, and, after approximately seven weeks, the undersigned decided not to wait for it. In retrospect, I should have waited, because the report did not

say what Plaintiff and his counsel represented to the Court and in fact contained substantial information adverse to Plaintiff's position.

(ADD. 32, footnotes omitted.)

The court also explained that the new affidavits submitted by Buscher and Scudder's testimony relating to cleaning and inspecting carpets in the home did not change the statute of limitations analysis. (ADD. 33.) Since Pearce had found mold in multiple rooms on both floors of the home, the court determined that Scudder's minimal, regularly scheduled carpet cleaning activities did not create a genuine issue of material fact. (ADD. 33-36, 41.)

**I. DeMars and Zimmerman moved for sanctions.**

On February 8, 2008, DeMars moved for sanctions under Minn. R. Civ. P. 56.07, Minn. R. Civ. P. 37.02, and Minn. R. Civ. P. 11, against Buscher, as well as against his counsel from both the Childress firm and the Dorsey firm in the form of, *inter alia*, attorneys fees incurred from July 17, 2007—the date of the original summary judgment hearing—until early February, 2008, when the sanctions motion was made.<sup>5</sup> (T. 03/05/08 at 49-50.) The motion papers were served along with a notice that Buscher had 21 days to withdraw or correct the offending papers. (A. 174-176.)

On February 25, 2008, counsel for Buscher (both from Dorsey and Briggs & Morgan) served amended affidavits and memoranda. (A. 177-228.) Three briefs were submitted in opposition to the motion. A full hearing, with all counsel present, was held on March 5, 2008. (*See generally* T. 03/05/08.)

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<sup>5</sup> Buscher hired the Briggs & Morgan law firm to represent him with respect to the sanctions issues.

**J. The court issued its preliminary order granting sanctions.**

In its order dated April 22, 2008, the court held that it was going to impose sanctions and explained that its decision was “primarily based” on Rule 56.07, but was also based on Rule 11, as well as on the court’s inherent powers. (ADD. 49, 65-66.) The court found that “the results of McGregor Pearce’s investigation were substantially misrepresented, both by errors of commission and errors of omission.” (ADD. 51.) The court stated, “Plaintiff and his counsel intentionally misquoted the Pearce Report, under the guise of presenting Plaintiff’s personal recollection of a five year old oral conversation by using some of the exact words and phrasing that appear in the report, with crucial omissions that change the sense of the Pearce Report.” (ADD. 52.) The court found that “the drafter of the Buscher summary judgment affidavit and memorandum made calculated decisions to mislead.” (ADD. 50-51, 53.) “Plaintiffs counsel argues that this was fair advocacy. It was not.” (ADD. 52.) The court specifically found that false information had been communicated to the court. (*Id.*)

The court went on: “Plaintiff’s attempt to cure the errors in the submissions noted above, by filing corrected affidavits and memoranda, does not cure the harm that has been caused by unnecessary expenditure of court time and attorney time in responding to his previous misrepresentations.” (ADD. 54, footnote omitted) The court noted that the corrected materials did not address the Childress attorneys’ violation of Rules of Professional Conduct 3.3(a)(1) or the violation of Minnesota Rule of Civil Procedure 56.07. (ADD. 54.) The court also stated that the corrected materials “fail[ed] to explain the misrepresentation concerning the more extensive investigation that was represented in

Mr. Scudder's original affidavit and the Dorsey memorandum." (ADD. 64-65.) The court concluded that Rule 11 safe harbor provisions "would not seem to apply to the kind of intentional misconduct that occurred here," and that Rule 56.07 "does not contain or appear to require a safe harbor provision." (ADD. 54-55.)

The court found that sanctionable conduct also occurred *after* the false summary judgment submissions in July of 2007. There were "additional misrepresentations in his affidavits and memorandum submitted in support of his motion for relief from judgment." (ADD 64.) The court found that Buscher and his counsel, through affidavits and memoranda submitted in connection with Buscher's Rule 60 motion, facilitated "the misrepresentation of Daniel Scudder's investigation." (ADD. 55.) The court found that the Dorsey lawyers played no part in the sanctionable conduct and that the Childress lawyers had misled the Dorsey lawyers. (ADD. 57.) The court also found that Buscher, by having his secretary contact Scudder, "intentionally violated" the court's no-contact order, "again showing his disrespect for the court." (ADD. 60.)

Addressing counsel's argument with respect to Rule 56.07, the court recognized that authority from other jurisdictions requires that sanctionable conduct be "egregious." (ADD. 61.) The court determined that Buscher's characterization of Pearce's findings *was* egregious and that Buscher's omissions regarding Pearce's actual findings were substantial. (*Id.*) The court stated:

Clearly the [Pearce] report created problems for Plaintiff's case. Plaintiff knew that, and Plaintiff intentionally chose to mischaracterize the Pearce Report for the purpose of escaping summary judgment, in this substantial case . . . .

(*Id.*) The court's memorandum went on to carefully raise, address, and consider each and every argument made in all three of the briefs submitted to the court in opposition to the sanctions motions concluding, *inter alia*, that Buscher's June, 2007 affidavit was "perjurious or blatantly false." (ADD. 62; *see generally* 58-65.)

The court indicated it would be imposing sanctions against Buscher and Childress, and the court set a hearing date and advised Buscher and his counsel that they should also come prepared to show cause why they should not be held in contempt of court for violating Rules 56.07 and/or 11.03(b) and be subject to constructive criminal contempt. (ADD. 47-48.) The court also requested briefing from the parties on whether the court should withdraw the pro hac vice status of the Childress lawyers. (ADD. 48.) The court also advised that Buscher should be prepared to show cause why he should not be held in contempt of court for violating its no-contact order, and the court ordered Buscher to bring to the hearing his secretary who contacted Scudder, documents he had related to the contact with Scudder, and his most recent financial statement. (*Id.*)

In response to Buscher's several objections to this order, the court issued an amended order indicating that it was going to refer the issue of criminal contempt by Buscher to the appropriate prosecuting attorney, rather than proceeding with the matter itself. (ADD. 80.) The court also stated that Buscher was no longer required to bring his secretary who contacted Scudder, documents he had related to the contact with Scudder, or his most recent financial statement. (*Id.*)

**K. The court held a hearing on the amount of sanctions and then issued orders imposing sanctions, costs, and disbursements against Buscher and Childress.**

