

NO. A09-0244

State of Minnesota
In Supreme Court

David Miller,

Appellant,

vs.

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

Respondents.

**BRIEF AND APPENDIX OF
RESPONDENT TOTAL SERVICE COMPANY**

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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 THE LEGAL ISSUE

Whether the district court properly precluded Appellant's expert evidence as a spoliation sanction, where Appellant destroyed evidence material to his claim and Respondents' defenses without prior notice of its destruction, thereby depriving Respondents of a reasonable opportunity to investigate Appellant's claim and prepare for litigation.

Description of how the issue was raised in the district court

Respondents raised this issue at trial by moving for summary judgment pursuant to Minn.R.Civ.P. 56.03. See Memorandum of Law in Support of Total Service Company's Motion for Joinder and Summary Judgment.

Concise statement of the district court's ruling

The Wright County District Court sanctioned Appellant through the preclusion of expert testimony after Appellant destroyed material evidence relevant to the claims and defenses without giving Respondents reasonable prior notice of its destruction and consequently granted summary judgment as a consequence of that sanction.

Description of how the issue was preserved for appeal

Appellant preserved this issue for appeal by filing a timely notice of appeal pursuant to Minn.R.Civ.App.P. 103.01, subd. 1, within the time period required by Minn.R.Civ.App.P. 104.01, subd. 1.

Apposite cases, constitutional, and statutory provisions

Fonda v. St. Paul City Railway Company, 71 Minn. 438, 74 N.W. 166 (1898)

Kmetz v. Johnson, 261 Minn. 395, 113 N.W.2d 96 (1962)

Hoffman v. Ford Motor Company, 587 N.W.2d 66 (Minn.App. 1998)

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

STATEMENT OF THE CASE

Appellant David J.T. Miller (“Appellant”) commenced this action on or about April 27, 2007, alleging water intrusion damage to his home under a variety of legal theories. *See* TSC Appendix at 7-17. He directed the majority of his claims against Respondents Linda J. Lankow (“Lankow”) and James E. Betz (“Betz”), the home’s prior owners. *See id.* at 10-15. Appellant also alleged that TSC and Respondent Donnelly Brothers (“Donnelly”) negligently failed to correct moisture intrusion and mold issues previously for Lankow when she owned the home. *See id.* at 15-16. In or about March 2008, Lankow and Betz commenced claims for contribution or indemnity against Respondent Burnet Realty, Inc., d/b/a Coldwell Banker Burnet (“Burnet”) and Respondent Mark A. Geier (“Geier”).

All Respondents, including TSC, moved for summary judgment. *See id.* at 1-5 (TSC’s joinder in the other Respondents’ summary judgment motions). In conjunction with those motions, Respondents, including TSC, argued that Appellant spoliated evidence by having the home remediated without giving Respondents reasonable notice of his remediation plans so that Respondents could inspect and preserve evidence. *See id.* at 2-4. On December 16, 2008, the Wright County District Court, the Honorable Stephen M. Halsey presiding, held that Appellant spoliated evidence relevant to the parties’ claims and defenses through the remediation work performed on his home and that the spoliation of evidence prejudiced Respondents. *See* TSC Addendum at 5-6. As a spoliation sanction, the district court precluded Appellant’s expert evidence. *See id.* at 6. As a consequence of that sanction, the district court granted summary judgment to

Respondents due to Appellant's inability to establish essential elements of his claims. *See id.* at 7.

On or about February 4, 2009, Appellant filed a timely notice of appeal. *See* Appellant's Appendix at 229-230. On December 22, 2009, the Minnesota Court of Appeals affirmed the district court's spoliation sanction and resulting summary judgment. *See Miller v. Lankow*, 776 N.W.2d 731, 741 (Minn.App. 2009). The Minnesota Court of Appeals held Appellant's alleged spoliation notices deficient because the notices failed to give Respondents sufficient advance notice of Appellant's remediation plans or an opportunity to inspect and preserve the evidence of mold and moisture damage before remediation. *See id.* at 739.

On January 20, 2010, Appellant filed with this Court a timely petition for review, contending that the court of appeals substantially expanded Minnesota law by deeming his alleged spoliation notices deficient due to their failure to advise Respondents of his remediation plans. *See* Appellant's Appendix at 255-261. TSC opposed review, noting that Appellant failed to satisfy the criteria for review set forth in Minn.R.Civ.App.P. 117. *See* Respondent Total Service Company's Response to the Petition for Review at 2-5. TSC respectfully noted that acceptance of review for the purpose of reversal "would undermine the foundation of Minnesota's spoliation law." TSC's Response to Petition at 5. On March 16, 2010, this Court granted the Petition for Review, thereby giving TSC this opportunity to explain why the lower court's decision should be affirmed as consistent with existing precedent concerning the spoliation of evidence. *See* Order

Granting Petition for Review. Based on the arguments and authorities stated herein, TSC respectfully asks this Court to affirm the lower courts' decisions in this action.

STATEMENT OF THE FACTS

The Minnesota Court of Appeals accurately recited the facts giving rise to this Appeal. *See Miller*, 776 N.W.2d at 734-736. In the interest of brevity and economy, TSC does not repeat them all here. Certain points, however, are essential to accurately understanding the timeline of events leading to Appellant's litigation with TSC. In the interest of clarity, TSC emphasizes those facts here.

In or about 2003, Lankow hired TSC to remove stucco, investigate the extent of moisture intrusion, and perform structural repairs associated with her effort to address moisture intrusion and mold in her St. Michael home. *See TSC Appendix* at 104 (28:8-25), 105 (29:1-21). She also hired Donnelly to re-stucco portions of the home's exterior removed during remediation. *See id.* TSC received no information suggesting that its repairs were incomplete following this work. *See Appellant's Appendix* at 216 (8:4-16). Upon completion of work performed by TSC and other contractors, Lankow placed her home on the market.

On May 21, 2004, Appellant purchased Lankow's home. *See TSC Appendix* at 104 (25:8-9). He signed the purchase documents and a receipt for disclosure forms, acknowledging that he knew about previous moisture and mold issues, and that contractors had performed repairs. *See id.* at 104 (25:15-25; 26:1-13). Appellant expressly waived his right to have the home inspected. *See id.* at 105 (32:15-18).

On September 20, 2005, Appellant discovered moisture intrusion and mold in parts of the home subject to remediation in 2003. *See id.* at 108 (41:21-25; 42:1-3), 120 (92:22-25), 121 (93:1-5). He informed TSC and Donnelly of his discovery by calling them on September 20, 2005, in order to inform them “that the house still had moisture problems and . . . to see if there was anything they could do about it.” *See id.* at 122 (97:15-17). TSC and Donnelly representatives agreed to meet Appellant at his home.

On September 30, 2005, Appellant met with TSC and Donnelly representatives at his home. At that meeting, TSC and Donnelly representatives explained the scope of their 2003 remediation work to Appellant. *See Appellant’s Appendix at 193, ¶ 5.* Appellant purportedly told TSC and Donnelly representatives that he was interested in addressing the moisture intrusion and mold problem immediately. *See Appellant’s Brief at 2.* Yet, there is no evidence that Appellant blamed either TSC or Donnelly for his moisture intrusion and mold problem. *See Appellant’s Appendix at 217 (9:21-25; 10:1-6).* In fact, Appellant testified: “The stucco would have had to have been removed to see exactly what was bad and if it was their areas that were bad.” *See TSC’s Appendix at 123 (104:23-25).*

TSC is experienced in determining the cause of water intrusion in homes. *See Appellant’s Appendix at 221 (26:12-15).* TSC’s president, Jeffrey Agness, testified that he could not determine whether Appellant’s moisture intrusion and mold problem implicated TSC’s work at the September 30, 2005 meeting. *See Appellant’s Appendix at 217 (11:1-25; 12:1).* He also testified that mold can come from many different things,

some of which are hidden and, therefore, not readily discoverable. *See id.* at 222 (30:11-23).

No evidence suggests that Appellant invited TSC and Donnelly to begin removing stucco in order to determine the scope, extent, and cause of the moisture intrusion and mold at the September 30, 2005 meeting. Rather, theories were offered about the possible cause of the moisture and mold. *See* TSC Appendix at 123 (103:14-21). The entire meeting lasted about 45 minutes. *See id.* at 123 (104:4-5).

