

Appellate Court Case No. A05-0426

STATE OF MINNESOTA  
IN COURT OF APPEALS

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Estelle Busch,

Appellant,

vs.

Model Corporation  
Joseph Shun DBA Model Garage Builders,

Respondent.

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APPELLANT'S BRIEF AND APPENDIX

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STATEMENT OF LEGAL ISSUES

- I. Whether Appellant, as a buyer, has a remedy when the seller of a Home Solicitation sale does not comply with the mandated statutory notification requirements in Minnesota's Home Solicitation statutes.

Trial court held: In the negative.

Most Apposite Cases

Niewind v. Carlson, 628 N.W.2d 649 (Minn. App. 2001)

- II. Whether Appellant is entitled to damages when a contractor refuses to do the contracted work.

Trial court held: In the negative

### Statement of the Case

This matter is before the Court pursuant to a Notice of Appeal dated March 2, 2005. Review is sought of an Order for Judgment dated December 24, 2005, and filed January 7, 2005, in Ramsey County District Court, Second Judicial District. The Honorable William H. Leary, III issued the Order.

Appellant, Estelle Busch, and Respondent, Model Corporation, Joseph Shun DBA Model Garage Builders, entered into a contract April 29, 2002. Respondent was to remove an existing garage and concrete driveway and sidewalk and build a new garage and install a new concrete driveway and sidewalk. The contract price was \$14,900 with \$5,000 down at contract signing, another one third paid after concrete work is completed and the balance due after the completion of all work. Respondent demanded another \$5,000 before the concrete work was completed. Appellant refused. This was not according to contract. Respondent was also not performing and the Appellant had to enlist the help of the Department of Commerce's Enforcement Division to get the Respondent to do some work. Respondent then refused to do the work. Eventually Appellant contracted with Durabilt Garages to continue the work at a cost of \$13,500.

Appellant sued the Respondent in Ramsey County Conciliation Court for fraudulent, deceptive or dishonest

practice and breach of contract. Respondent, besides refusing to do the work, was a door-to-door salesman and had not, as mandated by statutory law, given the Appellant the required notifications required with a "home solicitation sale". Although Appellant had requested the return of her \$5,000 downpayment, Referee Ludwigson awarded Appellant judgment of \$3,600 - the difference between Respondent's contract and Durabilt Garages' contract.

Respondent appealed the Conciliation Court's judgment to Ramsey County District Court March 11, 2004. Appellant, June 30, 2004, followed with a Notice of Motion and Motion for Summary Judgment, memorandum, and an affidavit listing and attaching copies of exhibits. Appellant was asking again for judgment of her \$5,000 for the same above reasons

Respondent's answer to the motion for Summary Judgment was only that he disputed many facts in Appellant's motion for Summary Judgment but stated no specific facts. Further, Respondent had refused to answer interrogatories Appellant had sent him.

The hearing for the motion for Summary Judgment was held August 5, 2004, and the Trial Court denied the motion. Although Respondent did not dispute that the contract was a home solicitation sale, the Trial Court's decision was that the Appellant had failed to prove it was a home solicitation sale. Further, the Trial Court appeared to be unfamiliar with the statutes pertaining to a home

solicitation sale and appeared more concerned with what Respondent could be awarded for any work he had done.

However, besides denying Appellant's motion for Summary Judgment, the Trial Court ordered Respondent to answer the interrogatories Appellant had sent him. The Trial Court also addressed the issue regarding Respondent's use of two names under which he was doing business - Model Corporation and Model Garage Builders. (See A. 24)

The District Court trial was held November 9, 2004. The Respondent did not file an exhibit list or any exhibits with the Court. The Respondent did not, before trial or at trial, give the Appellant an exhibit list or exhibit copies. The Trial Court awarded Respondent judgment. The Findings of Fact in the order contained many factual errors and, the Court, although finding the sale a home solicitation sale, said Minnesota's statute "... does not provide any guidance as to the type of damages that might flow from a failure to comply with the statute."

