

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, et al., Third-Party Defendants,

Respondents.

APPELLANT'S BRIEF, ADDENDUM AND APPENDIX

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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 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.

The district court imposed a spoliation sanction against Appellant, which resulted in the trial court’s grant of summary judgment against Appellant.

Authorities:

Foss v. Kincade,
746 N.W.2d 912 (Minn. Ct. App. 2008)17

Hoffman v. Ford Motor Co.,
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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.

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STATEMENT OF THE CASE

In 2004, Appellant David J.T. Miller (“Mr. Miller”) purchased a stucco home to live in with his two young daughters from Respondents Lankow and Betz (collectively referred to hereafter as the “Sellers”). The Purchase Agreement pursuant to which Mr. Miller acquired the home and related documents contained representations that Respondents Total Service Company and Donnelly Brothers (collectively referred to hereafter as the “Contractors”) had remediated rot, moisture and mold problems that had existed at the home in 2003.

In September, 2005, Mr. Miller discovered continuing severe moisture intrusion and mold at the home in some of the same areas that had allegedly been remediated by the Contractors. Within days thereafter, he telephoned the Contractors, informed them of the problems, and told them that the problems would have to be fixed immediately. Later that month, the Contractors visited Mr. Miller’s home for a 45-minute meeting where they were shown and inspected the problems and they both agreed that there was moisture in the wall again. Jeff Agness of Total Service Company stated in his deposition that he and Mark Donnelly of Donnelly Brothers (referred to hereafter as the “Donnelly”) met again with Lankow soon after the meeting at Mr. Miller’s home for the purpose of discussing their legal exposure to Mr. Miller’s potential claims.

On December 27, 2005, Mr. Miller’s former counsel sent the Contractors a letter to provide them with “*written notification of potential construction defects*” in the home. The letter included a copy of a moisture analysis report, which revealed the continuing mold and water infiltration problem, and discussed the discovery of “*work which was*

done inappropriately by your companies causing the problems to continue.” The letter concluded by stating:

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.
(emphasis added)

The December 27, 2005 letter also expressly provided notice of a possible claim for breach of the home-improvement warranty provided under *Minn. Stat. §§ 327A.01 to .08*. A virtually identical notice was sent to Sellers.

None of the Respondents took any action in response to the December 27, 2005 notice by January 9, 2006. Donnelly did visit the home (its second visit) after receiving the December 27, 2005 spoliation notice – but not until March 22, 2006. It is undisputed that no evidence had been disturbed as of that date. Despite twice visiting the home and despite receiving notice from Mr. Miller that moisture was actually coming down the inside part of the wall that Donnelly had allegedly repaired earlier, Donnelly did nothing further to investigate the problem. Donnelly failed to inquire further about the extent of the damage or condition of the house, failed to have an expert evaluate the problem and did nothing more to otherwise protect itself in the event of an adverse claim.

Having notified Respondents, orally and in writing, of a potential claim; having provided Respondents with an opportunity to inspect the home and correct the defects; having actually met the Respondent Contractors at the home; and having actually observed the Respondent Contractors inspect the home, Mr. Miller informed Respondents

in March 2007 that he intended to remove the stucco of the home and remediate the problem himself – more than a year after Mr. Miller’s initial notice to Respondents. Although Respondents complain that Mr. Miller may not have informed them that he intended to remove the stucco before he had actually begun the process of removing it, this complaint is irrelevant – by 2007 Respondents had repeatedly received notice but had taken no action to correct the defects, or safeguard themselves from the claim they were all aware would be made if they failed to correct the defects.

On December 16, 2008, Judge Stephen A. Halsey of the Wright County District Court issued an order imposing the most drastic spoliation sanction the law provides: excluding all evidence regarding the home and all of Mr. Miller’s expert’s opinions relating to the cause of the defects and ongoing moisture intrusion and mold and granting summary judgment against Mr. Miller on all of his claims.

Mr. Miller then appealed the matter to the Court of Appeals, where a divided Court of Appeals affirmed the district court’s decision. In so doing, the majority, in a published decision, substantially expanded current Minnesota spoliation jurisprudence by adding a new and additional requirement. As Judge Klaphake put it in his dissent:

[T]he majority insists that in addition to providing notice of a potential claim, [Mr. Miller] was also required to “inform respondents of [Mr. Miller’s] plan to remediate the moisture and mold problems.” This additional requirement adds an additional component to the claim notice required by [Hoffman v. Ford Motor Co., 587 N.W.2d 66, 70 (Minn. Ct. App. 1998)] and is wholly unsupported in the law.

