

<p>COLORADO COURT OF APPEALS  Colorado State Judicial Building  2 E. 14th Avenue  Denver, Colorado 80203</p>	<p>DATE FILED: September 19, 2017 2:48 PM  FILING ID: 2E764798F63EC  CASE NUMBER: 2017CA737</p>
<p>Appeal from the District Court, Weld County,  Hon. Todd L. Taylor, Presiding Judge  District Court Case No. 2014CV30957, Div. 4</p>	
<p>Plaintiffs-Appellees:</p> <p><b>JOSE A. MIRANDA</b>, an individual</p> <p>Defendants-Appellants:</p> <p><b>EWV, LLC</b>, a Colorado Limited Liability Company; <b>KEITH COWAN</b>, an individual; <b>LAURIE LECHUGA</b>, an individual</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
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<p style="text-align: center;"><b>AMENDED OPENING BRIEF ON APPEAL</b></p>	

## **CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

**The brief complies with the applicable word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).**

It contains 9,499 words (principal brief does not exceed 9,500 words; reply brief does not exceed 5,700 words).

**The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).**

**For each issue raised by the appellant**, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

**In response to each issue raised, the appellee** must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

**I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.**

*s/ Perry L. Glantz*

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## **STATEMENT OF THE ISSUES**

1. Whether the Court erred in finding the Contract is void and unenforceable because it required Miranda to engage in illegal acts when the applicable law indisputably permits performance of the contract.
2. Whether the Court erred in finding EWV made judicial admissions or is judicially estopped from arguing that the mobile homes in Eastwood could legally be removed as of the date of the Contract in light of extensive evidence contradicting this conclusion and the fact that neither doctrine can be applied to an alleged admission of law.
3. Whether the Court erred in finding the Contract was illusory and lacked valid consideration when the evidence presented on summary judgment belied this conclusion.
4. Whether the Court erred in finding the Contract was invalid because it violated the statutory requirements of C.R.S § 38-29-106 because C.R.S. § 38-29-106 does not apply to a landowner contracting for the removal of abandoned mobile homes from its property.
5. Whether the Court erred in entering summary judgment in Appellee's favor on Claims 1, 2, 10, 11 and 12 in Plaintiff's Fourth Amended Complaint and on EWV's counterclaims for breach of contract and indemnity.

6. Whether the case should be re-assigned to another judicial officer upon remand because the presiding judicial officer, Judge Todd Taylor, has exhibited actual bias toward Appellants and their counsel and Appellants will be unable to receive a fair hearing upon remand because of the District Court's actual bias or appearance of bias against Appellants and their counsel.

### **STATEMENT OF THE CASE**

EWV, LLC ("EWV") owns a mobile home park in Evans, Colorado that was flooded in 2013. Jose A. Miranda ("Miranda") contracted with EWV to remove flood-damaged mobile homes from the park. The relationship between EWV and Miranda is governed by a two-page "Quit Claim Bill of Sale" (the "Contract"). After Miranda commenced an action against EWV, the District Court entered summary judgment in EWV's favor enforcing the terms of the Contract. Subsequently, the Court reversed itself and entered summary judgment that the *exact same contract* was illegal, illusory, and not supported by adequate consideration.

The Court's reversal was based entirely on the Court's misunderstanding of an argument EWV made in another case. The Court concluded that EWV made a judicial admission in the other case that it was unlawful to remove the flood-damaged mobile homes, and also concluded that EWV intended to mislead the

Court in the other case. Based on these disputed findings, the Court applied the principle of judicial estoppel to bar EWV from even arguing the Contract was legal. In spite of numerous requests, at no point in either proceeding did the Court hold an evidentiary hearing.

The Court's second summary judgment order constituted error by: (1) ignoring the applicable law which indisputably demonstrates the Contract could legally be performed when signed; (2) misapplying the law of judicial admission and judicial estoppel; (3) failing to view the evidence of the prior case in the manner most favorable to EWV; (4) failing to consider facts favorable to EWV and disregarding material fact disputes, including Miranda's affirmance of the parties' contract, expert witness testimony, and evidence that the parties' contract was legal and enforceable; and (5) failing to give EWV the benefit of every favorable inference. The second summary judgment order should be reversed, and the Court's first summary judgment order affirmed.

### **STATEMENT OF THE FACTS**

EWV owns the Eastwood Village Mobile Home Park ("Eastwood") in Evans, Colorado. R. CF., p. 3373 ¶ 3. On September 13, 2013, Eastwood was flooded. R. CF., p. 3221. The mobile homes in Eastwood were damaged by the flood and abandoned. Ultimately, it fell to EWV to have the mobile homes removed from the property. Supp. R. CF., p. 572 ¶ 2.

On April 15, 2014, Riverside Storage and Recycling Center, LLC ("Riverside") agreed to remove 34 mobile homes from Eastwood. R. CF., p. 3369. Thereafter, Miranda and his mother toured Eastwood and expressed interest in removing the mobile homes Riverside had not spoken for. R. CF., p. 3362 at 56:20-:25.<sup>1</sup> Miranda and his mother ultimately agreed to remove 64 mobile homes. R. CF., pp. 3366-67 at 84:11-85:6. On April 24, 2014, EWV and Miranda signed the Contract. R. CF., pp. 65-66.

In the Contract, EWV assigned Miranda all of EWV's rights in the mobile homes. *Id.* In exchange, Miranda did not pay EWV. Instead, Miranda agreed, "at [his] sole cost and expense, [to] remove the [mobile homes] from [EWV's] property on or before August 31, 2014." *Id.*

EWV disclaimed all warranties for the mobile homes, including of title, and Miranda "acknowledge[d] and agree[d]" that the mobile homes had suffered "extensive flood damage." *Id.* Miranda further agreed to accept the mobile homes "'as is' and 'where is', and 'with all faults.'" *Id.* Miranda also agreed that if he failed to remove all 64 mobile homes before August 31, 2014, he would indemnify EWV for all costs to remove those that remained.<sup>2</sup> *Id.*

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<sup>1</sup> Miranda's mother is a purported expert in "evaluating and rehabilitating mobile homes." R. CF., p. 731.

<sup>2</sup> The August 31, 2014 deadline for the removal of the mobile homes was required by the City of Evans. Supp. R. CF., p. 1214 ¶ 2.

