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COLORADO COURT OF APPEALS
101 W. Colfax Avenue, Suite 800
Denver, Colorado 80202

DISTRICT COURT, SAN MIGUEL COUNTY, COLORADO
Trial Judge: James Schum
Case No: 10CV79

Appellants:

LESLIE R. EVANS and ESTHER H. EVANS,

v.

Appellees:

BCB PROPERTIES, LLC, a Colorado limited liability company, and ALAN TOWBIN, Individually.

▲ COURT USE ONLY▲

Case No: **12CA0596**

Division:

Courtroom:

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APPELLANTS' AMENDED OPENING BRIEF

COLORADO COURT OF APPEALS 101 W. Colfax Avenue, Suite 800 Denver, Colorado 80202 **DISTRICT COURT, SAN MIGUEL COUNTY, COLORADO** Trial Judge: James Schum Case No: 10CV79	
Appellants: LESLIE R. EVANS and ESTHER H. EVANS, **v.** **Appellees:** BCB PROPERTIES, LLC, a Colorado limited liability company, and ALAN TOWBIN, Individually.	**▲ COURT USE ONLY▲** Case No: **12CA0596** Division: Courtroom:
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CERTIFICATE OF COMPLIANCE

I hereby certify that this amended 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).

Choose one:

☒ It contains 7,057 words.

☒ It does not exceed 30 pages.

The brief complies with C.A.R. 28(k).

☒ For the party raising the issue:
It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the records (CD p.____), not to an entire document, where the issue was raised and ruled on.

☐ For the party responding to the issue:
It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

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

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OTHER AUTHORITIES

Appellants, Leslie R. Evans and Esther H. Evans (the "Evanses"), by and through undersigned counsel, hereby submit their Opening Brief.

I. STATEMENT OF THE ISSUES

Whether the court erred in construing the Declaration as barring any relief for a nuisance arising out of the use the brewpub?

Whether the court erred concluding there was no common nuisance or breach of the Declaration?

Whether the court erred in excusing the nuisance because the Evanses "knowingly" came to it?

Whether the court erred in holding the Evanses had a duty to mitigate?

Whether the court erred in holding that the landlord had no duty to mitigate?

Whether the court erred in failing to award damages?

II. STATEMENT OF THE CASE

A. NATURE OF CASE, PROCEEDINGS & DISPOSITION

The case at bar was initiated by Leslie and Esther Evans, as owners of a residential condominium, when the operation of a nearby commercial unit housing a brewpub began to create a profound odor that caused sickness and rendered the residential unit unmarketable. After multiple notices and pleas for assistance were

ignored, an action was filed on May 14, 2010, seeking relief for a common law nuisance and for breach of the Condominium Declaration.

A trial to the court was conducted January 23-25, 2012. The Honorable James Schum entered his "Findings of Fact, Conclusions of Law and Order" ("FCL") on February 9, 2012, denying all of the Evanses' claims against the owner of the unit. A Notice of Appeal was filed on March 23, 2012.

B. STATEMENT OF THE FACTS

BCB Properties, LLC ("BCB") is the owner and developer of a mixed use condominium project located in Telluride, Colorado. The complex consists of two luxury residential condominium units, three commercial units, and miscellaneous space. BCB recorded the Condominium Declaration (the "Declaration") on June 17, 1999. (Ex 4, CD p. 706)[1] The Appendix contains admitted Exhibit 28 which is a photo of the complex.

BCB leased one of the commercial spaces to an entity known as Portal One Corporation d/b/a Smuggler's Brewpub and Grille ("Smuggler's"). Smuggler's operated as a restaurant and brewpub during all times material to this action. (Ex. 7, CD p. 751-65.)

[1] Most of the referenced exhibits were stipulated into evidence. (CD p. 1801, l. 20 – p. 1803, l. 18) References to other exhibits are provided per C.A.R. 28(e).

The Declaration allowed the brewpub, provided its use was both normal and reasonable. The Declaration further defined uses that were unreasonable as those which caused annoyance, were offensive, or otherwise interfered with the use and enjoyment of the other units. (Ex. 4, CD p. 706.)

The Evanses purchased their unit for $1,925,000 on June 13, 2006, from prior owners (the Delaneys) who had purchased it directly from BCB. (Ex. 3, CD p. 689.) The Evanses originally filed a complaint against the Delaneys for nondisclosure of offensive odors, but eventually settled for a nominal sum related to the restaurant fryer odors when the Delaneys convinced the Evanses that they had never experienced the brewery stench being experienced by the Evanses in 2009. (Ex. 52, CD pp. 984-85.)

The Evanses were aware of the restaurant/brewpub and the related Declaration provisions. The pervasive brewery stench did not exist, however, when the Evanses and their realtor toured the condominium unit in 2006. (CD p. 1825, l. 15 – p. 1826, l. 16.)

Shortly after purchasing their unit, the Evanses experienced restaurant food/frying odors. In the spring of 2009, however, both the nature and extent of the odors emanating from the brewpub changed dramatically. Unrebutted trial testimony from multiple sources established that the odor from the brewery had

become overpowering, was causing multiple people to experience sickness, nausea, and headaches, and caused the brokers to cancel open houses and conclude that the unit was not marketable so long as the brewery odor continued to infect the Evans unit. (The specific testimony summarized above along with corresponding record references are provided within the Argument below.)