Respondents may have had little motivation to respond during the period that appellants attempted to notify them of the continuation of the mold and water

problem, but their dilatory tactics should not give them a legitimate spoliation claim. ... The threat of a spoliation sanction encourages an injured party to inform an alleged tortfeasor of a possible claim in order to enable the tortfeasor to defend against such a claim. Respondents were given that opportunity here, and the district court abused its discretion by imposing a spoliation sanction that extinguished appellant's claim. (emphasis added)

Mr. Miller respectfully requests that this Court reverse the district court's decision and remand this matter to the district court.

STATEMENT OF FACTS

Prior to Mr. Miller's purchase of the home, 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.*) Sellers contracted with the 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 Sellers. (*Aff. of David J.T. Miller at ¶ 6.*) At closing, Mr. Miller was provided with a document which specifically stated that 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 representations contained in the purchase agreement, and made orally by Lankow, that the moisture and mold problems had been corrected. (*Id at ¶ 3.*)

A. Respondent Contractors Received Verbal Notification of Appellant's Claim and Inspected the Home In September of 2005

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 Contractors of the defects via telephone. (*Id.*) On September 30, 2005, in response to Mr. Miller's telephone calls, Contractors visited the home. (*Id.*) During this approximately 45 minute meeting the Contractors were, according to Mr. Miller, shown a hole that had been cut in a wall of the home and "they both agreed that there was moisture in the wall again." (*Deposition of David Miller, at 101:19-25 and 102:1-8*) During the meeting, the Contractors claimed that they had only been engaged by Respondent Seller Lankow to repair limited areas of the home; when asked "what could they do for" Mr. Miller, Donnelly offered him a "fairly good price" to repair the problem, and Jeff Agness of Total Service Company said nothing. (*Id., at 104:16-21-25 and 105:18-25*) Agness stated in his deposition that he, Mark Donnelly, and the prior homeowners met soon after the meeting with Mr. Miller, and "[t]he purpose of the meeting was to make us aware that there may be a lawsuit on this, and for the people to be involved in that to ... take a look at what does that mean, why are we being sued, what are the issues here." (*Deposition of Jeff Agness, at 39:3-25*)

B. Respondent Contractors and Respondent Sellers Received Written Notification of Appellant's Claim In December of 2005

On December 27, 2005 Mr. Miller's former counsel sent a letter to Contractors to provide them with "written notification of potential construction defects" in the home.

The notice reads as follows:

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.]

(Aff. of Patrick W. Michenfelder, Ex. B; see also, Aff. of Timothy Waldeck, Ex. D; District Court's 12/16/08 Findings of Fact at ¶ 8.) Mr. Miller sent a very similar notice at the same time to Sellers. (Id.)

C. Respondent Donnelly Brothers Inspected the Home For a Second Time In March of 2006.

After receiving Mr. Miller's counsel's December 27, 2005 correspondence, Respondent Donnelly inspected the home for second time on March 10, 2006. *(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.*) According to the Affidavit of Mark Donnelly, his total investigation consisted of viewing “a cut [made] on the inside wall prior to my visit.” Despite Mr. Miller’s allegation that moisture was “actually coming down inside part of the wall” that Donnelly had purportedly repaired earlier, Donnelly did nothing further after twice visiting the home to correct the problem, did not inquire further about the problem, did not have an expert evaluate the problem and did nothing further to protect itself in the event of an adverse claim. (*See generally, Id.*)

D. Not Having Received Any Agreement from Respondents to Correct the Defects at His Home, Mr. Miller Moved Forward With the Remediation of the Mold and Rot at His Own Expense in 2007.

