

NO. A09-0244

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State of Minnesota  
In Supreme Court

David Miller,

*Appellant,*

vs.

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

*Respondents.*

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**BRIEF AND APPENDIX, VOLUME I, OF RESPONDENTS  
LINDA J. LANKOW AND JAMES E. BETZ**

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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 THE COURT OF APPEALS CORRECTLY HELD THAT THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY EXCLUDING APPELLANT'S EVIDENCE AS TO THE CAUSE AND ORIGIN OF THE MOISTURE INTRUSION CONDITION AND THE EXTENT OF DAMAGE IN THE SUBJECT HOME AS A SANCTION FOR SPOILIATION OF EVIDENCE.

#### **How the issue was raised below:**

This issue was presented to the District Court on motions for summary judgment brought by all of the Respondent parties. *See* Respondent Lankow and Betz's Memorandum in Support of Motions for Summary Judgment, Respondent Lankow and Betz's Appendix ("RA"), RA 32.

#### **Concise statement of the rulings of the courts below:**

The Court of Appeals upheld the District Court's exclusion of Appellant's evidence of the cause and origin of the moisture intrusion and mold condition and the extent of related damage in the subject home as a sanction for spoliation of evidence, and therefore upheld its consequent award of summary judgment as to each of Appellant's claims.

#### **Preservation of this issue for appeal:**

Appellant appealed from the judgment of the District Court via his Notice of Appeal dated February 4, 2009. Appellant's Appendix, p. 230.

#### **Most apposite authorities:**

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

*Wajda v. Kingsbury*, 652 N.W.2d 856 (Minn.App. 2002)

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

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**II. WHETHER THE QUESTION OF RESPONDENTS LANKOW AND BETZ'S ALLEGED FRAUDULENT CONCEALMENT OF APPELLANT'S CAUSE OF ACTION UNDER THE MINNESOTA DISCLOSURE STATUTE WAS PRESERVED FOR REVIEW AND, ALTERNATIVELY, WHETHER THIS QUESTION IS MOOTED BY APPELLANT'S SPOILIATION OF EVIDENCE, AND, ALTERNATIVELY, WHETHER A QUESTION OF FACT ARISES FROM THE RECORD AS TO WHETHER SUCH FRAUDULENT CONCEALMENT OCCURRED.**

**How the issue was raised below:**

This issue was presented to the District Court in Appellant's Memorandum of Law in Opposition to Defendants' and Third Party Defendants' Motions for Summary Judgment. RA 295.

**Concise statement of the rulings of the courts below:**

The District Court granted summary judgment dismissing Appellant's claim under Minn. Stat. § 513.57, Subd. 2 on the additional basis that Appellant failed to commence his action within that provision's two year limitation. The Court of Appeals did not reach this issue, holding that Appellant's spoliation of evidence was a sufficient basis for dismissal of all causes of action against Respondents Lankow and Betz.

**Preservation of this issue for appeal:**

Appellant appealed from the judgment of the District Court via his Notice of Appeal dated February 4, 2009. Appellant's Appendix, p. 230. However, Appellant did not include this issue in his petition for review by this Court, and therefore did not preserve it for review in the instant proceeding. Appellant's Petition for Review, Appellant's Appendix, p. 255 *et seq.*

**Most apposite authorities:**

*In re GlaxoSmithKline PLC*, 699 N.W.2d 749 (Minn. 2005)

*Schmucking v. Mayo*, 235 N.W. 633 (Minn. 1931)

*Haberle v. Buchwald*, 480 N.W.2d 351 (Minn.App. 1992)

Minn. Stat. § 513.57, Subd. 2 (2010)

## STATEMENT OF THE CASE

Appellant David Miller (“Appellant”) instituted this action on or about April 27, 2007 against the Respondent sellers, Linda Lankow and James Betz, and the Respondent contractors, Total Service Company (“Total Service”) and Donnelly Brothers (“Donnelly”), alleging, in essence, that the Respondent sellers had misled him as to the continuing existence of a moisture intrusion condition in the subject home, and that the Respondent contractors had failed to repair it. The Respondent parties cross-claimed against each other for contribution and indemnity, and Respondents Lankow and Betz instituted a third-party claim against their broker and agent for the sale of the subject home, Respondents Burnet Realty, Inc., d/b/a Coldwell Banker Burnet and Mark A. Geier.

All Respondents moved for summary judgment, on substantive grounds as to each of Appellant’s legal theories, and based on Appellant’s spoliation of evidence crucial to proof of the cause of the complained-of moisture intrusion condition and the extent of related damage. The Wright County District Court, the Honorable Stephen M. Halsey presiding, granted summary judgment in favor of all Respondents based on spoliation of evidence, and expiration of the statute of limitations as to Appellant’s Minnesota Disclosure Statute claim against Respondents Lankow and Betz. As a sanction for spoliation, the District Court excluded from evidence “the evidence from the home and all of Plaintiff’s expert reports relating to moisture intrusion and the extent of mold.” Appellant’s Addendum, p. 5. Summary judgment against all of Appellant’s claims necessarily followed. Appellant brought this appeal, seeking to overturn these rulings.

The Court of Appeals upheld the District Court's rulings as to spoliation and the consequent summary judgment, and did not reach the Disclosure Statute limitations issue, holding that Appellant's spoliation of evidence was a sufficient basis for dismissal of all causes of action against Respondents Lankow and Betz.

Appellant then petitioned for further review by this Court, which was granted on March 16, 2010. Appellant did not include the Disclosure Statute limitations issue in his petition for review by this Court, and therefore did not preserve it for review in the instant proceeding. Appellant's Petition for Review, Appellant's Appendix, p. 255 *et seq.*

As a part of its resolution of the motions before it, the District Court found that Respondent James Betz had no ownership interest in the subject home and did not sign the disclosure statement relative to the sale of the home, and therefore dismissed all claims against him with prejudice. Appellant's Addendum, pp. 5-6. This ruling is not contested on this appeal.

#### STATEMENT OF FACTS

##### **Respondent Lankow's Extensive Disclosure of the Pre-Sale Moisture Intrusion Condition**

Respondent Linda Lankow first discovered a moisture intrusion and mold condition in the subject home in approximately March of 2003. Deposition of Linda Lankow ("Lankow Deposition"), pp. 13-16, 21, Appendix of Respondents' Lankow and Betz ("RA") 119, 121.

