

NO. A09-0244

State of Minnesota
 In Supreme Court

David J. T. Miller,

Appellant,

vs.

Linda J. Lankow, et al.,

Respondents,

DCI, Inc.,

Defendant,

Donnelly Brothers,

Respondent,

Total Service Company,

Respondent,

and

Linda J. Lankow, et al., Third-Party Plaintiffs,

Respondents,

vs.

Burnet Realty Inc.,

d/b/a Coldwell Banker Burnet, et al., Third-Party Defendants,

Respondents.

**BRIEF AND APPENDIX OF AMICUS
 MINNESOTA ASSOCIATION FOR JUSTICE**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF LEGAL ISSUES

1. When and under what circumstances is a prospective claimant's duty to preserve evidence overtaken by a prospective respondent's duty to inspect that evidence?
2. What standards or factors should guide a trial court in fashioning an appropriate sanction for the spoliation of evidence?

ARGUMENT

I. A PROSPECTIVE CLAIMANT'S DUTY TO PRESERVE POTENTIAL EVIDENCE ENDS WHEN HE PROVIDES A PROSPECTIVE RESPONDENT WITH NOTICE THAT, IN THE TOTALITY OF THE CIRCUMSTANCES, TRIGGERS THE POTENTIAL RESPONDENT'S DUTY TO INSPECT.

This court described spoliation in *Federated Mutual Insurance Company v. Litchfield Precision Components, Inc.* as “[t]he destruction of evidence. It constitutes an obstruction of justice.”¹ In the same opinion, this Court cited with approval a California court's definition of spoliation: “the failure to preserve property for another's use as evidence in pending or future litigation.”² The first definition is written from the perspective of existing litigation between named parties; its tone implies intentional conduct in which property known to be evidence is destroyed by one party, to the detriment of the other. The second definition is different. It addresses a pre-suit situation in which a potential party has possession of what may be relevant

¹ 456 N.W.2d 434, 436 (Minn. 1990).

² *Id.* (citation omitted).

evidence. Its focuses on a potential claim, and the circumstances under which a person has a duty to preserve property that has the potential to be relevant evidence in a future lawsuit. The distinction is significant.

In *Federated* this court addressed the question of whether Minnesota should recognize the spoliation of evidence as an independent tort.³ The issue arose in the context of a fire loss, in which Federated, who had paid its insured for property lost in the fire, commenced suit against the building owner and its law firm for the spoliation of evidence. Federated claimed that its ability to prove a subrogation claim against the building owner was destroyed when the evidence of the cause of the fire was discarded before the subrogation claim was commenced.⁴ Significantly Federated, who had notice of the fire almost immediately, hired an expert to examine the fire loss site six days after the incident.⁵ He was refused access to the site.⁶ When evidence removed from the fire site and stored in a warehouse was discarded, Federated alleged it lacked sufficient evidence to prevail on the subrogation claim it intended to bring and instead commenced suit against the property owner and its attorneys, alleging intentional and negligent spoliation of evidence as independent torts.⁷

³ *Id.* at 435.

⁴ *Id.* at 436.

⁵ *Id.* at 435.

⁶ *Id.*

⁷ *Id.* at 436.

This court ultimately concluded that under the facts in *Federated* the damages were too speculative to support an independent tort in spoliation when brought before resolution of the underlying claim, and directed Federated and Minnesota trial courts to examine existing law and procedure to deal with spoliation.⁸ A pre-suit duty to preserve evidence was implicit in *Federated*. There was no need to address the scope of that duty or its interaction with a potential respondent's duty to investigate under those facts.

This court addressed spoliation again in *Patton v. Newmar Corporation*.⁹ The *Patton* court held that a court has the inherent authority to award sanctions for the spoliation of evidence, even where there was no court order to preserve it.¹⁰ The *Patton* court also held that spoliation could occur in the absence of bad faith, where the loss of the evidence was negligent or inadvertent.¹¹ In *Patton* the motor home that was the subject of what became a design defect products liability lawsuit was destroyed and parts negligently lost by the future plaintiffs' expert witness several years before suit was commenced.¹² The plaintiffs had access to and control over the evidence. Within six months of the accident, at a time when they still had access to the motor home, they knew enough to hire an expert to determine the

⁸ *Id.* at 439.

⁹ 538 N.W.2d 116 (Minn. 1995).

