

## Discovery sanctions OK in case involving mismarked report

The Court of Appeals has upheld an order requiring a plaintiff and his lawyers to pay more than \$117,000 in costs, attorney fees and sanctions in a case in which a key report was provided mismarked in a large pile of documents and its existence

The Court of Appeals decision is *Buscher v. Montag Development, et al.*

The case involved a suit over mold damage to a plaintiff's house after a remodeling proj-

# Chicago law firm sanctioned \$10,000 for wasting the court's time

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ect. The statute of limitations was a major issue in the case, and the mis-marked report provided evidence that the plaintiff may have been on notice of a problem earlier than he alleged.

Once the report came to light, Hennepin County District Court Judge Thomas Wexler dismissed the case as time-barred and issued the fee and sanction order. The judge also socked the plaintiff's law firm, Chicago-based Childress Duffy Goldblatt Ltd., with another \$10,000 sanction for wasting the court's time.

Under the circumstances, the Court of Appeals found in a 23-page opinion authored by Judge Stephen Muehlberg (a retired District Court judge sitting by appointment) that the trial court judge's actions were warranted.

The opinion is *Buscher v. Montag Development, et al.*

The litigation in the underlying case had been going on since 2006, when the plaintiff, Bradley Buscher, sued various contractors, alleging that they had botched a remodeling job on his Minnetonka home. Specifically, the plaintiff maintained that deficiencies in how the companies performed the project led to fungal growth in the exterior walls and wall-cavity materials.

Minneapolis attorney Deborah Eckland, who represented one of the defendant construction companies, said that two courts had found that the plaintiff submitted an affidavit that quoted from a written report on water damage to the property, but omitted key words in a misleading way. When the report was disclosed, it revealed

between 1996 and 1998. The plaintiff hired McGregor Pearce, an indoor-air-quality expert, to assess the air quality in the home. Pearce provided a written report on June 3, 2002, and the plaintiff testified that he also discussed the report with Pearce. The report stated that the mold results were mostly within normal range, but some areas were elevated and some areas had higher than safe levels.

The plaintiff discovered a major water leak in May 2004, and brought suit in February 2006. The plaintiff produced almost 4,000 pages of discovery documents. The documents included the 2002 Pearce report, but the report was incorrectly Bates-stamped (i.e. marked for identification) and the plaintiff's answers to interrogatories did not refer to the correct report. The answers referred the defendants to other Bates-stamped documents that did not include the Pearce report. Those documents pertained to a 2004 inspection of the house. The answers to interrogatories did not reveal that the Pearce report had been issued two years earlier.

In June 2007, the plaintiff stated in an affidavit that he was told by Pearce that there was normal mold and there was no water intrusion. The plaintiff omitted any reference to a written report. In July 2007 the defendants moved for summary judgment, alleging the suit was time-barred, but the judge denied the motion. At that time the judge ordered the plaintiff to produce the Pearce report again but the plaintiff did not.

The defendants moved to certify the question of whether the claim was time-barred to the Court of Appeals. During

have been brought within two years of the discovery of the injury.

The Court of Appeals said that a fair reading of the Pearce report, issued in 2002, put the plaintiff on notice of a potentially greater water problem.

"The report, while it may tend to minimize the mold problem, does not appear calculated to assuage the fears of a homeowner suspicious of the presence of mold," observed Muehlberg. After the Pearce report, the homeowner undertook a series of repairs, the court added. "[N]o rational trier of fact could conclude that he was unaware of the injury," Muehlberg wrote.

## Rule 56 sanctions and costs

The court then turned to the sanctions against the plaintiff and reviewed them under Rule 56.07 of the Minnesota Rules of Civil Procedure.

Finding no Minnesota caselaw directly on point, the court reviewed cases involving federal Rule 56, and determined that the common theme in the opinions is the presence or absence of bad faith. The court said that two affidavits submitted by the plaintiff were objectionable. The plaintiff's affidavit was drafted to omit reference to the written Pearce report, misquoted the written report, referenced an incorrect Bates number and did not attach the written report, the court said. A witness affidavit, drafted by plaintiff's counsel, was misleading, the court added.

"The district court noted that [the plaintiff's] attorneys were experienced; the report was available; and the attorneys surely understood the significance of the

it," Muehlberg wrote.

The Court of Appeals upheld the award of expert witness fees even though the case was never tried. The appellate court agreed with the District Court judge that the defendants were required to do investigative trial preparation to make dispositive motions, and it would be misplaced to deny the costs because the matter was resolved by summary judgment.

## Wasting the court's time

In addition to the attorney fees, the District Court sanctioned the Childress firm \$10,000 for wasting the court's time on unnecessary issues. The appellate court said that Rule 11 of the Minnesota Rules of Civil Procedure provided an appropriate basis for the sanctions and that the firm had received the procedural safe harbor protections afforded by the rule, even though the sanctions were not imposed until the end of the litigation.

Substantial evidence supported the District Court's findings that the law firm represented that it had significant experience in mold cases and knew it was permitting inaccurate inferences to be raised in its documents; that it incorrectly paraphrased the language of the Pearce report; that it affirmatively misrepresented the results of the study and violated the rules of professional conduct by making a false statement to the court, Muehlberg wrote. Under the circumstances, the penalty is reasonable, the court said.

— Barbara L. Jones

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report but chose to deliberately conceal

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that process, the Pearce report was discovered by defense counsel in September 2007 and the District Court judge sua sponte vacated his order denying summary judgment.

After a hearing, the judge ordered the plaintiff and his attorneys to pay sanctions of \$37,761 in attorney fees to two defendants and ordered the law firm to pay a \$10,000 penalty to the Hennepin County District Court. The judge also awarded \$79,376 in costs to the two defendants.

### Plaintiff on notice in 2002

The court first determined that there were no genuine issues of material fact about when the plaintiff knew or should have known about the existence of the injury. Under Minn. Stat. sec. 541.051, subd.1 (a), the suit should

that the homeowners knew or should have known of the water problem in 2002 and that their suit, subject to a two-year statute of limitations, was untimely, she told Minnesota Lawyer.

Eckland would not speculate as to whether the plaintiff or the lawyers deliberately misled the court or the defendants, but pointed out that the wording in the affidavit was nearly identical to the written report.

"They had to have the report sitting right there to get the wording right," she said.

Attorneys for the plaintiff and the law firm could not be reached for comment.

### 'Pearce report' in 2002

The plaintiff and his family experienced physical illness and water-related problems to their home after remodeling

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