20150349

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

City of Fargo,

Plaintiff-Appellee,

vs.

William Rakowski,

Defendant-Appellant.

Supreme Court No. 20150349

District Court No. 09-2014-CV-03440

REPLY BRIEF OF DEFENDANT-APPELLANT

APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT ENTERED ON NOVEMBER 10, 2015, AND THE EARLIER ORDER ON COMPETING MOTIONS FOR SUMMARY JUDGMENT DATED JUNE 25, 2015

CASS COUNTY DISTRICT COURT, EAST-CENTRAL JUDICIAL DISTRICT
HONORABLE DOUGLAS HERMAN

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[¶1] **ISSUES ON APPEAL**

[¶2] "Eternal vigilance is the price of liberty." Attributed to Thomas Jefferson; *Richmond Enquirer*, December 30, 1834.

[¶3] Failure to address RAKOWSKI'S issues acts to confess legitimacy. "Respondents on appeal cannot complain if propositions of appellants are taken as confessed which they do not undertake to refute." State ex rel. Blank v. Gramling, 219 Wis. 196, 199, 262 N.W. 614, 615 (1935); In re Disciplinary Proceedings against Johns, 847 N.W.2d 179, 188 (Wisc. 2014).

[¶4] **STATEMENT OF THE CASE**

[¶5] The City of Fargo ["CITY"] inexplicably asserts claimed "facts" instead of simply accepting RAKOWSKI'S procedural history. The CITY articulates its constant error permeating both action and appeal, by asserting as "fact", twice made [*emphasis* added]:

A. "During this initial inspection (of November 11, 2011), *Mrozla found multiple violations* of the City Property Code."

B. "At each of these re-inspections (of December 12, 2011, December 29, 2011, January 23, 2012 and February 27, 2012), *Mrozla continued to find violations* of the Property Code."

[¶6] City Inspector Mrozla has no authority to make any judicial determinations; never should the findings and determinations of a non-lawyer, non-judge be regarded as part of the procedural history of this case. City of Fargo v. Malme, 2007 ND 137, 737 N.W.2d 390; a decision cited in ¶s 11, 48, 54, and 69 of RAKOWSKI'S Brief, but ignored by the CITY.

[¶7] Such statements actually prove, or "confess by failure to refute", some of

RAKOWSKI'S appellate points: (A) John Mrozla is not a lawyer, citing Malme [RAKOWSKI'S Brief, ¶ 48]; (B) "imposition of an illegal tax or illegal penalty", citing Malme [RAKOWSKI'S Brief, ¶ 54], and (C) a $100 assessment by non-judicially countenanced process [and certainly not in Malme], not arising by contract and not a tax, then it must be a bill of attainder – all done without judicial trial. RAKOWSKI'S Brief, ¶ 69.

[¶8] **STATEMENT OF FACTS**

[¶9] The CITY accentuates its pervasive legal and factual flaw involving a non-lawyer, non-judge, a third (3rd) and fourth (4th) time [*emphasis* added; Brief of Appellee, ¶ 9; 20]:

A. "*Mrozla found numerous violations* of the Property Code."

B. "In short, the City provides a free initial inspection for all rental properties in the City. *If any violation of the Property Code are found*, the City also provides the first re-inspection at no cost. If a second re-inspection is required, however, the City charges a fee of $100. Any subsequent re-inspections of the rental property also carry a $100 fee."

[¶10] CITY asserts as fact the prior Municipal Court proceedings against RAKOWSKI [giving rise to double jeopardy/res judicata claim(s)]. Brief of Appellee, ¶ 10, as *plead* [¶ 30 of the Answer; App., p. 15], *testified* [Affidavit, ¶ 9; App., p. 46], and *admitted* by CITY. Brief of Defendant-Appellant, ¶ 30; App., p. 33.

[¶11] CITY submits a footnote #1 referencing RAKOWSKI'S "Answer". Brief of Appellee, ¶ 12. Footnote #1 has nothing to do with the "Answer" [App., ps. 6-16], but rather, provides proof of violation of several appellate rules, that should be equally applicable

to appellees, as well as appellants. Moe v. State, 2015 ND 93, ¶ 11, 862 N.W.2d 510, citing Risovi v. Job Service North Dakota, 2014 ND 60, ¶ 12, 845 N.W.2d 15, relating to the impropriety of first time issues arising on appeal, and violations of N.D.R.App.P. 28(f) involving non-appendix materials requiring docket references [and sanctions if "outside of the scope of the record"; Deacon's Development, LLP v. Lamb, 2006 ND 172, ¶ 18, 719 N.W.2d 379].[1]

[¶12] CITY never advanced any reason to excuse the CITY'S admissions served on Assistant City Attorney Bass. App., ps. 32-35. The footnote comments should be disregarded, or give rise to sanctions. CITY fails to understand the significance of Rule 3.5 of the North Dakota Rules of Court requiring electronic filing and service through the Odyssey electronic filing system, as well as a mandated e-mail address for each attorney. Only attorney Bass was identified as attorney between October 9, 2014 [App., p. 5] and May 5, 2015. Until the 2016 Brief of Appellee, the changed status of attorney Bass had never been disclosed. N.D.R.Civ.P. 5(b)(1&2) obligated electronic filing and service upon attorney Bass, repeatedly done by RAKOWSKI and the court [Docket Entries # 2; 6; 7; 9, 10, 21 {App., p. 48}, 24 {App., p. 51}, 26, and 34; after May 5, 2015, attorney Casey Moen was served after appearing].