Therefore "[t]his court concludes that the damages to which Plaintiff would be entitled would be those that exist at law." At the trial the Trial Court accepted and marked as Exhibit 4 what Respondent claimed he had done as well as Respondent's arbitrary value. (See A. 112) The Trial Court concluded the value of what Respondent claimed exceeded Appellant's \$5,000 and ordered judgment to the Respondent.

### Statement of the Facts

Respondent (Shun) telephoned Appellant (Busch) the morning of April 29, 2002, to set up a meeting for 1:00 P.M. the same day at Busch's home. Previously, Shun had met twice with Busch at her home. Shun's business is building residential garages and, although Shun operates his business out of his home, Shun personally solicits his business at a prospective buyer's home and any offers or negotiations take place at a prospective buyer's home.

Shun and Busch entered into a contract. Busch's old garage, driveway and sidewalk were to be removed and replaced with a new 24 x 22 foot garage, a new 40 x 11 foot concrete driveway and a new concrete 91 x 2 1/2 foot sidewalk. Contract price was \$14,900 paid in three installments; (1) \$5,000 paid at contract signing, (2) another one third paid after the completion of all concrete work and (3) the balance of \$4,900 paid after the completion of all work. (A. 58)

Shun induced Busch to enter the contract with assurances that his company, Model, had fifty years of experience and, for example, had "...qualified crews that return year after year to backup our claim of a quality job." This was not true. Shun had just started operating under the name Model after a bankruptcy action. (A. 78) Shun had previously been business as Inter-City

builders or Innsbruck Builders. (A. 77)

Problems followed. The following is a brief, but not exclusive, history of the problems:

Shun, at contract signing, said he would immediately draw up the garage specs and immediately send them to Busch. Busch did not receive the garage specs until June 3, 2002 (over a month later) and the specs were completely blacked out and, consequently, not readable. (A. 60)

Promised work dates were not kept and Shun was not doing the contracted work.

The old garage was removed May 22, 2002, but the old garage slab remained in place. The garage slab was broken up June 14, 2002, and piled up on the back of Busch's lot by the alley. (A. 65) Neighbors complained and small children were climbing on this dangerous hazard. The city of Minneapolis said the broken up slab concrete pile had to be removed but Shun's telephone was answered by a recorder and Shun did not return Busch's message.

Ten days later, June 24, 2002, the broken up slab concrete still remained on the back of Busch's lot, and still no contact with Shun, Busch filed a complaint with the Better Business Bureau (BBB). Busch's resolution was either Shun do the contracted work or return Busch's \$5,000 down-payment. (A. 66)

Because of the problem, on Thursday, June 27, 2002,

Busch talked to the Minneapolis Inspection Department. The Inspection Department directed Busch to the Minnesota Department of Commerce's Enforcement Division. (Enforcement Division) On Friday, June 28, 2002, Busch called the Enforcement Division. She talked to Charlie Durenberger. Durenberger contacted Shun and, under the threat of Shun losing his building license again, Shun removed the piled up slab concrete the following Monday, July 1, 2002.

Unaware that Shun's intent was then to pour a concrete garage slab, per his letter to the BBB dated July 19, 2002, and received by the BBB July 22, 2002, and do no further work, (A. 69) Busch, under the impression that the contracted work would continue, allowed Shun to pour the garage slab.

Shun poured one half of the garage slab on July 3, 2002, and the other half on July 9, 2002. Shun did no further work after July 9, 2002. The site was left as shown in picture with even the form boards still intact. (A. 101) (The garage slab was poured below grade but Busch did not find this out until later when Busch contracted with Durabilt Garages to complete the work)

On July 5th, midway through the concrete slab pouring, Shun telephoned Busch and vented anger at her for Busch's contacts with the BBB, the Minneapolis Inspection Department and the Enforcement Division. Shun also told Busch that he would not do any work after the slab concrete pouring unless

Busch gave him another \$5,000. Again, on July 11th, Shun called Busch demanding another \$5,000 or he would do no further work.

