
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.

REPLY BRIEF OF APPELLANT

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INTRODUCTION

This appeal largely turns on the answer to one straightforward question: Did Appellant David J.T. Miller [hereafter, “Mr. Miller”] provide Respondents Linda J. Lankow, James E. Betz, Total Service Company and Donnelly Brothers¹ reasonable notice of a breach or claim? The answer to this question is equally straightforward. Because the record is replete with undisputed material facts demonstrating that on more than one occasion Mr. Miller provided Respondents with reasonable notice of a breach and claim, the district court’s order was clearly erroneous and its act of imposing a spoliation sanction that resulted in entry of summary judgment against Mr. Miller on all of his claims was an abuse of discretion.

To the extent that Respondents have failed to meaningfully counter the arguments set forth in Mr. Miller’s initial brief, there is no need for Mr. Miller to make any response. Cf. Correll v. Distinctive Dental Servs., 636 N.W.2d 578, 582 (Minn. Ct. App. 2001) (since reply briefs are optional, an appellant’s failure to file a reply brief does not reflect on the merits of the appellant’s case). To avoid unnecessary duplication of his initial brief, Mr. Miller addresses here only those arguments of Respondents that warrant additional comment, and requests that the Court examine his initial brief for his position with regard to the issues raised by Respondents.

¹ Respondents Linda J. Lankow and James E. Betz may be referred to hereafter as “Respondent Sellers.” Respondents Donnelly Brothers and Total Service Company may be referred to hereafter as “Respondent Contractors.” Respondent Sellers and Respondent Contractors may be collectively referred to hereafter as “Respondents.”

ARGUMENT

I. RESPONDENTS OFFER AN ERRONEOUS STANDARD OF REVIEW.

Respondents apparently argue that a district court's role as the fact-finder in spoliation disputes compels this Court to review the district court's decision on an abuse of discretion standard. This argument puts the cart before the horse. Before a reviewing court examines whether a district court abused its discretion in imposing a sanction, the reviewing court first examines whether the district court was authorized to impose a spoliation sanction. "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). Here, the district court misapplied the law to *undisputed* material facts in concluding that it was authorized to impose a spoliation sanction. Accordingly, whether the district court was authorized to impose a sanction can be analyzed as purely a question of law. "An appellate court is not bound by, and need not give deference to, the district court's decision on a question of law." Bondy v. Allen, 635 N.W.2d 244, 249 (Minn. Ct. App. 2001) (citing Frost-Benco Elec. Ass'n v. Minn. Pub. Utils. Comm'n, 358 N.W.2d 639, 642 (Minn. 1984)). "The application of the law to the stipulated facts is a question of law, and thus is freely reviewable." Morton Bldgs., Inc. v. Comm'r of Revenue, 488 N.W.2d 254, 257 (Minn. 1992). A reviewing court need not defer to the district court's application of the law when the material facts are not in dispute. Hubred v. Control Data Corp., 442 N.W.2d 308, 310 (Minn. 1989); see also, *The Minnesota Court of Appeals Standards of Review*, Revised August 8, 2008, page 1. Therefore, as to

the undisputed material facts of this case, this Court's review of whether the district court had authority to impose a spoliation sanction is *de novo*.

Referencing Foust and Patton v. Newmar Corp., 538 N.W.2d 116 (Minn. 1995), Respondent Total Service Company argues that a court is automatically authorized to impose a spoliation sanction where spoliation of evidence has occurred such that one party has gained an evidentiary advantage over another party. (Respondent Total Service Company's Brief, 6.) Respondent Sellers appear to take this argument one step further, claiming that a court is automatically authorized to impose a sanction in every case where spoliation of evidence has occurred. (Respondent Sellers' Brief, 13.) Neither Foust, nor Patton, nor any other case supports these propositions.

The Foust court stated that it was necessary to review whether a district court had authority to impose a "*spoliation sanction*." The term "spoliation sanction" clearly refers to a sanction that has been issued in the presence of spoliation. Obviously, if a court were automatically authorized to impose a sanction in every case where spoliation of evidence has occurred (as Respondent Sellers and Respondent Total Service Company apparently suggest) the first prong of the Foust test would be rendered meaningless. Hence, this Court should not accept Respondent Sellers' and Total Service Company's interpretation of Foust.