¹⁰ *Id.* at 119.

¹¹ *Id.*

¹² *Id.* at 117-118.

cause of the fire that caused the accident. The *Patton* court plainly assumed that the holders of the potential evidence – the plaintiffs in that case – had a duty to preserve what they had reason to believe would be relevant evidence in a future lawsuit. Under the facts of *Patton* the future defendant undisputedly had no knowledge of any facts that would raise a duty on its part to inspect the vehicle before suit commenced. There no need to consider a duty to inspect, or whether there are circumstances under which the duty to inspect supersedes the duty to preserve.

The central issue in this case, at what point prior to suit does a potential party's duty to investigate take precedence over the other party's duty to preserve potential evidence, came to a head in *Hoffman v. Ford Motor Company*.¹³ *Hoffman* was a products liability case in which homeowners, Daniel and Barbara Hoffman, asserted manufacturing defect and breach of warranty claims against Ford Motor Company, the manufacturer of their Ford Taurus. The Hoffman's claim alleged that their new car, which was parked in their attached garage, started a fire that did extensive damage to their garage and home. Mr. Hoffman notified his homeowners' insurer of the fire, and called his car dealer, Brookdale Ford, to cancel a service appointment and to request copies of paperwork related to his purchase of the car.¹⁴ While making the request he mentioned that the car caught fire in the garage and burned down the house.¹⁵ That

¹³ 587 N.W.2d 66 (Minn. App. 1998).

¹⁴ *Id.* at 68.

¹⁵ *Id.*

single comment was the only notice either the Ford dealership or Ford Motor Company had of the incident until after he began suit. In the meantime both the fire inspector and two investigators hired by Mr. Hoffman's homeowner's insurer examined both the garage and the car.¹⁶ Photographs were taken. Shortly after this second inspection the car was towed to a salvage yard, and the garage and the home were demolished.¹⁷ Less than a year later Hoffman commenced suit against Ford, alleging that his Taurus was defectively manufactured, and that this defect was the cause of the fire.¹⁸ Ford, who had not examined the fire scene and had access to the car only after it had been towed, sought exclusion of all expert testimony dealing with the cause of the fire as a sanction for spoliation. Mr. Hoffman argued that he had given the Ford dealership notice of the fire and the fire's relationship to the car, and that this notice was sufficient to protect him from a sanction for the spoliation of evidence.

The *Hoffman* court noted that there was no Minnesota case that provided "a rule for determining the sufficiency of notice to avoid a sanction for the spoliation of evidence."¹⁹ Analogizing to the UCC's notice provisions for breach of sales warranty claims, the *Hoffman* court cited to this court's decision in *Church of Nativity v. WatPro*,

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 70.

*Inc.*²⁰ and adopted the factors identified there. The *Nativity* decision identified three purposes served by the UCC's notice provision:

First, notice provides the seller a chance to correct any defect. Second, notice affords the seller an opportunity to prepare for negotiation and litigation. Third, notice provides the seller a safeguard against stale claims being asserted after it is too late for the manufacturer or seller to investigate them.²¹

Concluding that the purposes of a "spoliation notice" are "virtually identical," the *Hoffman* court adopted these principles and held that "to be sufficient in content, a spoliation notice must reasonably notify the recipient of a breach or a claim."²² Applying this standard, the *Hoffman* court found that the trial court's conclusion that a single phone call to the car dealership to cancel an appointment and request copies of his purchase paperwork was insufficient notice of a potential claim against the dealership to avoid sanctions for spoliation was not an abuse of discretion.²³

The *Hoffman* "spoliation notice" standard has been applied by the Court of Appeals in a series of unpublished cases.²⁴ Each case

²⁰ 491 N.W.2d 1 (Minn. 1992).

²¹ *Id.* (quoting *Prutch v. Ford Motor Co.*, 618 P.2d 657, 661 (Colo. 1980)).

²² *Hoffman*, 587 N.W.2d at 70.