Miranda did not begin work at Eastwood until June 2014, two months after signing the Contract. R. CF., p. 3514 at 53:2-55:11. Miranda admitted the *only thing* preventing him from starting work at Eastwood when he signed the Contract was his lack of preparation. *Id.* Ultimately, Miranda obtained moving permits from Weld County to remove 19 mobile homes from Eastwood before the August 31, 2014 deadline. R. CF., p. 3566 (Response to Interrogatory No. 9). City building officials toured Eastwood regularly while Miranda and Riverside removed the mobile homes, and they never raised any issue regarding the legality of the removal of the mobile homes. R. CF., p. 3506 at 106:10-107:2. Miranda remains in possession of those 19 mobile homes. R. CF., p. 967 at 113:4-8. Miranda failed to remove 45 mobile homes subject to the Contract. R. CF., p. 3129 at 105:5-13. EWV arranged for the removal of the 45 mobile homes that Miranda failed to remove. EWV incurred \$273,920 in costs to do so. R. CF., p. 653, ¶ 15, 272-92.

## **COURSE OF PROCEEDINGS AND DISPOSITION BELOW**

### **I. EWV files lawsuit to reopen Eastwood after the September 2013 flood.**

Prior to the September 2013 flood, Eastwood operated as an "existing manufactured home park," which was akin to status as a legally nonconforming use. R. CF., p. 3191. After the flood, the City declared Eastwood was no longer an existing manufactured home park and could not reopen. R. CF., p. 3373, ¶ 6-7. EWV filed suit against the City on December 16, 2013, seeking a declaration that

Eastwood remained an "existing manufactured home park" and could reopen (hereinafter "*EWV I*"). Supp. R. CF., p. 6, ¶ C. EWV later amended its complaint to add claims for inverse condemnation. R. CF., p. 3521. The City counterclaimed, alleging nuisance violations existed at Eastwood because the flood-damaged mobile homes had not been removed. R. CF., pp. 3530-31.

**II. The City claims that EWV "refused" to cleanup Eastwood after the flood.**

On May 9, 2014, the City moved for partial summary judgment on its nuisance claim. Supp. R. CF., p. 106. The City alleged "the destroyed mobile homes ... have not been cleaned up," and alleged that EWV "*refuses* to do anything to clean up the junk and trash that has accumulated on its property." Supp. R. CF., p. 109 (emphasis added). In opposition to the City's motion, EWV explained that while it had *previously* encountered barriers to removing the mobile homes from Eastwood, which explained why they were still on the property, those barriers were now gone and EWV was in the process of removing the homes. Supp. R. CF., p. 179-86. EWV submitted copies of contracts that it had entered into with Miranda, Riverside, and another contractor as proof of its cleanup efforts. Supp. R. CF., pp. 195-201.

### **III. The District Court denies the City's motion.**

The Court denied the City's motion for partial summary judgment. In its Order, the Court found that:

Through the affidavit of its managing member, Keith Cowan, EWV claims that it continues to cleanup Eastwood, but cannot cleanup a large portion of the manufactured homes because it does not hold title to those properties.

Supp. R. CF., p. 471. **This was not a correct statement of EWV's position.**

EWV had stated that it *previously* could not remove mobile homes to which it did not hold title. However, "[n]ow that so much time has passed," EWV and its contractors could get permits to remove the mobile homes. Supp. R. CF., p. 227 ¶ 11.

Neither party challenged the District Court's erroneous finding because it was not germane to the core issues in *EWV I*. Moreover, EWV and the City *agreed* that the mobile homes could lawfully be removed from Eastwood because they had been abandoned. R. CF., pp. 3542-43 at 48:23-49:2. Tellingly, once the mobile homes were removed and Eastwood was cleaned up the City voluntarily dismissed its nuisance claims. Supp. R. CF., pp. 572-73.

### **IV. Miranda files suit for EWV's alleged breach of the Contract.**

On October 9, 2014, Miranda, filed suit alleging claims based on misrepresentation as well as for breach of contract and other claims for relief. R.

CF., pp. 3-11. The Complaint confirmed the Contract was a valid and enforceable contract. R. CF., p. 9 ¶ 68.

Prior to any response, Plaintiffs amended the complaint by adding three statutory claims for relief. R. CF., pp. 21-32. The First Amended Complaint again alleged that the Contract was a valid and enforceable agreement. R. CF., pp. 27-28. Defendants answered the claim for breach of contract, filed their own counterclaim for breach of contract, and moved to dismiss all of Plaintiffs' other claims. R. CF., pp. 43-84.

Plaintiffs were granted permission to file another amended complaint. R. CF., p. 177. The Second Amended Complaint contained the same allegations confirming the Contract was a valid and enforceable agreement. R. CF., p. 133. Defendants again answered the claim for breach of contract, reasserted their counterclaims, and moved to dismiss all other claims. R. CF., p. 191-217.

Thereafter, the Court issued an order converting the motion to dismiss to a motion for summary judgment. R. CF., p. 251. The Court granted the motion (the "First Summary Judgment Order") and ruled the Contract was a valid contract. R. CF., pp. 461-68. "In exchange for EWV quitclaiming any 'right, title and interest' it had in 64 mobile homes, Miranda agreed to remove the mobile homes by August 31, 2014." R. CF., p. 452. "In his fifth claim for relief, Miranda alleges that a valid contract exists. Defendant EWV likewise alleges that a valid and enforceable

contract exists in its first counterclaim for relief. **It is therefore undisputed that a written contract exists.**" R. CF., p. 461 (emphasis added).

The Court ruled, "[u]nder these circumstances, where the only allegation of improper conduct is that Defendant EWV strictly enforced its rights under the contract with Miranda, I conclude that Plaintiffs' unjust enrichment claim fails as a matter of law." R. CF., p. 461. The Court rejected the misrepresentation claims based upon the Contract as well:

But it is undisputed that Miranda agreed he was buying the mobile homes "'as is' and 'where is', [sic] and 'with all faults.'" And it is undisputed that Miranda acknowledged that he "disclaim[ed] any and all express or implied warranties, including merchantability or fitness for a particular use or purpose."

...

Miranda acknowledged here that (1) he had an opportunity to independently inspect the mobile homes; (2) that Defendants were not making any express or implied promises that the mobile homes could be resold or used for any particular purpose; and (3) that he was not relying on any statements or representations made by Defendants to the contrary.

R. CF., p. 463. The Court further relied on the Contract to enter summary judgment against Plaintiffs under the economic loss rule. R. CF., p. 465.

Thereafter, Miranda submitted a Third Amended Complaint. R. CF., p. 476-83. Like his past three complaints, the Third Amended Complaint alleged that the Contract was a valid and enforceable agreement. R. CF., p. 480 ¶ 52. At this

point, Miranda's attorney filed a lien on the case and withdrew. R. CF., pp. 707-12.

**V. On the eve of trial, Miranda claimed, for the first time, that the Contract is invalid and unenforceable because EWV did not hold title to the mobile homes.**

Miranda retained replacement counsel who, on the eve of trial, moved to file the fifth version of the complaint in this case. R. CF., p. 914. It was at this point that Miranda's entire theory of the case changed.

