COURT OF APPEALS, STATE OF COLORADO Colorado State Judicial Building 2 E. 14th Ave Denver, CO 80203 DATE FILED: November 8, 2017 8:39 PM FILING ID: BFF63CEDB814E CASE NUMBER: 2017CA737	
Appeal from the District Court, CITY AND COUNTY OF Weld, COLORADO, Case No. 14CV30958, Div. 4 Honorable Judge Todd L. Taylor	
JOSE MIRANDA, an individual Plaintiff – Appellee, v. EWV, LLC, a Colorado Limited Liability Company; KEITH COWAN, an individual; LAURIE LECHUGA, an invidual Defendants – Appellants.	▲Court Use Only▲ Case Number: 2017CA737
Attorneys for Plaintiff- Appellee Joel A. Moritz, Esq. Joseph J. Novak, Esq. Moritz Law, LLC 3570 E. 12th Ave. Denver, CO 80206 Phone: (303)586-5004/(720)307-4023 Fax: (303)432-8887 Email: jmoritz@moritzlaw.net; jnovak@moritzlaw.net Atty. Reg. Nos. 9864; 41904	

PLAINTIFF/APPELLEE'S ANSWER BRIEF

Plaintiff/Appellee Jose Miranda ("**Miranda**"), by and through his undersigned counsel, Moritz Law, LLC, hereby submits his answer brief in support thereof states as follows:

CERTIFICATE OF COMPLIANCE

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

The brief complies with C.A.R. 28(g) because it contains 9,138 words,

The brief complies with C.A.R. 28(k) because it contains under a separate heading (1) a concise statement of the applicable standard of review with citation to authority; and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled.

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

s/ Joseph J. Novak
Counsel for Defendant/Appellant

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STATEMENT OF CASE

I. NATURE OF CASE

Defendant EWV, LLC ("**EWV**") fraudulently induced Plaintiff Jose Miranda to enter into a contract where EWV transferred its burden to clean its own property at the cost of hundreds of thousands of dollars to Mr. Miranda in exchange for nothing.

EWV owns a mobile home park located in Evans, Colorado that was flooded in 2013, resulting in complete destruction of all 157 mobile homes located on the property. Following the flood, the City of Evans designated the mobile homes as tier 1 material and ordered that they be removed and destroyed. However, in an effort to avoid paying the costs of cleaning its property, EWV represented to third parties that the mobile homes could be refurbished and resold. Relying on these representations, Miranda entered into a contract wherein EWV transferred its alleged rights in the abandoned mobile homes to Miranda in exchange for Miranda agreeing to remove the homes from the Property.

The "Contract", titled "Quit Claim Bill of Sale" sought to insulate EWV and its members from the inevitable fraud and misrepresentation claims by disclaiming any warranties and representations for the mobile homes. However, EWV had no rights in the abandoned mobile homes at the time the Contract was made (or any

time after), and therefore had nothing to offer in the Contract, thus making its promise illusory and in violation of the Manufactured Mobile Homes Act and the Evans City Code.

Moreover, EWV knew that it did not have proper titles for the homes, a necessary precondition to their removal. EWV successfully argued in a related piece of litigation that it was prevented from cleaning its property because the City of Evans allegedly refused to issue certificates of title for the abandoned mobile homes. Thus, the Contract was illegal by EWV's own admission because it required Mr. Miranda to remove mobile homes that he did not have title for.

The Defendants were sanctioned for their improper actions throughout the discovery process, including the withholding of an affidavit from Defendant Keith Cowan wherein he attested to the illegality of the Contract in the related piece of litigation. The trial court granted Miranda's Motion for Partial Summary Judgment in part, finding that the Contract was illegal, illusory and lacked consideration.

II. STATEMENT OF FACTS AND RELEVANT PROCEDURAL HISTORY

A. BACKGROUND FACTS

EWV owns Eastwood Village Mobile Home Park ("**Eastwood**"), located in Evans, Colorado. R. CF., p. 72 ¶ 10. On September 13, 2013, Eastwood was

struck by historic flooding that destroyed all 156 mobile homes located there. *Id.* The flood caused a complete shutdown of Eastwood. *Id.* at 3054-55.

Following the flood, the City of Evans ("**Evans**") requested a plan from EWV and its principal member, Keith Cowan ("**Cowan**," collectively with EWV, "**Defendants**"[1]) as to how they intended to clean up Eastwood. On Tuesday, September 24, 2013, Evans sent an email to Defendants informing Defendants that they needed "to let us know immediately your plans for removal of the homes from [Eastwood]." *Id*. at 1229. That email informed Defendants that the mobile "homes have been declared as non-habitable and slated for destruction." *Id.* at 1229-30.

On September 30, 2013, Defendants received an estimate for cleanup of Eastwood from a company called Professional Restoration, which estimated the cost to be approximately $692,248.19. *Id*. at 3089-90. Defendants did not hire Professional Restoration. *Id.* at 3066.

Around that same date, Evans sent a letter advising Defendants that the conditions at the Property violated the Municipal Code of the City of Evans. *Id*. at p. 3087. Evans sent a notice of violation to Defendants on December 16, 2013, requiring Defendants to take action by January 21, 2014. *Id*. at 3099.

On or about April 21, 2014, Defendants placed an internet advertisement offering the flood damaged mobile homes to anyone free of charge, as long as the

[1] There is a third defendant, Laurie Lechuga ("**Lechuga**"), who will be referred to separately.

homes were completely removed from Eastwood. *Id*. at 3101; 3083-84. The advertisement provided that "What you do with the home after you remove it from the site it is up to you and at your own risk." *Id*. at 3101. The advertisement did *not* include any reference to Evans' order of "the demolition of and removal of all structures." *Id*. at 3101, 3087, 3099

In reliance on representations made by Lechuga, one of Defendant EWV's employees, which were consistent with the Craig's List Advertisement Miranda entered into an alleged contract with EWV for the removal of sixty-four (64) mobile homes. (Miranda had not seen the advertisement. *Id*. at 3109; 3166). Pursuant to the Contract, EWV transferred its "right, title and interest" in sixty-four (64) mobile homes located at Eastwood to Miranda. R. CF., p. 3166. The Contract required Miranda to remove the 64 mobile homes by August 31, 2014. *Id*. at 3166. The Contract further required Miranda to indemnify, defend, and hold EWV harmless, and to pay for the removal costs if he did not complete the removal by August 31, 2013. *Id*. at 3166

Cowan has since admitted that EWV did not have certificates of titles for any of the homes included in the Contract. *Id*. at 3069.

