COLORADO COURT OF APPEALS

DATE FILED: March 16, 2023
CASE NUMBER: 2021CA1856

Court of Appeals No. 21CA1856
Arapahoe County District Court No. 19CV32566
Honorable Frederick T. Martinez, Judge

Kathleen Keaten and Delaney Keaten,

Plaintiffs-Appellees,

v.

Terra Management Group, LLC and Littleton Main Street LLC, d/b/a Main Street Apartments,

Defendants-Appellants.

JUDGMENT AFFIRMED

Division IV
Opinion by JUSTICE MARTINEZ*
Fox and Lipinsky, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced March 16, 2023

Ogborn Mihm, LLP, Jason B. Wesoky, Kylie Schmidt, Denver, Colorado; Ross Ziev, P.C., Ross Ziev, Denver, Colorado, for Plaintiffs-Appellees

Brownstein Hyatt Farber Schreck, LLP, Julian R. Ellis, Jr., Sean S. Cuff, Christopher O. Murray, Denver, Colorado, for Defendants-Appellants

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2022.

¶ 1 Defendants, Terra Management Group, LLC and Littleton Main Street LLC, appeal the district court's judgment entered following a trial to the court. Defendants contend that the district court misapplied the Colorado Premises Liability Act[1] (PLA), erred by imposing an adverse inference sanction for defendants' spoliation of evidence, and improperly awarded exemplary and physical impairment damages against them. We affirm.

I. Background

¶ 2 Defendants own and manage Main Street Apartments (Main Street), a Section 8 housing tax credit apartment complex located in Littleton, Colorado. Plaintiffs, Kathleen Keaten and Delaney Keaten, resided in Unit 303E, located directly above Unit 203E, from October 2005 to December 2019. Melissa Lopez resided in Unit 203E until August 28, 2018. Both plaintiffs had physical disabilities before they began to notice unusual chemical smells in their apartment in late 2017.

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[1] The PLA was amended on April 7, 2022. *See* Ch. 75, sec. 2, § 13-21-115, 2022 Colo. Sess. Laws 381-84. We cite to the version of the PLA in existence before the amendment.

¶ 3 On March 15, 2018, they reported the presence of "strong chemical fumes" to the on-site property manager and theorized that the fumes originated from the apartment directly below them, Unit 203E. The property manager reported the complaint to his supervisor and made recommendations regarding potential investigative and remedial action. These recommendations were relayed in a letter to his supervisor. The recommendations included contacting the residents, the police department, defendants' attorneys, and local housing authorities, as well as conducting an inspection when the fumes were present, before taking corrective action. The property manager left his position shortly after receiving the complaint from plaintiffs. Defendants did not follow the recommendations in the report.

¶ 4 On April 5, 2018, plaintiffs informed defendants that they were suffering from a variety of ailments due to their exposure to what they suspected were methamphetamine (meth) fumes coming from Unit 203E. Plaintiffs reported experiencing stinging, itchy, watery eyes; burning sensations in the nose and throat; bloody noses; heart palpitations; difficulty breathing; shortness of breath; congestion; numbness of the gums and tongue; dizziness;

headaches; difficulty concentrating; and irritability. Plaintiffs also reported loud noises and an increase in the intensity of the fumes between 9:30 p.m. and 1:30 a.m. Plaintiffs repeatedly raised the same concerns with defendants, notifying them that the fumes were persistent.

¶ 5 Littleton Housing Authority (LHA) inspects Section 8 housing complexes to ensure habitability. An LHA inspector performed an inspection of plaintiffs' apartment on April 24, 2018. The inspector noticed chemical smells in the apartment and reported them to LHA and defendants. On May 4, 2018, LHA informed defendants that Unit 303E had failed inspection due to the presence of fumes. But no chemical smell was present when LHA inspected Unit 303E again on May 30, 2018. However, plaintiffs continued to complain to defendants of ongoing chemical fumes in their apartment.