Because the Court had already ruled that virtually all of Miranda's claims were barred by the terms of the Contract, Miranda sought to evade the contract. In his Fourth Amended Complaint, Miranda argued for the first time that the Contract was illegal and unenforceable because EWV did not hold title to the mobile homes at the time the Contract was executed. R. CF., p. 912 ¶ 56-57. In his prior complaints, replies to EWV's counterclaim, written discovery responses, and his own deposition, Miranda had *never* alleged or disclosed that EWV's lack of title to the mobile homes had *anything* to do with the Contract. In addition to moving to amend his complaint, Miranda moved for sanctions. Miranda alleged that EWV violated C.R.C.P. 26 by failing to disclose the affidavit of Keith Cowan (the "Cowan Affidavit") that EWV filed in *EWV I* to oppose the City's motion for partial summary judgment. R. CF., p. 1085.

The Court granted Miranda's sanctions motion (the "Sanctions Order") without holding any evidentiary hearings. R. CF., pp. 1928-47. The Sanctions Order is revealing and its impact on the rest of this case is undeniable. In the Sanctions Order, the Court held that EWV had an obligation under C.R.C.P. 26(a) to produce the Cowan Affidavit, even though it is a public document<sup>3</sup> and was only allegedly relevant to a legal theory that Miranda had never before alleged or disclosed. R. CF., pp. 1943-44. The Court then allowed Miranda to file an amended complaint (his sixth) and a dispositive motion based on the Cowan Affidavit. R. CF., pp. 1945-47. In the Sanctions Order, the Court gave Miranda a roadmap of claims and arguments to make:

The significance of these statements [in the Cowan Affidavit] to this case is that they appear to be judicial admissions by Cowan that, by the end of May 2014, EWV *did not hold title* to all but one of the mobile homes—which, presumably, would include the mobile homes promised to Miranda in April 2014—and that EWV was *prohibited by law* from removing these homes from its property, even it [sic] had given Miranda a deadline to remove them.

...

So Cowan's declarations appear to be judicial admissions that, at least by May 30, 2014, Miranda could not legally remove the mobile homes from EWV's property and that, instead, the mobile homes—the "personal property" described in the quitclaim bill of sale—had to be destroyed.

R. CF., pp. 1935-36.

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<sup>3</sup> See *Averyt v. Wal-Mart Stores, Inc.*, 265 P.3d 456, 460 (Colo. 2011) ("As a general rule . . . discovery is not required for public documents that are equally available to all parties.").

So I will give Miranda the opportunity [sic] amend his complaint based on the information in the affidavit, and then the opportunity to file dispositive motions. Miranda has 21 days from the date of the Order in which to amend his complaint. Should Miranda elect to amend his complaint, then he will also have the right to file dispositive motions based on his amended allegations and the Cowan affidavit.

R. CF., p. 1946.

Predictably, Miranda filed a Fifth Amended Complaint and a motion for summary judgment that mirrored the Sanctions Order. R. CF., pp. 2458-72, 3220-49. Miranda even cited the Sanctions Order for both *factual and legal support*, even though the Court never held an evidentiary hearing before issuing it. R. CF., pp. 3233-34.

The result was a foregone conclusion. The Court partially granted Miranda's motion for summary judgment (the "Second Summary Judgment Order"), finding that the Contract was illegal and void.<sup>4</sup> R. CF., pp. 3663-82. And although the Court had previously found that the parties *agreed* that the Contract was valid and enforceable, the Court alternatively held that the Contract was void as illusory and for lack of consideration. R. CF., p. 3669.

The connection between the Court's analysis in the Sanctions Order and its conclusions in the Second Summary Judgment Order is unmistakable. The

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<sup>4</sup> The Court only denied Miranda's motion with respect to claims that were not originally included in the Court's roadmap in the Sanctions Order. R. CF., pp. 3679-81.

contrast between the Court's First and Second Summary Judgment Orders also could not be starker. Whereas the First Summary Judgment Order enforced the parties' promises and extolled the virtues of the Contract's disclaimers, the Second Summary Judgment Order questioned EWV's motives and disparaged the terms of the parties' voluntary contractual agreement. In total, in the span of 19 months between the First and Second Summary Judgment Orders, the Court went from holding that there was no genuine dispute of material fact that the Contract was a valid and enforceable agreement, which barred nearly all of Miranda's claims, to holding on two alternative grounds *that the exact opposite was true*.<sup>5</sup> In those 19 months the Court refused to hold an evidentiary hearing.

On April 7, 2017, the District Court granted Appellants motion to enter final judgment on the claims subject to the second summary judgment order, and certified the second summary judgment order as a final order for purposes of appeal. R. CF., pp. 3756-57. Appellants timely filed this notice of appeal. R. CF., p. 3758.

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<sup>5</sup> The First Summary Judgment Order is located at R. CF., pp. 461-68. The Sanctions Order is located at R. CF., pp. 1928-47. The Second Summary Judgment Order is located at R. CF. pp. 3663-82. The Cowan Affidavit, on which the District Court based its Sanctions Order and the Second Summary Judgment Order, is available at Supp. R., pp. 226-28. The Contract is located at R. CF., pp. 3166-67.

## **SUMMARY OF ARGUMENT**

The Court erred in concluding that the Contract was unenforceable. The Court misunderstood EWV's argument in *EWV I* and, as a direct result of that misunderstanding, failed to consider evidence that EWV's positions in both cases were consistent and that it was lawful to remove mobile homes from Eastwood when the Contract was signed. The Court also disregarded evidence of consideration and Miranda's ratification of the Contract which would eliminate his power to avoid the contract. The Court further erred in its interpretation and application of the doctrines of judicial admissions and judicial estoppel and of Colorado statutes. Above all, the Court made numerous findings of disputed fact and it failed to view the evidence in the light most favorable to Appellants and draw all reasonable inferences in their favor.

Reading the First Summary Judgment Order against both the Sanctions Order and the Second Summary Judgment Order is illuminating. It shows that the Court did not adhere to the standard of review for motions under C.R.C.P. 56. Moreover, it demonstrates that the Second Summary Judgment Order was a product of conclusions the Court had already reached when it decided to enter sanctions against EWV. Accordingly, this Court should reverse the Second Summary Judgment Order and remand this case with instructions for reassignment to a new judicial officer to reinstate the First Summary Judgment Order.

## ARGUMENT

### **I. The Contract is a valid and legal contract because the mobile homes had been abandoned on EWV's property.**

#### **A. Standard of Review**

The Court of Appeals "reviews a trial court's order on a summary judgment motion de novo." *Gibbons v. Ludlow*, 2013 CO 49, ¶ 11.