Miranda agreed to the Contract because he intended to refurbish the mobile homes and resell them. *Id*. at 3105. Miranda subsequently discovered that the

mobile homes had been designated Tier 1 material and ordered to be destroyed, meaning that he could not resell the mobile homes. *Id*. at 3093.

1. The Evans Litigation

During the aftermath of the flood, Defendants became engaged in a fight with Evans, primarily over the lack of action in cleaning Eastwood and whether Evans was trying to take Eastwood from Defendants. Supp. R. CF., p. 4. On December 16, 2013, EWV initiated a lawsuit against Evans, EWV, LLC v. City of Evans, Colorado, Case No. 2013CV031060, Weld County, Colorado (the "**Evans Litigation**"). *Id*. at 1-7. EWV sought declaratory relief that Eastwood had not discontinued its manufactured home park use and that it would be allowed to continue its operations. *Id*. at 6. EWV subsequently amended its Complaint to add a claim for inverse condemnation. *Id*. at 25.

On February 26, 2014, Evans asserted counterclaims against EWV, seeking a declaration that EWV had discontinued its use of Eastwood for three or more consecutive months and that any further use of Eastwood must be in full compliance with the Evans City Code. *Id*. at 47. Evans also asserted two claims for relief related to the condition of Eastwood, claiming that the condition constituted nuisance violations. *Id*. at 44-45.

On May 9, 2014, fifteen days *after* the contract between Miranda and EWV, Evans filed a Motion for Partial Summary Judgment (the "**Evans SJ Motion**"),

seeking judgment on its third and fourth claims for relief ("Maintenance and Nuisance Violations" and "Nuisance Violations"). *Id*. at 106-111. Evans argued that Eastwood had not been cleaned after seven months, that it was "inundated with junk and trash," and that EWV had refused to do anything to clean the junk and trash. *Id*. at 108-109. Evans sought an order requiring EWV to immediately clean Eastwood. *Id*. at 110.

On May 30, 2017, thirty-five days ***after*** the contract between Miranda and EWV, EWV responded to the Evans SJ Motion. *Id*. at 179-187. EWV argued in its Response that, since the date of the flood, "the City of Evans has taken measures to prevent EWV from continuing operation of Eastwood." *Id*. at 179-180. EWV argued that it was prevented from removing the mobile homes located on the property due to Evans' actions. *Id*. at 185. Specifically, EWV argued:

> Finally, as the City is clearly aware and previously stated to FEMA, EWV does not hold title to a large portion of these manufactured homes and, in order for EWV to remove the homes from the property, state statute requires it acquire title. . . Despite multiple attempts to obtain such authority from the State of Colorado and the City of Evans, EWV has been unable to obtain authority for the removal of the homes to which it has been unable to obtain title.
>
> *Id*. at p. 185.

EWV's Response included an affidavit from Defendant Cowan. *Id*. at 226-227 (the "**Affidavit**") In that Affidavit, Cowan represented that EWV "[has] attempted to obtain permission from the State of Colorado for removal of the

manufactured homes to which it does not hold title, but has been unsuccessful." *Id*. at 227, ¶ 7. Cowan further represented that Evans told EWV that it "would not give them the certificates necessary to allow them to legally disturb and remove the manufactured homes." *Id*. at 227, ¶ 9.

Finally, Cowan represented that "[n]ow that so much time has passed since the destruction and abandonment of the manufactured homes … Weld County is legally empowered to issue destruction permits for manufactured homes." *Id*. at 227, ¶ 9.

On June 17, 2014, the court found:

> 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. EWV also claims that it has made efforts to obtain permission from the State of Colorado to remove these homes, but that Colorado requires EWV to first obtain certificates of abandonment from Evans— which EWV claims that Evans has refused to provide.

Id. at 471.

Accordingly, the court found there to be a genuine issue of material fact and therefore denied the Evans SJ Motion. *Id*.

Defendant's Opening Brief claims that EWV "and the City *agreed* that the mobile homes could lawfully be removed from Eastwood because they had been abandoned." Brief at p. 7 (emphasis in original). The record in this case, however,

belies that conclusion. Evans' Reply in the Evans Litigation argued "regardless of the reason behind Plaintiff's inactions and the true ownership of the trailers, the Property still contains 152 destroyed trailers, constituting trash and junk." Supp. R. CF., p. 277. This argument shows that Defendants' inaction does not relieve them of their obligations and that they should have secured certificates of title in accordance with the Manufactured Homes Act and the Evans City Code.

2. The Miranda Litigation

On October 9, 2014, Miranda initiated this lawsuit against Defendants and Lechuga. R. CF., p. 1-12. Miranda then amended his Complaint on November 13, 2014, and included thirteen claims for relief. R. CF., p. 21-31. Paragraph 29 of the First Amended Complaint included the allegation that "neither of the Defendants [EWV, Cowan, or Lechuga] held legal title to some of the Miranda Mobile Homes" demonstrating that the titles were at issue from the beginning of the lawsuit. *Id.* at 23. On December 9, 2014, Miranda again amended his Complaint, but included that same allegation. *Id.* at 130-145; 136 at ¶ 35. Defendants and Lechuga eventually answered that allegation by neither admitting nor denying, but stating, "As stated in the Quit Claim Bill of Sale, 'SELLER MAKES NO WARRANTY OF TITLE…' Defendant Keith Cowan held legal title to some of the mobile homes listed in the Quit Claim Bill of Sale which he transferred to Jose Miranda at the time of the agreement." *Id.* at 73; 183.