On March 15, 2007, Mr. Miller’s counsel sent letters to each of the Respondents notifying them that he intended to proceed with remedial work on March 22, 2007. (*Aff. of Patrick W. Michenfelder, Ex. D.*) Only one of the Contractors, Donnelly, responded to the March 15, 2007 notice, and not until March 23, 2007. (*See Aff. of Mark Donnelly at ¶¶ 7 and 8.*) Sellers never attempted to inspect the home until July 15, 2008. (*Appendix, 212.*) And Respondent Total Service Company never attempted to inspect the home after March 2006. (*Depo. Jeff Agness, 8/13/08, 11:17-25 and 12:1-6.*)

As noted in Judge Klaphake’s dissent in the Court of Appeal’s decision, the fact that it appears that Mr. Miller had already conducted stucco removal work in early 2007 is irrelevant: by 2007, Respondents had repeatedly received notice of Mr. Miller’s claim and had ample opportunity to either correct the defects or prepare themselves for an adverse claim. In addition, the majority in the Court of Appeal’s decision misunderstood

the facts of this case and erroneously stated that “by March 23, 2007, the entire exterior of the home, including the stucco and the underlying plywood, had already been removed.” In fact, 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 and nothing in the record suggests that the underlying plywood had been removed by March 23, 2007. (*Affidavit of Charles Johnson, at ¶ 5*) Furthermore, the record includes 21 photographs taken of the exterior of the home in 2007 after the stucco was removed that clearly show the condition of the walls, including the presence of mold. And, lastly, the record also includes the observations of a number of witnesses who observed the condition of the home including Mark Donnelly, Jeff Agness, Keith Strombeck, Charles Johnson, and David Miller. (*Id. at ¶ 5*)

ARGUMENT

I. STANDARD OF REVIEW

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). Before a reviewing court examines whether a district court abused its discretion in imposing a sanction for the spoliation of evidence, the reviewing court first examines whether the district court was authorized to impose a spoliation sanction in the first place. *Id.*

II. THE DISTRICT COURT ABUSED ITS DISCRETION BY IMPOSING A SPOILIATION SANCTION IN THIS CASE

A. Mr. Miller Provided Respondents With Adequate Spoliation Notice On Multiple Occasions.

In order to be sufficient in content, Minnesota law requires that “a spoliation notice must 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). In this case, Respondents were properly notified of their breach and Mr. Miller’s claim on repeated occasions, both orally and in writing. As set forth above, before September 30, 2005, Mr. Miller notified Contractors of the construction defects via telephone. In response to that notice, Contractors visited the home on or about September 30, 2005. (*District Court’s Findings of Fact*, page 3, ¶ 7.) Jeff Agness’s admission that he and Respondents met soon after the first visit to the home to discuss their legal exposure clearly shows that they were notified of a potential claim by Mr. Miller.

On December 27, 2005, Mr. Miller’s counsel sent letters to the Contractors to provide them with “written notice of potential construction defects.” Although under *Hoffman* there is no requirement that a plaintiff notify a defendant of a breach and a claim, Mr. Miller’s attorney did both in his December 27, 2005 correspondence. Thus the December 27, 2005 letter expressly stated that “... 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.” (*Aff. of Patrick W. Michenfelder, Exs. A and B.*) The district court found “[t]hat on December 27, 2005, [Mr. Miller’s] attorney sent a letter to Defendants notifying them of potential construction defects and inviting them to inspect

the property and discuss possible resolutions.” (*District Court Findings of Fact* ¶ 8.) (emphasis added). In response to this second notice, Donnelly visited the home for a second time in March of 2006.

It was not until 2007, more than a year after the original verbal notice and subsequent written notice, that Mr. Miller moved forward with the remedial work necessary to address the mold and rot at the home at his own expense. On these facts, the district court lacked authority to impose a spoliation sanction of any kind. In *Hoffman*, the court discussed the purposes of a "spoliation notice" by analogizing to the notice provisions found in the Minn. Stat. § 336.2-607(3)(a) (1996) (a UCC provision requiring that a claimant must “notify the seller of breach or be barred from any remedy”). It also concluded that such notice may be oral or written 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; and 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* (citations omitted).

Here, Respondents received repeated notice of the breach and claim. They had ample opportunity to correct the defects, prepare for negotiation and litigation, and safeguard against claims being asserted after it was too late to investigate them. Accordingly, there can be no serious dispute that the notice was not only reasonable in content, but provided Respondents with ample time within which to respond to the notice. *Hoffman* confirms 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.

B. Neither *Hoffman* Nor Any Other Minnesota Case Required Mr. Miller to provide “Sufficient Notice That the Evidence Would be Destroyed” as the District Court and Majority of the Court of Appeals Erroneously Concluded.

