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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' REPLY 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	▲ COURT USE ONLY ▲
Appellants: LESLIE R. EVANS and ESTHER H. EVANS, **v.** **Appellees:** BCB PROPERTIES, LLC, a Colorado limited liability company, and ALAN TOWBIN, Individually. **Attorney for Appellants:** Daniel A. Gregory GREGORY, GOLDEN & LANDERYOU, LLC ATTORNEYS AT LAW 1199 Main Avenue, Suite 213 Durango, CO 81301 **Phone:** (970) 247-3123 **Fax:** (970) 247-8293 **E-mail:** Daniel@daglaw.com **Atty. Reg. No.:** 22949	Case No: **12CA0596** Division: Courtroom:
CERTIFICATE OF COMPLIANCE	

I hereby certify that this reply 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).

☒ It contains 5,500 words. The word count of the Rebuttal Appendix is included in this certification.

☐ It does not exceed 18 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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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

I. INTRODUCTION 1

II. ARGUMENT 1

A. THE UNREBUTTED RELEVANT EVIDENCE ESTABLISHED A NUISANCE AS A MATTER OF LAW 1

1. Standard of Review 1

2. The Brewpub's Prior Existence, the Quantity of Beer Produced, Whether it Increased, and Testimony from its Brewmaster is Irrelevant 2

3. The Relevant Facts are Undisputed By Any Competent Evidence and Result in a Conclusion of a Nuisance as a Matter of Law 3

B. THE DECLARATION DID NOT BAR A NUISANCE CLAIM WHERE THE BREWPUB'S OPERATION WAS CONDITIONED ON A REASONABLE USE 5

1. Standard of Review 5

2. A Reasonable Use is Not a Use Which Causes Nausea, Headaches, and Unmarketability Because the Space and its Equipment Are Not Maintained and Operational 5

C. THE EVANSES HAD NO DUTY TO MITIGATE BY REPAIRING BCB'S UNIT; CONVERSELY, BCB HAD BOTH A LEGAL DUTY AND CONTRACTUAL OBLIGATION TO MAINTAIN ITS UNIT SO THAT ITS USE COMPLIED WITH THE DECLARATION BY BEING "REASONABLE" 9

TABLE OF CONTENTS (cont.)

Page

1. Standard of Review 9

2. Colorado Law and the Other Jurisdictions Share the Rule that a Victimized Homeowner is Not Required to "Mitigate" a Nuisance by Repairing His Offending Neighbor's Property 9

   a. The majority of the work necessary to mitigate the brewery odor from escaping the pub and invading the neighboring property had to be done in the BCB-owned brewpub space 9

   b. The Evanses had no legal duty to mitigate 12

   c. Even if such a duty existed, the Evanses satisfied it 12

D. CAUSATION FOR BOTH FORMS OF DAMAGES WAS CONVINCINGLY DEMONSTRATED 15

1. Standard of Review 15

2. Causation was Established in Two Distinct, Non-Duplicative Measures 15

E. ATTORNEY FEES SHOULD BE AWARDED UPON REVERSAL 18

III. CONCLUSION 19

CERTIFICATE OF SERVICE 19

REBUTTAL APPENDIX

TABLE OF AUTHORITIES

Page

CASES

Allison v. Smith, 695 P.2d 791 (Colo.App. 1984) 2

Bledsoe Land Co. LLP v. Forest Oil Corp., 277 P.3d 838 (Colo.App. 2011) 5

Burt v. Beautiful Savior Lutheran Church, 809 P.2d 1064 (Colo.App. 1990) 13

Cary v. United of Omaha Life Ins. Co., 68 P.3d 462 (Colo. 2003) 9

Desimone v. Mutual Materials Co., 162 P.2d 808 (Wash. 1945) 12

Fair v. Red Lion Inn, 943 P.2d 431 (Colo. 1997) 10, 15

Fibreglas Fabricators, Inc. v. Kylberg, 799 P.2d 371 (Colo. 1990) 8

Francis ex rel Goodridge v. Dahl, 107 P.3d 1171 (Colo. App. 2005) 13

Johnston v. City of Galva, 147 N.E. 453 (Ill. 1925) 12

Koontz v. Rosener, 787 P.2d 192 (Colo.App. 1989) 15

Miller v. Carnation Co., 564 P.2d 127 (Colo. App. 1977) 6

Oresta v. Romano Bros., Inc., 73 S.E.2d 622 (W.Va. 1952) 12

People v. Kaiser, 32 P.3d 480 (Colo. 2001). 4, 15

People v. Platt, 81 P.3d 1060 (Colo. 2004) 7, 15

Staley v. Sagel, 841 P.2d 379 (Colo. App. 1992) 6

Sullivan v. Davis, 474 P.2d 218 (Colo. 1970) 11

Swieckowski v. City of Ft. Collins, 934 P.2d 1380 (Colo. 1997) 1

TABLE OF AUTHORITIES (cont.)