In response to the First and Second Amended Complaint, Defendants and Lechuga filed a Motion to Dismiss, which the trial court converted to a Motion for Summary Judgment. *Id*. at 100-120; The Court then dismissed all of Miranda's claims not related to the Contract, finding that the disclaimer language in the Contract precluded any of those claims. *Id*. at 451-472. The Court again allowed Miranda to amend his Complaint. *Id.* at 472. However, the Court's ruling left Miranda with only contractual claims. *Id.* Still, Miranda again alleged that Defendants and Lechuga might not have had titles to the mobile homes, which Defendants and Lechuga answered in the same way as set forth above. *Id.* at 476-483; 479 at ¶ 35.

The Parties then engaged in discovery, including the combined deposition of EWV and Cowan. Shortly after that deposition, Miranda discovered Cowan's Affidavit filed in Evans Litigation wherein he stated under penalty of perjury that EWV did not have title for any of the mobile homes at the time EWV executed the contract with Miranda and that EWV was prevented from removing the mobile homes without the titles. *Id*. at 1079.

The trial court eventually entered sanctions against Defendants and Lechuga for their failure to comply with C.R.C.P. 30(b)(6) and for their failure to produce the affidavit, which the Court found to be relevant to the litigation. *Id*. at 1928-1947.

3. The Sanctions Order issued in the Miranda Litigation

On July 29, 2016, the trial court issued its Order on Plaintiff's Amended Motion for Sanctions Pursuant to C.R.C.P. 37, granting sanctions against Defendants and Lechuga for their failure to comply with their discovery obligations. *Id.* at 1928-1947. Defendants' brief attempts to conflate the Sanctions Order with the order granting Miranda's Motion for Partial Summary Judgment and even argues that the trial court provided a "road map" to Miranda. The trial court's Sanctions Order is twenty (20) pages long, very well reasoned and supported by applicable law, and speaks for itself. *Id.* at 1928-1947. The suggestion that the trial court was favoring Miranda and showing him the way to judgment is a desperate, inappropriate, unsupportable reach.

The Sanctions Order found that EWV was not prepared for its C.R.C.P. 30(b)(6) deposition in violation of the Rule, and that the Affidavit should have been disclosed. *Id.* at 1928-1947. The Sanctions Order rejected Defendants' argument that the Affidavit was not relevant, finding that in each complaint filed, Miranda alleged that EWV did not have title to the mobile homes, which Defendants dodged in each of their answers. *Id.* at 1933-34. The Sanctions Order granted Miranda leave to file an amended complaint in light of the new evidence that Defendants had improperly withheld, and granted Miranda leave to file a

Motion for Summary Judgment. *Id*. at 1946.

The Sanctions Order is not at issue in this appeal, despite Defendants' backdoor attempts to disparage the Order and the trial court for issuing the Order.

4. The Fifth Amended Complaint and the granting of Partial Summary Judgment

Pursuant to the Sanctions Order, Miranda amended his Complaint for a fifth time and asserted that the Contract was invalid, among other claims. *Id*. at 2458-72. The trial court granted Miranda's Motion for Partial Summary Judgment in part, and held that the Contract was invalid. *Id*. at 3663-82.

ARGUMENT

The crux of Defendants' argument as to why the Contract is enforceable is that title to the abandoned mobile homes that had been abandoned on Eastwood automatically transferred to EWV by operation of law, thereby providing EWV with the right to sell the abandoned mobile homes to a third party without providing certificates of title. Defendants' argument fails. In fact, EWV has already successfully presented the opposite legal argument and was able to prevail on summary judgment in the Evans Litigation by arguing that the possession of certificates of title was a condition precedent to removing the mobile homes legally from EWV's property. Defendants' new position that title is irrelevant to the

removal of the abandoned homes advanced in this litigation is only a result of the circumstances.

Title for mobile homes does not transfer to a landowner by operation of law. The Manufactured Mobile Homes Act, § C.R.S. 38-29-106 (the "**Act**") makes it clear that a landowner such as EWV must take affirmative action and obtain certificates of title before removing abandoned mobile homes from its property. Furthermore, the Evans City Code provides both the method and the time period a landowner such as EWV must follow in order to obtain title for mobile homes.

I. THE TRIAL COURT'S RULING THAT THE COBNTRACT IS UNBENFORCEABLE IS CORRECT

The trial court provided two legal grounds for finding the Contract to be unenforceable. R. CF., pp. 3663-64. First, the trial court correctly found that the Contract had an illegal purpose, and that Defendants' actions were meant "to circumvent the restrictions imposed by state law and the governmental authorities." R. CF., p. 3674. Second, the trial court found that EWV's alleged promise contained in the Contract was illusory and that the contract lacked any consideration for Miranda. R. CF., pp. 3675-78.

A. Standard of Review

Miranda agrees with Defendants' statements concerning the standard of review and preservation of the issue for appeal.

B. The Contract violated the Manufactured Homes Act and therefore was illegal

The trial court found the Contract to be illegal because it violated C.R.S. § 38-29-106, 2014:

> In light of EWV's admission that it did not have title to the mobile homes at the time of the making of the agreement, the transfer of EWV's purported interest in those homes violated the statute. (And if EWV truly had title to the mobile homes, then C.R.S. § 38-29-112 would have required that title be formally transferred to Miranda; not simply transfer whatever right or interest that EWV might have in the homes through a quitclaim deed.) So even if EWV had not intended to circumvent the restrictions imposed by Evans, Colorado, and FEMA on removing the mobile homes affected by the flood, the agreement is still void because it violated the statutory requirements of C.R.S. § 38-29-106.
>
> R. CF., p. 3674.

The trial court's ruling correctly interpreted the Act. As set out in more detail below, the Act denies any person the right to sell a mobile home to a third party without delivering the certificate of title for the home. This requirement is expressly stated in unambiguous terms.