¶ 6 On August 28, 2018, Ms. Lopez was evicted from Unit 203E. During the process of the eviction, defendants noted a strong smell of ammonia in the apartment. Plaintiffs took pictures of multiple containers, which appeared to be gas canisters and a propane tank, that had been removed from the apartment. Defendants began

renovating the apartment on September 4, 2018. A new tenant moved into Unit 203E on September 27, 2018.

¶ 7 Plaintiffs filed their complaint on October 30, 2019, alleging violations of the PLA. After trace amounts of meth were remediated from Unit 303E, the district court ordered defendants to perform testing in Unit 203E. Testing was performed on both apartments. Relatively small amounts of meth were found in Unit 303E, but Unit 203E had multiple areas where the meth levels exceeded the permissible legal limits. On October 29, 2019, testing was performed on the outside of both apartments but none of the samples tested above the regulatory limit. On November 13, 2019, testing performed on the interior of Unit 303E resulted in one sample above the regulatory limit. Lisa Oliveto, a Solid Waste Specialist with the Tri-County Health Department, testified at trial that Unit 203E was contaminated and needed to be placarded to deny anyone entry into the unit prior to remediation, and any remediation would need to be performed by a certified contractor.

¶ 8 Over the course of the time that plaintiffs reported the chemical fumes in their apartment, they developed permanent brain injuries resulting in memory problems, cognitive disfunction, and

corresponding balance issues. Multiple medical professionals confirmed plaintiffs' diagnosis of permanent brain injury after plaintiffs underwent numerous medical tests, including ocular monitoring, vestibular ocular reflex testing, positional testing, postureography, functional brain imaging, neuro cognitive testing, and single-photon emission computerized tomography scan analysis. At the time of trial, plaintiffs experienced traits of dementia that contemporaneously manifested themselves, though Delaney Keaten was thirty-two years old and Kathleen Keaten, her mother, was approximately thirty years older. Kathleen Keaten's service dog, who had resided in Unit 303E with plaintiffs, also manifested unusual symptoms. Multiple healthcare professionals testified at trial that plaintiffs' injuries are permanent and were caused by exposure to toxic fumes.

II. Analysis

¶ 9 Defendants contend on appeal that the district court misapplied the PLA, erred in imposing an adverse inference against defendants as a sanction for spoliation of evidence, and improperly awarded exemplary and physical impairment damages against them.

A. PLA Actual Knowledge

¶ 10 Defendants argue that the district court misconstrued and misapplied the knowledge requirement of the PLA in its determination that defendants had actual and constructive knowledge of the dangerous condition in Unit 303E. We disagree.

1. Standard of Review

¶ 11 A judgment following a bench trial presents a mixed question of law and fact. *Premier Members Fed. Credit Union v. Block*, 2013 COA 128, ¶ 27. We defer to the district court's findings of fact unless they are clearly erroneous and review the conclusions of law de novo. *Id.* The district court, being the trier of fact, has the duty to determine what the facts actually are in case of conflicting evidence and to make all determinations of credibility. *Baumgartner v. Tweedy*, 143 Colo. 556, 559, 354 P.2d 586, 588 (1960). As an appellate court, our function is not to make factual determinations, but to determine whether the trial court's findings of fact are supported by sufficient evidence. *Eaton v. Francis*, 484 P.2d 128, 129-30 (Colo. App. 1971) (not published pursuant to C.A.R. 35(f)). If they are so supported, the court's findings are

binding upon appeal. *Ruston v. Centennial Real Est. & Inv. Co.*, 166 Colo. 377, 380, 445 P.2d 64, 66 (1968).

¶ 12 The General Assembly enacted the PLA to "establish a comprehensive and exclusive specification of the duties landowners owe to those injured on their property." *Vigil v. Franklin*, 103 P.3d 322, 328 (Colo. 2004); § 13-21-115(2), C.R.S. 2019 ("In any civil action brought against a landowner by a person who alleges injury occurring while on the real property of another and by reason of the condition of such property, or activities conducted or circumstances existing on such property, the landowner shall be liable only as provided in" section 13-21-115(3).) The statute "preempts prior common law theories of liability, and [is] the sole codification of landowner duties in tort." *Vigil*, 103 P.3d at 328; *see Wycoff v. Grace Cmty. Church of Assemblies of God*, 251 P.3d 1260, 1265 (Colo. App. 2010) ("The [PLA] provides the sole remedy against landowners for injuries on their property.").