The BBB received Shun's reply to Busch's complaint July 23, 2002, a month after Busch's complaint and after he had poured the garage slab. Never, as Shun claimed, was orange plastic fencing put around the broken up slab concrete, never had Busch made any threats nor was the ground unworkable or did Busch ask for options not in the contract let alone not pay for any options. Shun accused Busch of breaching the contract because she refused to give Shun a second payment until the concrete work was completed. Shun's resolution was to return and install one course of stone faced blocks on the garage slab, do no further work and keep Busch's downpayment of \$5,000. (A. 69)

Also attached to Shun's reply was garage specs for another address, not mine, (A. 69) and a diagram (A. 69) Shun had apparently made just for his reply. Busch had never seen or received this diagram before. Also attached was a July 17, 2002, letter from Shun to Busch asking for more money if he was to do any further work. (A. 69)

Shun's above letter made Busch aware that Shun did not, and probably never did, intend to honor the contract. Instead of doing the work per the contract, Shun was demanding

a second not due \$5,000 before he would do any more work and was making false allegations concerning Busch. What work Shun had done was only because of the Enforcement Division involvement.

On July 25, 2002, Busch answered Shun's letter and refused his offer to return and install the one course of stone faced block on the garage slab and denied his allegations. Busch also set a deadline of August 9, 2002, for reaching a resolution reached. (A. 90) The problems were being dragged into the fourth month. Busch needed time to find another garage builder and get the work completed.

Busch also wrote letters to the Enforcement Division so it would be aware of how the problems were being played out. (A. 75, 93)

BBB's letter of August 9, 2002, had attached Shun's letter dated August 8, 2002, that he would do further work. (A. 95) Shun also wrote the Enforcement Division that he would do no further work. (A. 97) Busch wrote a letter, dated August 14, 2002, that Busch took notice of Shun's refusal to do any further work. (A. 98)

The Enforcement Division, after reviewing the situation, sent Busch a letter, dated August 14, 2002, advising Busch to consult private legal counsel to explore the remedies available to Busch through civil action. (A. 99)

Through legal advice, Busch was made aware that Shun had not only breached the contract by demanding not due money before he would do any further work but Shun had not followed the mandated statutory requirements of a home solicitation sale. (A. 119)

Consequently, on August 22, 2002 Busch wrote Shun a letter officially cancelling the contract and requested that Shun return her \$5,000 downpayment. (A. 100) Shun neither replied nor returned to Busch her \$5,000 downpayment.

Durabilt Garage Builders also required Busch to cancel the contract with Shun before it would do the work. Durabilt Garage Builders then built the garage and removed and replaced the existing sidewalk and driveway for \$13,500. (A. 103)

Busch sued Shun in Ramsey County Conciliation Court for the return of her \$5,000 deposit plus expenses. Busch was granted judgment of \$3,600 - the difference between Shun's contract and Durabilt Builders' contract. (A. 2) Shun appealed the judgment in Ramsey County District Court. (A. 3) The District Court, after trial, awarded Shun judgment. (A. 24)

## ARGUMENT

### Standard of Review

Questions of law are reviewed on a de nova basis without deference to the trial court's decision. London Const. v. Roseville Townhomes, 473 N.W.2d 917,919 (Minn. Ct. App. 1991) Appellant's Notice of Review raises questions of law.

1. If the parties intention can be determined wholly from the writing, the construction of the instrument is a question of law for the reviewing court to resolve. Wolfson v. City of St. Paul, 535 N.W.2d 384, 386 (Minn. Sept 28, 1995)

2. Application of a statute to the undisputed facts of a case involves a question of law, and the district court's decision is not binding on the reviewing court. O'Malley v. Ulland Bros., 549 N.W.2d 889, 892 (Minn. 1996)

This action involves a breach of contract of a Home solicitation sale.

The contract Appellant and Respondent entered into April 29, 2002 is clear. Appellant's old garage, old concrete driveway and sidewalk were to be removed and replaced with a new 24 x 22 foot garage and a new 40 x 11 concrete driveway and sidewalk. The contract price was \$14,900 which was to be paid in three installments; (1) \$5,000 at contract signing, (2) another one third after

concrete work completion and (3) the balance of \$4,9000 paid after the completion of all work. (A. 58) Appellant gave Respondent \$5,000 at the time of signing the contract. (A. 59)

Because Respondent was not doing the work, Appellant put in a complaint to the Better Business Bureau (BBB) (A. 66) and the Department of Commerce's Enforcement Division. (Enforcement Division) (A. 75, 93) The Enforcement's involvement did result in Respondent immediately hauling away the dangerous piled up slab concrete and pouring a garage slab. Only until the end of August did the Appellant find out this slab was below grade.