²³ *Id.*

²⁴ *See Smothers v. Insurance Restoration Specialist, Inc.*, 2005 WL 624511 (Minn. App. March 17, 2005)(mold, home repaired); *Dodd v. Leviton Manufacturing Co.*, 2003 WL 21147151 (Minn. App. May 20, 2003)(fire, home repaired); *Garrison v. Farmers Co-operative Exch.*,

involves a home that became uninhabitable following the incident in question, whether it be mold, a fire, or a propane explosion. In each case some kind of notice was given to prospective defendants that there was a problem. In each case the home – which had to be repaired to be inhabitable – was repaired or replaced before a representative of the prospective defendant did an inspection. And in each case the trial court, applying what it perceived to be the rule of *Hoffman*, excluded all of the plaintiff's expert testimony – usually based on inspections done by a fire marshal and/or inspectors hired by a home insurer. Each case was then dismissed for lack of prima facie evidence that would permit the claim to go forward.

This case is the latest in this line. Its facts compel a weighing of a pre-suit duty to preserve evidence against an opposing party's duty to investigate. While the *Hoffman* considerations are pertinent, they do not tell the whole story.

The duty to preserve evidence is fairly well defined. Where a party has reason to anticipate that litigation may occur, and that party has possession and/or control of potential evidence, the duty to preserve that evidence attaches. This is true no matter which party has possession or control of the evidence: the potential claimant or the potential respondent. The timing and scope of the other party's duty to inspect is not nearly as well defined.

In the context of this case and in most of *Hoffman's* progeny, the injured party is the consumer whose home has been damaged, in this

2000 WL 1693630 (Minn. App. Nov. 8, 2000)(propane explosion, home emptied by relatives). All three are contained in the MNAJ Appendix.

case by mold. Typically the home is uninhabitable after the trigger incident – be it fire, mold, or explosion - and must be either repaired or replaced quickly. This case is typical in this respect. The damage was such that the evidence – the walls of the home itself – had to be destroyed in order for the home to be repaired and made safe. The same holds true for fire cases and explosion cases. The fire or explosion site itself constitutes evidence, and must be destroyed for the home to be repaired or rebuilt. That must occur long before the statute of limitations for a breach of warranty or negligence claim expires. Unless there is an effective means to satisfy the duty to preserve evidence quickly, the homeowner is faced with a Hobson’s choice: repair his home to make it habitable, thereby spoliating evidence, or preserve the damaged residence until the end of what can be protracted litigation. The *Hoffman* court attempted to address this Hobson’s choice with an adequate “spoliation notice.” The solution is more appropriately described in a respondent’s corresponding duty to inspect. In the context of this type of consumer construction defect or a fire loss case, a mechanism whereby the consumer can successfully satisfy his or her obligation to preserve evidence by triggering a potential wrongdoer’s duty to conduct a meaningful inspection or lose the ability to raise a sanctions defense in later litigation is necessary to foster a just resolution of this type of claim. This case affords this Court the opportunity to define the proper scope and trigger point for that duty.

The three purposes of the UCC warranty notice the *Hoffman* court borrowed from *Nativity* highlights the underlying principles that should be considered when determining at what point the duty to

inspect potentially relevant evidence is triggered. The non-spoliator must have sufficient information to know that there is a problem, to know that the problem has caused harm, and to know that he or she is sufficiently connected to the problem that if a solution cannot be found that litigation may be anticipated. A fourth piece of information is inferred: that the non-spoliator has reason to know that the holder of the evidence has or is likely to have what may to prove to be relevant evidence.

It is here that the spoliation scenario differs from a breach of warranty claim under the UCC. The UCC statutorily requires notice of a breach because it also statutorily requires a seller to attempt to cure. Absent sufficient notice from the buyer, the seller cannot be held to its duty to cure. In most spoliation cases, there is neither a statutory duty to give notice nor a statutory cure requirement. Nevertheless, a common law notice requirement used to shift the burden of continued retention of potential evidence to trigger another party's duty to thoroughly inspect that potential evidence is a fair and workable solution that addresses the legitimate needs of both sides.

