

NO. A09-0244

State of Minnesota
In Supreme Court

David J.T. Miller,

Appellant,

v.

Linda J. Lankow, James E. Betz,
Donnelly Brothers, Total Service Company, Burnet Realty Inc.
d/b/a Coldwell Banker Burnet and Mark A. Geier,

Respondents.

RESPONDENT DONNELLY BROTHERS' BRIEF

Patrick W. Michenfelder (#024207X)
Frederick M. Young (#0352937)
GRIES & LENHARDT, P.L.L.P.
12725 - 43rd Street N.E., Suite 201
St. Michael, Minnesota 55376
(763) 497-3099

Attorneys for Appellant

Timothy W. Waldeck (#11375X)
WALDECK & LIND, P.A.
1400 TCF Tower
121 South Eighth Street
Minneapolis, Minnesota 55402
(612) 375-1550

*Attorneys for Respondent
Donnelly Brothers*

Jonathan M. Zentner (#297951)
Kafi C. Linville (#30251X)
500 Young Quinlan Building
81 South Ninth Street
Minneapolis, Minnesota 55402
(612) 339-3500

*Attorneys for Respondent
Total Service Company*

(Additional Counsel listed on following page)

Timothy J. O'Connor (#216483)
Eric Steinhoff (#387050)
150 South Fifth Street, Suite 1700
Minneapolis, Minnesota 55402
(612) 333-3637

Attorneys for Respondents
Burnet Realty Inc. d/b/a Coldwell Banker
and Mark A. Geier

Robert P. Christensen (#16597)
ROBERT P. CHRISTENSEN, P.A.
670 Park Place East
5775 Wayzata Boulevard
Saint Louis Park, Minnesota 55416
(612) 333-7733

and

SCOTT WILSON (#163193)
5615 Shorewood Lane
Shorewood, Minnesota 55331
(651) 353-3184

Attorneys for Respondents
Linda J. Lankow and James E. Betz

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

STATEMENT OF THE ISSUE..... 1

Did the district court abuse its discretion by imposing a sanction
for spoliation of evidence where Appellant, without sufficient
notice, destroyed evidence to the prejudice of opposing parties?..... 1

STATEMENT OF THE CASE..... 2

STATEMENT OF THE FACTS..... 3

ARGUMENT..... 6

The court of appeals was correct in finding that the district court
acted properly and within its broad discretion by imposing a
spoliation sanction where Appellant, without sufficient notice,
destroyed evidence to the prejudice of opposing parties..... 6

A. Standard of Review..... 6

B. Sufficiency of Notice..... 6

C. Prejudice to Opposing Parties..... 13

CONCLUSION..... 15

CERTIFICATE OF COMPLIANCE..... 16

TABLE OF AUTHORITIES

Cases

<i>Berry Asphalt Co. v. Apex Oil Products Co.</i> , 9 N.W.2d 437 (Minn. 1943).....	9
<i>Church of Nativity v. WatPro, Inc.</i> , 491 N.W.2d 1 (Minn. 1992).....	9, 10
<i>Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc.</i> , 456 N.W.2d 434 (Minn. 1990).....	6
<i>Himes v. Woodings-Verona Tool Works, Inc.</i> , 565 N.W.2d 469 (Minn. App. 1997).....	13
<i>Hoffman v. Ford Motor Co.</i> , 587 N.W.2d 66 (Minn. App. 1998).....	6, 9-11
<i>Marracco v. General Motors Corp.</i> , 966 F.2d 220 (7th Cir. 1992).....	6
<i>Miller v. Lankow</i> , 776 N.W.2d 731 (Minn. App. 2009).....	4, 6, 7, 11, 13
<i>Moosbrugger v. McGraw-Edison Co.</i> , 170 N.W.2d 72 (Minn. 1969).....	9
<i>Patton v. Newmar Corp.</i> , 538 N.W.2d 116 (Minn. 1995).....	6-8, 10, 12, 13, 15
<i>Truesdale v. Friedman</i> , 132 N.W.2d 854 (Minn. 1965).....	9
<i>Valspar Refinish, Inc. v. Gaylord's, Inc.</i> , 764 N.W.2d 359 (Minn. 2009).....	9

