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NO. A09-0244

State of Minnesota
In Court of Appeals

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 A. Geier,

Respondents.

BRIEF OF APPELLANT

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STATEMENT OF ISSUES

I. WHETHER RESPONDENTS WERE ENTITLED TO OBTAIN AN ORDER IMPOSING SANCTIONS AGAINST APPELLANT FOR SPOILIATION OF EVIDENCE, WHICH RESULTED IN A GRANT OF SUMMARY JUDGMENT AGAINST APPELLANT ON ALL OF HIS CLAIMS.

Without making findings as to several material facts, the trial court imposed a spoliation sanction against Appellant, which resulted in the trial court’s grant of summary judgment against Appellant.

Authorities:

Foss v. Kincade,
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II. WHETHER MINNESOTA STATUTES § 513.57, SUBD. 2 BARRED ONE OR MORE OF APPELLANT’S CLAIMS.

The district court granted summary judgment for Respondents on this issue.

Authorities:

Minn. Stat. § 513.57, subd. 221, 22

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STATEMENT OF CASE

In May 2004, Appellant David J.T. Miller (“Mr. Miller”) purchased a home [hereafter, “Home”] from Respondents James Betz and Linda Lankow [hereafter, “Respondent Sellers”] to live in as his sole residence with his two daughters. At the time of the sale, Respondent Sellers represented that the home had some prior moisture intrusion, construction defects, and mold problems, but that those matters had been corrected by Respondents Donnelly Brothers and Total Service Company [hereafter, “Respondent Contractors”].

Approximately one year later, Mr. Miller discovered that the problems with the Home had never been corrected. In 2005, Mr. Miller and his counsel promptly, after discovering the continuing mold and moisture problems, notified Respondent Contractors and Respondent Sellers of those problems orally and in writing. In response to these communications and having been threatened with suit, Respondent Contractors visited the Home, but refused to take any actions to correct the problems. Because Mr. Miller had given Respondent Contractors and Respondent Sellers more than a year’s notice of his claims and the construction defects, mold and moisture intrusion, he commenced remedial work in early 2007.

Judge Stephen A. Halsey of the Wright County District Court issued an order on December 16, 2008, imposing a spoliation sanction against Mr. Miller, excluding all evidence from the Home and all of Mr. Miller’s expert reports relating to moisture intrusion and the extent of the mold and granting summary judgment against Mr. Miller on all of his claims. This appeal followed.

STATEMENT OF FACTS

Prior to Mr. Miller's purchase of the Home, Respondent Sellers had experienced moisture intrusion, rot and mold in the Home. (Deposition of Linda J. Lankow, 4/15/08, 20:23-25 through 46:1-11.) Respondent Sellers contracted with Respondent Contractors to perform work with regard to the water intrusion, rot and mold infestation. (Id.)

In May of 2004, Mr. Miller purchased the Home from Respondent Sellers. (See Aff. of David J.T. Miller at ¶ 6.) At closing, Mr. Miller was provided with a document which specifically stated that Respondent Sellers had become aware of the moisture and mold problem in the spring of 2003 and that "the affected areas were remediated by licensed professional contractors and engineers." (Aff. of David J.T. Miller at ¶ 4, Ex. A.) Mr. Miller decided to purchase the Home in reliance on Respondent Lankow's written and oral representations that the moisture and mold problems had been corrected. (Id at ¶ 3.)

I. In September 2005, Respondent Contractors Receive at Least Two Oral Notices of Breach.

On or about September 20, 2005, Mr. Miller discovered continuing moisture intrusion and mold infestation problems with the areas of the Home that had been allegedly remediated. (Aff. of David J.T. Miller at ¶ 7; see also, District Court's Findings of Fact, 12/16/08 at ¶ 7.) On or about that same date, Mr. Miller notified Respondent Contractors of the defects via telephone. (Id.) On September 30, 2005, in response to Mr. Miller's telephone calls, Respondent Contractors visited the Home. (Id.) Respondent Donnelly Brothers denies that the parties expressly talked about tearing

stucco off of the Home at that meeting, but it is undisputed that the parties discussed possible resolution of the moisture intrusion and mold infestation issues during that visit (which would necessarily require remediation, including without limitation, removal of stucco). (Aff. of David J.T. Miller at ¶ 7; See Aff. of Timothy W. Waldeck at ¶ 6, Ex. 5 (citing to Aff. of Mark Donnelly at ¶ 6); see generally, Deposition of Jeff Agness, 8/13/08.)