Perhaps more importantly, the interpretation of Foust offered by Respondent Sellers and Total Service Company would require this Court to conclude that a district court has authority to issue a "spoliation sanction" even where a party provides reasonable notice of a breach or claim to an opposing party. Such an interpretation of

Foust directly conflicts with a wealth of case law on this point. A reasonable notice divests a court of authority to impose a spoliation sanction. See e.g. Hoffman v. Ford Motor Co., 587 N.W.2d 66, 70-71 (Minn. Ct. App. 1998) (holding, that to be sufficient in content, a spoliation notice must reasonably notify the recipient of a breach **or** a claim); see also, Vitelli v. Knudson, 2009 WL 910846 (Minn. Ct. App. 2009) (unpublished). Thus, whether the district court was authorized to impose a sanction is purely a question of law, not fact, which is subject to *de novo* review. In any event, even under an “abuse of discretion” or “clear error” standard, Mr. Miller is entitled to a reversal of the district court’s order and judgment.

II. RESPONDENTS MISCHARACTERIZE APPELLANT’S NOTICES.

A. Respondents Mischaracterize Requirements Under Hoffman.

Respondent Donnelly Brothers erroneously submits that the Hoffman court “held that a party can avoid sanctions if the opposing party had reasonable notice of the claim, an opportunity to correct defects, and an opportunity to collect evidence to prepare for litigation.” (Id.) This is a misstatement of the Hoffman court’s opinion. The Hoffman court merely *discussed* the fact that a spoliation notice *serves three purposes*.

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.

Hoffman, 587 N.W.2d at 70 (internal citations omitted). In any event, Respondent Donnelly Brothers acknowledges that these three purposes are served when a party receives reasonable notice of a breach or a claim. (Respondent Donnelly Brothers' Brief, 7.) Likewise, Respondent Total Service Company acknowledges that under Hoffman, a party can avoid spoliation sanctions if the party simply provides a reasonable notice of a breach or a claim to the opposing party.² (Respondent Total Service Company's Brief, 8.) This is precisely what Mr. Miller did. Indeed, Respondent Sellers acknowledge that notice came to them:

[I]n the form of three letters sent by Appellant's counsels [sic.], two on December 27, 2005, and one on March 15, 2007 by the current counsel [sic.]. The first two letters of December 27, 2005 **served to inform Respondents of the water intrusion problems [Mr. Miller] had encountered and referenced the possibility of suit ***.**

(Respondent Sellers' Brief, 7.) (emphasis added) (internal citations omitted). Again, it is undisputed that the evidence in question was preserved well over a year following December 27, 2005. Accordingly, it was clear error for the district court to impose a sanction against Mr. Miller.

² Respondent Sellers argue, without citation to any case whatsoever, that "a sufficient spoliation notice must notify the affected parties that destructive testing or repairs will be performed on or after a date certain." (Respondent Sellers' Brief, 15.) Obviously, this argument, unsupported by any case law, conflicts with the holding in Hoffman and Vitelli.

B. Respondents Mischaracterize Appellant's Counsel's December 27, 2005 Letters.

1. The notice of the home improvement warranty claim, by itself, barred the district court from imposing a spoliation sanction.

Respondent Sellers expressly acknowledge that Mr. Miller's counsel's December 27, 2005 letter contained a "home improvement warranty claim notice." (See Respondent Sellers' Brief, pages 8 and 9.) Respondent Total Service Company argues for the first time on appeal that the references to Minn. Stat. Ch. 327A contained in Mr. Miller's counsel's December 27, 2005 letters rendered the letters "functionally distinct" from a "spoliation notice." Respondent Sellers tagged along with Respondent Total Service Company on this "functionally distinct" argument in their brief. However, Respondents cite no law in support of this argument, and there is no such law to support this argument.

Indeed, the words "function" and "purpose" are synonyms. The Hoffman court expressly noted that the purposes of a breach of warranty claim notice are "virtually identical" to a "spoliation notice." Accordingly, although Hoffman may not have expressly held that a spoliation notice is interchangeable with a breach of warranty claim notice, the decision in Hoffman plainly supports such a conclusion. See Hoffman, 587 N.W.2d at 70-71 (a spoliation notice need only reasonably notify a recipient of a claim or breach – the functional equivalent of a breach of warranty notice).

Respondent Total Service Company also submits that: "neither the Uniform Commercial Code nor the home improvement warranty statute says [sic.] that notices of a claim made pursuant to those statutes function as spoliation notices." (Respondent Total

Service Company's Brief, 9.) Turning that argument on its head, it can also be said that "neither the Uniform Commercial Code nor the home improvement warranty statute say that notices of a claim made pursuant to those statutes *cannot* function as spoliation notices." Respondent Total Service Company's observation adds nothing to this Court's analysis.