Unpublished Cases

<i>Dodd v. Leviton Manufacturing Company</i> , 2003 WL 21147151 (Minn. App.).....	10, 11
<i>Garrison v. Farmers Co-operative Exchange</i> , 2000 WL 169630 (Minn. App.)....	11
<i>Smothers v. Insurance Restoration Specialist, Inc.</i> , 2005 WL 624511 (Minn. App.).....	10

Statutes

M.S.A. § 336.2-607.....	9, 10
-------------------------	-------

STATEMENT OF THE ISSUE

Did the district court abuse its discretion by imposing a sanction for spoliation of evidence where Appellant, without sufficient notice, destroyed evidence to the prejudice of opposing parties?

This issue was presented to the district court on a motion for summary judgment by Respondent Donnelly Brothers under Rule 56 of the Minnesota Rules of Civil Procedure. *See* Defendant Donnelly Brothers' Memorandum of Law in Support of Motion for Summary Judgment.

The court of appeals affirmed the district court's spoliation sanction based on its finding that Appellant failed to provide sufficient notice of spoliation of evidence and that the opposing parties were prejudiced.

Appellant timely appealed the district court's decision pursuant to Rules 103 and 104 of the Minnesota Rules of Civil Appellate Procedure.

Apposite Authority:

Patton v. Newmar Corp., 538 N.W.2d 116 (Minn. 1995);
Church of Nativity v. WatPro, Inc., 491 N.W.2d 1 (Minn. 1992),
overruled on other grounds, Ly v. Nystrom, 615 N.W.2d 302 (Minn. 2000);
Hoffman v. Ford Motor Co., 587 N.W.2d 66 (Minn. App. 1998).

STATEMENT OF THE CASE

Respondent Donnelly Brothers provides a statement of the case and facts in this brief pursuant to Rule 128.02 of the Rules of Civil Appellate Procedure. Appellant has failed to state the facts fairly and accurately and with complete honesty and objectivity as required by Minn. R. Civ. App. P. 128.02 Subd. 1(c) (“The facts must be stated fairly, with complete candor, and as concisely as possible.”); see David F. Herr & Sam Hanson, *Minnesota Practice* § 128.6 (2009).

Appellant Miller appealed the decision of the Honorable Judge Stephen M. Halsey of the Wright County District Court granting summary judgment against him and in favor of the defendants. *Appellant’s Addendum* at 1. The district court granted summary judgment after imposing a spoliation sanction against Appellant, excluding the evidence upon which he based his claims. The court of appeals affirmed on December 22, 2009. *Miller v. Lankow*, 776 N.W.2d 731 (Minn. App. 2009).

Appellant’s suit arose out of a moisture intrusion claim at his home. The complaint asserts 9 causes of action against the various parties; Appellant’s only claim against Donnelly Brothers was for negligence. *Appellant’s Appendix* at 9.

The district court found that Appellant destroyed evidence without providing sufficient notice and as such prejudiced Donnelly Brothers and the other defendants. With the exclusion of that evidence, the district court granted summary judgment to the defendants, and the court of appeals affirmed. *Id.* at 739. Appellant now seeks from this court by way of its acceptance of the Petition for Review a reversal of the court of appeals’ and district court’s decisions.

STATEMENT OF THE FACTS

Appellant purchased his home from Respondent Lankow in May 2004.

Appellant's Appendix at 14, *Affidavit of Miller*. Ms. Lankow discovered the moisture problem in her home the year before when another potential buyer had the home inspected. *Appellant's Appendix* at 125, *Deposition of Lankow*.