The sticking point in this case is how much information must the non-spoliating party have to trigger the duty to inspect, and how much time must be permitted to allow whatever inspection is deemed necessary by that party to be necessary. Those questions are readily dealt with by utilization of principles familiar in the common law. The duty to preserve the potential evidence in the first place is triggered when the evidence holder should reasonably anticipate litigation. Actual notice of potential litigation is not required. As the Supreme

Court of Texas noted in *Trevino v. Ortega*²⁵ in the context of deciding when a party, pre-suit, anticipates litigation so as to trigger the duty to preserve evidence, “a party should be found to be on notice of potential litigation when, after viewing the totality of the circumstances, the party either actually anticipated litigation or a reasonable person in the party’s position would have anticipated litigation.” Per *Trevino*, “whether a party actually did or reasonably should have anticipated litigation is simply a fact issue for the trial court to decide by viewing the totality of the circumstances.”²⁶

The same logic applies to determining at what point the non-spoliator’s duty to inspect potential evidence is triggered. By examining the totality of the circumstances, a court will examine whether the non-spoliating party has or has been given sufficient information to know that there is a problem, to know that the problem has caused harm, to know that he or she is sufficiently connected to the problem that if a solution cannot be found litigation should be anticipated, and to know that there is potentially relevant evidence that should be inspected.

²⁵ *Trevino v. Ortega*, 969 S.W.2d 951, 956 (Tex 1998).

²⁶ *Id.* *Trevino* arose in the context of a medical malpractice claim in which a hospital failed to retain medical records. In the process of deciding that Texas, like Minnesota, does not recognize spoliation as an independent tort, the *Trevino* court undertook a comprehensive analysis of spoliation law around the country. Although the case does not address the pre-suit duty to inspect, the *Trevino* court’s analysis of spoliation law is articulate and well reasoned. Its conclusions parallel the conclusions of this court in most respects, making the opinion useful for the purposes of the analysis facing this court in this case.

By using a totality of the circumstances approach the trial court will take into consideration the legal context in which the situation arises. In a case such as this one, which involves construction, construction warranties, and the residential real estate disclosures and protections contained in Minnesota Statutes Sections 513.52 – .60, the totality of the circumstances include the fact that the contractors who are respondents in this case repaired mold and water intrusion in the home during the Lankow ownership, had warranted the work, were notified of the renewed problem by Miller, and were looked to for repairs. The totality of the circumstances also must take into consideration the reality of damaged real estate with a mold problem: the property may or may not be inhabitable, and will only grow worse if the homeowner does not have it repaired. Given a homeowner’s duty to mitigate damages, contractors in this position must be charged with common sense constructive knowledge that if they do not repair the home that the owner is highly likely to have it repaired, most likely as quickly as possible. Given the arguments made by the contractors in this case – that the moldy and damaged walls of the home itself are the best evidence of the cause and extent of the damage, common sense also dictates that they knew that when the damage was repaired this “best evidence” would necessarily be destroyed. All of this information should be considered in a totality of the circumstances analysis to determine whether the non-spoiling contractors actually knew that the home would be repaired, thereby compromising the evidence they now deem critical, or whether they must be deemed to have constructive knowledge of those

circumstances because a reasonable person in the their position would.

Using such a test to trigger a duty on the part of a non-spoliating party to inspect evidence he or she has reason to know may not be preserved for anticipated litigation addresses the concerns of all of the players. The holder of the evidence can make certain that any anticipated opposing litigants have actual notice of the impending change or destruction of evidence by giving actual notice of that fact, with an invitation to inspect and a reasonable time in which to conduct the inspection. In situations involving homeowners with fire damage or water intrusion, where the best evidence, the home itself, must be razed or repaired, contractors who have notice of the problem while the home is still available for inspection and superior knowledge of what kind of evidence is needed to assess the cause of the problem will not be rewarded for sitting on their hands, using a spoliation defense as a weapon. Homeowners will be able to repair the homes and mitigate their damages, yet contractors will have the opportunity to collect the evidence they deem necessary before that repair is done. While the same test is pertinent to claims based on defective products, torts, or even contract claims, it is particularly pertinent to fire, explosion, and construction cases.

Given the multiplicity of parties involved in this case, another point must be made. The analysis of whether a duty to conduct a pre-suit inspection has been triggered so as to eliminate that party's right to seek a spoliation sanction is an analysis that is specific to each party. The relationship between Mr. Miller and the contractors, including the circumstances surrounding the notice afforded to each

of them and their level of constructive knowledge, is separate and distinct from the circumstances surrounding the relationship between Mr. Miller and the sellers, and is different yet again from the circumstances surrounding the relationship between Mr. Miller and the realty company. Each of these relationships must be independently analyzed for the purpose of determining whether a duty to inspect was triggered prior to the destruction of the home.