Respondent Total Service Company does not even attempt to cite to any authority or the record in support of its third and final argument that breach of warranty claim notices do not function as a "spoliation notice." Arguments unsupported by the record or law should not be entertained.

Furthermore, notices made pursuant to the home improvement warranty statute are actually more comprehensive than a "reasonable notice of a breach or claim," which prevents a court from imposing a "spoliation sanction." Again, 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(a). 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 letters. It also charged Respondents with knowledge that Mr. Miller had a right to remediate the home in question [hereafter, "Home"] immediately after the expiration of that 30 day period. Respondent Contractors, rather than exercising their right to inspect the property, allowed

the 30 day period to expire without taking any action. Therefore, it was clear error for the district court to impose a sanction against Mr. Miller.

2. Notwithstanding the notice given pursuant to Minn. Stat. Ch. 327A, Appellant's counsel's December 27, 2005 letters constituted reasonable notices.

Separate and independent of the home improvement warranty claim notice in the December 27, 2005 letters, the December 27, 2005 letters contained reasonable notice of Mr. Miller's claims and Respondents' breaches. The December 27, 2005 letters (both of which all Respondents undisputedly received) expressly set forth and memorialized that: (1) when Respondent Sellers owned the home, "[Respondent Sellers] hired [Respondent Contractors] in various capacities to assist in remediating the mold problem and preventing future water infiltration;" (2) at the time of the sale of the Home, Respondent Sellers *falsely* represented to Mr. Miller that the mold and water infiltration "problems had been fixed;" and (3) Mr. Miller completed an inspection after purchasing the Home and the inspection "discussed several items of work which was done inappropriately by [Respondent Contractors] causing the problems to continue." (Mr. Miller's Initial Appendix, 38-39; 41-42.) Accordingly, it is disingenuous, at best, for Respondents to argue in their briefs "that it was not clear" that they were "responsible" parties, that it was not clear that "they were responsible *for causing the problems*," that "the letter fails to identify any specific problem with any specific work [Respondent Contractors] performed," or that the letter "did not identify a breach."

3. Respondent Donnelly Brothers offers a tortured reading of Appellant's counsel's December 27, 2005 letters.

Respondent Donnelly Brothers makes the absurd argument that Mr. Miller's counsel's December 27, 2005 letter simply gives "explicit directions on how Respondent should avoid a claim" and that "Donnelly Brothers followed those directions."³ A relevant portion of Mr. Miller's counsel's December 27, 2005 provides:

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.]

(Mr. Miller's Initial Appendix, 39.) The letter plainly does not contain a representation as to how suit may be entirely "avoided" as Respondent Donnelly Brothers suggests. The letter, read in its entirety, is a plain statement that Mr. Miller had mold and moisture intrusion problems that were caused by Respondent Contractors and that if Respondent Contractors did not fix those problems, Mr. Miller would sue Respondents.

Moreover, the record is void of any statement by any representative of Respondent Donnelly Brothers that Respondent Donnelly Brothers believed the December 27, 2005 letters gave explicit instructions on how Respondent Donnelly Brothers could act to avoid a claim. In any event, Respondent Donnelly Brothers could not have believed that it avoided suit, because Respondent Donnelly Brothers failed to respond to the letter by

³ Notably, none of the other Respondents adopted this argument.

January 9, 2006 as requested. Donnelly Brothers is straining for arguments to defeat Mr. Miller's well-founded appeal.

C. Respondents Mischaracterize Appellant's Counsel's March 15, 2007 Written Notice.

Respondent Total Service Company disingenuously argues that "Appellant's current counsel likely wrote the March 15, 2007 letter, because he realized that the December 27, 2005 letter was insufficient to notify Respondent Contractors of a breach or claim ***."⁴ This argument is contrary to the plain language contained in the March 15, 2007 letter, which provides in pertinent part:

In view of the previous notice to you and opportunity to inspect, Mr. Miller does not have any obligation to permit any further inspection before completing the repair work. Accordingly, this letter is sent merely as a courtesy, and is not indicative or to be construed as an admission of any obligation to provide further notice or further opportunity to inspect prior to completing the remedial work that is necessary.

