COLORADO COURT OF APPEALS Colorado State Judicial Building 2 E. 14th Avenue Denver, Colorado 80203	DATE FILED: December 22, 2017 4:07 PM FILING ID: 5B110125B8ABD CASE NUMBER: 2017CA737
Appeal from the District Court, Weld County, Hon. Todd L. Taylor, Presiding Judge District Court Case No. 2014CV30957, Div. 4	
Plaintiffs-Appellees: **JOSE A. MIRANDA**, an individual Defendants-Appellants: **EWV, LLC,** a Colorado Limited Liability Company; **KEITH COWAN**, an individual; **LAURIE LECHUGA**, an individual	▲ COURT USE ONLY ▲
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REPLY BRIEF	

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).

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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
Perry L. Glantz (Atty. Reg. #16869)

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INTRODUCTION

Plaintiff/Appellee Jose Miranda ("Miranda") devotes the majority of his Answer Brief to a statute, C.R.S. § 38-29-106, that does not apply to this case. He couples his erroneous statutory construction with an interpretation of the Quit Claim Bill of Sale (the "Contract") that effectively rewrites his entire agreement with Defendant/Appellant EWV, LLC ("EWV"). Miranda's claim that the Contract is invalid because it conflicts with Colorado statutes simply cannot stand.

Based on its plain terms, C.R.S. § 38-29-106 only applies to parties in whose name a manufactured home has been titled. The manufactured homes at Eastwood Village Mobile Home Park ("Eastwood") had been abandoned, and EWV was not the registered title holder of any of them. Therefore, § 106 does not apply to this case. While a landowner can obtain title to an abandoned home pursuant to C.R.S. § 38-29-119 by posting a bond, nothing in § 119 obligates a landowner to do so. Rather, under Colorado law, the landowner can assign this right to a third-party, which is exactly what EWV did here. In the Contract, Miranda accepted EWV's assignment and assumed the obligation of bonding for new titles should he deem it necessary or advisable. Miranda was also able to (and did) obtain moving permits to remove the manufactured homes from Eastwood.

Based on this, it is a legal fiction Miranda could not legally remove the manufactured homes from Eastwood. Indeed, Miranda ratified the Contract when

he performed his obligations by removing homes from Eastwood with knowledge that EWV did not hold title to them, when he kept the 19 homes he removed, and when he filed suit against EWV for breach of the Contract and sought $2.5 million in damages. It is astounding that Miranda now claims this same Contract is unlawful when he was earlier seeking a multi-million dollar recovery for its alleged breach. It is also telling that neither he nor the District Court has ever addressed the fact that Miranda ratified an agreement that they both claim was illusory.

In short, the Contract is lawful and enforceable. The statutory scheme relied upon by Miranda does not apply to the agreement between EWV and Miranda. The Contract is also enforceable because Miranda ratified it and because it is otherwise supported by consideration. For those reasons, the District Court's Second Summary Judgment Order should be reversed.

ARGUMENT

I. The Contract is not barred by the title transfer provisions in C.R.S. § 38-29-106.

A. There is no requirement that EWV itself bond for a new title.

In his Answer Brief, Miranda primarily claims that the Contract is unenforceable because it conflicts with C.R.S. § 38-29-106. This is a departure from the Second Summary Judgment Order in which the District Court relied on EWV's purported judicial admissions to invalidate the Contract, and used just one

paragraph at the end of its analysis to hold, in the alternative, that the Contract violated § 106. Miranda's tactical shift on appeal is an implicit admission that the District Court's primary reasoning in the Second Summary Judgment cannot withstand appeal.

Regardless, Miranda's statutory argument is wrong. By its plain terms, § 106 only applies to the holder of a certificate of title. Section 106 incorporates the title transfer procedures of C.R.S. § 38-29-112, which requires that "the person in whose name said certificate of title is registered, if he is other than a dealer, . . . execute a formal transfer of the home described in the certificate." None of the abandoned manufactured homes at Eastwood were registered in EWV's name. Accordingly, EWV had no obligation to transfer titles to Miranda, and § 106 does not apply to the Contract and cannot serve to invalidate it.