Ms. Lankow responded that spring and summer by having the home thoroughly tested for moisture by Industrial Hygiene Services Corporation (“Industrial Hygiene”), first for interior moisture by probing through drywall, and then for exterior moisture by probing through stucco. The entire house was tested, inside and out. Lankow Deposition pp. 21-22, 29-32, 102-03, RA 121-22, 132; Industrial Hygiene interior and exterior moisture reports, RA 137-68. Industrial Hygiene bored approximately 60 holes into the exterior, all around the entire house. Lankow Deposition, p. 70, RA 128.

Ms. Lankow hired Defendant Diversified Contractors, Inc. (which has settled out of this case under a *Pierringer* agreement) to do fungal remediation in the basement of the house. *Id.* pp. 22-23, RA 121. She hired Respondent Total Service to handle necessary structural repairs. *Id.* p. 22-24, 106-07, RA 121, 133. Respondent Donnelly was already on the project to handle the associated stucco work. *Id.* p. 36, RA 123.

After Ms. Lankow obtained the July 11, 2003 exterior moisture report from Industrial Hygiene, she talked with Total Service’s project manager, Keith Strombeck, and asked him to expand the scope of the repairs. Specifically she gave Strombeck the comprehensive moisture report provided by Industrial Hygiene and asked him to go in and fix every area that had abnormal moisture. Lankow Deposition pp. 33-34, 42, RA 123-24. She had an agreement with Total Service that where there were elevated moisture readings on the Industrial Hygiene report, Total Service would inspect that area, and if they found a problem, they would “chase the damage” until they had identified its full extent and fixed it. They were to do this on each side of the house. *Id.* pp. 34-35, 42-43, RA 123-24. Once the Industrial Hygiene report was in Project Manager Strombeck’s

hands, Ms. Lankow relied on him and Total Service to tell her what needed to be done. *Id.* p. 65, RA 127. Her request of Strombeck and Total Service was to have the entire problem fixed. *Id.* pp. 88-89, 106, 131, RA 130-31, 133, 131, 135. There was never anything that Total Service recommended that Ms. Lankow didn't authorize them to do. *Id.* p. 122, RA 134. Ms. Lankow testified as follows concerning her efforts to fix the moisture intrusion problem in the home:

Q. You didn't hire Total Services to investigate the cause of the water intrusion, did you?

A. I just wanted it fixed.

Q. You wanted them to fix the damage?

A. I just wanted it fixed. Whatever the issue was, I just wanted it fixed.

Q. Well, let me rephrase that. When you say you wanted it fixed, are you saying you wanted the damage fixed?

A. I wasn't distinguishing between what – just fixing or what the cause was. I didn't want this to reoccur, so I wasn't distinguishing between, tell me exactly what caused this - - I just wanted it fixed so it wouldn't happen again.

*Id.* p. 123, RA 134; *see id.* pp. 131-32, RA 135.<sup>1</sup>

In the course of the later sale of the home, Ms. Lankow did everything she could to disclose to Appellant Miller the full nature of the moisture intrusion problem and the

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<sup>1</sup> At various times the allegation has been made that Respondent Lankow somehow limited the work of the Respondent Contractors. Respondent Lankow has consistently denied this allegation, and the testimony of both Appellant Miller and Respondent Total Service's Project Manager Keith Strombeck fails to support it. *See* Deposition of David J. T. Miller, pp. 125, 131-33, Appellant's Appendix, pp. 99-101; Deposition of Keith Strombeck pp. 18, 39, 89, RA 224, 227, 234.

thorough steps taken to address it, beginning at the point of his first showing of the home. At the time of that showing, Ms. Lankow displayed, on her kitchen counter, a binder containing numerous photographs of the repair, records of all the contractors involved, and the disclosure statement she had filled out relative to the home (and that was later signed by the parties to the sale of the home at the same time as the purchase agreement). Affidavit of Linda Lankow (“Lankow Affidavit”), Paragraphs 2 - 4 and Exs. A – H thereto, RA 38-97. Approximately 60 days passed between the date of the first showing and the date of the May 21, 2004 closing, and Appellant Miller acknowledges that this disclosure was available to him during this entire time. Deposition of David Miller (“Miller Deposition”) pp. 165-66, RA 190. At the time that the Purchase Agreement was signed on March 24, 2004, Appellant signed a receipt for all the repair documents. Lankow Affidavit, Ex. I, RA 97; Miller Deposition pp. 175-76, RA 191. Appellant did not review any of these documents prior to closing. *Id.* pp. 93-94, RA 184. In fact, Appellant did not review these documents until he encountered his own moisture issues with the house approximately one and one-half years after the closing, during late 2005. *Id.* p. 138, RA 186.

Appellant waived any inspection of the home in the purchase agreement. Lankow Affidavit, Ex. J, line 36, RA 98; Miller Deposition pp. 32-33, RA 177-78.

The disclosure statement that was prepared in connection with the sale and provided to Appellant reads as follows with respect to the disclosed moisture intrusion and mold condition: “Seller became aware of a moisture intrusion/mold issue in spring of 2003. The affected areas were remediated by licensed professional contractors and

engineers.” Lankow Affidavit, Ex. H, RA 95. At the top of its first page, the disclosure statement carries a clear disclaimer of warranty: “This disclosure is not a warranty or a guaranty of any kind by the Seller(s) or Licensee(s) representing or assisting any party/ies in the transaction.” Just below that, immediately adjacent to the bold, capitalized heading “**INSTRUCTIONS TO BUYER,**” the document states that “[b]uyers are encouraged to thoroughly inspect the property personally or have it inspected by a third party, and to inquire about specific areas of concern.” *Id.*, RA 93. At page four, there is an extensive notice under the bold-faced, capitalized heading, “**WATER INTRUSION AND MOLD GROWTH.**” This notice clearly informs purchasers that “mold growth is often difficult to detect” and that “[i]f you have a concern about water intrusion or the resulting mold/mildew/fungi growth, you may want to consider having the property inspected for moisture problems before entering into a purchase agreement . . . .” *Id.*, RA 96. Each page of the disclosure statement carries the bold, capitalized heading, “**THE INFORMATION DISCLOSED IS GIVEN TO THE BEST OF THE SELLER’S KNOWLEDGE.**” *Id.*, RA 93-96. Appellant and his then-current wife signed the disclosure statement on the same date that they signed the purchase agreement. Appellant testified that the disclosure statement was explained to him and that he had no questions about it. *Id.*, RA 96; Miller Deposition pp. 167-68, RA 190.