(Mr. Miller's Initial Appendix, page 51.) (emphasis added).⁵

⁴ Likewise, Respondent Sellers disingenuously argue that Mr. Miller's counsel's March 15, 2007 notice would not have been sent "if Appellant had intended his first letter of December 27, 2005 to serve as an adequate spoliation notice."

⁵ The idea that Mr. Miller's counsel's March 15, 2007 letter was a sham is false. Mr. Miller's counsel respectfully submits, that there was no intention to create a false memorial of the condition of the Home on March 15, 2007. At that early date, it was Mr. Miller's counsel's understanding that the relevant evidence had not been disturbed. Notably, the mold infested sheathing, windows and structural members of the Home, which contained the mold, were still intact and undisturbed as late as March 22, 2007. For that same reason, Respondent Donnelly Brothers statement in its brief that "the work had been **completed** by March 15, 2007" was false and lacked the candor required by the Minnesota Rules of Civil Appellate Procedure. (Respondent Donnelly Brothers' Brief, page 4.) (emphasis added)

D. The Vitelli Case is Analogous to the Instant Dispute.

Respondent Donnelly Brothers' citation to the unpublished case of Vitelli, 2009 WL 910846 (unpublished) supports Mr. Miller's arguments. The Vitelli case is not inapposite as Respondent Donnelly Brothers suggests. The homeowners in Vitelli hired an attorney after discovering that their home might have been negligently constructed. The Vitelli court observed and reasoned that spoliation sanctions were properly denied in that case because:

Here, the Vitellis' attorney sent [the contractor] a letter on October 4, 2005, informing [the contractor] of the water damage, and that "subsequent investigation revealed that there was a substantial water drainage problem at the home while it was being built which resulted in the installation of a drainage channel in the back of the home." The letter also stated that: "A landscape engineer has determined that the drainage channel was defectively designed and installed. It will have to be relocated and replaced." The letter further requested that "your insurance carrier or counsel contact me."

A second letter, sent on October 13, 2005, was even more specific. This letter provided:

The Vitellis had another water intrusion in last week's storm. In order to attempt to determine the extent of their problems they had their drain tile scoped. One of them is partially crushed by and filled with concrete which apparently happened during the construction process. A number of the other ones are completely blocked such that the scope camera was unable to penetrate. The initial impression of the cost of repairs to the system are decidedly expensive. You need to get your insurance company involved.

A review of the letters demonstrates that [the contractor] was informed of the damage and that the damage appeared to result from faulty construction. The letter also stated that the damage was extensive and potentially expensive to repair, which was sufficient to put [the contractor] on notice. The request to involve [the contractor's] insurer was further notice of a potential or pending claim. Accordingly, the two letters provided [the contractor] with sufficient notice of [the homeowners'] *potential* claim.

[The contractor] also contends that the two letters did not provide the required notice of the destruction of relevant evidence. [The contractor] argues that because the house was renovated and the lot re-graded shortly after the letters were sent, and the letters did not advise [the contractor] of the potential destruction of evidence, the district court erred in denying the request for sanctions for spoliation of evidence.

Although not specifically stated in Hoffman, we agree that the notice requirement set forth in Hoffman must be given far enough in advance of the destruction of evidence to provide the alleged responsible party with the opportunity to inspect the evidence. Here, the record reflects that the Vitellis began remediation of the damage to their home within days after they incurred damage. Although the letters sent to [the contractor] informed [the contractor] of the damage, the letters did not indicate with any specificity that renovations would begin soon. Nevertheless, the record reflects that despite notice of the Vitellis' *potential* claims, [the contractor] never asked to investigate the premises before the Vitellis' complaint was filed in March 2006. It was only after the complaint was filed that [the contractors] asserted a right to investigate the alleged damage.

Therefore, in light of [the contractor's] failure to act timely, we cannot conclude that the district court abused its discretion in denying [the contractor's] motion for summary judgment.

Vitelli, 2009 WL 910846, 4-5 (unpublished) (emphasis added). Indeed, in Vitelli, the attorney's letters did not even mention the word "suit." Here, Mr. Miller's counsel's December 27, 2005 written notice expressly threatened the possibility of "suit."

In Vitelli, the attorney's letters did not specify when remedial work might commence and work was commenced within days of the letters. Here, remedial work was not commenced for over a year after Mr. Miller's counsel's December 27, 2005 letter.

In Vitelli, the contractor, after receiving the attorney's written notice, did not attempt to inspect the home until approximately five months after receiving the letters.