Mr. Evans had voiced a concern over the possible impact of increased production to Town authorities and others when he read newspaper articles in August 2008 and January 2009 that the brewpub was increasing its volume of production to serve other local restaurants and facilities by adding $100,000 of new equipment. (Ex. 23 & 24, CD p. 842-43; admitted at CD p. 1836, l. 1-3; CD. p. 1831, l. 18 – p. 1833, l. 8.) Unrebutted testimony from the brewpub's "brewmaster," Mr. Christopher Fish, established that the production of beer increased from 400 barrels in 2003 to 1,100 barrels in 2009. (CD p. 1482, l. 25 – p. 1483, l. 4.)

By November of 2009 the Evanses had reluctantly decided to sell their unit because of financial burdens arising from the terminal illness of Mr. Evans' father and the slowing of Mr. Evans' real estate practice in Florida. Upon hearing from his realtor that there was a very offensive odor that was much stronger than anything previously experienced such that it made her "nauseous," Mr. Evans

wrote a letter to both the HOA and BCB notifying them that he was attempting to sell his unit, and demanding that action be taken to manage the brewery odor to a reasonable level so as to not impact the Evans' efforts to sell their unit. (CD p. 1836, l. 10 - p. 1837, l. 7; Ex. 25, CD p. 844; Ex 31, CD. p. 877.)

On November 12, 2009, BCB's attorney responded to Mr. Evans by promising that the issue would be "seriously looked into." (Ex. 19, CD p. 835-36.)

After a month of no response or action, Mr. Evans again wrote to Mr. Steel, reminding him that he was attempting to sell his unit and that he could incur damages if the nuisance was not addressed. (Ex. 21, CD p. 840.)

On December 17, 2009, the president of the HOA, Jerry Sklar, who owned the other residential unit, also wrote a letter to Mr. Steel stating that when the Sklars purchased "there was no brewery smell, and there was no reason to expect that to change" and characterizing the condition in 2009 as "a health hazard...a nuisance...(and) "the pollution problems." (Ex. 22, CD p. 841; admitted at CD p. 1849, l. 3-4.)

On December 27, 2009, the realtor holding an open house at the unit cut short the planned event because "... the smell was so bad she had to leave early as it was making her sick to her stomach." (Ex. 31, CD p. 877.)

On August 4, 2010, the ultimate purchaser (hereinafter "Buyers") was first shown the unit. Their broker, Mr. Patterson, reported to the Evanses' broker that the smell was a "100% deal breaker." (Ex. 34, CD p. 880.)

The Evanses' objective was to have the brewing odor from BCB's commercial unit managed to a reasonable level so that the Evanses' unit could be sold; it was not to engage in litigation. Despite the filing of the complaint on May 14, 2010, the Evanses attempted to resolve the issue in the conference room rather than the courtroom by suggesting that the Defendants hire their own engineer to design a solution and by agreeing to delay the need for disclosures in the interim. (Ex. 37, CD p. 898; Ex. 40, CD p. 903.) Defendants obtained a report from John Cunningham, P.E., on August 10, 2010. (Ex. 74, CD p. 1204.)

On August 19, 2010, the Evanses' attorney informed Defendants' counsel that Cunningham's design was acceptable, and provided them notice that there was a potential purchaser who the Evanses were in danger of losing if that design fix was not immediately implemented. (Ex. 37, CD p. 898.) On August 26, 2010, a subsequent notice informed Defendants that the buyer had "backed away from pursuing further negotiations to buy because of the brewery odor issue." (Ex. 38, CD p. 899.) BCB reacted by filing a cross claim against its tenant rather than addressing the issue. (CD. p. 1767, l. 5-9).

Defendant Towbin managed BCB for its principals, his wife and brother-in-law. He was personally involved in deciding to continually renew the lease after it became a month-to-month tenancy.[2] (CD p. 1768, l. 8). He admitted knowing that the tenant "...was on the ropes financially (and) couldn't afford" to pay for the mechanical work recommended by Defendants' chosen engineer. (CD p. 1788.) Nonetheless, he consciously chose every month to simply deposit the base *and percentage* rent being paid rather than using or allowing some portion of those funds to perform the remedial work. As found by the trial judge, Defendants "chose to do nothing about the odors." (FCL, p. 4, l. 8, CD p. 1451.)

On November 15, 2010, Defendants' counsel were informed that the buyer would "not make an offer unless we know the odor problem will be mitigated." (Ex. 40, CD p. 903.)

After a new owner of the tenant, Joe Malecki, finally began to implement some of the work recommended by Defendants' engineer, the Evanses made a counteroffer on April 1, 2011, to sell the unit for $1.8 million. The buyers then ***conditionally*** contracted to purchase at $1,775,000, but insisted upon an Article 29.2 which allowed them to delay closing until they could experience the

[2] BCB/Smugglers entered into a ten year lease in 1998; renewed it for a single year expiring on 8/29/09; thereafter, BCB continued the lease on a month-to-month basis. (Ex. 7, CD p. 751-65; Ex. 63, CD p. 1143; Transcript, CD p. 1769, l. 12-14)

condominium during a peak brewing session, and cancel the contract if the smell continued to persist despite the work which had been done. (Ex. 50, CD p. 972.)

