

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A24-1054**

Daniel W Crandall, et al.,
Appellants,

vs.

James E Hanson,
Respondent.

**Filed March 17, 2025
Affirmed
Schmidt, Judge**

Olmsted County District Court
File No. 55-CV-21-2026

David W. VanDerHeyden, VanDerHeyden Law Office, P.A., Rochester, Minnesota (for appellants)

Christopher W. Bowman, Madigan, Dahl & Harlan, P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Johnson, Presiding Judge; Larkin, Judge; and Schmidt, Judge.

NONPRECEDENTIAL OPINION

SCHMIDT, Judge

The district court excluded appellants' evidence obtained after a certain date as a spoliation sanction and then, on respondent's motion for summary judgment, dismissed appellants' claims related to an alleged breach of a construction contract. On appeal, appellants argue the district court (1) abused its discretion in the spoliation and sanction

rulings, and (2) erred in determining that there were no genuine issues of material fact related to damages. We affirm.

FACTS

Appellants Daniel and Lorean Crandall¹ and respondent James Hanson are neighbors. Hanson has over 35 years of experience constructing retaining walls. In the summer of 2019, Daniel contacted Hanson about building retaining walls at the Crandalls' residence. The parties entered into an oral contract for the construction of the retaining walls. They dispute some of the terms, but it is undisputed that they agreed that the Crandalls would pay Hanson for his labor, skill, and materials used to construct the retaining walls. Daniel also agreed to work on the project and use some of his equipment.

Construction began in August 2019 and continued into October 2019. Sometime in October, Hanson told the Crandalls that, because of the fall weather, it would be best for Hanson to return in the spring of 2020 to complete the walls. The Crandalls disagreed, believing that the walls could be finished in 2019. On October 31, 2019, Daniel sent a letter notifying Hanson that the project was defective and incomplete, and gave Hanson a deadline of November 30, 2019, to remedy the situation. The letter read:

There have been weeks of nice weather that you could have been fulfilling this obligation. You are working on other jobs, leaving ours totally abandoned, so it is clear you have made your choice.

This puts me in an undesirable position. This job was going to take two weeks. You started in July; it is now November. Had this job been done on time, I would have been able to have my patio poured and my driveway poured and moving on to the

¹ The opinion refers to appellants by their first name or collectively as “the Crandalls.”

rest of my landscaping. As it is, I have a dirt driveway and pallets for a patio. I am now at the back of the list with other contractors.

We have been advised by Legal Counsel to take this first step and give you the opportunity to complete our job, and do it correctly, based on Dan's interpretation of the original agreement! That was based on all materials and labor.

The wall is defective, unfinished and is sinking in again. The wall foundation needs to be sitting on virgin soil, or this problem will never go away.

Deadline for completion is November 30, 2019. If not completed, you can expect the next step, which will be Legal action.

In addition, I want \$1700 cash refund for block that was not \$500 more expensive, and the \$1200 to rebuild the wall that I said I would pay you if Dynamic² didn't pay you. Dynamic paid you \$2000 to do the job.

If the job is completed to satisfaction and on time, I will let the other overcharges from the original bid slide. If I am forced to litigate this issue, I will need to include every expense past, present and future, for another company to come in and do the job over. I have been told that they would only take this job on if they tear everything down and redo the foundation and rebuild to their standards.

This is what I meant about a can of worms.

Twelve days later, Hanson responded to the letter with a text message explaining that he could not complete the retaining walls until the spring due to the frozen ground.

In the spring of 2020, Hanson did not return to complete the work. On June 3, 2020,

² Dynamic Masonry Products is the business that sold the retaining wall blocks.

the Crandalls' attorney sent a letter to Hanson, which read, in relevant part:

Mr. and Mrs. Crandall have requested my assistance in resolving this matter in light of your abandonment of this retaining wall project. You have been paid \$11,700.00 and have had numerous opportunities to remedy your deficient and improper work. My clients have obtained two bids to bring the project into a condition where a properly built wall may be constructed. Both of those estimates are in excess of \$40,000.00. My clients believe that your deficient work will cause them and has caused them monetary damages and that a jury would find for them in at least that amount.

Hanson did not respond to the letter or inspect his work on the retaining walls.