Although Mr. Miller was not required to provide any notice that he intended to remediate the home, he did so by way of a March 15, 2007 letter to Respondents advising that he intended to proceed with remedial work on March 22, 2007. But this is irrelevant, as is the fact that it appears that Mr. Miller had already conducted stucco removal work in early 2007: by 2007, Respondents had repeatedly received notice of Mr. Miller’s claim and had ample opportunity to either correct the defects or prepare themselves for an adverse claim.

Because the repeated notice provided to Respondents prior to that time was sufficient under *Hoffman*, the district court had no authority to impose any spoliation sanction on Mr. Miller. Neither *Hoffman* nor any other Minnesota case required Mr. Miller to “inform Respondents of his plan to remediate the moisture and mold problems” or provide “sufficient notice that the evidence would be destroyed” as the district court and the majority in the Court of Appeal’s decision erroneously concluded.¹

¹ It is noteworthy that under Chapter 327A of the Minnesota Statutes, a contractor has a right to inspect subject property within a 30 day period following notice, and make an offer to repair any and all defects, but the right to inspect and make an offer to repair defects expires after thirty days. Minn. Stat. § 327A.02, subd. 4(a). In the instant case, because the December 27, 2005 spoliation notice made express reference to Minn. Ch. 327A, Respondents were arguably charged with knowledge that Mr. Miller had a right to remediate the home immediately after the expiration of the 30 day period found at Minn.

In addition to issuing an order based on an impermissible expansion of the requirements set forth in *Hoffman*, the district court also improperly relied on the unpublished opinion in *Smothers v. Insurance Restoration Specialist, Inc.*, No. A04-1036, 2005 WL 624511 (Minn. Ct. App. 2005) (mis-cited by the district court as 2005 WL 62511), an opinion that none of the parties referenced in their district court submissions. In *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796 (Minn. Ct. App. 1993), the Minnesota Court of Appeals stated that it is improper to rely on unpublished opinions as binding precedent and warned 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. As the *Bloch* court put it: We remind the bench and bar firmly that neither the trial courts nor practitioners are to rely on unpublished opinions as binding precedent.

Even if *Smothers* were appropriate to rely on, it is not analogous to the instant case in any material respect. The homeowners in *Smothers* orally complained to one defendant contractor “about the poor drywall and carpet workmanship” but “did not alert the [defendant contractors] to the issue of mold damage.” In addition, the homeowners in *Smothers* never suggested during their meetings with any defendant contractor that the defendant contractors were responsible for the complained of conditions of the home.

Stat. § 327A.02, subd. 4(a). Contractors, rather than exercising their right to inspect the home, allowed the 30 day period to expire without taking any action. Although the March 15, 2007 notice is irrelevant, it is worth pointing out that only one of the Contractors, Donnelly, responded to it, and not until March 23, 2007. Sellers never attempted to inspect the home until July 15, 2008 and Respondent Total Service Company never attempted to inspect the home after March 2006.

And, after the defendant contractors in *Smother's* ceased work on the home, they never performed an inspection of the property in question.

The homeowners in *Smother's* did send a letter to the Department of Commerce (never directly to any of the defendant contractors), but the 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.” This conclusion was based on the cumulative effect of three facts: (1) “the second letter from the Department of Commerce, warning [the defendant contractors] 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 contractors] 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.” As a result, the *Smother's* court concluded that the defendant contractors could not have understood that the plaintiff might assert claims against them. Even though one of the defendants did not dispute receiving notice of the homeowners' claims on June 5, 2002 -- before the house in question was razed on June 11, 2002 -- the 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.”

The facts of *Smother's* stand in stark contrast to the facts at issue here. In this case, Respondents were clearly made aware that Mr. Miller might commence a lawsuit against them and were aware of this fact for well over a year before the evidence was disturbed --

not the six days at issue in *Smothers*. In addition, the Contractors in this case actually inspected the home before the evidence was disturbed – Donnelly doing so on two separate occasions. *Smothers*, in addition to being unpublished, simply turned on facts that are not present here. It should not have been relied upon by the district court.

C. By Concluding that Minnesota Law Required Mr. Miller to Provide Respondents with Sufficient Notice that the Evidence would be Disturbed, the District Court and Majority in the Court of Appeal’s Decision Imposed Additional and New Requirements on Mr. Miller -- Reaching Beyond the Court of Appeal’s Error-Correcting Function and Making New Law.

