The summaries of the Colorado Court of Appeals published opinions constitute no part of the opinion of the division but have been prepared by the division for the convenience of the reader. The summaries may not be cited or relied upon as they are not the official language of the division. Any discrepancy between the language in the summary and in the opinion should be resolved in favor of the language in the opinion.

SUMMARY
March 30, 2023

**2023COA30**

**No. 21CA1957, *Blakeland v Taghavi* — Torts — Toxic Substances — Trespass — Nuisance — Negligence; Damages — Pro Rata Liability**

In this appeal of a judgment holding defendants jointly and severally liable for environmental property damage, a division of the court of appeals determines that section 13-21-111.5, C.R.S. 2022, precludes a judgment of joint and several liability with regard to damages that the trial court found were indivisible. The division concludes that the General Assembly has not adopted the Restatement (Second) of Torts section 433B(2) (Am. L. Inst. 1965), which provides that a court may determine that defendants are jointly and severally liable when it finds that damages are indivisible. Accordingly, the division holds that the plain language of section 13-21-111.5 requires the apportionment of liability in this

case and that section 433B(2) of the Restatement (Second) of Torts may not supersede the statute.

The division also upholds the trial court's calculation of damages caused by the migration of toxic chemicals onto the plaintiff's property.

COLORADO COURT OF APPEALS **2023COA30**

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Court of Appeals No. 21CA1957
Jefferson County District Court No. 19CV30107
Honorable Jeffrey R. Pilkington, Judge

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Blakeland Drive Investors, LLP IV,

Plaintiff-Appellee,

v.

Rashid Taghavi and Taghavi, Inc., d/b/a Gas Express, a Colorado corporation,

Defendants-Appellants.

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JUDGMENT AFFIRMED IN PART AND REVERSED
IN PART, AND CASE REMANDED WITH DIRECTIONS

Division I
Opinion by JUDGE TAUBMAN*
Johnson and Richman*, JJ., concur

Announced March 30, 2023

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James A. Beckwith, Arvada, Colorado; Lewis Roca Rothgerber Christie, LLP, Kendra N. Beckwith, Denver, Colorado, for Plaintiff-Appellee

Martin J. Plank, P.C, Martin J. Plank, Denver, Colorado; Dworkin, Chambers, Williams, York, Benson, & Evans, P.C., Steven G. York, Geri O'Brien Williams, Sean J. O'Brien, 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 In this environmental tort case, defendants, Rashid Taghavi and Taghavi, Inc. (Taghavi),[1] seek review of the trial court's judgment finding Taghavi liable for damages attributable to the migration of two toxic substances from his property onto the adjoining property of plaintiff, Blakeland Drive Investors, LLP IV (BDI). At issue in this appeal is whether the trial court (1) applied the correct standard in holding Taghavi liable for the migration of a certain type of toxic substance; (2) erred in determining the migration interfered with BDI's use of its property; (3) erred in the calculation of damages; and (4) properly held Taghavi jointly and severally liable with codefendant Duggan Petroleum Company (Duggan). We affirm the trial court's findings of liability and its calculation of damages but reverse its conclusion that Taghavi and Duggan were jointly and severally liable. Accordingly, we remand for further proceedings.

[1] For simplicity, we refer to both defendants jointly as Taghavi.

## I. Background

¶ 2 The toxic substances at the center of this case came from leaking underground gasoline storage tanks on the property owned first by Duggan and later by Taghavi.

¶ 3 In 1997, BDI purchased Lots 7-10, which have remained undeveloped. At that time, Duggan owned the adjoining Lot 5, on which it operated a gas station. In 1999, Duggan discovered that its underground gasoline storage tanks had leaked. Colorado's Division of Oil and Public Safety (OPS) ordered further monitoring of the leaks, which showed two toxic substances migrating through the soil and groundwater on Lot 5.

¶ 4 One toxic substance was BTEX (benzene, toluene, ethylbenzene, xylene), a carcinogenic element of gasoline that migrates through water or vapor. The other toxic substance was MTBE (methyl tert-butyl ether), a compound made from petroleum hydrocarbons that dissolves in water and becomes difficult to separate from it. Colorado banned MTBE in 2000, and it was phased out in Colorado by 2002.

