

NO. A09-0244

State of Minnesota
In Supreme Court

David J. T. Miller,

Appellant,

vs.

Linda J. Lankow, et al.,

Respondents,

DCI, Inc.,

Defendant,

Donnelly Brothers,

Respondent,

Total Service Company,

Respondent,

and

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

Respondents,

vs.

Burnet Realty Inc., d/b/a Coldwell Banker Burnet,
and Mark A. Geier, Third-Party Defendants,

Respondents.

**BRIEF AND APPENDIX OF RESPONDENTS
BURNET REALTY, INC. AND MARK A. GEIER**

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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 Issue

Did the trial court, which is vested with considerable inherent judicial authority necessary as part of its vital function to resolve cases, abuse its discretion in concluding that:

- 1) a spoliation sanction was appropriate given the failure of Appellant Miller to provide reasonable notice that evidence would be destroyed through the remediation of the property; and,
- 2) the evidence Miller proffered regarding the spoliated evidence should be excluded.

The spoliation issue was raised in the trial court as part of the Respondents' motions for summary judgment and requests for a sanction given Miller's spoliation of evidence.

The trial court concluded that Miller failed to give appropriate notice, that Miller spoliated evidence, and that the appropriate sanction would be to exclude the evidence Miller proffered concerning the condition of the property. Add.1.

Appellant Miller timely appealed, A.229, and the Court of Appeals affirmed the trial court's spoliation sanction, and affirmed the resulting grant of summary judgment to the respondents, A.251.

Apposite authority:

Patton v. Newmar Corp., 538 N.W.2d 116 (Minn. 1995)

Statement of the Case

This appeal addresses a trial court's assessment of whether evidence was spoliated and the appropriate sanction to impose for the spoliation of evidence. This appeal arises out of the sale of a house and the buyer's subsequent concerns about moisture intrusion from alleged construction defects and claimed misrepresentations involved in the sale.

The appeal in large part concerns whether Miller gave the respondent contractors and respondent seller appropriate notice of Miller's intent to spoliolate evidence as part of an eventual remediation of the property. On appeal Miller frequently lumps all the respondents together as if they were some monolithic group. This characterization is particularly inappropriate given that Miller never asserted a direct claim against Respondents Burnet Realty Inc. and Mark A. Geier ("CB Burnet"), third-party defendants and the broker and agent for the respondent seller. Indeed, CB Burnet did not learn of any issues with the house until well over a year after the relevant evidence was destroyed. As well, the undisputed evidence is that Miller provided less information to the respondent seller than to the respondent contractors. This is significant because Miller seems to argue that contractors generally have or should be held to have greater knowledge than a normal home seller.

See, e.g., Miller’s Brief at 12 n.1 (referencing the right of a contractor to inspect property after receiving notice of a claim of a breach of warranty).

Respondents Lankow and Betz, the respondent “sellers,” brought a third-party action against CB Burnet for contribution almost a year after Miller sued Lankow and the respondent contractors in April 2007. A.1; CBB.A.1.¹ The third-party complaint served in 2008 was the first notice of any potential claim against CB Burnet, which represented Lankow in the 2004 sale of her house. Thus, CB Burnet had no opportunity whatsoever to inspect the property before the relevant evidence was destroyed.

Judge Stephen Halsey of the Wright County District Court found that Miller spoliated evidence and excluded and all of Miller’s expert witness testimony relating to moisture intrusion and mold. Judge Halsey also granted the respondents’ summary judgment motions, including CB Burnet’s motion to dismiss the third-party contribution claim. A.1.

¹ Although Miller alleged that Betz was a seller, A.1 (¶ 1), Betz never owned the property and he never had any relationship with CB Burnet concerning the property. The trial court correctly dismissed Miller’s claims against Betz because he did not have an ownership interest in the house at the time it was sold and he did not sign any disclosure statements. Add.4 (¶ 1). The Court of Appeals affirmed that decision. *Miller v. Lankow*, 776 N.W.2d 731 (Minn. Ct. App. 2009). On appeal to this Court, Miller has not directly challenged the dismissal of his claims against Betz, either by mentioning it in his Petition for Review or by providing argument and authority in his brief to this Court.

The Court of Appeals affirmed, *Miller v. Lankow*, 776 N.W.2d 731 (Minn. Ct. App. 2009), concluding that the trial court did not abuse its discretion in determining that Appellant Miller did not provide sufficient notice that afforded the contractors and seller an opportunity to inspect and preserve the evidence of mold and moisture damage before Miller's remediation efforts destroyed that evidence.