DeMars and Zimmerman provided submissions to the court detailing the fees incurred relative to the sanctions issues, as well as with respect to costs and disbursements. The court held a hearing regarding these issues on July 11, 2008. Thereafter, the court issued an order awarding DeMars \$24,059 and Zimmerman \$13,702 as against Buscher and Childress.<sup>6</sup> (ADD. 101-02.) The court also ordered the Childress firm to pay a penalty to the court of \$10,000. (*Id.*) In the memorandum accompanying that order, the court stated that Buscher's submissions in opposition to DeMars' and Zimmerman's original summary judgment motion "included the misrepresentations that generated substantial unnecessary time and attention by the opposing parties and by the Court, and that unnecessarily increased the cost of this litigation." (ADD. 103.) In so doing, the court again found that its award of sanctions was based on its inherent power as well as upon Minn. Stat. § 549.211 and Minn. R. Civ. P. 11.03(a)(2). (ADD. 106.) In addition, the court found that it was appropriate to order both Buscher and the Childress firm to pay a penalty to the court for "the very substantial time" that the court devoted to "the wrongful conduct." (ADD. 108.) It noted that such sanctions would have been imposed "on the court's own motion, even if there had been no motion by defendants." (*Id.*)

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<sup>6</sup> The court declined to include in the sanctions award the attorney fees and costs DeMars incurred related to moving to exclude one of Buscher's primary experts, Thomas Irmiter, because the court denied the motion on its merits.

At the same time, the court issued a preliminary order on costs and disbursements and ordered an evidentiary hearing on costs. (ADD. 110-118.) After the costs hearing, the court issued a final order on October 6, 2008, awarding DeMars costs and disbursements in the amount of \$63,060, and Zimmerman costs and disbursements of \$16,676. (ADD. 119-130.)

## ARGUMENT

### I. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT.

#### A. Standard of Review

On appeal from summary judgment, “the role of the reviewing court is to review the record for the purpose of answering two questions: (1) whether there are any genuine issues of material fact to be determined, and (2) whether the trial court erred in its application of the law.” *Offerdahl v. Univ. of Minn. Hosps. and Clinics*, 426 N.W.2d 425, 427 (Minn. 1988). The facts must be reviewed in the light most favorable to the nonmoving party. *H.B. ex. rel. Clark v. Whittemore*, 552 N.W.2d 705, 705 (Minn. 1996).

Once a showing has been made under Rule 56, the burden shifts to the non-moving party to “present specific facts showing that there is a genuine issue for trial.” Minn. R. Civ. P. 56.05; *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).

“Speculation, general assertions and promises to produce evidence at trial” are insufficient to meet this burden. *Nicollet Restoration v. City of St. Paul*, 533 N.W.2d 845, 848 (Minn. 1995). “Genuine issues of material fact must be shown by substantial evidence.” *Brookfield Trade Ctr., Inc. v. County of Ramsey*, 609 N.W.2d 868, 874

(Minn. 2000). When assessing whether there are genuine issues of material facts, “the court is not required to ignore its conclusion that a particular piece of evidence may have no probative value, such that reasonable persons could not draw different conclusions from the evidence presented.” *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997).

**B. The Two-Year Statute of Limitations, Minn. Stat. § 541.051, subd. 1, Begins to Run When the Homeowner Discovers an “Actionable Injury.”**

Minn. Stat. § 541.051 provides the statute of limitations applicable to Buscher’s claims:

(a) Except where fraud is involved, no action by any person in contract, tort, or otherwise to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property . . . shall be brought against any person performing or furnishing the design, planning, supervision, materials, or observation of construction or construction of the improvement to real property . . . more than two years after discovery of the injury . . . .

Minn. Stat. § 541.051, subd. 1(a) (2006).

Minnesota courts define “discovery of the injury” as the time when an “actionable injury” was discovered. *Dakota County v. BWBR Architects*, 645 N.W.2d 487, 492 (Minn. Ct. App. 2002) (citing *The Rivers v. Richard Schwartz/Neil Weber, Inc.*, 459 N.W.2d 166, 168, n. 2 (Minn. Ct. App. 1990), *review denied* (Minn. Oct. 25, 1990)). An “actionable injury” is discovered “when the plaintiff discovers an injury sufficient to entitle him or her to maintain a cause of action.” *Metropolitan Life Ins. Co. v. M.A. Mortenson Co.*, 545 N.W.2d 394, 398 (Minn. Ct. App. 1996), *review denied* (Minn. May 21, 1996).

In construction defect litigation, homeowners have made numerous arguments to avoid summary judgment. Some have argued that the statute should not run if they discover damage but do not know what caused it. Others have argued that the statute cannot run when there are multiple defects occurring in different parts of the house that develop at different times. Others still have argued that the statute should not run if they notice slight problems, then notice bigger problems.

The courts have consistently rejected these arguments, returning again and again to the rule that the statute begins to run upon discovery of an “actionable injury,” not discovery of the defect. *Dakota County*, 645 N.W.2d at 492; *Hyland Hill N. Condo. Ass’n, Inc. v. Hyland Hill Co.*, 549 N.W.2d 617 (Minn. 1996), *cert. denied*, 519 U.S. 1041 (1996), *overruled on other grounds by, Vlahos v. R&I Const. of Bloomington, Inc.*, 676 N.W.2d 672 (Minn. 2004). 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 the running of the statute whenever the homeowner discovers an “actionable injury.” *See Dakota County*, 645 N.W.2d 487; *see also Greenbrier Vill. Condo. Two Ass’n, Inc. v. Keller Inv., Inc.*, 409 N.W.2d 519, 523 (Minn. Ct. App. 1987) (“It is not necessary for the final or ultimate damages to be known or predictable, however, the statute begins to run when some damage occurs which would entitle the victim to maintain a cause of action.”) (*citing Bulau v. Hector Plumbing and Heating Co.*, 402 N.W.2d 528, 530 (Minn. 1987)). The courts have acknowledged that while dismissing claims as time-barred under § 541.051 “may be harsh, the legislative intent of Minn. Stat. § 541.051 is clear.” *Ford v. Emerson Elec. Co.*, 430 N.W.2d 198, 201 (Minn.

Ct. App. 1988) (affirming district court's grant of summary judgment and dismissal of wrongful death action).<sup>7</sup>

Several seminal Court decisions illustrate why the district court's order granting summary judgment must be affirmed.