Page

CASES

Sylvester v. Jerome, 34 P. 760 (Colo. 1893) 11

Weize Co., LLC v. Colorado Reg'l Const., Inc.,
251 P.3d 489, 496 (Colo. App. 2010) 1

Woodward v. Bd. of Directors of Tamarron, 155 P.3d 621
(Colo. App. 2007) 3

STATUTES

C.R.S. § 13-17-202 18

OTHER AUTHORITIES

66 C.J.S., Nuisance, § 177 12

39 AM.JUR., *Nuisances*, § 138 12

15 AM.JUR., *Nuisances*, § 41 12

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

I. INTRODUCTION

The core of this action is whether, as a matter of law, the condominium Declaration was properly construed to permit action that unquestionably caused a nuisance as defined by Colorado law. Appellants have attached a Rebuttal Appendix illustrating the actual, relevant facts which refute Appellees' appendix references, and which demonstrate Appellees' attempts to support the record through incomplete testimony and blatant mischaracterizations of the record.

II. ARGUMENT

A. THE UNREBUTTED RELEVANT EVIDENCE ESTABLISHED A NUISANCE AS A MATTER OF LAW.

1. Standard of Review.

The Evanses disagree with Appellees' argument that a clearly erroneous standard applies as to this issue because a de novo review is appropriate where the *relevant* facts are undisputed. Where "...the underlying facts are undisputed, the issue is one of law, and an appellate court is not bound by the district court's determinations." *Swieckowski v. City of Ft. Collins*, 934 P.2d 1380, 1384 (Colo. 1997); *Weize Co., LLC v. Colorado Reg'l Const., Inc.*, 251 P.3d 489, 496 (Colo. App. 2010).

2. The Brewpub's Prior Existence, the Quantity of Beer Produced, Whether it Increased, and Testimony from its Brewmaster is Irrelevant.

Appellees' recitation of the court's ruling that "Defendants did not unreasonably interfere with Plaintiffs' use and enjoyment" *omits* the first part of the sentence which reads "Given the circumstances and findings above, the Court concludes that Defendants…." FCL p.12, CD p.1459. In terms of the proper standard of review, the question is: *Are the relevant circumstances and facts undisputed?*

Appellees' rely on the following to argue that the facts were not undisputed, and the trial court improperly relied upon these same facts as the "circumstances and findings" supporting its conclusion.

- The Evanses purchased their unit knowing that the Declaration allowed a brewpub. This fact is irrelevant under Colorado law. "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...." *Allison v. Smith*, 695 P.2d 791, 794-795 (Colo. App. 1984).
- There was no limit on the volume of beer that could be produced, and while more beer results in more odor, it is not necessarily a more intense odor. The issue in a nuisance action is, regardless of the quantity of an

offending element produced on one's own property, whether the offending element invades the neighboring property so as to unreasonably interfere with its use and enjoyment. Whether 1 or 10,000 barrels of beer were produced, the issue, as explained by engineer Burggraaf and reflected in Smuggler's engineer's letter, was that the brewpub, without fixes to its mechanical system and location, was not satisfying the core concepts of "containment" and "evacuation." CD pp. 1651, l. 11; 1655, l. 2-3; 1941, l. 8-12.

- Chris Fish, brewmaster, did not notice a difference in the odor *in the brewery where he worked.* "For me, I have been doing it for so long that it's just like the smell that I smell every day at work...." CD p. 1481, l. 23-25. He also testified he was never in the Evans unit, therefore, his testimony was not probative as to whether the odors caused an unreasonable interference in the use and enjoyment of the Evans home.

3. The Relevant Facts are Undisputed By Any Competent Evidence and Result in a Conclusion of a Nuisance as a Matter of Law.