Unrebutted expert testimony at trial established the following:

- The final list price $2.19M minus an additional 10% discount was a fair market price based on a Comparable Market Analysis performed by the Evanses' broker. (CD p. 1576, l. 4-25.)
- The odor was emanating from the brewpub and invading the Evans unit. (CD p. 1719, l. 20 – p. 1720, l. 15.)
- It was neither physically possible nor economically feasible for the Evanses to keep the odor from invading their unit by virtue of pressurization or other efforts within their unit. (CD p. 1680, l. 25 – p. 1682, l. 14.)

III. ARGUMENT

A. SUMMARY OF ARGUMENT

The trial court erred in construing the Declaration of Condominium as barring any relief for a nuisance arising out of the use of the brewpub. The Declaration allowed a brewpub so long as its use was ***both*** normal and reasonable. The unrebutted evidence was that the use was unreasonable as defined by both the Declaration and the Colorado common law of nuisance.

The unrebutted evidence at trial established that the brewing odor from the neighboring unit owned by the landlord caused nausea, headaches, a burning sensation, and affected the marketability and timing of the ultimate closing for the Evans unit.

The trial court reached erroneous conclusions of law by holding that the Evanses relinquished any claim by knowingly coming to the nuisance, and by holding that the Evanses violated a *non-existent* duty to mitigate the harm by fortifying their unit; something that the unrebutted testimony of experts established was neither physically nor financially feasible.

The trial court's conclusion that the landlord had no duty to mitigate the nuisance ignored both the obligation set forth in the Declaration and the common law duty of a landlord who knowingly allows a nuisance to continue despite having control over the leasehold. The tenancy was a month-to-month tenancy that the landlord continually renewed despite knowledge of the nuisance and the damage it was causing.

The unrebutted testimony established that the Evanses were damaged in the form of carrying costs incurred because of a delayed closing and a diminution in value caused by the nuisance. The trial court erred as a matter of law in failing to award damages under these circumstances.

B. ARGUMENT OF ISSUES PRESENTED

1. The Trial Court Erred in Construing the Declaration as Barring Any Relief for a Nuisance Arising Out of the Use of the Brewpub.

a. Compliance with C.A.R. 28(k).

(1) Contract interpretation is a question of law that an appellate court reviews de novo without being bound by the trial court's findings and conclusions. *Bledsoe Land Co. LLLP v. Forest Oil Corp.*, 277 P.3d 838, 842 (Colo. App. 2011).

(2) The reasonableness issue was argued throughout the trial and ruled upon in the FCL, p. 12, l. 4; CD p. 1459.

b. Discussion of the Issue.

The trial judge misconstrued the Declaration by holding that:

> "By purchasing the property and accepting the brewery and restaurant, Plaintiffs knowingly relinquished ***any right*** to make a claim for ***a nuisance*** caused by their operations." (FCL, p. 12, l. 4; CD p. 1459).

The fundamental fallacy underlying the error is that it fails to recognize that the reasonableness limitation imposed on the brewpub would result in no nuisance being created if adhered to by BCB and its tenant. This limitation is in fact at the heart of what defines a nuisance. In holding that the Declaration "... bars any claim for a nuisance..." (FCL, p. 2, l. 13; CD p. 1449), the trial court focused on a non-contested fan issue rather than considering whether a use which caused sickness

and rendered the unit unmarketable was unreasonable. The Declaration establishes that the operation of the brewpub shall not constitute a nuisance provided that its use is ***both normal and reasonable.*** The trial court's holding failed to both give effect to the term "reasonable" and to distinguish between what was a normal use of the brewpub, and when that use and the resulting odor ceased to be reasonable and thus constituted a nuisance.

Contract language "must be examined and construed in harmony with the plain and generally accepted meaning of the words used, and reference must be made to *all* the agreement's provisions." *Fibreglas Fabricators, Inc. v. Kylberg,* 799 P.2d 371, 374 (Colo. 1990). Each and every provision in a contract must be given effect if at all possible; avoiding an interpretation that renders certain terms superfluous. *Aronoff v. Western Federal Sav. & Loan Ass'n.* 470 P.2d 889, 891 (Colo. App. 1970); *United States v. Brye*, 146 F.3d 1207, 1211 (10th Cir. 1998).

The use of the space to brew beer is a "normal" use of the brewpub, but the use is also expressly required to be "reasonable." The Evanses did not relinquish any right to make a claim arising out of the ***unreasonable*** operation of the brewpub. This unreasonableness limitation is clear when one reads the relevant provisions of the Declaration in context, giving effect to all of its terms such that they are in harmony with one another.