#### **B. Preservation**

This issue was preserved in the proceedings below. R. CF., p. 3606.

#### **C. Argument**

To form a valid contract, there must be an accepted offer that is supported by consideration. *See, e.g., Kovac v. Farmers Ins. Exch.*, 2017 COA 7M, ¶ 23, *as modified on denial of reh'g* (Feb. 23, 2017). In the Contract, EWV agreed to "convey[], release[] and forever quit claim[]" to Miranda its "right, title and interest" in the homes without a cash payment from Miranda. R. CF., pp. 65-66. In exchange, Miranda agreed to remove the mobile homes that he selected from Eastwood by August 31, 2014 at his own cost. *Id.*

These promises were supported by consideration. A signed agreement is presumed to be supported by adequate consideration. *Grant v. Oten*, 626 P.2d 764, 766 (Colo. App. 1981). If this presumption is rebutted with evidence of no consideration, whether there is consideration is "a question of fact for the trier of fact." *Id.* The Colorado Supreme Court "has long held that any benefit to a

promisor or any detriment to a promisee at the time of the contract—no matter how slight—constitutes adequate consideration." *Lucht's Concrete Pumping, Inc. v. Horner*, 255 P.3d 1058, 1061 (Colo. 2011). "Except in extreme circumstances, such as those involving allegations of unconscionability, a court should not judge or attempt to assess the adequacy of the consideration." *Id.*

The mobile homes had been abandoned on EWV's property. As property owner, EWV held the right to obtain a title to the abandoned mobile homes by posting a bond. *See* C.R.S. § 38-29-119. On account of the Contract, Miranda now stood in EWV's shoes and could obtain titles through the bonding procedure in C.R.S. § 38-29-119. In addition, Miranda testified that the mobile homes had scrap value. R. CF., p. 3121 at 72:24-75:7. Thus, the Contract had consideration, and it is a valid and enforceable agreement as a matter of law. *Id.* (court "need only find some consideration, regardless of its relative value" to be sufficient).

The Court previously reached this same conclusion. In its First Summary Judgment Order, the Court held it was "undisputed that a written contract exists." R. CF., p. 461. The Court's holding was based on the terms of the Contract as well as Miranda's pleadings, which confirm the existence of a valid agreement. In each of the first five versions of the complaint, Miranda alleged the Contract was valid. *See* Section IV. Indeed, in Third Amended Complaint, after dismissing his claim for premises liability, *Miranda only alleged claims for breach of contract.* R. CF.,

pp. 476-83 (Third Amend. Compl.); 713-14 (Stipulation Dismissing Premises Liability Claim). He claimed that EWV breached the Contract by interfering with his removal of mobile homes from Eastwood, and he was owed \$2,520,601.42 in compensatory damages. R. CF., pp. 732-33. Miranda's actions also reflect the existence of a valid agreement. Miranda performed by removing 19 mobile homes from Eastwood. R. CF., p. 3129 at 105:5-:7. Miranda remains in possession of those mobile homes. R. CF., p. 967 at 113:4-:8.

Accordingly, there is no genuine dispute of any material fact that the Contract is a valid and enforceable agreement. The Second Summary Judgment Order should be reversed, and the First Summary Judgment Order should be reinstated.

**II. The Court erred in concluding that the Contract was void because it had an "illegal purpose."**

**A. Standard of Review**

The Court of Appeals "reviews a trial court's order on a summary judgment motion de novo." *Gibbons*, 2013 CO 49, ¶ 11.

**B. Preservation**

This issue was preserved in the proceedings below. R. CF., pp. 3606-18.

**C. Argument**

The Court erred when it concluded that the Contract was void because it had an "illegal purpose." To reach this conclusion, the Court erroneously relied on the

alleged judicial admissions of EWV and its managing member, Keith Cowan. Under Colorado law, a party cannot judicially admit a proposition of law. Moreover, even if EWV's and Cowan's statements could be judicial admissions of law, the Court misconstrued the statements and positions in *EWV I*. Finally, the Court erred by disregarding disputed facts and failing to give EWV the benefit of every favorable inference.

**1. The Court erred in applying the doctrine of judicial admissions because EWV cannot judicially admit a proposition of law.**

The Court relied on purported judicial admissions of EWV and Mr. Cowan to find that it was unlawful for Miranda to remove mobile homes from Eastwood. This was erroneous because "[t]he judicial admissions doctrine . . . does not apply to propositions of law." *Miller v. Brannon*, 207 P.3d 923, 929 (Colo. App. 2009); *see also Guidry v. Sheet Metal Workers Int'l Ass'n, Local No. 9*, 10 F.3d 700, 716 (10th Cir. 1993), *abrogated in part on other grounds on reh'g*, 39 F.3d 1078 n.3 (1994) (en banc) ("Because the matter . . . was admitted [as] a proposition of law, the doctrine of judicial admission is not applicable.").

Whether mobile homes could lawfully be removed from Eastwood is a proposition of law, not of fact. There was no dispute about whether it was *physically possible* to remove mobile homes from Eastwood (a fact); rather, Miranda alleged and the Court found that EWV admitted that it was *legally*

*impossible* to do so because EWV did not hold title to the mobile homes. EWV cannot make an act unlawful through its own statements. Rather, the Court was required to engage in an independent analysis of applicable authorities to determine whether it was lawful to remove mobile homes from Eastwood on April 24, 2014, which the Court did not do. The Court did not do so because there is no authority that supports the proposition. Accordingly, the Court's reliance on EWV's and Cowan's purported judicial admissions was an erroneous application of Colorado law that should be reversed.

**2. Under City of Evans Municipal Code, it was lawful for Miranda to remove mobile homes from Eastwood because they had been abandoned.**

**a. There is no genuine dispute of material fact that Miranda lawfully removed 19 mobile homes from Eastwood.**

It was lawful for EWV to contract with Miranda for the removal of mobile homes from Eastwood on April 24, 2014 because the mobile homes had been abandoned, and it was erroneous for the Court to void the Contract.