A nuisance is an unreasonable interference with the invaded property which is so substantial in nature that it would be of definite offensiveness, inconvenience or annoyance to a normal person. *Woodward v. Bd. of Directors of Tamarron,* 155

P.3d 621, 628 (Colo. App. 2007). The following facts are un-contradicted in the record.

- The brewpub space and its mechanical systems "were significantly deteriorated…."; the mechanical systems "… had been maintained at a bare minimum level, if at all. Parts of the system were not operational." Burggraaf from his 7/26/10 visit (before any remedial work), CD pp. 1662, l. 16 - 1663, l. 6.

- The odor *in the Evans unit* caused headaches, nausea, and a burning sensation; caused the cancellation of an open house "because it smelled so badly that I had to leave"; was considered by the listing broker to render the unit unmarketable, "…we would not be able to sell this unit unless the smells went away"; and by the ultimate buyers' broker to be a "100% deal breaker." Ex. 31, CD p. 877; CD p. 1921, l. 19 - 1923, l. 17; CD p.1932, l.8 – 1934, l. 4; CD p. 1625, l. 10-11; Ex. 34, CD p. 880.

Even if the trial court's "findings and circumstances" were judged by the standard Appellees suggest, they would be set aside where they were "clearly erroneous or unsupported by the record." *People v. Kaiser,* 32 P.3d 480, 483 (Colo. 2001). The application of the law of nuisance to these facts, however, is

subject to de novo review, and the court's conclusion must be reversed where the uncontradicted facts constitute the very definition of a nuisance come to life.

B. THE DECLARATION DID NOT BAR A NUISANCE CLAIM WHERE THE BREWPUB'S OPERATION WAS CONDITIONED ON A REASONABLE USE.

1. Standard of Review.

Appellees agree, as they must, that the construction of the Declaration, a contract, is subject to a de novo review. *Bledsoe Land Co. LLLP v. Forest Oil Corp.,* 277 P.3d 838, 842 (Colo. App. 2011).

2. A Reasonable Use is *Not* a Use Which Causes Nausea, Headaches, and Unmarketability Because the Space and its Equipment Are Not Maintained and Operational.

Appellees argue in error that the Evanses confuse the reasonable use of the brewpub space with the unreasonable interference. The fallacy in this argument is twofold. First, there is no confusion; the brewpub space was used unreasonably; not by brewing beer, but by brewing beer in a space and with mechanical equipment that was not maintained to achieve the critical mechanical engineering principles of "containment" and "evacuation." The use of the brewpub was not reasonable where the unrefuted testimony established that its physical space "was significantly deteriorated" and its mechanical equipment was "maintained at a bare minimum level, if at all," and where "parts were not operational." CD pp. 1662, l. 16 - 1663, l. 6. The use of the brewpub itself was unreasonable where the owner

and tenant cared more about profit and production than properly containing and evacuating the odiferous fruits of their labor such that they would not impact their neighbor's home. Second, the concepts are related. Failing to contain and evacuate the brewpub's odor such that it caused headaches, nausea, burning sensations, and rendered the unit unsellable constitutes a *per se* unreasonable use. No property owner has the right to utilize his property in such a manner as to inflict these conditions on his neighbor. *See, e.g.,* *Staley v. Sagel,* 841 P.2d 379 (Colo.App. 1992) (affirming nuisance claim based on effects of dust, smell, and waste disposal from neighboring hog farm); *Miller v. Carnation Co.,* 564 P.2d 127 (Colo.App. 1977) (affirming award of damages caused by flies and rodents from neighboring poultry ranch).

The Evanses do not claim that the operation of the brewpub to brew beer is an unreasonable use. Rather, they claim that when the physical plant is unmaintained such that the brewing of beer causes odors which are allowed to invade and impact their home causing sickness and preventing sales, *that* use is unreasonable. When a majority of the mechanical work as recommended by Cunningham, the engineer hired by the tenant, which was endorsed by Burggraaf, the engineer hired by the Evanses (CD pp. 1660, l.6 – 1661, l. 9) was finally performed, it demonstrated how the space *could be* and should have been

reasonably used to brew beer; indeed, it was the performance of that work, of which the doors were described as "peripheral concepts that are completely inadequate to control the problem as it exists" (CD p. 1730, l. 4-7), which led to the odor finally being managed to a reasonable level such that the buyers were willing to close. This is what is allowed by the Declaration -- a reasonable use in a properly maintained environment.