TSC heard nothing further from Appellant until December 27, 2005, when Appellant's former attorney, Michael G. Halvorson, wrote TSC and Donnelly, alleging that TSC and Donnelly's 2003 remediation work was defective.¹ *See* Appellant's Addendum at 9-10; Appellant's Appendix at 195-196. Attorney Halvorson's letter encouraged TSC and Donnelly to inspect Appellant's home and discuss possible solutions. *See* Appellant's Addendum at 10; Appellant's Appendix at 196. The letter provided notice of a possible claim for breach of home improvement warranty and advised that Appellant would commence a lawsuit if Halvorson did not hear from TSC or Donnelly by January 9, 2006. *See* Appellant's Addendum at 9-10; Appellant's Appendix at 195-196. The letter did not invite TSC to begin removing stucco in order to determine

¹ Appellant argues that after this meeting, representatives of TSC and Donnelly met with Respondents Lankow and Betz to discuss an impending lawsuit involving Appellant, claiming that TSC's president, Jeffrey Agness, admitted to doing so. *See* Appellant's Brief at 6, 10. That argument is misplaced, because Mr. Agness testified that he and Donnelly did not meet with Respondents Lankow and Betz to discuss impending litigation with Appellant until there was some threat of a suit. *See* Appellant's Appendix at 224. There was no threat of a lawsuit until Respondents received correspondence from Attorney Halvorson on December 25, 2005.

the scope, extent, and cause of the moisture intrusion and mold. *See id.* The letter said nothing about Appellant's plan to commence remediation if TSC or Donnelly failed to respond to the letter by January 9, 2006. *See id.*

On March 10, 2006, a Donnelly representative visited Appellant's home. By that time, Appellant had removed a portion of an interior wall in order to investigate the moisture intrusion and mold problem for himself. *See Appellant's Appendix at 194 at ¶ 5.* Despite the presence of moisture inside that wall, the Donnelly representative could not determine how to resolve the problem. *See id.* Appellant and the Donnelly representative reached no agreement as to how to address the problem. *See id.* There is no evidence that Appellant informed the Donnelly representative of his plans for remediation at the March 10, 2006, meeting. *See id.* at ¶ 6. The record contains no evidence of further contact between Appellant and any Respondent for more than one year.

On March 15, 2007, Appellant's current attorney, Patrick W. Michenfelder, wrote Respondents, instructing them to immediately schedule any further inspections of Appellant's home because Appellant planned to proceed with needed repairs on March 22, 2007. *See Appellant's Appendix at 200-201.* That letter did not mention that Appellant had already hired J Brothers Construction in January 2007 to undertake remediation which began at the end of that month. *See id; cf. TSC's Appendix at 115 (69:25; 70:1-6).* When a Donnelly representative visited Appellant's residence on March 23, 2007, the home's stucco already was removed. *See Appellant's Appendix at 194, ¶ 8.* Respondents had no notice of Appellant's intention to perform this work before March 15, 2007.

Appellant, nevertheless, sued Respondents on or about April 27, 2007, under various theories. *See* TSC Appendix at 7-17. He claimed, *inter alia*, that TSC failed to properly remediate moisture intrusion and mold when Lankow hired it to perform that work in 2003. *See id.* at 15. Ultimately, TSC and the other Respondents moved for summary judgment, arguing that Appellant spoliated evidence of water damage and mold by making repairs without providing them a meaningful opportunity to inspect the home. *See id.* at 1-7. In moving for summary judgment, TSC called the district court's attention to Mr. Agness' testimony that his inability to access and inspect the physical evidence made it impossible for him to determine the cause of Appellant's moisture intrusion and mold problem and to prepare a defense to Appellant's claims. *See id.* at 3-4; Appellant's Appendix at 225 (44:7-21; 45:3-21).

In opposing TSC's summary judgment motion, Appellant argued that Attorney Halvorson's December 27, 2005, letter, and Attorney Michenfelder's March 15, 2007, letter invited Respondents to inspect the home. *See* TSC Appendix at 29-30. He contended that the December 27, 2005, letter implicitly advised Respondents of his intention to undertake remediation. *See id.* at 30. Appellant characterized Attorney Michenfelder's March 15, 2007 letter as "an excessive precaution taken . . . to ensure that [Appellant] would avoid sanctions for any remediation work he undertook." *I* at 31.

Appellant also supported his summary judgment opposition with the Affidavit of Charles Johnson, an officer of J Brothers Construction. *See* TSC Appendix at 59-64. Attached to that Affidavit were 21 black and white photographs of the home as it appeared after the removal of stucco from the home's sheathing. *See id.* at 66-86.

Although Johnson accused TSC and Donnelly of building code violations, his affidavit does not bother to support that accusation with reference to the attached photographs. *See id.* at 61-62. Johnson also did not support his accusation of building code violations with any detailed descriptions of the home based on his personal observations. *See id.* Consequently, TSC argued that Johnson lacked adequate evidentiary foundation for the opinions he offered. *See id.* at 92-93.

The district court rejected Appellant's arguments, determined that Appellant spoliated evidence, and sanctioned Appellant by precluding his expert evidence. *See* TSC Addendum at 6. As a consequence of that sanction, the district court determined that Appellant could not present a genuine issue of material fact with respect to his claims and granted summary judgment in favor of all Respondents, including TSC. *See id.* at 7. Appellant appealed his case to the Minnesota Court of Appeals. *See* Appellant's Appendix at 229.

In the Minnesota Court of Appeals, Appellant relied heavily upon the decision of the Minnesota Court of Appeals in *Hoffman v. Ford Motor Company* to support the position that he gave Respondents oral and written notices adequate to sustain his burden to preserve relevant evidence and to avoid spoliation sanctions. *See* Brief of Appellant filed in Minnesota Court of Appeals at 9-12. He argued that Respondents had notice of a breach or a claim as early as September 30, 2005, when their representatives visited his home, because they discussed the need to remove stucco in order to address the moisture intrusion and mold problems. *See id.* at 10. Appellant also argued that the December 27,

2005, letter constituted sufficient notice of a breach, because the letter told Respondents that Appellant intended to put the matter into suit. *See id.* at 12.

The Minnesota Court of Appeals rejected those arguments and affirmed the district court's determination that Appellant spoliated evidence through the remediation work performed in 2007. *See Miller*, 776 N.W.2d at 741. Following its own precedent in *Hoffman v. Ford Motor Company*, 587 N.W.2d 66 (Minn.App. 1998), the Minnesota Court of Appeals determined that Appellant spoliated evidence to Respondents' prejudice and affirmed the district court's sanction and resulting summary judgment. *See id.* at 736-738. Within 60 days after the Minnesota Court of Appeals filed its opinion affirming the district court's rulings, Appellant appealed to this Court. *See Appellant's Appendix* at 255-261.

For all the reasons discussed below, TSC respectfully urges this Court to reject Appellant's arguments, to affirm the rulings of the lower courts, and to fashion a rule of law applicable to this case and to future cases which clearly establishes how a custodian of material evidence must discharge its obligation to preserve relevant evidence through a spoliation notice.

ARGUMENT

I. APPLICABLE STANDARD OF REVIEW

Appellant challenges the district court's exclusion of his expert evidence as a spoliation sanction, not the district court's grant of summary judgment *per se*.²

² TSC acknowledges that this Court reviews the grant of summary judgment *de novo*. *See Lefto v. Hoggsbreath Enterprises, Inc.*, 581 N.W.2d 855, 856 (Minn. 1998).

Accordingly, the only standard of review applicable to this appeal is that which applies to the imposition of spoliation sanctions. “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 v. Newmar Corporation*, 538 N.W.2d 116, 119 (Minn. 1995) (quoting *Marrocco v. General Motors Corp.*, 966 F.2d 220, 223 (7th Cir. 1992)). TSC respectfully submits that Appellant has not, and cannot, sustain that difficult burden under the facts of this case for the reasons set forth herein.

II. THIS COURT’S LIMITED PRECEDENT PROVIDES AN ANALYTICAL FRAMEWORK FOR ANALYZING THE ISSUE ON APPEAL.

This Court has defined spoliation generally as the destruction of evidence constituting an obstruction of justice. See *Federated Mutual Insurance Company v. Litchfield Precision Components, Inc.*, 456 N.W.2d 434, 436 (Minn. 1990) (citing BLACK’S LAW DICTIONARY 1257 (5th ed. 1979)). The United States District Court for the Southern District of New York also has defined “spoliation” as “the destruction or significant alteration of evidence, or the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation.” *Zubulake v. USB Warburg, LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003)³ (quoting *West v. Goodyear Tire & Rubber*

TSC does not understand Appellant’s appeal to involve this standard of review, however, because TSC does not perceive Appellant as challenging the grant of summary judgment so much as the preclusion of his expert evidence as a spoliation sanction.

³ TSC provides the Court with a copy of this decision on pages 159-172 of its Appendix.

Co., 167 F.3d 776, 779 (2d Cir. 1999)). In Minnesota, “the affirmative destruction of evidence has not been condoned.” *Patton*, 538 N.W.2d at 119.

In the past 114 years, this Court has decided only four cases involving spoliation-related issues. The first two of those cases did not involve the actual destruction of relevant evidence prior to litigation. Rather, they involved situations in which one party claimed prejudice by the failure of another party to present relevant evidence at trial.

In *Fonda v. St. Paul City Railway Company*, the plaintiff sued the defendant for injuries he sustained due to the negligence of the defendant’s motorman in the operation of one of the defendant’s cars resulting in a plaintiff’s verdict. *See* 71 Minn. 438, 443, 74 N.W. 166, 167 (1898). Because the defendant did not call its own motorman as a witness at trial, the Ramsey County District Court told the jury that it could draw an adverse inference from the fact that a party failed to adduce evidence within its control reasonably calculated to throw light upon the responsibility of either party. *See id.* at 452, 74 N.W. at 170. This Court affirmed the district court’s adverse inference instruction, holding:

The presumption arising from the spoliation or suppression of evidence, that it would, if produced, be unfavorable to the party destroying or suppressing it, obtains with most force to the case of documentary evidence in the exclusive possession and control of the party. But the presumption is not necessarily limited to such cases.