Statement of Facts

The Court of Appeals and the other parties have accurately summarized the undisputed facts. CB Burnet notes and emphasizes some relevant facts that support affirming the trial court's grant of summary judgment to CB Burnet.

The September 2005 conversations that Miller references were with the respondent contractors and did not involve the seller or CB Burnet. See Miller's Brief at 5-6.

Neither of the December 2005 letters that Miller's counsel sent were sent to CB Burnet. See Miller's Brief at 6-7; Add.7-10. Neither of the December 2005 letters made any mention that Miller intended to undertake any repairs or alteration of the property. Add.7-10. The December 27, 2005 letter to the seller threatened suit and advised the seller that Miller had

notified the respondent contractors of the problem “[i]n an effort to protect any warranty rights you and/or [Miller] may have.” Add.7-8. Unlike Miller’s letter to the respondent contractors, Add.9-10, the letter to the seller did not invite her to inspect the property, Add.7-8.

The seller immediately responded to Miller’s “unfounded claims of false representations regarding the condition of the property” and challenged Miller to identify any legal theory or factual basis for claiming the seller could be liable A.47-48 (1/5/06 Betz letter). Miller did not respond to this challenge. No one provided a copy of the seller’s letter to CB Burnet.

On appeal Miller references a meeting with representatives of the respondent contractors within perhaps 30 days of the December 27, 2005 letter. A.14 (Miller Aff., ¶ 7). Miller also references a March 2006 meeting with a representative from Donnelly Brothers. See Miller’s Brief at 7-8. There is no evidence, however, that Miller had any discussions or meetings with the seller, or with CB Burnet. Indeed, Miller never spoke with Respondent Mark Geier. A.89 (Miller depo. p. 85).

The first notice that Miller intended to undertake “corrective efforts in the immediate future” and alter the property through remediation was in a March 15, 2007 letter to the respondent contractors and seller. A.50

(3/15/2007 Michenfelder letter). Miller did not provide this notice to CB Burnet. The undisputed evidence, however, is that even before this letter was sent, Miller had signed a contract months earlier and began remediation that destroyed relevant evidence. *E.g.* A.194 (Donnelly Aff., ¶ 8); A.88, A.105 (Miller depo. pp. 82-83, 151); A.197-199 (J Brothers Home Improvements, Inc. Addition & Remodeling Contract).

Summary of Argument

The trial court did not abuse its discretion in sanctioning Miller for spoliating evidence. The trial court's decision is consistent with this Court's precedent and other decisions from the Court of Appeals.

Miller has not argued for a change in Minnesota law regarding spoliation of evidence. Indeed, the law in Minnesota and the corresponding standard of review remain sound. Trial courts make and should continue to make evidentiary decisions regarding spoliation of evidence claims – with appropriate guidance from the appellate courts. This Court should approve the Court of Appeal's recognition that appropriate notice should advise that evidence will be destroyed.

On appeal Miller does not contend that disputed issues of material fact exist. He simply disagrees with the decision the trial court made based upon

the undisputed facts, and argues that the trial court should have reached a different result. He essentially contends, as a matter of law, that notice of a potential claim is sufficient, or is implicit notice that evidence will be destroyed.

The trial court did not abuse its discretion in finding that Miller spoliated evidence, in concluding that Miller's initial purported notice was insufficient, and in selecting the sanction to address the spoliation of evidence. This Court should not create a situation where appellate courts will end up essentially reviewing *de novo* whether a sanction is appropriate and determining anew what the appropriate sanction should be. To do so will foist responsibility onto the appellate courts to substitute their views as to the actual handling of a particular lawsuit.

At a minimum, this Court should affirm the summary judgment granted to CB Burnet because it was never given any notice of any claim, let alone notice of an intent to destroy evidence, until over a year after the evidence was spoliated. CB Burnet should not be prejudiced by being forced to rely solely upon Miller's investigation and expert opinion regarding the condition of the property.

Argument and Authorities

I. The trial court did not abuse its discretion in finding that Appellant Miller did not provide reasonable notice of his intent to destroy, and thus spoliates, relevant evidence through remediation of the house.

Miller's argument on appeal should be rejected because he has not shown that the trial court abused its discretion when it concluded that Miller spoliates evidence and failed to give sufficient notice that evidence would be destroyed. As this Court has noted when a party challenges a trial court's spoliation decision, a party faces a difficult burden given the "considerable inherent judicial authority" granted to trial courts. *Patton v. Newmar Corp.*, 538 N.W.2d 116, 118 (Minn. 1995). Miller has failed to overcome this difficult burden.