The closing on the sale of the subject home to Appellant took place on May 21, 2004. Lankow Affidavit, Paragraph 7, RA 39.

### **Appellant's Inadequate Notice of Spoliation**

Appellant initiated extensive destructive repairs of the home before he commenced the instant suit. It was only after his contractor tore into the home that he decided to sue. Miller Deposition pp. 55, 146-47, RA 181, 188. The only notice that was provided to Respondents Lankow and Betz came in the form of three letters sent by Appellant's counsels, two on December 27, 2005 by a prior attorney, and one on March 15, 2007 by his current counsel. Affidavit of Robert Christensen ("Christensen Affidavit"), Ex. F, RA 209-14. The first two letters of December 27, 2005 served to inform Respondents of the water intrusion problems Plaintiff had encountered and referenced the possibility of suit (the contractors were generally invited to inspect without limitation as to date). However, these letters made no reference to destructive repairs whatsoever. *Id.*

The next written contact from Appellant regarding the home took place over a year later, in the form of the second letter dated March 15, 2007. *Id.* This letter did reference destructive repairs, and purported to provide seven days' notice of repairs it claimed were to be performed on March 22, 2007. In fact, this letter is a sham; the repairs had begun during January or February of that year and either all of the stucco or substantial areas of it had already been removed (along with "a lot of the plywood"). Miller Deposition pp. 82-83, 106, 150-51, RA 183, 185, 189; Appellant's Appendix at pp. 197-99 (showing payment based on full removal of stucco by March 15, 2007). There is no question that by March 23, 2007, all stucco had been removed from the home, along with all independent evidence of the cause and origin of the moisture

intrusion and mold condition. Affidavit of Mark Donnelly, Paragraph 8; Appellant's Appendix p. 194.<sup>2</sup>

Jeff Agness, the owner of Total Service, testified that Appellant's destructive repairs have made it impossible for him to determine the cause of the moisture intrusion problems that lie at the heart of Appellant's claims. This has been of substantial prejudice to his defense of the case, and has made it essentially impossible for him to fully defend himself. In his view, this impediment applies to all of the Respondents. Deposition of Jeff Agness pp. 44-45, RA 219-20.<sup>3</sup> Clearly, this impediment applies to Respondents Lankow and Betz, who are accused of misrepresenting the condition of the home at the time it was sold, a condition that cannot now be independently established. Notably, Appellant himself indicated his understanding that Respondents would need to examine the pre-repair condition of the home in order to determine whether or not they were responsible ("The stucco would have to have been removed to see exactly what was

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<sup>2</sup> In connection with the destructive repairs that he performed without notice, Appellant claims that "he and his daughters had been forced to live in a mold and rot infested house for more than a year." Appellant's Brief hereunder, p. 15. Appellant was forced to do no such thing. If Appellant desired to begin repairs at an earlier time, all he was required to do was to send a letter to Respondents reasonably in advance of the repairs, notifying them – specifically and truthfully – of the date by which he intended to begin the repairs. Appellant failed to provide this simple notice, and the District Court's recognition of this fact led it, appropriately, to sanction Appellant in the way that it did.

<sup>3</sup> The testimony of Jeff Agnes, as owner of Respondent Contractor Total Service, was foreseeably relevant to Respondents' spoliation defense. Nonetheless, Appellant's counsel chose not to attend the Agnes deposition. Deposition of Jeff Agnes, p. 2, RA 216.

bad and if it was their areas that were bad”). Miller Deposition, Appellant’s Appendix, p. 93.

Following Appellant’s destructive repairs, the only remaining evidence of the home’s pre-repair condition is the report of Appellant’s expert and photographs taken by him and Appellant. Some or all of these photographs are attached to the affidavit of Plaintiff’s expert, Charles Johnson (“Johnson Affidavit”). Johnson Affidavit, Exhibit A, submitted by Appellant in the course of the summary judgment proceeding below, RA 303. Johnson describes the photographs as “fair and accurate depictions of the home as it appeared after stucco was removed from the sheathing of the home in 2007 and before any other remediation efforts were commenced in 2007.” Johnson Affidavit, Paragraph 3, RA 304. Obviously, these photographs, taken after removal of the stucco, do not depict the condition of the home as it existed prior to repair. Further, there is no testimony or evidence showing that examination of any existing photographs, without examination of the pre-repair condition of the home, would allow an expert to draw valid conclusions concerning the cause and origin and extent of the complained-of moisture intrusion condition in the home. While there are references to a moisture analysis that is not included in the record,<sup>4</sup> the record contains no meaningful documentation of inspection of the pre-repair condition of the home, containing specific observations and measurements.

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<sup>4</sup> Appellant’s letters of December 27, 2005 reference, but do not actually attach, the moisture analysis obtained by Appellant’s prospective buyer – Appellant’s Appendix, pp. 41-44.

Appellant commenced this action via his Summons and Complaint dated April 27, 2007, after the destructive repairs had been conducted. Appellant's Appendix, p. 1. Appellant claimed negligence against all Respondents for allegedly failing to properly repair the pre-sale moisture intrusion condition, and claimed separately against Respondents Lankow and Betz in an additional eight counts based upon their alleged failure to properly disclose the condition, including five different forms of misrepresentation (among them, violation of the Minnesota Disclosure Statute, Minn. Stat. §§ 513.52 through 513.60), breach of contract, breach of warranty, and unjust enrichment. The cause and origin of the post-sale moisture condition in the home and the extent of damage prior to repair are crucial elements of proof as to each of Appellant's claims.

## ARGUMENT

### I. Standard of Review

The findings of the District Court below as to the occurrence of spoliation, the adequacy of notice and the existence of prejudice are not to be overturned on appeal unless they are clearly erroneous. *Hoffman v. Ford Motor Co.*, 587 N.W.2d 66, 70-71 (Minn.App. 1998); see *Wadja v. Kingsbury*, 652 N.W.2d 856, 861 (Minn.App. 2002).