Midway between the garage slab pouring and right after Respondent demanded another \$5,000 or he would do no more work. Appellant refused to give Respondent another \$5,000 at this time. Appellant made it clear to Respondent that a second payment was not due until the concrete work was completed as per the contract. Another concern was that the Enforcement Division had to be enlisted to even get the work done that was done.

Respondent's reply to Appellant's complaint to the BBB was:

We have a contract that explains in detail the specifications on the construction and payments for her project. The payments of her garage was to be divided into thirds. Ms. Busch made her first one third down payment which would cover, permits, the removal of her old garage, the removal

of her old concrete floor, excavation for new garage and a new concrete foundation. (A. 69)

The contract does not say this. The contract is clear that a second third payment is not due until the concrete work is finished. The concrete work included both the driveway and sidewalk.

The Respondent also indicated in his reply to the BBB his intent to do no more work. The Respondent also said, in his reply, he had told the Enforcement Division of his intent to do no further work.

Respondent followed through with letters to both the BBB and Enforcement Division that he would do no more work. (A. 95, 97)

A party breaches a contract when it totally or partially fails to perform its obligations under the contract. Associated Ciemas of Am. v. World Amusement Co., 201 Minn. 94, 99, 276 N.W. 7, 10 (1937) Respondent refused to honor the contract.

Finally, the terms of the contract payments are not ambiguous. The second payment was due after the concrete work was completed. Respondent's attempt to put new meaning as to when a second payment was due, and accuse Appellant of breach, fails. It is also beyond incredulous that Respondent would pour a garage slab without telling Appellant that would be the end of his work in order to put claim on Appellant's \$5,000 downpayment. (A. 69) If

Appellant had been aware of Respondent's intention, as well as his false defensive fabrication, Appellant would never have allowed the Respondent to pour the garage slab.

Furthermore, Respondent was a door-to-door salesman and was required to follow the mandated statutory provisions of Minn. Stat. s325G.06 for a "Home Solicitation Sale".

Appellant (1) regularly engaged in the (2) sales of garages and concrete work for (3) residential purposes and (4) personally solicited the sale which (5) exceeded \$25 and (6) any negotiations or offers to purchase took place at a buyer's home not the place of Shun's place of business.

Minn. Stat. s325G.06, subd. 2 (A. 119)

A seller of a home solicitation sale is required to at the time the sale occurs:

1. Orally notify the buyer of the right to cancel
2. In the immediate proximity to the space reserved in the contract for the signature of the buyer a notification of the right to cancel
3. Furnish the buyer a fully completed form in duplicate captioned NOTICE OF CANCELLATION  
Minn. Stat. s325G.08 (A. 122)

Respondent did not, and did not claim to have done, give Appellant the required notifications.

After the Respondent moved this action to District Court, the Appellant filed a motion for Summary Judgment based on the breach of contract and because Respondent

failed to follow the mandated statutory notification provisions of a home solicitation sale.

Respondent answered the motion for Summary Judgment only with a general denial. It listed no specific facts in dispute. (A. 23) However, the trial court denied Appellant's motion because the trial court said Appellant had failed to prove the sale was a home solicitation sale. And because the Appellant had inadvertently not included the Durabilt Garages contract in her affidavit, the trial court said it had nothing to determine damages on a claim of breach of contract. (A. 24, SJ T 18)

At the motion for Summary Judgment hearing the trial court kept indicating that Respondent should be entitled to relief for what work he had done regardless of his breach of contract or his failure to follow the mandated statutory requirements of a home solicitation statute. (SJ T 8-10,13, 15) The trial court also appeared unfamiliar with the home solicitation statutes. (SJ T 15-18)) and appeared unsure of the statutes pertaining to a home solicitation sale.

