

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.

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INTRODUCTION

This appeal turns on the answer to one straight forward question: Did Mr. Miller provide Respondents with spoliation notice that reasonably notified them of their breach or his claim? The answer to this question is equally straight forward: Mr. Miller provided Respondents with adequate spoliation notice on multiple occasions.

ARGUMENT

I. MR. MILLER PROVIDED RESPONDENTS WITH REASONABLE NOTICE OF THEIR BREACH AND HIS CLAIM.

In order to be sufficient in content, Minnesota law requires that “A spoliation notice must reasonably notify the recipient of a breach or a claim.” *Hoffman v. Ford Motor Company*, 587 N.W.2d 66, 70 (Minn. Ct. App. 1988). *Hoffman* also confirms that the notice may be oral or written and is intended to serve three purposes. First, notice provides the seller a chance to correct any defect. Second, notice affords the seller an opportunity to prepare for negotiation and litigation. And 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. *Hoffman (citations omitted)*.

Here, Respondents received repeated notice of the breach and claim. Respondent Contractors received verbal notification of Appellant’s claim and inspected the home in September, 2005. Respondent Contractors and Respondent Sellers received written notification of Appellant’s claim in December, 2005. Respondent Donnelly Brothers inspected the home for a second time in March of 2006. Not having received any agreement from Respondents to correct the defects at his home, Mr. Miller moved

forward with the remediation of his mold and rot infested home at his own expense in 2007.

The repeated notice provided to Respondents provided them with ample opportunity to correct the defects, prepare for negotiation and litigation, and safeguard against claims being asserted after it was too late to investigate them. Accordingly, there can be no serious dispute that the notice was not only reasonable in content, but provided Respondents with ample time within which to respond to the notice. *Hoffman* confirms that sanctions are not to be issued for spoliation when a plaintiff has reasonably notified the opposing party of a breach or claim -- as was the case here.

Further, neither *Hoffman* nor any other Minnesota case required Mr. Miller to provide "sufficient notice that the evidence would be destroyed" as the District Court and majority of the Court of Appeals erroneously concluded. And there is no fair and just reason that the current spoliation requirements should be expanded at Mr. Miller's expense under the circumstances at issue here. Respondents, rather than step up to the plate and correct a problem they had ample opportunity to correct, chose instead to expend their energy pointing fingers at each other in a prolonged, expensive, and inappropriate effort to avoid responsibility for their actions. This behavior ultimately forced Mr. Miller remediate his home at his own cost. These circumstances should not entitle Respondents to gain any advantage in this matter and certainly should not entitle them to a decision expanding Minnesota law at Mr. Miller's expense.

II. IT IS APPROPRIATE FOR THE COURT TO DETERMINE THAT MINN. STAT. § 513.57, SUBD. 2 DID NOT BAR ANY OF MR. MILLER'S CLAIMS.

Respondents also seek to persuade this Court not to even consider his contention that the District Court erred in granting summary judgment on the basis that Minnesota Statute Section 513.57, subd. 2 barred any of Mr. Miller's claims. But the law, just as it does not require the conclusion that Mr. Miller's claims should be extinguished based on principles of spoliation, does not require that this Court accept the invitation to bar consideration of this issue as a procedural matter. Well established authority makes it clear that this Court may review any matter that it deems the interest of justice may require. *Minn. R. Civ. App. P. Rule 103.04 (Scope of Review)*. See also *In Re The Estate of Francis E. Barg a.k.a. Francis Edward Barg*, 752 N.W.2d 52 (Minn. 2008) (Rehearing denied July 21, 2008) (No new or controverted facts needed in order to address issue briefed below, and no prejudice would result from Supreme Court's consideration of issue). This issue was argued and briefed by the parties both at the district court level and in the Court of Appeals. No prejudice would result from the Court's consideration of it here and the parties would all benefit from the Court's guidance on this aspect of their dispute.

CONCLUSION

Mr. Miller provided Respondents with adequate spoliation notice on multiple occasions and there is no requirement under current Minnesota law that required him to take the additional step of advising the Respondents that he was going to remediate the mold and rot in his home at his own expense after the Respondents had failed to do so for

more than two years. Because adequate notice was provided to Respondents, the District Court should not have sanctioned Mr. Miller at all. As a result, the District Court erred when it imposed the most draconian sanction available to it by extinguishing Mr. Miller's claim. For these, and all of the reasons expressed in Appellant's brief, Appellant respectfully requests that the District Court and majority of Court of Appeals decision be reversed, and that this matter be remanded to the District Court with instructions to take such actions as are consistent with this Court's opinion.

Respectfully submitted,

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Dated: 5/27/10

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms to Minn. R. Civ. App. Rule 132.01 for a brief using the following typeface: times New Roman, 13 point font. The length of this brief is 991 words. This brief was prepared using Microsoft Word 2003.

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