### 1. *Greenbrier*

In *Greenbrier Vill. Condo. Two Ass'n, Inc. v. Keller Inv., Inc.*, 409 N.W.2d 519 (Minn. Ct. App. 1987),<sup>8</sup> a condominium building had multiple problems: defects in the roof flashing, basement ceiling mortar, patios, hallway expansion joints, ceiling plank joints, and sidewalks and water intrusion. The building owner sued various builders in September 1983. Discovery revealed that more than two years before suing, the association became aware of intermittent problems with the construction work, and a memorandum from the association's maintenance committee listed some, but not all, of

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<sup>7</sup> The federal courts in Minnesota have been quite active in interpreting § 541.051, and they are in complete harmony with the state courts. To have an "actionable injury," one must only have enough facts to be aware a "potential injury may exist." *Appletree Square One Limited v. W.R. Grace & Co.*, 815 F.Supp. 1266, 1279 (D. Minn. 1993) ("A plaintiff may not sit on its hands and wait for the full details to become available. Rather, the plaintiff must then act on what is known . . . . The statute of limitations "does not await a 'leisurely discovery of the full details' of the injury.") (citing *Davidson v. Wilson*, 763 F.Supp. 1465, 1469 (D. Minn. 1990)), *aff'd*, 973 F.2d 1391 (8th Cir. 1992)); *Continental Grain Co. v. Fegles Construction Co., Inc.*, 480 F.2d 793, 797 (8th Cir. 1973) ("It is not necessary for the final or ultimate damages to be known or predictable, however, the statute begins to run when some damage occurs which would entitle the victim to maintain a cause of action."); *Moen v. Rexnord, Inc.*, 659 F.Supp. 988, 990 (D. Minn. 1987) (It is irrelevant whether a homeowner knows that the damage he has discovered could support a potential cause of action.).

<sup>8</sup> Though *Greenbrier* was decided prior to the amendment of Minn. Stat. § 541.051, the amendment does not alter any of the Court's analysis, and *Greenbrier* is still good law.

the defects that were ultimately at issue in the lawsuit. *Id.* at 520. The district court granted summary judgment.

On appeal, the association conceded that discovery of some of the relatively minor defects (sunken patios and rusted flashing) were discovered more than two years prior to suit, but argued that several others were discovered within that period (inadequate flashing, hazardous basement ceiling mortar, cracks in the hallways, cracks in the units, settling of entrance walk, and exterior leaks). The association argued that “these defects differ from those discovered before September 1981 not only in degree, but in kind.” *Id.* at 524.

The Court of Appeals began by stating that § 541.051 begins to run upon discovery of the damage. The court then stated:

It is not necessary for the final or ultimate damages to be known or predictable, however, the statute begins to run when some damage occurs which would entitle the victim to maintain a cause of action.

*Id.* at 523 (emphasis removed). The Court rejected the association’s attempt to circumvent the running of the statute of limitations by distinguishing or separating the problems that had been discovered over the years, finding that the association had a cause of action in September 1981. In so finding, the Court held:

We do not find any of the specified defects (or those subsequently cited) sufficiently separate and distinct from those mentioned in the discovery documents to create a cause of action in addition to that which arose prior to September 1981.

*Id.* at 524. The court also rejected the association’s argument that it had only discovered “symptoms of defective workmanship.” The court stated, “It is not necessary for the final

or ultimate damages to be known . . . .” *Id.* (alteration in original). Because the association had learned of defects more than two years before suing that were “sufficient to state a cause of action,” *id.* at 525, the Court of Appeals affirmed the district court’s grant of summary judgment.

## 2. *The Rivers*

A few years after *Greenbrier*, the Court confronted a similar fact pattern in *The Rivers v. Richard Schwartz/Neil Weber, Inc.*, 459 N.W.2d 166 (Minn. Ct. App. 1990). There, a condo association sued for defects in the roof, terrace, garage, and brick façade, and the record showed that various association members and residents noticed different problems at different times. The district court was satisfied that the association had discovered “an injury sufficient to entitle it to maintain a cause of action” more than two years before suing. *Id.* at 169, citing *Greenbrier*, 409 N.W.2d at 524. This Court affirmed. *Id.*

## 3. *Hyland Hill*

In *Hyland Hill N. Condo. Ass’n, Inc. v. Hyland Hill Co.*, 549 N.W.2d 617 (Minn. 1996), *cert. denied*, 519 U.S. 1041 (1996), *overruled on other grounds by, Vlahos v. R&I Const. of Bloomington, Inc.*, 676 N.W.2d 672 (Minn. 2004), the Minnesota Supreme Court held that § 541.051 commences upon discovery of an injury, even if the injury increases in severity, and even if other types of injuries develop later on. The plaintiff in *Hyland Hill* was aware of relatively slight water intrusion from the roof in 1987, but did not have a “deluge” of water intrusion until 1989. The Supreme Court held that the statute begins to run “upon discovery of the injury,” which was when the plaintiff became

aware of the relatively slight water intrusion in 1987, not when the “deluge” occurred in 1989. *Id.* at 621.

The Supreme Court also held that non-roof-related defects were time-barred, even though they were not related to the roof, and even though they occurred over the next several years:

To draw a line between roof, masonry, patio or sundeck defects strikes us as arbitrary. The [plaintiff] has cited no law, nor are we aware of any, which would require the district court to distinguish between these different types of construction defects.

*Id.* The Supreme Court held that the plaintiff’s roof and non-roof defect claims were time-barred by § 541.051. *Id.* at 622.

#### 4. *Dakota County*

At issue in *Dakota County v. BWBR Architects*, 645 N.W.2d 487 (Minn. Ct. App. 2002), were construction defects in one of the County’s buildings. Beginning in 1992, Dakota County workers were notified about leaks in the building, and over the course of the next two years, the County’s maintenance staff performed repairs on dozens of leaks located in different parts of the building. After six years, expert investigation was performed and suit was initiated in 1998.

The Court noted that leaks began back in 1992 and that the statute begins to run upon discovery of an “actionable injury.” *See id.* at 492. It did not matter that the County maintenance workers who discovered the leaks were not experts. “Expert knowledge is unnecessary, however, because it is knowledge of the injury, not the defect, which triggers the statute of limitations.” *Id.* (citing *Hyland Hill*, 549 N.W.2d at 621).

Importantly, the court made clear that all the various leaks were really just one problem, defective construction:

Dakota County also argues that the various leaks were separate and distinct, or that some of the leaks were discovered well after 1994, so that the statute of limitations should not apply equally to these subsequent leaks. Similar arguments have been rejected by the supreme court, which has concluded that separate injuries must be aggregated under the mantle of defective construction and that the statute of limitations begins to run upon discovery of an actionable injury.

*Id.* at 493 (citing *Hyland Hill*, 549 N.W.2d at 621 (emphasis added)).

**C. The District Court Correctly Determined That, as a Matter of Law, Buscher Discovered an “Actionable Injury” in 2002.**

It is undisputed that Buscher discovered eight different instances of damage in 2002, and—with the Pearce Report now a part of the record—it is also undisputed that Buscher discovered mold growing in his home in 2002. The district court properly found, in accordance with the longstanding precedent outlined above, that Buscher’s lawsuit in 2006 was commenced too late.