This is not a question of waiver or strict construction of an exculpatory clause because Section 8.05 of the Declaration does not purport to be a waiver or release. The Declaration does *not* state that there is a "safe harbor" or "get out of jail free card" where the pub is being operated so unreasonably that it destroys the enjoyment and marketability of another unit in the complex. The core question is whether the use was reasonable. The court's *mis*-construction of the Declaration is reviewed as a matter of law; and its application of the Declaration, when properly construed, to the uncontradicted facts is similarly reviewed de novo. *People v. Platt*, 81 P.3d 1060, 1065 (Colo. 2004).

The Evanses agree that Section 8.06 is "subject to" Section 8.05, however, this does not mean, as Appellees' argument implies, that the language in Section 8.06 disappears or becomes a nullity. Appellees also seek to ignore the language appearing immediately above the brewpub language in Section 8.05. This language

is set out in the Opening Brief, but it generally prohibits "any use" which is the source of an "unreasonable annoyance, unreasonably offends or unreasonably interfere(s) with the enjoyment and use of a unit." Proper construction gives each of these provisions meaning and effect such that they are harmonious with one another. *Fibreglas Fabricators, Inc. v. Kylberg,* 799 P.2d 371, 374 (Colo. 1990). Thus, the proper construction is that a reasonable use of the brewpub is permitted, but a use which unreasonably interferes with the quiet enjoyment of a condominium by creating conditions that "would reasonably be found by other to be noxious or offensive" is unreasonable, and it is not excused by an interpretation of the Declaration that relies on carefully parsed language while ignoring the context and express language surrounding it.

When the Declaration is properly construed to permit a reasonable use and prohibit an unreasonable use, and that construction is applied to the un-contradicted facts of the unmaintained state of BCB's space such that odors produced therein were not properly contained and evacuated and, instead, were allowed to freely flow to and negatively impact the Evans home, the inescapable conclusion to be reached as a matter of law is that a nuisance was created that violated the Declaration.

C. The Evanses Had No Duty to Mitigate by Repairing BCB's Unit; Conversely, BCB Had Both a Legal Duty and Contractual Obligation to Maintain Its Unit so that Its Use Complied with the Declaration by Being "Reasonable."

1. Standard of Review.

Appellees cannot dispute that the existence of a legal duty is subject to de novo review. Cary v. United of Omaha Life Ins. Co., 68 P.3d 462, 465 (Colo. 2003).

2. Colorado Law and Other Jurisdictions Share the Rule that a Victimized Homeowner is Not Required to "Mitigate" a Nuisance by Repairing His Offending Neighbor's Property.

a. The majority of the work necessary to mitigate the brewery odor from escaping the pub and invading the neighboring property had to be done in the BCB-owned brewpub space.

The uncontradicted facts previously referenced establish that new mechanical equipment and work on the existing makeup air system and brewpub space itself was necessary before the pub odor was sufficiently mitigated such that the buyers would be willing to close. Appellees' misrepresentation that minor work on a common area door solved the problem does not change this fiction to fact merely because they continue to repeat it. This assertion is simply not supported anywhere in the record; indeed, it is rebutted by engineers Lakin, Burggraaf and Cunningham, and even by realtor Patterson.

Patterson testified "I examined the completed product of the door in place *and the mechanical fix that was done in the brewery* and it was my assessment that the odors had been reduced to an acceptable level." CD p. 1697, l. 8-11. In addition to Lakin's comments that the doors were "peripheral concepts," Cunningham, P.E., when asked if he just recommended putting a seal under the door, testified "No, I did not." He then provided a detailed explanation of why he made each of his recommendations and how they were interrelated; then he concluded by saying "yes" when asked if it was his opinion that all of these things would be the best practice to try to mitigate this issue. CD pp. 1946, l. 18 - 1949, l. 6. When Burggraaf was asked whether a sealed door at the bottom of the stairway leading into the brewery and putting a threshold onto the door going into the Evans unit would have solved the issues, he testified "Not at all. We would not have gone to the length to have two professional engineers looking at or evaluating space and generating a two-page list of what needed to be done if we could have done it simply with some door seals." CD p. 1663, l. 7-17.