Ms. Lankow hired Total Service Company to do structural repairs and she hired Donnelly Brothers to re-stucco those areas of the exterior on which Total Service Company had performed work. *Appellant's Appendix* at 126, 130, 132. Donnelly Brothers was not hired to remediate, but simply to patch the repaired areas of the exterior. *Appellant's Appendix* at 126, 130; *see also Appellant's Appendix* at 191-92, *Donnelly Brothers Contract*. At no time prior to the removal of the stucco did Appellant advise Respondents that the stucco was going to be removed.

Appellant discovered moisture problems in September 2005. *Appellant's Appendix* at 79, *Deposition of Miller*. In late 2005 Appellant contacted Donnelly Brothers twice. *Appellant's Appendix* at 14. Donnelly Brothers informed Appellant that they only patched the stucco on limited parts of the home. *Appellant's Appendix* at 193-194, *Affidavit of Donnelly*.

Mark Donnelly of Donnelly Brothers and Jeff Agness of Total Service Company visited Appellant at his home on September 30, 2005. *Appellant's Appendix* at 193. Appellant testified to his intentions at the time of that meeting; "I didn't want to sue . . . if I could get it done cheap enough, I'd just fix it myself." *Appellant's Appendix* at 81. Appellant did not inform Donnelly Brothers that he was going to make any repairs or

instigate a suit against Donnelly Brothers. *Appellant's Appendix* at 194; *see also Appellant's Appendix* at 14.

Appellant knew during that meeting what would need to happen in order to determine fault in this case; each relevant party testified similarly on this issue. Appellant testified that he understood that “[t]he stucco would have had to have been removed to see exactly what was bad and if it was their areas that were bad.” *Appellant's Appendix* at 93. This is consistent with Mr. Donnelly’s testimony in his affidavit which states that he would have “(1) identified the work Donnelly Brothers performed and (2) tested the thickness, the condition of the paper, the installation of the paper, and the condition of the sheathing in order to analyze the relationship between Donnelly Brothers’ stucco work and the moisture problem...” *Appellant's Appendix* at 194. Mr. Agness of Total Service Company testified similarly, advising that it’s not always possible to identify the cause of mold and that you would need access to the stucco and other building materials. *Appellant's Appendix* at 225-26, *Deposition of Agness*.

Appellant’s first attorney Halvorson sent a December 27, 2005 letter that, though it raised claims, failed to mention plans to remediate: a fact conceded by Appellants. *See Miller v. Lankow*, 776 N.W.2d at 737-38. This letter nonetheless resulted in yet another meeting between Donnelly Brothers and Appellant on March 10, 2006, during which Appellant again made no mention of remediation plans.

Appellant’s next known activity was to contract with J Brothers, the stucco removers, on January 15, 2007. *Appellant's Appendix* at 197-99. The contract provided

for the removal of stucco and payments to J Brothers at various times, including after completion of the work. The contract provided for the following method of payment:

To the contractor in the following manner:
\$10,000 upon signing of this contract
\$10,000 upon start of work
\$20,000 after stucco removed
Balance upon completion

Appellant's Appendix at 197. The invoice shows that corresponding payments were made at the following times including the date of completion:

February 2, 2007	\$10,000.00
March 9, 2007	\$10,000.00
March 15, 2007	\$20,000.00

Appellant's Appendix at 199.

According to the timing of these payments, work started on March 9, 2007 and the stucco was removed by March 15, 2007. Appellant's second attorney, a year after the last contact with Donnelly Brothers and on the day after the stucco was removed, sent a letter dated March 15, 2007 informing Respondents that Appellant intended to proceed with repairs. *Appellant's Appendix* at 200, *Letter from Michenfelder*. By this date, as evidenced by the invoice, the stucco was removed. *Appellant's Appendix* at 199.

No photographs were taken during the removal process. *Appellant's Addendum* at 3. The photographs that were provided did not show the destruction process or intermittent stages of it; they were simply before-and-after shots and not of the stucco, the critical evidence. *Appellant's Addendum* at 3. No efforts were made to measure the condition of the stucco or its relationship to the original stucco, and no observation notes were maintained. Donnelly Brothers did not have an opportunity to distinguish the work

done by them as opposed to the original stucco contractor, and was not able to test the thickness of the stucco, the installation of the underlying paper, or the condition of the sheathing. *Appellant's Appendix* at 194.