2. Additional Background

¶ 13 In 2004, defendants trained their employees how to identify meth labs, discovered a meth lab in a Main Street apartment, and

remediated the situation. Defendants did not continue to train their employees in this area, however.

¶ 14 Defendants were notified multiple times of the conditions within Unit 303E and the suspected source of the fumes. Plaintiffs complained to the property manager; placed various phone calls to defendants; sent defendants multiple letters outlining the presence of the fumes and suspicious noises and evening activity occurring in Unit 203E, as well as the injuries they were experiencing; and called the police.

¶ 15 Although the evidence is conflicting, it appears that defendants responded to plaintiffs' complaints by conducting at least one inspection of Unit 203E during the daytime hours and walking the hallways outside the apartments. When defendants contacted Ms. Lopez, she admitted to using "solvents" for furniture repair within her apartment. It is unclear what efforts defendants made to respond to plaintiffs' complaints before Ms. Lopez was evicted from Main Street. Defendants possessed emergency powers, through language in their standard form of lease, to enter any apartment without prior notice to the tenant. Defendants never performed any inspections of or visits to Unit 203E during the

evening hours, when plaintiffs described hearing loud noises and experiencing stronger chemical smells.

3. Knowledge of Dangerous Condition

¶ 16 There was no dispute at trial that defendants qualify as landowners under the PLA. Defendants further conceded that plaintiffs are invitees for the purposes of the PLA. The statute provides that a landowner must "protect [invitees] against dangers of which he actually knew or should have known." § 13-21-115(3)(c)(I), C.R.S. 2019. The PLA's requirement that the landowner "actually knew or should have known" is satisfied by evidence of either actual knowledge or a showing that the landowner should have known of the condition. *Lombard v. Colo. Outdoor Educ. Ctr., Inc.*, 187 P.3d 565, 571 (Colo. 2008).

¶ 17 The district court found that plaintiffs had reported the presence of fumes on multiple occasions, that defendants were informed that a doctor had diagnosed plaintiffs with injuries related to the fumes when they became persistent, and that plaintiffs reported loud noises late at night coming from Unit 203E and an increase in the potency of the fumes at that time. The district court found that defendants knew Unit 303E had failed an LHA

inspection due to the chemical smells. The district court also found that, given defendants' prior experience with a meth lab, they should have known that such a lab "created a living situation that was 'unfit for habitation.'" In fact, defendants' property manager filed an incident report on the matter with recommendations that the district court found defendants failed to follow. The district court determined that the numerous reports and complaints provided defendants with actual notice of the dangerous condition in Unit 203E and that it was impacting plaintiffs' health, and that defendants did not react reasonably by failing to respond.

¶ 18 The parties disagree as to the extent of defendants' efforts to remediate and investigate the situation in Unit 203E. The parties' briefs engage in extensive factual arguments concerning the timeline of events and what actions defendants took, should have taken, or did not take during the time plaintiffs were exposed to the fumes. We defer to the district court's findings of fact unless they are clearly erroneous and contain no support within the record. *Woodbridge Condo. Ass'n v. Lo Viento Blanco, LLC*, 2020 COA 34, ¶ 24. Sufficient evidence exists in the record to support the district

court's finding that defendants had actual knowledge of the toxic fumes at Main Street that impacted plaintiffs.

¶ 19 Defendants argue that the district court misapplied the knowledge requirement of the PLA by relying on the defendants' actions regarding the meth lab discovered at Main Street in 2004 to establish that defendants possessed actual knowledge that there was a meth lab in Unit 203E. We disagree. The district court made extensive factual findings related to defendants' actual notice of the toxic fumes and the impact of the fumes on plaintiffs. The district court appears to have considered the fact that defendants had previously encountered a meth lab within their building merely to establish that defendants knew a meth lab would render an apartment "unfit for habitation." This fact alone did not establish defendants' knowledge of the toxic fumes or their cause within Unit 203E, and the district court did not improperly rely on it to establish actual knowledge.