"The defendant bears the burden of proving the defense of a failure to mitigate damages." *Fair v. Red Lion Inn,* 943 P.2d 431, 437 (Colo. 1997). Appellees' suggestion that they did not need an engineer or any other witness and carried their burden because they "called into question" the opinions of the experts

is disingenuous because it ignores the requirement for competent evidence. They have not and cannot point to one shred of competent evidence resulting from their questions which would support a finding or even an inference that, contrary to the opinions of the three engineers and the testimony as to the mechanical work that was actually done, the only work necessary to mitigate the harm was a door. Mere argument of counsel does not satisfy the standard for competent evidence upon which a court can rely. *Sullivan v. Davis,* 474 P.2d 218 (Colo. 1970).

b. The Evanses had no legal duty to mitigate.

Appellees can point to no Colorado decision for the proposition that one whose property is invaded by a nuisance created on his neighbor's property has a duty to mitigate. Instead, they argue that *Sylvester v. Jerome,* 34 P. 760, 763 (Colo. 1893), is "ancient." In *Sylvester,* the Court held that a 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 (neighboring) defendants." The fact that this proposition has stood the test of time enhances rather than undermines its validity.

The proposition recognized by the *Sylvester* Court is neither novel nor unique to Colorado. "A person whose property has been injured by the maintenance of a nuisance is not bound to prevent or reduce the damages,

especially where the nuisance is in a place over which he has no control. 66 C.J.S, Nuisances, § 177; 39 Am.Jur., Nuisances, Section 138; 15 Am.Jur., Damages, Section 41." *Oresta v. Romano Bros., Inc.,* 73 S.E.2d 622, 632 (W.Va. 1952); "The requirement of minimizing damages does not apply to cases of nuisances or in cases of intentional or continuing torts." *Desimone v. Mutual Materials Co.,* 162 P.2d 808, 812 (Wash. 1945); "(t)he rule requiring the injured party to protect himself from the consequences of the wrongful act of another by the exercise of ordinary effort, care, and expense on his part does not apply in cases of nuisances." *Johnston v. City of Galva*, 147 N.E. 453, 454 (Ill. 1925). The Evanses were not in control of BCB's leasehold space; BCB was in control, particularly where they continued to allow their month-to-month tenant to continue its operation when they had the legal control necessary every month to terminate the lease and thus the offending condition.

c. Even if such a duty existed, the Evanses satisfied it.

Assuming *arguendo* that a duty exists under Colorado law to mitigate a nuisance caused by one's neighbor, the Evanses more than satisfied any such duty. Failure to mitigate damages refers to the injured party's failure to take such steps *as are reasonable* under the circumstances to minimize the resulting damages. One is not required, however, to take unreasonable measures in an effort to

mitigate his or her damages. *Burt v. Beautiful Savior Lutheran Church*, 809 P.2d 1064, 1068 (Colo.App. 1990).

Moreover, a plaintiff's failure to mitigate damages is excused if there were reasonable grounds for the failure, including financial inability of the plaintiff. *Francis ex rel. Goodridge v. Dahl*, 107 P.3d 1171, 1173 (Colo. App. 2005). The record is replete with references to the fact that the Evanses were selling their condominium because of the financial straits they were in because of the downturn of Mr. Evanses' practice, the prolonged sickness and related expense of caring for his dying father, and the poor state of the economy. CD pp. 1833, l. 10 – 1834, l. 12. Evidence demonstrated he had to rescue the condo from possible foreclosure and satisfy tax liens. CD p. 1706, l. 13-14.

Rather than exercise control over its own space, BCB instead contends that the Evanses, who were selling a condo they loved because of their financial stresses, should have paid to repair BCB's space, its mechanical equipment, and the common area. There is not one case in the country that imposes any such duty.

Mark Burggraaf, ME, answered the question of whether the Evanses could have taken *steps within their condominium* to block the offending odor when he informed Judge Schum that this would have required work designed "to overcome the lack of pressurization in the overall building" and that it would have been a

"non-starter" costing "hundreds of thousands of dollars, possibly even pushing a million plus…." CD pp. 1680, l. 25 – p. 1682, l. 14.