The trial court told the Respondent his answer to Appellant's motion was insufficient and ordered the Respondent to answer interrogatories Appellant had sent him which he had not and still has not. Further, because Respondent was operating under two names, Model Corporation and Model Garage Builders, Respondent was questioned about

the two names. Respondent hedged over the two names. He knew a corporation was required to be represented by an attorney in court.

Court: For purposes of these proceedings, do you concede that Ms. Busch can bring a claim against you personally for this garage:

Defendant: I am having a hard time hearing you too.

Court: Well, let me repeat the question.

Defendant: That's okay. I am thinking about it; just for future reference.

Court: Okay.

Defendant: There is listed --- it was listed as Model Corporation, okay: And that was to protect myself from being sued personally, it wasn't listed as a corporation and it was never officially --- it was listed as Model Garage Builders.

Court: Let ask you this, have you ever incorporated an organization called Model Corporation?

Defendant: Incorporated it:

Court: Yes?

Defendant: Not officially. No.

Court: Okay

Plaintiff: The Secretary of State shows that he has.

Court: Okay.

Defendant: There was a mistake on the license, but in the process of about a year and a half to two years of trying to correct that, it's in the final stage now where they had made a mistake and listed my license as Model Corporation. It is not --- it's not Model Garage Builders.

The trial court found then that Model Corporation would have no corporate protection. (SJ T 4-7)

After a trial November 9, 2004, the trial court found that the contract was a home solicitation sale. (A. 5?) Consequently, the following statute goes into effect.

Minn. Stat. s325G.08 (2003) Writing required; notice of right to cancel; notice of cancellation.

Subd. 1. In a home solicitation sale, at the time the sale occurs, the seller shall:

(a) inform the buyer orally of the right to cancel;  
(b) furnish the buyer with a fully completed receipt or copy of a contract pertaining to the sale which shows the date of the transaction, contains the name and address of the seller, and in immediate proximity to the space reserved in the contract for the signature of the buyer or on the front page of the receipt if a contract is not used and boldface substantially the following form:

"You, the buyer may cancel this purchase at any time prior to midnight of the third business day after the date of this purchase. See attached notice of cancellation form for an explanation of this right." and

(c) furnish each buyer a fully completed form in duplicate captioned, "**NOTICE OF CANCELLATION**", which shall be attached to the contract or receipt and easily detachable, and which shall contain in boldface type of a minimum size of ten points the following information and statements: (A. 12?)

The trial court found that Respondent did not orally inform Appellant of her right to cancel the sale nor did Respondent give Appellant with a form notice of cancellation. The trial court does not address the requirement that a buyer's right to cancel be on the contract. Instead, the trial court suggests incorrectly in its findings of fact that because the contract provided that "10% of the contract price charged for orders cancelled after 3 days" by implication, Appellant had a right to

cancel the contract without penalty within three days of signing. (A. 49) The contract did not have the required cancellation notice.

The trial court held that Appellant was "entitled to the relief prescribed by statute, including damages and other equitable relief as determined by the court".

(A 52) The statute is clear:

Minn. Stat. 325G.08, subd. 2 Writing required; notice of right to cancel; notice of cancellation.  
Until the seller has complied with this section the buyer may cancel the home solicitation sale by notifying the seller in any manner and by any means of the intention to cancel.

Appellant cancelled the contract by letter August 22, 2002. Appellant also requested that her \$5,000 downpayment be returned to her. (A. 100)

325G.09, Subd. 1. Return of payments or goods.  
Within ten days after a home solicitation sale has been cancelled or an offer to purchase revoked, the seller must tender to the buyer any payments made by the buyer and any note or other evidence of indebtedness.

325G.09, Subd. 6. If the seller has performed any services pursuant to a home solicitation sale prior to its cancellation, the seller is entitled to no compensation. (A. 124)

Appellant is entitled to have her \$5,000 downpayment returned to her. Respondent is entitled to no compensation.

The Minnesota statutes concerning a home solicitation sale is a consumer protection statute that protects a consumer from over-aggressive or unscrupulous door-to-door salespeople.

Minn. Stat. s645.16 Legislative intent controls.

The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature. Every law shall be construed, if possible, to give effect to all of its provision.