Miranda implicitly acknowledges this fact in his Answer Brief. Instead of claiming that § 106 applies directly to EWV, he contends that EWV "should have" first obtained replacement titles through C.R.S. § 38-29-119 and transferred them to Miranda pursuant to § 106. Answer Brief at 19. Miranda has no support for this proposition. *Id.* Section 119 is a non-mandatory procedure for a party to obtain a replacement title if the circumstances warrant it. Section 119 is not exclusive to landowners and nothing in it prohibits EWV from assigning its right to bond for new titles to Miranda. Rather, Colorado law "favors assignability of rights."

Roberts v. Holland & Hart, 857 P.2d 492, 495 (Colo. App. 1993); *Brown v. Gray*, 227 F.3d 1278, 1294 (10th Cir. 2000) ("Colorado generally favors the assignment of rights pursuant to a valid contractual arrangement"). Accordingly, the Contract was a lawful assignment to Miranda of EWV's right to bond for new titles pursuant to § 119.

This is how local governments interpret and enforce these statutory provisions. In unrebutted testimony, Craig Shriver of Riverside Storage and Recycling Center, LLC ("Riverside"), who was the other contractor at Eastwood, stated that he obtains titles to abandoned manufactured homes from county governments even though he is the contractor and assignee of landowners who have asked him to remove abandoned manufactured homes from their properties. R. CF., 3581-82. In addition, the moving permits that Miranda (through his mother, Silvia) obtained from Weld County state that an owner *or its agent* can request a moving permit, which confirms that it is lawful for a party other than the owner to get a permit to remove a manufactured home from Eastwood. *See* R. CF., 2597.

In response, Miranda claims that the Contract was exclusively a "sale" of manufactured homes that is subject to § 106. The plain terms of the Contract negate that argument. In the Contract, EWV agreed to "convey[], release[] and forever quit claim[]" to Miranda its "right, title and interest" in 64 manufactured

homes. R. CF., 3166-67. The Contract stated that EWV's interest in the manufactured homes was being:

> SOLD, QUITCLAIMED, CONVEYED, TRANSFERRED AND ASSIGNED TO [MIRANDA] "AS IS" AND "WHERE IS", AND "WITH ALL FAULTS." [EWV] MAKES NO WARRANTY OF TITLE AND [EWV] HEREBY DISCLAIMS ANY AND ALL EXPRESS OR IMPLIED WARRANTIES . . . .

Id. (capitalization in original). Miranda acknowledged that he was relying on his own inspection of the manufactured homes, including the title history:

> [Miranda] acknowledges that the list for the [manufactured homes] has been audited and verified by [Miranda]. [Miranda] further acknowledges that [EWV] shall only be required to sell, quitclaim, convey, transfer and assign its interest in the [manufactured homes] to the extent it has such an interest.

Id. A "court should interpret a contract in its entirety with the end in view of seeking to harmonize and to give effect to all provisions so that none will be rendered meaningless." *Copper Mountain, Inc. v. Indus. Sys., Inc.*, 208 P.3d 692, 697 (Colo. 2009) (quotation omitted). Accordingly, the Contract must be construed as a sale of the manufactured homes only to the extent EWV had an ownership interest (which it did not warrant), and as a valid assignment to the extent its interest in the manufactured homes was as the landowner entitled to bond for new titles. For that reason, the Contract complied with Colorado law, which favors the assignment of rights.

Additionally, Miranda and the District Court disregard that EWV gathered and delivered to Miranda titles for 44 of the 63 manufactured homes in the Contract. R. CF., 3511. Indeed, Miranda represented to Weld County that *his mother* was the owner of many manufactured homes subject to the Contract.[1] *See, e.g.*, R. CF., 2595-99. Therefore, even accepting as true Miranda's flawed interpretation of § 106, EWV complied with the statute.

