20110320

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STATE OF NORTH DAKOTA

SUPREME COURT OF NORTH DAKOTA

Case No. 20110320

EVI Columbus, LLC, Plaintiff and Appellee, vs. Timothy C. Lamb and Elizabeth Fletcher Lamb, and any person in possession, and all persons unknown claiming any interest in or lien or encumbrance upon the real estate described in the Complaint, Defendants and Appellants	

REPLY BRIEF OF THE APPELLANTS

APPEAL FROM THE NORTHEAST CENTRAL DISTRICT COURT,

GRAND FORKS COUNTY,

HONORABLE SONJA CLAPP, PRESIDING

For the APPELLANTS:

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March 12, 2012

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I. INTRODUCTION.

[¶001] The Appellants, Elizabeth Fletcher Lamb and Timothy C. Lamb (Buyers), respectfully submit this brief in reply to that of the Appellee, EVI Columbus, LLC (Seller). Consistent with its conduct throughout this litigation, rather than squarely address whether Seller sold Buyers a lemon for a house, Seller asks this Court to allow form to trump substance.

[¶002] On appeal, the primary relief Buyers ask for is "a hearing on the merits of the defects in Buyers' new home." Appellants' Brief, ¶063. Rather than facing that point, Seller bemoans "the tortured history of this litigation." Seller's Brief, ¶18. Seller complains that Buyers "will continue to live in the property ... without making any payments." *Ibid.*, ¶20.

[¶003] Regardless of the outcome of this appeal, Seller's claim is inaccurate. If Buyers win on appeal, we will have a hearing on the merits, and a redemption price that will take into effect the merits of Buyers' claim of defects.

[¶004] Further, Buyers have posted a bond of $25,079.31 to protect Seller from any consequence of Buyers "not making

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any payments." Amended Order for Stay Pending Appeal, ¶03. Doc. #197, pp. 1-2, setting amount of bond.[1] Regardless of the outcome of this appeal, Sellers are protected – either keeping the deposit as part of a redemption price after a hearing on the merits, or keeping the deposit as compensation for use of the property during the appeal.

[¶005] All Buyers have ever asked for in this lawsuit is to have the redemption price reflect proper adjustment for the latent and material defects in their brand new home. If anybody has tortured this litigation, it is Seller. If it had just let Buyers litigate the issue of the defects, we'd have long since had a decision – on the merits.

II. RULE 8.

[¶006] True, as Seller says, Buyers' "Answer was prepared by an attorney licensed to practice in this State." Seller's Brief, ¶18. But, rather than squarely facing whether Buyers' brand new house is a lemon, Seller raised a plethora

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1. Somewhat surprisingly, the record does not reflect payment of the bond, at least in Odyssey. Payment was made. The absence of any proceedings based on non-payment establishes that.

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of arguments hoping to trap that unwary practitioner. By adopting notice pleading, this Court permanently closed the trapping season on unwary practitioners. This follows practice in federal courts, from which our Rule 8 is derived.

> [Rule 8] is consistent with the general philosophy contained in the Federal Rules: highly technical pleading rules, which only serve to trap the unwary practitioner, are eschewed in favor of a system of notice pleading.

Gooding v. Warner-Lambert Co., 744 F.2d 354, 358 (3rd. Cir. 1984) (holding, *inter alia*, that trial court abused discretion in not allowing Title VII civil rights claimant to amend complaint to include statement that she had been issued a "right to sue" letter by EEOC).

[¶007] Seller never argues it was blissfully unaware of Buyers' claims. Seller doesn't even argue Buyers' claims have no merit. Seller's brief on appeal contains not one word on the merits. Not one word saying, "The house was fine." Not one word saying, "Ah, come on, there wasn't any mold." Not one word saying, "The tile drainage system worked great." And certainly not even a closing exhortation, "Buyers are making a mountain out of a molehill for a few defects."

[¶008] Why? Because the thing Seller fears the most is

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a trial on the merits - where Buyers can describe the defectively installed drainage system, the resulting latent mold, the eventual patent mold, the defective driveway, the missing insulation, the cracked bathtub, and the other defects described in Buyers' Appendix, pp. 32-39.