On appeal, Buscher ignores the above-discussed seminal case law and instead cites to only two published cases: *Wittmer v. Ruegemer*, 419 N.W.2d 493 (Minn. 1988), and *Lake City Apartments v. Lund-Martin Co.*, 428 N.W.2d 110 (Minn. Ct. App. 1988). Buscher lists *Wittmer* as the lead apposite case in his “statement of issues,” and later cites to it for the proposition that “if reasonable minds may differ about the time of discovery or when the *defective and unsafe condition* should have been discovered in the exercise of due diligence, the question is for the trier of fact.” *Wittmer*, 419 N.W.2d at 497 (emphasis added).

It is significant to note that the only two published cases that Buscher relies upon, *Wittmer* and *Lake City*, were both decided in 1988. In response to *Wittmer*, the legislature amended Minn. Stat. § 541.051 to clarify that the limitations period begins to run upon discovery “of the *injury*,” not discovery of a “defective and unsafe condition.” See Minn. Stat. § 541.051 (amended by 1988 Minn. Laws ch. 607). Although *Wittmer* was not technically overruled, the Supreme Court found in *Willmar v. Short-Elliott-Hendrickson*, 475 N.W.2d 73, 76-77 (Minn. 1991), that the legislature’s amendment “significantly altered the statute of limitations” and “effectively overruled *Wittmer* by establishing the discovery of the injury, rather than a defective condition, as the point at which the limitations period begins to run.” Accord *Hyland Hill*, 549 N.W.2d at 621.

*Wittmer* and *Lake City*, given the amendment to § 541.051, really serve to highlight the fact that the statute of limitations began to run when Buscher discovered multiple instances of property damage and mold in 2002 related to the construction project.<sup>9</sup> Whether Buscher discovered the precise *condition* causing the injury is irrelevant. It is discovery of the *injury*, not discovery of the condition causing the injury,

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<sup>9</sup> Buscher’s attempt to analogize the facts of *Wittmer* and *Lake City* to this case is difficult because, at least with respect to *Wittmer*, the Court never addressed the question of when the building owner first discovered damage sufficient to constitute an actionable injury. See *Wittmer*, 419 N.W.2d at 496. With respect to *Lake City*, the owner in that case had an engineering firm investigate a pipe leak problem, and it recommended that a pressure reducing valve be installed; that was done, and all leaks stopped for two years. But in this case, Buscher discovered eight instances of damage in different places in his home back in 2002, never had his home thoroughly inspected, and never made necessary repairs. Moreover, he also knew in 2002 that there were elevated mold levels in the home, even near some of the leakage problems, but never addressed them.

that triggers the statute of limitations. *Willmar*, 485 N.W.2d at 76-77; *Hyland Hill*, 549 N.W.2d at 621.

Other than *Wittmer* and *Lake City*, Buscher relies upon three unpublished cases: *Fuhr v. D.A. Smith Builders, Inc.*, No. A04-2457, 2005 WL 3371035 (Minn. Ct. App. Dec. 13, 2005), *City of Minneapolis v. Architectural Alliance*, No. A05-1909, 2006 WL 2348084 (Minn. Ct. App. Aug. 15, 2006), and *Li v. Zawadski*, No. A07-0604, 2008 WL 933459 (Minn. Ct. App. Apr. 8, 2008). While Buscher acknowledges that these unpublished cases are not precedential, Buscher nevertheless repeatedly utilizes them for that very purpose. Unpublished opinions of the Court of Appeals are not precedential and should not be cited as precedent. Minn. Stat. § 480A.08, subd. 3(c). One of the reasons for this rule is that “[b]ecause the full fact situation is seldom set out in unpublished opinions, the danger of mis-citation is great.” *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800 (Minn. Ct. App. 1993); *see also Vlahos v. R&I Const. of Bloomington, Inc.*, 676 N.W.2d 672, 676, n. 3 (Minn. 2004).

Buscher argues these cases establish that summary judgment is not appropriate when a homeowner discovers minor, unrelated problems, fixes those problems, and then later discovers new and different problems. *See Fuhr*, 2005 WL 3371035, at \*3; *Zawadski*, 2008 WL 933459, at \*5-\*6; *City of Minneapolis*, 2006 WL 2348084, at \*7. But in so doing, he not only ignores the seminal published cases that hold otherwise, he

also ignores the substantial number of other unpublished cases which are detrimental to his argument.<sup>10</sup>

Even if these cases could be considered precedential, Buscher's reliance on these cases is misplaced because in all three cases the court concluded that there was a fact issue regarding whether the homeowner discovered an actionable injury. In *Fuhr*, the homeowner discovered discolored sheetrock below a window. 2005 WL 3371035, at \*1. The homeowner ripped out the sheetrock, and the studs behind the sheetrock were "clean as a whistle." *Id.* Everything was fine until over four years later when water damage was discovered at the same window. *Id.* The homeowner then removed the sheetrock and discovered "massive mold." *Id.* In *Zawadski*, the homeowner had the home inspected early on and the inspector indicated that the house was in "very good" condition but that "no place is perfect." 2008 WL 933459, at \*1. The inspector found some issues that needed to be addressed (e.g. missing caulking, missing shingles), but the inspector did

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<sup>10</sup> See, e.g., *Hoffman v. Van Hook*, No. A06-1213, 2007 WL 1053816 (Minn. Ct. App. Apr. 10, 2007) (homeowner's claims time-barred pursuant to *Dakota County* because he discovered damage to his home more than two years before suing, even though he later discovered more significant and different damage) (RA. 213-218.); *Oie v. Kroiss Construction, Ltd.*, No. A03-1135, 2004 WL 728246 (Minn. Ct. App. Apr. 6, 2004) (homeowner's claims time-barred pursuant to *Dakota County* because he discovered moisture in his basement, broken windows, gutter issues, and stucco discoloration more than two years before suing, even though an inspector was hired and found no problems and repairs were made, and even though it was not until later, within two years of suing, that the homeowner discovered he had a water infiltration problem and that mold was growing in his home) (RA. 219-225.); see also *Trips, Inc. v. Yaggy Colby Assocs., Inc.*, No. A04-718, 2005 WL 14925 (Minn. Ct. App. Jan. 4, 2005) (RA. 226-231.); *Cedar Woods Ass'n v. Concord Realty Inv. & Dev. Co.*, No. C7-99-218, 1999 WL 451220 (Minn. Ct. App. July 6, 1999) (RA. 232-235); *Zaidan Holdings, Inc. v. Miller, Hanson, Westerbeck & Berger Architects, Inc.*, No. C0-94-2101, 1995 WL 228189 (Minn. Ct. App. Apr. 18, 1995) (RA. 236-238). This case is much more similar to *Hoffman* and *Oie*.

not locate property damage such as water intrusion or mold. *Id.* In *City of Minneapolis*, the building owner discovered minor concrete chipping early on that the owner believed was caused by machinery driving on the concrete and tools being dropped on the concrete, and the building owner's engineer determined that it was impossible that defective construction would have caused the problems. 2006 WL 2348084, at \*2, \*7.