The Evanses wrote multiple emails and letters to the HOA and BCB prior to filing the action begging them to fix *their space* and common area; negotiated with Appellees and their tenant by suggesting that they get their engineer to make recommendations; hired engineer, Burggraaf, to review those recommendations; pleaded for months for BCB and its tenant to implement those findings; and later provided them with multiple emails and warning letters letting them know that an actual buyer was refusing to go forward until the necessary steps were taken to contain and properly evacuate the smells. Ex. 16, CD p. 831; Ex. 17, CD p. 833; Ex. 18, CD p. 834; Ex. 20, CD p. 837; Ex. 21, CD p. 840; Ex. 37, CD p. 898; Ex. 38, CD p. 899; Ex. 40, CD p. 903. What more were the Evanses reasonably required to do?

In summary, the Evanses did everything they could while BCB "chose to do nothing about the odors." FCL, CD p. 1451. Indeed, BCB had not only a duty (see cases in Opening brief), but a contractual obligation under Section 8.13 of the Declaration to insure their tenant complied with the Declaration, including Sections 8.05 and 8.06.

Generally, what constitutes a reasonable effort to mitigate damages is a question of fact to be determined by the trier of fact, and the Evanses agree that the trial court's determination is subject to the clearly erroneous standard. Fair v. Red Lion Inn, *supra*. Such a finding cannot stand, however, where, as here, there is a complete absence in the record to support such a finding. People v. Kaiser, *supra*. There is no evidence in the record justifying a finding that the Evanses failed to mitigate their damages, and the manifest weight of the evidence demonstrates that they in fact did everything within their power to first prevent and later mitigate the harm that was being inflicted upon their home.

D. CAUSATION FOR BOTH FORMS OF DAMAGES WAS CONVINCINGLY DEMONSTRATED.

1. Standard of Review.

The Evanses acknowledge that causation of injury is subject to the clearly erroneous standard. Koontz v. Rosener, 787 P.2d 192, 196 (Colo. App. 1989), however, whether the trial court applied the correct legal standard to the facts established by the record is a mixed question of fact and law reviewed de novo. People v. Platt, *supra*.

2. Causation was Established in Two Distinct, Non-Duplicative Measures.

Regarding Appellees' argument on causation, the Evanses generally rest on the law and record citations in their Opening Brief except to emphasize the following. The Evanses suffered two forms of damages. One, the diminution in value of their condominium as a result of the nuisance. Two, the fact that they suffered continuing carrying costs from when the ultimate buyers originally expressed interest, to the date when they finally closed after the odor had been mitigated.

The evidence is overwhelming that the discounted sales price was directly attributable to the brewery odor. The testimony of the only expert admitted on this issue, Sally Courtney, is set out in detail in the Opening Brief. The buyers' broker's testimony is also recited therein. In addition to those more extensive references, the proof of causation is illustrated when one begins with yet another of Appellees' misrepresentations, to wit, "The Plaintiffs sold their unit for fair market value in the opinion of both their broker and the purchaser's broker." Appellees' brief, p. 4 ¶ 9. In fact, when one merely checks the very record references cited by Appellees, the actual testimony is dramatically at odds with Appellees' imaginative characterization of the testimony. At CD p. 1623, l. 18-21, the Evanses' broker testified: "Many times the first offer is the best and only offer, and so, when you have a ready, willing, and able buyer **sometimes it's better to take even a little**

more of a hit and get the job done." Ms. Courtney went on to testify as follows: "But now we are down to $2,190,000. We are down to seven ninety-eight a square foot and **that's below what I felt the unit should go for.**" CD p. 1577, l. 14-16. When asked whether she had an opinion on whether the unit "suffered a discounted sales price because of the brewery odor," she answered, "Yes, I do. I think that it definitely suffered ... I thought the two four five five was a good price to list. I do not over price listings. When we dropped it to two million one ninety in February, we were now down lower than I thought we should be...." (The unit closed at "$1,775,000 which equates to six forty-seven a square foot.") CD pp. 1588, l. 22 - 1589, l. 1-8. This is a far cry from evidence that the unit sold for fair market value.

As to the carrying costs, there is no dispute that the property eventually sold for $1,775,000, that the buyers contract was presented to BCB and its tenant as a part of a C.R.C.P. 26(a) disclosure on 11/1/10, and that they were provided emails on 8/19/10, 8/26/10 and 11/5/10 warning them that "the buyer has now backed away" and that the "potential buyer will not make an offer unless ... odor ... mitigated." Ex. 36, CD p. 882; Ex. 37, CD p. 898; Ex. 38, CD p. 899; Ex. 40, CD p. 903.