Id. at 452, 74 N.W.2d at 170. This Court approved the use of an adverse inference instruction under these circumstances, reasoning that one party’s failure to call its own witness should not require its opponent to go “‘into the enemy’s camp’ for evidence” by “calling the very man charged with the negligence which caused the injury.” *Id.* at 452-453, 74 N.W. at 171. Thus, *Fonda* approved a district court’s use of an adverse inference

instruction as a sanction or a penalty for prejudice caused by a party's failure to introduce relevant evidence within its exclusive control.

This Court's decision in *Kmetz v. Johnson*, 261 Minn. 395, 113 N.W.2d 96 (1962) involved a similar issue, but yielded the opposite result. In *Kmetz*, a plaintiff who lost at trial argued that the Chisago County District Court should have permitted her lawyer to argue in summation that the defendant's failure to introduce photographic evidence would have been material in establishing the defendant's negligence. *See id.* at 401, 113 N.W.2d at 100. This Court disagreed, concluding that a noncustodial plaintiff is not entitled to an adverse inference instruction against a custodial defendant who fails to present photographic evidence equally available to both parties prior to trial. *See id.*, 261 Minn. at 401-402, 113 N.W.2d at 100-101. Thus, *Kmetz* stands for the proposition that district courts should not use an adverse inference instruction to sanction a party who fails to present evidence equally available to both parties, because the equal availability of the omitted evidence avoids any unfair prejudice that might otherwise result from one party's failure to present relevant evidence at trial.

The remaining two decisions of this Court addressed the issue of how district courts should address spoliation when it occurs prior to litigation. In *Federated Mutual Insurance Company v. Litchfield Precision Components, Inc.*, the Hennepin County District Court certified three questions to this Court: (1) whether Minnesota recognizes a cause of action for intentional spoliation of evidence; (2) whether Minnesota recognizes a cause of action for negligent spoliation of evidence; and (3) whether a subrogated insurer stated a sufficiently cognizable claim against the alleged spoliators under either or both of

these claims prior to the resolution of its subrogation claim. *See Federated*, 456 N.W.2d at 435. This Court declined to recognize a cause of action for the intentional or negligent spoliation of evidence under the facts presented and, therefore, answered all three certified questions negatively. *See id.* at 439. In reaching that decision, the Court observed that Minnesota “permits ‘an unfavorable inference to be drawn from failure to produce evidence in the possession and under the control of a party to litigation.’” *See id.* at 436 (quoting *Kmetz*, 261 Minn. at 401, 113 N.W.2d at 100). It also noted the presence of discovery and other criminal sanctions to address the problem of spoliation. *See id.*

This Court’s decision in *Patton v. Newmar Corporation*, represents the fourth and final time this Court has addressed the issue of spoliation. *Patton* decided two questions: “whether the trial court is authorized to impose a sanction for spoliation of evidence and, if so, whether it abused its discretion by excluding as a sanction the testimony and documentary evidence obtained by plaintiffs’ expert during his investigation.” *Patton*, 538 N.W.2d at 118. This Court answered the first question affirmatively by accepting and applying standards that the United States Court of Appeals for the Eighth Circuit set in *Dillon v. Nissan Motor Co., Ltd.*, 986 F.2d 263 (8th Cir. 1993) and holding that the district court has inherent power to impose sanctions to remedy the prejudicial effect of spoliation.⁴ *See Patton*, 538 N.W.2d at 119. This Court answered the second question

⁴ In the court of appeals, and to a limited extent in this Court, Appellant has cast the issue on appeal in terms of whether the district court had authority to preclude his expert proof as a spoliation sanction. *See* Appellant’s Brief to the Minnesota Court of Appeals at 19-20; *cf.* Appellant’s Brief at 16 (“[e]ven if it is assumed for purposes of argument that the district court had authority to impose a spoliation sanction in this case. . .”). Because this Court decided that district courts have inherent authority to impose

negatively, holding that a district court does not abuse its discretion by excluding the testimony and documentary evidence obtained by the plaintiff's expert during his investigation when the undisputed evidence showed that the evidence was substantially modified or altered prior to the accident, the extent to which and the effects of which no longer could be ascertained due to the spoliation. *See id.*

Clearly, these four decisions do not address the precise issue on appeal. Yet they provide a framework for analyzing that issue. *Fonda* approved the use of an adverse inference instruction to sanction a defendant's failure to present relevant evidence within its exclusive control to the plaintiff's prejudice. *Kmetz* upheld the denial of such a sanction because the omitted evidence was equally available to both parties. *Federated* declined to recognize tort claims to address the prejudicial effect of spoliation in preference to the imposition of sanctions. *Patton* reaffirmed the district court's inherent power to impose sanctions against a party who destroys relevant evidence to the prejudice of its opponent.

The over-arching theme of these decisions is that Minnesota courts have discretion to punish the prejudicial spoliation of evidence through sanctions, which may include the preclusion of the spoliator's expert proof.⁵ Prejudice determines the availability of

sanctions to punish the prejudicial spoliation of evidence, TSC really does not perceive the Wright County District Court's abstract ability to impose spoliation sanctions to be an issue.

⁵ TSC acknowledges that it asked the district court for summary judgment as a spoliation sanction. *See* TSC Appendix at 3. The Wright County District Court did not render summary judgment as a spoliation sanction. Rather, the district court precluded Appellant's expert proof as a spoliation sanction in accordance with this Court's decision

sanction, and the degree of prejudice determines the severity of sanction. Sanctions are not imposed where there is no prejudice, that is, where the evidence in question is equally available to both parties. TSC respectfully suggests that this Court should decide this appeal, and fashion a rule for evaluating the sufficiency of spoliation notices in future cases, with these over-arching themes in mind.

III. THE COMMON LAW REQUIRED APPELLANT TO PRESERVE RELEVANT EVIDENCE ONCE HE KNEW OR SHOULD HAVE KNOWN THAT IT MIGHT BE RELEVANT TO FUTURE LITIGATION.

Minnesota appellate courts have not specified exactly when the obligation to preserve relevant evidence arises.⁶ Federal courts, including the Eighth Circuit and the United States District Court for the District of Minnesota, recognize that the obligation to preserve material evidence arises when a person reasonably should know that evidence

in *Patton*. See TSC Addendum at 6, ¶ 6. TSC does not mean to infer that a district court is powerless to dismiss a case as a spoliation sanction. After all, this Court held in *Patton* that a district court's authority to sanction the prejudicial spoliation of evidence stems from the district court's inherent power. See *Patton*, 538 N.W.2d at 119. In reaching that holding, this Court accepted and applied the standards set by the Eighth Circuit in *Dillon*. See *id.* There, the Eighth Circuit held that a United States District Court's authority to impose spoliation sanctions is comparable to its authority to impose sanctions under Fed.R.Civ.P. 37. See *Dillon*, 986 F.2d at 268.

⁶ TSC recognizes that some courts refer to this obligation as a "duty" to preserve relevant evidence. It is unclear whether, in every case, the word "duty" refers to a tort duty or to an evidentiary obligation. Generally there must be a special relationship between people before the common law will impose a tort duty on one for the benefit of the other. See *Bjerke v. Johnson*, 742 N.W.2d 660, 665 (Minn. 2007). Whether Minnesota law provides for a special relationship between the custodian of relevant evidence and noncustodial parties or potential litigants presents an interesting question not presented here and which this Court may decide in a different case on a different day. Given the current state of Minnesota's common law, TSC understands "duty" as it relates to the preservation of relevant evidence to refer to no more than an evidentiary obligation placed upon the custodian when litigation becomes reasonably foreseeable.

within its custody may be relevant to future litigation. *See Dillon*, 986 F.2d at 268; *Wagoner v. Black & Decker*, Civ. No. 05-1537 (JNE/SRN), 2006 U.S. Dist. LEXIS 55314 at *8-9 (D.Minn. 2006)⁷; *Capellupo v. FMC Corp.*, 126 F.R.D. 545, 551 (D.Minn. 1989). The Superior Court for the State of New Jersey, however, noted:

[A] duty to preserve evidence, independent from a court order to preserve evidence, arises where there is: (1) pending or probable litigation involving the defendants; (2) knowledge by the plaintiff of the existence or likelihood of litigation; (3) foreseeability of harm to the defendants, or in other words, discarding the evidence would be prejudicial to defendants; and (4) evidence relevant to the litigation.

Hirsch v. General Motors Corporation, 266 N.J. Super. 222, 254, 628 A.2d 1108, 1124 (1993).

“A plaintiff’s duty is more often triggered before litigation commences, in large part because plaintiffs control the timing of litigation.” *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*, Court File No. 05 Civ. 9016 (SAS), 2010 U.S. Dist. LEXIS 1839 at *14 (S.D.N.Y. 2010).⁸ The existence of similar rules under Minnesota’s common law seems logical, given this Court’s acceptance and application of the Eighth Circuit’s standards for imposing sanctions to address the prejudicial effect of spoliation. *See Patton*, 538 N.W.2d at 119 (accepting and applying Eighth Circuit law recognizing the trial court’s inherent power to impose sanctions to remedy the prejudice of spoliation).

⁷ TSC provides the Court with a copy of this unpublished case on pages 212-218 of its Appendix.