ARGUMENT

The court of appeals was correct in finding that the district court acted properly and within its broad discretion by imposing a spoliation sanction where Appellant, without sufficient notice, destroyed evidence to the prejudice of opposing parties.

A. Standard of Review

The court of appeals applied the proper standard of review in finding that the district court did not commit clear error. The district court has broad discretion to decide what, if any, sanction should be imposed when spoliation occurs. *Patton v. Newmar Corp.*, 538 N.W.2d 116, 119 (Minn. 1995). Spoliation is a factual finding that will not be set aside unless clearly erroneous. *Miller v. Lankow*, 776 N.W.2d at 736 (citing *Hoffman v. Ford Motor Co.*, 587 N.W.2d 66, 70-71 (Minn. App. 1998)). “One challenging the trial court's choice of a sanction has the difficult burden of convincing an appellate court that the trial court abused its discretion – ‘a burden which is met only when it is clear that no reasonable person would agree [with] the trial court's assessment of what sanctions are appropriate.’” *Patton*, 538 N.W.2d at 119 (quoting *Marracco v. General Motors Corp.*, 966 F.2d 220, 223 (7th Cir. 1992)).

B. Sufficiency of Notice

Spoliation is the destruction of evidence or the failure to preserve property for another's use in pending or future litigation. *Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc.*, 456 N.W.2d 434, 436 (Minn. 1990). Disposal of evidence is

spoliation when a party knows or should have known that the evidence should be preserved for pending or future litigation. *Patton*, 538 N.W.2d at 118.

The district court has broad discretion to impose sanctions in spoliation decisions. *Patton*, 538 N.W.2d at 119. Here, the district court found that Appellant destroyed evidence without sufficient notice to the other parties; it then exercised its inherent power to impose sanctions. *See id.* The district court cited extensively to the record in its order and judgment, *Appellant's Addendum* at 1, and the court of appeals systematically addressed each fact supporting the district court's findings in its decision to affirm. *Miller v. Lankow*, 776 N.W.2d 731.

The court of appeals described the various purported notices. Oral notice on September 20, 2005 did no more than complain of moisture problems. *Id.* at 736-37. This was followed by a September 30, 2005 meeting; like the September 20, 2005 phone call, this meeting did not constitute notice. *Id.* at 737. There is no evidence that Appellant believed that Respondents were responsible for the damage; rather, he was dealing with a moisture problem. Certainly no representations were made about the destruction of evidence. *Id.* Written notice of December 27, 2005 did inform of potential claims and as Appellant concedes, it fails to mention anticipated remediation. *Id.* at 737-38. The March 10, 2006 meeting between Donnelly and Appellants again evidenced no indication of remediation plans. *Id.* at 738. All of these facts occurred within the setting that the Appellant knew that the stucco would have had to have been removed to see exactly what was bad and if there were areas that were bad. *Appellant's Appendix* at 93.

This was followed by the March 15, 2007 letter claiming to notify parties of intended remediation. *Id.* at 738-39. However, as we know, this was not true because the evidence had been destroyed by the date that letter was issued.

Appellant had the opportunity to provide sufficient notice. On January 15, 2007 Appellant had contracted to have the remediation work done. This was two months before the March 15, 2007 letter. On February 2, 2007 a \$10,000 payment was made in consideration of that contract; this was six weeks before the March 15, 2007 letter. On March 9, 2007 another \$10,000 payment was made at the time when the demolition began. On March 15, 2007, the date the letter was sent, a \$20,000 payment was made after the stucco, the critical evidence in this case, had been removed.