Notably, Miranda offers his interpretation of § 106 without citation to any case law, regulations or testimony from industry experts, government officials or witnesses of any kind. On the other hand, EWV's statutory construction is consistent with Miranda's own testimony, in which he acknowledged that he could begin work at Eastwood the day he signed the Contract. This construction is also consistent with how local governments enforce these statutory provisions. In affidavit testimony that Miranda and the District Court both disregard, Craig Shriver stated that he is *regularly* retained by manufactured home park owners to remove abandoned manufactured homes for which the park owner does not have title. R. CF., 3581-82. Shriver further stated that he is nevertheless able to obtain titles to the manufactured homes from county governments through the bonding procedure in § 119 after he removes the manufactured home from the park owner's

[1] For the home with title ending in 942, Miranda received the title, R. CF., 2598-99, and Silvia Miranda is listed as the "owner" in a moving permit application, *id.*, 2597, and a tax assessment payment. *Id.*, 2595-96.

property, even though he does not have title to it. *Id.* This is also *precisely what happened* at Eastwood, and confirms that the Contract is in line with how local governments interpret and enforce C.R.S. §§ 38-29-106 and -119.

Not a single law enforcement agency or official has claimed that the removal of homes from Eastwood was unlawful, no former owners of the homes at Eastwood has come forward claiming they were wronged, and Riverside has been able to refurbish and place manufactured homes from Eastwood in other manufactured home parks across the state. Finding that the Contract is unlawful will conflict with how local governments have interpreted and enforced these provisions, and upset long-standing industry practices that no party, public or private, has ever declared was unlawful until the District Court's erroneous Second Summary Judgment Order. The Contract should be enforced as lawful.

B. The City of Evans Municipal Code does not require EWV to retitle the manufactured homes.

Miranda erroneously claims that the City of Evans Municipal Code (the "Code") required EWV to bond for new titles to the manufactured homes at Eastwood. The Code provides that a manufactured home park owner "shall have one hundred twenty (120) days to obtain title to the home" once it has been abandoned. Code § 18.04.090(C)(3). The only thing this provision requires is that a park owner be given 120 days to attempt to obtain title. It does not require that a

park owner actually get the title or bond for it if the original titleholder cannot be found.

The Code envisions what will happen if the park owner cannot get the title. Once the 120 days pass, the park owner may contract to remove the manufactured home from its property, provided the park owner has made and has proof of "reasonable attempts to obtain title to the home." *Id*. This provision implies that a park owner may not be able to obtain title within 120 days. Why else would proof of "reasonable attempts" be necessary if the park owner were obligated to retitle every abandoned manufactured home on its property? This provision also eliminates Miranda's speculative concern that park owners will "sit on their hands" and wait for the 120 days to pass. To the contrary, every park owner is obligated to show reasonable attempts to obtain the title. EWV made such reasonable attempts to obtain titles. R. CF., 3390.

Moreover, the City of Evans is the entity charged with initially interpreting and enforcing its own Code. And despite being engaged in years of contentious litigation with EWV concerning Eastwood, the City has *never* claimed that EWV was obligated to retitle the abandoned manufactured homes at Eastwood before contracting for their removal. To the contrary, in deposition questioning of Cowan, the City of Evans' attorney agreed with EWV that, after the passage of sufficient

time, the manufactured homes could lawfully be removed from Eastwood. *See* R. CF., 3542-43 at 48:23-49:2.