In July 2020, the Crandalls hired an expert to inspect the retaining walls. The expert informed the Crandalls that he did not believe the walls were installed correctly because there was no footing under the retaining walls; one of the walls was sagging, which opened voids between the blocks and allowed water to wash through the blocks; and the walls were bowed in several areas. The expert also discovered there was no permit obtained for the retaining walls, as required by Minnesota's building code. The expert recommended that the walls be torn down and replaced. The Crandalls sought bids and eventually replaced the retaining walls sometime around September 2020.

The Crandalls sued Hanson in September 2020, alleging four counts in their complaint: (1) breach of contract; (2) breach of state building code requirements; (3) negligent design and construction; and (4) fraud/misrepresentation. The Crandalls alleged that Hanson had unilaterally abandoned the project; Hanson had many opportunities to remedy the deficient work; the cost to remediate and repair the project was \$41,616.47; and the Crandalls had already paid Hanson \$11,200.

Hanson moved for summary judgment in February 2022, alleging that the Crandalls spoliated evidence by failing to provide Hanson with notice and an opportunity to inspect the retaining walls before they were replaced, which prejudiced Hanson's ability to wage a defense.³ The Crandalls opposed the motion, arguing that Hanson was fully aware of the defects and had ample opportunity to correct his work. They also argued that Hanson had time to inspect the walls before they were replaced and that replacement of the walls was necessary to prevent further damage to their property.

The district court found that the Crandalls spoliated evidence because they "did not sufficiently provide Hanson a full and fair opportunity to inspect the retaining walls." The court elaborated:

The Crandalls rely on the letter they sent Hanson on October 31, 2019. The letter stated that Hanson had until November 30, 2019, to complete the project and if not, the Crandalls would treat Hanson as if he abandoned the project. It also mentioned that if the Crandalls had to go with another contractor, he or she would need to replace the retaining walls and start fresh. The letter did not say the Crandalls had plans to replace the retaining walls. The letter essentially only provided a deadline to complete the retaining wall and contained warnings about the potential costs if they had to go with another contractor. The Crandalls sent no other notices to Hanson after they decided to move forward with replacing the retaining walls nearly a year later in September 2020. As such, the Crandalls did not satisfy the notice requirement in *Miller* [v. *Lankow*, 801 N.W.2d 120 (Minn. 2011)] and have spoliated evidence.

³ Hanson also argued that he was entitled to summary judgment on the Crandalls' claim for fraud/misrepresentation. The district court agreed and dismissed the claim. The Crandalls do not challenge the dismissal of their fraud/misrepresentation claim on appeal.

The district court did not address the June 3, 2020, letter in its opinion because the letter was not part of the record at the time of the summary judgment proceeding. As a sanction for spoliating evidence, the district court ruled that any evidence that the Crandalls obtained after October 31, 2019, would be excluded.

On May 1, 2024, long after discovery closed and days before trial was set to commence, the Crandalls submitted their second supplemental answers to Hanson's interrogatories. In their supplemental answer to an interrogatory requesting a detailed description of claimed damages, the Crandalls stated they were "claiming damages for breach of contract in the amount of \$41,616.47." The Crandalls explained that this computation of damages was based on their election "to recover the amount based upon the difference between the value of the property before and after the harm (the fair market value of the property on October 31, 2019 minus the fair market value, if any, of what remains of the property after damage)." This was the first time during the multiyear litigation that the Crandalls explicitly articulated a diminution-in-value theory of damages.

On May 2, 2024, Hanson moved for summary judgment on the Crandalls' remaining claims, arguing that the Crandalls have not produced admissible evidence to support any recoverable damages due to the spoliation sanction. Hanson also argued that the Crandalls failed to timely disclose their diminution-in-value damages calculation. In opposition to the motion, the Crandalls argued that Hanson was on notice that the Crandalls were seeking diminution-in-value damages from the start of the case. They also asserted that there was evidence of damages that predated October 31, 2019, in the amount of \$11,200 for the amounts paid by the Crandalls to Hanson during construction.

On May 6, 2024—the morning of trial—the district court addressed the motion, noting that the Crandalls’ diminution-in-value damages theory was not properly noticed, but that the \$11,200 that the Crandalls paid to Hanson could be recoverable damages. But after Hanson’s counsel argued that damages in a construction case are limited to either the cost of reconstruction or diminution of value—and that a contract payment, like the \$11,200, was not a valid measure of damages—the district court granted Hanson’s motion. The court filed its written order the next day, dismissing the complaint “on the basis that damages are speculative, remote, or conjectural.” This appeal follows.