Defendants, seeking an end run around the plain language, argue that a landowner such as EWV is somehow exempted from the clear language of the Act because the Act requires "the person in whose name said certificate of title is registered" to execute the formal transfer. C.R.S. § 38-29-112. According to Defendants, a landowner cannot be bound by the Act because a landowner may

possess mobile homes that have been abandoned or the certificates have been lost and thus a landowner has no ability to transfer a certificate with the sale of the abandoned mobile homes.

Defendants' argument fails because EWV had the ability to obtain certificates of title for abandoned homes, or for those where the certificates have been lost. First, the Act provides that a party with an abandoned mobile home may obtain a certificate of title by showing, *inter alia*, a copy of an order or judgment for possession obtained through a civil eviction proceeding. Second, the abandoned mobile homes were located in Evans, Colorado. The Evans City Code expressly provides a landowner such as EWV the ability to obtain certificates of title for mobile homes abandoned on the property. In fact, the process is amazingly easy, especially for sophisticated parties like Defendants. The reality is Defendants ignored EWV's legal obligations and sought to transfer the burden of handling 64 worthless mobile homes to Miranda through misrepresentations that the mobile homes had value. Unloading worthless mobile homes illegally would shift financial loss to an unsuspecting third party and result in significant savings to Defendants.

1. The Act <u>Requires</u> Certificates of Title be included in the sale of manufactured homes

The Act, § C.R.S. 38-29-106, provides:

> Except as provided in C.R.S. § 38-29-114, 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 C.R.S. § 38-29-112, and no purchaser or transferee shall acquire any right, title, or interest in and to a manufactured home purchased by him unless and until he obtains from the transferor the certificate of title thereto, duly transferred to him in accordance with the provisions of this article.

The relevant language of the Manufactured Homes Act is clear and unambiguous. "*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." *Id.*

When interpreting a statute, courts should strive to give effect to the legislative purposes by adopting an interpretation that best effectuates those purposes. *Smith v. Exec. Custom Homes, Inc.*, 230 P.3d 1186, 1189 (Colo. 2010). "In order to ascertain the legislative intent, Courts look first to the plain language of the statute, giving the language its commonly accepted and understood meaning. Where the statutory language is clear and unambiguous, courts do not resort to legislative history or further rules of statutory construction." *Id.* (internal citations omitted).

Defendants seek to circumvent this clear and unambiguous language of the Act by citing to another provision, Section 112. This provision, however, only further supports Miranda's position. Section 112 of the Act requires that "upon 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 of title." C.R.S. 38-29-112 (emphasis added). "The word 'shall,' when used in a statute, involves a 'mandatory connotation' and hence is the antithesis of discretion or choice." *People v. Guenther*, 740 P.2d 971, 975 (Colo. 1987).

Thus, the only relevance C.R.S. 38-29-112 has is whether EWV executed the certificate of title in the prescribed manner when selling the mobile homes to Miranda. Of course, EWV had no certificates of title to transfer, thereby rendering this provision of the Act irrelevant.

Defendants, however, argue that because Section 112 of the Act requires the transfer of a certificate of title to be made by the "person in whose name said certificate of title is registered", the Act cannot 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," purportedly because the landowner cannot have a certificate of title issued in its name. Brief at p. 31. Defendants' argument requires this Court to accept the false premise that EWV had no ability to obtain certificates of title for mobile homes abandoned on its property.

In fact, Section 119, relied on by Defendants, actually demonstrates the fatal flaw in Defendants' argument. Defendants argue that Section 119 of the Act provides a mobile home owner with the ability to obtain a certificate of title by showing "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." Defendants argue that 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." Unfortunately for Defendants, a *full* reading of Section 119 of the Act provides Defendants with the mechanism for obtaining a certificate of title for abandoned mobile homes.

> In situations involving an abandoned manufactured home located on an applicant's real property, *a copy of an order or judgment for possession obtained through a civil eviction proceeding, along with proof of efforts to notify, via certified mail, regular mail, and posting as otherwise required by law, the prior owner of the potential removal or transfer of title of the home, as well as proof of ownership of the real property on which the home is located, shall constitute sufficient evidence of the applicant's right to a certificate of title for the home*. The statement shall contain or be accompanied by a written declaration that it is made under the penalties of perjury in the second degree, as defined in C.R.S. § 18-8-503, and shall accompany the formal application for the certificate as required in C.R.S. § 38-29-107.
>
> C.R.S. § 38-29-119 (emphasis added).

Thus, Defendants could have obtained the titles necessary to transfer mobile homes in accordance with the Act and then transferred the mobile homes to Miranda. It did not do so.[2]

The Act is clear. "No person shall sell or otherwise transfer a manufactured home … without delivering the certificate of title to such home." C.R.S. § 38-29-106. Section 112 of the Act *required* EWV to execute a formal transfer of the home described in the certificate of title. Section 119 of the Act provides a party such as EWV, the owner of the real property in which the mobile homes were abandoned, with the process to obtain a certificate of title. EWV should have obtained the certificates of title in accordance with the Act before selling mobile homes. Without the certificates of title, EWV has no legal right in the abandoned mobile homes, and thus cannot sell mobile homes belonging to other parties.

Defendants' brief contains an analogy to a contract requiring permits, which is misleading. First, those types of contracts generally contain a condition that permits be obtained. Second, the hypothetical contract scenario Defendants present would not be governed by a very specific statutory scheme with clear requirements, whereas here the process for selling of mobile homes is delineated by the Legislature.

[2] It's important to note that Section 119 expressly applies to the landowner ("In situations involving an abandoned manufactured home located on an *applicant's real property*" (emphasis added)).

2. Facts are irrelevant to statutory interpretation

This Court should disregard Defendants' argument that the trial court "erred in disregarding material facts concerning its interpretation of C.R.S. § 38-29-106." Statutory interpretation is a question of law. *Bryant v. Community Choice Credit Union*, 160 P.3d 266, 274 (Colo. 2007). Where the statutory language is clear and unambiguous Courts do not resort to legislative history or further rules of statutory construction. *Smith*, 230 P.3d at 1189. Defendants' brief does not argue that the statute is ambiguous, and thus facts at the trial level are completely irrelevant to the interpretation of the Act.