¶ 20 Additionally, the district court found that defendants should have known of the dangerous condition because by exercising reasonable diligence to investigate plaintiffs' numerous complaints, they would have discovered the source of the fumes. The district

court partially based its finding on plaintiffs' report that the fumes and loud noises were most frequent between 9:30 p.m. and 1:30 a.m., and that defendants could have investigated the fumes and noises by performing an unannounced inspection of Unit 203E. The district court also relied on the on-site property manager's incident report, in which he recommended an inspection at the time fumes were frequently present. Additionally, in support of its conclusion of constructive knowledge, the district court cited defendants' refusal to conduct air quality testing in either apartment and its finding that defendants were "dismissive" of plaintiffs' complaints and allowed plaintiffs' complaints to "linger without resolution." The record contains sufficient evidence to support the district court's finding that defendants should have known of the dangerous condition in Unit 203E. The district court applied the proper legal standard in making this finding.

¶ 21 Defendants argue that the district court erred in applying a heightened duty of care in determining that defendants did not exercise reasonable diligence in investigating plaintiffs' concerns. We disagree. While the district court cited to defendants' ability to legally enter apartments in Main Street in an emergency and their

failure to do so, there is no indication that the court relied on this finding to impart additional duties on defendants. The district court also noted the incident report recommendations that defendants did not follow, their failure to conduct any kind of testing, and that defendants were dismissive of plaintiffs' complaints at the time of the exposure. The fact that the district court considered that defendants could have taken reasonable measures to investigate the dangerous condition in Unit 203E, and did not do so, does not lead to the conclusion that the district court applied an improper standard.

B. The Adverse Inference Spoliation Sanction

¶ 22 Defendants assert that the district court should not have applied an adverse inference as a sanction for defendants' destruction of evidence and that the court's application of the inference was flawed. We disagree.

1. Standard of Review

¶ 23 We review a district court's imposition of spoliation sanctions for abuse of discretion. *Aloi v. Union Pac. R.R. Corp.*, 129 P.3d 999, 1002 (Colo. 2006). An abuse of discretion occurs when the district court's determination is manifestly arbitrary, unreasonable, or

unfair. *Castillo v. Chief Alt., LLC*, 140 P.3d 234, 236 (Colo. App. 2006). A district court enjoys broad discretion to impose sanctions for the spoliation of evidence, even if the evidence was not subject to a discovery order. *Warembourg v. Excel Elec., Inc.*, 2020 COA 103, ¶ 52.

2. Additional Background

¶ 24 On August 28, 2018, Ms. Lopez was evicted from Unit 203E for reasons unrelated to plaintiffs' complaints. While in Unit 203E, representatives of defendants noted a strong odor of ammonia and cat urine. It was defendants' policy to photograph all items removed from an apartment during the course of an eviction in order to protect themselves from potential liability. Although representatives of defendants were present during the eviction, they failed to take any photographs, contravening their own policy. Plaintiffs were able to take several pictures from their unit during the eviction process, however. These photographs show multiple containers, which appear to be gas cannisters and propane tanks, being removed from Unit 203E. Defendants did not preserve, inspect, or collect these items.

¶ 25 When defendants began renovating Unit 203E in September, they removed the carpet, sealed the floor beneath, painted the walls, and cleaned the apartment. Defendants made no efforts to preserve the carpet samples from Unit 203E or to perform any testing before making the renovations. At the time of the renovation, defendants had been made aware of plaintiffs' complaints associated with the apartment and of the injuries that they had claimed as a consequence of the fumes emanating from Unit 203E.

¶ 26 The district court's findings related to causation expressly described defendants' spoliation of evidence:

> This Court is extremely concerned about Defendants[']failure to preserve incriminating evidence, the failure to sample or test, allowing the destruction of material evidence, and then attempting to cover up, hide or destroy evidence when they knew of [plaintiffs'] claims and the threat of potential liability.