Evans Municipal Code Sections 19.22.020(A) and 19.22.030(C) provide three key guideposts for this analysis. R. CF., p. 3191. First, Code Section 19.22.020(A) defines an abandoned mobile home as one "that is cited under the abatement of Dangerous Building Code with a notice and order and is not brought into compliance with the building code within thirty-days' notice of

said violation." *Id.* Second, under Code Section 19.22.030(C), a landowner like EWV has 120 days after abandonment in which it must make "reasonable attempts" to obtain title to the abandoned mobile homes from their prior owners. Third, following expiration of the 120 day period, a mobile home park owner has a 30-day safe harbor to "contract[] with a mover to remove the home from the park." *Id.* By contracting for the removal of the homes during this 30-day period, the park owner "shall not be liable for any penalties." *Id.* (emphasis added).<sup>6</sup>

These provisions guided EWV's actions in *EWV I* and demonstrate why the Contract has a "lawful purpose." Eastwood flooded in September 2013. On December 16, 2013, the City issued a Notice of Violation ("NOV") to EWV for its alleged failure to remove the mobile homes from Eastwood. R. CF., p. 3099. On January 23, 2014, EWV's counsel responded to the NOV. R. CF., p. 3387. EWV stated its belief that it could not remove the homes until it obtained authority to do so. *Id.* This position was consistent with the City's understanding after the flood that only the title holder of the mobile homes could remove them from Eastwood. R. CF., p. 3378. EWV sought to circumvent this requirement, and expedite the removal process, by requesting "abandonment permits" from the City, which

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<sup>6</sup> Code Section 19.22.030(C) refers to when a park owner obtains title to a manufactured home during the 120 day period. It is silent about a park owner's rights if he does not do so. A reasonable inference drawn from this silence, and one followed by EWV, is that the park owner has 30 days after the 120 day period expires to contract for the removal of the homes.

would give EWV the legal authority to remove the mobile homes before the 120 day period had run. Supp. R., p. 227 ¶ 9. The City denied EWV's requests. *Id.*

Accordingly, EWV had to wait until the mobile homes were abandoned by operation of law. Supp. R. CF., p. 227 ¶ 11. It was EWV's good faith understanding that the NOV date (December 16, 2013) commenced the 120 day abandonment period under City Code. R. CF., p. 3594. The 120 day abandonment period expired on April 15, 2014, and the 30-day safe harbor under Code Section 19.22.030(C) commenced. **At this point, EWV could lawfully contract for the removal of the mobile homes.** Nine days later, on April 24, 2014, EWV contracted with Miranda. R. CF., pp. 3166-67. EWV also contracted with Riverside and another individual to remove mobile homes from Eastwood. R. CF., pp. 2315-19. Together, these three contracts provided for the removal of every abandoned mobile home in Eastwood.

Based on these undisputed facts, the mobile homes had been abandoned under City Code and it was lawful for EWV to contract with Miranda to remove them from Eastwood. Indeed, under City Code Section 19.22.030(C), EWV's contracts relieved it of liability for "any penalties." Moreover, neither the Court nor Miranda has identified any statute, regulation or ordinance preventing EWV from contracting to remove the mobile homes from its property once they were abandoned.

All evidence in this case supports the lawfulness of the Contract. Miranda obtained moving permits from Weld County. R. CF., pp. 1969-2230. Riverside did the same. R. CF., pp. 3599-3600. It was inherently lawful for Miranda and Riverside to remove mobile homes from Eastwood when they obtained permits from Weld County to do so. Miranda also admitted in his deposition that the only barrier to him performing under the Contract was his lack of preparations; *nothing else* stood in his way. R. CF., p. 952 at 54:20-55:11. Craig Shriver of Riverside also testified that it was legal and possible to remove mobile homes from Eastwood once they were abandoned even if he or EWV did not hold title to them. R. CF., p. 1896 at 104:16-20. Even the City of Evans City Attorney, in a deposition of Cowan, stated that mobile homes that had been abandoned by the passage of time could be removed from Eastwood. *See* R. CF., pp. 3542-43 at 48:23-49:2. Thus, Weld County, through the issuance of permits, the City of Evans Attorney, Miranda and Shriver all *agree* that it was lawful to remove mobile homes from Eastwood after April 15, 2014.

This evidence establishes that it was lawful to remove mobile homes from Eastwood when the Contract was signed, and the Contract did not have an "illegal purpose" as a matter of law. At a minimum, summary judgment must be reversed because the Court erred by failing to consider this evidence of legality in the Second Summary Judgment Order.

**b. The Court erred in its interpretation of EWV's arguments in *EWV I*.**

EWV never stated that it was illegal for Miranda to remove mobile homes from Eastwood. In reaching this erroneous conclusion, the Court failed to consider the timeline of events outlined above, which provide context for the Cowan Affidavit and EWV's response to the City's partial motion for summary judgment.

In the Cowan Affidavit, Mr. Cowan stated that the "remaining manufactured homes have not presently been removed because EWV was prohibited by law from removing homes to which it did not hold title." Supp. R. CF., p. 227 ¶ 6. (emphasis added). Notably, Mr. Cowan referred to the homes in the present tense (that they "have not presently been removed") but refers to the reason why they could not be removed in the *past tense* (EWV "**was**" prohibited from removing them). This is a clear indication that EWV had *previously* been prohibited from removing the mobile homes to which it did not have title *but that was no longer the case*. Cowan explained what changed: "[n]ow that so much time has passed since the destruction and abandonment of the manufactured homes," which is a reference to the 120 day abandonment period in City Code, EWV and its contractors could obtain permits for the removal of homes to which EWV did not have title. Supp. R. CF, p. 227 ¶ 11.

Cowan continued: "EWV has entered into contracts for the removal of the homes when legally possible. At this point, EWV and/or the parties removing the

manufactured homes are awaiting the approval of Weld County to be allowed to destroy or remove the homes." Supp. R. CF., p. 227 ¶10-11. This approval came in the form of permits to move or destroy the mobile homes. R. CF., p. 3504 at 88:16-:21. Thus, the Cowan Affidavit states that the only barrier to removal was county permits—not titles—and Weld County could now issue those permits. The City did not dispute EWV's claim. In fact, the City Attorney agreed that abandoned mobile homes could be removed from Eastwood. R. CF., pp. 3542-43 at 48:23-49:4.

In denying the City's partial summary judgment motion in *EWV I*, the Court misconstrued EWV's position. This confusion continued into this case, where the Court erroneously held that EWV had taken the position that it was unlawful to remove mobile homes to which EWV did not hold title in May of 2014. For the reasons above, that is not what EWV said in *EWV I* and the Court erred in its analysis of EWV's position.

Further, in the Second Summary Judgment Order, the Court erred by holding that the Contract was invalid because EWV did not hold permits to remove the mobile homes when the Contract was signed. It was lawful and possible for Weld County to issue the permits once the homes had been abandoned. Supp. R. CF., p. 227 ¶ 11. Thus, Miranda was capable of obtaining the necessary permits to remove mobile homes, and it is undisputed that he obtained 19 permits. There is

no legal authority requiring EWV to get moving permits before entering into a contract to have the mobile homes removed.

This situation is similar to a contract to remodel a house. The contractor and homeowner enter into an agreement for the remodeling work, which will require building permits. The parties agree that if the remodel is not completed by a given date, the contractor will suffer penalties. This contract is perfectly legal at the time it is signed, even though the contractor cannot lawfully start performing the work until he obtains permits, because the contractor is *able to get* the permits.