3. The Evans City Code further verifies Defendants were required to obtain certificates of title.

The falsehood that title to the mobile homes automatically transfers to the landowner (EWV) by operation of law is further exposed through a review of the Evans City Code.

The Evans City Code provides the process a landowner such as EWV must follow to obtain the certificates of title required for abandoned mobile homes. Specifically, Evans City Code Section 19.22.030(C) provides: "Once a home has been abandoned, *the manufactured park owner shall* have one hundred twenty (120) days to obtain title to the home. At any time during said one hundred twenty (120) days or upon reaching the one hundred twenty (120) days, the park owner

shall be required to provide proof of reasonable attempts to obtain title to the home." R. CF., p. 3191.

Like the Act, the Evans City Code is clear and unambiguous. EWV had 120 days from the date of abandonment to obtain title for the homes. This is non-discretionary. *See, e.g. People v. Guenther*, 740 P.2d 971, 975 (Colo. 1987) (The use of the word "shall" means this was a mandatory obligation of EWV). In fact, the Evans City Code even provided EWV with a roadmap for when and how it could obtain the relevant certificates.

First, Section 19.22.020(A) of Evans City Code defines "[a]bandoned or abandonment" of a mobile home to include "lack of occupancy with no forwarding information or signage indicating the home is for rent or sale and/or windows that are not secured." R. CF., p. 3191. It also provides that "A mobile or manufactured home 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 shall be considered for the purpose of this Chapter to be abandoned." *Id.*

According to the Code, "Once a home has been abandoned, *the manufactured park owner shall* have one hundred twenty (120) days to obtain title to the home. At any time during said one hundred twenty (120) days or upon reaching the one hundred twenty (120) days, the park owner *shall* be required to

provide proof of reasonable attempts to obtain title to the home." R. CF., p. 3191 (emphasis added). In other words, EWV had 120 days from the date of abandonment to obtain titles to the mobile homes, but failed to do so, thus subjecting itself to penalties. R. CF., p. 3191.

Pursuant to the Code's abandonment definition, the mobile homes were "abandoned" on or around the date of the flood, which occurred on September 13, 2013. Defendants then had 120 days from the date of the flood to obtain titles, on or before January 11, 2014. The fact that Defendants sat idly on their hands instead of complying with the Evans City Code does not result in title for all the abandoned mobile homes suddenly transferring to EWV by operation of some undisclosed law.

Defendants then argue that after the 120-day period provided by the Evans City Code expires, the landowner then has a 30-day "safe harbor" to contract with a mover to remove the homes. Once again, Defendants' argument requires this Court to ignore portions of the Evans City Code. The 30-day "safe harbor" referenced by Defendants is only triggered *after* the landowner obtains title. "*Upon obtaining title to such home*, a manufactured home park owner shall have thirty (30) days to remove or bring such home into compliance." R. CF., p. 3192 (Section C).

The plain language belies Defendants' tortured interpretation of the Act and the Evans City Code. Nothing in either the Act or the Code supports the proposition that title for all 156 mobile homes located at Eastwood suddenly became EWV's personal property 120 days after they were abandoned. The language is clear that a landowner "shall have" 120 days to obtain a certificate of title for the abandoned mobile homes, and "shall" be required to provide proof of reasonable attempts to obtain title.

Defendants' position promotes the idea that landowners should undertake no action, and just wait the 120 days. This way, according to Defendants, a landowner is relieved of the obligation to show proof of reasonable attempts to obtain title. Accepting this outcome will require this Court to ignore plain language of the Act and the Code, while also re-defining the term "shall" to mean discretion or choice. It would also eviscerate the statutory scheme by allowing manufactured home park owners to simply sit on their hands for 120 days to get around an entire statutory scheme governing certificates of title for manufactured homes.

C. The Agreement was Illusory and Lacked Consideration

The trial court also found the Contract to be unenforceable was because EWV's promise in the Contract was illusory and Miranda received no consideration.

"The central issue to be determined is whether the bilateral contract between [the parties] lacks mutuality. Such a contract must contain promises by each party thereto - the promise of one party is the consideration for the promise of the other. If one party in fact promises nothing, there is no mutuality and no contract." *United Press Int'l, Inc. v. Sentinel Pub. Co*., 441 P.2d 316, 319 (1968). A promise is a good consideration for a promise, when they are mutual; that is, reciprocal, and impose upon each of the parties a legal binding obligation which each can enforce against the other. *Rhodes v. Haberstich*, 326 P.2d 657, 660 (1958).

It is undisputed that EWV did not have ownership interest in any of the 64 mobile homes included in the Contract. R. CF., p. 3666. This fact was critical to the trial court's ruling that the Contract was illusory and lacked consideration:

> [B]ecause EWV has admitted that it did not hold title to the mobile homes when the agreement was made, and because EWV disclaimed any warranty of title, EWV's promise to convey its interest in the mobile homes to Miranda was an empty, illusory promise. Miranda did not receive what he bargained for; the agreement is therefore unenforceable for lack of consideration.
>
> R. CF., p. 3669.

The trial court's ruling is correct. The Contract required EWV to transfer its "right, title and interest in the [fifty-three] mobile homes." R. CF., p. 3166. The Contract, however, went on to state that EWV "shall only be required to sell, quitclaim, convey, transfer and assign its interest in the [mobile homes] *to the*

extent it has such interest." *Id.* (emphasis added). Thus, because EWV had no interest in the mobile homes, it conveyed nothing to Miranda.

Furthermore, as EWV represented to the trial court, "In agreeing to give away the mobile homes, EWV made 'no warranty of title' and 'disclaimed all express and implied warranties, including merchantability or fitness for a particular use purpose of any other warranty, express or implied.'" R. CF., p. 309. This means there was no legally binding obligation for which Miranda could enforce against EWV. "Because EWV did not give up anything of value and because no rights were created that the EWV did not already possess," the Contract was wholly illusory. *Bernhardt v. Hemphill*, 878 P.2d 107, 111 (Colo. App. 1994).