Finally, Miranda takes issue with EWV's calculation of when the manufactured homes were abandoned, asserting that the homes had been abandoned well before the Notice of Violation ("NOV") was issued by the City. Miranda's claim actually supports EWV's position. Even if the manufactured homes at Eastwood had been abandoned by operation of law before April 2014, this still means that it was lawful for Miranda to remove them when he agreed to the Contract on April 24, 2014. Regardless of the abandonment date of the homes, it is undisputed that they had been abandoned by the time Miranda contracted to remove them from Eastwood. This fact is sufficient to find that the Contract was lawful because Weld County could issue permits for their removal. Supp. R., 227 ¶ 11.

II. The Contract was a legal means for removing flood-damaged manufactured homes from Eastwood Village.

A. Miranda ratified the Contract.

Tellingly, neither the District Court in the Second Summary Judgment Order nor Miranda in his Answer Brief address the fact that Miranda ratified the Contract and lost his ability to avoid it. Miranda, with full knowledge that EWV did not have title to each of the manufactured homes at Eastwood, performed. Accordingly, he cannot now seek to avoid the Contract. *See Wark v. Bopp*, 199

P.2d 892, 894 (Colo. 1948) ("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."). He has also retained his benefits under the Contract by keeping the 19 homes he removed. R. CF., 967 at 113:4-8. *See, e.g.*, *Wark*, 199 P.2d at 894 (if party "continue[s] 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"); *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 ratified by performing and accepting plaintiff's performance).

Additionally, Miranda filed suit to enforce the Contract, and he demanded more than $2.5 million in damages for EWV's alleged breach. R. CF., 27-28, 140, 480, and 968 at 118:11-:15. *See Halm v. Wright*, 168 P. 36, 37–38 (Colo. 1917) (bringing suit for breach of contract is an affirmance of contract); *Gerbaz v. Hulsey*, 288 P.2d 357, 359 (Colo. 1955) (plaintiff "could not affirm and at the same time disaffirm the contract"). The District Court and Miranda do not address any of this evidence of Miranda's ratification because it is inconsistent with their preferred outcome that the Contract be deemed voidable for lack of consideration. However, because Miranda's ratification of the Contract eliminates his power of avoidance,

or at minimum raises a genuine fact dispute, summary judgment cannot be entered that the Contact is invalid for lack of consideration.

B. The District Court disregarded evidence of consideration when it concluded that the Contract was illusory.

In his Answer Brief, Miranda confirms that EWV had the right to bond for new titles pursuant to § 119. Through the Contract, EWV assigned that right to Miranda, which is consideration. Miranda admitted the homes had scrap value, which is consideration. R. CF., 3121 at 72:24-75:7. Miranda remains in possession of 19 manufactured homes, which is consideration. R. CF., 967 at 113:4-8; *Strachan v. Drake*, 158 P. 310, 313 (Colo. 1916) ("Defendant accepted benefits under the contract, and he is therefore not in [a] position to say that it lacked consideration."). Moreover, as Riverside has proven, those homes can be refurbished and placed in other manufactured home parks. R. CF., 3582 ¶ 7. This evidence proves the Contract had adequate consideration as a matter of law.

At a minimum, whether a contract is supported by adequate consideration is a fact question. *Grant v. Oten*, 626 P.2d 764, 766 (Colo. App. 1981) (signed agreement is presumed to have adequate consideration, and if evidence of no consideration is presented, consideration becomes "a question of fact for the trier of fact"). The District Court erred in entering summary judgment because it disregarded the evidence of consideration outlined above, which raises a genuine fact dispute for trial.

C. Miranda admitted that EWV had obligations under the Contract.

The District Court erred in finding that EWV had no obligations under the Contract. By assigning its interest in the homes to Miranda, EWV could not later claim that it (and not Miranda) had the right to possess the homes or bond for new titles. Moreover, by brining suit against EWV for breach of contract (and seeking $2.5 million in damages) Miranda admitted that EWV had legally enforceable obligations under the Contract.