[¶009] In sum, Seller's argument is: "Re-open a trapping season on unwary practitioners." Because Seller's argument has no more strength than that, Buyers' requested relief should be granted.

III. FITNESS FOR PURPOSE.

[¶010] Seller complains that Buyers' introduction of the legal theory of fitness for a particular purpose came very late in the case. Again, Seller raises form (namely the formal title ascribed to a legal theory) over substance – whether the house is a lemon. Seller's argument overlooks the undisputable fact that the issue of habitability was raised in Buyers' answer – "Defendants also assert affirmative defenses, including ... breach of an implied warranty of habitability." Answer, p. 4. Buyers' Appx., p. 27.

[¶011] As it turned out, it would probably have been better if Buyers had described their claim as breach of

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warranty of fitness for purpose as a residence. As both parties have cited (Buyers' Brief, ¶¶39, 40, *et al.*; Seller's Brief, ¶¶31, 33), that theory has been recognized in North Dakota since 1973. *Dobler v. Malloy*, 214 N.W.2d 510 (N.D. 1973).

[¶012] Seller tries to conjure up a difference between the two legal theories – implied warranty of habitability and fitness for use as a residence. Seller's Brief, ¶32. It is a distinction without a difference. An uninhabitable structure is not fit for the purpose of being used as a residence.

[¶013] Is Buyers' house such a structure? We don't know. There has never been a factual determination on that point. That's what Buyers seek – an opportunity to be heard on the merits.

IV. THE COSTS ISSUE.

[¶014] Seller says Buyers are personally liable for the $150 costs judgment because Seller perceives some difference between a cancellation of a contract for deed on the one hand, and the costs of getting that cancellation on the other. Seller's own documents destroy that argument.

[¶015] In its pleadings, that's exactly what Seller

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asked for: "That at the election of the Plaintiff, ... the [house] be sold ... and that the proceeds thereof be applied to the payment of costs and expenses of this action, ..." Complaint, p. 5, ¶3. Buyers' Appx., p. 12. Seller envisioned recovering costs as part of a redemption or sale, not the separate "gotcha" personal judgment Seller now wants.

[¶016] Even if Seller is entitled to a personal judgment, it is for $140, not $150. That's what Seller's lawyer Scott Landa swore was owed. "The attached Time and Expense report is a *true* and accurate summary of the attorney's fees and costs necessarily incurred by EVI Columbus ... ." Affidavit of Attorney's Fees and Costs, ¶2. Buyers' Appx., p. 59, emphasis added. The expense report referred to in Landa's affidavit says "Billed Expenses ... $140.00." Buyers' Appx., p. 65. At oral argument for the attorney fees hearing, Buyers' counsel even said it looked like $140 was due – and Seller's counsel never said otherwise. "They've asked for $20,222 in attorney fees. And $140 in ... [costs] – they appear to be legitimate costs. If they're reducing that down to the $140, I'm delighted." Transcript of September 22, 2011, Hearing, 06:09-12. Appellee Appx., p. 6. Thus the proper

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figure for costs is $140.

[¶017] Of course, Buyers' agreement to $140 as the proper figure is not a concession of the separate issue – that a personal judgment was authorized. The parties didn't discuss that point at the attorney fees hearing. The focus on the discussion was the $20,222 attorney fee exhibit.

V. THE ATTORNEY'S FEE ISSUE.

[¶018] Seller just will not give up trying to deny it asked for attorney fees. Even now, it claims "it had not, and was not, seeking attorney's fees in connection with canceling the Contract for Deed." Seller's Brief, ¶51 (at p. 25).

[¶019] Elizabeth Fletcher Lamb did not write, "The attached Time and Expense report is a true and accurate summary of the attorney's fees ... ." Timothy C. Lamb did not write those words. Scott J. Landa wrote those words – "on oath" no less. Affidavit of Attorney's Fees and Costs, ¶2. Buyers' Appx., p. 59.