[¶13] Attorney Bass will never be a person exempt from electronic service as suggested – she is the *attorney*; and N.D.R.Civ.P. 5(b)(1) required such electronic service – even if she fails to read it, or even act upon it. Written consent for service under N.D.R.Civ.P.

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[1] CITY persists violating the rules in Brief of Appellee, Footnote 2, page 7. Fargo City Commission agendas and minutes are not in the record; earlier amendments occurred in 2007 [Ordinance 4602].

5(b)(3)(F) is not involved. Brief of Appellee, Footnote 1. On February 16, 2016, when electronically serving the its appellate brief discussing attorney Bass' employment status, CITY violates the rules of appellate procedure referencing matters outside of this record.

[¶14] **LAW AND ARGUMENT**

[¶15] **Standard of Review**

[¶16] CITY does not dispute the standard of review, but cites irrelevant decision(s). RAKOWSKI relies not on "unsupported and conclusory allegations", nor "(f)actual assertions in a brief". RAKOWSKI relies upon sworn testimony [App., ps. 44-47], and also, "conclusively established" admissions. App., ps. 32-35. Summary judgment could have been granted in his favor, but never against him.

[¶17] **POINT 1. Summary judgment favoring the City of Fargo was legally and factually impossible.**

[¶18] RAKOWSKI has never claimed that the CITY does not have general authority to regulate public health, sanitation, and safety through enactment of a building code – there is no *building code* at issue. CITY'S reliance upon City of Grand Forks v. Lamb, 2005 ND 103, 697 N.W.2d 362, at ¶s 17 & 21 of its brief, to establish a municipality's right to impose penalty and/or the lower court's basis for allowing the "expense for repeated re-inspections due to a property owner's failure to comply with the Property Code", actually proves both the double jeopardy/res judicata argument, always advanced [RAKOWSKI'S Points 1, 2 & 4 arising out of the Malme decision].

[¶19] At issue is an international property maintenance code; CITY has no known legal right to impose an inspection fee for unsolicited services claimed to have been provided a

property owner without the existence of a contract wherein the fee for services rendered are agreed upon in advance. CITY'S argument, at ¶ 19 of its brief, that the drafters of the International Property Maintenance Code are the authority for such fees by contriving documents allowing for the "municipality to insert an appropraite (sic) fee schedule for activities and services" is laughable. Any quest toward international standardization by adoption of an international code still requires adherence to each government's rule of law. We believe neither the Kingdom of Bahrain, nor the bicameral Italian parliament [among many possible foreign governments] will have little, or no regard for any of our constitutions, statutory laws, and any opinions arising therefrom – nor do we care what their systems would allow. Quest for international standardization should not suppress, nor supplant, our laws. [¶20] RAKOWSKI was without a contract for any inspection services, nor can it be said the CITY acted in accordance with law as to imposition of property taxes. N.D.C.C. Chap. 57-02. CITY has not identified any statutory process allowing a municipality to suspend the laws of contract and/or taxation. CITY's imposition of re-inspection fees violates Article X, Section 5, of North Dakota's Constitution requiring "(t)axes shall be uniform upon the same class of property ..", and reliance upon Ennis v. City of Ray, 1999 ND 104, 595 N.W.2d 305 [Brief of Appellee, ¶ 23] is misplaced. RAKOWSKI has been targeted for a payment not uniformly applied to all. In Ennis, everyone was required to pay for the garbage collection service. CITY, under the guise of public health, safety, morals, and welfare, should not be allowed to create a fee system equally capable of conversion into fees targeting others – newspapers, lawyers, doctors, electricians, plumbers, truckers, cowboys, oil companies - you name it, someone can concoct a scheme to oversee or inspect, especially if it generates more

money. CITY's attempt to equate re-inspection fees to overload charges under State ex rel. Backes v. A Motor Vehicle Described as a Pawling and Harnishefeger (P & H) 655, 37 ½ Ton Crane With A 100 Foot Boom, Serial # 16789, 492 N.W.2d 595 (N.D. 1992) is also spurious – the crane owner voluntarily chose to drive 500 feet on a public road in Bismarck knowing the consequences, to include a judicial process to contest the "action" brought by the State "seeking $7,174.00 in charges for the crane being 48,320 pounds over the road weight limit, under N.D.C.C. Chapter 39-12." A "judicial" determination would impose the penalty, not one determined by a non-lawyer, non-judge.