II. In December 2005, Respondent Sellers and Respondent Contractors Receive Written Notice of the Breach and Appellant's Claims.

It is undisputed that on December 27, 2005 Mr. Miller's former counsel provided Respondent Sellers with a written notice that stated as follows:

*Re: Project Address – 4600 Palmgren Ln NE, St. Michael, MN 55376
Former Owner – Jim and Linda Lankow*

Dear Parties:

Please be advised, this office represents David Miller in connection with certain construction problems he is having. As part of our representation, please accept this letter as written notification of potential construction defects in violation of Minnesota Statute 327A.

As you may or may not be aware, in approximately April of 2004, Mr. Miller purchased the above-address from Jim and Linda Lankow. Prior to the purchase, Jim and Linda Lankow had had trouble with water infiltration and mold. In an effort to resolve those issues, they hired each of your companies in various capacities to assist in remediating the mold problem and preventing future water infiltration.

During the purchase process, Jim and Linda Lankow disclosed the problems but assured my client that the problem had been fixed by your companies. They gave Mr. Miller paperwork establishing that the work had been completed with no remaining mold. For your reference, I am enclosing a copy of said paperwork.

However, recently Mr. Miller decided to sell the residence. During the sale process a potential buyer obtained an inspection prior to the purchase. This

inspection occurred in October of this year and revealed several locations of continuing water infiltration and mold. The inspection also discussed several items of work which was done inappropriately by your companies causing the problems to continue. For your reference, I have enclosed a copy of the moisture analysis of the inspection report.

It is my hope that between your companies, the previous owner, and my client, we will be able to resolve this issue amicably and without much legal cost. As such, please contact me at your convenience if you wish to inspect the property and discuss possible resolutions. However, if I do not hear from you by January 9, 2006, I will presume that you do not wish to work on a resolution and I will put the matter into suit. Thank you and look forward to speaking with you. [sic.]

Respectfully

/s/ Michael G. Halvorsen

(Aff. of Patrick W. Michenfelder, Ex. B; see also, Aff. of Timothy Waldeck, Ex. D; See generally, entire record; see also, District Court's 12/16/08 Findings of Fact at ¶ 8.) It is undisputed that on December 27, 2005 Mr. Miller's former counsel provided Respondent Sellers with a written notice that stated as follows:

Re: Sale Address – 4600 Palmgren Ln NE, St. Michael, MN 55376

Dear Jim and/or Linda Lankow:

Please be advised, this office represents David Miller in connection with certain water intrusion problems he is having with his home. As you know, in approximately April of 2004, Mr. Miller purchased the above address from you. Prior to the purchase, you disclosed water infiltration and mold issues. However, during the purchase, you assured Mr. Miller that the problems had been fixed. This was false.

In October of this year, Mr. Miller was trying to sell the residence and during the sale process a potential buyer obtained an inspection prior to the purchase. The inspection revealed several locations of continuing water infiltration and mold. For your reference, I have also enclosed a copy of the moisture analysis of the inspection report.

In an effort to protect any warranty rights you and/or my client may have against the companies which attempted to fix the problem, I have sent each company a letter notifying them of the continuing problems. A copy of said letter is enclosed herewith for your reference.

It is my hope that between said companies, yourself, and my client, we will be able to resolve this issue amicably and without much legal cost. If it is your wish to do the same, I would recommend contacting me at your convenience to the further handling of these problems. If I do not hear from you by January 9, 2006, I will presume that you do not wish to work on a resolution and I will put the matter into suit. Thank you and look forward to speaking with you. [sic.]

Respectfully

/s/ Michael G. Halvorsen

(Id.)

III. In March 2006, Respondent Donnelly Brothers Inspects the Home a Second Time.

Respondent Donnelly Brothers inspected the Home again on March 10, 2006 after receiving Mr. Miller's counsel's December 27, 2005 correspondence. (See Aff. of Mark Donnelly at ¶¶ 3 and 5 (which is attached as Exhibit 5 to the Aff. of Timothy Waldeck); Aff. of David J.T. Miller at ¶ 7; see also, Aff. of Patrick W. Michenfelder, Ex. D.) Respondent Total Service Company has not acknowledged inspecting Mr. Miller's Home on that same day, but has not expressly denied doing so, either.