II. WHERE BAD FAITH IS NOT AN ISSUE, IN FASHIONING APROPRIATE SPOILIATION SANCTIONS A TRIAL COURT SHOULD SPECIFCALLY IDENTIFY THE PREJUDICE SUFFERED, AND CRAFT A REMEDY THAT, WHERE POSSIBLE, ADDRESSES ANY REAL PRJUDICE YET ALLOWS THE CASE TO PROCEED ON THE MERITS

In *Patton* this court held that when spoliation occurs, bad faith is not required for the imposition of a corrective sanction.²⁷ The purpose of the sanction in the context of inadvertent or negligent spoliation is primarily to correct the evidentiary advantage the spoliating party has gained over the non-spoliating party.²⁸ With that in mind, courts are to impose “the least restrictive sanction available under the circumstances.”²⁹ This standard requires the trial court “to examine the nature of the item lost in the context of the claims asserted and the potential remediation of the prejudice.”³⁰

²⁷ *Patton*, 538 N.W.2d at 119.

²⁸ *Id.*

²⁹ *Id.* at 118.

³⁰ *Id.* at 119.

This standard necessarily requires each trial court to examine the parties, circumstances, and evidence before it on a case by case basis. A determination of evidentiary prejudice cannot be made on a general basis as a matter of law. While there is precedent for concluding that the only evidentiary cure for the improper destruction of critically relevant evidence is to preclude the spoliating party from introducing expert opinions based on an analysis of that missing evidence, such a harsh sanction ought to be applied only where the evidence in the case before the court warrants it.

The Court of Appeals decision in this case suggests that when remediation of the mold and moisture problems resulted in the destruction of “the nature, cause and extent of these problems,” case law holds that the non-spoliating party “should be allowed to conduct an independent investigation of the cause of the damage.”³¹ This suggests that where causation evidence is spoliated such that the opposing party is not able to conduct an independent examination of the original site of the damage or incident, the proper sanction is the exclusion of all evidence presented by the spoliating party as a matter of law. The Court of Appeals has certainly taken this approach when it quotes *Hoffman* for the proposition that “the fire scene itself is the best evidence of the origin and cause of a fire,” and then on this basis upholds the exclusion of all expert evidence based on the homeowner’s early inspection of the later-remediated building.³² The

³¹ *Miller v. Lankow*, 776 N.W.2d 731, 740 (Minn. App. 2009).

³² *Garrison*, 2000 WL 1693630 at *5, and *Dodd*, 2003 WL 21147151 at *4-*5, both quoting *Hoffman*, 587 N.W. 2d at 71.

circumstances in each case are different, and this court should take the opportunity to remind the lower courts that a case by case examination of the evidence before it is pivotal to the proper selection of a spoliation sanction.

The evidence and circumstances in this case are instructive. Assuming, *arguendo*, that upon application of the totality of the circumstances analysis discussed above to the contractors in this case resulted in the conclusion that they had a duty to inspect the Miller home before its 2007 remediation, then Miller's remediation of the home before litigation began was not wrongful. In the words of the *Trevino* court, the remediation of the home was not the *improper* pre-suit destruction of relevant evidence.³³ Further assume that the photographs taken of the damage were in color and of excellent quality, and that the expert reports describing the extent and location of the water intrusion and damage had been attached to the notice sent to the contractors before remediation.³⁴ This particular set of circumstances could and should lead to a different conclusion than the *verbatim* application of the idea that where a home is remediated, the opposing party is presumptively entitled to exclude all evidence based on the remediated or destroyed home. The circumstances and evidence of prejudice in each case is different. Each must be evaluated on its own terms.

³³*Trevino*, 969 S.W.2d at 954 (emphasis added).

³⁴ The notice in the record refers to attached reports, but upon information and belief those reports were not attached to the notice that was made part of the record.

CONCLUSION

This court should adopt a reasonable, totality of the circumstances analytical model for trial courts to apply to determine a trigger point for when one party's pre-suit duty to preserve potential evidence is superseded by another party's duty to inspect that evidence sufficiently to support any defenses they may have. The analysis of whether and when such a duty shift occurs is case specific, as is the obligation to fashion spoliation remedies that are specific to each case. Amicus MNAJ urges this court to examine the reasonable, even-handed approach described above and adopt it for application by the trial courts of this state.

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CERTIFICATION OF BRIEF LENGTH

I hereby certify 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 3,675 words. This brief was prepared using Microsoft Word 2007.

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