Appellant had two months from the time he planned to destroy evidence to the time the stucco was completely removed from the house. The reason the March 15, 2007 letter was sent is obvious; the obligation to give notice is consistent with the Appellant's belief that stucco would need to be viewed in order to determine if it was bad and if it was the work of any of the Respondents. Presumably, Appellant's attorney sent the notice not out of an abundance of care, since the evidence was gone, but rather out of knowledge that notice of destruction of evidence was required. It is against this backdrop that Appellant cannot show that "no reasonable person would agree [with] the trial court's assessment of what sanctions are appropriate." *Patton*, 538 N.W.2d at 119.

Specifically at issue here is the district court's finding that Appellant's purported notice was insufficient to avoid spoliation sanctions. This Court has never addressed the sufficiency of a spoliation notice; however, it has addressed the sufficiency of a notice for

breach of warranty or contract under Minnesota's Uniform Commercial Code and its precursor statute. M.S.A. § 336.2-607(3)(a); see *Valspar Refinish, Inc. v. Gaylord's, Inc.*, 764 N.W.2d 359, 365-66 (Minn. 2009) (addressing sufficiency of notice under contract); *Church of Nativity v. WatPro, Inc.*, 491 N.W.2d 1, 5-6 (Minn. 1992), *overruled on other grounds*, *Ly v. Nystrom*, 615 N.W.2d 302 (Minn. 2000) (addressing sufficiency of notice under UCC); *Moosbrugger v. McGraw-Edison Co.*, 170 N.W.2d 72, 78-79 (Minn. 1969) (addressing sufficiency of notice under precursor to UCC statute); *Truesdale v. Friedman*, 132 N.W.2d 854, 863 (Minn. 1965) (addressing timeliness and sufficiency of notice under precursor to UCC statute); *Berry Asphalt Co. v. Apex Oil Products Co.*, 9 N.W.2d 437, 439 (Minn. 1943) (addressing sufficiency of notice under precursor to UCC statute). This is significant for reasons below.

The Minnesota Court of Appeals, addressing the sufficiency of a spoliation notice, has held: "to be sufficient in content, a spoliation notice must reasonably notify the recipient of a breach or claim." *Hoffman v. Ford Motor Co.*, 587 N.W.2d 66, 70 (Minn. App. 1998). Importantly, the Supreme Court cases cited above all address notice under contract or the UCC. Notice in these situations is required by contract or by statute before a claimant may commence an action for breach of warranty or contract in a sale of goods. *Hoffman* fits well with this analogy because the notice requirements of the UCC, like the Supreme Court cases cited above, involve a singular opposing party where the identity of the opposing party is clear and the complained-of defect is plainly identifiable.

In the present case, however, while the home was identifiable, the cause of the claimed moisture intrusion was not. Furthermore, responsibility, if any, for that moisture

intrusion is unidentifiable between the multiple parties. The evidence of the defect itself was hidden behind the home's façade. These distinguishing features are typical in construction defect cases, and require determination of the sufficiency of notice of spoliation rather than notice of a claim. A district court must look to the purposes underlying the notice requirement in order to make a ruling on the sufficiency of notice.

The purposes of notice, borrowed from the UCC in *Hoffman*, include the following: "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." *Hoffman*, 587 N.W.2d at 70 (quoting *Church of Nativity v. WatPro, Inc.*, 491 N.W.2d 1, 5-6 (Minn. 1992)); *see also* M.S.A. § 336.2-607(3)(a) and comment 4. The court of appeals held that "[t]he purposes of a 'spoliation notice' are virtually identical." *Hoffman*, 587 N.W.2d at 70.

Patton, a case like this one in which a Petition for Review was granted, this Court stated that district courts have broad discretion to impose sanctions in spoliation decisions. *Patton*, 538 N.W.2d at 119. Here, the district court found that Appellant's purported notice did not achieve the purposes of notice. *See Appellant's Addendum* at 4.