The District Court "has broad authority in determining what, if any, sanction is to be imposed for spoliation of evidence." *Wajda, supra* at 860, citing *Patton v. Newmar Corp.*, 538 N.W.2d 116, 119 (Minn. 1995). In light of this broad authority, the District Court's choice of sanction is reviewed on an abuse of discretion basis:

One challenging the trial court's choice of a sanction has the difficult burden of convincing an appellate court that the trial court abused its discretion – “a burden which is met *only when it is clear that no reasonable person would agree [with] the trial court's assessment of what sanctions are appropriate.*” *Marrocco v. General Motors Corp.*, 966 F.2d 220, 223 (7<sup>th</sup> Cir. 1992).

*Patton, supra* (emphasis supplied).

**II. The Court of Appeals Appropriately Upheld the District Court's Award of Summary Judgment to Respondents Based Upon Appellant's Destruction of the Key Evidence of the Cause and Origin of the Moisture Intrusion Condition and the Extent of Damage.**

**A. The District Court had authority to impose a sanction because spoliation unquestionably occurred.**

At a number of points in his brief, Appellant asserts that the District Court lacked authority to impose any sanction for spoliation of evidence in this case. These assertions distract from the central issues, which go to the District Court's finding that Appellant's spoliation notice was inadequate, and that court's exercise of discretion in sanctioning Appellant as it did. It is true, the Court of Appeals has stated that “[o]n 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.App. 2005), review den. (2005) (citation omitted). However, the first part of that equation, that of the lower court's authority, is not in question on this appeal.

Spoliation means “the destruction of relevant evidence by a party.” *Hoffman v. Ford Motor Co.*, 587 N.W.2d 66, 70 (Minn.App. 1998), citing *Donohoe v. American Isuzu Motors, Inc.*, 155 F.R.D. 515, 519 (M.D.Pa. 1994). Spoliation has occurred,

regardless of intent, “where one party gains an evidentiary advantage over the opposing party by failing to preserve evidence . . . where the [former party] knew or should have known that the evidence should be preserved for pending or future litigation; . . . .”

*Foust, supra* at 30.

On the instant record, there is no question that Appellant destroyed relevant evidence, and either knew or should have known that it was relevant and needed to be preserved for future litigation. There is therefore no question that spoliation occurred.

The occurrence of spoliation establishes the district court’s authority to sanction. The existence of this authority was settled in *Patton*, wherein this Court observed that “courts are vested with considerable inherent judicial authority necessary to their ‘vital function – the disposition of individual cases to deliver remedies for wrongs and ‘justice freely and without purchase; completely and without denial; promptly and without delay, conformable to the laws.’” 538 N.W.2d at 118-19 (citation omitted). It is this simple principle, that a valid finding of spoliation triggers the court’s inherent authority to remedy wrongs, that the Court of Appeals referred to in *Foust* when it considered whether the lower court was authorized to impose a spoliation sanction.

The District Court below did not clearly err in finding that Appellant spoliated evidence. As that court observed, “[t]he best evidence of the intrusion and extent of water and mold in the home is the home itself and the original work done by Defendants Donnelly and Total Service.” Appellant’s Addendum, p. 4. Appellant himself does not dispute this, and his testimony indicates that he understood the importance of that evidence to any investigation of the cause of the moisture intrusion problem. Any

inquiry into the District Court's authority ends there: The District Court had authority to sanction Appellant because he spoliated evidence. The remaining questions are the questions central to this appeal: whether the District Court erred in determining that Appellant did not give adequate spoliation notice, and whether that court abused its discretion in choosing the sanction as it did.

**B. The Court of Appeals correctly held that the District Court did not clearly err by determining that Appellant's spoliation notice was inadequate and that a sanction was therefore warranted.**

The District Court's authority to sanction spoliation is founded upon the existence of a duty to preserve material evidence that arises where a person reasonably should know that evidence within its custody may be relevant to future litigation. See *Foust*, *supra* at 30; *Dillon v. Nissan Motor Co.*, 986 F.2d 263, 268 (8<sup>th</sup> Cir. 1993); *Capellupo v. FMC Corp.*, 126 F.R.D. 545, 551 (D.Minn. 1989). This duty may be satisfied by either preserving the evidence or by sending an adequate spoliation notice. See *Hoffman*, *supra* at 70-71.

In *Hoffman*, the Court of Appeals determined that a party spoliating evidence can avoid sanctions if the opposing parties had reasonable notice of the claim, an opportunity to correct defects, and an opportunity to collect evidence to prepare for litigation. 587 N.W.2d at 70. The *Hoffman* court summarized this standard by observing that "to be sufficient . . . , a spoliation notice must *reasonably* notify the recipient of a breach or a claim." *Id.* (emphasis supplied).

The *Hoffman* decision analogized spoliation notices to notices of breach of warranty under UCC 2-607. However, while similar, spoliation notices and UCC breach

of warranty notices are functionally distinct, and nothing in *Hoffman* compels a conclusion to the contrary. The primary purpose of a spoliation notice is to guard against destruction of evidence before the non-spoliating parties are given a reasonable opportunity to inspect it. While UCC breach of warranty notices in serve, in part, a similar purpose,<sup>5</sup> preservation of the opportunity to inspect evidence is not the primary purpose of such notices.<sup>6</sup>

While *Hoffman* set the broad conceptual standard for spoliation notices, it did not fully define the specific parameters for sufficiency in all circumstances. The purported spoliation notice in *Hoffman* was a single phone call that made no reference to any potential liability or claim, let alone the destruction of key evidence. *Hoffman* at 68. Because this communication failed as bare notice of a claim, the court in *Hoffman* had no occasion to consider whether a spoliation notice is sufficient where it gives notice of a potential claim but does not give notice of impending destruction of evidence.

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<sup>5</sup> As the court in *Hoffman* observed, one of the purposes of warranty notices is “to safeguard against stale claims being asserted after it is too late for the manufacturer to investigate them.” *Hoffman* at 70.