Interpreting the words "normal ***and reasonable use"*** *as used in the Declaration* is aided by examining each of the specific words used and their context. Immediately above these words, Section 8.05 illuminates their meaning by providing that:

> "No nuisance shall be permitted ... nor any use, activity or practice which is the source of ***unreasonable*** annoyance ... or which ***unreasonably*** offends or disturbs any unit owner, or which may ***unreasonably*** interfere with the peaceful enjoyment or possession of the proper use of a unit." (Ex. 4, CD p. 706)

Additionally, this reasonableness threshold is emphasized in Section 8.06:

> ...No...odor shall be emitted from any portion of the Common Interest Community which would ***reasonably be found by others to be noxious or offensive***...This Section 8.06 shall be subject to the provisions of Section 8.05 above. (Emphasis added.) (Ex. 4, *supra.*)

Thus, while the Declaration provided that the normal ***and*** reasonable use would not constitute a "nuisance," these words construed in context made it clear that a use causing an unreasonable annoyance, which was reasonably found by others to be offensive or noxious, or which unreasonably interfered with the possession of a unit was not a reasonable use. By limiting the brewpub's use to that which was reasonable, the Declaration prohibited, rather than permitted, a nuisance from being created by an unreasonable use of the brewpub.

2. A Common Law Nuisance and a Violation of the Declaration Was Established by Overwhelming and Unrebutted Evidence.

a. Compliance with C.A.R. 28(k).

(1) Undisputed facts present an issue of law to be reviewed de novo. *Sterenbuch v. Goss*, 266 P.3d 428, 432 (Colo. App. 2011); *Swieckowski v. City of Ft. Collins*, 934 P.2d 1380, 1383-1384 (Colo. 1997).

(2) The ruling on this issue is at FCL p. 12, CD. p. 1459, l. 1.

b. Discussion of the Issue.

The unrebutted evidence comprised of numerous, diverse witnesses and related documents overwhelmingly established that the brewpub's operation produced noxious and offensive odors that unreasonably interfered with both the Evanses' use of and effort to sell their unit.

A trial court's findings of fact cannot stand if the record contains no evidence to support them. *Wright v. Horse Creek Ranches*, 697 P.2d 384 (Colo. 1985). "If competent evidence supports the trial court's findings of fact, we give deference to them; conversely, we set aside findings of fact that are clearly erroneous or unsupported by the record." *People v. Kaiser*, 32 P.3d 480, 483 (Colo. 2001).

Mr. Evans testified that beginning in 2009 the smell was a "terrible," "pungent" odor that was as different as "apples and oranges" from what had

previously existed; that it "hit you" and rendered the unit "virtually uninhabitable." (CD p. 1874, l.7-14; p. 1875, l. 6-7; p. 1876, l. 10-14.)

Mrs. Evans testified when the smell changed in 2009-10 "it was like a different condominium," and that it "was horrible ... caused her to develop headaches ... become sick to her stomach ... (and suffer) sleeplessness." She also identified by name guests who had to move out because the odor was "so strong." (CD p. 1921, l. 19 - p. 1923, l. 17.)

Lorrie Denesik was a broker who *previously* had worked for Sally Courtney, the Evanses' selling broker. She had no current relationship with the Evanses or Ms. Courtney at the time of trial. She relayed her attempt to hold an open house during the 2009 Christmas Season as being cut short because of an "incredibly pungent" brewery odor that caused her to suffer "a really bad headache," "nauseous[ness]," and a "burning" sensation in her stomach and sinuses. She described the strength of the smell as being "very strong; almost like ammonia." (CD p. 1932, l. 8 – p. 1934, l. 4.)

John Cunningham, P.E., the engineer consulted by the Defendants, reported that he experienced the smell in the Evans unit, and that his nine-point solution "would solve the issue of containing and properly exhausting the beer odors." (CD p. 1937, l. 2– p. 1938, l. 25.)

Corie Chandler, a broker with Ms. Courtney's office, reported the condition she experienced was "to the point ... it was impeding our ability to sell the condo." Ms. Chandler testified she had shown the unit to the Evanses in 2006 and did not then experience the odors reported in her August 2010 email. "It was a foul, overwhelming, offensive smell"; when she opened the door, she "...would get hit with the smell." (CD p. 1955, l. 23 - p. 1956, l. 23; p. 1959, l. 10 - p. 1960, l. 4.)

Susan Griffin was Ms. Courtney's office manager who had gone to take photos for the local Multiple Listing Service in November 2009. She testified that "the smell was absolutely horrendous ... very nauseating ... (she) almost threw up ... (she had) never smelled that type of strong stench in a residence ... it was an awful, awful stink." (CD p. 1975, l. 4 – p. 1976, l. 22.)

Ms. Courtney testified that when the unit had been sold to the Evanses in 2006 there were no noticeable smells, but that in 2009-2010 it was a "pungent," "foul," "repulsive" odor,[3] and that she would not be able to sell the unit "unless these smells went away." (CD p. 1562, l. 8–p. 1563, l. 24; p. 1568; p. 1600, l. 11-18.)

[3] *Proof of the nuisance does not depend on whether there was a change in the odor.* Proof of the change was offered to show the difference between the prior reasonable use vs. the later unreasonable use causing sickness and affecting marketability.

Steve Patterson, the broker representing the Buyers, testified that "the odors were not acceptable"; that as they walked in it "was just too much"; that his clients who intended to offer the unit for rent had the impression that "once they open that door and get hit with that smell it would possibly be over for that rental." (CD p. 1689, l. 5-24.)