⁸ TSC provides the Court with a copy of this unpublished case on pages 173-211 of its Appendix.

It is illogical to expect that someone who lacks custody of relevant evidence should take affirmative steps to preserve it, no matter how likely the prospect of litigation. This Court recognized that point within the context of the State's obligation to preserve evidence collected during a criminal investigation when it observed that "it would be illogical to impose an obligation on the state to preserve evidence that it does not possess." *State v. Krosch*, 642 N.W.2d 713, 718 (Minn. 2002). Similar logic applies in civil cases, as evident from this Court's observation in *Kmetz* about the difference between drawing an adverse inference against a party lacking a proof burden versus one having that burden. In *Kmetz*, this Court observed:

The opponent whose case is a denial of the other party's affirmation has no burden of *persuading the jury*. A party may legally sit inactive, and expect the proponent to prove his own case. Therefore, until the burden of producing evidence has shifted, the opponent has no call to bring forward any evidence at all, and may go to the jury trusting solely to the weakness of the first party's evidence. Hence, though he takes risk in so doing, yet his failure to produce evidence cannot at this stage afford any inference as to his lack of it; otherwise the first party would virtually be evading his legitimate burden.

Kmetz, 261 Minn. at 403, 113 N.W.2d at 101 (quoting 2 Wigmore, EVIDENCE § 290 (3 ed.)) (emphasis in original). If a defendant may avoid liability merely by exposing the weakness in the plaintiff's own evidence, it stands to reason that the plaintiff may not destroy evidence within his exclusive control prior to litigation and later use that destruction to sabotage the defense. See *Hirsch*, 266 N.J. Super. at 254, 628 A.2d at 1124 ("Plaintiffs cannot 'clean their hands' by shifting the burden of preserving evidence to defendants after plaintiffs had breached their duty to preserve or provide inspection access to crucial evidence.").

It follows, therefore, that Appellant had a duty to preserve his home's condition as soon as he had actual or constructive notice that such evidence would be relevant to future litigation. The record is not clear exactly when Appellant acquired such notice. Appellant testified that he called the contractors on September 20, 2005, to inform them "that the house still had moisture problems and . . . to see if there was anything they could do about it." *See* TSC Appendix at 122 (97:15-17). Thus, the record does not support the notion that Appellant anticipated litigation when he notified Respondent contractors of moisture intrusion and mold on September 20, 2005.

The record also does not support the notion that Appellant had actual or constructive notice that his home's condition would be relevant to future litigation when he met Respondent contractors at his home on September 30, 2005. At that meeting, Appellant did not tell representatives of TSC and Donnelly that he thought their work was faulty. He also did not advise them that he contemplated suing them. Indeed, according to Appellant, the stucco exterior made it difficult to determine the cause and extent of the moisture intrusion and mold. *See id.* at 123 (104:23-25). If Appellant himself could not discern the cause and extent of the moisture intrusion and mold, it is difficult to conclude that Appellant knew or should have known that that the home's condition would be relevant to future litigation because no evidence suggests that either Appellant or Respondent contractors contemplated litigation at that time.

Appellant had to have acquired actual or constructive knowledge that his home's condition would be relevant to future litigation sometime between September 30, 2005, and December 27, 2005, when Attorney Halvorson wrote Respondents threatening a

lawsuit for allegedly faulty construction. From that point forward, Appellant was obliged to preserve the home's condition as evidence relevant to future litigation.

IV. A SPOILIATION NOTICE PERMITS A PARTY HAVING A LEGITIMATE NEED TO DESTROY RELEVANT EVIDENCE PRIOR TO LITIGATION TO SATISFY THAT NEED WHILE FULFILLING ITS OBLIGATION TO PRESERVE RELEVANT EVIDENCE.

Although a person must preserve relevant evidence within its custody once the person acquires actual or constructive notice of its relevance to future litigation, this obligation's scope "is not boundless." *Hirsch*, 266 N.J. Super. at 251, 628 A.2d at 1122. The law does not require the custodian of relevant evidence to take extraordinary measures to preserve it. *See Trevino v. Ortega*, 969 S.W.2d 951, 957 (Tex. 1998). The custodian of relevant evidence need only do what is reasonable. *See Hirsch*, 266 N.J. Super. at 251, 628 A.2d at 1122.

Certain circumstances may give a person having custody of relevant evidence a legitimate reason to destroy relevant evidence prior to litigation. For example, homeowners who lose their home to fire caused by faulty construction are not required to obtain the consent of all potential defendants prior to rebuilding. *See American Family Mutual Insurance Company v. Golke*, 2009 WI 81 at ¶30, 319 Wis.2d 397, 416, 768 N.W.2d 729, 738. The Wisconsin Supreme Court made this observation concerning that kind of situation:

Such a rule would place the party in control of the evidence at the mercy of its adversary who would be indirectly rewarded for withholding its consent to destroy evidence. An adversary would have no incentive to either inspect the evidence or grant its consent to the destruction of evidence. This is to say nothing of the unfairness to insureds who (like the homeowners in this case) could be stuck in limbo while a court-endorsed

and costly waiting game ensued between the parties. We cannot endorse a rule that encourages such brinkmanship.

Golke, 2009 WI 81 at ¶ 30, 319 Wis.2d at 416, 768 N.W.2d at 738. Accordingly, the custodian of relevant evidence may have a legitimate need to destroy relevant evidence prior to litigation. The facts and circumstances of each case must determine will determine the legitimacy of that need.

Assuming that the custodian of relevant evidence in fact has a legitimate need to destroy it prior to litigation, that need cannot place an unreasonable burden on non-custodial parties or potential litigants. One court observed:

It would be prudent for manufacturers and retailers to immediately inspect every accident involving their goods. However, that is excessively burdensome. Moreover, it is not sound policy that a plaintiff, who exercises complete control over the evidence, may unilaterally inspect and discard it.

Hirsch, 266 N.J. Super. at 254, 628 A.2d at 1124. Hence, the custodian of relevant evidence, who has a legitimate need to destroy relevant evidence prior to litigation, may not satisfy that need unilaterally. The custodian must notify noncustodial parties and potential litigants of the planned destruction.

“Numerous other courts have outlined or suggested” a sufficient spoliation notice as a method for balancing the interests of custodial parties, noncustodial parties, and potential litigants when a legitimate need to alter or destroy relevant evidence arises before litigation or trial. *See Golke*, 2009 WI 81 at ¶ 28, 319 Wis.2d at 414, 768 N.W.2d at 737 (citing numerous cases evaluating the sufficiency of spoliation notices in footnote 10 of that opinion). The decisions of at least five of those courts provide instructive

examples of how a spoliation notice performs this important function. In *Northern Assurance Company v. Ware*, the United States District Court for the District of Maine precluded a plaintiff's expert proof because the plaintiff destroyed relevant evidence from a fire scene without first "afford[ing] reasonable notice to likely adversaries that such [destruction] was about to occur . . .". *Ware*, 145 F.R.D. 281, 284 (D.Me. 1993).⁹ In *Cooper v. United Vaccines, Inc.*, the United States District Court for the Eastern District of Wisconsin dismissed the case as a spoliation sanction, holding that a plaintiff who destroyed all remaining samples of a vaccine through botched, ex-parte destructive testing "should have informed [the defendant] of its intention to engage in destructive testing" so that the defendant "could either participate in those tests or conduct its own tests on the retained samples." *Cooper*, 117 F.Supp.2d 864, 875 (E.D.Wis. 2000).¹⁰ Similarly, in *Howell v. Maytag*, the United States District Court for the Middle District of Pennsylvania sanctioned a plaintiff for demolishing a fire scene prior to litigation, noting

⁹ In *Ware*, the United States District Court for the District of Maine explained why having such notice is so important to the judicial process: "If, in a single case, one party is permitted to selectively determine what relevant evidence is worthy of being preserved for use in a possible suit and to destroy, without notice to a potential adversary, other evidence, knowing of its potential relevance to the issues to be generated by the assertion of its claims, it will quickly become routine practice that important evidence will be destroyed for the sake of convenience and self-interest. Thus, the truth-seeking process will be irreparably subverted, denying opposing parties a full and fair hearing." *Ware*, 145 F.R.D. at 284.

¹⁰ *Cooper* is especially interesting because it suggests that non-custodial defendants do not have a compelling reason even to demand access to evidence until they are sued. *See Cooper*, 117 F.Supp.2d at 875. There, as here, the lawsuit occurred after the ex-parte destruction of evidence. *See id.* There, as here, the custodial plaintiff destroyed the evidence without notifying the noncustodial defendants of when the destruction was scheduled to occur. *See id.* That failure resulted in a sanction of dismissal despite the argument, reminiscent of Appellant's argument here, that the noncustodial defendant had declined pre-suit inspection offers. *See id.*; cf. Appellant's Brief at 11.

that the plaintiff failed to give the noncustodial defendant prior notice that would have allowed the defendant's own expert to examine the scene. *See Howell*, 168 F.R.D. 502, 506-507 (M.D.Pa. 1996). In *Hirsch v. General Motors Corporation*, the Superior Court of New Jersey considered whether the plaintiffs' subrogated insurer afforded non-custodial defendants with notice sufficient to discharge its obligation to preserve relevant evidence stemming from fire damage to the plaintiffs' car. *See Hirsch*, 266 N.J. Super. at 251-252, 628 A.2d at 1122-1123. That court supported its decision to preclude all evidence regarding the plaintiffs' inspection by saying: "Plaintiffs cannot 'clean their hands' by shifting the burden of preserving evidence to defendants after plaintiffs had breached their duty to preserve or provide *inspection access* to crucial evidence." *Hirsch*, 266 N.J. Super. at 254, 628 A.2d at 1124 (emphasis added). Conversely, in *Hamilton Mutual Insurance Company of Cincinnati v. Ford Motor Company*, the Ohio Court of Appeals affirmed the trial court's decision to deny spoliation sanctions where the noncustodial defendant declined to inspect the remnants of a van destroyed by fire in response to the custodial plaintiff's notification that it intended to sell the van for salvage due to the accumulation of storage charges. *See Hamilton*, 122 Ohio App. 3d 611, 614, 702 N.E.2d 491, 493 (1997).