An abuse of discretion occurs "only when it is clear that no reasonable person would agree [with] the trial court's" decision. *Id.* at 119 (*quoting Marracco v. General Motors Corp.*, 966 F.2d 220, 223 (7th Cir. 1992)). Absent "some indication that the trial court exercised its discretion arbitrarily, capriciously, or contrary to legal usage, the appellate court is bound by the result." *Kroning v. State Farm Auto Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997) (citation omitted).

Minnesota's appellate courts should be reluctant to substitute their judgment in place of a trial court's evidentiary decisions. "While a trial court's discretion is not unbridled, the exercise of it is more of an art than a science." *Id.* at 47. Even if another court might have reached a different result, that does not establish that an abuse of discretion occurred for that is not the standard used to review a trial court's evidentiary decision. *Id.*²

Miller must establish that no reasonable person would agree with the trial court that the purported notice in December 2005 – which did not advise that any particular destruction of evidence was planned as part of any remediation – was insufficient. Because Miller has failed to do so, this Court should affirm.

² In dissenting from the Court of Appeals' decision, Judge Shumaker believed that sufficient notice had been provided, and that the respondents did not show that they were prejudiced. Accordingly, the dissent believed that the March 2007 letter from Miller's current counsel was irrelevant because sufficient notice had supposedly already been provided. With all respect, the dissent would substitute its views for that of the trial court, which is not the appropriate standard of review. *Kroning*, 567 N.W.2d at 47; *Benson v. Northern Gopher Enterprises, Inc.*, 444 N.W.2d 444, 446 (Minn. 1990) (reinstating trial court's judgment based upon evidentiary decision to exclude evidence; "[e]ven if this court would have reached a different conclusion . . ., the decision of the trial judge will not be reversed absent clear abuse of discretion"). The dissent further suggested that the contractors were dilatory, but there was no finding of that. More importantly, there was no evidence or finding of any dilatory or inequitable conduct on the part of the seller or CB Burnet.

The trial court did not misapply the law. It cited to and applied the Court of Appeals' decision in *Hoffman*, which recognized that notice must "be sufficient in content [to] . . . reasonably notify the recipient of a breach or a claim." *Hoffman v. Ford Motor Co.*, 587 N.W.2d 66, 70 (Minn. Ct. App. 1998). To the extent *Hoffman* did not make clear that notice should advise that evidence will be destroyed, it was not an abuse of discretion for the trial court here, under the circumstances, to find that such notice is important.

Significantly, Miller has provided no authority that the notice given need not disclose that evidence will be destroyed. Nor has Miller explained why giving notice that evidence will be destroyed is burdensome or an unreasonable requirement.

A recent decision from the Wisconsin Supreme Court in the context of a construction defect claim contains an informative discussion of what notice must be given before evidence is destroyed. See *American Family Mut. Ins. Co. v. Golke*, 319 Wis.2d 397, 768 N.W.2d 729, 737 & n.10 (2009) (noting "loose consensus" of cases that notice requirement exists to allow an inspection of relevant evidence before the evidence is destroyed). Importantly, *Golke* recognized that a "trial court must use its own judgment, its own discretion, to determine whether the *content* of the notice is

sufficient in light of the totality of the circumstances.” *Id.*, 768 N.W.2d at 738 (original emphasis). The trial court here appropriately did just that.

Implicit in the rationale underlying *Patton*, *Hoffman*, and *Golke* is that notice will be given that evidence will be destroyed so that an independent investigation can take place before the evidence is destroyed. *See, e.g., Golke*, 768 N.W.2d at 737 n. 10.

Miller’s characterization that he needed to immediately address the “mold-infested” house because of his young children is belied by the undisputed facts – Miller learned of moisture problems in September of 2005 (A.78 (Miller depo. pp. 41-42)), yet he did not undertake any repairs until early 2007. By Miller’s own account, he did not take any action for well over a year. More importantly, Miller failed to explain why he could not have provided adequate notice sooner that he was going to destroy the relevant evidence, or why he could not wait a reasonable time after giving appropriate notice before he arranged for and began destruction of relevant evidence. Though he argues now that the sanction was “patently unfair,” Miller has offered no reason why he did not provide earlier notice that he was going to tear off the stucco and remediate the property. He could simply have sent the March 2007 letter a few months sooner.