The trial court agreed with this position, finding an illusory promise to be one that appears to be real, but in reality offers nothing: "Whereas a real promise can be consideration for a contract, an illusory promise cannot. If all the consideration given by one party to a contract consists of illusory promises, then the party has provided no consideration and cannot enforce the contract." *In re Cox Enterprises, Inc. Set-top Cable Television Box Antitrust Litig.*, 835 F.3d 1195, 1209 (10th Cir. 2016). *See also GMAC Mortgage Corp. v. PWI Grp.*, 155 P3d 556, 557-59 (Colo. App. 2006) (Where a party "does not own any right, title, or interest in the subject properties it purported to convey," any deed executed by that party "is patently invalid and contains an illusory grant.")

The trial court also found that the Contract lacked consideration, finding that because Defendant had no interest in the mobile homes it purported to transfer to Miranda, it gave up nothing and Miranda received nothing. "EWV simply shifted the burden to remove the mobile homes to Miranda." R. CF., p. 3678.

Defendants seduced Miranda into signing the Contract based on misrepresentations and falsehoods. EWV had no interest in any of the mobile homes, and thus conveyed nothing to Miranda but an illusion in an attempt to avoid the cost of disposing of the homes or obtaining titles to them.

II. DEFENDANT'S OPPOSITE POSITIONS IN TWO DIFFERENT BUT RELATED PROCEEDINGS WARRANT THE APPLICATION OF THE DOCTRINES OF JUDICIAL ADMISSION AND JUDICIAL ESTOPPEL

The trial court applied the doctrines of judicial admission and judicial estoppel to Defendants, finding that:

> the defendants' position here is contrary to the one they took in the Evans litigation: that the mobile homes could not be legally removed because EWV did not hold title and no certificates of abandonment had been issued—as of May 30, 2014—more than a month after the agreement had been made with Miranda. The defendants' position here is totally inconsistent with the position that EWV took in the Evans litigation.
>
> R. CF., p. 3671.

Defendants of course took that position when it was convenient in order to avoid or delay its legal obligations and to avoid spending money to properly

dispose of the mobile homes. It then took the opposite position in this case when it was in its self-interest to do so.

A. Standard of Review

Miranda agrees with Defendants' statements concerning the standard of review and preservation of the issue for appeal.

B. Defendants' position changed based on the circumstances

Defendants present the position that the Court erred in its interpretation of EWV's arguments in the Evans Litigation. Defendants' attempt at revisionist history should not be taken seriously, especially when considering its arguments in the Evans Litigation were clear and successful.

Defendants induced Miranda to sign the Contract on or about April 24, 2014. R. CF., pp. 3166-67. The one page Contract does not contain conditions. Meanwhile, approximately fifteen (15) days later, Evans filed the Evans SJ Motion in the Evans Litigation. R. CF., pp. 3168-73. Specifically, Evans sought summary judgment on its third claim (Maintenance and Nuisance Violations) and on its fourth claim (Nuisance Violations). *Id.* Evans argued that EWV had violated the Evans City Code by failing to remove the 153 mobile homes located on the Property because they were a public nuisance. R. CF., p. 3169.

EWV filed its response to the Evans SJ Motion on May 30, 2017, approximately six (6) weeks after the Contract was executed. R. CF., pp. 3174-82. EWV's response did not deny that the condition of the property needed to be remedied, but argued that EWV was unable to clean the property. *Id.* EWV accused Evans of refusing to provide the certificates necessary to have the mobile homes removed. R. CF., p. 3176, ¶ 9. As EWV argued in the Evans Litigation (on May 30, 2017):

> Finally, as the City is clearly aware and previously stated to FEMA, EWV does not hold title to a large portion of these manufactured homes and, in order for EWV to remove the homes from the property, state statute requires it acquire title. EWV has worked diligently to obtain title to as many of the homes as possible. Further, EWV has executed contracts for removal of each of the manufactured homes from the property and will allow removal as soon as it is legal [sic] authorized to do so. Despite multiple attempts to obtain such authority from the State of Colorado and the City of Evans, EWV has been unable to obtain authority for the removal of the homes to which it has been unable to obtain title. In sum, the City of Evans has actively blocked EWV's ability to conduct clean-up efforts on the property and now seeks to benefit from that conduct.
> R. CF., p. 3180.

EWV's argument was supported by an affidavit from Cowan. R. CF., 3183-85. In that affidavit, Cowan averred, "EWV has attempted to obtain permission from the State of Colorado for the removal of the manufactured homes to which it does not hold title, but has been unsuccessful." R. CF., 3184, ¶ 8.

EWV was successful in defeating the Evans SJ Motion through these arguments. R. CF., p. 3186-90. In denying the Evans SJ Motion, the Evans Litigation court found:

> 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. EWV also claims that it has made efforts to obtain permission from the State of Colorado to remove these homes, but that Colorado requires EWV to first obtain certificates of abandonment from Evans – Which EWV claims that Evans has refused to provide."
>
> R. CF., p. 3189.

Defendants now maintain that the April 24th Contract was legal on the date it was executed, and that Miranda could have removed the mobile homes as of that date, notwithstanding its representations made approximately six (6) weeks later in the Evans Litigation that the mobile homes cannot be removed without first obtaining certificates. Incredulously, Defendants argue that the trial court in the Evans Litigation "misunderstood" EWV's argument and that the Evans Litigation 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." Brief at pp. 17-18. Defendants conveniently claim that the above referenced quote from the Court's ruling was not a correct statement of EWV's position, but that "neither

party challenged the District Court's erroneous finding because it was not germane to the core issues." Brief at p. 7.