The theme running through these cases is virtually identical to the theme which underlies this Court's decisions in *Fonda* and *Kmetz*. There is no prejudice, and therefore no basis for sanction, where noncustodial parties and potential litigants receive a spoliation notice, whereby the custodial party makes relevant evidence *equally available* to noncustodial parties and potential litigations for some reasonable time prior to its

destruction. Equal availability involves equal access to the evidence and equal knowledge of the planned destruction.

V. THE COURT OF APPEALS CORRECTLY DECIDED THIS CASE BASED ON ITS UNIQUE FACTS ACCORDING TO EXISTING PRECEDENT IN A MANNER CONSISTENT WITH THE “EQUAL AVAILABILITY” CONCEPT ARTICULATED AND APPLIED IN *FONDA* AND *KMETZ*.

Although the principle of “equal availability” has existed for the past 114 years for the purpose of determining when to give an adverse inference jury instruction, no Minnesota appellate court has used that concept to evaluate the sufficiency of a spoliation notice. In Minnesota, the first published case to consider and decide the sufficiency of a spoliation notice was *Hoffman*. The second was the decision of the court of appeals in this action. Neither applied the “equal availability” principle of *Fonda* and *Kmetz*. This appeal offers this Court an opportunity to apply that principle to spoliation notices.

Both Appellant and Judge Klaphake, who filed a dissenting opinion, take the view that the Minnesota Court of Appeals incorrectly decided this case by misapplying that court’s earlier decision *Hoffman*. See Appellant’s Brief at 12; *Miller*, 776 N.W.2d at 741-742 (Klaphake, J., dissenting). That view misapprehends *Hoffman*, incorrectly implies that *Hoffman*’s rationale somehow binds this Court, and fails to consider whether the decisions issued by the court of appeals in both *Hoffman* and this case actually reflect the “equal availability” concept this Court articulated and applied in *Fonda* and *Kmetz*.

A. *Hoffman*’s Result Is Consistent With “Equal Availability.”

This Court long ago observed that “[c]ourts may in proper instances apply old rules to newly created conditions, but they cannot create new rules for conditions already

regulated.”” *Stabs v. City of Tower*, 229 Minn. 552, 566, 40 N.W.2d 362, 371 (1949) (quoting *Seibel v. Leach*, 233 Wis.2d 66, 67, 288 N.W. 774, 775 (1939)). That observation applies especially to intermediate appellate and district courts as they struggle to address newly created conditions with existing legal rules because “the task of extending existing law falls to the supreme court or to the legislature,” not the lower courts. *Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn.App. 1987). The court of appeals did no more than attempt to address newly created conditions with existing rules when it decided *Hoffman*.

Hoffman did no more than necessary under the facts presented. Daniel Hoffman parked his new Ford Taurus automobile in the garage attached to his home. Within a half hour of his arrival home, Mr. Hoffman’s garage caught fire. *See Hoffman*, 587 N.W.2d at 67. The next day, Hoffman called Brookdale Ford, the dealer from whom he purchased the Taurus, to cancel a service appointment and to request copies of the sales invoice, loan papers, and warranty. *See id.* Hoffman merely told a Brookdale Ford employee “my new Ford Taurus started on fire in my garage and burned my whole house down.” *Id.* at 68. Hoffman never informed Brookdale Ford or Ford Motor Company of his plans to clear the fire scene or have the automobile wreckage to a salvage yard where it was subject to corrosion. *See id.* at 68-69. He ultimately sued Brookdale Ford and Ford Motor Company for damage due to the fire. *See id.* at 69.

The Hennepin County District Court determined that relevant evidence, such as the car, the garage, and the garage contents were destroyed, that the defendants lacked a meaningful opportunity to inspect and preserve relevant evidence, and that Hoffman’s

single phone call was insufficient to require the defendants to make further inquiry. *See id.* at 70. Concluding that the spoliation of evidence occurred, the district court sanctioned Hoffman by precluding all testimony and evidence regarding the fire's cause, derived from the Taurus, the garage, or the garage's contents. *See id.* As a consequence of that sanction, the district court dismissed Hoffman's claim. *See id.*

On appeal, “[t]he parties agree[d] that there [was] no Minnesota case that specifically provide[d] a rule for determining the sufficiency of notice to avoid a sanction for the spoliation of evidence.” *Hoffman*, 587 N.W.2d at 70 (emphasis added). In an effort to assist the court of appeals, “[t]he parties analogize[d] such notice . . . to that required for breach of sales warranty claims,” citing to this Court's decision in *Church of Nativity v. Watpro, Inc.*, 491 N.W.2d 1, 5-6 (Minn. 1992). *Id.* (emphasis added). For that reason, the *Hoffman* court held that “a spoliation notice must *reasonably* notify the recipient of a breach or a claim” to be sufficient in terms of content. *Id.* (emphasis added). The *Hoffman* court affirmed the district court *on the facts presented*, noting that Hoffman's single phone call neither alleged a breach of warranty nor indicated that Hoffman “was making, or might make, a claim.” *Id.* Given the deficiency in Hoffman's single phone call, the Minnesota Court of Appeals had no reason to consider whether a spoliation notice is sufficient if it notifies the recipient of a breach or a claim, but fails to provide notice that relevant evidence will or may be destroyed.

This point is important, because Appellant essentially argues that *any* notice of a breach or a claim is sufficient to discharge a custodial party's obligation to preserve relevant evidence within that party's sole custody and control. *See* Appellant's Brief at

5-9; *see also* Appellant’s Brief to the Minnesota Court of Appeals at 12-13 (arguing that a spoliation notice is sufficient if it performs the function of a warranty claim notice pursuant to Chapter 327A of Minnesota Statutes). Judge Klaphake evidently shares Appellant’s view of *Hoffman*, given his concern that the court of appeals impermissibly extended *Hoffman* here. *See Miller*, 776 N.W.2d at 741 (Klaphake, J., dissenting). Yet *Hoffman*’s fact-specific character does not support such an understanding of its holding.

Hoffman’s fact-specific character means that its rule of law cannot function as a proverbial legal straight jacket for evaluating the sufficiency of spoliation notices. Its rule of law plainly says that “a spoliation notice must *reasonably notify* the recipient of a breach or a claim.” *Hoffman*, 587 N.W.2d at 70 (emphasis added). Given the fact that whatever notice is given must be *reasonable*, it is unreasonable to conclude that *Hoffman* requires non-custodial defendants to take affirmative steps to prevent a custodial plaintiff from destroying relevant evidence without reasonable notice, both of the destruction and when that notice will occur.

Nothing in *Hoffman* permits a custodial party to keep noncustodial parties and potential litigants guessing about the custodial party’s plans to alter or destroy relevant evidence, no matter how necessary the ultimate alteration or destruction may be.¹¹ The fact that “the affirmative destruction of evidence has not been condoned,” *Patton*, 538 N.W.2d at 119, entitles noncustodial parties and potential litigants to await the custodial

¹¹ If *Hoffman* stands for the proposition that Appellant may destroy evidence without providing notice of its impending destruction to noncustodial parties and potential litigants, then its rule of law, which requires *reasonable* notice, is meaningless. *See Hoffman*, 587 N.W.2d at 70. The court of appeals recognized this point when it decided this case as it did. *See Miller*, 776 N.W.2d at 736-737.

party's notice of its plan to alter or destroy relevant evidence before they take any action. That entitlement is especially certain where the custodial party bears the burden of proof, for both this Court and Professor Wigmore has recognized that the noncustodial parties lacking that burden "may legally sit inactive, and expect the proponent to prove his own case." *Kmetz*, 261 Minn. at 403, 113 N.W.2d at 101 (quoting 2 Wigmore, EVIDENCE § 290). Therefore, neither *Hoffman's* letter nor its spirit supports Appellant's virtual interpretation of that decision or the dissenting opinion.

More importantly, *Hoffman's* result is consistent with the concept of "equal availability" set forth in *Fonda* and *Kmetz*. *Hoffman's* insurer retained two fire investigators, both of whom had the opportunity to investigate the fire scene and the Taurus. *See Hoffman*, 587 N.W.2d at 68. *Hoffman* never gave Brookdale Ford and Ford Motor Company, noncustodial parties and potential litigants, the same opportunity. He merely advised Brookdale Ford of the fire, cancelled a service appointment, and requested certain documents associated with his vehicle purchase. In other words, *Hoffman* never made the fire scene and the automobile wreckage equally available to Brookdale Ford and Ford Motor Company. The court of appeals could have reached the same result in *Hoffman* by holding, consistent with this Court's decisions in *Fonda* and *Kmetz*, that *Hoffman's* telephone call failed to constitute a reasonable spoliation notice, because it failed to make relevant evidence equally available to Brookdale Ford and Ford Motor Company prior to its destruction.