Based on these findings, the court drew "a negative inference regarding defendants' conduct and the destruction of evidence which would have established a link in the chain of evidence against it." Despite the extensive cleaning and renovations of Unit

203E, areas of the apartment still tested above the regulatory limits from meth.

3. Spoliation Sanction

¶ 27 Defendants do not contest that the evidence that was destroyed was relevant and material, or that the evidence was destroyed during the eviction of the tenant and cleaning of Unit 203E, which defendants performed. Spoliation of evidence occurs when (1) a party acts in a way that results in the loss or destruction of evidence; (2) the evidence would have been relevant to an issue at trial and otherwise would naturally have been introduced into evidence; and (3) the evidence was destroyed when the party responsible for the loss of the evidence knew or should have known that the destroyed evidence was relevant to pending, imminent, or reasonably foreseeable litigation. *Id.* at ¶¶ 55-56.

¶ 28 Even where a party destroys potential evidence negligently or intentionally, the trial court retains the inherent power to impose sanctions for the spoliation of evidence. *Pfantz v. Kmart Corp.*, 85 P.3d 564, 569 (Colo. App. 2003). If the spoliating party is merely negligent, an adverse inference nevertheless may be imposed to remediate harm when the inference is "reasonably likely to have

been contained in the destroyed evidence." *Id.* (quoting *Rodriguez v. Schutt*, 896 P.2d 881, 884 (Colo. App. 1994)). The sanction for the spoliation of evidence should be commensurate with the seriousness of the disobedient party's conduct. *Id.* at 568.

¶ 29 A party may be sanctioned for destroying evidence after receiving notice that it is relevant to litigation regardless of whether a complaint has been filed, so long as the party knew or should have known that the destroyed evidence was relevant to pending, imminent, or reasonably foreseeable litigation. *Warembourg*, ¶¶ 61-62. The behavior of the party moving for sanctions is an important factor for assessing whether sanctions are appropriate. *Castillo*, 140 P.3d at 237. The analysis of when litigation was "reasonably foreseeable" is "a flexible fact-specific standard that allows a district court to exercise the discretion necessary to confront the myriad factual situations inherent in the spoliation inquiry." *Warembourg*, ¶ 62 (quoting *Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1320 (Fed. Cir. 2011)).

¶ 30 In *Castillo*, about a month after a nightclub patron was injured, an employee of the corporate defendant spoke with the injured plaintiff's father, who said that the plaintiff "was doing okay,

that her bills were being paid, that she wasn't hurt that bad, and they weren't going to sue or anything." 140 P.3d at 237. In that case, the defendant knew that the plaintiff had suffered an injury, so there was some reasonable basis to believe that future litigation was possible. As a result, the defendants preserved the evidence for approximately a year and a half following the incident. *Id.* The plaintiff brought suit a month after the defendant discarded the evidence. However, based on the plaintiff's actions, the court determined that sanctions were not appropriate because the defendant was not on notice of pending litigation. *Id.*

¶ 31 Defendants argue that the district court erred in applying a spoliation sanction where defendants had no notice that litigation was pending, and the district court did not make proper findings related to notice. We disagree.

¶ 32 When making its findings related to notice, the district court referenced the fact that an incident report, which defendants admitted is filled out, in part, to prepare for possible legal action, was submitted by the property manager. The incident report itself recommended that defendants contact their attorneys. The district court also cited to the fact that plaintiffs had notified defendants of

the issue and that they had experienced severe health consequences as a result of their exposure, which defendants should have known indicated they had sustained damages and litigation was reasonably foreseeable as a result. Plaintiffs were vocal and persistent in their complaints related to the toxic fume exposure they were experiencing, and Ms. Lopez admitted to using solvents within the unit. However, defendants nonetheless made no efforts to preserve evidence, contrary to their own policy, and actively destroyed potential evidence when they renovated Unit 203E. It was not an abuse of the district court's broad discretion in this matter to conclude that defendants should have known that litigation was reasonably foreseeable before they evicted Ms. Lopez and renovated Unit 203E. Further, plaintiffs appear to have taken actions on their own behalf to preserve evidence by taking pictures during the eviction and requesting that defendants get the apartments tested. At no time did plaintiffs communicate to defendants that there was no need to preserve evidence because they would not be pursuing litigation against them, or state that the injuries they had sustained had been resolved.