Here, Respondent Total Service Company claims it never attempted to inspect the home at any time after it received Mr. Miller's counsel's December 27, 2005 letter and Mr. Miller's counsel's March 15, 2007 letter. Respondent Sellers do not dispute that they did not attempt to inspect the home until July 15, 2008 (more than two *years* after Mr. Miller's counsel's December 27, 2005 letter and more than a year after receiving Mr. Miller's counsel's March 15, 2007 letter). Respondent Donnelly Brothers claims that it did not attempt to "perform an inspection" *for an entire year* after receiving Mr. Miller's counsel's December 27, 2005 letter.

Respondent Donnelly Brothers, without citation to any authority, takes the absurd position that Mr. Miller's counsel's December 27, 2005 letters only gave notice of a defect, not a breach, and that notice of a defect and notice of a breach are mutually exclusive. Vitelli makes clear that a spoliation notice that discusses defects constitutes a notice of a breach or claim. Id., at 4-5 (unpublished). Furthermore, it is axiomatic that a defect often *is* the breach. *cf. Bruner & O'Connor on Construction Law*, § 9.28 at 503 (stating that under the UCC, "[a] buyer's failure to notify the seller of a defect, within a reasonable time of breach of the contract, will result in the buyer being barred from all remedies"). The holding in Vitelli clearly demonstrates that the district court in the instant dispute erred and abused its discretion when it imposed sanctions against Mr. Miller for the spoliation of evidence.

III. THE DISTRICT COURT'S ORDER IS UNSUPPORTED BY A FINDING THAT RESPONDENTS SUFFERED PREJUDICE.

A. The Trial Court Did Not Find Prejudice.

Respondent Donnelly Brothers erroneously states that Mr. Miller “overlooked the [district] court’s express finding of prejudice in paragraphs 5 and 6 of [the district court’s] *Findings of Fact. App. Add.* at 5.” (Respondent Donnelly Brothers Brief, 14.) It is actually Respondent Donnelly Brothers that made an erroneous observation. The page number and paragraphs referenced by Donnelly Brothers are *Conclusions of Law*, not Findings of Fact of the district court. The district court’s Findings of Fact are void of any finding that Respondents were prejudiced by the destruction of evidence. (Mr. Miller’s Addendum., 2-3.) Accordingly, Mr. Miller was correct in citing *Foss v. Kincade*, 746 N.W.2d 912 (Minn. Ct. App. 2008), *rev. granted* (Minn. June 18, 2008), in arguing that the district court was at least partially correct in not *finding* prejudice. Accordingly, Mr. Miller’s comparison to *Foss* is proper.

B. The Deposition Transcript of Jeffrey Agness Does Not Support a Finding of Prejudice.

At pages 12 and 13 of its brief, Respondent Total Service Company reproduces a very limited portion of the deposition transcript of Jeff Agness, Total Service Company’s President. Even a cursory review of Mr. Agness’ deposition transcript reveals that most, if not all of the questions appearing on pages 36 and 37 of Mr. Agness’ deposition transcript were based on hypothetical premises, not reality. By way of example and without limitation, when Jeff Agness was asked whether Mr. Miller’s remedial work may have prejudiced Total Service Company, those inquiries were based on the hypothetical

(and false) premise that Total Service Company actually attempted to inspect the premises. Jeff Agness testified in his deposition that even as of August 13, 2008, Total Service Company never attempted to inspect the home. (Depo. Jeffrey Agness, 8/13/08, 11:17-25 and 12:1-6.)

Again, by way of example and without limitation, we also know that the questions appearing on pages 36 and 37 of Mr. Agness' deposition transcript were based on the hypothetical (and false) premise that Total Service Company never had an opportunity to inspect the Home prior to the time it was remediated. We know this is a false premise because it is undisputed that the evidence in question was preserved until at least January 2007, and it is undisputed that Total Service Company had the opportunity to inspect the Home between September 2005 and January 2007. Therefore, the deposition transcript of Jeff Agness does not support a finding of prejudice.

IV. AN INSTRUCTION THAT A JURY MAY BE PERMITTED TO DRAW AN ADVERSE INFERENCE WOULD NOT RENDER APPELLANT'S CLAIM UNTENABLE.