One cannot assume that every mention of a possible claim means that evidence will be destroyed, or that the destruction of evidence is impending. In contending that the notice he gave was sufficient, Miller seems to suggest that the respondent contractors somehow should be subject to a heightened standard because of their industry knowledge or experience. Setting aside that there is no evidence in the record to support this assertion, or for adopting such a broad generalization as a matter of law that would apply to any party involved in the building trades, this argument does not explain why an ordinary seller such as Lankow should be held to any greater standard. At a minimum, the trial did not err in concluding that Miller's notice to Lankow was insufficient. Thus, it was appropriate both to dismiss Miller's claim against Lankow and to dismiss Lankow's contribution claim against CB Burnet.

Given the importance of allowing parties equal access to relevant evidence, the trial court did not abuse its discretion in concluding that spoliation occurred and that Miller's purported notice was insufficient. On appeal, the Court of Appeal's decision aptly described that sufficient notice should advise that evidence will be destroyed when property is scheduled to be remediated in a construction defect case.

II. The trial court did not abuse its discretion in choosing a spoliation sanction and excluding the evidence Miller proffered.

Miller argues on appeal that even if a spoliation sanction is warranted, the sanction the trial court selected was too severe. Miller has failed to show that the trial court abused its discretion in selecting the sanction to address Miller's spoliation of evidence. While Miller argues that a lesser sanction should have been imposed, he has not shown that no reasonable person would agree with the trial court.

A trial court's decision as to what sanction to impose is reviewed on appeal under an abuse of discretion standard. *Patton*, 538 N.W.2d at 119. In particular, one challenging the "choice of a sanction" faces a difficult burden to show "that no reasonable person would agree [with] the trial court's assessment" of what sanction to impose. *Id.* (citation omitted).

The argument Miller makes – that exclusion of his expert testimony was too severe a sanction in light of the resulting grant of summary judgment – is the identical argument this Court rejected in *Patton*. *Patton* directly addressed "the scope of the trial court's authority to impose a sanction for spoliation of evidence." *Id.* at 118.

Miller, similar to the court of appeals in *Patton*, “has misapprehended the nature and extent of the sanction imposed by the trial court.” *Id.* Miller erroneously characterizes the summary judgment of dismissal as the sanction the trial court imposed, *e.g.* Miller’s Brief at 16 (“the sanction of dismissal”), when the actual sanction was the exclusion of evidence – a recognized and appropriate sanction, albeit one that could have significant consequences:

The summary judgment of dismissal was not itself a sanction, but only the inevitable consequence of the plaintiffs’ failure, without evidence of the physical condition of the product itself, to raise genuine issues of material fact with regard to their claim[.]

Patton, 538 N.W.2d at 118.³

In *Patton* the trial court sanctioned the plaintiffs for spoliating relevant evidence – a motor home destroyed in a fire that was the subject and basis of their product liability claim – and excluded the plaintiffs’ expert witness’ testimony. The trial court then granted summary judgment in favor of the

³ Minnesota courts have regularly and appropriately granted summary judgment as an “inevitable consequence” following the exclusion of expert testimony and as a sanction for the spoliation of evidence. *See, e.g. Himes v. Woodings-Verona Tool Works, Inc.*, 565 N.W.2d 469, 470-71 (Minn. Ct. App. 1997); *see also Smothers v. Insurance Restoration Specialist, Inc.*, A04-1036, 2005 WL 624511 (Minn. Ct. App. Mar. 17, 2005) (A.264).

defendant manufacturer of the motor home. While the Court of Appeals agreed that the trial court had the inherent authority to sanction the plaintiffs for spoliating evidence, and that the defendant was prejudiced from the loss of the evidence, the Court of Appeals concluded the dismissal of the claim was excessive and an abuse of discretion because there was no finding of bad faith or willful destruction of the evidence. This Court disagreed, concluding that a more severe sanction of excluding evidence did not depend on whether evidence was intentionally spoliated.

Had the trial court here chosen a lesser sanction, it may not have abused its discretion in doing so. The question on appeal, however, is whether the trial court abused its discretion in imposing the sanction it selected, *i.e.* is it clear that no reasonable person would agree with the trial court's assessment of what sanction is appropriate. *Patton*, 538 N.W.2d at 119; *see also Foust v. McFarland*, 698 N.W.2d 24, 31-33 (Minn. Ct. App. 2005) (affirming trial court's adverse inference spoliation sanction and rejecting argument that trial court abused its discretion in not imposing a more severe sanction); *Dodd v. Leviton Mfg. Co.*, CX-02-1570, 2003 WL 21147151 (Minn. Ct. App. 2003) (MNAJ App.6) (affirming trial court's spoliation sanction while

recognizing that the trial court also may not have abused its discretion had it chosen a lesser sanction such as an adverse-inference instruction).