IV. Respondents Feign Prejudice.

The earliest alleged date that Mr. Miller commenced any work on the Home was January or February 2007. (See, District Court's Findings of Fact, 12/16/08, at ¶ 9.) Respondents did not allege that they were actually aware in 2007 that remedial work had been commenced. On March 15, 2007, having provided Respondent Contractors and

Respondent Sellers with multiple notices as set forth above, Mr. Miller's counsel wrote to Respondent Sellers and Respondent Contractors to make an additional effort to inform them of the matters identified in the above-referenced December 27, 2005 correspondence. Additionally, Mr. Miller's counsel's March 15, 2007 letter notified Respondent Contractors and Respondent Sellers that Mr. Miller would proceed with remedial work on March 22, 2007. (Aff. of Patrick W. Michenfelder, Ex. D.) It is undisputed that Respondent Sellers and Respondent Contractors received this notice by March 22, 2006 and that they failed to contact Mr. Miller or his counsel on or before that date.

The record is void of any evidence that Respondent Sellers ever attempted to inspect the Home until July 15, 2008. (See Appendix, 212.) The record is void of any evidence that Respondent Total Service Company ever attempted to inspect the Home after March 2006. In fact, Jeff Agness of Respondent Total Service Company testified in his deposition that even as of August 13, 2008, Total Service Company never attempted to inspect the home. (Depo. Jeff Agness, 8/13/08, 11:17-25 and 12:1-6.) Again, it is also undisputed that although Respondent Donnelly Brothers had been informed by March 22, 2007 that remedial work would commence on March 22, 2007, Defendant Donnelly Brothers made no effort to contact Mr. Miller's counsel or Mr. Miller on or before March 22, 2007. (See Aff. of Mark Donnelly at ¶¶ 7 and 8.)

ARGUMENT

I. THE DISTRICT COURT ERRED AND ABUSED ITS DISCRETION IN SANCTIONING APPELLANT BECAUSE PRIOR TO REMEDIATING THE MOLD INFESTED HOME AND OVER A PERIOD OF MORE THAN A YEAR RESPONDENTS HAD NOTICE OF THE CONSTRUCTION DEFECTS AND APPELLANT'S CLAIMS, RESPONDENTS HAD THE OPPORTUNITY TO INSPECT THE HOME, RESPONDENTS DONNELLY BROTHERS AND TOTAL SERVICE COMPANY ACTUALLY INSPECTED THE MOLD INFESTED HOME, RESPONDENTS TOTAL SERVICE COMPANY AND DONNELLY BROTHERS HAD THE OPPORTUNITY TO REPAIR THE HOME, AND RESPONDENTS LINDA LANKOW AND JAMES BETZ NEVER REQUESTED TO INSPECT THE HOME.

A. Standard of Review.

Summary judgment is proper when there is no genuine issue of material fact and either party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. On appeal from summary judgment, the role of the reviewing court is to review the record for the purpose of answering two questions: (1) whether there are any genuine issues of material fact to be determined, and (2) whether the district court erred in its application of the law. O'Malley v. Ulland Bros., 549 N.W.2d 889, 892 (Minn. 1996) (citing Offerdahl v. University of Minn. Hosps. & Clinics, 426 N.W.2d 425, 427 (Minn.1988)). In reviewing a granted motion for summary judgment, the facts must be taken in the light most favorable to the party against whom summary judgment was granted. O'Malley, 549 N.W.2d at 892 (citing Schleicher v. Lunda Constr. Co., 406 N.W.2d 311, 312 (Minn.1987)). On review, an appellate court considers whether the district court is authorized to impose a sanction for spoliation of evidence and, if so, whether it abused its discretion by imposing such a sanction. Foust v. McFarland, 698 N.W.2d 24, 29 (Minn.

Ct. App. 2005) (internal citations omitted). Here, the district court erred in the application of Minnesota jurisprudence in concluding that it was authorized to impose a sanction for spoliation of evidence.

B. The District Court did not have Authority to Impose a Sanction for Spoliation Because Mr. Miller Provided Respondents with Adequate Notice on Multiple Occasions.