When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.

When the words are not explicit, the intention of the legislature may be ascertained by considering, among other matters:

- (1) the occasion and necessity for the law;
- (2) the circumstances under which it was enacted;
- (3) the mischief to be remedied;
- (4) the object to be attained; (A. 130)

The remedy Appellant seeks is explicit in Minn. Stat. s325G.08, subd. 2, that until the seller has complied with the notification section the buyer may cancel the home solicitation sale by notifying the seller in any manner and by any means of the intention to cancel. Appellant had no choice. Respondent refused to do the work. Further, Minn. Stat. 325G.09, subd.1 is clear that within ten days after a home solicitation sale has been canceled or an offer to purchase revoked the seller must return to the buyer any payments made by the buyer. Lastly, Minn. Stat. s325G.09, subd. 6 is clear that if the seller has performed any services pursuant to a home solicitation sale prior to its cancellation, the seller is entitled to no compensation.

In Niewind v. Carlson, 628 N.W.2d 649 (Minn. App. 2001) the court reversed the trial court's decision citing Minn. Stat. Minn. s645.16 that when the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded. Niewind, a contractor, lost his mechanic lien rights to \$24,284.57 because the prelien notice was solely not in bold type as required by Minn. Stat. s514.011, sub. 1. (A. 113)

**The home solicitation** statutes are just as clear and free from all ambiguity and the letter of the law should not be disregarded.

The trial court did find the contract between Appellant and Respondent a home solicitation. Further, the trial court found Appellant is entitled to the relief prescribed by statute, including damages and "other equitable relief as determined by the court". The trial court did not apply the the remedy provided in Minn. Stat. 325G.09, subd. 1, the return of Appellant's \$5,000 downpayment nor the remedy provided in Minn. Stat. s325G.09, subd. 6, the denial to Respondent of any compensation for what work he did prior to the contract's cancellation.

Instead the trial court found that Minn. Stat. s325G.11 did not provide any guidance as to the type of damages that might flow from a failure to comply with the requirements

of the home soliciation statutes. The trial court concluded the damages Appellant would be entitled to would be those that exist at law. The trial court then awarded judgment to the Respondent concluding that work that Respondent claimed he had done and the value which Respondent claimed for the work exceeded Appellant's \$5,000 downpayment. (Defendant's Exhibit No. 4. A. 52)

**The trial court's award of judgment to Respondent should be reversed and Appellant should be awarded judgment of her \$5,000 downpayment.**

1. The trial court looked at Minn. Stat. s325G.11 and concluded it did not provide any guidance as to the type of damages that might flow from the failure to comply. (A. 52) However, Minn. Stats. s325G.08, subd. 2, and s325G.09, subd. 1 and subd.6, do provide remedies that are clear if one does not comply with the home soliciation statute. Untill a seller provides the mandated notificiations, a buyer can cancell a sale, receive back any payments given to the seller and the seller is entitled to no compensation for any services performed prior to the cancellation. (A. 123,124) Respondent did not provide the mandated notifications and the Appellant cancelled the contract because the Respondent refused to do the contracted work. The Appellant is entitled to judgment for her \$5,000 downpayment and the Respondent is entitled to no compensation.

2. The trial court's obvious lack of impartiality affected the trial court's decision to grant Respondent judgment. At the motion for Summary Judgment hearing the trial court said:

So, what I am suggesting to you is this, to the extent that you paid \$5,000.00, even though you didn't get the entire garage, you didn't pay for an entire garage, you paid for \$5,000.00 essentially worth of work and the question is, the work that was done by Mr. Shun, what is the value of that and to the extent that you obtained some sort of value, you're not entitled to the return of that portion of the \$5,000. (SJ T 10)

The trial court's lack of impartiality also was apparent during the trial.

THE COURT: ---then let me raise this question with you. Let's say that Mr. Shun did not comply with the statutes in terms of the three day notice of cancellation, let's say that's true?

THE PLAINTIFF: Mm-hmm.