B. The Decision Of The Court Of Appeals Below Also Accords With “Equal Availability.”

Appellant claims the court of appeals exceeded its role as an error-correcting court through its decision in this action. *See* Appellant’s Brief at 15. If that claim is accurate, then the court of appeals exceeded its role as an error-correcting court in *Hoffman*, which recognized the lack of any Minnesota case specifically providing a rule for determining the sufficiency of a spoliation notice. *See Hoffman*, 587 N.W.2d at 70. Accordingly, Appellant’s bald assertion that the court of appeals somehow exceeded its judicial role by deciding this action as it did is both logically inconsistent and strangely selective, weakness that Appellant cannot realistically overcome.

Fortunately, the weakness of Appellant’s assertion relative to *Hoffman* is more of a curious sideshow than a decisional barrier. As noted above, *Hoffman’s* result is consistent with the concept of “equal availability” under *Fonda* and *Kmetz*. The decision of the court of appeals in this action is consistent with *Hoffman’s* result. Consequently, the decision of the court of appeals in this action also is consistent with the concept of “equal availability” as this Court articulated and applied that concept in *Fonda* and *Kmetz* within the context of an adverse inference instruction.

- 1. Neither Appellant’s September 20, 2005 phone call, nor his September 30, 2005 meeting with TSC and Donnelly Representatives made the home “equally available” to Respondents, assuming Appellant’s obligation to preserve evidence had arisen in September 2005.**

The court of appeals held that neither Appellant’s September 20, 2005 phone call to Respondent contractors, nor his subsequent meeting with them on September 30, 2005,

constituted reasonable notice of a breach or a claim because neither the phone call nor the meeting advised Respondent contractors that Appellant believed them responsible for his moisture intrusion and mold problem. *See Miller*, 776 N.W.2d at 736-737. If Appellant was not blaming TSC and Donnelly for his moisture intrusion and mold problems in September 2005, then one cannot conclude that Appellant could foresee the potential for litigation at that time. Appellant's obligation to preserve relevant evidence would not even have arising in September 2005 if he could not reasonably foresee litigation then.

Appellant testified that he informed TSC and Donnelly of his discovery by calling them on September 20, 2005, in order to inform them "that the house still had moisture problems and . . . to see if there was anything they could do about it." *See TSC Appendix at 122 (97:15-17)*. There is no evidence that Appellant blamed either TSC or Donnelly for his moisture intrusion and mold problem, either in his September 20 phone call or at the September 30 meeting. *See Appellant's Appendix at 217 (9:21-25; 10:1-6)*. In fact, Appellant testified: "The stucco would have had to have been removed to see exactly what was bad and if it was their areas that were bad." *See TSC's Appendix at 123 (104:23-25)*. From this, the court of appeals accurately concluded that "Appellant's own account of the meeting suggests that he was only in the initial stages of determining the cause of the moisture and mold and was hopeful that the contractors could help him remediate the problem." *Miller*, 776 N.W.2d at 737.

If Appellant himself lacked a clear understanding of the extent and scope of his moisture intrusion and mold problem, it is illogical to expect that Respondent contractors should have asked Appellant for an opportunity to remove stucco from the home in order

to preserve evidence for use in future litigation that even Appellant could not, and apparently did not, foresee at that time. Moreover, the record fails to show that Appellant provided Respondent contractors with information about his remediation plans, either in the September 20 phone call, or at the September 30 meeting. Hence, even if TSC and Donnelly had equal inspection access to Appellant's home in September 2005, they lacked equal knowledge about Appellant's remediation plans at that time. Thus, assuming Appellant's obligation to preserve relevant evidence had arisen by September 2005, one cannot conclude that Appellant's home was equally available to TSC for the purpose of preserving evidence in September 2005 because TSC and Donnelly lacked equal knowledge of Appellant's remediation plans.

2. The December 27, 2005 letter also did not make Appellant's home "equally available" to Respondents, because it failed to disclose Appellant's remediation plan.

Appellant clearly had a duty to preserve relevant evidence by December 27, 2005, when his first attorney, Michael Halvorson, wrote Respondent contractors. That letter accuses Respondent contractors of performing faulty work in connection with the 2003 remediation work they did for Lankow. Accordingly, Appellant's obligation to preserve the home's condition arose when Attorney Halvorson wrote this letter because the potential for litigation would have been foreseeable to Appellant at that time.

Respondent contractors also could have foreseen the possibility of litigation upon receiving that letter. Yet the December 27, 2005, letter does not give TSC and Donnelly equal knowledge of Appellant's remediation plans, even if one can understand it as providing equal inspection access. While the letter offers Respondent contractors an

opportunity to inspect the home, it provides no details as to what that inspection might entail. The letter says nothing about Appellant's remediation plans, let alone his timetable for implementing them, which he presumably intended to undertake as early as, if not earlier than, December 27, 2005.¹² Without equal knowledge of Appellant's remediation plans, as well as equal access to the home, one cannot conclude that the December 27, 2005, letter made the home equally available to Respondents for the purpose of preserving relevant evidence prior to its destruction. Hence, the court of appeals held 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 the date of the notice to inspect and preserve evidence." *Miller*, 776 N.W.2d at 738.

The December 27, 2005, letter fails to provide such notice. In failing to provide such notice, the December 27, 2005, letter fails to make relevant evidence equally available to noncustodial parties or potential litigants. Respondent contractors were left to guess at whether or when Appellant might commence remediation. The law cannot permit a spoliation notice to place such an unreasonable burden on noncustodial parties or potential litigants, any more than it can require noncustodial manufacturers or retailers to drop everything and make inspections simply because they hear of an accident or injury involving their goods. *See Hirsch*, 266 N.J. Super. at 254, 628 A.2d at 1124. Even

¹² This presumption is a fair one, given Appellant's insistence that Respondent contractors always should have known that he intended to fix the home, because he told Respondent contractors at the September 30, 2005 meeting that he desired to fix the moisture intrusion and mold issues immediately. *See Appellant's Brief* at 2. Assuming that Appellant did say he wanted to fix the moisture intrusion and mold problem immediately at the September 30 meeting, the record contains no facts establishing that he threatened litigation at that time.

if one interprets the December 27, 2005, letter as granting Respondent contractors a degree of inspection access equal to that which Appellant then enjoyed, the home was not equally available to them so long as Appellant had superior knowledge about the timing of remediation.

Finally, Appellant's argument that the December 27, 2005, letter was sufficient notice to avoid a spoliation sanction is specious given the letter of March 15, 2007. Assuming, charitably, that Appellant sincerely believes the December 27, 2005, letter constituted sufficient notice, there is no reason for the second letter. Appellant's current counsel likely wrote it because he realized the need for better notice as a practical, if not a legal, matter.¹³ Accordingly, the March 15, 2007, letter actually supports the lower courts' conclusions that the December 27, 2005, letter was insufficient notice to avoid a spoliation sanction. Therefore, the lower courts did not abuse their discretion in determining that the December 27, 2005, letter insufficient as a spoliation notice.

3. The March 10, 2006 meeting did not make the home "equally available" to Respondents, because it did not disclose Appellant's remediation plan.

This Court may form the same conclusion about the March 10, 2006, meeting. TSC representatives did not attend that meeting, nor did Respondents Lankow, Betz, Coldwell Banker, or Geier. Their failure to attend is not unreasonable, given the fact that the December 27, 2007, letter said nothing about the timing of any destructive

¹³ TSC is not accusing Appellant's current counsel of authorizing the affirmative destruction of evidence.

remediation. The letter offered Respondents no greater access to the home than they had in September 2005.

More importantly, Appellant sued no one as of March 10, 2006. The United States District Court for the Eastern District of Wisconsin has taken the position that a non-custodial defendant has no obligation to take affirmative steps to protect evidence in the custodial plaintiff's possession until sued. *See Cooper*, 117 F.Supp.2d at 875. The only logical and workable way to permit a custodial party to destroy evidence for legitimate purposes prior to litigation is to require the custodial party to tell noncustodial parties and potential litigants when the impending destruction will occur. Nothing in the record suggests that Appellant disclosed his remediation plans to *anyone* as of the March 10, 2006, meeting. Absent such disclosure, the March 10, 2006 meeting did not make the home equally available to Respondents, who still lacked equal knowledge of Appellant's planned remediation.

4. Appellant makes no serious effort to convince this Court that the March 15, 2007, letter made the home "equally available," because remediation already occurred.

In the district court, Appellant characterized the March 15, 2007 letter Appellant's current counsel drafted as "an excessive precaution taken . . . to ensure that Plaintiff would avoid sanctions for any remediation work he undertook." *See Appellant's Appendix at 31.* He makes no such argument to this Court. Such an argument would be unavailing anyway.