As the Minnesota Court of Appeals recognized in Hoffman v. Ford Motor Co., 587 N.W.2d 66, 70-71 (Minn. Ct. App. 1998), if party provides reasonable notice of the breach or claim before spoliating evidence, a court does not have the authority to impose a sanction for the spoliation. See e.g., Id at 70-71. The court in Hoffman observed and held:

There is no Minnesota case that specifically provides a rule for determining the sufficiency of notice to avoid a sanction for the spoliation of evidence. The parties analogize such notice, however, to that required for breach of sales warranty claims, and they cite Church of Nativity v. WatPro, Inc., 491 N.W.2d 1, 5-6 (Minn. 1992), as authority. That case dealt with a U.C.C. breach of warranty claim for the sale of defective roofing materials. Under the U.C.C., a claimant must "notify the seller of breach or be barred from any remedy." Minn.Stat. § 336.2-607(3)(a) (1996). The supreme court said that "[t]he sufficiency of notice of a breach of warranty is a jury question * * * " that requires an evaluation of the factual setting and circumstances of the parties. WatPro, 491 N.W.2d at 5. Such notice may take any form, may be oral, and is intended to serve three purposes:

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

Id. (quoting Prutch v. Ford Motor Co., 618 P.2d 657, 661 (Colo.1980)). The purposes of a "spoliation notice" are virtually identical. Thus, we rely on WatPro in reviewing the notice issue in this case **and hold that, to be sufficient in content, a spoliation notice must reasonably notify the recipient of a breach or a claim.**

The "notice" in this case consisted of a single telephone call by Daniel Hoffman to an employee of the dealership from which he bought his car. He made the call for two reasons, namely, to cancel a service appointment and to request copies of paperwork relating to the car. At no time did he allege a breach of warranty or indicate that he was making, or might make, a claim. He was vague as to cause, fault or responsibility, saying only that "my new Ford Taurus started on fire." He did not request an inspection, a meeting, or any action beyond the delivery of documents. He neither called nor had any other communication with Brookdale Ford about the fire after that. Nor did his homeowners' insurer ever contact Brookdale Ford about the fire loss. On these facts, we cannot conclude that the trial court's finding that notice was insufficient in content was clearly erroneous.

Hoffman, 587 N.W.2d at 70-71 (emphasis added). Unlike the defendant in Hoffman, Respondent Sellers and Respondent Contractors received notice of the breach *and* claim on several occasions, both orally and in writing, prior to the time that remedial work was commenced.

1. On and Prior to September 30, 2005, Respondent Contractors Received Oral Notice of the Breach.

It is undisputed that before September 30, 2005, Mr. Miller notified Respondent Contractors of the construction defects (breach) via telephone. It is undisputed that in response to that notice, Respondent Contractors visited the Home on or about September 30, 2005. (See, Court's Findings of Fact page 3, ¶ 7.) Respondent Donnelly Brothers denies that the parties expressly talked about tearing stucco off of the Home at that meeting, but it is undisputed that the parties discussed possible resolution of the moisture intrusion and mold infestation issues during that visit (which would necessarily require remediation, including without limitation, removal of stucco). (Aff. of David J.T. Miller at ¶ 7; See Aff. of Timothy W. Waldeck at ¶ 6, Ex. 5 (citing to Aff. of Mark Donnelly at ¶ 6); see generally, Deposition of Jeff Agness, 8/13/08.) It is further undisputed that after

September 30, 2005 and before Mr. Miller commenced remedial work, Respondent Contractors had well over a year to inspect the Home. It would have been absurd for Respondent Sellers and Respondent Contractors to expect that Mr. Miller and his children intended to wait indefinitely to commence remedial work and continue to live in a moisture-intruded, mold-infested home after providing Respondent Sellers and Respondent Contractors more than one year's notice of those conditions. On these facts alone, the district court lacked authority to impose a spoliation sanction with regard to Mr. Miller's claims against Respondents Donnelly Brothers and Total Service Company.

2. Again, on December 27, 2005, Respondent Sellers and Respondent Contractors Received Written Notice of the Breach and Appellant's Claims.

a. Notice of the breach.

Under Hoffman, Mr. Miller's counsel's December 27, 2005 letter to Respondent Contractors (which was also enclosed in December 27, 2005 correspondence to Respondent Sellers), by itself was enough notice such that the district court should not have imposed a sanction against Mr. Miller for commencing remedial work more than a year later. Id., 587 N.W.2d at 70-71 (holding, that to be sufficient in content, a spoliation notice must reasonably notify the recipient of a breach or a claim). Indeed, the district court found "[t]hat on December 27, 2005, Plaintiff's attorney sent a letter to Defendants notifying them of potential construction defects and inviting them to inspect the property and discuss possible resolutions." (Findings of Fact ¶ 8.) (emphasis added). Again, it is undisputed that Respondents had well over a year to inspect the Home after December

27, 2005 and before Mr. Miller commenced remedial work. Therefore, the district court was required to conclude that it had no authority to impose a spoliation sanction.

b. Notice of Appellant's claims.