Amicus Minnesota Association for Justice has provided the Court with three unpublished opinions in which the spoliation notice was found to be insufficient. *See Smothers v. Insurance Restoration Specialist, Inc.*, 2005 WL 624511 (Minn. App.); *Dodd*

v. *Leviton Manufacturing Company*, 2003 WL 21147151 (Minn. App.); *Garrison v. Farmers Co-operative Exchange*, 2000 WL 169630 (Minn. App.).¹

In all three cases, the district court imposed sanctions excluding the spoliated evidence. Here, the court of appeals followed what has been done similarly in other cases at both the district court and appellate levels. The court of appeals, in its approval of the district court, simply articulated in non-UCC terms what is expected of parties regarding destruction of evidence:

[I]n order to provide a meaningful opportunity to correct defects, prepare for negotiation or litigation, and safeguard against stale claims, as required by *Hoffman*, we conclude that a party must provide actual notice of the nature and timing of any action that could lead to destruction of evidence and afford a reasonable amount of time from that date of the notice to inspect and preserve evidence.

Miller v. Lankow, 776 N.W.2d at 738.

The *Hoffman* decision and those cases decided by this Court involving contracts, the UCC, and products liability were decided under various fact-intensive situations. The court of appeals, dealing with spoliation notice rather than notice of a claim under the UCC set forth a clear and manageable approach for the district courts to protect evidence for litigation purposes.

Appellant professed to give such notice in his letter dated March 15, 2007.

Appellant's Appendix at 200-201. Appellant insists that the letter dated March 15, 2007 is insignificant in this case; however, its mere existence is a testament to the insufficiency

¹ These unpublished cases were provided pursuant to M.S.A. § 480A.08 Subd. 3 in Amicus' Appendix therefore they will not be reproduced here.

of all other purported notices. Such insignificance is hard to believe when the Appellant himself noted that “the stucco would have to have been removed to see exactly what was bad and if it was their areas that were bad.” *Appellant’s Appendix* at 93. It appears that during the destruction process, Appellant realized the need to give a spoliation notice. Instead of dealing with the spoliation issue candidly, Appellant attempted to avoid the issue by giving a late spoliation notice via the letter dated March 15, 2007.

The only function of the letter dated March 15, 2007 was to inform Respondents that Appellant was destroying relevant evidence. That letter was the only indication that relevant evidence was being destroyed. Not only did Appellant know the significance, such significance was also evident by the fact that Mr. Donnelly, upon receiving Plaintiff’s letter, visited the site within a day. *Appellant’s Appendix* at 194. Of course, this attempt to give a spoliation notice failed because all the stucco had already been removed by the time the letter was sent. *Appellant’s Appendix* at 197-99. The district court accordingly found the letter did not sufficiently notify Respondents because the destruction of relevant evidence was already complete by March 15, 2007. *Appellant’s Addendum* at 3-4; *Appellant’s Appendix* at 197-99.

What the court of appeals articulated as duties of a party controlling evidence has been applied in several cases under varying facts. Its decision sets forth spoliation guidelines not couched in UCC terms but in a broader application. The fact-intensive nature of spoliation decisions requires district courts to look to the purposes of notice in order to determine each case. That fact-intensive analysis benefits from the district court’s broad discretion under *Patton*, 538 N.W.2d at 119. This in effect states the

obvious about the spoliation rule. It is a field leveler. A party with evidence cannot destroy it without first providing an opportunity to opposing interests to view the evidence and act accordingly. It is more than notice of a claim, rather it is notice of spoliation of evidence. The court of appeals' requirement that "a party must provide actual notice of the nature and timing of ... destruction of evidence and afford a reasonable [opportunity] to inspect and preserve evidence" applied in a meaningful way a standard to a broader spectrum of spoliation cases. *Miller v. Lankow*, 776 N.W.2d at 738.

C. Prejudice to Opposing Parties

This Court has held that the standard for determining the impact of spoliation is prejudice to the opposing party. *Patton v. Newmar Corp.*, 538 N.W.2d 116, 118 (Minn. 1995). In so holding, you noted that the district court is not only empowered, but is obligated to determine the consequences of the evidentiary loss. *Id.* at 119.