¶ 33 The district court did not abuse its discretion in determining that defendants should have known of their potential liability before plaintiffs filed suit. Based on the district court's factual findings, it was within the bounds of the court's discretion to apply an adverse inference.

4. Application of Spoliation Sanction

¶ 34 Defendants argue that the district court misapplied the spoliation sanction when it improperly inferred a pathway between the apartments based solely on the adverse inference, when no evidence existed in the record to support such a finding. We disagree. It is not clear that the district court used the adverse inference in the way that defendants contend. In fact, the district court cited to multiple factual findings that supported its holding that a meth lab existed in Unit 203E, and the toxic fumes caused plaintiffs' injuries. In making its causation finding, the district court referred to the testing results that demonstrated a presence of meth above the regulatory limits in Unit 203E and a lower concentration in Unit 303E, the testimony of an industrial hygienist at trial that Unit 203E was likely the source of the toxic fumes, and the fact that the fumes were clearly present and identifiable by both

plaintiffs and the LHA inspector in unit 303E on multiple occasions. Additionally, the district court cited to the fact that both plaintiffs, despite their age difference, developed contemporaneous brain injuries due to fume exposure at the same time. The district court found, by a preponderance of the evidence, that these facts established causation without relying on the adverse inference to establish a pathway between the apartments. While the district court stated that it was unsure of the exact pathway between the apartments, it did not rely on an adverse inference from spoliation, but on evidence of contamination, to find that the fumes originated in Unit 203E and impacted plaintiffs in Unit 303E.

¶ 35 The fact that the district court did not find defendants' testimony on the pathway issue credible and inferred a pathway for the fumes based on conflicting evidence that it determined was credible does not constitute an abuse of discretion. Additionally, it is not an abuse of discretion for the district court to imply that more evidence on the causation issue would have been discovered if defendants had not failed to preserve any of the evidence in Unit 203E before renovating it. Defendants also argue that the idea that they were expected to preserve Unit 203E in its previous condition,

instead of renovating it and reletting it to another tenant, would constitute an unacceptable burden. However, testing could have been completed before renovation, samples could have been acquired, and pictures could have been taken that would have allowed defendants to rent out the property while simultaneously preserving evidence. Defendants did not take any of these actions and nothing suggests the district court would have required more to avoid an adverse inference.

¶ 36 While the district court did use the adverse inference in its analysis of causation, stating that the destroyed evidence "would have established a link in the chain of evidence," the inference related to the existence of a meth lab and the probability that evidence of such a lab would have been discovered but for the destruction of evidence. This is a proper inference — that the evidence destroyed would have shown what defendants did not want it to show. Thus, the court used the adverse inference in the manner in which it was intended.

¶ 37 Because the record supported a negative inference from the spoliation of evidence, and the district court did not use the

inference in the manner defendants contend, but instead cited other evidence of causation, we find no abuse of discretion.

C. Damages

¶ 38 Defendants argue that the district court erred in awarding exemplary damages because they claim the evidence of "willful and wanton conduct" at trial was lacking. They also argue that the district court erred in awarding physical impairment damages because plaintiffs waived their rights. We disagree.

1. Standard of Review

¶ 39 We review an award of exemplary damages for abuse of discretion. *Peterson v. McMahon*, 99 P.3d 594, 600 (Colo. 2004). The fact finder has the sole prerogative to assess the amount of damages, and its award will not be set aside unless it is manifestly and clearly erroneous. *Logixx Automation, Inc. v. Lawrence Michels Fam. Tr.*, 56 P.3d 1224, 1227 (Colo. App. 2002). The trier of fact has wide discretion in fixing the amount of damages in an action involving personal injuries, and the award will not be disturbed on review unless it is grossly and manifestly excessive. *Kunkel v. Garrison*, 475 P.2d 354, 355 (Colo. App. 1970) (not published pursuant to C.A.R. 35(f)).