Although under Hoffman there is no requirement that a plaintiff notify a defendant of a claim, as well as a breach, Mr. Miller's attorney did both in his December 27, 2005 correspondence. Specifically, Mr. Miller's counsel's December 27, 2005 letter to Respondent Sellers and Mr. Miller's counsel's separate December 27, 2005 letter to Respondent Contractors, expressly stated that Mr. Miller may "put [the] matter into suit." (Aff. of Patrick W. Michenfelder, Exs. A and B.) The district court failed to make findings as to these material facts and apply such findings in its Conclusions of Law in its December 16, 2008 Order. On this undisputed record, the district court lacked authority to impose a sanction for spoliation.

Furthermore, Mr. Miller's counsel's December 27, 2005 letter to Respondent Contractors went so far as to give notice of a claim pursuant to Minnesota Statutes Chapter 327A. (Id, Ex. B.) Chapter 327A of the Minnesota Statutes expressly allows a contractor to inspect subject property within a 30 day period and make an offer to repair any and all defects. Minn. Stat. § 327A.02, subd. 4, titled "Response from vendor to notice of claim" provides:

(a) Following notice under section 327A.03, the vendee must allow an inspection and opportunity to offer to repair the known loss or damage. Upon request of the vendee, a court may order the vendor to conduct the inspection. The inspection must be performed and any offer to repair must be made in writing to the vendee within 30 days of the vendor's receipt of the written notice required under section 327A.03, clause (a), alleging loss or damage. The applicable statute of limitations is tolled from the date the written notice provided by the vendee is postmarked, or

if not sent through the mail, received by the vendor until the earliest of the following:

- (1) the date the vendee rejects the vendor's offer to repair;
- (2) the date the vendor rejects the vendee's claim in writing;
- (3) failure by the vendor to make an offer to repair within the 30-day period described in this subdivision; or
- (4) 180 days.

For purposes of this subdivision, "vendor" includes a home improvement contractor.

(Id.) Accordingly, in addition to the express notice that Respondents received that Mr. Miller may "put [the] matter into suit," Minn. Stat. Chapter 327A required Respondent Sellers and Respondent Contractors to conduct any inspection they wished to conduct within 30 days of receiving Mr. Miller's counsel's December 27, 2005 letter. Instead of exercising their right to inspect the property, they allowed the 30 day period to expire without taking any action. The district court failed to make findings as to these material facts, facts which preclude the relief Respondents sought below, and apply such findings in its Conclusions of Law in its December 16, 2008 Order.

3. On March 10, 2006, Respondent Donnelly Brothers Performed a Second Inspection of the Home.

As set forth in Section B 1, Respondent Donnelly Brothers visited the Home on September 30, 2005, after receiving notice of the construction defects. It is undisputed that Respondent Donnelly Brothers inspected the Home again on March 10, 2006 after receiving Mr. Miller's counsel's December 27, 2005 correspondence. (See Aff. of Mark Donnelly at ¶¶ 3 and 5 (which is attached as Exhibit 5 to the Aff. of Timothy Waldeck);

Aff. of David J.T. Miller at ¶ 7; see also, Aff. of Patrick W. Michenfelder, Ex. D.) Respondent Total Service Company has not acknowledged inspecting Mr. Miller's Home on that same day, but has not expressly denied doing so, either. Notwithstanding whether Respondent Total Service Company attended the March 10, 2006 inspection, it is abundantly clear that it had the opportunity to do so. Accordingly, the district court lacked authority to impose a sanction for spoliation on the basis that Respondent Contractors did not have a reasonable opportunity to inspect the evidence at issue after receiving notice of the construction defects (breach) and Mr. Miller's claims.

In addition to issuing an order in contradiction of Hoffman, the district court issued its order in reliance on an unpublished case that none of the parties relied on in their arguments: Smothers v. Insurance Restoration Specialist, Inc., 2005 WL 624511 (Minn. Ct. App. 2005) (mis-cited by the district court as 2005 WL 62511). In Dynamic Air, Inc. v. Bloch, 502 N.W.2d 796, the Minnesota Court of Appeals wisely noted:

At best, [unpublished] opinions can be of persuasive value.

It is improper to rely on unpublished opinions as binding precedent. We note also that the use of such opinions has the potential to result in profound unfairness.

Because the full fact situation is seldom set out in unpublished opinions, the danger of mis-citation is great.

The legislature has unequivocally provided that unpublished opinions are not precedential. We remind the bench and bar firmly that neither the trial courts nor practitioners are to rely on unpublished opinions as binding precedent.