<sup>6</sup> Home improvement warranty notices are similarly distinct. Appellant claims that his letter of December 27, 2005 to the Respondent contractors, which made reference to the home improvement warranty provisions of Minn. Ch. 327A, “arguably charged [Respondents] with knowledge that Mr. Miller had a right to remediate the home immediately after the expiration of the 30 day [inspection] period found at Minn. Stat. § 327A.02, subd. 4(a).” Appellant’s Brief, p. 12, n.1. Leaving aside the functional and legal distinction between warranty notices and spoliation notices, Appellant here ignores the fact that the warranty and inspection requirements of Ch. 327A do not apply to Respondent sellers, who are ordinary homeowners and do not construct “dwellings for the purpose of sale.” Minn. Stat. § 327A.01, Subd. 7 (2010).

The Court of Appeals below focused on the central purpose of spoliation notice, that of preserving the parties' opportunity to inspect evidence, in concluding that an adequate spoliation notice must provide express notice of destruction of evidence:

We agree that the letters offered some notice of the potential claim. But in order to provide a meaningful opportunity to correct defects, prepare for negotiation or litigation, and safeguard against stale claims, as required by *Hoffman*, we conclude that *a party must provide actual notice of the nature and timing of any action that could lead to the destruction of evidence* and afford a reasonable amount of time from the date of the notice to inspect and preserve evidence.

*Miller v. Lankow*, 776 N.W.2d 731, 738 (Minn.App. 2009), review granted (March 16, 2010) (emphasis supplied).

The December 27, 2005 letters received by Respondents Lankow and Betz served only to assert that there was a water infiltration and mold condition in the home, to generally invite inspection (by the contractors) without any limitation as to date, and to threaten litigation if the Appellant's attorney was not contacted by a particular date. These letters contained no notice of the impending destruction of the evidence and therefore failed to serve the central purpose of a spoliation notice.

The requirement that an adequate spoliation notice must contain express notice of destruction of evidence is nothing more than a confirmation of accepted practice<sup>7</sup> and common sense. The compelling need for this requirement can be demonstrated by simple

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<sup>7</sup> The letter of March 15, 2007, which purported to give notice of destruction of the evidence after it was already substantially destroyed, demonstrates Appellant's own appreciation of this accepted practice. If Appellant's counsel had believed that the December 27, 2005 letters were adequate spoliation notice despite the absence of any warning of destruction of evidence therein, he would have had no reason to send the second, sham notice of March 15, 2007.

comparison of the burden it places on those who have custody of relevant evidence with the burden that the *absence* of the requirement would place on all prospective litigants who lack such custody, and upon the courts of this State. The party having custody of relevant evidence can fulfill the requirement of express notice of destruction by adding two sentences to a notice letter, alerting potential opposing litigants that relevant evidence will be destroyed by a date certain, and allowing inspection during a reasonable period in advance of that date. By contrast, if express notice of destruction were not required, every prospective litigant in the State would be forced to act affirmatively to preserve evidence in the possession of a potential opponent, whenever the possibility of a lawsuit arose. In cases of any evidentiary complexity, even where the potential opponent is willing cooperate with inspection, thousands of dollars would have to be spent on prophylactic inspections by anyone who reasonably suspected that they might become the target of litigation. Where cooperation by the person in control of the evidence cannot be obtained, prospective litigants would be forced to initiate court proceedings in order to obtain injunctive relief. The practical burden placed by the requirement of express notice of destruction upon persons with custody of evidence is tiny; the alternative burden to be placed on potential opposing litigants and on the courts by the absence of the requirement is somewhere between onerous and unsustainable.

As Respondent Total Service Company points out, there is nothing in *Hoffman*, in the pronouncements of this Court, or in the common law generally that requires that potential litigants carry this burden, *e.g.*, that they take affirmative steps to preserve

evidence in the custody of a potential opponent absent clear notice of impending destruction.<sup>8</sup>

In requiring express notice of destruction as a component of valid spoliation notice, the Court of Appeals below provided prospective litigants, parties and the courts of this State with a rule that is at once clear, fair, predictable in operation, and consistent with decades of accepted practice. No improvement upon the Court of Appeals ruling is necessary; it should be upheld by this Court as an expression of sound policy within the framework of existing law.<sup>9</sup>

Appellant's claim that the Court of Appeals has in this case impermissibly exceeded its bounds as an "error-correcting" court is selective and seems disingenuous,

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<sup>8</sup> As Respondent TSC also asserts, courts of other jurisdictions have required express notice of destruction as a component of valid spoliation notice. *See Cooper v. United Vaccines, Inc.*, 117 F.Supp.2d 864, 875 (E.D.Wis. 2000); *Northern Assurance Co. v. Ware*, 145 F.R.D. 281, 284 (D.Me. 1993); *Howell v. Maytag*, 168 F.R.D. 502, 506-07 (M.D.Pa. 1996).

<sup>9</sup> The alternative "totality of circumstances" approach advocated by amicus Minnesota Association for Justice (MNAJ) should be recognized for the nullity that it is. In proposing a "totality of the circumstances" analysis, the MNAJ offers this Court a label rather than a rule or principal. The MNAJ's proposed approach provides no guidance to either potential litigants or to the courts in determining what is and is not an adequate spoliation notice. It is also poorly founded in the law, relying principally upon a concurrence in a Texas decision that does not address the requirements for a valid spoliation notice. *See Trevino v. Ortega*, 969 S.W.2d 950 (Tex. 2008). As a member of the MNAJ, the undersigned counsel suspects that the MNAJ has taken the position it has because it is institutionally averse to any rule of law that can operate to dismiss the claim of a plaintiff. In truth, as co-Respondent Total Service also asserts, the issue raised by this appeal is not a plaintiff's issue or a defendant's issue – it is a practice issue. The requirement of express notice of destruction of evidence as a component of valid spoliation notice fairly protects the rights of any prospective litigant, plaintiff or defendant, where relevant evidence is in the possession of a potential litigation opponent.

given that Appellant simultaneously relies upon the letter of the Court of Appeals' opinion in *Hoffman* as defining the full extent of any notice requirement. The extent of the precedential value of Court of Appeals decisions has not been directly addressed by either this Court or the Court of Appeals. Magnuson & Herr, 3 Minn. Prac., Appellate Rules Annotated R 117, §17.3 (2010 ed.). Obviously, many Court of Appeals decisions, like *Hoffman*, function as precedent in the absence of pertinent rulings by this Court. Regardless of how this jurisprudential question is resolved, the Court of Appeals has done nothing more in this instance than to apply existing principles governing valid spoliation notice to the facts before it.