As the Minnesota Court of Appeals noted, Appellant undisputedly removed the home's stucco exterior and underlying plywood by the time Attorney Michenfelder wrote

his March 15, 2007, letter. *See Miller*, 776 N.W.2d at 738-739. The March 15, 2007 letter cannot make relevant evidence equally available to Respondent contractors in terms of access or knowledge, because the relevant evidence was already destroyed when Attorney Michenfelder wrote the letter. Therefore, given its unreasonable character, the lower courts committed no clear error by refusing to conclude that the March 15, 2007, letter amounted to *reasonable* notice of a breach or a claim.

5. TSC demonstrated that Appellant's unannounced remediation work prejudiced Respondents, and the record therefore supports the district court's finding of prejudice.

Appellant argues, in effect, that that the district court's decision to sanction him by precluding his expert evidence amounts to an abuse of discretion because Respondent contractors failed to demonstrate prejudice. *See Appellant's Brief* at 17. That argument is disingenuous and wrong. TSC did provide evidence of prejudice through the deposition testimony of its president, Jeff Agness, who testified that he could not determine the cause of Appellant's moisture intrusion and mold without access to the physical evidence. *See TSC Appendix* at 19-20. Moreover, even Appellant testified that the home's stucco exterior made it difficult to determine the cause and extent of the moisture and mold. He specifically testified: "The stucco would have had to have been removed to see exactly what was bad and if it was their areas that were bad." TSC Appendix at 123 (104:23-25).

Appellant counters that he discharged his burden to preserve relevant evidence despite the 2007 remediation work because he opposed Respondents' summary judgment motions with 21 black and white photographs showing the home's exterior after the

stucco was removed. *See* Appellant’s Brief at 17. He neglects to mention two important points. The first point is that the photographs are of poor quality. *See* TSC Appendix at 66-86. The second, and more important, point is that he produced the photographs by attaching them to the Affidavit of his expert Charles Johnson, whose affidavit simply accuses Respondent contractors of violating various building code provisions *without any attempt to demonstrate those violations with reference to the photographs*. *See id.* at 61-62. Charles Johnson, who had access to the physical evidence, could opine that Respondent contractors’ work violated various building code provisions. Appellant argues, in effect, that TSC should do something this Court in *Fonda* said no party should be forced to do— “go into enemy’s camp” for evidence necessary to support its defenses. *See Fonda*, 71 Minn. at 452, 74 N.W. at 171. Minnesota law does not require TSC to use Johnson as its own expert, or to rely on his opinions to refute Appellant’s claims. *See Patton*, 538 N.W.2d at 119 (holding that prejudice exists where spoliation causes a party to become dependent on the opponent’s experts). Yet TSC found itself in just that situation when Appellant undertook the unannounced remediation work. One hardly can consider the photographs, taken by Appellant and his expert, an adequate substitute for the physical evidence, *and thus a cure for prejudice*, especially when Appellant’s own expert does not rely upon the photographs to support his criticism of the work TSC and Donnelly performed.

Under those circumstances the district court held that “[t]he best evidence of the intrusion and extent of water and mold in the home, is the home itself and the original work done by Defendants Donnelly and Total Service.” Appellant’s own expert never

bothered to use the 21 black and white photographs to establish Respondent contractors' alleged faulty workmanship. *See* TSC Appendix at 59-63. In this situation, "[t]he trial court was well within its authority to quantify the defendant's prejudice and to fashion the sanction to exclude not only the testimony, but also the photographic evidence where there has been no showing that the photographs clearly and comprehensively depict the remains of the [relevant evidence]." *Patton*, 538 N.W.2d at 119. Thus, the district court did not clearly error by refusing to find that Appellant's photographs cured the prejudice that his unannounced remediation work otherwise caused.

6. Appellant cannot establish that a less severe sanction would have cured the prejudice.

Appellant also argues that the district court erred by not imposing a less severe sanction than total preclusion of his expert proof. *See* Appellant's Brief at 16-17. By arguing that the district court should have imposed a less severe sanction, Appellant implicitly acknowledges that the record provides this Court and the lower courts with a basis for concluding that Appellant spoliated evidence to Respondents' prejudice. When a party spoliates evidence to the prejudice of others, the only remaining issue is what sanction justly addresses the spoliator's conduct. "Because the critical item of evidence no longer exists to speak for the plaintiff[s] claims or to the defendant[s] defense[s], the trial court is not only empowered, but is obligated to determine the consequences of the evidentiary loss." *Patton*, 538 N.W.2d at 119.

District courts certainly have broad authority to impose sanctions to address the spoliation of evidence. Appellant cites *Kmetz* and *Wajda v. Kingsbury*, 652 N.W.2d 856,

861 (Minn.App. 2002), for the proposition that the district court could have allowed Appellant to present his expert proof but given the jury an adverse inference instruction. Curiously, Appellant fails to explain how such a sanction would have proved either sensible or workable.

Appellant's failure to provide such an explanation is not so mysterious when one considers the foundational infirmity of Charles Johnson's opinion. Evidence must be admissible in order to create a genuine issue of material fact. *See Hopkins v. LaFontaine*, 474 N.W.2d 209, 212 (Minn.App. 1991). Rule 702 of the Minnesota Rules of Evidence governs the admissibility of expert testimony. *See Minn.R.Evid. 702* (2010). It provides that an expert's opinion must have foundational reliability in order to be admissible. *Id.* This requirement merely codifies the prior decision of this Court, which holds that an expert's opinion must have adequate factual foundation in order to be admissible. *See Albert Lea Ice & Fuel Company v. United States Fire Insurance Company*, 239 Minn. 198, 203, 58 N.W.2d 614, 618 (1953).

Spoliation issues aside, Appellant's expert's opinion lacks foundational reliability. As noted above, Johnson simply accuses TSC and Donnelly of violating building codes without explaining how they violated them. He cannot offer such an explanation with reference to the physical evidence itself, because doing so would only emphasize the prejudicial character of Appellant's spoliation. He does not do so with reference to the photographs, because the photographs by themselves establish nothing. If they did, Johnson would be able to identify Respondent contractors' alleged malfeasance from the photographs.

These circumstances belie the argument that the district court's choice of sanctions was excessive. Charles Johnson would have to testify in a manner consistent with his affidavit, otherwise his testimony could be subject to exclusion as an undisclosed opinion. *See Dennie v. Metropolitan Medical Center*, 387 N.W.2d 401, 406 (Minn. 1986). Assuming Johnson testified in a manner consistent with his affidavit, Respondents would have had a good basis for asking the district court to strike his testimony for lack of foundational reliability. *See Minn.R.Evid. 702; Albert Lea Ice & Fuel Co.*, 239 Minn. at 203, 58 N.W.2d at 618. If the district court granted that motion, Appellant's trial position would be no better than it presently is.

Let us assume, however, that the case was tried, and the district court did not strike Johnson's testimony on foundation grounds. An unorthodox trial certainly would result. Appellant essentially argues that the district court should have allowed him to present speculative expert testimony to the jury and then told the jury it could disregard that evidence because Appellant destroyed Respondent contractors work through destructive remediation. Such a bizarre arrangement would have infused the trial with speculation, thereby violating this Court's repeated view that trial courts should not permit jurors to speculate. *See Smith v. Knowles*, 281 N.W.2d 653, 656 (Minn. 1979) (district court properly granted defendant's motion to dismiss where record would have compelled jury to speculate); *Easton Farmers Elevator Company v. Chromalloy American Corporation*, 310 Minn. 568, 578, 246 N.W.2d 705, 712 (1976) (trial judge erroneously allowed jury to speculate on item of damages); *Lewrenz v. E.W. Wylie Company*, 236 Minn. 94, 99, 51 N.W.2d 834, 837 (1952) (jury cannot be allowed to speculate where evidence presents

two or more equal but opposing theories of liability). It also would have allowed Appellant to present a case based on speculation, which by definition cannot create a genuine issue of material fact. *See Fownes v. Hubbard Broadcasting, Inc.*, 302 Minn. 471, 475, 225 N.W.2d 534, 537 (1975).

That result presents no workable solution to the problem Appellant's spoliation of evidence caused. Hence, the only sensible and workable sanction available was the one the district court imposed, namely the preclusion of Appellant's expert proof. This Court's decision in *Patton* justifies that result. *See Patton*, 538 N.W.2d at 119.

VI. HOFFMAN'S SHORTCOMINGS MAKE IT DESIREABLE FOR THIS COURT TO DEVELOP AN IMPROVED RULE OF LAW FOR EVALUATING THE SUFFICIENCY OF SPOLIATION NOTICES.

Currently, the only rule of law addressing the sufficiency of spoliation notices is that which the court of appeals expressed in *Hoffman* and in this case. *Hoffman's* result is correct, but its rule of law is incomplete, and its rationale is misplaced. Therefore, the time has come for this Court to formulate a fair and an improved rule of law for evaluating the sufficiency of spoliation notices.

Hoffman simply holds that a spoliation notice must provide reasonable notice of a breach or a claim in order to be sufficient. *See Hoffman*, 587 N.W.2d at 70. This rule says virtually nothing about what information a spoliation notice must provide in order to be considered reasonable. For that reason, *Hoffman's* rule of law is incomplete.