This position cannot be accepted as legitimate. EWV defeated a motion for partial summary judgment on two of the four claims brought by Evans in the Evans Litigation. It is impossible to understand how a court's ruling on a motion for partial summary judgment is not germane to the issues raised in the litigation, and EWV fails to expound on this position. Furthermore, failing to correct the Court raises ethical issues. Model Rule of Professional Conduct 3.3 expressly states that a "lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false." If Defendants truly believed that the Court's ruling was founded on a misstatement of EWV's position, they had an affirmative duty to correct the trial court. The fact they waited until after Miranda discovered the affidavit and brought it to this Court's attention in this litigation is demonstrative of Defendants changing positions based on the exigencies of the matter.

There was no misunderstanding by the trial court. The trial court accepted EWV's argument in the Evans litigation that it could not legally remove the mobile homes without the proper certificates, and that the City of Evans refused to issue the proper certificates. EWV was successful in maintaining this position, and is now changing its position because that position no longer works in its favor.

C. Judicial Admission Applies to the statements made by Defendant in the Evans Litigation.

A "judicial admission" is a formal, deliberate declaration which a party or his attorney makes in a judicial proceeding for the purpose of dispensing with proof of formal matters or of facts about which there is no real dispute. *Kempter v. Hurd*, 713 P.2d 1274, 1279 (Colo. 1986). Judicial admissions need not be written when made in court, nor must they be made by a party, as his counsel is impliedly authorized to make them. *Id*. Generally, any fact whatsoever may be the subject of a judicial admission, and parties may stipulate away valuable rights, provided the court is not required to abrogate inviolate rules of public policy. *Id.* Finally, judicial admissions act as "evidence against the party making them, and may constitute the basis of a verdict." *People v. Bergerud*, 223 P.3d 686, 700 (Colo. 2010).

The trial court determined that Defendants are bound by their judicial admissions of factual representations made by Defendants in the Evans Litigation, dismissing Defendants' attempt to characterize their positions there as propositions of law rather than representations of fact. R. CF., p. 3672. The averments made by Defendants in the Evans Litigation that led to the defeat of the Evans SJ Motion were indeed facts. As the trial court held, "the defendants are bound here by their judicial admissions that EWV did not hold title to the mobile homes and that the

homes could not be legally removed from EWV's property without first obtaining certificates of abandonment from Evans. EWV is further bound by its judicial admission that, at least as of May 30, 2014, Evans had refused to provide EWV with the necessary certificates "to legally disturb the homes." R. CF., p. 3672.

Moreover, due to the fact that EWV did not have title to the mobile homes, the Contract was illegal, illusory, and lacked consideration. EWV's position in the Evans Litigation was correct that it needed to obtain certificates of title before it could contract for the removal of the mobile homes. The fact that Defendants did nothing for nearly eight (8) months does not suddenly create legal rights for EWV in these mobile homes. It is important to note that EWV did not assert this "safe harbor" argument or its argument that title transfers to Defendant by operation of law after 120 days at any point in the Evans Litigation. Nor could it, as the date of abandonment was the date of the flood, which occurred on September 13, 2013. Defendant's argument that the notice of violation triggered the compliance obligation is fantasy, as the Evans City Code clearly defines abandonment to include "lack of occupancy with no forwarding information or signage indicating the home is for rent or sale and/or windows that are not secured," which occurred immediately after the flood in September, 2013.

D. The Doctrine of Judicial Estoppel applies to Defendant's attempt to change its argument based on the circumstances

The trial court also applied the Doctrine of Judicial Estoppel in preventing Defendants from presenting a completely opposite position than what Defendants advanced in the Evans Litigation. Judicial estoppel is an equitable doctrine by which courts require parties to maintain consistency of positions in proceedings, assuring promotion of truth and preventing parties from deliberately shifting positions to suit exigencies of the moment. *Johnson v. Lindon City Corp.*, 405 F.3d 1065, 1069-70 (10th Cir. 2005) ("Judicial estoppel protects the integrity of the judicial process ... by prohibiting parties from deliberately changing positions according to the exigencies of the moment.") *citing New Hampshire v. Maine*, 532 U.S. 742, 750, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001).

The doctrine of judicial estoppel applies if: (i) two positions are taken by the same party; (ii) positions are taken in same or related proceedings involving the same party; (iii) party taking positions was successful in maintaining first position and benefitted from that position; (iv) inconsistency is part of intentional effort to mislead court; and (v) positions are totally inconsistent. *Estate of Burford v. Burford*, 935 P.2d 943, 948 (Colo. 1997). In Colorado, judicial estoppel requires that a party take a position in a proceeding that is totally inconsistent with a position he successfully took in an earlier, related proceeding in an intentional

effort to mislead the court. *Johnson* 405 F.3d 1065, 1069 ("whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled.") (internal citation omitted).

In its brief, Defendants argues that judicial admissions cannot apply to propositions of law, that the positions advanced in each of the cases were not inconsistent, and that there was no evidence supporting a finding of intent. Defendant appears to concede the remaining elements.

1. The trial court applied the Doctrine of Judicial Estoppel to Defendant's factual assertions

In the Evans Litigation, Defendants advanced the position that EWV could not remove the mobile homes because it did not hold title to them. Defendants argued that it first had to obtain certificates from Evans, which Evans had refused to provide. The Evans Litigation court expressly adopted this argument when denying the Evans SJ Motion, finding:

> 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. EWV also claims that it has made efforts to obtain permission from the State of Colorado to remove these homes, but that Colorado requires EWV to first obtain certificates of

> abandonment from Evans— which EWV claims that Evans has refused to provide.
>
> Supp. R. CF., p. 471.

The Evans Litigation court went on to hold "viewing these statements as true, a genuine issue of material fact exists as to Defendant's third and fourth claims" and denied the Evans SJ Motion. Supp. R. CF., p. 471.