Second, the Contract is valid notwithstanding EWV's disclaimer of warranties, including warranty of title. Quitclaims are valid conveyances of a grantor's present interest, whatever it may be. *Premier Bank v. Bd. of Cty. Comm'rs of Cty. of Bent*, 214 P.3d 574, 578 (Colo. App. 2009) ("[Q]uitclaim conveys whatever interest the grantor has in the property, if any at all") (quoting 1 W. Carpenter, Colorado Real Estate Practice § 3.2, at 301 (2008)). Disclaiming warranties of title or of fitness for a particular purpose does not render the Contract invalid. *See, e.g., Tuttle v. Burrows*, 852 P.2d 1314, 1316 (Colo. App. 1992) ("[A] quitclaim deed does not represent that a grantor possesses any interest at all . . . ."). Accordingly, the Contract is valid and is not illusory even if EWV did not hold title to all the homes at the time the Contract was executed.

III. The District Court erred by failing to consider evidence that it was lawful to remove manufactured homes from Eastwood Village.

In entering summary judgment, the District Court erroneously disregarded numerous material facts showing that it was lawful for Miranda to remove manufactured homes from Eastwood when the Contract was signed:

- Miranda obtained valid moving permits from Weld County to remove 19 manufactured homes from Eastwood, including at least one without a title. R. CF., 3566 (Response to Interrogatory No. 9); 1969-2230; 3511 (showing that Miranda removed home at lot 146 in Eastwood, which did not have title).
- Miranda remains in possession of the 19 homes he removed. R. CF., 967 at 113:4-8.
- There is no evidence of any former owners of any of the homes in Eastwood raising any issue with their removal from Eastwood.
- The other contractor at Eastwood, Riverside, also removed each of its manufactured homes from Eastwood, including many without titles. R. CF., p. 3506 at 106:1-:3, 3505 at 104:16-:20; R. CF., 3582 ¶ 5. Riverside was able to get moving permits from Weld County for each of the homes it removed, including homes for which it did not have certificates of title. R. CF., 3582 ¶ 4.

- City of Evans officials toured Eastwood frequently and raised no issues about the legality of removing the homes. R. CF., 3506 at 106:10-107:2. Indeed, in moving for partial summary judgment in *EWV I*, the City of Evans ("City") took the explicit position that the homes *could be* removed from Eastwood. R. CF., 3542-43 at 48:23-49:2.
- Indeed, no government authority, entity or official has ever claimed that it was unlawful for Miranda to remove homes from Eastwood—until the District Court entered its summary judgment order invalidating the Contract.
- Shriver testified that he is "regularly contracted" to remove abandoned manufactured homes, including "hundreds of homes without titles." R. CF., 3582 ¶ 5; R. CF., 3507 at 111:8-112:7.
- At least four homes Riverside removed have been refurbished and are currently being used as residences. R. CF., 3582 ¶ 7.

These undisputed facts prove that it was lawful for Miranda to remove manufactured homes from Eastwood and to refurbish and use them, and the District Court erred by disregarding them in entering summary judgment against EWV.

IV. The District Court erred in concluding that EWV judicially admitted it was unlawful to remove homes from Eastwood.

A. EWV cannot judicially admit propositions of law.

Disregarding the material facts outlined above, the District Court concluded that the Contract had an "illegal purpose" based solely on a purported judicial admission by EWV "that none of the homes could be removed—including by Miranda—when the agreement was formed." R. CF., 3669.

This finding must be reversed because a party cannot judicially admit a proposition of law. *Miller v. Brannon*, 207 P.3d 923, 929 (Colo. App. 2009); *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 (1994). In his Answer Brief, Miranda does not dispute this principle. Rather, he makes the conclusory claim that EWV's purported admissions "were indeed facts." Answer Brief at 31-32. This unsupported assertion cannot stand. In the District Court's own words, EWV purportedly admitted that the "mobile homes *could not legally be removed*." R. CF., 3674 (emphasis added). Whether an act can be done "legally" is by definition a legal conclusion, and EWV cannot render an act unlawful through sheer proclamation.