In sum, the Court erred in its analysis of EWV's arguments in *EWV I*. Neither EWV nor Cowan ever stated that it was unlawful to remove mobile homes from Eastwood when the Contract was signed. Therefore, it was erroneous for the Court to void the Contract as an illegal contract based on EWV's arguments in *EWV I*.

**3. The Court erred in holding that EWV was judicially estopped from claiming that the Contract was valid and enforceable.**

Under Colorado law, the party advancing the principle of judicial estoppel must prove, among other elements, that a party has taken inconsistent positions in different cases and the inconsistency is part of an intentional effort to mislead the court. *Estate of Burford v. Burford*, 935 P.2d 943, 948 (Colo. 1997). The two

positions must be "totally inconsistent-that is, the truth of one position must necessarily preclude the truth of the other." *Id.*

The Court erred in applying the doctrine of judicial estoppel against Appellants for three reasons. First, judicial estoppel does not apply to propositions of law. Second, even if judicial estoppel applies, the Court erred in its analysis of Appellants' prior and current positions. Finally, the District Court disregarded genuine disputes of material fact regarding Appellants' prior positions and whether they intended to mislead the Court.

**a. Judicial estoppel does not apply to propositions of law.**

The judicial estoppel "doctrine normally applies to inconsistent factual positions rather than legal positions: '[T]he position to be estopped must be one of fact rather than law or legal theory.'" *Arko v. People*, 183 P.3d 555, 560 (Colo. 2008) (quoting *Lowery v. Stovall*, 92 F.3d 219, 224 (4th Cir. 1996)). Indeed, this Court has refused to apply judicial estoppel to propositions of law, such as jurisdiction, because only a court may determine what the law is. *See Hall v. Am. Standard Ins. Co. of Wis.*, 2012 COA 201, ¶ 24 ("[P]ositions taken by the parties are not determinative" of jurisdictional issue "because the parties cannot confer jurisdiction on this court."); *c.f. People v. Shell*, 148 P.3d 162, 175 (Colo. 2006)

(holding unlicensed individual to "previous acknowledgement that a power of attorney is not a proxy for a law license").

Here, the Court "held" EWV to its purported prior position that it was unlawful for mobile homes to be removed from Eastwood. This was erroneous because the doctrine of judicial estoppel does not apply to propositions of law.

**b. EWV has not taken inconsistent positions.**

The Court also erred when it concluded that EWV took inconsistent positions in *EWV I* and this litigation. *See* Section II, 2, b, *supra*. At a minimum, genuine disputes of material fact preclude the entry of summary judgment. For instance, EWV, through Keith Cowan, has given consistent deposition testimony in *EWV I* and this case. In *EWV I*, Mr. Cowan agreed with the City's position that "after a period of time," a landowner where a mobile home has been abandoned can remove the mobile home. R. CF., p. 3542 at 48:23 – 49:4. Mr. Cowan also testified that EWV entered into contracts for the removal of mobile homes as soon as he believed the abandonment period had expired. R. CF., p. 3546 at 106:21 – 107:18. During his deposition in the present case, Mr. Cowan stated the mobile "homes had been abandoned" and "EWV has the right to get them off the property" because of the "[t]ime frame" after the flood. R. CF., p. 3261 at 100:1-:15.

Mr. Cowan's deposition testimony is evidence of consistency in EWV's positions, which raises a fact dispute that cannot be resolved against the Appellants

on summary judgment. Moreover, it is reasonable to infer that Cowan submitted copies of contracts, including the Contract, to the Court in the Cowan Affidavit because Cowan believed they were lawful agreements. *See* R. CF., pp. 2315-19. Why would Cowan submit contracts to a District Court if he was taking the position, as required under judicial estoppel, that they were *illegal*? In the Second Summary Judgment Order, the Court failed to consider this evidence or draw every reasonable inference from the evidence in Appellants' favor. *See, e.g., People In Interest of S.N. v. S.N.*, 2014 CO 64, ¶ 15-16 (summary judgment standard). As a result, the Second Summary Judgment Order should be reversed.

**c. The Court's finding that EWV intentionally misled the Court is not supported by the evidence.**

To be judicially estopped, a party must take an inconsistent position that is "part of an intentional effort to mislead the court." *Estate of Burford*, 935 P.2d at 948. Intent is a fact-dependent inquiry that is inappropriate for summary judgment. *See Gulf Ins. Co. v. State*, 607 P.2d 1016, 1019 (Colo. App. 1979) ("Generally, issues relative to a party's intent may not be resolved by summary judgment."); *Grimm Const. Co., Inc. v. Denver Bd. of Water Comm'rs*, 835 P.2d 599, 602 (Colo. App. 1992) ("[T]he issue of a party's intent is a question of fact and is generally not appropriate for summary disposition.").

The Court erred when it concluded that there was no genuine dispute that EWV and Mr. Cowan intended to mislead the court. First, the Court stated that "**I cannot tell if Cowan and EWV's lawyers were trying to mislead the court** in the Evans litigation by asserting that EWV did not hold title to any of the mobile homes—knowing full well that Cowan did hold title to some of the homes." R. CF., p. 3673 (emphasis added). This is an explicit acknowledgement that the record was insufficient to establish an essential element of judicial estoppel, which precludes the entry of summary judgment.

Second, the Court reached its damning conclusion against EWV, Cowan, and their counsel regarding a fact-intensive issue such as their intent without an evidentiary hearing in *EWV I* or the proceedings below. The Court determined Cowan was personally trying to deceive the Court, yet he never allowed a word of testimony from Cowan himself. For the Court to reach this conclusion on the present record is erroneous.

Third, the Court erred in disregarding conflicting evidence of EWV's and Cowan's intent. As set forth above, the record is replete with evidence that EWV took consistent positions in *EWV I* and these proceedings. In light of that evidence and the lengthy and complex proceedings in *EWV I* and this matter, the need for an evidentiary hearing could not have been greater. *EWV I* and this case span nearly four years. The cases relate to issues as diverse as inverse condemnation, flooding,

nuisance law, due process, and contracts. A reasonable fact finder could conclude that even if there was any inconsistency in EWV's and Cowan's positions, it is attributable to new facts coming to light or a new understanding of applicable legal authorities, and not their intent to mislead. The Court erred in failing to give Appellants' the benefit of this inference on summary judgment. For these reasons, the Court's finding on judicial estoppel must be reversed.

### **III. EWV was not required to transfer title to mobile homes that were abandoned by operation of law.**

#### **A. Standard of Review**

The Court of Appeals reviews a district court's interpretation of statute *de novo*. *Sherritt v. Rocky Mountain Fire Dist.*, 205 P.3d 544, 545 (Colo. App. 2009).