DECISION

The Crandalls raise two issues on appeal. First, they argue that the district court abused its discretion by ordering a spoliation sanction. Second, they contend that the district court erred in finding no genuine issues of material fact exist with respect to damages and erred in its application of the law. We address these issues in turn.

I. The district court did not abuse its discretion by imposing a spoliation sanction.

The Crandalls argue the district court abused its discretion by finding they spoliated evidence and, thereafter, by imposing a sanction. “We review a district court’s decision to impose spoliation sanctions for abuse of discretion.” *Miller*, 801 N.W.2d at 127.

We first address whether the district court abused its discretion in finding that the Crandalls spoliated evidence. A party has a duty to preserve evidence when they know or should know that litigation is reasonably foreseeable. *Id.* at 127-28. A breach of the duty to preserve evidence may be sanctioned, “under a court’s inherent authority, as spoliation.” *Id.* at 128. But the duty to preserve evidence is not boundless and “must be tempered by

allowing custodial parties to dispose of or remediate evidence when the situation reasonably requires it.” *Id.* A “custodial party with a legitimate need to destroy evidence may be absolved of a failure to preserve evidence by providing sufficient notice and a full and fair opportunity to inspect the evidence to a noncustodial party.” *Id.* at 129.

The district court found that “the Crandalls did not sufficiently provide Hanson a full and fair opportunity to inspect the retaining walls.” The court noted that the October 2019 letter “did not say the Crandalls had plans to replace the retaining walls [but] essentially only provided a deadline to complete the retaining wall[s] and contained warnings about the potential costs if they had to go with another contractor.” The district court added that “[t]he Crandalls sent no other notices to Hanson after they decided to move forward with replacing the retaining walls nearly a year later in September 2020.”

When evaluating the sufficiency of a notice, a district court should consider the totality of the circumstances. *Id.* at 131. A notice will usually be sufficient if it indicates “the time and nature of any action likely to lead to destruction of the evidence, and offering a full and fair opportunity to inspect[.]” *Id.* at 132.

The Crandalls argue that the June 2020 letter, together with the October 2019 letter, demonstrate that Hanson had a full and fair opportunity to inspect prior to destruction of the wall. Hanson argues that the June 2020 letter should be set aside because it was not made available for review by the district court at the time of the court’s ruling. Hanson also contends that neither letter provided valid notice or the opportunity to inspect.

The district court did not err. The October 2019 letter only provided a deadline for Hanson to complete the retaining walls and included warnings about the potential costs if

a new contractor was needed. It did not address the extent to which evidence would be destroyed, the approximate date of when it would be destroyed, or offer Hanson an opportunity to inspect the evidence. Even if we were to consider the June 2020 letter—which was not before the district court at the summary judgment stage—the letter is simply a demand letter from the Crandalls’ attorney. While the letter explained that the Crandalls had obtained two bids to reconstruct the retaining walls and noted their desire to resolve the matter, the letter does not provide Hanson an opportunity to inspect the walls or detail when—or even if—the Crandalls planned to replace the walls. Considering the totality of the circumstances, we conclude that the district court did not abuse its discretion in determining that the Crandalls failed to sufficiently notify Hanson and spoliated evidence by destroying the retaining walls.

We next turn to whether the district court abused its discretion by imposing a sanction. The supreme court has adopted three factors for district courts to consider when determining whether to impose sanctions for a custodial party’s destruction of evidence:

(1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party and, where the offending party is seriously at fault, will serve to deter such conduct by others in the future.

Id. (quotation omitted). In fashioning a sanction, a court must “examine the nature of the item lost in the context of the claims asserted and the potential for remediation of the prejudice” to the opposing party. *Patton v. Newmar Corp.*, 538 N.W.2d 116, 119 (Minn. 1995). A party challenging a “choice of a sanction has the difficult burden of convincing

an appellate court that the [district] court abused its discretion—a burden which is met only when it is clear that no reasonable person would agree with the [district] court’s assessment of what sanctions are appropriate.” *Id.* (quotation omitted).