B. The District Court erred in its interpretation of EWV's prior statements and by failing to give EWV the benefit of every reasonable inference regarding its prior statements.

"Summary judgment is appropriate only in the clearest of cases, where no doubt exists concerning any material fact." *Bauer v. Sw. Denver Mental Health Ctr., Inc.*, 701 P.2d 114, 117 (Colo. App. 1985). It may be entered only when all admissible evidence "clearly disclose[s] that there is no genuine issue as to any material fact, with any doubts being resolved in favor of the non-moving party." *Id.*

The District Court erred by disregarding evidence, and failing to view that evidence in the light most favorable to EWV, when it concluded that EWV admitted it was unlawful to remove homes from Eastwood. In *EWV I*, Cowan submitted an affidavit (the "Cowan Affidavit") stating that EWV "**was** prohibited by law from removing homes to which it did not have title." Supp. R. CF, p. 227 ¶ 6 (emphasis added). But, "N**ow** that so much time has passed since the destruction and abandonment of the manufactured homes at Eastwood Village, Weld County is legally empowered to issue destruction permits for manufactured homes." *Id.* ¶ 11 (emphasis added). "EWV and the parties removing the manufactured homes are now requesting the necessary permits from Weld County." *Id*. These statements make clear that lack of title was no longer a barrier to removal. The only thing needed to remove the homes was a permit.

The District Court misconstrued these statements and failed to consider them in the proceedings below. Indeed, in its Second Summary Judgment Order, the District Court did not even recognize the existence of Paragraph 11 of the Cowan Affidavit. Because the District Court failed to consider all material evidence, and failed to view the evidence in the light most favorable to EWV, summary judgment must be reversed.

Moreover, the City's motion for partial summary judgment was a *backwards looking* motion. The City alleged that EWV "refused" to do anything to clean up the homes at Eastwood. Supp. R. CF., 109. EWV explained why it had not removed the homes sooner, and what it was doing now that the homes were deemed abandoned and *could be removed*. The exact dates these events occurred were not at issue. That is why EWV did not spell them out with precision. To the extent EWV's prior pleadings were inelegantly or ambiguously drafted, on summary judgment they must construed in EWV's favor. *Bauer*, 701 P.2d at 117.

Miranda perpetuates the District Court's false narrative by noting that EWV's prior pleadings were filed a month after the Contract was signed, implying that the Contract was not lawful when executed. Answer Brief at 36-37. However, an agreement is not void simply because an action called for in the contract cannot be performed until permits are obtained. There are myriad agreements—like construction projects—where parties agree to a contract even before permits are

obtained. Moreover, Miranda got every permit he requested. As a result, it was lawful for Miranda to perform the Contract.

In his Answer Brief, Miranda also inaccurately claims that the homes at Eastwood had to be destroyed and could not be removed or resold. Answer Brief at 11. That is simply false. While it is ultimately irrelevant how Miranda used the homes once he removed them from Eastwood—Miranda accepted the manufactured homes "as is" and "with all faults"—his claim is another example of a legal argument at odds with the facts. *See* R. CF., 3166-67 (the Contract). The City never issued an order condemning the manufactured homes. It merely ordered their "removal" from Eastwood. R. CF., 3322-23 (City correspondence to EWV stating "we are now considering the homes to be debris that will have to be removed" but "we have not issued any orders for demolition through the building code"). Riverside refurbished at least four of the homes it removed from Eastwood and a neighboring manufactured home park, and has placed them in the Friendly Village of the Rockies and Redwood Estates mobile home parks. R. CF., 3582 ¶ 7.

The bottom line is that the Contract was a fair and lawful deal. EWV had to remove the manufactured homes from Eastwood. It could have kept the homes for itself because they had been abandoned. EWV chose not to. Instead, it gave its right, title and interest in the homes to parties who were willing to remove them. What the parties did with the homes after they removed them was at their own risk.