The District Court below did not clearly err in finding that the notice provided by Appellant was inadequate to avoid sanctions, because it did not provide a clear indication that the evidence would be destroyed in time to allow Respondents reasonable opportunity to inspect it. The Court of Appeals correctly upheld this ruling and in so doing recognized that, consistent with law, common sense and accepted practice, valid spoliation notices must provide express notice of destruction of evidence. This Court should affirm.

**C. The Court of Appeals correctly held that the District Court did not abuse its discretion in its choice of sanction.**

Once it had properly determined that sanctionable spoliation occurred, the District Court was then charged with determining the appropriate sanction. *Patton, supra* at 119. Spoliation sanctions are determined based upon the level of prejudice suffered by the non-spoliating parties, regardless of the spoliating party's intent:

The decision on sanctions for the spoliation of evidence focuses on prejudice to the opposing party, even where the evidence was destroyed through “inadvertence or negligence” as opposed to willful action. *Patton v. Newmar Corp.*, 538 N.W.2d 116, 119 (Minn. 1995).

*Himes v. Woodings-Verona Tool Works, Inc.*, 565 N.W.2d 469, 470 (Minn.App. 1997).

As the Court of Appeals has observed, “[s]poliation cases, *by their nature*, require at least a partial inference of prejudice based on unobtainable (spoiled) evidence.” *Foust, supra* at 31.

The prejudice to the Respondents in this case is total. Each of the nine separate causes of action brought against Respondents Lankow and Betz depended upon proof that the moisture intrusion condition encountered by Appellant after the sale had its cause and origin in the condition of the home at the time of sale, and upon proof of the extent of moisture and mold damage. Appellant’s actions eradicated all independent evidence of the condition of home as it had existed at the time of sale and the extent of damage. Following Appellant’s destructive repairs, there was no way to determine whether the cause of Appellant’s post-sale problem moisture intrusion condition lay in the pre-sale condition of the home, save for the report of Appellant’s expert and photographs taken by him and Appellant.<sup>10</sup> There was also no way to independently measure the extent of the

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<sup>10</sup> Appellant’s testimony indicates that he appreciated the importance of the pre-repair stucco covering to investigation of the cause of the moisture intrusion problem. The testimony of TSC representative Jeff Agnes confirms this crucial importance, as does simple reason: The relationship between the pre-repair stucco and building apertures like windows is clearly relevant to any understanding of the cause. Appellant’s removal of the stucco destroyed this evidence. Appellant’s reliance upon *Foss v. Kincade*, 766 N.W.2d 317 (Minn. 2009) for his argument that prejudice did not occur is unavailing, as the court in that case determined that the object lost in that case was not of significant evidentiary value. 766 N.W.2d at 323-24.

related damage. It is well-settled that non-spoliating parties are not obligated to rely on an expert not aligned with them in lieu of inspection of destroyed evidence. *Patton, supra; Himes v. Woodings-Verona Tool Works, Inc.*, 565 N.W.2d 469, 471 (Minn.App. 1997); see *Smothers v. Insurance Restoration Specialists, Inc.*, (unpublished) 2005 WL 624511 (Minn.App. 2005), Appellant's Appendix, p. 264 ("A party's expert witness should not have to rely on secondhand information provided by the opposing party."). Also, photographic evidence is properly excluded where, as here, there is no showing that the spoliating party's photographs clearly and comprehensively depict the condition of the destroyed evidence, or that the nature, cause and origin of the complained of defect or condition can be gleaned from examination of those photographs without inspection of the depicted evidence itself. *Patton* at 119.<sup>11</sup>

Even if it was consistent with law and fairness to force Respondents to rely upon Appellant's expert opinion and photographs, this evidence is wholly inadequate as proof of the pre-repair condition of the home. Notably, despite Appellant's claim that adequate evidence was preserved, he fails to include the entirety of his summary judgment submissions to the District Court in his Appendix. He does include the Affidavits of David Miller (Appellant's Appendix, p. 12) and Patrick Michenfelder (*id.*, pp. 33 – 158,

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<sup>11</sup> In essence, amicus MNAJ also offers its "totality of the circumstances" approach in the context of choice of sanctions. As noted above, this is an approach that is empty of any rule or principle that might guide future prospective litigants and the courts, and it should therefore be disregarded. More importantly, the MNAJ's position seeks, without clear acknowledgment, to overrule established precedent, cited above, holding that a non-spoliating party may not be forced to rely upon the spoliating party's expert opinions and record of destroyed evidence in lieu of the evidence itself.

including the appended depositions of David Miller and Linda Lankow). These, together with his memorandum in opposition (Respondent Lankow and Betz's Appendix, RA 263 *et seq.*) and the affidavit of his expert Charles Johnson (*id.*, RA 303 *et seq.*), comprise the totality of Appellant's contribution to the record on summary judgment below. *See id.*, RA 299. Therefore, as far as preserved evidence of the pre-repair condition of the home is concerned, the record now before this Court contains only the affidavit of Appellant's expert, Charles Johnson.<sup>12</sup> The Johnson affidavit attaches 22 black and white photographs of the exterior of the home, taken *after* Appellant's removal of the stucco (RA 309-319.11).<sup>13</sup> The Johnson affidavit itself contains conclusory opinions, but is opaque as to the existence or preservation of evidence that might form the foundation for those opinions. Expert Johnson does not attempt to explain his opinions by reference to the attached photographs (most likely because they are inadequate to explain his opinions), nor does he include any report of inspection findings containing specific

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<sup>12</sup> As indicated above, Appellant's letters of December 27, 2005 reference, but do not actually attach, the moisture analysis obtained by Appellant's prospective buyer – Appellant's Appendix, pp. 41-44.