The Crandalls argue that the district court abused its discretion by not analyzing the three factors before imposing a sanction. Although the district court may not have expressly named the factors, our review of the record shows that the court appropriately analyzed the factors when imposing the sanction. First, the district court found that the Crandalls were at fault for demolishing and replacing the retaining walls without notice to Hanson. Second, the district court found that Hanson suffered prejudice “because he was not able to examine the retaining walls to determine the extent of the damages at the time the retaining walls were replaced.” And third, the district court imposed the least-restrictive sanction that it determined would avoid substantial unfairness to Hanson.

As the court explained, the Crandalls had the opportunity to hire an expert to inspect the retaining walls and provide an opinion about the quality of the walls. Hanson was not afforded this opportunity. Had Hanson received sufficient notice while the walls remained intact, Hanson could have inspected them or hired an expert to review the quality of work and the costs of repair. The Crandalls’ spoliation of evidence deprived Hanson of his opportunity to defend against the allegation that he was at fault for the defective walls and diminished his ability to develop an informed position on any damages the Crandalls may have suffered. Within its discretion, the district court determined that allowing evidence obtained after the parties’ relationship ceased—evidence that Hanson would not have had the opportunity to counter—would have prejudiced Hanson.

On this record, the district court acted well within its discretion in deciding that the Crandalls spoliated evidence. And because the Crandalls have not met their difficult burden to demonstrate that no reasonable person would agree with the court's imposition of the sanction it imposed, we conclude that the district court also acted within its discretion in fashioning an appropriate sanction.

II. The district court did not err by dismissing the Crandalls' claims.

The Crandalls argue that the district court erred by dismissing their claims because genuine issues of material fact for trial remain. Given that the district court referred to information provided in discovery that was not included or referenced in the pleadings, we treat the district court's order as one granting summary judgment. *See Antone v. Mirviss*, 720 N.W.2d 331, 334 n.4 (Minn. 2006) (stating that when a district court considers matters outside the pleadings, a motion to dismiss should be treated as one for summary judgment).

In an appeal from summary judgment, we determine whether there is a genuine issue of material fact for trial and whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). The standard of review is de novo. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002).

The district court dismissed the remaining claims based on the Crandalls' inability to prove damages. *See Logan v. Norwest Bank Minn., N.A.*, 603 N.W.2d 659, 663 (Minn. App. 1999) (providing that damages are an essential element of a breach-of-contract claim); *Laska v. Anoka County*, 696 N.W.2d 133, 137 (Minn. App. 2005) (providing that damages are an essential element of a negligence claim). The court reasoned that (1) the Crandalls did not give Hanson proper notice that their damages claim would be based on a

theory of the diminution of value, and (2) the two checks totaling \$11,200 for payment to Hanson by the Crandalls for work Hanson performed on the retaining walls was not a valid measure of damages in a case involving a construction contract.

As to the Crandalls' diminution-in-value theory, we agree with the district court's determination. This damages theory was first raised in the Crandalls' second supplemental answers to Hanson's interrogatories, which were submitted only days before trial was scheduled to commence. Before this, the Crandalls simply listed several documents—without explanation—in response to discovery requests to detail their claimed damages. While we recognize that Minnesota is a notice-pleading state, *see Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 604-05 (Minn. 2014), waiting until several days before trial to respond to discovery and detail the damages claimed in a multiyear litigation does little to ensure fairness and to allow the opposing party to adequately prepare.

We also agree with the district court that the checks are not evidence of a recognized measure of damages for this construction case. Minnesota law is clear that the appropriate measure of damages for breach of a construction contract is either the cost of reconstruction or diminution of value. *Johnson v. Garages, Etc., Inc.*, 367 N.W.2d 85, 86 (Minn. App. 1985). And we have reversed an award of damages based on the original cost of construction because “[t]here is no Minnesota law holding that the measure of damages for breach of a construction contract is the breaching party’s cost for that portion of the contract which is in breach.” *Id.* at 87. Because Minnesota law does not recognize construction costs—like the payments—as damages in a breach-of-construction-contract case like this, the amount paid by the Crandalls cannot be the measure of damages.

Without admissible evidence to support their claimed damages, there is no genuine issue as to any material fact. We therefore conclude that the district court did not err in dismissing the Crandalls' claims.

Affirmed.