Miranda freely agreed to that deal.[2] He did so because he believed there was potential profit from refurbishing and selling the homes. R. CF., 951 at 51:22-52:8. EWV did not, in the District Court's derisive characterization, "shift[] the burden to remove the mobile homes to Miranda." R. CF., 3678 at 16. Instead, the Contract lawfully allocated the risks and opportunities between the parties. Under Colorado law, it is not for the District Court to decide whether it was wise for Miranda to enter into this agreement in hindsight. *Bush v. Koll*, 29 P. 919, 920 (Colo. App. 1892) (holding that "[c]ourts of law must allow parties to make their own contracts" and, therefore, the question of whether the contract is wise or unwise is "ordinarily an immaterial inquiry").

V. Genuine disputes of material fact preclude summary judgment on Miranda's claim of judicial estoppel.

Summary judgment cannot be entered on Miranda's claim of judicial estoppel because there is insufficient evidence to prove each element of judicial estoppel, and there are genuine disputes of material fact regarding the evidence that is in the record on each of these elements.

[2] Miranda and his mother, who is a purported expert in refurbishing manufactured homes, toured Eastwood and the homes he agreed to remove before he signed the Contract. R. CF., 944 at 22:8-24:24. He and his mother personally selected the 64 homes they wanted to remove. *Id.* at 22:18-:19. Miranda did not agree to remove some homes that were abandoned in Eastwood because of their condition. *Id.* at 23:15-24:1.

A. EWV's positions are consistent.

For judicial estoppel to apply, EWV's positions must be "totally inconsistent-that is, the truth of one position must necessarily preclude the truth of the other." *Estate of Burford v. Burford*, 935 P.2d 943, 948 (Colo. 1997). EWV maintained consistent positions in *EWV I* and the proceedings below as a matter of law.

EWV has consistently maintained that it needed title to the manufactured homes to remove them from Eastwood until the home had been deemed abandoned. Cowan (but not EWV) held title to some of the manufactured homes at Eastwood. But he did so only as the mortgagee. R. CF., 3392-3499 (partial copies of sales contracts). Cowan had lent money to the tenants/mortgagees of the homes to purchase the homes and held title as security for the tenants' promises to repay. *Id*. Cowan held the good faith belief that because he was a mortgagee he could not exercise dominion or control over the homes until they had been abandoned. R. CF., 3542 at 48:23–49:4, 3546 at 107:1-:7.

EWV sought to speed up the abandonment process by obtaining abandonment permits from the City of Evans, but was denied. Supp. R., 227 ¶ 9. Accordingly, EWV waited until the 120-day abandonment period passed after the City issued the NOV, at which time it entered into contracts to have the homes removed. R. CF., 3542 at 48:23–49:4; 3546 at 106:21–107:18; 3261 at 100:1-:15.

EWV stated that the homes could be removed simply by obtaining a moving permit from Weld County. Supp. R., 227 ¶ 11. This position is consistent with EWV's claims in the proceedings below, in which EWV contends that Miranda could (and did) remove manufactured homes from Eastwood by requesting permits from Weld County.

In the Summary Judgment Order, the District Court failed to acknowledge EWV's position that the homes could now be removed because they had been abandoned. The District Court also disregarded evidence of consistency in EWV's positions. Cowan testified consistently that the manufactured homes could be removed *after sufficient time passed*. R. CF., 3261 at 100:1-:15 (testifying that "homes had been abandoned" and "EWV has the right to get them off the property" because of the "[t]ime frame" after the flood"). The City Attorney agreed with EWV's position in deposition questioning of Cowan. R. CF., 3542-43 at 48:23-49:4. This evidence raises a fact dispute regarding the consistency of EWV's position, and it was error for the District Court to disregard it.