Id., 502 N.W.2d at 800-801 (Minn. Ct. App. 1993). Smothers is not analogous to the instant case in any material respect. First, the homeowners in Smothers only orally complained to a defendant contractor “about the poor drywall and carpet workmanship” and “did not alert the [defendant contractors] to the issue of mold damage.” In stark contrast to Smothers, in this case it is undisputed that Mr. Miller notified Respondent Contractors and Respondent Sellers on multiple occasions of the conditions that are the subject of this action over a year before Mr. Miller commenced remedial work.

Second, the homeowners in Smothers never suggested during their meeting with any defendant contractor that the defendant contractors were responsible for the complained of conditions of the home. As a result, the Smothers court concluded that the defendant contractors could not have understood that the plaintiff might assert claims against them. Here, no similar conclusion can be reached in light of the December 27, 2005 notice sent by Mr. Miller’s counsel. Moreover, as set forth above, it is undisputed that before Mr. Miller commenced remedial work, Respondent Contractors and Respondent Sellers were aware that Mr. Miller might commence a lawsuit against them.

Third, although the homeowners in Smothers sent a letter to the Department of Commerce (and never directly to the defendant contractors), the Smothers court held that it was proper for the district court to conclude that “any notice of appellants' claim that the letter might have provided was rendered ineffective by [the homeowners’] and the Department of Commerce's actions thereafter.” The Smothers court reached this conclusion based on the cumulative effect of three facts: (1) “the second letter from the Department of Commerce, warning [the defendant contractor] of the consequences of

performing work without building permits, indicated that the Department of Commerce's primary concern was the building-permit issue;" (2) "the letter also stated that the investigation was over, leading [the defendant contractor] to believe that the matter was concluded;" and (3) "[the homeowners] did not contest the closing of the investigation, nor did they further pursue any grievance at that time." In this case, the district court made no findings that Mr. Miller or his attorneys engaged in any similar conduct to render ineffective Mr. Miller's oral notices to Respondent Contractors. (See generally, District Court's Findings of Fact, 12/16/08.) Likewise, the district court made no findings that Mr. Miller or his attorneys engaged in any conduct to render ineffective Mr. Miller's attorney's December 27, 2005 written notice to Respondent Contractors and Respondent Sellers. (Id.)

Fourth, after the defendant contractors in Smothers ceased work on the home, they never performed an inspection of the Home – they only met with the homeowners. In this case, the district court made no such finding. Again, in contrast to Smothers, in this case Mr. Miller submitted a sworn affidavit stating that at the time of his meeting with Respondent Contractors on September 30, 2005, Respondent Contractors inspected the Home. (Aff. of David J.T. Miller at ¶ 7.) Respondents did not submit affidavits contradicting this sworn testimony.

Fifth, although one of the defendants in Smothers did not dispute receiving notice of the homeowners' claims¹ on June 5, 2002 (before the house in question was razed on

¹ The other defendant contractor in Smothers claimed it did not receive the Summons and Complaint (which was allegedly the first and only written notice) until June 17, 2002 – 6 days *after* the house was razed in that case.

June 11, 2002), the Smothers court indicated that with such a short notice period it was necessary for the homeowners to “state when [the homeowners] intended to raze their house.” Here, the notice period to the Respondent Sellers and Respondent Contractors was well over a year, not the six days in Smothers. The notice period in this case was more than reasonable; it would have been absurd for Respondent Sellers and Respondent Contractors to expect that Plaintiff and his children intended to wait to commence remedial work and continue to live in a moisture intruded, mold infested home after providing Respondent Sellers and Respondent Contractors an entire year’s notice of those conditions.²

It made no sense for the district court to fault Mr. Miller for Respondent Sellers’ and Respondent Contractors’ failure to act after receiving multiple notices of the construction defects and Mr. Miller’s claims. Indeed, the Hoffman court held that sanctions are not to be issued for spoliation when a plaintiff has reasonably notified the opposing party of a breach or claim as was the case here.

² Even if Mr. Miller’s counsel’s March 15, 2007 notice had been the *only* notice to Respondents, that notice was sufficient because Respondent Sellers and Respondent Contractors were expressly informed of the date on which Mr. Miller intended to proceed with remedial work: March 22, 2007 (unlike the 6-day notice in Smothers which did not contain a date certain for the commencement of remedial work). It is undisputed that all Respondent Contractors and Respondent Sellers had Mr. Miller’s counsel’s March 15, 2007 notice in their respective possession on March 22, 2007 and not a single Respondent contacted Mr. Miller or his counsel on or before March 22, 2007. It is inconsequential when Mr. Miller commenced remedial work, because each and every Respondent Seller and Respondent Contractor had knowledge that remedial work would commence on March 22, 2007, but chose not to contact Mr. Miller or his counsel on or before that date.