THE COURT: It seems to me, and I have mentioned this to you before, he should be entitled to or perhaps he should be entitled to the benefit that you received in him removing your old garage, disposing of that garage and then giving you a new concrete floor: If I determine that he violated a statute and that he's, might arguably have to forfeit the \$5,000.00, then in fairness it would also seem that he is entitled to that portion of the money that you paid to him where he actually performed work for you to your benefit. I mean, ultimately, if you get the \$5,000.00, you would've gotten the free removal of a garage, the free disposal of the garage, the free excavation of a concrete slab and the free repouring of the slab, does that seem fair to you? (Tr T 36,37))

And, in fact, the trial court's granting Respondent judgment was reflective of the trial court's lack of impartiality. The trial court abused its discretionary

powers by ignoring the correct application of the statute. The statute's provisions do not have a remedy for a seller that does not comply with the mandated notification requirement. The statute is left meaningless without it.

3. Appellant understands that it is not the province of the appellate courts to reconcile conflicting evidence. On appeal, a trial court's findings of fact are given great deference, and shall not be set aside unless clearly erroneous. Fletcher v. St. Paul Pioneer Press, 589 N.W.2d 96, 101 (Minn. 1999) However, some facts in the trial court's "findings of fact" are clearly erroneous and apparently is another factor that affected the trial court's "conclusions of law" and, consequently, the award of judgment to the Respondent.

Findings of fact No. 4 - After the garage slab, and even before it was completely poured, Respondent did demand another payment of \$5,000. The Appellant refused because the payment was not due under the contract until the concrete work was completed. The driveway and sidewalk had yet to be removed and concrete poured. The Appellant did not ever refuse to give Respondent a second payment of \$5,000 claiming the work had not been properly performed. (Appellant was not aware that the work had not been properly performed until Durabilt Garage Builders

looked at it the later part of August.) Appellant refused to give Respondent a second \$5,000 because what work he had done was because of the Enforcement Division's involvement and because the contract called for it only after the completion of the concrete work. (Tr T 40, See also Summary Judgment memorandum, A. 4 and trial memorandum, A. 26)

And never did Appellant demand completion of the garage before any further payments were due. In reference that the parties had many disagreements, Appellant's problem was Respondent was not doing the work. Consequently Appellant had to enlist the BBB and Enforcement Division for help. (A. 66 and A. 75, 97)

Findings of fact No. 5 - Because Respondent refused to honor the contract and do the work, Durabilt Garages finished the work for \$13,500. However, Appellant did not agree that that the work done by Durabilt Garages had a number of "features", which cost Appellant more beyond those contained in the agreement between Appellant and Respondent. (A. 50) Appellant's attempt to address this claim of the Respondent was denied. The trial court said "Now, you are commenting about the evidence and I don't need to hear that." (Tr T 73)

Findings of fact No. 6 - Appellant did not claim that

Respondent breached the contract by pouring a "below grade" slab. Appellant claimed the Respondent breached the contract by demanding a second payment of \$5,000 before the concrete work was completed and, not receiving the \$5,000, refused to do any further work. (SJ T. 8)

Appellant's only claim has been for the return of her \$5,000 downpayment that was given to Respondent because he did not comply with the statutory notifications of a home soliciation sale or the difference between Respondent's contract and Durabilt Garages contract of \$3,600.

Findings of fact No. 7 - The Respondent submitted to the trial court a list of work Respondent claimed he had done and his arbitrary value of this work. Over the objection of Appellant, the trial court accepted it had it marked Defendant's Exhibit No. 4. (A. 112) The Appellant had never received an exhibit list nor copies of any exhibits the Respondent intended to submit to the court at trial.

The trial court found that Appellant did not dispute that this work was performed or the value of the work. This is not correct. Appellant adamantly denied that Respondent had done some of this work.

THE PLAINTIFF: Yes. Almost everything [Mr. Shun] has said just overwhelms me. Number One, he did not take out the sidewalk, my daughter can testify to that. He did not take out the driveway, he did not do the block work, he put nothing around the concrete. (Tr T 60)

Appellant's witness also denied that Respondent did the above work.