In either misreading Mr. Miller's initial brief or intentionally misrepresenting the argument in Mr. Miller's initial brief, Respondent Total Service Company falsely submits that "Appellant suggests that the district court could have allowed him to present his expert evidence and then instruct the jury to draw an adverse inference with regard to that evidence ***." Mr. Miller *never* suggested that it would be appropriate for the district court *to instruct the jury to draw an adverse inference*. Mr. Miller suggested that even if the district court had authority to impose a sanction for spoliation (which it did not), the district court failed to temper its sanction by fulfilling its duty to impose the least

restrictive sanction available, such as an instruction to the jury that the jury *is permitted* to draw an adverse inference. There is a vast difference between “an instruction to the jury to draw an adverse inference” versus “an instruction to the jury that the jury *is permitted* to draw an adverse inference.” It is axiomatic that the latter instruction would leave questions of material fact for the jury to consider. Respondent Total Service Company only addresses the former instruction, not the latter, and therefore, does not challenge Mr. Miller’s initial brief.

V. RESPONDENT SELLERS’ ARGUMENT THAT THERE WAS NO FRAUDULENT CONCEALMENT OF THE MOLD AND MOISTURE INTRUSION PROBLEMS FAILS.

A reviewing court must generally consider only those issues that the record shows were presented and considered by the trial court in deciding the matter before it. Thayer v. American Financial Advisers, Inc., 322 N.W.2d 599, 604 (Minn. 1982) (abrogated on other grounds); Thiele v. Stich, 425 N.W.2d 580, 582 (Minn. 1988); see also Thompson v. Barnes, 200 N.W.2d 921, 927 (Minn. 1972). Respondent Sellers, for the first time on appeal, argue that a party asserting a tolling defense to the statute of limitations retains the burden of establishing elements of fraudulent concealment. Therefore, Respondent Sellers’ argument should be ignored in its entirety.

Even if the Court were to entertain Respondent Sellers’ argument, it would fail. “Fraud is bad, it should not be permitted to go unchecked anywhere, and justice should always be able to penetrate its armor. We are of the opinion that fraudulent concealment tolls the statute of limitations.” DeCosse v. Armstrong Cork Co., 319 N.W.2d 45, 51 (Minn. 1982). Here, Respondent Sellers’ false disclosure was the act of concealment.

Evidence exists which suggests that Respondent Sellers knew their disclosure not to be true at the time of its making. Specifically, Respondent Contractors have taken the position that the scope of their respective work was quite limited and did not contemplate total remediation. What we have in this case is circumstantial evidence in the absence of an express admission by Lankow that she knew it to be false that the Home was remediated. Mr. Miller's Violation of Disclosure Statute claim is not premised on the issue of whether Respondent Sellers disclosed the prior moisture and mold problems. Mr. Miller's Violation of Disclosure Statute claim is premised on the question of whether the Respondent Sellers knew the prior moisture problem was not fully remediated.

It cannot be said that Mr. Miller acted without reasonable diligence in discovering the claim. The victim of an intentional misrepresentation is excused from any duty to investigate the false representation. Greer v. Paust, 256 N.W. 190 (Minn. 1934). Normally a buyer has no duty to investigate a seller's representations. Berryman v. Riegert, 175 N.W.2d 438 (Minn. 1970) (the buyer noticed standing water in the basement and the court held that the buyer had a right to rely on the seller's false statement that the water was due to a cesspool clog that could be fixed). Therefore, Mr. Miller did not have a duty to immediately assume that Respondent Sellers representations were false and commence an investigation.

It was not until September 2005 that Mr. Miller discovered signs that Respondent Sellers representations were false. Mr. Miller contacted Respondent Contractors within the month, retained an attorney who wrote letters to Respondents within the year, and Mr. Miller continued to investigate the claims. Accordingly, Mr. Miller acted with due

diligence. At a minimum, a material question of fact exists as to whether Mr. Miller acted with due diligence. The existence of a material question of fact precludes a district court from granting summary judgment. See e.g., Rathbun v. W.T. Grant, 219 N.W.2d 641, 646 (Minn. 1974) (any doubt as to whether a material question of fact exists precludes the entry of summary judgment).

CONCLUSION

The district court clearly erred and abused its discretion in concluding that the notices provided by Mr. Miller to Respondent Sellers and Respondent Contractors were inadequate to avoid sanctions. 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,

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Dated: May 22, 2009

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms to Minn. R. Civ. App. Rule 132.01 for a brief using the following typeface: times New Roman, 13 point font. The length of this brief is 4,644 words. This brief was prepared using Microsoft Word 2003.

Respectfully submitted,

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