What is common in *Fuhr*, *Zawadski*, and *City of Minneapolis* is that there was arguably a fact issue about whether a reasonable owner would be aware that the problems discovered early on were related to the construction work performed by the defendants that were eventually sued. A reasonable person in the *Fuhr* case may have thought there was no actionable injury because the studs were "clean as a whistle." A reasonable person in the *Zawadski* case may have thought there was no actionable injury because there was no real damage to the property and the home inspector concluded that the house was in "very good" condition. And a reasonable person in the *City of Minneapolis* case may have thought there was no actionable injury because there was no evidence that the minor concrete chipping was related to the installation of the concrete.

But there is no such fact issue in the present case. Buscher is asking this Court to ignore the seminal statute of limitations cases and reverse the district court based upon snippets from unpublished case law. *Dakota County* mandates that when there are multiple construction defects, the court is to aggregate these defects and start the running of the statute whenever the homeowner first discovers an "actionable injury." As the district court found, Buscher discovered eight different instances of property damage in 2002—not just minor problems, but *damage to his home*. Buscher knew at the time that

all the damage had to do with the construction work done by the builders. The damage was present in many places at his home, including water intrusion at a chimney, deteriorated stucco at the pool house, water intrusion at a skylight, and mold in the basement and on the main floor. Some of the worst mold was near the exterior columns where Buscher had noticed water intrusion problems. The presence of elevated mold levels in his home, coupled with his knowledge of water intrusion and other damage occurring in different parts of his home, constitutes knowledge of injury, as a matter of law, thereby triggering the statute of limitations.

In his Amended Complaint, Buscher clearly alleges that his causes of action are based on construction defects associated with the work of the contractors, and he even includes specific allegations that relate directly to the particular damage he discovered in 2002, not 2004. For example, Buscher alleges in the Amended Complaint that “DeMars . . . [was] under a legal duty . . . in managing the construction of . . . the new pool house so as to guard against injury and damage.” (Amended Comp. at 7.) Buscher discovered stucco problems with the pool house in 2002. Buscher alleges that “DeMars . . . failed . . . to install counter flashing at all locations where the new roof assemblies tied into existing roof assemblies . . . [and failed] to install kick-out diverters.” (Amended Comp. at 8.) Buscher discovered the missing flashing and the resulting water staining on the stucco in 2002 and had to pay a contractor to install flashing.

It is immaterial that Buscher discovered additional damage in 2004, and it does not matter if some of the damage discovered in 2004 was different in kind or severity—what *is* dispositive is that Buscher discovered an actionable injury in 2002. As this Court held

in *Greenbrier*, 409 N.W.2d at 523, “It is not necessary for the final or ultimate damages to be known or predictable, however, the statute begins to run when some damage occurs which would entitle the victim to maintain a cause of action.” Nearly identical factual issues and holdings were involved in *The Rivers*, 459 N.W.2d at 166 (different defects discovered at different times), *Hyland Hill*, 549 N.W.2d at 621 (“The [plaintiff] has cited no law, nor are we aware of any, which would require the district court to distinguish between these different types of construction defects.”), and *Dakota County*, 645 N.W.2d at 493 (“the supreme court . . . has concluded that separate injuries must be aggregated under the mantle of defective construction and that the statute of limitations begins to run upon discovery of an actionable injury.”).

As the district court correctly found, the damages for which Buscher is suing were first discovered in 2002. While additional damage was discovered in 2004, there is no authority that allows the court to have a limitations period for the 2002-discovered remodeling work problems, and another limitations period for the 2004-discovered remodeling work problems. Instead, *Dakota County* requires these defects to be aggregated. While scenarios can be imagined where damages could be so dissimilar to somehow require multiple statute of limitations periods, when Buscher discovered problems with his roof, window, chimney, insulation, and stucco and *mold growing in his home*, he was on notice of an actionable injury. When it comes to deciding whether defects should be aggregated (as in *Dakota County*) or whether the defects are so dissimilar that they should not be aggregated, the decision falls to the discretion of the district court judge and is reviewed under the “abuse of discretion” standard. *See Hyland*

*Hill*, 617 N.W.2d at 621 (“Thus, for purposes of establishing a discovery date, we hold that the district court did not abuse its discretion in not distinguishing between roof and nonroof defects.”); *see also Trips, Inc. v. Yaggy Colby Assocs., Inc.*, No. A04-718, 2005 WL 14925, at \*4 (Minn. Ct. App. Jan. 4, 2005) (“[T]he district court here did not abuse its discretion by choosing to treat all of [plaintiff’s] moisture-related injuries as one injury . . . .”) (RA. 226-231.)

Buscher’s attempt to save his claim by arguing that “mold is everywhere” and that he had his carpet cleaner check for mold near the door to the pool misses the point. As the district court properly determined, what triggered the statute in 2002, as a matter of law, was Buscher’s discovery of eight instances of damage to his home *plus* Pearce finding elevated mold levels *plus* Pearce finding two atypical mold species that are indicative of damp building materials *plus* Pearce finding some of the worst mold near an area where Buscher had discovered water intrusion. (*See* ADD. 31-32.)

In accordance with the Court of Appeals’ decisions in *Greenbrier*, *The Rivers*, *Metropolitan Life*, and *Dakota County*, in accordance with the Supreme Court’s decision in *Hyland Hill*, and in harmony with the federal courts’ decisions in *Appletree Square*, *Davidson*, *Continental Grain*, and *Moen*, the district court properly held that Buscher’s claims are barred by Minn. Stat. § 541.051. That decision should be affirmed.

## **II. THE DISTRICT COURT COMMITTED NO ERROR IN IMPOSING MONETARY SANCTIONS AGAINST BUSCHER AND CHILDRESS.**

### **A. Standard of Review**

The district court has wide discretion in awarding the type of sanctions it deems necessary, and a sanctions award is typically reviewed for an abuse of discretion. *Kellar v. Von Holtum*, 605 N.W.2d 696, 702 (Minn. 2000); *Becker v. Alloy Hardfacing & Eng'g Co.*, 401 N.W.2d 655, 661 (Minn. 1987). The district court's interpretation of its powers and obligations under statutes and rules is reviewed de novo. *Weston v. McWilliams & Assocs.*, 716 N.W.2d 634, 638 (Minn. 2006) (statutes); *Rubey v. Vannett*, 714 N.W.2d 417, 421 (Minn. 2006) (rules).