2. Additional Background

¶ 40 Extensive testimony was provided at trial by medical professionals that both plaintiffs experienced permanent physical injuries as a result of their exposure to toxic fumes. A physical therapist who testified regarding the injuries estimated that the lifetime treatment for plaintiffs would total $3,665,008. During closing argument, plaintiffs made a lost wages analogy to aid the district court in making a finding on the amount of damages that could be apportioned to a permanent brain injury. No testimony was provided at trial to indicate that plaintiffs had been working before their exposure or would be working in the future.

3. Exemplary Damages

¶ 41 Colorado permits exemplary damages "[i]n all civil actions in which damages are assessed" and the injury "is attended by circumstances of fraud, malice, or willful and wanton conduct." § 13-21-102(1)(a), C.R.S. 2022. Willful and wanton conduct is "conduct purposefully committed which the actor must have realized as dangerous, done heedlessly and recklessly, without regard to consequences, or of the rights and safety of others." § 13-21-102(1)(b). Where the defendant is conscious of its conduct and

the existing conditions and knew or should have known that injury would result, the statutory requirements of section 13-21-102 are met. *Coors v. Sec. Life of Denver Ins. Co.*, 112 P.3d 59, 66 (Colo. 2005). Exemplary damages must be proved beyond a reasonable doubt. *Tri-Aspen Constr. Co. v. Johnson*, 714 P.2d 484, 486 (Colo. 1986).

¶ 42 Defendants challenge the exemplary damage award only on the grounds that insufficient evidence at trial supports a finding of willful and wanton conduct beyond a reasonable doubt. As discussed above, the record supports the district court's findings that defendants knew of the danger of toxic fumes from meth, were dismissive of plaintiffs' complaints of injuries, failed to take appropriate measures, and destroyed evidence. The fact that defendants presented conflicting evidence, which the district court did not find convincing, does not establish reasonable doubt. We conclude that the district court did not abuse its discretion by finding that defendants' conduct was willful and wanton beyond a reasonable doubt.

4. Physical Impairment Damages

¶ 43 Colorado considers physical impairment a category of damages that may be awarded separate and apart from other noneconomic damages. *Pringle v. Valdez*, 171 P.3d 624, 631 (Colo. 2007).

¶ 44 Defendants argue that because plaintiffs presented no evidence of lost wages at trial, they waived their only argument for physical impairment damages. Although plaintiffs neither requested nor attempted to prove damages for lost wages in their closing argument, plaintiffs suggested that the value of the damages for severe brain injuries could be measured by analogy to lost wages. Defendants' claim that plaintiffs "put on no evidence 'that their opportunities for advancement or change in vocation were affected by their alleged physical impairment'" is a red herring because plaintiffs were not even suggesting they were entitled to damages for lost earning potential. Ample evidence was presented at trial to show, by a preponderance of the evidence, that plaintiffs experienced severe brain injuries and physical impacts as a result of exposure to toxic fumes. Damages such as quality of life and injury to the brain have no price tag, and we are aware of nothing that prohibits consideration of analogies or comparisons to arrive at

an appropriate damage award. The district court did not abuse its discretion in how it determined damages for brain injuries to the plaintiffs. Therefore, we will not disturb the district court's computation of damages.

III. Disposition

¶ 45 The judgment is affirmed.

JUDGE FOX and JUDGE LIPINSKY concur.

Court of Appeals

STATE OF COLORADO
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PAULINE BROCK
CLERK OF THE COURT

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Gilbert M. Román,
Chief Judge

DATED: January 6, 2022

Notice to self-represented parties**: You may be able to obtain help for your civil appeal from a volunteer lawyer through The Colorado Bar Association's (CBA) pro bono programs. If you are interested in learning more about the CBA's pro bono programs, please visit the CBA's website at **www.cobar.org/appellate-pro-bono** or contact the Court's self-represented litigant coordinator at 720-625-5107 or **appeals.selfhelp@judicial.state.co.us.