Chris Lakin, P.E., specializing in environmental engineering, testified that the "whole condo had been inundated" by what he variously described as a "very prominent," "oppressive," "pronounced, profound odors"; he testified regarding Health Department regulations "they clearly were not being complied with" and that "it actually smelled worse in the Evans unit than it did down in the brewery." (CD p. 1720, l. 9; p. 1722, l. 17-20; p. 1733, l. 4 – p. 1734, l. 5.)

A claim for nuisance is predicated upon a substantial invasion of an individual's interest in the use and enjoyment of his or her property. *Hoery v. United States*, 64 P.3d 214, 218 (Colo. 2003). Liability for nuisance may arise from a negligent invasion of a person's interest; as alleged in the case at bar. Conduct constituting a nuisance may include indirect or physical conditions created by a defendant that cause harm. *Id.* at 218.

The essential question to be resolved when a private nuisance is claimed is whether the offending party has unreasonably interfered with the claimant's use

and enjoyment of his property. The interference which occurs must also be substantial in nature as measured by the standard that it would be of definite offensiveness, inconvenience, or annoyance to a normal person in the community. *Northwest Water Corp. v. Pennetta*, 479 P.2d 398, 400 (Colo. App. 1970); *Woodward v. Bd of Directors of Tamarron Assn.*, 155 P.3d 621, 628 (Colo. App. 2007); Restatement (Second) of Torts, § 826, Comment b.

"The unreasonable and substantial interference test ... necessarily includes a consideration whether the questioned activity is reasonable under all surrounding circumstances." *Allison v. Smith*, 695 P.2d 791, 794 (Colo. App. 1984). Generally, to be unreasonable, an interference must be significant enough that a normal person in the community would find it offensive, annoying, or inconvenient. *Public Service Company v. Van Wyk*, 27 P.3d 377, 391 (Colo. 2001).

While the question of reasonableness is fact issue, *Woodward, supra*, at 628, *unrebutted* testimony from multiple, diverse "normal people" established that the stench was pungent and overwhelming, caused nausea and headaches and was considered by the buyers to be a "100% deal breaker." Rather than applying the reasonableness test to these facts, the trial judge instead simply concluded that:

> "Given the circumstances and findings stated above, the Court concludes that Defendants did not unreasonable [*sic*] interfere with

> the Plaintiffs' use and enjoyment of their condo. By purchasing the property and accepting the brewery and restaurant, Plaintiffs knowingly relinquished any right to make a claim for nuisance caused by their operations." (FCL, p. 12; CD p. 1459.)

The error of misconstruing of the Declaration and ignoring the unchallenged testimony of both fact and expert witnesses as to the effect created by the foul and nauseating odor allowed to infect the Evanses' unit mandates reversal.

3. The Court Erred as a Matter of Law in Excusing the Nuisance by Concluding that the Evanses "Knowingly" Came to It.

a. Compliance with C.A.R. 28(k).

(1) Conclusions of law are subject to de novo review. *City of Boulder v. Fowler Irrevocable Trust*, 53 P.3d 725, 727 (Colo. App. 2002).

(2) The ruling on this issue is at FCL, p. 12, CD. p. 1459, ¶ 2.

b. Discussion of the Issue.

The trial court's conclusion was in error where it held that the Evanses "relinquished any right to make a claim for a nuisance" by "knowingly" coming to the nuisance. (FCL, p. 12, CD p. 1459, ¶ 2.)

Colorado law has long adopted the majority view rejecting this very proposition. In *Allison, supra*, at 794-95, the court held as follows:

> The doctrine of voluntary assumption of risk has no application in nuisance cases to relief from liability. Thus it is no defense to an action for nuisance that the plaintiff 'came to the nuisance' by knowingly acquiring property in the vicinity of the defendant's

> premises.... The duty to use due care, it seems, is not abated toward one who has elected to live or reside in the vicinity of the nuisance." 2 F. Harper & F. James, *The Law of Torts* § 1.28 (1956).
>
> "The law does not give to the owner of a building the right to maintain a nuisance in it merely because he constructed the same before another building was constructed and later occupied by persons who have been injured by a nuisance conducted in the building first erected." *Krebs v. Hermann*, 6 P.2d 907, 908 (Colo. 1931).

The court's conclusion, exacerbated by ignoring the unrebutted evidence that the use and its effect dramatically changed over time, justifies reversal.

4. The Court Erred in Concluding the Evanses Had a Duty to Fortify Their Home Against the Nuisance.

a. Compliance with C.A.R. 28(k).

(1) The determination of whether a duty exists is subject to de novo review. *Cary v. United of Omaha Life Ins. Co.*, 68 P.3d 462, 465 (Colo. 2003).

(2) The ruling on this issue is at FCL ¶ 3, CD p. 1454, l. 9.

b. Discussion of the Issue.

The "circumstances" considered by the trial court in concluding there was no nuisance included its conclusion that the Evanses should have themselves mitigated the harm. (FCL, ¶ 3, CD p. 1454, l. 9)

Not only did the unrefuted testimony of the expert engineers (one in direct response to the judge's questions) plainly reject this notion, the suggestion that one suffering a nuisance caused by a neighboring property must take it upon

themselves to abate the offending condition was soundly rejected over one hundred years ago by the Colorado Supreme Court.