### **B. The January 9, 2008 Proceeding was Procedurally Proper.**

Buscher's opposition to sanctions rests heavily on Buscher's argument that the January 9, 2008 court proceeding, at which carpet cleaner Daniel Scudder testified, was procedurally improper. (App. Br. at 29.) Buscher claims the district court lacked authority to conduct such a proceeding and that he was denied his safe harbor rights under Rule 11. (*Id.* at 30.) His arguments fail in every respect. Buscher fundamentally misconstrues the very nature and purpose of the proceeding, and all his arguments following therefrom are flawed as a result.

The purpose of the January 9 proceeding was to provide Buscher the opportunity to submit additional evidence relating to the cleaning and inspection of carpets by Scudder. (ADD. 26; 59-60.) It was not a sanctions hearing of any sort. At the proceeding, Scudder gave his testimony, and the court accepted the additional

submissions Buscher wanted the court to consider. (T. 01/09/08 at 4, 9-10, 15-78.) The proceeding was in response to Buscher's Rule 60 request to reopen the record to allow this very evidence. (ADD. 26, 59-60.) Buscher wanted the court to consider evidence relating to Scudder's cleaning and inspection of carpets, and Buscher was provided that opportunity at the January 9 proceeding.

The court followed appropriate procedural rules in conducting the proceeding. The court explained that its order requiring Scudder to testify in court was based on Rule 614 of the Minnesota Rules of Evidence. (ADD. 59-60.) This Rule provides that "[t]he court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called." Minn. R. Evid. 614(a). The Rule further provides that the court may interrogate any witness called to testify. Minn. R. Evid. 614(b); *see generally Olson v. Blue Cross and Blue Shield*, 269 N.W.2d 697, 702 (Minn. 1978) ("If a trial court is doubtful about the testimony of any witness in a court trial, he may have not only the right but the duty to interrogate a witness.").

The court also appropriately ordered Buscher to have no contact with Scudder prior to the hearing and to remain outside the courtroom while Scudder testified. The court explained that its no-contact order was "designed to secure un-coached testimony from Mr. Scudder," that Buscher cited to no authority that such an order was impermissible, and that the no-contact order was "akin to sequestering witnesses." (ADD. 60.) Under Rule 615 of the Minnesota Rules of Evidence, the district court may sequester witnesses on its own motion. The court appropriately took into account the fact that Buscher had previously "misrepresented the content of the Pearce Report" and that

there were apparent inconsistencies in affidavits and records relating to the carpet cleaning. (ADD. 26-27.) After Buscher had violated the no-contact order, it was appropriate for the court to consider this violation in deciding to have Buscher remain outside the courtroom while Scudder testified. Buscher cites to Minn. R. Evid. 615, Advisory Committee Comment – 1989, for the proposition that individuals who are “essential to the trial process . . . should not be excluded.” This misquotes the Comment, which does not say anything regarding parties being excluded.

Buscher also argues the Scudder proceeding was improper under Rule 11 because the court denied Buscher certain minimum procedural safeguards. (App. Br. at 29-30). This argument is also wrong. As stated, the purpose of the proceeding was not to investigate sanctionable conduct by Buscher, but rather to add to the record the testimony of Scudder and documents related to his work. (ADD. 26; 59-60.) Scudder’s testimony went to the issue of whether Scudder’s activities would somehow stop the statute from running after Buscher discovered an actionable injury in 2002. The testimony was not taken to investigate sanctionable conduct, although further bad faith conduct was discovered in the process.

For such a proceeding, Buscher is not afforded any procedural safeguards under Rule 11. At the time of the Scudder hearing, DeMars and Zimmerman had not even yet moved for sanctions—that did not occur until a month later. (A. 174-176.)

**C. The District Court Properly Imposed Sanctions Under Rule 56.07 For Buscher's Bad Faith Submissions on the Motion for Summary Judgment.**

The district court found that “the drafter of the Buscher summary judgment affidavit and memorandum made calculated decisions to mislead” in order to escape summary judgment. (ADD. 53, 61.) The court stated that “the results of McGregor Pearce’s investigation were substantially misrepresented, both by errors of commission and errors of omission.” (ADD. 51.) The court imposed sanctions under Rule 56.07 of the Minnesota Rules of Civil Procedure and its inherent powers. (ADD. 68, 106).

Rule 56.07 provides as follows:

Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party submitting them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits causes the other party to incur, including reasonable attorney fees, and any offending party or attorney may be adjudged guilty of contempt.

Minn. R. Civ. P. 56.07 (emphasis added). The district court determined that Buscher’s affidavit was presented in bad faith and, in accordance with the unambiguous language of Rule 56.07, the district court ordered Buscher to pay DeMars and Zimmerman the amount of expenses the bad faith affidavit caused them. The district court’s determination of what constitutes “bad faith” under Rule 56.07 is reviewed for abuse of discretion. *Citation Homes, Inc. v. Felton*, C0-01-2216, 2002 WL 1331745, at \*3 (Minn. Ct. App. June 18, 2002) (RA. 239-242). (There is no published Minnesota case law on this subject.)

Buscher argues the district court cannot base its determination of bad faith under Rule 56.07 on credibility determinations. However, in *Citation Homes*, the Court held that the district court properly based its determination of bad faith “primarily on credibility,” and that such a determination is left to the sound discretion of the district court. 2002 WL 1331745, at \*4 (affirming district court’s finding of bad faith under Rule 56.07). Minnesota commentators agree that the district court has discretion in determining the propriety of a sanctions award under Rule 56.07, even to the extent of identifying what “bad faith” is under any given circumstance, describing the rule as “delineat[ing] the inherent power of the court to preserve the integrity of summary judgment procedures.” 2 David F. Herr & Roger S. Haydock, *Minnesota Practice* § 56.41 (3d ed. 1998).

In the present case, Buscher’s credibility played a role in the district court’s determination of bad faith, and the district court committed no error by making this credibility determination. The court also based its determination of “bad faith” on a comparison of Buscher’s affidavit to the language in the Pearce Report. The court determined that the affidavit language was drawn from the report, but that through “errors of commission and omission,” Pearce’s findings were misrepresented in the affidavit. (ADD. 83-84.) The district court’s determination of “bad faith” was appropriately based on Buscher’s credibility *and* its comparison of the affidavit and report language.

Buscher’s affidavit rises to the level of “bad faith” as that phrase is used in Rule 56.07. The Court in *Citation Homes* defined “bad faith” to include “affidavits that make intentional and false statements or intentional omissions.” 2002 WL 1331745, at \*4.