Miller also argues that the respondents were not prejudiced from his spoliation of evidence. But Miller has not shown that the trial court clearly erred in finding that the destruction of evidence was prejudicial. A trial court's finding of prejudice in connection with a spoliation motion will not be reversed unless the finding is clearly erroneous. Significantly, Miller does not contend that the evidence that was destroyed as part of the remediation, *i.e.* the condition of the house, was irrelevant.

The trial court specifically concluded that the prejudice from the destruction of the evidence was "extremely significant" and "significantly prejudice[d]" the defendant contractors and sellers' "ability to put on a suitable and competent defense." Add.4-5 (¶¶ 5-6). While Miller disagrees, he has failed to show that the trial court's conclusion was either clearly erroneous or an abuse of its discretion.

Prejudice is determined by considering the nature of the item lost in the context of the claims asserted and the potential for correcting the prejudice. *Patton*, 538 N.W.2d at 119. Notably, Miller has never argued that

condition of the house was irrelevant to his claims or to the potential defenses of any of the respondents.

Unlike *Foss v. Kincade*, 766 N.W.2d 317, 323 (Minn. 2009), where this Court agreed with the Court of Appeals that an examination of the bookcase that injured the child would not have aided the defendants, the trial court found that the spoliation of evidence was “extremely significant” to the defendant contractors and seller, in part because they would have to rely upon Miller’s own investigation and expert report. A.5 (¶¶ 5-6). Given the testimony from TSC and Donnelly Brothers about their inability to determine the cause of the mold and moisture problems, the trial court’s finding of prejudice was not clearly erroneous and the Court of Appeals properly upheld it. *Miller*, 776 N.W.2d at 739. Numerous courts have appropriately recognized in a variety of fire loss, product liability, and construction defect cases that examining the condition of the disputed evidence itself is vitally important. Indeed, Miller’s own experts had access to the property and based their opinions on that inspection – an opportunity and right denied to CB Burnet because Miller spoliated the evidence and no one gave CB Burnet notice of the claim until a year into the lawsuit and well over a year after the relevant evidence was destroyed.

Wajda v. Kingsbury, 652 N.W.2d 856 (Minn. Ct. App. 2002), does not aid Miller. All the Court of Appeals did there was to conclude that the trial court did not abuse its discretion in giving an adverse jury instruction. *Id.* at 862-63. *Wajda* does not show that the trial court abused its discretion in this case. *Wajda* is simply an example of a lesser possible sanction, but one that the trial court chose not to select here.

Similarly, *Kmetz v. Johnson*, 261 Minn. 395, 113 N.W.2d 96 (1962), does not help Miller. *Kmetz* did not address the actual spoliation of evidence but instead reviewed whether a trial court erred in preventing a plaintiff from commenting on the defendant's failure to produce certain photographs when no demand was made to produce the photos. *Id.*, 113 N.W.2d at 100.

Because the trial court did not abuse its discretion, the sanction it selected should be affirmed.⁴

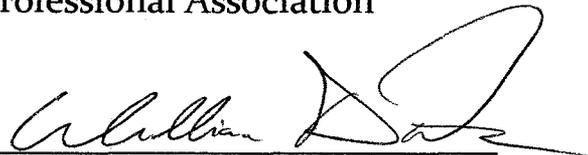
⁴ This Court should decline to consider Miller's argument that Count VIII of his Complaint – a claim that Lankow violated Minnesota's seller's disclosure statute – should not have been dismissed. Miller did not raise in his petition for review any challenge to the dismissal of his claims under Minn. Stat. § 513.55 against Lankow. A.255. Instead, the only legal issue Miller raised concerned the trial court's spoliation sanction, and thus this Court should decline to consider Miller's argument concerning his seller's disclosure claim. See *Hapka v. Paquin Farms*, 458 N.W.2d 683, 685-86 (Minn. 1990) (declining to consider issue not addressed in petition for review).

Conclusion

Because evidence was spoliated, the trial court did not abuse its discretion in deciding that a sanction was appropriate. Although Miller gave notice that he might bring suit, he did not provide notice that evidence was going to be spoliated until after the destruction of evidence had started. Under all the circumstances, the trial court also did not abuse its discretion in the sanction it chose to impose. Because Miller's expert evidence was appropriately excluded, the trial court did not err in granting summary judgment to the defendant respondents based upon Miller's failure to establish that any genuine issues of material fact existed in support of his claims. The trial court also appropriately granted summary judgment to CB Burnet, and this Court should affirm that decision.

Dated: May 17, 2010

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