The Court of Appeal’s function is to correct errors, not to make new law. *See e.g., Tereault v. Palmer*, 413 N.W.2d 283 (Minn. Ct. App. 1987). As set forth above, Minnesota law currently contains no requirement that would require Mr. Miller to provide Respondents with sufficient notice that the evidence of the Contractors defective workmanship would be disturbed. Moreover, nothing in the facts of this case suggests that this additional requirement should be imposed. Mr. Miller clearly complied with existing Minnesota law when he repeatedly notified Respondents of a potential claim and gave them the opportunity to inspect the evidence, when Respondents actually inspected the evidence and when Respondents can show no prejudice resulting from Mr. Miller’s conduct. It was only after he and his daughters had been forced to live in a mold and rot infested house for more than a year, during which time Respondents did nothing to correct the defects, that Mr. Miller made the decision to remediate the mold at his own expense. Under these circumstances, it would be patently unfair to subject Mr. Miller to

the additional requirement that the district court and majority in the Court of Appeal's decision imposed upon him.

III. THE DISTRICT COURT ABUSED ITS DISCRETION BECAUSE ITS SANCTION EXTINGUISHING MR. MILLER'S CLAIM WAS NOT APPROPRIATELY TEMPERED.

Even if it is assumed for purposes of argument that the district court had the authority to impose a spoliation sanction in this case, the district court abused its discretion because the sanction of dismissal violated the 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)

Sanctions are available for spoliation that are much less drastic than dismissal, including, for example, an instruction to the jury that they are permitted to draw an adverse inference with regard to the 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 from 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).

Further, sanctioning a party for disturbing evidence “is only appropriate if the unavailability of the evidence results in prejudice to the opposing party.” *Foss v. Kincade*, 766 N.W.2d 317, 323 (Minn. 2009); see also *Patton*, 538 N.W.2d at 119 (stating that spoliation sanction should be tailored to address “the impact of spoliation – the prejudice to the opposing party”). In crafting a spoliation sanction, the court must “examine the nature of the item lost in the context of the claims asserted and the potential for remediation of the prejudice.” *Foss*, 766 N.W.2d at 323 (quoting *Patton*, 538 N.W.2d at 119). In *Foss*, the supreme court ruled that the homeowners’ disposal of a bookcase that had fallen on a visiting child did not merit a discovery sanction in a negligence action brought against the homeowners, because the bookcase had no evidentiary value and its disposal did not prejudice the plaintiffs. *Foss*, 766 N.W.2d at 324.

Here, neither Donnelly nor the other Respondents have shown that they were unable to determine the nature of Mr. Miller’s claims or their response to them because of any lack of evidence in the record. As in *Foss*, they have not shown that they suffered prejudice as the result of Mr. Miller’s 2007 repair work to his home, work that was commenced more than a year after Respondents were notified of Mr. Miller’s claims. In addition, the record includes 21 photographs taken of the exterior of Mr. Miller’s home in 2007 after the stucco was removed that, while black and white, clearly show the condition of the walls, including the presence of mold, and the record also includes the observations of various witnesses who observed the condition of the home. Under these circumstances, the sanction of extinguishing Mr. Miller’s entire claim was an abuse of discretion.

IV. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT ON THE BASIS THAT MINNESOTA STATUTES § 513.57, SUBD. 2 BARRED ANY OF MR. MILLER'S CLAIMS.

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.*" (emphasis added) 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, pursuant to *Minn. Stat. § 513.57, subd. 3*, *Minn. Stat. § 513.57, subd. 2* is not a bar to any of Mr. Miller's eight separate other causes of action.

With regard to Count VIII, 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. "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, Sellers’ false disclosure was an act of concealment. Contractors have taken the position that the scope of their respective work was quite limited and did not contemplate total remediation. If that is true, Sellers have knowingly made a false disclosure by concealing this critical information from Mr. Miller. It was not until September, 2005, that Mr. Miller discovered signs that the representations contained in the purchase agreement for the home and made orally by Lankow were false. (*District 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. Respondents 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.

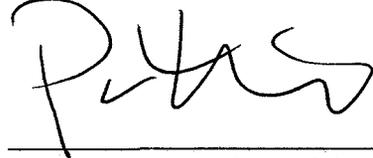
CONCLUSION

The district court erred and abused its discretion in concluding that the notices provided by Mr. Miller to Respondents were inadequate to avoid sanctions. The district court’s application of the spoliation sanction and its order granting summary judgment to Respondents should 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: 4/14/10

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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 5,338 words. This brief was prepared using Microsoft Word 2003.

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