<sup>13</sup> There is some discrepancy between the photographs attached to the copy of the Johnson Affidavit that was provided to Respondents Lankow and Betz and those attached to the copy provided to Respondent Total Service. Twenty-one such photographs accompanied the copy of the affidavit provided to Total Service, only eleven were attached to the copy provided to Respondents Lankow and Betz. One of the eleven photos provided to Lankow and Betz was not provided to Total Service. The twenty-two photographs now attached to the Johnson Affidavit that is contained in the Appendix of Respondents Lankow and Betz (RA 309–319.11) were therefore compiled by combining the photographs in Respondent Lankow and Betz's possession with those possessed by Total Service. Regardless of this discrepancy, none of the provided photos depict the condition of the home prior to removal of the stucco.

observations and measurements, upon which his opinions might be based. In essence, the Johnson affidavit serves only to preserve Johnson's opinions, as distinct from any evidence directly probative of the cause of the moisture intrusion condition that existed prior to Appellant's repairs.

By choosing to exclude Appellant's evidence "from the home and all of [Appellant's] expert reports relating to moisture intrusion and the extent of mold," the District Court did nothing more than to place the parties on an equal footing following Appellant's destruction of the essential evidence as to cause and origin and extent of damage. The fact that this measure necessarily caused Appellant's claim to suffer adverse summary judgment is not an indictment of the sanction. Under Minnesota law, it is the party who loses or destroys evidence that must bear the consequence of the loss. *Himes, supra*. An evidentiary exclusion with the identical effect of dismissal was affirmed by this Court in *Patton*, where the plaintiff failed to preserve the subject motor home prior to suing the defendant manufacturer for alleged defects in the fuel system. *Patton* at 117-19. While the impact of the sanction chosen by the court below is harsh, it is an unavoidable consequence of the Appellant's destruction of key evidence without due notice. Spoliation cases of this nature inevitably require that the district court weigh the evidence presented by the parties to determine which side is to bear the consequences of the destruction of evidence. As Professor Steenson and his co-authors have observed, ". . . in many spoliation cases, there is no middle ground—either the plaintiff's case must be dismissed or the [defendant] will be deprived of a meaningful defense." Steenson, Prince and Brew, 27 Minn. Prac., Product Liability Law § 12.2 (2008). This is precisely

the choice that the District Court faced below, requiring that court to either dismiss the Appellant's case or leave the Respondents without a meaningful defense as to the cause and origin of the complained of moisture intrusion condition and the extent of damage caused by that condition.

The choice that the District Court made, which resulted in dismissal of the Appellant's case, was the equitable choice. At any point after his discovery of the moisture intrusion condition in September of 2005, the Appellant could easily have communicated the date by which his destructive repairs would begin, thereby affording Respondents a clear opportunity to either inspect or hold their peace. He chose not to do this, and later pretended to do it after those repairs were substantially underway. Under this set of circumstances, and on this record, it cannot be said that "no reasonable person would agree" with the District Court's choice, which was that the Appellant should bear the evidentiary cost of his spoliation, rather than the Respondents. Thus, the District Court did not abuse its discretion by excluding all of Appellant's evidence as to the cause and origin of the moisture intrusion condition and the extent of the damage caused by it.

Consistent with this, the District Court did not abuse its discretion by refusing to choose a less restrictive sanction. In this and similar cases, the only available less restrictive sanction is an adverse inference instruction. Where spoliation has occurred, it is impossible to know what the destroyed evidence itself would have shown. *Federated Mutual Ins. Co. v. Litchfield Precision Components, Inc.*, 456 N.W.2d 434, 438 (Minn. 1990). In the instant case, except for the above-referenced inadequate expert report and photographs provided by Appellant (which the non-spoliating parties are not required to

rely upon), there is no way to know what the pre-repair condition of the home would have shown concerning the cause and origin of the moisture intrusion condition and the extent of the damage. In this circumstance, any sanction short of dismissal would be inherently erroneous, because it would permit the jury to speculate as to the pre-repair condition of the home based upon inadequate evidence. Surmise and speculation cannot create a genuine issue of fact for jury resolution. *Fownes v. Hubbard Broadcasting, Inc.*, 225 N.W.2d 534, 536 (Minn. 1975).

The Appellant's actions destroyed, without proper notice, the best and only impartial evidence of the cause and origin of the complained of moisture intrusion condition and the extent of the damage, the pre-repair condition of the home itself. Lacking access to this evidence, the Respondents are unable to prepare a meaningful defense as to the cause and origin and damage components of Appellant's claims. In light of the Appellant's destruction of this evidence without proper notice, the District Court did not abuse its discretion in choosing to exclude Appellant's evidence as to the cause and origin of the moisture intrusion condition and the extent of damage caused by it, and the Court of Appeals properly upheld the District Court in this regard. This Court should also affirm.

**III. Appellant Did Not Preserve For Review the Question as to Whether Respondents Lankow and Betz Fraudulently Concealed Appellant's Cause of Action Under the Minnesota Disclosure Statute. Alternatively, this Question is Mooted by Appellant's Spoliation of Evidence, and, Alternatively, No Question of Fact Arises from the Record as to Whether Such Fraudulent Concealment Occurred.**

This Court will not ordinarily review issues that are not raised in the petition for further review. *In re GlaxoSmithKline PLC*, 699 N.W.2d 749, 757 (Minn. 2005); *Northwest Racquet Swim & Health Clubs, Inc. v. Deloitte & Touche*, 535 N.W.2d 612, 613 n.1 (Minn. 1995). Appellant's Petition for Review hereunder does not reference, and therefore does not preserve for review, the question as to whether Respondents Lankow and Betz fraudulently concealed Appellant's cause of action under the Minnesota Disclosure Statute<sup>14</sup> (Appellant's Appendix, pp. 255-261). Respondents Lankow and Betz therefore respectfully request that this Court disregard Appellant's arguments and leave the ruling of the Court of Appeals below undisturbed in connection with the fraudulent concealment issue.

Alternatively, should this Court choose to address this issue, it should simply uphold the ruling of the Court of Appeals below, which found that Appellant's spoliation and the consequent sanction eradicated any issue of fact "as to whether Lankow concealed mold or moisture intrusion from him or failed to provide the appropriate disclosures under Section 513.55," thus mooting Appellant's assertion that his disclosure statute claim was fraudulently concealed from him. *Miller, supra* at 741.

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<sup>14</sup> Minn. Stat. §§ 513.52 to 513.60 (2010).