¶ 5 Both toxic substances filtrate downward in soil to groundwater, where BTEX then floats on water or vapor, while

MTBE dissolves in the water, causing both substances to move laterally with the groundwater. Thus, by 2001, both toxic substances on Lot 5 were migrating downslope to Lots 7-10.

¶ 6 Duggan attempted to remove the substances without success. In 2000, Duggan sold the property to Willary Metro, LLC, which then in 2003 sold the property to Rimfire31, Inc. No leaks were reported on Lot 5 during the ownerships of Willary Metro and Rimfire31.

¶ 7 Rashid Taghavi purchased Lot 5 from Rimfire31 in 2004, and Taghavi, Inc. has its principal place of business on Lot 5, operating a gas station and convivence store — which remain open today. Taghavi received an environmental report notifying him of the leaks of the toxic substances. Later that year, after Taghavi acquired the property, he reported another leak from the gasoline storage containers, but little information is known about that event.

¶ 8 Duggan remained liable for the contamination on Lot 5 according to the OPS, and Duggan continued monitoring and remediation efforts. In 2006, OPS issued a no-further-action-required letter to Duggan based on the reduction of levels of the

toxic substances present on Lot 5, and Taghavi received a copy of the letter.

¶ 9 In 2010, the storage tanks leaked again. This time, the storage tanks released only BTEX because MTBE had been phased out. Taghavi hired Palmetto Environmental to conduct tests and report on the leak, and it found that BTEX and MTBE on Lot 5 were migrating to Lots 7-10. Palmetto Environmental continued monitoring the migration until 2016, when it stopped reporting.

¶ 10 In 2017, when BDI attempted to sell Lots 7-10, it learned of the migration of BTEX and MTBE from Lot 5 onto its property. BDI's own assessment found BTEX and MTBE present on Lots 7-10 at levels above the limits required for detection. BDI sued Duggan and Taghavi for continuing trespass, continuing nuisance, and negligence. In response, Taghavi denied liability and designated Willary Metro and Rimfire31 as nonparties at fault.

¶ 11 At the bench trial, BDI sought $5,645,684 for the amount required to replace the contaminated soil on its lots. BDI's appraiser estimated the value of Lots 7-10 prior to contamination at $1,435,000, while Taghavi's appraiser estimated the value at $990,000. BDI also presented evidence of three offers to purchase

the property, in the amounts of $1,350,000, $1,200,000, and $500,000, respectively. The last offer acknowledged the presence of BTEX and MTBE on Lots 7-10. Meanwhile, Taghavi presented testimony that a remedial measure in the form of a vapor barrier could provide protection from BTEX for any buildings that BDI might construct on its property.

¶ 12 The trial court found Duggan and Taghavi liable for the migration of MTBE and BTEX from Lot 5 onto Lots 7-10. Although the 2010 leak contained only BTEX, the trial court determined that the 2010 leak had caused the newly released BTEX to mix with the already present MTBE and BTEX on Lot 5 and cause further, continuous migration of both toxic substances. Viewing Taghavi's appraisal and the offer acknowledging contamination as credible, the trial court calculated damages in favor of BDI at $490,000 based on the diminution of value of its property. Last, the trial court held Duggan and Taghavi jointly and severally liable based on what it determined was the indivisible nature of the contamination they had caused through the leaking storage tanks. Only Taghavi has appealed.

## II. Liability for MTBE

¶ 13 Taghavi contends that the trial court erred by (1) incorrectly applying the legal standards for trespass and nuisance in finding him liable for the MTBE intrusion onto BDI's property; (2) improperly applying the negligent standard of nonfeasance to Taghavi for MTBE's intrusion onto BDI's property; and (3) allocating liability to Taghavi without allocating liability to the designated nonparties at fault. We are not persuaded.

### A. Standard of Review

¶ 14 We review de novo the court's application of the governing legal standards. *Lawry v. Palm*, 192 P.3d 550, 558 (Colo. App. 2008). *See generally Hoery v. United States*, 64 P.3d 214, 218-20 (Colo. 2003) (discussing the difference between continuing and permanent torts).