[¶21] **POINT 2. The City of Fargo cannot create inspection contracts by ordinance, nor can it impose a tax upon a targeted individual landowner.**

[¶22] CITY fails to discuss RAKOWSKI'S primary argument – the lack of a judicial determination by trial, not city inspector. State v. Irwin, 2010 ND 132, ¶ 10, 785 N.W.2d 245.

[¶23] **POINT 3. The warrant requirement of two (2) Constitutions does not disappear because the City of Fargo passes an ordinance.**

[¶24] Reliance upon State v. Nguyen, 2013 ND 252, ¶ 8, 841 N.W.2d 676 [Brief of Appellee, ¶ 33] is misplaced – it does not eliminate the warrant requirement; the lead-in sentence establishes the primacy of two (2) constitutions recognized in State v. Dunn, 2002 ND 189, ¶ 4, 653 N.W.2d 688.

[¶25] CITY'S reliance upon City of Vincennes v. Emmons, 841 N.E.2d 155 (Ind. 2006) [Brief of Appellee, ¶ 34] is equally misplaced; there existed a housing code setting standards for residential rental units providing for regulation and inspection of units, while CITY does

not. CITY directs all its energy, and penalty, against the landlord, without regard to the possessing tenant. See, N.D.C.C. § 47-16-13.1. With respect to Property Code § 104.3 and N.D.C.C. § 29-29.1-01 referenced at ¶s 35 and 36 of the Brief of Appellee, CITY fails to understand the constitutional warrant requirement is the code official's "recourse to the remedies provided by law to secure entry". CITY never sought an administrative search warrant [requiring a magistrate], nor was one obtained. N.D.C.C. § 29-29.1-05 precludes introduction of any facts or evidence without a validly issued warrant. All facts and evidence should have been suppressed.

[¶26] Reliance upon Mann v. Calumet City, Ill., 588 F.3d 949, 951-952 (7th Cir. 2009) [Brief of Appellee, ¶ 38] is misplaced. The case requires Fargo's ordinance(s) to include a single element to "avoid() invalidation under the Fourth Amendment by requiring that the city's inspectors obtain a warrant to inspect a house over the owner's objection." CITY was warrantless –none issued judicially, nor administratively.

[¶27] **POINT 4. The Double Jeopardy Clause and/or res judicata provides RAKOWSKI a legal shield.**

[¶28] "Conclusively established" and testified to, RAKOWSKI plead guilty to an Information "with respect to the 2012 inspections", and was sentenced. App., p. 33; 46. CITY fails to address *Brown v. Ohio's* [432 U.S. 161, 165 (1977)] simple admonition limiting courts and prosecutors. Brief of Defendant-Appellant, ¶ 77. While sending a letter may not be a judicial act, *determining a violation of city ordinance* causing re-inspection fees to arise crosses the Malme line.

[¶29] **POINT 5. RAKOWSKI'S claims under 42 U.S.C. § 1983 should not have**

been disregarded.

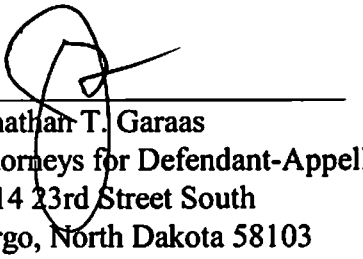
[¶30] RAKOWSKI'S Complaint is not a single paragraph claim under 42 U.S.C. § 1983, et seq. RAKOWSKI outlined a series of CITY "actions", all of which collectively gave rise to a judicial remedy grounded in federal laws – including the right to be free of government searches without warrant.

[¶31] **CONCLUSION**

Eternally vigilant, RAKOWSKI seeks protection of his liberty.

Respectfully submitted this 1st day of March, 2016.

Garaas Law Firm



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AFFIDAVIT OF MAILING

State of North Dakota
County of Cass

[¶1] Pat Doty, being first duly sworn on oath, deposes and says: Affiant is a resident of the City of Fargo, North Dakota, and over the age of eighteen years, and not a party to the above entitled matter.

[¶2] On the day of 1st day of March, 2016, Affiant deposited in the United States Post Office at Fargo, North Dakota, a true and correct copy of the following documents in the above entitled action: REPLY BRIEF OF DEFENDANT-APPELLANT.

[¶3] The copies of the foregoing were securely enclosed in an envelope with postage duly prepaid and addressed as follows:

Casey W. Moen
Office of City Attorney
412 NP Avenue
Fargo, ND 58102

Ian McLean
Serkland Law Firm
10 Roberts Street
P.O. Box 6017
Fargo, ND 58108-6017

[¶4] To the best of Affiant's knowledge, the address above given was the actual post office address of the party intended to be so served. The above documents were duly mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.

Pat Doty

Pat Doty

Subscribed and sworn to before me this 1st day of March, 2016.

JONATHAN T. GARAAS
Notary Public
State of North Dakota
My Commission Expires Dec. 28, 2021

Notary Public

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