Defendants argue that the trial court applied the doctrine of judicial admission to a proposition of law. That is simply not true, as the trial court relied on the factual assertions advanced by Defendants in denying the Evans SJ Motion, which happened to be in direct contradiction to the position advanced by Defendants in this litigation. Here, Defendants argue that Miranda had the authority to remove the mobile homes as soon as the Contract was executed, despite the fact that EWV did not have title to transfer. This position is fundamentally different than the argument in the Evans Litigation, where EWV claimed, "Finally, as the City is clearly aware and previously stated to FEMA, EWV does not hold title to a large portion of these manufactured homes and, in order for EWV to remove the homes from the property, state statute requires it acquire title." Supp. R. CF., p. 185. The trial court rejected "defendants' assertions that EWV actually *did* have title to the mobile homes and that Miranda

theoretically *could* have removed the mobile homes from EWV's property as soon as the agreement was made." R. CF., p. 3672 (emphasis in original).

2. The positions advanced in each of the two litigations directly contradict each other

Defendants perpetuate the falsehood that Defendants have not taken inconsistent positions. The trial court disagreed, finding:

> The defendants take the position here that EWV did have title to some of the mobile homes and that the homes could be removed without first obtaining a certificate of abandonment. So the defendants' position here is contrary to the one they took in the Evans litigation: that the mobile homes could not be legally removed because EWV did not hold title and no certificates of abandonment had been issued—as of May 30, 2014—more than a month after the agreement had been made with Miranda. The defendants' position here is totally inconsistent with the position that EWV took in the Evans litigation.

R. CF., p. 3671.

Still, Defendants argue semantics in trying to convince this Court that its position has remained consistent.

In the Evans Litigation, Defendants made it clear that without title, the homes could not be removed from Eastwood. As EWV argued on May 30, 2017, approximately six (6) weeks *after* the Contract was executed, "EWV <u>*does*</u> not hold title to a large portion of the manufactured homes and, in order for EWV to remove the homes from the property, state statute requires it acquire title." Supp. R. CF.,

p. 185. There are no past tense arguments here, as Defendants attempt to portray in their opening brief.

Defendants further argued in that same pleading, "EWV has executed contracts for removal of each of the manufactured homes from the property and *will allow removal as soon as it is legal authorized to do so*." Supp. R. CF., p. 185. This statement is clear, and forward-looking. Defendants did not argue that EWV has executed contracts for removal and *did* allow removal as soon as it *became* legally authorized to do so, but rather made it clear that without certificates of titles, the mobile homes could not be removed.

The affidavit that Defendants submitted with its response to the Evans SJ Motion further demonstrates that their positions are inconsistent. Cowan stated "EWV has entered into contracts for the removal of the homes *as soon as* legally possible." Supp. R. CF., p. 227, ¶ 10.

Defendants attempt to reframe their argument, asking "Why would Cowan submit contracts to a District Court if he was taking the position, as required under judicial estoppel, that they were *illegal*." Brief at p. 27 (emphasis in original). This hypothetical is a red herring. Neither Miranda nor the trial court has asserted that Defendants claimed the contracts were illegal in the Evans Litigation. Defendants attached the contracts to the Response to the Evans SJ Motion in an attempt to show the Evans Litigation court that Defendants had been prevented from

removing the mobile homes due to the actions by Evans. Defendants even acknowledged in its affidavit that the contracts were not legal at the time, stating that the contracts called for the "removal of homes as soon as legally possible." This is directly contradictory to Defendants' argument that EWV only entered into the contracts *after* the removal of homes became legally possible, as it now argues.

3. Intent can be inferred through documents

Although it is generally true that intent is fact dependent, the trial court here found that Defendants' intention to mislead the court was demonstrated through their pleadings. Defendants argue in this case that EWV did have title to some of the mobile homes and that the homes could be removed without first obtaining a certificate of abandonment. In the Evans Litigation, Defendants argued that the mobile homes could not be legally removed because EWV did not hold title and no certificates of abandonment had been issued as of May 30, 2014, more than a month after the Contract was made.

The trial court determined that the inconsistency is intended to mislead the Court. The trial court's ruling relied on the fact that Cowan was fully aware of the agreement with Miranda when EWV filed its Response to the Evans SJ Motion. R. CF., pp. 3671-72. The trial court noted that EWV even attached the contracts to the Response, while simultaneously arguing that none of the mobile homes on EWV's

property could be "legally disturbed" because of lack of proper title and Evans' alleged improper refusal to issue certificates of abandonment. *Id.*

In other words, the trial court relied on the plain language contained in Defendants' pleadings to determine Defendants' intent. Similarly, in determining a party's intent when interpreting a contract, Courts regularly rely on the plain language of the contract. *See, e.g. USI Properties East, Inc. v. Simpson*, 938 P.2d 168, 173 (Colo. 1997) ("The intent of the parties to a contract is to be determined primarily from the instrument itself).

Here, Defendants' intent can be determined by the documents themselves. As the trial court found, Defendants included a copy of the Contract with its pleading, alleging that the Contract called for removal of the homes "as soon as legally possible." Defendants clearly presented the position that the mobile homes could not be removed without title, which the City of Evans refused to issue. Defendants' own words, including the Response to the Evans SJ Motion and the Affidavit, are what the Court relied on in determining Defendants' intent. This is the same procedure courts use when evaluating a parties' intent in entering into a contract.

4. There are no grounds to reassign this matter to a different judge

Defendants accuse the trial court of bias because it disagreed with Defendants' arguments. Plaintiff's reference to the Court's first summary judgment order, which was entered before either party conducted any discovery, is irrelevant. The trial court relied on the evidence submitted with Plaintiff's Motion for Partial Summary Judgment. Defendants were successful in numerous pleadings and never complained about alleged bias. Judge Taylor's rulings have consistently shown analysis and legal support. Judge Taylor has issued well-reasoned, articulated orders. Furthermore, Judge Taylor even granted Defendants the right to appeal the relevant orders over Plaintiff's objections, showing that there is no bias but rather substantive legal rulings that did not go in Defendants favor.

CONCLUSION

The trial court's Order on Plaintiff's Motion for Partial Summary Judgment was sound and in accordance with Colorado law. This Court should affirm the order and remand the case for trial on the remaining claims to the same judicial officer.

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of November, 2017, a true and correct copy of the foregoing **PLAINTIFF/APPELLEE'S ANSWER BRIEF** was filed and served via ICCES in the appellate court as follows:

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