4. It is Undisputed that Respondent Sellers and Respondent Contractors had Notice of Appellant's Claims Before Appellant Commenced Remedial Work.

Jeff Agness of Respondent Total Service Company expressly acknowledged the following during his deposition of August 13, 2008, which was undisputed by Respondent Sellers and Respondent Donnelly Brothers:

Q: Okay. Now, you mentioned that there was another meeting, and I'm trying to figure out, was Mr. Miller involved in that meeting?

A: No.

Q: And was this before the meeting with Mr. Miller or after the meeting with Mr. Miller?

A: I believe it was after.

Q: And who was at that meeting?

A: Mark Donnelly, for sure I know that, and two people who I believe were the owners of the home that sold it to Mr. Miller.

Q: And what was the purpose of the meeting, do you know?

A: The purpose of the meeting was to make us aware that there may be a lawsuit on this, and for the people that were involved in that to, you know, kind of take a look at what does that mean, why are we being sued, what are the issues here. That's my understanding.

Q: Do you know who called the meeting?

A: I do not.

Q: Do you know if at that meeting, at the time of that meeting, whether or not plaintiffs [sic.] had already torn off all of the siding on the house?

A: I don't believe they had.

Q: But there had been some threat of a lawsuit?

A: Yes.

(Deposition of Jeff Agness, 8/13/08, 38:24-25 and 39:1-25.) Respondents clearly had notice of Mr. Miller's claims before Mr. Miller commenced remedial work. Accordingly, the district court lacked authority to impose a sanction for spoliation on the theory that Respondent Sellers and Respondent Contractors did not have reasonable notice of Mr. Miller's claims.

C. The District Court did not have Authority to Impose a Sanction for Spoliation Because Respondents Failed to Demonstrate Prejudice.

The district court's sanction served no purpose, whatsoever. "The propriety of a sanction for the spoliation of evidence is determined by the prejudice resulting to the opposing party." Hoffman, 587 N.W.2d at 71. The district court did not make a finding that Respondents were, in fact, prejudiced by the commencement of the remedial work. (See generally, District Court's Findings of Fact, 12/16/08.) Indeed, not a single Respondent expressly asserted that they were unable to determine the cause of the moisture intrusion and mold based on the photographs that were taken of the home. Mr. Miller concedes that Respondent Donnelly Brothers, in its memoranda supporting its motion for summary judgment, engaged in a lengthy discussion concerning the nature of stucco and how it might relate to Mr. Miller's claims and Respondent Donnelly Brothers'

defenses. However, much of that discussion was unsupported by the record. The district court's actions in this regard were at least partially consistent with the Minnesota Court of Appeals holding in Foss v. Kincade, 746 N.W.2d 912 (Minn. Ct. App. 2008), *rev. granted* (Minn. June 18, 2008). In Foss, a bookcase that was not affixed to a wall injured a child; the child's parents claim that the homeowners had spoliated evidence by permitting the bookcase to be disposed. The Foss court rejected the argument out of hand because the expert "had no trouble rendering opinions based on a photograph of the bookcase, including the opinion that the accident could have been prevented with the use of wall brackets." Id at 918.

D. Even if the District Court Had the Authority to Impose a Sanction for Spoliation of Evidence (which it did not), the District Court's Sanction Was Not Tempered By the District Court's Duty to Impose the Least Restrictive Sanction Under the Circumstances.

Where a district court has the authority to impose a sanction for the spoliation of evidence, the power to sanction must be tempered by "the duty to impose the least restrictive sanction available under the circumstances." Patton v. Newmar Corp., 538 N.W.2d 116, 118 (Minn. 1995) (quoting Bachmeier v. Wallwork Truck Ctrs., 507 N.W.2d 527, 533 (N.D. 1993)). There is a range of sanctions available for improper spoliation, including without limitation, an instruction to the jury that they are permitted to draw an adverse inference with regard to the improperly spoliated evidence. See e.g., Wajda v. Kingsbury, 652 N.W.2d 856, 861 (Minn. Ct. App. 2002) (holding that sanction of an adverse jury instruction was proper where plaintiff destroyed evidence favorable to defendant's case without any attempt, whatsoever, to notify defendant of destruction); see

also, Kmetz v. Johnson, 113 N.W.2d 96, 100 (Minn. 1962) (noting that, in general, a trial court is permitted to instruct the jury that an unfavorable inference may be drawn for a party's failure to produce evidence in the possession and control of that certain party, if evidence was previously requested by the opposing party).