The court of appeals in this action clarified that reasonable notice requires "actual notice of the nature and timing of any action that could lead to destruction of evidence" and that "afford[s] a reasonable amount of time from the date of the notice to inspect and

preserve the evidence.” *Miller*, 776 N.W.2d at 738. This rule certainly makes the *Hoffman* rule more complete by specifying what information a spoliation notice must include in order to be reasonable. Yet it does not address *Hoffman’s* misplaced rationale which, if left unchanged, may continue to prompt unnecessary litigation.

The *Hoffman* court reasoned that spoliation notices serve purposes “virtually identical” to the purposes for sales warranty claim notices under the Uniform Commercial Code. *Hoffman*, 587 N.W.2d at 70. It adopted that reasoning at the insistence of that case’s parties, who TSC respectfully submits had neither fully appreciated the contours of Minnesota’s spoliation law nor the ramifications of their suggestion.¹⁴ Valid spoliation notices, like valid sales warranty claim notices and home improvement warranty claim notices, obligate the recipient to act. Both notices serve virtually identical purposes to that extent, but their common purpose end there. *Hoffman’s* rationale is misplaced, because it fails to account for a spoliation notice’s functional uniqueness.

An adequate spoliation notice, one that discharges a custodial party’s obligation to preserve evidence prior to litigation or trial, determines where that obligation ends. In the process, it determines where the responsibility of noncustodial parties and potential litigants to preserve evidence held by another begins. The typical spoliation notice defines the parameters for how the duty to preserve evidence will be discharged so that the custodial party may avoid sanction and noncustodial parties or potential litigations

¹⁴ This point is evident from the fact that *Hoffman* does not even mention *Fonda* and *Kmetz*, let alone look to those time-honored decisions for possible guidance.

may avoid prejudice. For example, when the custodian has a legitimate need to alter or destroy evidence prelitigation, the custodian typically notifies noncustodial parties or potential litigants that destructive testing or repairs will be performed on or by a certain date. That notice also advises the defense that inspections and non-destructive tests must be scheduled before that date, thereby requiring noncustodial parties or potential litigants to act diligently to investigate the claim and prepare for litigation while the evidence still is in existence or thereafter hold their peace. Proper spoliation notices settle, not raise, legal issues related to the preservation and destruction of evidence. Sales warranty claim notices and home improvement warranty claim notices do not perform that function.

Although TSC initially urged this Court to decline review, a careful study of existing precedent and a survey of the rules other courts apply to spoliation cases reveals the need for developing our State's common law spoliation rules in a way that better assists trial courts in analyzing and deciding, and members of the bar in handling and understanding, spoliation issues. TSC respectfully urges this court to take the opportunity to fashion such a rule for application in this case and future cases.

Members of our State's bar are obliged, not only to represent their clients ethically and honestly, but to do so in a way that promotes the consistent, efficient, fair, and orderly administration of justice. Essential to such an administration of justice are legal rules which fairly apply to everyone and whose application produces reasonably predictable results. As officers of this honorable Court, they are responsible for assisting this Court formulate such rules. Counsel for TSC does not shrink from, but embraces, that responsibility.

The effectiveness of any proposed rule of law depends on how accurately its proponent perceives the problem to be addressed. We state the problem to be addressed by way of a question: How shall a spoliation notice discharge the obligation to preserve relevant evidence without imposing an undue burden, either on the custodial party having a legitimate reason to destroy the evidence before litigation or trial, or on noncustodial parties and potential litigants having an equally legitimate need for access to the evidence prior to its destruction? That question is the dilemma every district court judge faces when asked to evaluate a spoliation notice's sufficiency. It is the dilemma with which courts around the country continue to struggle, as the above-cited authorities indicate. It is the dilemma now confronting this Court. Simply responding that the sufficiency of a spoliation notice depends on the so-called "totality of circumstances" without regard to the specific facts of a case, as members of a claimant-oriented interest group have done here, does not answer the question sufficiently or honestly.¹⁵

¹⁵ TSC here refers to the brief submitted by Amicus Minnesota Association for Justice ("MNAJ"). Assuming this Court permits Amicus' untimely brief to stand, a word or two about its position here is required. The MNAJ consists of many experienced and talented attorneys, including not only those here aligned with TSC and Donnelly, but also those involved in the amicus participation before this Court. Unfortunately, that organization offers this Court little more than a buzz phrase, "totality of circumstances," not a tangible rule of law to be applied here and in future cases. The MNAJ treats the issue before the Court simplistically, merely as one involving the interests of individual plaintiffs versus defendant businesses. The issue before the Court, however, really is not a "plaintiff versus defendant" issue, but a "practice issue," one affecting the way a custodian of relevant evidence conducts discovery, whether the custodian is a plaintiff or a defendant. Therein lies the importance and the "state-wide" impact of this Court's decision, something Appellant's Petition for Review failed to address and something this Court's acceptance of review has forced counsel for TSC to appreciate. See Minn.R.Civ.App.P. 117, subd. 2(a), subd. 2(d)(3); cf. Appellant's Petition for Review; TSC's Response to Petition for Review.

Cases from other jurisdictions certainly may be instructive in fashioning a rule to address this dilemma. Yet TSC respectfully submits that the foundation for such a rule already exists in this Court's well-established precedent, making the wholesale adoption of another jurisdiction's law unnecessary. *Fonda* and *Kmetz* provide a set of symbiotic rules under which the existence of prejudice turns on whether the evidence in question was equally available to both parties, thereby determining the availability of spoliation sanctions regardless of their form.

With that guiding principle in mind, TSC states the rule of law to be applied in future cases requiring an analysis of whether a spoliation is sufficient. That rule of law is comprised of these points:

1. If a person who possesses evidence which that person reasonably should know is relevant to pending or future litigation, that person must preserve that evidence from destruction or significant alteration so that other parties or potential litigants may use it to develop their claims or defenses. This obligation lasts until the litigation ends or is no longer reasonably foreseeable. *See Dillon*, 986 F.2d at 268; *Wagoner*, 2006 U.S. Dist. LEXIS 55314 at *8-9; *Capellupo*, 126 F.R.D. at 551.
2. Once it arises, the obligation to preserve evidence is a continuing obligation, similar to the obligation to supplement discovery responses during the course of discovery. *See Minn.R.Civ.P. 26.05* (2010).
3. When the legitimate need for altering or destroying relevant evidence arises prior to litigation or trial, the custodian of that evidence must discharge its continuing obligation to preserve the evidence by giving non-custodial parties and potential litigants

a reasonable spoliation notice which provides: (a) reasonable notice of a possible claim; (b) a reasonable description of the basis for that claim; (c) a reasonable description of the evidence within its custody; and (d) a reasonable opportunity to inspect the evidence within its custody. *See Golke*, 2009 WI 81 at ¶ 28, 319 Wis.2d at 415, 768 N.W.2d at 737.

4. A spoliation notice provides noncustodial parties and potential litigants with a reasonable opportunity to inspect evidence only when, for some reasonable period of time prior to the alteration or destruction of the evidence, it makes the evidence equally available to noncustodial parties and potential litigants. *See Fonda*, 71 Minn. at 452, 74 N.W.2d at 170; *Kmetz*, 261 Minn. at 401-402, 113 N.W.2d at 100-101.

5. Equal availability requires that the custodian's spoliation notice must provide noncustodial parties and potential litigants with both equal inspection access to the evidence and equal knowledge of the custodian's ultimate plan to alter or destroy the evidence. *Hirsch*, 266 N.J. Super. at 254, 628 A.2d at 1124. A spoliation notice that affords equal inspection access, without affording equal knowledge as to the custodian's plans for destruction, does not make the evidence equally available because the notice requires noncustodial parties and potential litigants to guess about whether or when destruction might occur. It is unreasonable to force noncustodial parties or potential litigants to guess about such matters, because "the affirmative destruction of evidence has not been condoned." *Patton*, 538 N.W.2d at 119.

While this proposed rule may not answer every question involving the sufficiency and operation of spoliation notices, TSC submits that it will constructively develop

Minnesota's common law in accordance with past precedent in an area ripe for development in future cases.

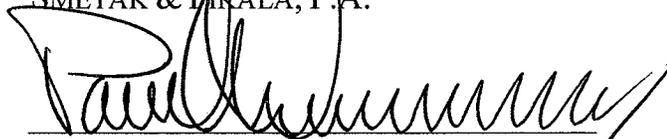
CONCLUSION

For all the foregoing reasons, TSC respectfully asks this Court to affirm the decisions of the lower courts, to apply the foregoing proposed rule of law to this case, and to require its application in future cases involving the use and sufficiency of spoliation notices.

Respectfully submitted,

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Dated: 5/13/10



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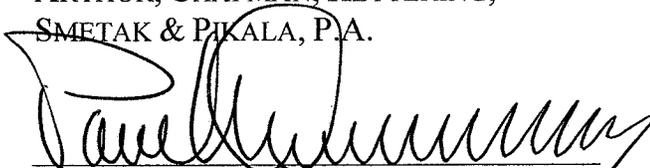
CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief of Respondent Total Service Company conforms to Minn.R.Civ.App.P. 132.01, subd. 3(a)(1), for a brief produced with proportionally spaced font.

There are 13,004 words in this Brief, not including the Table of Contents and the Table of Authorities. The word processing software used to prepare this Brief was Microsoft® Office Word 2007.

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