Federal case law interpreting the analogous federal rule, Rule 56(g), indicates that sanctions are warranted for affidavits that contain “a highly reckless representation of an important fact” and where an affidavit was “flatly at odds with facts indisputably within his knowledge.” *Cobell v. Norton*, 214 F.R.D. 13, 20 (D.C. Cir. 2003) (citing *Rogers v. AC Humko Corp.*, 56 F.Supp.2d 972, 979-81 (W.D. Tenn. 1999); *Acrotube, Inc. v. J.K. Fin. Group, Inc.*, 653 F.Supp. 470, 477-78 (N.D. Ga. 1987)). In the present case, the district court determined that Buscher’s conduct was beyond reckless, that Buscher had “intentionally misquoted the Pearce Report, under the guise of presenting Plaintiff’s personal recollection of a five year old oral conversation . . . .” (ADD. 52.)

Buscher points to this Court’s decision in *Bresser v. Minnesota Trust Co. of Austin v. Bruns*, No. C2-97-140, 1997 WL 559744 (Minn. Ct. App. Sept. 9. 1997), to argue that Rule 56.07 should be invoked only if the case proceeds past summary judgment and the affiant later gives testimony that contradicts his earlier affidavit. While that happened to be the particular procedural scenario in *Bresser*, the Court did not hold or even suggest that this was the only procedural posture that could give rise to sanctions under Rule 56.07. Such a limitation would conflict with the clear language of the rule which, on its face, allows the court to assess sanctions if it appears “to the satisfaction of the court *at any time* that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay.” Minn. R. Civ. P. 56.07 (emphasis added).

The district court properly determined that Buscher’s summary judgment affidavit was presented in “bad faith” under Rule 56.07. As a result, and in accordance with the

clear language in Rule 56.07, the district court appropriately ordered Buscher to pay DeMars and Zimmerman the amount of fees and costs the bad faith affidavit caused them to incur.

Buscher argues that even if his affidavit was presented in bad faith, the district court abused its discretion under Rule 56.07 because Buscher filed “corrected” affidavits and memoranda. However, as correctly noted by the district court, Rule 56.07 does not contain a safe harbor provision. (ADD. 54.) There is no authority for the proposition that Rule 11 safe harbor provisions should be applied in assessing sanctions under Rule 56.07. Nevertheless, certain basic procedures arguably apply. In *Uselman v. Uselman*, 464 N.W.2d 130, 143 (Minn. 1990), *superseded by statute and rule*, the Supreme Court stated that “the attorney or party must have fair notice of both the possibility of a sanction and the reason for its proposed imposition.” Here, the record indicates that Buscher was notified on February 8, 2008 of DeMars’ intention to seek sanctions, his attorneys submitted three memoranda in opposition, and he was provided full opportunity to be heard at the March 5, 2008 sanctions hearing. Buscher was therefore given fair notice of the possibility of a sanction, the reasons for it, and a full opportunity to be heard.

The district court’s decision to award sanctions under Rule 56.07 was procedurally proper, and the court did not abuse its discretion. Its decision should be affirmed.

**D. The District Court Properly Imposed Sanctions Under Rule 11 For Buscher’s Bad Faith Submissions on the Rule 60 Motion.**

The district court found that Buscher facilitated “the misrepresentation of Daniel Scudder’s investigation” by filing affidavits and memoranda in support of his Rule 60

motion that contained “misrepresentations.” (ADD. 55-58, 64.) The court imposed sanctions under Rule 11.03 and its inherent powers. (ADD. 68, 106.)

Unlike Rule 56.07, a motion brought under Rule 11 must adhere to the 21-day safe harbor rule contained in Rule 11.03(a)(1).<sup>11</sup> DeMars complied with this rule. He served Buscher with his motion for sanctions on February 8, 2008. (A. 174-176.) Within the safe harbor period, Buscher served certain “corrected” affidavits and memoranda. (A. 177-228.) However, because these “corrected” documents did not satisfactorily correct the issues on which DeMars moved for sanctions, DeMars filed the motion for sanctions on February 29, 2008. (RA. 274.) A full hearing was then held on March 5, 2008. (*See generally* T. 03/05/08.)

Buscher argues that his filing of amended affidavits terminated DeMars’ and Zimmerman’s right to seek sanctions. (App. Br. at 31.) That is wrong. A party moving for sanctions is required to give the non-moving party an opportunity to serve corrected materials, but after the 21-day safe harbor period, the moving party is permitted under Rule 11.03(a)(1) to go forward with a sanctions hearing if it so desires, irrespective of whether the non-moving party made an attempt to correct its submissions.

Buscher also argues DeMars should have brought his sanctions motion earlier in the lawsuit. (App. Br. at 31.) Rule 11 does not say anything with regards to when during a lawsuit a motion for sanctions should be brought. However, in *Uselman* the Supreme Court stated that notice of the possibility of sanctions should be given “as early as

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<sup>11</sup> Rule 11 was amended in 2007, but the amendment related to stylistic changes only. Rule 11.03(a)(1) has been renumbered to Rule 11(c)(2).

possible during the proceedings to provide the attorney and party the opportunity to correct future conduct.” 464 N.W.2d at 143. Buscher argues that since he had produced the Pearce Report in August of 2006, DeMars and Zimmerman could have moved for sanctions immediately after Buscher served his June 2007 affidavit. (App. Br. at 31.) Buscher’s argument that DeMars and Zimmerman should have uncovered his wrongdoing sooner ignores the court’s finding that Buscher facilitated DeMars and Zimmerman overlooking the Pearce report by mis-Bates numbering the report and not identifying the date of the report in his interrogatory answer. (ADD. 50; T 03/05/08 at 13-14; ADD. 52.) DeMars uncovered the Pearce Report in September 2007. DeMars and Zimmerman first heard about Scudder in October 2007 at the motion to certify hearing, and they did not know Scudder’s inspection had been misrepresented until January 2008. The motion for sanctions was promptly served in February 2008.

There is no requirement that parties need to bring a Rule 11 motion within a certain amount of time following sanctionable conduct. This would seem especially true given Buscher masked his misconduct by mis-Bates numbering the Pearce Report and then ignored the court’s order that he provide the report to the court under cover of affidavit. The only requirement under Rule 11 is that the moving party provide a 21-day safe harbor period, and DeMars satisfied that requirement.

Buscher argues he availed himself of Rule 11’s safe harbor provision by submitting corrected affidavits and memoranda, but that the court improperly disregarded the corrected materials and wrongly imposed a monetary sanction. The district court

determined that the corrected materials “did not cure the harm,” and that it would be “bad policy” to apply safe harbor protections to intentional misstatements. (ADD. 86.)