THE WITNESS: .... but as far as what he says with the block being placed by him, he did not place the block, he did not tear up the sidewalk, he did not tear up and remove the driveway. That was done by Durabuilt. He did not fence the hazardous debris and he did not remove it within one day. (Tr T 66)

Moreover, Appellant had declined Respondent's offer to return and place a course of block on top of the slab. (A. 71, 90) Durabuilt Garages contract also included the placing of block work on the garage slab as well as the removal of miscellaneous concrete (the driveway and sidewalk. (A. 103)

On Exhibit 4 (A. 112) Respondent has a permit cost of \$221 for the building of a garage which he did not build. Respondent also arbitrarily listed the value of his garage slab at \$4,321. (garage floor, excavation and base)

At the motion for Summary Judgment hearing the trial court was insistent that the Respondent should be paid for what work he had done (A. 9, 10) Because of this, the Respondent not only prepared a list of work not only of work he did not do but arbitrarily inflated the work of what he did do.

The trial court concluded:

8. Plaintiff tendered \$5,000 as the first installment on the contract with Defendant. Plaintiff obtained the benefit of the removal of the single-car garage, driveway, and sidewalk; the issuance of the

building permit; excavation; garage slab at a total cost of \$5,723. Plaintiff failed to prove that the garage slab was improperly constructed. Defendant failed to prove that he placed a course of block above the slab. Given that the benefit conferred by Defendant exceeded the amount of the first installment, Plaintiff is not entitled to recover damages that directly resulted from Defendant's work. (A. 52, 53)

The trial court accepted only Respondent's testimony as proof as to what he claimed. The Respondent did not offer any evidence to back up his testimony. The trial court, however, said Defendant failed to prove that he placed a course of block above the slab. This is incorrect. It was Appellant's evidence of the Durabuilt Garages contract that included the block work that proved Respondent did not do this block work. Yet Respondent continued to testify that he did the block work.

The trial court ignored both the Appellant's testimony and Appellant's witness's testimony that Respondent did not remove the driveway and sidewalk accepting only Respondent's testimony that he did the removal. The trial court also ignored Appellant's expert witness's, a civil engineer, testimony:

Q In terms of the design and construction of roadways, is the issue of whether or not a roadway is or is not above grade, is that an issue for you?

A Absolutely. We have to have --- we maintain our grade elevations or profile grade evaluations to meet drainage requirements. (Tr T 23)

Theoretically, the garage slab should've

been poured much higher, such that when the second contractor came in to tie in the sidewalk, the garage side would've been higher and the sidewalk would be running away from the garage and not into the garage. (Tr T 27)

The trial court did find the contract between the Appellant and Respondent a "home solicitation" sale. The above is offered as proof of the confusion of the action during trial as well as the apparent lack of impartiality of the trial court. For instance, Appellant was denied the right to have evidence entered and given no opportunity to cross exam the Respondent.

#### CONCLUSION

Appellant Estelle Busch respectfully requests that this Court **REVERSE** the Order for Judgment of the District Court against Plaintiff dated December 7, 2004. The contract between the Plaintiff and Appellant was a Home Solicitation sale. Plaintiff's complaint against Defendant was Defendant's failure to comply with the mandated notifications of a Home Solicitation sale and Defendant's breach of contract. The evidence is clear that Defendant did not comply with the mandated statutory notifications required of a Home Solicitation sale. The evidence is clear that Defendant refused to do any work after Defendant demanded a second payment of \$5,000 and Plaintiff refused.

The contract is clear that a second payment of \$5,000 was not due until the completion of all concrete work and the concrete work had not been completed.

Not only did Defendant not comply with the mandated statutory notifications of a Home Solicitation sale and breach the contract but he has attempted to be unjustly enriched by claiming work he did not do. Defendant's strategy was to falsely fabricate about events and Plaintiff's behavior.

The remedy is clear in the Home Solicitation statute. Until a seller provides the mandated notifications, a buyer may cancel a sale and receive back any monies tendered. The seller is not entitled to any compensation for any work he has done before the contract cancellation. Appellant cancelled the contract and should be awarded a judgment of her \$5,000 downpayment.

Respectfully submitted this 2nd day of May 2005.

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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) (with amendments effective July 1, 2007).