The Court of Appeals also commented as follows concerning the merits of Appellant's fraudulent concealment defense to the Disclosure Statute limitations provision:

Furthermore, the record clearly reflects that Lankow provided appellant with notice of the moisture and mold problems and the extent of her remediation efforts, but appellant chose not to obtain an independent inspection before closing on the home. Therefore, the district court did not err in granting summary judgment to Lankow and Betz.

*Id.*

While the summary judgment compelled by the spoliation sanction is not independently in question, to the extent that this alternative basis for summary judgment against Appellant's Disclosure Statute claim is addressed, the standard of review applicable to summary judgment comes into practical application. This familiar standard is briefly as follows: Where a summary judgment is appealed, the appellate courts review the case to determine whether there are any genuine issues of material fact and whether the trial court erred in its application of the law. *Vlahos v. R. & I. Constr. of Bloomington, Inc.*, 676 N.W.2d 672, 677 (Minn. 2004); *Grandnorthern, Inc. v. West Mall Partnership*, 359 N.W.2d 41, 43-44 (Minn.App. 1984).

In fact, the record contains no basis for Appellant's claim that Respondent Lankow fraudulently concealed his Disclosure Statute claim from him.<sup>15</sup> Instead, all of

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<sup>15</sup> Appellant's citation to the District Court's Finding of Fact, ¶ 7 as support for his assertion that in "September, 2005 . . . Mr. Miller discovered signs that the representations contained in the purchase agreement for the home and made orally by Lankow were false" is an outright misrepresentation of that Finding. Brief of Appellant hereunder, p. 19. The Finding in question actually states, in entirety:

the evidence in this case shows the contrary to be true – Respondent Lankow disclosed the pre-existing condition, supplied Appellant with complete records of the related repairs, and told him what she believed to be true, *e.g.*, that the condition had been remediated. Assuming *arguendo* that the information she disclosed was incorrect, that would be an element of Appellant’s Disclosure Statute claim, not a concealment of it.

As the party asserting it as a defense to the statute of limitations, Appellant “retains the burden of establishing the elements of fraudulent concealment.” *DeCosse v. Armstrong Cork Co.*, 319 N.W.2d 45, 51 (Minn. 1982). The Court of Appeals identified and explained those elements in *Haberle v. Buchwald*, a medical malpractice case:

To establish fraudulent concealment, a plaintiff must prove there was an affirmative act or statement which concealed a potential cause of action, that the statement was known to be false or was made in reckless disregard of its truth or falsity, and that the concealment could not have been discovered by reasonable diligence.

480 N.W.2d 351, 357 (Minn.App. 1992) (citation omitted). No genuine issue of fact arises from the instant record with respect to at least two of the three required elements. First, even if Appellant Lankow’s statements to the effect that the moisture intrusion problem had been “remediated” or otherwise resolved led to a concealment of the moisture intrusion condition, there is no evidence whatsoever that any statement or

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That Plaintiff discovered moisture intrusion in the home on or about September 20, 2005. Plaintiff hired an attorney. Agents of Defendant Donnelly and Defendant Total Service visited with Plaintiff on September 30, 2005. Defendants explained the scope of their 2003 work. Plaintiff did not inform Defendants at this time that he was going to make any repairs or institute a suit against them.

Appellant’s Appendix, p. 3.

representation by Appellants Lankow or Betz were known by them to be false or made in reckless disregard of truth or falsity. Second, Appellant cannot show that reasonable diligence, including promptly reading the provided disclosure materials and performing an inspection, would not have uncovered any moisture intrusion condition existing at time of sale. It is Appellant's burden to establish an issue of fact as to these elements, and his failure to do so requires that the District Court's finding that his Disclosure Statute claim is time-barred be affirmed.

In addition, the record on summary judgment in this case does not require an assumption that there was any concealment at all, fraudulent or otherwise. The pre-existing moisture intrusion condition was fully and extensively disclosed to Appellant and he was expressly invited to have the house inspected. He failed to read the disclosure until approximately a year and a half after it was provided and he failed to inspect. In *Schmucking v. Mayo*, 235 N.W. 633 (Minn. 1931) (cited by Appellant in support of his claim of fraudulent concealment), this Court observed that “[i]n the absence of fraud, ignorance of the cause of action does not toll the statute of limitations . . . . [t]here is real distinction between ignorance and concealment.” 235 N.W. at [add pinpoint cite].

Appellant failed to preserve for review the question of fraudulent concealment of his Disclosure Statute claim in his petition for review. Even if the issue had been preserved, the Court of Appeals correctly found that the issue of fraudulent concealment is mooted by Appellant's spoliation and the associated sanction. Finally, even if the issue were to be reached, the record contains no evidence that Respondents Lankow and Betz concealed any facts known to them, fraudulently or otherwise. There is therefore no

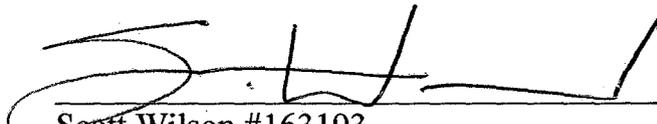
basis for tolling the applicable two year limitation period, and the District Court's entry of summary judgment on the additional basis that Appellant's Disclosure Statute claim was time-barred was therefore proper. This Court should affirm the holdings of the courts below as to Appellant's allegation of fraudulent concealment.

### CONCLUSION

In its ruling below, the Court of Appeals gave simple expression to existing principles of law, common sense and practice when it required that affirmative notice of destruction of evidence is a necessary component of valid spoliation notice. The Court of Appeals therefore appropriately upheld the District Court below as to its findings that Appellant's spoliation notice was inadequate, that Respondents' defenses had been fatally prejudiced, and that exclusion of Appellant's evidence leading to summary judgment was the necessary sanction.

Respondents Lankow and Betz respectfully request that this Court affirm the Court of Appeals in all respects, and alternatively request remand to the District Court in the event of reversal.

Dated: May 14, 2010



A handwritten signature in black ink, appearing to read 'S. Wilson', written over a horizontal line.

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**CERTIFICATE OF COMPLIANCE**

I certify that this brief conforms to the requirements of Minn. R. Civ. App. Rule 132.01, Subd. 3. This brief employs Times New Roman 13 point font. The length of the brief is no more than 9,839 words. This brief was prepared using Microsoft Word 2000.

Dated: Mar 14, 2010



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