#### **B. Preservation**

This issue was preserved in the proceedings below. R. CF., p. 3610.

#### **C. Argument**

The Court alternatively held that the Contract was invalid "because it violated the statutory requirements of [C.R.S.] § 38-29-106." R. CF., p. 3675. The Court's holding was erroneous because C.R.S. § 38-29-106 does not apply to a landowner contracting for the removal of abandoned mobile homes from its property.

**1. Landowners are not required to transfer title to mobile homes when the landowner does not hold title to the mobile home.**

C.R.S. § 38-29-106 provides, in relevant part, that "no person shall sell or otherwise transfer a manufactured home to a purchaser or transferee thereof without delivering to such purchaser or transferee the certificate of title to such home, duly transferred in the manner prescribed in section 38-29-112." In turn, C.R.S. § 38-29-112 provides that "[u]pon the sale or transfer of a manufactured home for which a certificate of title has been issued, **the person in whose name said certificate of title is registered**, ... shall, in his own person or by his duly authorized agent or attorney, execute a formal transfer of the home described in the certificate . . . ." C.R.S. § 38-29-112 (emphasis added).

By their plain terms, Sections 106 and 112 only require that "the person in whose name [the] certificate of title is registered" transfer a certificate of title to a purchaser or transferee. These provisions do not apply to landowners, like EWV, who possess mobile homes because they have been abandoned and the certificates of title are lost, missing or have not been transferred to the landowner. *See Pinnacol Assurance v. Hoff*, 2016 CO 53, ¶ 48 ("We construe the legislature's failure to include particular language not as an oversight, but as a deliberate omission reflecting legislative intent."); *Sherritt*, 205 P.3d at 545 (courts "are not at

liberty to read additional terms into, or to modify, the plain language of a statute.") (quotation omitted).

Rather, C.R.S. § 38-29-119 expressly addresses this circumstance. It provides that when a certificate of title is lost or missing, a new owner of a manufactured home can obtain a certificate of title by producing "**a bill of sale thereto**, or other evidence of the ownership thereof that satisfies the director of the right of the applicant to have a certificate of title issued to him or her." C.R.S. § 38-29-119(1) (emphasis added). Based on this plain language, a "bill of sale" is a proper and legal means of conveying and evidencing ownership of a manufactured home in circumstances, like this case, where the certificate of title is lost or missing. Thus, under C.R.S. § 38-29-119, the Contract was a lawful agreement, and the District Court erred in holding that the Contract violated Colorado law.

**2. The Court erred by disregarding material facts concerning its interpretation of C.R.S. § 38-29-106.**

The District Court erred by failing to consider expert testimony that its interpretation of C.R.S. § 38-29-106 is inconsistent with the statute's real-world application and that it would have draconian effects. *See Trappers Lake Lodge & Resort, LLC v. Colorado Dep't of Revenue*, 179 P.3d 198, 199–200 (Colo. App. 2007) (if statutory provisions "are ambiguous or unclear, such that the words chosen do not inexorably lead to a single result, [courts] may consider, among

other things, the legislative declaration, the object sought to be attained, and the consequences of a particular construction.") (quotations omitted).

Craig Shriver, an expert in mobile home removal, installation, refurbishing and demolition, and the managing member of Riverside, testified that lack of title to a mobile home, once abandoned, had nothing to do with his ability to remove mobile homes from Eastwood. R. CF., p. 3505 at 104:16-:25. He also testified that he *regularly* contracts with mobile home park owners to remove abandoned mobile homes for which the park owner does not have title. *Id.* R. CF., p. 3507 at 110:17-112:7; 3509 at 135:10-136:13. In those cases, after he removes the home, he follows the statutory procedure in C.R.S. § 38-29-119 to obtain a new title. R. CF., p. 3503 at 38:11-39:6; p. 3507 at 111:8-112:7. In fact, he often removes the abandoned mobile home, places it in his storage facility, and waits to obtain a new title until he places it in a new location because mobile homes are titled in the county in which they are placed. R. CF., p. 3508 at 129:6-130:17.

The Court erred by failing to consider any of Mr. Shriver's testimony (indeed, Mr. Shriver's name does not even appear in the Second Summary Judgment Order). The District Court's interpretation of C.R.S. § 38-29-106 would impose onerous new requirements on landowners and others in the mobile home industry, and the Second Summary Judgment Order should be reversed so the

District Court can conduct further fact finding on the application C.R.S. § 38-29-106 before such draconian effects are imposed.

#### **IV. The Court erred in concluding that the Contract was voidable.**

##### **A. Standard of Review**

The Court of Appeals "reviews a trial court's order on a summary judgment motion de novo." *Gibbons*, 2013 CO 49, ¶ 11.

##### **B. Preservation**

This issue was preserved in the proceedings below. R. CF., pp. 3618-22.

##### **C. Argument**

The Court alternatively held that the Contract was voidable because it lacked consideration and was illusory. The Court erred by failing to consider evidence of consideration and Miranda's affirmance of the parties' agreement.

#### **1. The Contract did not lack consideration and was not illusory as a matter of law.**

As set forth in Section I(C) above, there is no genuine dispute that the Contract was supported by adequate consideration because EWV assigned its rights in the mobile homes to Miranda, the homes had scrap value, and Miranda remains in possession of 19 homes. At a minimum, the Court erred in failing to consider evidence of consideration that raises a genuine dispute for trial. *Grant*, 626 P.2d at 766 ("[I]he issue of whether there was valid consideration becomes a question of fact for the trier of fact."). Moreover, the Court erred in reviewing the

adequacy of the consideration based on the status of the parties *after* the Contract had been executed. "Consideration is not to be measured in the light of the eventual success or failure under a contract but rather consideration is measured as of the time of making the contract." *W. Fed. Sav. & Loan Ass'n of Denver v. Nat'l Homes Corp.*, 445 P.2d 892, 897–98 (Colo. 1968).

The Court also erred in concluding that EWV had no obligations under the Contract. EWV promised to and did give all of its right, title, and interest in the mobile homes to Miranda. Under the agreement, EWV could not (for instance) later return and claim a right to the homes or take scrap from them. Further, EWV could not prevent Miranda from removing the mobile homes that were listed in the Contract. Miranda has asserted a claim for breach of contract against EWV, and is seeking \$2.5 million in compensatory damages, which is an admission that EWV had some obligation under the Contract that it allegedly breached. Finally, the Contract is not illusory merely because EWV disclaimed warranties of habitability and of title. Miranda accepted the risk associated with taking the mobile homes "as is" and "with all faults" when he agreed to the Contract without paying EWV any money.