### B. Legal Standards

¶ 15 Trespass is a physical intrusion on the property of another without permission from the landowner. *Hoery*, 64 P.3d at 217; *see also Sanderson v. Heath Mesa Homeowners Ass'n*, 183 P.3d 679, 682 (Colo. App. 2008). The intrusion may occur when a landowner causes a toxin to enter another's land: an "actor, without himself

entering the land, may invade another's interest in its exclusive possession by . . . placing a thing either on or beneath the surface of the land." *Hoery*, 64 P.3d at 217 (quoting Restatement (Second) of Torts §§ 158(a) cmt. i, 159(1) (Am. L. Inst. 1965)). Such an invasion may occur when a landowner "sets in motion a force which, in the usual course of events, will damage property of another." *Id.*

¶ 16 Similarly, to establish nuisance there must have been an invasion of an interest in property that results in the unreasonable and substantial interference with the use and enjoyment of that property. *Id.* at 218; *Pub. Serv. Co. of Colo. v. Van Wyk*, 27 P.3d 377, 391 (Colo. 2001). Liability for nuisance may result from conduct that is intentional; negligent; or so dangerous and abnormal, or out of place in its surroundings, that it falls within the principles of strict liability. *Hoery*, 64 P.3d at 217. "Like a trespass, conduct constituting a nuisance can include indirect or physical conditions created by [a] defendant that cause harm." *Id.* at 218.

¶ 17 For ongoing acts, the failure to remove a tortiously placed contaminant on another's property is a continuing trespass, and

likewise, a continuing nuisance arises when an activity creates a harmful physical condition — even if the activity that caused the harm has since ceased. *Id.* "For continuing intrusions — either by way of trespass or nuisance — each repetition or continuance amounts to another wrong, giving rise to a new cause of action." *Id.*

¶ 18 Last, a claim of negligence requires the plaintiff to establish that the defendant owed a legal duty to the plaintiff, the defendant breached that duty, and the breach proximately caused an injury. *Casebolt v. Cowan*, 829 P.2d 352, 356 (Colo. 1992). For negligence claims, the law distinguishes between misfeasance — conduct that actively injures the plaintiff — and nonfeasance — conduct that fails to take positive steps to protect a plaintiff from harm. *Univ. of Denver v. Whitlock*, 744 P.2d 54, 57-58 (Colo. 1987). Nonfeasance requires a special relationship between the parties for a duty to arise. *Id.* However, under Colorado law, "[t]he occupier of land generally owes a duty of reasonable care to prevent activities and conditions on his land from injuring persons or property outside his land, i.e., persons or personal property on public land or on other private land." *Moore v. Standard Paint & Glass Co. of Pueblo*, 145 Colo. 151, 155, 358 P.2d 33, 36 (1960) (quoting 2 Fowler V. Harper

& Fleming James, Jr., *The Law of Torts* § 27.19, at 1521 (1956)); *see also State, Dep't of Health v. The Mill*, 887 P.2d 993, 1002 (Colo. 1994).

### C. Analysis

#### 1. Taghavi's Liability for MTBE

¶ 19 Taghavi does not dispute the trial court's factual findings. He argues that the trial court's "factual findings establish that [he] did not commit any affirmative act that created the condition or set a force in motion to cause MTBE to enter BDI's property." Taghavi contends he could not have committed an affirmative act that caused the migration of MTBE as a matter of law because he purchased Lot 5 in 2004, after MTBE had been banned in Colorado and was no longer sold as of 2002. We disagree.

¶ 20 The trial court rejected Taghavi's claim that both BTEX and MTBE came only from Duggan because Taghavi knew of the migrating contamination, failed to stop the migration, and allowed the storage tanks to leak in 2004 and 2010 during his ownership of Lot 5.

¶ 21 Thus, the trial court concluded that Taghavi committed a trespass because "[t]he physical intrusion of BTEX *and MTBE* was

caused by the intentional acts of Taghavi because the leaks and existing contamination *set in motion further contamination and migration* to Lots 7-10 through groundwater and soil vapors." (Emphasis added.) Likewise, the trial court found that Taghavi committed a continuing nuisance because the "*intentional activities of storing gasoline* in leaking tanks and allowing the gasoline to leak and migrate to Lots 7-10 resulted in the unreasonable and substantial interference with [BDI's] use and enjoyment of the parcel." (Emphasis added.)