> "The ruling of the court refusing to allow the defendants to show that the plaintiff might make his cellar water-tight by the use of cement must be upheld. **Plaintiff was under no obligation, equitable, legal, or moral, to make his cellar water-tight, to avoid in part the consequences of the wrongful act of defendants.**" *Sylvester v. Jerome*, 34 P. 760, 763 (Colo. 1893). (Emphasis supplied.)

Mark Burggraaf, P.E., testified that, **"I looked to see if there was some possibility within – some reasonable possibility – within construction, the constraints of the construction to pressurize the Evans unit and I determined that there was not."** He then engaged in the following Q&A with the trial judge:

> **Judge:** "Why, specifically, could the condo unit not be pressurized?"
> **MB:** "It has to do with the structure. There is no void spaces. It would have required a rooftop unit of some sort on the exterior; everything would have had to have been done exterior to the space which was not designed for it; it would have been a significant cost probably in terms of hundreds of thousands of dollars, possibly even pushing a million plus from that standpoint because of the work that would have been required and so it simply was a non-starter."
> **Judge:** "You can't simply put some sort of fan unit there, bring air from the outside to the inside."
> **MB:** "Not on this million-plus dollar valued condominium."
> **Judge:** "Why not?"
> **MB:** "Because the air would not be tempered. Realistically you're on the right track when you suggest bringing a fan in just to push it in, or blow it in. But right now, you know, today is below freezing outside. That fan needs to be able to run continuously. That means now that I have to bring heating capability in through that fan unit.... I would have to bring freeze protection capability in. It has to be large enough to effectively pressurize the space; you're trying to overcome

> ***the lack of pressurization in the overall building***, and so you are trying to make up for ***a leaky building with just one unit***, one space, so it would be a significant sized amount." (CD p. 1680, l. 25 – p. 1682, l. 14.)

With regard to the trial court's suggestion that a few door seals would solve the issue, Chris Lakin, P.E., a specialist in environmental engineering, testified that even assuming that the doors were as good as they possibly could be, his opinion was that the doors themselves would not have solved the problem. Specifically, he testified that the doors were "... peripheral concepts that are completely inadequate to control the problem as it exists." (CD p. 1729, l. 25 - p. 1730, l. 8.)

Not only is the record devoid of any support for the conclusion that the Evanses could have mitigated the nuisance by work within their unit, such a finding was specifically rejected by the unrebutted testimony from two engineers. This finding would impose on the non-offending landowner a non-existent duty to barricade its property against a nuisance generated on a neighboring property; a proposition that has been clearly rejected by Colorado law.

5. The Court Erred in Holding that the Landlord Had No Duty to Mitigate a Known Nuisance Where the Landlord Had Legal Control of the Unit.

a. Compliance with C.A.R. 28(k).

(1) The determination of whether a duty exists is subject to de novo review. *Cary, supra,* at 465.

(2) The ruling on this issue is at FCL, ¶ 3; CD p. 1459, l. 16.

b. Discussion of the Issue.

The trial court held that:

> "...[N]either the landlord nor the tenant had a duty to take action upon the demands of Plaintiffs....In general, there is no duty imposed on a landlord to take affirmative action to prevent injury to a third party absent a special relationship not here present." (FCL, p. 12, CD p. 1459, ¶ 3.)

This holding confuses the circumstances where a landlord is not liable under the law of premises liability for an injury occurring within the leasehold over which he has little control, with the law imposing liability for a nuisance invading a neighboring property when the landlord has the legal right to control and eliminate the offending conduct. This holding also ignores the Declaration which imposed on BCB the express obligation to require its tenant to comply with the Declaration; including its prohibition against unreasonable uses.

Section 8.13 of the Declaration entitled "**Lease of a Unit**" provided that:

> "Any Unit Owner shall have the right to lease their Unit ... subject to the following: (b) Any long-term lease or rental agreement ... shall provide that the lease or rental agreement is subject to the terms of this Declaration." (Ex. 5, CD p. 735.)

Colorado courts have not squarely addressed the issue of a landlord's liability for *continuously permitting* a tenant to operate the leasehold in a manner that creates a nuisance on a neighboring property. Other jurisdictions have

analyzed the issue by considering the landlord's knowledge of the nuisance when it had the control necessary to abate or mitigate the activity. In *Tetzlaff v. Camp*, 715 N.W.2d 256, 260 (Iowa 2006), the court discussed the issue of a landlord's liability regarding a nuisance as follows:

> The landlord is generally not responsible for the tenant's acts in creating or maintaining a nuisance upon the leasehold once the landlord transfers possession to tenant. One important exception to this general rule (is found in) section 837 of the Restatement Second of Torts which provides:
> (1) A lessor of land is subject to liability for a nuisance caused by an activity carried on upon the land while the lease continues and the lessor continues as owner, if the lessor would be liable if he had carried on the activity himself, and
> (*a*) at the time of the lease the lessor consents to the activity or knows or has reason to know that it will be carried on, and
> (*b*) he then knows or should know that it will necessarily involve or is already causing the nuisance.