**2. The Court disregarded evidence that Miranda affirmed the Contract.**

A contract that lacks consideration or is illusory is voidable, as opposed to void. "[A] voidable document is operative until it is set aside by a court." *In re*

*Estate of Foiles*, 2014 COA 104, ¶ 25. "If a party, having the right to rescind a contract, does any act which amounts to an admission of the existence of the contract, he cannot afterwards elect to treat it as void." *Wark v. Bopp*, 199 P.2d 892, 894 (Colo. 1948). Whether a voidable contract has been affirmed is a question of fact. *See Olson v. Dev. Properties, Inc.*, 515 P.2d 1140, 1141 (Colo. App. 1973) (reversing summary judgment because whether plaintiff ratified voidable contract "should be determined by the trier of fact after a full hearing on the issues presented.").

The Court erred by holding that the Contract was void because there is evidence that Miranda affirmed the Contract and lost his power of avoidance. First, bringing suit for breach of contract is an affirmation of the contract, "for clearly one who seeks damages for the breach of a covenant of a given contract of necessity must have elected to consider and treat the contract as of full force and effect." *Halm v. Wright*, 168 P. 36, 37–38 (Colo. 1917); *Gerbaz v. Hulsey*, 288 P.2d 357, 359 (Colo. 1955) (plaintiff "could not affirm and at the same time disaffirm the contract."). Miranda filed five consecutive complaints in this case and in each of them he sought to enforce the terms of the Contract. *See* Section IV. Indeed, his Third Amended Complaint *only contained claims for breach of contract*. R. CF., pp. 476-83; 713-14. Thus, Miranda affirmed the contract by his pleadings in this action, and he cannot now rescind it.

Second, if a party:

having the right to rescind a contract, does any act which amounts to an admission of the existence of the contract, he cannot afterwards elect to treat it as void. . . . If he be silent, and continue to treat the property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract, as if the mistake or fraud had not occurred. He is not permitted to play fast and loose. Delay and vacillation are fatal to the right which had before subsisted.

*Wark*, 199 P.2d at 894. Here, by the plain terms of the Contract, Miranda was aware that EWV did not hold title to the mobile homes and that EWV was not warranting title to them. R. CF., p. 534. Nevertheless, he performed and treated the Contract as valid by removing mobile homes from Eastwood, and he remains in possession of the homes he removed. He cannot now claim the Contract is avoidable for lack of consideration on the grounds that EWV lacked title. *See id.*; *Jones v. Dressel*, 623 P.2d 370, 374 (Colo. 1981) (minor affirmed avoidable agreement "by accepting the benefits of the contract"); *Emley v. Tenenbone*, 255 P. 627, 628 (Colo. 1927) (defendant's performance, and acceptance of performance from plaintiff, was ratification of voidable contract); *Ponder v. Altura Farms Co.*, 143 P. 570, 572 (Colo. 1914) (same).

At a minimum, whether Miranda was aware of the alleged defects in the Contract that he now claims render it voidable and whether he timely exercised his right to avoidance are fact questions that cannot be resolved on summary judgment.

**V. The Court of Appeals should reverse the Order and remand with instructions to reassign this matter to a different judge.**

It is within the inherent authority of this Court to reassign a matter on remand. *See* C.R.S. § 13-4-102(3) ("The court of appeals shall have authority to issue any writs, directives, orders, and mandates necessary to the determination of cases within its jurisdiction."); *Mitchell v. Maynard*, 80 F.3d 1433, 1448 (10th Cir. 1996) (citing federal enabling statute as authority for authorization to reassign case to different district court judge). Reassignment is necessary because Appellants will be unable to receive a fair and unbiased determination of disputed issues in light of the District Court's (Hon. Todd Taylor) findings in the Sanctions Order and Second Summary Judgment Order. For instance, in the Second Summary Judgment Order the Court found, without testimony, that it was an *undisputed fact* that EWV and Cowan intentionally misled the Court. The Court also inferred that EWV's counsel acted maliciously in their representation of EWV and Cowan in *EWV I* and this litigation. Without a reassignment, if this issue is remanded for an evidentiary hearing, Appellants will face a tribunal that has predetermined the issue. Even as to other factual disputes on remand, Appellants cannot reasonably expect a fair hearing when the Court has already determined that Appellants intentionally set out to mislead him.

The Court also appears to have tipped the scales against Appellants on legal issues. For instance, in the First Summary Judgment Order, the Court held that

Miranda's claim under the Colorado Consumer Protection Act ("CCPA") was barred because he alleged a "purely private wrong." R. CF., pp. 456-459. The Court held, "even after giving the Plaintiffs the benefit of all favorable inferences supported by the undisputed facts, no basis exists to conclude that the alleged misrepresentations [regarding the mobile homes] were made to anyone other than Plaintiffs." *Id.* The Court also held it was "undisputed that Defendants offered the damaged mobile homes in the context of the unique circumstances of the 2013 flood—not in the usual course of business," which precludes a CCPA claim. *Id.* at 8. Yet, in the Second Summary Judgment Order, *the Court allowed Miranda to reassert a CCPA claim.* The Court explicitly found that a "genuine dispute exists as to the nature and extent of [EWV's] alleged misrepresentations . . . [and] about the potential public impact" of them. R. CF., p. 3681. Between the two orders, not one new bit of evidence was presented on this issue. The only reasonable explanation for these two diametrically opposed findings is the Court's new disposition toward Appellants.

Under C.R.C.P. 97 and the Canons of Judicial Conduct, District Court judges must be disqualified when they have actual bias or the appearance of bias toward a party. Specifically, a judge shall be disqualified "in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to [when] [t]he judge has a personal bias or prejudice concerning a party or

a party's lawyer." CJC 2.11(A)(1). There can be little question that Judge Taylor has expressed a personal bias or prejudice toward EWV, Cowan and their counsel, and his impartiality can reasonably be questioned. At a minimum, upon remand, Judge Taylor's prior findings as to Cowan's and his counsel's purported misdeeds will call into question the ability of Appellants to receive a fair and unbiased hearing. Accordingly, it is necessary and appropriate for this Court to exercise its inherent authority on remand to instruct the Chief Judge of the 19th Judicial District to reassign this matter to a different judicial officer.

### CONCLUSION

The District Court erred in entering summary judgment in Appellee's favor. The Second Summary Judgment Order should be reversed, and this case should be remanded with instructions to enter the First Summary Judgment Order enforcing the terms of the Contract. When remanded, this Court should order that it be reassigned to a different judicial officer.

STINSON LEONARD STREET LLP

*s/ Perry L. Glantz*

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Perry L. Glantz, #16869

**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that a true and correct copy of the foregoing was served on this 19th day of September 2017, by Colorado Courts E-filing on the following:

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