¶ 22 Taghavi's argument overlooks the trial court's finding that the BTEX from the 2010 gasoline leak on Lot 5 combined with the already present BTEX and MTBE from the earlier leaks. While the migration of both toxic substances occurred before Taghavi's purchase of Lot 5, the 2010 leak caused by Taghavi's activity of storing gasoline for its gas station beneath the surface of Lot 5 and allowing it to leak set in motion a further migration that damaged Lots 7-10 based on the usual course of migration, a course already established with the gas leaks caused by Duggan. *Hoery*, 64 P.3d at 217. Thus, the continued migration of both toxic substances occurred because of the condition Taghavi created: storing the

gasoline. *Id.* at 218. That condition then set in motion further repetition and continuation of the contamination started by Duggan. *Id.* Therefore, the trial court applied the correct standard in finding Taghavi liable for committing a continuing trespass and nuisance because of the further migration of the MTBE already present on Lot 5.

2. Taghavi's Liability for Negligence

¶ 23 As it relates to negligence, Taghavi argues that the trial court erred because it applied a nonfeasance legal standard without a special relationship between the parties. Taghavi contends that analysis under the nonfeasance standard applies here because he did not have an affirmative duty to remediate the preexisting condition of MTBE contamination caused by the prior landowner, Duggan. Again, we disagree.

¶ 24 The trial court determined that the 2010 gasoline leak resulted from the conditions created by Taghavi's negligent conduct in storing gasoline, causing injuries to BDI's adjoining property. *See Moore*, 145 Colo. at 156, 358 P.2d at 36. It follows that the trial court did not apply the standard of nonfeasance to hold Taghavi liable as the current landowner for the contamination caused by

Duggan as the previous landowner. Instead, the trial court properly found Taghavi liable for allowing gasoline to leak in 2010, which created a condition that harmed BDI's property — a risk made foreseeable and preventable by Duggan's already having harmed BDI's property through the earlier leaks from the gasoline tanks. *Id.*; *see also The Mill*, 887 P.2d at 1002.

¶ 25 Because the trial court's determination of negligence was based on Taghavi's misfeasance, the court was not required to find a special relationship between the parties based on nonfeasance. *Whitlock*, 744 P.2d at 57-58.

3. No Liability for Nonparties at Fault

¶ 26 Last, Taghavi contends as a matter of public policy that the trial court acted inconsistently by not attributing liability to the nonparties at fault. Taghavi raises this issue for the first time on appeal and cites no legal authority in support of his claim. Therefore, we decline to address the issue. *Est. of Stevenson v. Hollywood Bar & Cafe, Inc.*, 832 P.2d 718, 721 n.5 (Colo. 1992) ("Arguments never presented to, considered or ruled upon by a trial court may not be raised for the first time on appeal.").

## III. BTEX Liability

¶ 27 Taghavi argues the trial court erred by finding him liable for nuisance and negligence based on the contamination of BTEX because BTEX was present in only small, unharmful quantities.[2] He also asserts the trial court failed to acknowledge Taghavi's remediation actions. We are not persuaded.

### A. Standard of Review

¶ 28 As already noted, we review de novo a trial court's application of the governing legal standards. *Lawry*, 192 P.3d at 558. "The trial court, as fact finder, is charged with assessing the witnesses' credibility and determining the evidence's sufficiency, probative effect, and weight." *State ex rel. Suthers v. Mandatory Poster Agency, Inc.*, 260 P.3d 9, 15 (Colo. App. 2009). We may not disturb the trial court's findings of fact unless they are clearly erroneous, meaning they have no support in the record. *M.D.C./Wood, Inc. v. Mortimer*, 866 P.2d 1380, 1383 (Colo. 1994); *Page v. Clark*, 197

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[2] Monitoring of the lots indicated BTEX concentrations surpassed the reporting limits, meaning the minimum amounts necessary for detection. The concentrations were below the OPS's established risk-based screening levels, which are the minimum amounts necessary to establish a danger to public safety.