Even if the offending party submits revised materials during the safe harbor period, the district court still has discretion whether to impose monetary sanctions. *See* Minn. R. Civ. P. 11.03(b). As long as appropriate notice has been given and the offending party has an opportunity to respond, the district court has “wide discretion” under Rule 11 to award the type of sanctions it deems necessary. *Gibson v. Coldwell Banker Burnet*, 659 N.W. 2d 782, 790 (Minn. Ct. App. 2003). Rule 11.03(b) states that a sanction should be limited to deter repetition of comparable conduct by others similarly situated and can include an award of attorney fees incurred as a direct result of the violation. Here, the district court appropriately found that dismissal of Buscher’s claims was too severe under the circumstances. But, in consideration of the considerable waste of time and money caused by Buscher’s false Rule 60 submissions, the district court appropriately assessed a monetary sanction against Buscher. The district court’s decision should be affirmed.

**E. The District Court’s Inherent Power is Additional Authority for its Sanctions Order.**

The district court expressly recognized in its orders that its award of monetary sanctions was based not only on Rules 56.07 and 11, but also on its exercise of its inherent power. (ADD. 106.) The Minnesota Supreme Court has recognized that the courts have inherent authority to address misconduct. In *Patton v. Newmar Corp.*, 538 N.W.2d 116 (Minn. 1995), the Supreme Court stated that “courts are vested with

considerable inherent judicial authority to their vital function—the disposition of individual cases to deliver remedies for wrongs and justice freely and without purchase; completely and without denial; promptly and without delay, conformable to the law.” *Id.* at 118 (internal quotation marks removed); *see also In re Clerk of Lyon County Court's Compensation*, 241 N.W.2d 781, 786 (Minn. 1976) (holding that a court’s inherent judicial power “comprehends all authority necessary to preserve and improve the fundamental judicial function of deciding cases”).

In exercising its inherent powers, the courts must ensure that a party and his attorney receive notice and an opportunity to be heard. *Lyon County* 241 N.W.2d at 786. The court, however, need not adhere to specific safe harbor requirements. Indeed, to so require would defeat the purpose of the doctrine, which is to allow for the imposition of sanctions in an appropriate case “when a party’s conduct is not within the reach of rule or statute.” *NASCO, Inc. v. Calcasieu Television & Radio, Inc.*, 894 F. 2d 696, 702 (5th Cir. 1990), *aff’d by Chambers*, 501 U.S. 32; *see also* David F. Herr and Roger S. Haydock, 1 Minn. Prac. Civil Rules Annotated section 11.10 (4th ed. 2000) (“Courts have the inherent authority to sanction parties and their attorneys when their conduct is outside the reach of Minn. R. Civ. P. 11 or Minn. Stat. 549.211.”).

Buscher argues that the Court of Appeals has not allowed a district court to use its inherent power to deny a litigant its safe harbor rights. App. Br. at 39 (citing *Steele v. Mengelkoch*, A07-1375 , 2008 WL 2966529 (Minn. Ct. App. Aug. 5, 2008) (A. 270-273)). But in *Steele*, the district court’s award of sanctions was based exclusively on Rule 11, not invocation of its inherent power. *See* 2008 WL 2966529, at \* 3. In

circumstances where a district court's sanctions award was expressly based on its inherent power, this Court has affirmed the award of monetary sanctions even though Rule 11 safe harbor provisions were not followed. *See Olson v. Babler*, A05-395, 2006 WL 851798, at \* 7 (Minn. Ct. App. Apr. 4, 2006).

Buscher and his counsel repeatedly engaged in sanctionable conduct, which wasted judicial resources and caused DeMars and Zimmerman to incur substantial attorney fees and costs. Under Rules 56.07, Rule 11, and under its inherent power, the district court properly granted sanctions. The district court's sanctions order should be affirmed.

### **III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN AWARDING COSTS.**

An award of costs and disbursements is within the sound discretion of the district court and is reviewed for an abuse of that discretion. *Lake Superior Ctr. Auth. v. Hammel, Green & Abrahamson, Inc.*, 715 N.W.2d 458, 482 (Minn. Ct. App. 2006). Buscher argues the court erred in awarding DeMars and Zimmerman their expert fees because the fees were excessive and because none of the experts testified.

The district court was well within its power to award these expert fees. *Quade & Sons Refrigeration, Inc. v. Minnesota Min. & Mfg. Co.*, 510 N.W.2d 256, 260 (Minn. Ct. App. 1994) (noting that Minn. Stat. § 357.25 permits a judge to allow expert fees "as may be just and reasonable.") The experts' fees were well documented and reasonable. (*See* ADD. 123-24, 129.) The district court's award of costs and disbursements should be affirmed.

**IV. THE DISTRICT COURT ERRED IN EXCLUDING FROM THE SANCTIONS AWARD FEES RELATED TO DEMARS' MOTION TO EXCLUDE THOMAS IRMITER.**

As outlined above, the district court properly imposed sanctions, and the court properly based its monetary award on the fees and costs DeMars and Zimmerman would not have incurred but for the sanctionable conduct. However, the court erred in excluding from the monetary award the \$9,330.10 in fees and costs DeMars incurred related to moving to exclude one of Buscher's primary experts, Thomas Irmiter. (RA. 251.) The court excluded these fees and costs because the court denied the motion on its merits. (ADD. 107.)

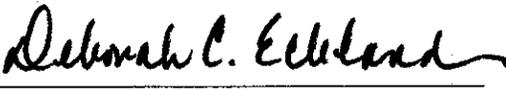
The Irmiter motion was brought *after* the initial summary judgment hearing in July 2007. (RA. 253-55.) Had Buscher and Childress not engaged in sanctionable conduct, DeMars would not have incurred the fees and costs in bringing the Irmiter motion. Whether the Irmiter motion was denied should not be determinative of whether the fees and costs are included in the sanctions award. The motion was reasonably brought, as evidenced by the fact that Irmiter has been excluded in other cases, (*see* RA. 265-67), and the motion would not have been brought but for the sanctionable conduct. Therefore, the fees and costs DeMars incurred in bringing the Irmiter motion should have been included in the sanctions award. Minn. R. Civ. P. 56.07 ("the court shall forthwith order the party submitting [the bad faith affidavits] to pay to the other party the amount of the reasonable expenses which the filing of the affidavit causes the other party to incur").

## CONCLUSION

The district court was correct in holding, as a matter of law, that Buscher had knowledge of an actionable injury more than two years before he sued DeMars and Zimmerman and in dismissing Buscher's case. The court was also correct to address and sanction the bad conduct it witnessed throughout this proceeding. With the exception of the denial of the fees and costs incurred by DeMars in moving to exclude Irmiter, the district court's decision should be affirmed in all respects.

Dated: January 23, 2009

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**CERTIFICATION OF BRIEF LENGTH**

The undersigned hereby certifies that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 13,172 words. This brief was prepared using Microsoft Office Word 2003.

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