[¶020] If Seller wasn't trying to collect attorney fees, just what <u>was</u> it doing? Seller knew all along NDCC §28-26-04 prohibits attorney fees. "EVI did request in the motion for summary judgment its costs and its expenses pursuant to

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statute and the provisions of the Contract for Deed, but *specifically and purposefully* did not request its attorneys fees." Plaintiff's Response to "Borrowers' Objection to Attorney Fees and Proposed Judgment," pp. 2-3, emphasis added. Doc. #140, pp. 2-3. We must not forget that the Contract for Deed allows attorney fees. "Buyer(s) ... agree ... *to pay as part of the debt* hereby secured ... *attorney's fees* incurred in canceling or foreclosing this contract ... ." Contract for Deed, p. 2, ¶3(a), emphasis added. Buyers' Appx., p. 16.

[¶021] Why did Seller "specifically and purposefully" omit seeking something paragraph 3(a) of its own contract expressly allowed for? The only sensible explanation is that Seller was well aware of NDCC §28-26-04 and wisely omitted asking for attorney fees in the complaint. Then the mistake of the trial judge presented a temptation too great to resist – try to get attorney fees out of that "unwary practitioner" with the temerity to fight back.

[¶022] The honorable course of action then – knowing of NDCC §28-26-04 - was to ask the trial court for clarification, or to supply a statement of "costs" explaining the omission of attorney fees. Rather, Seller chose the dishonorable course

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and tried to "sneak it in." Not only should that conduct not be rewarded, it should be loudly condemned.

VI. SELLER'S FRIVOLOUS CLAIM OF FRIVOLITY.

[¶023] Seller takes great affront that Buyers have even appealed this case, claiming the appeal is flagrantly groundless and devoid of merit. Seller's Brief, ¶¶46-52. Yet beyond summarizing its argument in bullet-point lists, Seller enlightens us not on how the appeal is flagrantly groundless and devoid of merit.

[¶024] For an example of an outlandish argument on appeal that still didn't trigger an award of attorney fees, consider *Production Credit Association v. Obrigewitch*, 443 N.W.2d 923 (N.D. 1989). In that case the defendants refused service and the sheriff's deputy put the papers on a courtroom bench "two feet" from the husband, the wife fled the courtroom, and the sheriff put her papers on the bench with the husband's. *Obrigewitch*, 443 N.W.2d at 925. Not surprisingly, the borrowers appealed the judgment, and the lender asked for an award of attorney fees on appeal. That request was denied. *Ibid.*, at 926.

[¶025] As to persistence in the litigation, if anything,

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Seller is guilty of that. Even now, it still tries to evade responsibility for asking for attorney fees in the lower court.

[¶026] Seller's claim of frivolity is itself frivolous. It seems to be offended that Buyers didn't just surrender. There is no duty to surrender.

VI. ADDITIONAL RELIEF REQUESTED.

[¶027] Dealing with frivolous claims of frivolity gets tiresome. This Court's time is too valuable to waste on boilerplate claims that an appeal is frivolous. This is not the first time an appellee has tried that gambit with Buyers' counsel. *See Weiss v. Collection Center, Inc.*, 2003 ND 128, 667 N.W.2d 567 (partially reversing trial court and denying request for costs of allegedly frivolous appeal).

[¶028] Specious requests should be discouraged by a counter-award. Accordingly, Buyers ask that they be awarded costs and attorney fees for dealing with the frivolity issue and that, on remand, the trial court hold a hearing on the proper amount of attorney fees.

[¶029] Signature page follows.

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[¶030] Dated March 12, 2012.

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CERTIFICATE OF SERVICE

[¶031] In accordance with Rule 25(d), NDRAppP, and Administrative Order 14, I certify that I have served the Reply Brief of the Appellants by e-mail to:

Tracy A. Kennedy, Esq.
tracykennedy@northdakotalaw.net

Scott J. Landa, Esq.
scottlanda@northdakotalaw.net

[¶032] I certify that I have tested the e-mail to the Clerk of the North Dakota Supreme Court, and the e-mail to opposing counsel, for viruses, and the virus-check reported none.

[¶033] Dated March 12, 2012.

/s/ ***John J. Gosbee***
John J. Gosbee

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