Colo. 306, 313, 592 P.2d 792, 796 (1979). "When the evidence is conflicting, a reviewing court may not substitute its conclusions for those of the trial court merely because there may be credible evidence supporting a different result." *Lawry*, 192 P.3d at 558.

### B. Legal Standard

¶ 29 As stated above in Part II.B, nuisance is an invasion of an interest in property that results in the unreasonable and substantial interference with the use and enjoyment of that property. *Hoery*, 64 P.3d at 218; *Van Wyk*, 27 P.3d at 391. Unreasonable and substantial interference "must be significant enough that a normal person in the community would find it offensive, annoying, or inconvenient." *Van Wyk*, 27 P.3d at 391. Unreasonableness is determined by the finder of fact. *Id.*

### C. Analysis

¶ 30 Taghavi argues that the trial court erred by not determining whether BTEX caused substantial interference with BDI's use of the property.

¶ 31 Crediting the testimony of John Drafts of Palmetto Environmental, the trial court found that the 2010 leak of the gasoline tank that Taghavi caused resulted in BTEX migrating onto

BDI's property. The trial court appropriately looked to *Van Wyk* to assess whether the toxic substances substantially interfered with BDI's use of the property. 27 P.3d at 391. It concluded that "Taghavi's intentional activities of storing gasoline in leaking tanks and allowing the gasoline to leak and migrate to Lots 7-10 resulted in the *unreasonable and substantial interference* with [BDI's] use and enjoyment of the parcel." (Emphasis added.) Therefore, the trial court properly determined that the interference was unreasonable and substantial. We find the trial court's finding is not clearly erroneous.

¶ 32 Taghavi also contests the trial court's findings that BTEX caused substantial interference because the BTEX discovered on Lots 7-10 did not threaten anyone's personal health and did not substantially damage BDI's property. Because the trial court determines as a factual matter the unreasonableness of conduct alleged to be a nuisance, we review this issue for clear error. *Van Wyk*, 27 P.3d at 391.

¶ 33 The trial court was not required to determine that the BTEX levels specifically threatened personal health to find that an invasion of property occurred — especially within the context of its

finding that the BTEX had combined with the MTBE. Instead, migrating toxic substances are generally considered to cause unreasonable and substantial harm. *See Hoery*, 64 P.3d at 223 ("[W]e find that public policy favors the discontinuance of both the continuing migration and the ongoing presence of toxic chemicals into [the plaintiff's] property and irrigation well.").

¶ 34 Further, the unreasonableness or substantiality of the interference need not threaten personal health but may derive from the interference being offensive, annoying, or inconvenient to a normal person in the community. *Van Wyk*, 27 P.3d at 391. The trial court had support for its findings of unreasonable or substantial interference because there was evidence showing a $490,000 diminution in value to the property if sold by BDI, and that evidence indicated that members of the community saw the contamination as sufficiently inconvenient or annoying to decrease the property's value significantly. *See id.* Despite Taghavi's arguments, it was within the trial court's discretion to rely on an offer letter for $500,000 rather than the two higher offer letters preferred by Taghavi — just as the trial court properly relied on Taghavi's own appraisal report of $990,000 rather than BDI's

higher appraisal. *See Lawry*, 192 P.3d at 558. Therefore, we find no clear error.

¶ 35 Taghavi also argues that the trial court erred by holding him liable for negligence for the contamination of BTEX because the trial court's ruling "disregards uncontested evidence" about his remediation efforts. This is also a factual issue we review for clear error because the trial court determines the sufficiency, probative effect, and weight of the evidence. *State ex rel. Suthers*, 260 P.3d at 15.

¶ 36 Again, the trial court found that MTBE and BTEX had migrated onto BDI's property as a result of the 2010 gasoline leak, meaning the trial court did not need to find that Taghavi was negligent for BTEX contamination alone. The record also shows that, as of 2018, soil and vapor samples indicated that both MTBE and BTEX remained detectable on Lots 7-10. The trial court further supported its ruling by finding Taghavi's "remediation efforts have not been successful" because Taghavi's proposed remediation — a vapor barrier — would not remove BTEX from the soil and would protect any new construction only from BTEX. Given this record

support, we conclude that the trial court did not clearly err. *See Lawry*, 192 P.3d at 558.