Here, Mr. Miller lived with his children in a mold infested home for over a year before commencing remedial work while he and his attorneys repeatedly notified Respondent Sellers and Respondent Contractors of his claims and his intent to perform remedial work. Therefore, even if there was a basis for the Court to sanction Mr. Miller for his act of undertaking remedial work so that he and his children would no longer have to live in a mold infested home (and there is no such basis), the district court failed to temper its authority to impose the least restrictive sanction available: an instruction to the jury that they are permitted to draw an adverse inference with regard to the evidence that was destroyed in the course of remediation. Instead, the district court excluded all evidence of the Home, which completely precluded Mr. Miller's ability to ever hold any of the Respondents accountable for their actions.

II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON THE BASIS THAT MINNESOTA STATUTES § 513.57, SUBD. 2 BARRED ONE OR MORE OF APPELLANT'S CLAIMS.

When the district court's summary judgment determination involves the application of a statute to undisputed facts and no material question of fact exists, this Court's review is de novo. Northern States Power Co. v. City of Mendota Heights, 646 N.W.2d 919, 924 (Minn. Ct. App. 2002) (citing O'Malley, 549 N.W.2d at 892).

Minnesota Statutes § 513.57 is not a bar to any of Mr. Miller's claims. Minnesota Statutes § 513.57, subd. 2, titled, "Liability," provides:

A seller who fails to make a disclosure as required by sections 513.52 to 513.60 and was aware of material facts pertaining to the real property is liable to the prospective buyer. A person injured by a violation of this section may bring a civil action and recover damages and receive other equitable relief as determined by the court. An action under this subdivision must be commenced within two years after the date on which the prospective buyer closed the purchase or transfer of the real property.

Minn. Stat. § 513.57, subd. 3, titled, "Other actions," provides in pertinent part:

Nothing in sections 513.52 to 513.60 precludes liability for an action based on fraud, negligent misrepresentation, or other actions allowed by law.

Here, Count VIII of Mr. Miller's Complaint titled, "VIOLATION OF DISCLOSURE STATUTE," is the only claim brought under sections 513.52 to 513.60 of the Minnesota Statutes. Therefore, Minn. Stat. § 513.57, subd. 2 is not a bar to Counts I, II, III, IV, V, VI, VII, nor IX of Mr. Miller's Complaint.

With regard to Count VIII of Mr. Miller's Complaint titled "VIOLATION OF DISCLOSURE STATUTE," the district court failed to observe that regardless of when a cause of action accrues Minnesota courts have consistently recognized that fraudulent concealment of the cause of action will prevent the running of the applicable statute of limitations. See e.g., Schmucking v. Mayo, 235 N.W. 633 (Minn. 1931). That rule is necessary to achieve the result in nonfraud cases that the "discovery rule" achieves in fraud cases. At a minimum, there is a material question of fact as to whether Respondent Sellers concealed their knowledge of the complained of conditions in the home. (Aff. of David J.T. Miller at ¶¶ 3, 4, Ex. A; See generally, Deposition of David J.T. Miller.) It is

undisputed that Mr. Miller discovered these conditions on or about September 20, 2005. (See, Court's Findings of Fact, ¶ 7.) Accordingly, for purposes of summary judgment, the district court was required to presume that Mr. Miller had two years from September 20, 2005 to commence an action for a violation of Minn. Stat. §§ 513.52 through 513.60. Respondent Contractors and Respondent Sellers in this action were served with the Summons and Complaint by May 7, 2007. Therefore, the district court erred in granting summary judgment on the basis that Minn. Stat. § 513.57 barred one or more of Mr. Miller's claims.

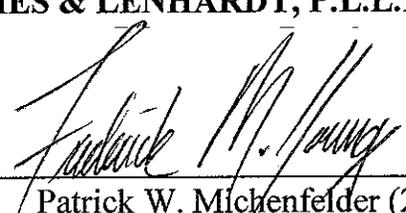
CONCLUSION

The district court's application of the spoliation sanction and its order granting summary judgment to Respondents must be reversed and the district court should be directed to take all such actions as are consistent with this Court's opinion.

Respectfully submitted,

GRIES & LENHARDT, P.L.L.P.

Dated: April 10, 2009

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