The court of appeals pointed out that "Appellant does not dispute that relevant evidence was destroyed." *Miller v. Lankow*, 776 N.W.2d at 736. The district court found that "[t]he best evidence . . . is the home itself and the work done by Defendants Donnelly and Total Service." The district court further found that Appellant gained an advantage by being able to inspect the work, and that the prejudice to Respondents was "extremely significant." *Appellant's Addendum* at 5.

Appellant knew early on that in order to determine causation that "[t]he stucco would have had to have been removed to see exactly what was bad and if it was their areas that were bad." *Appellant's Appendix* at 93. Both Donnelly and Agness testified similarly. Mr. Donnelly told him during their first meeting that the work Donnelly

Brothers performed was limited to patching repaired areas of the house. *Appellant's Appendix* at 193-194. This shows all parties knew early on that causation was an issue.

At the time of the first meeting, Appellant planned on doing the work himself; this would not prompt a non-custodial party to take action on its own to tear apart someone else's home. This is especially true where Donnelly Brothers performed limited work on the home. Despite knowing that the stucco would need to be removed in order to determine what caused the moisture problems, Appellant did not indicate that he would remove stucco at any time before removing it. This is true even though two months before the stucco removal he contracted specifically for that to be done, he made \$20,000 in payments before the day notice was sent, and he made a \$20,000 payment on the day the notice was sent. Appellant, who knew early on that causation was an issue, disregarded it when he removed the stucco without notifying the other parties.

Donnelly Brothers was never offered the opportunity to view or observe the tearing apart of the exterior of Appellant's home in order to distinguish the work it performed from that of the original stucco contractor, and then to test the thickness, the condition and installation of the paper, and the sheathing in order to analyze the relationship between Donnelly Brothers' stucco work and the moisture problem. *See Appellant's Appendix* at 194. By the time Donnelly Brothers did have reason to act, which Mr. Donnelly did immediately after receiving the March 15, 2007 letter, the removal had already taken place. The district court recognized that distinction, and its findings were not abusive of its broad discretion. The prejudice to Respondents is clear and apparently without contest. It adversely affected Respondents' ability to pursue

negotiations or prepare for litigation. Appellant's destruction of evidence also raises the issue of what evidence he could rely upon to prove his case, without photos, measurements, or observations. To destroy this evidence with ample opportunity to protect it, knowing its import, should, much like the finding in *Patton*, result in the exclusion of this evidence and leave Appellant without the ability to prove his claim.

CONCLUSION

The court of appeals properly affirmed the district court's finding that Appellant's purported spoliation notice was insufficient to avoid sanctions and that Respondents were prejudiced by Appellant's destruction of relevant and necessary evidence. Clearly Appellant could have provided notice to Respondents on January 15, 2007 when he contracted for the destruction of the evidence. The court of appeals articulately stated that a party is to provide actual notice of any action that could lead to destruction of evidence and afford a reasonable amount of time from the date of the notice to inspect and preserve the evidence. Respondent Donnelly Brothers therefore respectfully requests that this Court affirm the decisions of the courts below.

Respectfully submitted,

WALDECK & LIND, P.A.

Dated: _____

5/7/10



Timothy W. Waldeck (#11375X)

1400 TCF Tower
121 South Eighth Street
Minneapolis, MN 55402
(612) 375-1550

Attorneys for Respondent Donnelly Brothers

CERTIFICATE OF COMPLIANCE

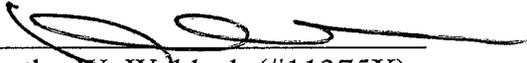
I hereby certify that this brief conforms to Minn. R. Civ. App. Rule 132.01 for a brief using the following typeface: Times New Roman, 13 point font. The length of this brief is 3, 924 words. This brief was prepared using Microsoft Word 2003.

Respectfully submitted,

WALDECK & LIND, P.A.

Dated: _____

5/7/10



Timothy W. Waldeck (#11375X)

1400 TCF Tower

121 South Eighth Street

Minneapolis, Minnesota 55402

(612) 375-1550

Attorneys for Respondent Donnelly Brothers