Miranda is incorrect that EWV's counsel allowed the Court to be misled. Rule of Professional Conduct 3.3 does not apply here because EWV did not make a misleading or false statement of law or fact to the District Court. Rather, the Court erred in misconstruing EWV's truthful statements and legal assertions. There is no requirement that prevailing parties file additional motions simply to ensure

that its position *was understood*. Such a requirement would impose unimaginable burdens on parties and the courts that is neither required nor contemplated by the Rules of Civil Procedure.

B. EWV's and Cowan's intent cannot be determined solely through pleadings.

Summary judgment "is not a substitute for trial," and "is appropriate *only* where there is no role for the fact finder to play." *Roberts v. Am. Family Mut. Ins. Co.*, 144 P.3d 546, 548 (Colo. 2006) (emphasis in original). "Summary judgment is appropriate only in the clearest of cases, where no doubt exists concerning any material fact." *Bauer*, 701 P.2d at 117.

Here, there are substantial disputed material facts concerning EWV's and Cowan's intent to mislead the District Court, and a trial is necessary to decide the issue. There is evidence of consistency in EWV's and Cowan's statements and positions, which indicate they did not intend to mislead the District Court. The City also agreed with EWV's position that the manufactured homes could be removed from Eastwood after the passage of sufficient time. The facts also show that Miranda lawfully removed manufactured homes from Eastwood, which indicates that it was not EWV's and Cowan's intent to represent that it was unlawful for Miranda to remove manufactured homes from Eastwood. Indeed, EWV and Cowan are entitled to the inference that the inclusion of EWV's contract with

Miranda in the Cowan Affidavit demonstrates that they were not misleading the Court.

Miranda concedes that determining a party's intent "is fact dependent," but claims that the Court was correct in disregarding material facts concerning EWV's and Cowan's intent. Answer Brief at 44. Astoundingly, Miranda claims that the District Court can assess EWV's and Cowan's intent merely by looking at the parties' pleadings, as if the Court were engaging in contract interpretation. Applying judicial estoppel is nothing like contract interpretation. EWV's and Cowan's intent cannot be determined by solely looking at the four corners of EWV's pleadings.

Whether "defendants acted in 'good faith' necessarily involves their state of mind, resolution of this issue must include a reference to all facts and circumstances of the case as developed not only from direct and circumstantial evidence, but cross-examination and determination of credibility made by the trier of facts." *Martin v. Weld Cty.*, 598 P.2d 532, 534–35 (Colo. App. 1979). In addition, in applying judicial estoppel, unlike in contract interpretation, there is no parol evidence rule barring consideration of extrinsic evidence. Rather, under Rule 56, the District Court must consider all the evidence, including depositions and affidavits that are *outside* the pleadings. C.R.C.P. 56(c).

Even if EWV did change its positions in the two lawsuits (it did not), determining EWV's intent for making that change cannot be done on the current record. EWV is entitled to the inference that any changes in its positions were the result of a good faith change in the understanding of the facts or law. *EWV I* and the proceedings below involve complex legal principles and detailed factual scenarios, and they have both spanned years of time. It is not only reasonable but expected that a party's understanding of the issues will evolve with fact discovery and additional analysis. Testimony is needed to ascertain whether a changed position was the product of good faith or intent to mislead. *Governor's Ranch Prof'l Ctr., Ltd. v. Mercy of Colo., Inc*., 793 P.2d 648, 651 (Colo. App. 1990) ("All inferences must be made in favor of the non-moving party."). "Summary judgment is appropriate only in the clearest of cases," and the evidence shows determining EWV's and Cowan's intent is far from a clear case. *Bauer*, 701 P.2d at 117. The Second Summary Judgment Order should be reversed.

CONCLUSION

The Second Summary Judgment Order should be reversed and this case remanded with instructions to enter the First Summary Judgment Order enforcing the terms of the Contract. When remanded, this Court should order that the case be reassigned to a different judicial officer.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on December 22, 2017, I filed the foregoing using the Colorado E-Filing/Service System for filing and service on the following:

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