See also, 58 Am.Jur.2d *Nuisances* § 120, at 647 (2002) ("Under the Restatement Second of Torts, a lessor's liability is generally based on his or her consent to or knowledge of the nuisance."); *Uccello v. Laudenslayer*, 118 Cal.Rptr. 741 (Cal. App. 1975):

> A landlord may be held responsible where "... at or after the time possession is given to the tenant the landlord retains or acquires a recognizable degree of control...with a concomitant right and power to obviate the condition and prevent the injury. In these situations, the law imposes on the landlord a duty to use ordinary care to eliminate

> the condition with resulting liability for injuries caused by his failure so to act; *and*

Daigle v. Cont'l Oil Co., 277 F. Supp. 875, 881-82 (W.D. La. 1967):

> ...one may not use his property or permit it to be used to the injury of any legal right of another....The owner cannot escape responsibility for activities conducted on his premises by his lessee when those actions damage neighboring property owners, because the duty owed to the neighbor is non-delegable.[4]

Applying these principals, BCB is liable where it knew the use of its property was causing sickness and impeding the sale of the Evans unit and where it had the control to stop that use or cause it to be mitigated. Each month BCB had the legal right to end the lease, or to terminate it for breach of the Declaration; the tenant had no right to continue but for BCB's express consent. *See, Fibreglas Fabricators, supra.* at 376 ("...because the lease agreement ended...the lessees at the time of condemnation held no right or interest in the property in question....). Notwithstanding Mr. Evans' November 2009 notices to BCB of the nuisance, BCB consciously decided each month to allow the nuisance to persist. Later, BCB chose to "do nothing" even after receiving the August 26, 2010 notice that the brewery odor was "a 100% deal breaker" for the Buyers. BCB simply chose

[4] Colorado has recognized a property owner's non-delegable duty under certain circumstances. *See, Jules v. Embassy Properties, Inc.*, 905 P.2d 13, 15 (Colo. App. 1995).

collecting profits from its lessee's operation over exercising its control to abate the nuisance.

This callous refusal to abate the nuisance invading its neighbor's property breached BCB's common law duty as recognized by the Restatement and sister state authorities, and it violated the Declaration's prohibition against an unreasonable use and its obligation that one's tenant must abide by its terms.

The cases relied on by the court to hold that BCB had no duty to eliminate the nuisance are inopposite. Both *Perez v. Grovert*, 962 P.2d 996 (Colo. App. 1998), and *University of Denver v. Whitlock*, 744 P.2d 54 (Colo. 1987), addressed the issue of a landlord's liability for injury to a person occurring on the leasehold premises and under a long-term lease leaving little control to the landlord. Such circumstances are different than a situation where a landlord knowingly makes a decision each month to continue a lease knowing that the effect of that decision is to continue imposing a nuisance on a neighboring property; particularly where both properties are part of a condominium community governed by a declaration. A landlord who knowingly makes a monthly decision to allow a nuisance on its property to persist and damage a neighboring property *is participating* in the continuation of the tort. *Under such circumstances*, the law should not

countenance the landlord sticking its head in the sand like the proverbial ostrich and ignoring the damage being foisted upon its neighbor.

Mr. Towbin shares in BCB's liability because of his control of the landlord's monthly decisions to continuously renew the lease notwithstanding his knowledge of the nuisance. *Hoang v. Arbess*, 80 P.3d 863 (Colo. App. 2003).

6. The Court Erred in Holding that Damages Were Not Established.

a. Compliance with C.A.R. 28(k).

(1) A trial court's application of legal principles to the facts is reviewed de novo. *Department of Transportation v. First Place, LLC*, 148 P.3d 261, 264 (Colo. App. 2006). Whether the trial court applied the correct legal standard to the facts established by the record is a mixed question of fact and law we review de novo. *People v. Platt*, 81 P.3d 1060, 1065 (Colo. 2004).

(2) The ruling on this issue is at FCL, p. 13, CD. p. 1460, l. 13.

b. Discussion of the Issue.

> "The test is not whether damages may be ascertained with mathematical certainty but whether it has been established that a party was in fact damaged. If so, the trier of fact is obligated to make a determination based upon the available evidence." *A.A. & E.B. Jones Co. v. Boucher*, 530 P.2d 974, 983 (Colo. App. 1974).

The rule which precludes recovery of uncertain and speculative damages applies only where the fact of damages is uncertain, not where the

amount is uncertain. *Cope v. Vermeer Sales & Serv. of Colorado, Inc.*, 650 P.2d 1307, 1309 (Colo. App. 1982).

Damages in a nuisance action do not easily lend themselves to an exact formula since use and enjoyment of land are subjective in nature. *Allison, supra,* at 795. Damages available on nuisance claims may include diminution of market value and loss of use of the property. *Board of County Commissioners v. Slovek,* 723 P.2d 1309 (Colo. 1986); *Burt v. Beautiful Savior Lutheran Church,* 809 P.2d 1064 (Colo. App. 1990). In the case at bar, the Buyers' refusal to negotiate and close while the nuisance persisted caused the proof of precise damages to be problematic. The fact that the Evanses were damaged, however, is beyond reproach.