The buyers put in their contract a specific clause, 29.2, that *conditioned their obligation to close specifically on the elimination of the odor to their satisfaction.* In discussing the origin of this article, their broker testified as follows:

> I examined the completed product of the door in place *and the mechanical fix that was done in the brewery* and it was my assessment that the odors had been reduced to an acceptable level. I conveyed that to the buyer and said, I am not willing to take this responsibility on my shoulders, this is almost $2 million of your money. You need to get *this satisfied* to your satisfaction. And that's the origin of 29.2. CD p. 1697, l. 8-16.

Accordingly, it was clear that the delay in closing by the buyers and the resultant suffering of continued carrying costs by the Evanses was directly caused by the odor. Ex. 50, article 29.2, CD. p. 972.

E. ATTORNEY FEES SHOULD BE AWARDED UPON REVERSAL.

Appellees oppose the Evanses' request under the specious argument that they "have not stated the legal basis therefor." The Evanses' Opening Brief requested fees both under CCIOA and the terms of the Declaration, and they reiterate that request here. The Appellees are at least consistent in ignoring facts and creating fiction to support the arguments throughout their brief. Additionally, the Evanses' reliance on the actual facts in the record and established legal principles renders the Appellees' request for fees based on C.R.S. § 13-17-202 inexplicable and insincere. The Evanses indeed encourage the Court to examine

and compare the facts stated by both parties against those actually found in the record.

III. 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.

Respectfully submitted this 17th day of January, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of January, 2013, a true and correct copy of the foregoing document, with attachments, was served via *Lexis Nexis* or by other electronic means on the following:

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REBUTTAL APPENDIX RE: APPELLEES' ALLEGED MISREPRESENTATIONS

APPELLEES' REPRESENTATIONS OF "TRUTH" (number references correspond with Appellees' row numbering)	ACTUAL FACTS IN THE RECORD
1. The brewpub was not nearby, it was *under* Plaintiffs' unit. (Appellees also misrepresent twice in their brief, pp. 2 & 3, that the brewpub was "right below" the Evans unit.)	Although one condominium complex, the brewpub is in a separate, nearby unit. This irrefutable *physical* fact is depicted in Ex. 28, CD p. 871, a view of the complex from the east; Ex. 38, CD pp. 899-900, a view of the common area between the residential structure and the Smuggler's structure; and Ex. 58, CD p. 1115, a view from the south. These photos demonstrate that the Smuggler's commercial unit is "nearby" the residential structure and separated by a common area walkway. The brewpub is in the basement of the Smuggler's unit. It is **not** underneath the Evans residential unit.
2., 6. & 7. "The testimony was that the odor of brewing didn't change." "The unit was sold – so it couldn't have been unmarketable."	Mr. Evans (CD p. 1874, l.7-14; p. 1875, l. 6-7; p. 1876, l. 10-14), Mrs. Evans (CD p. 1921, l. 19 - p. 1923, l. 17.), and listing/selling broker Sally Courtney (CD p. 1562, l. 8–p. 1563, l. 24; p. 1568, l 5-16; p. 1600, l. 11-18) testified to a different smell from when the unit was purchased in 2006 and when it was being sold in 2011. Buyers' broker testified that it became marketable only after the nuisance was abated. "It was totally dependent on the amelioration of that odor." CD p. 1693, l. 8-9.

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The contents of the Sklar email are not in evidence because they were admitted under a hearsay exception.	Sklar's email, while not offered for the truth of the matter asserted, demonstrated that he provided *notice* to BCB/Towbin of his *perception* that a smell which had not previously existed was now so intense that he called it "pollution." Ex. 22, CD. p. 841. The email and its contents were admitted in evidence to show "We are notifying you. **Other people are notifying you.** Please do something." Offer and Judge's ruling at CD pp. 188, l. 16 - 1849, l. 4.
Plaintiffs did not establish that the odors changed, relying upon testimony from Christopher Fish.	Fish testified that he was never in the Evans unit. CD p. 1482, l. 15-17. He was not competent, therefore, to offer any evidence as to the extent or any change of the odor in the Evans unit. He also testified that the more beer produced the more odor there is, and that between 2003 and 2009 the volume increased from 400 to 1100 barrels. CD p. 1482, l. 18 – 1483, l. 4.
3. The Declaration barred a claim for nuisance on account of the brewpub.	Giving meaning to all of the language in Sections 8.05 and 8.06 results in the Declaration being properly construed such that the use of the brewpub must be "reasonable." A nuisance claim is not barred where the use is unreasonable. Appellees' and the trial court's interpretation would render Section 8.06 a nullity. CD p. 706.
8. Appellees make the nonsensical suggestion that the Evanses' objective was not to have the brewing odor	Exhibits demonstrate that Les Evans pleaded through letters and emails to BCB's attorney and its manager to