Damages for nuisance have been awarded in a variety of circumstances involving odors, pests and noise. *See, Staley v. Sagel,* 841 P.2d 379 (Colo.App. 1992) (affirming damages on nuisance claim based on effects of dust, smell, and waste disposal from neighboring hog farm); *Burt, supra* (damages caused by smell in the home following water damage); *Miller v. Carnation Co.*, 564 P.2d 127 (1977) (damages caused by flies and rodents from neighboring poultry ranch).

In addition to the nuisance causing nausea, headaches, and the cancellation of open houses, unrebutted evidence established that the brewery odor impeded the

marketability of the unit by causing the Buyers to conclude that their intention to rent the unit would not be feasible so long as the nuisance remained unabated. (CD p. 1689, l. 17-24.)

Steve Patterson testified that the Buyers' willingness to negotiate "was totally dependent on the amelioration of that odor"; that he was trying to complete the transaction "and that would require that the odor be fixed to my buyers' satisfaction"; and when asked if they "were going to close on the contract if it (the work) had not been completed," he answered "no." When asked if there was a primary issue that kept his clients from closing he responded "the odor issue." (CD pp. 1693, l. 8-9, 16-20; 1702, l. 9-11; 1707, l. 8-10.) Ms. Courtney testified *as the only expert on the subject* that she felt confident that if the brewery odor had been abated or eliminated the unit would have sold at $1,775,000 in the fall of 2010 (rather than in June of 2011). (CD p. 1596, l. 3-10.)

Mr. Evans testified and submitted tangible evidence that he was incurring a monthly carrying cost comprised of HOA dues, insurance, utilities, mortgage, and taxes of $10,749.07 while the Buyers waited for the nuisance to be abated. (Ex. 55, CD p. 1024-25; Transcript, CD p. 1861, l. 11-25.) Damages sought at trial for these costs were requested *only* from the time notice was given that the Buyers "had backed away" to the time when the closing occurred (once the Buyers were

able to test the unit during a peak brewing weekend); damages were not sought for the lost marketing time between November 2009 and when the Buyers first became involved in August 2010.

The diminution in value was established in part by Sally Courtney's *unrebutted* expert testimony relying on her 25+ years as a realtor in Telluride as supported by her comparative market analysis that the unit "definitely suffered" a discounted sales price because of the brewery odor; that dropping the listing to $2,190,000 brought the price "down lower than I thought we should be, but because of the odors and with Les' personal situation, I felt that it was a very aggressive listing price and I felt confident that for 7-10% off, which would take us into the mid-to-high $1.9s, that we should be able to get this thing done," and that "I don't think there's any doubt that the reason that this condo sold for that price is because the odor and the time frame that it took to get this problem solved." (CD p. 1588, l. 25 – p. 1590, l. 13). Mr. Evans testified that he suffered at least a $200,000 loss in value as a result of the nuisance. (CD p. 1865, l. 23 – p. 1866, l. 3). Steve Patterson explained the offer to purchase at only $1.7M. Although he noted that the unit had been the subject of tax liens and a foreclosure notice,[5] when *initially* asked on *cross examination* by BCB's lawyer what justified the lower

[5] The evidence was that both of these issues had been eliminated prior to it being sold. (CD p. 1912, l. 5-9).

offer, he responded with the one-word answer, "Odor." Based on the evidence, the Evanses' requested diminution in value damages for the difference between "the mid-to-high $1.9s" and the ultimate sale price of $1,775,000. Where the plaintiff introduces some evidence which is sufficient to allow a reasonable estimate of damages, it is incumbent upon the trier of fact to determine a monetary award which will adequately compensate the plaintiff. *Allison, supra,* at 795. The evidence that the monthly carrying costs and the diminished sales price were directly related to the continuation of the nuisance required a finding of damages.

IV. CONCLUSION

Based upon the unrebutted competent evidence in the record and applicable law as cited herein, the Evanses respectfully request reversal of the trial court's decision.

V. REQUEST FOR ATTORNEY'S FEES

Appellants request attorney's fees as proper under CCIOA and the Declaration.

Respectfully submitted this 31st day of October, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of October, 2012, a true and correct copy of the foregoing document, with attachments, was served via *Lexis Nexis* or by other electronic means on the following:

John H. Steel
126 W. Colorado Ave., Suite 202
P. O. Box 2784
Telluride, CO 81435

Debi Brown

APPENDIX

BROCHURE WITH PHOTOS OF UNIT
(Exhibit 28, p. 1-2)

SAN JUAN WAREHOUSE

Telluride, Colorado

EXHIBIT

28

tabbies

Peaks Real Estate | Sotheby's INTERNATIONAL REALTY

SAN JUAN WAREHOUSE

Spacious condominium located in the heart of Telluride, just two blocks from the Gondola and skiing, and two blocks to downtown shopping and restaurants. Multi-level unit with living, dining, den, and master bedroom on the top floor. The second level offers a huge guest master suite, two additional bedrooms, three baths, and full laundry room. Three decks offer fantastic views of Ajax, Bear Creek and the ski area.

225 S. Pine St., Unit A
Telluride, CO 81435

Offered at
$2,190,000

4 bedrooms, 4.5 bathrooms
2,742 square feet

2008 Taxes: $7,003
HOA Dues: $2,100/Quarter
MLS# 25577

Sally Puff Courtney

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