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managed to a reasonable level so that the unit could be sold, but rather to engage in litigation.	mitigate the odor because it was affecting his ability to sell the unit. Ex. 16, CD p. 831-32; Ex. 17, CD p. 833; Ex. 18, CD p. 834; Ex 21, CD p. 840. These communications were prior to filing the lawsuit. Ex. 65, CD. pp. 1150-57.
9. "[I]t was both physically possible and economically feasible for the Plaintiffs to keep the odor out of their unit by very simple efforts in the **common areas....**" "Simple and inexpensive alterations eliminated the odors in the condominium unit." CD p. 1704, l. 6-9 and 20-21. "What ended up as the solution to the odor in Plaintiffs' condo, *merely installing and sealing an interior door....*" (Appellees' Brief, p. 26, ¶ 1).	There is no record evidence of the actual cost of the multiple repairs performed. Appellees omit from their reference the full body of the testimony that "other mechanical work that had been accomplished was (also) in place...." CD p. 1707, l. 18-22. Mechanical engineer, Burggraaf testified to the extent of work that had been done as of 5/16/11, including **installation of a new fan system, a new containment hood, and the servicing of the makeup air unit.** CD pp. 1660, l. 6 – 1661, l. 9. Realtor, Patterson, testified that prior to the buyers' closing he had "examined the completed product of the door in place ***and*** the mechanical fix that was done **in the brewery....**" CD p. 1697, l. 8-10. Patterson further testified that **"the door would not solve the problem inside of the unit."** CD p. 1691, l. 20-21. Burggraaf, the ME, when asked whether a sealed door at the bottom of the stairway leading into the brewery and putting a threshold onto the door going into the Evans unit would have solved the issues, testified "Not at all. We would not have gone to the length to have two professional

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	engineers looking at or evaluating space and generating a two-page list of what needed to be done if we could have done it simply with some door seals." CD p. 1663, l. 7-17. Accordingly, mechanical work to properly contain and evacuate was necessary **in the brewery** and was accomplished prior to the buyers and their broker being willing to close.
"Mr. Evans himself **admitted** that simple alternations were sufficient to sell the unit."	Appellees' own record reference squarely rebuts their characterization of this proposition being "admitted"; it was emphatically denied - "No, that is not correct." CD p. 1894, l. 20.
"The Plaintiffs sold their unit for fair market value in the opinion of both their broker and the purchaser's broker. CD p. 1623, l. 18-21, and CD pp. 1903, l. 24-25; CD p. 1706, l. 21-23." Appellees' Brief p. 4, ¶ 9.	This is perhaps the most egregious example of Appellees' torturing record facts into fiction. At CD p. 1623, l. 18-21, the Evans broker testified "many times the first offer is the best and only offer, and so, when you have a ready, willing, and able buyer **sometimes it's better to take even a little more of a hit and get the job done.**" Ms. Courtney went on to testify as follows: "But now we are down to $2,190,000. We are down to seven ninety-eight a square foot and **that's below what I felt the unit should go for.**" CD p. 1577, l. 14-16. When asked whether she had an opinion on whether the unit "suffered a discounted sales price because of the brewery odor," she answered, "Yes, I do. I think that it definitely suffered ... I

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	thought the two four five five was a good price to list. I do not over price listings. When we dropped it to two million one ninety in February, we were now down lower than I thought we should be...." (The unit closed at "$1,775,000 which equates to six forty-seven a square foot.") CD p. 1588, l. 22 - 1589, l. 1-8. When the purchasers' broker was asked, "Do you think that your clients paid ***far below the market value of this property***?", he testified "No." CD p. 1706, l. 21-23. This is a far cry from any evidence that the property sold for fair market value. Appellees' final record reference of CD p. 1903, l. 24-25, is Les Evans responding to a question with the answer "I don't know a broker that doesn't tell a party that he's getting a good deal." How any of the above ***actual record facts*** have been tortured into Appellees' alleged statement of facts is a mystery beyond the bounds of human comprehension.