## IV. Damages

¶ 37 Taghavi argues that the trial court erred in its calculation of damages for continuing trespass and negligence caused by the presence of BTEX by not limiting the damages to the remediation costs associated with a vapor barrier. We are not persuaded.

### A. Standard of Review

¶ 38 We review de novo a trial court's application of legal standards. *Lawry*, 192 P.3d at 558. Nonetheless, we will not disturb the trial court's findings of fact unless they are clearly erroneous. *Mortimer*, 866 P.2d at 1383; *Page*, 197 Colo. at 313, 592 P.2d at 796. Specifically, we review a fact finder's assessment of damages for clear error. *Morris v. Belfor USA Grp., Inc.*, 201 P.3d 1253, 1257 (Colo. App. 2008).

### B. Legal Standard

¶ 39 "[M]arket value before and after the injury is ordinarily the rule applied to measure damages to real property." *Zwick v. Simpson*, 193 Colo. 36, 38, 572 P.2d 133, 134 (1977). However, in the discretion of the trial court, the costs of remediation may be an

appropriate measure of damages in certain circumstances. *Bd. of Cnty. Comm'rs v. Slovek*, 723 P.2d 1309, 1316 (Colo. 1986).

### C. Analysis

¶ 40 The trial court properly awarded damages based on the diminution of the value of BDI's property, awarding the difference between $500,000 — the amount in a letter of intent for the contaminated property — and $990,000, which Taghavi's appraiser opined was the value of the property before the contamination. *See Zwick*, 193 Colo. at 38, 572 P.2d at 134. Although Taghavi contests this calculation by pointing to other credible evidence of different appraisals of the property and evidence of remediation efforts, the trial court acted within its discretion in rejecting Taghavi's contention that damages should be measured by the cost of remediation — i.e., the cost of installing a vapor barrier. *See Lawry*, 192 P.3d at 558.

¶ 41 Therefore, the trial court did not clearly err in its award of damages. *See Mortimer*, 866 P.2d at 1383.

## V. Joint and Several Liability

¶ 42 Taghavi argues that the trial court erred by holding him jointly and severally liable with Duggan because such liability violates Colorado's pro rata liability statute. We agree.

¶ 43 As an initial matter, BDI contends that Taghavi either waived or invited any error. We disagree.

¶ 44 "Waiver is the intentional relinquishment of a known right or privilege." *Dep't of Health v. Donahue*, 690 P.2d 243, 247 (Colo. 1984). "To hold a party waived objection to an error, a court must find some record evidence that the defendant intentionally relinquished a known right." *Bernache v. Brown*, 2020 COA 106, ¶ 10, 471 P.3d 1234, 1238.

¶ 45 In its trial brief, BDI relied on the Restatement (Second) of Torts section 433B to argue Taghavi bore the burden of proof to limit his liability for an indivisible injury and failed to meet this burden at trial by establishing how the damages should be apportioned between Taghavi and Duggan. Instead, BDI contended, Taghavi merely argued none of the damages could be attributed to him because of "the volume of MTBE that was on Lots 7-10 before Taghavi bought Lot 5."

¶ 46 Because the General Assembly has not adopted section 433B of the Restatement (Second) of Torts, section 433B may not supersede the pro rata division of liability provided in section 13-21-111.5(1) C.R.S. 2022 (discussed below). *Grease Monkey Int'l, Inc. v. Montoya*, 904 P.2d 468, 470 n.2 (Colo. 1995) ("Courts do not have the authority to 'adopt' a section of a restatement as the law. A court may apply sections of the restatements as a formulation of the law that is applicable to the issue which is before the court. The adoption of law is solely within the province of the General Assembly."). Thus, Taghavi did not have a burden to prove his apportionment of liability under section 13-21-111.5.

¶ 47 If Taghavi did not have a burden to prove his proportionate share of liability, his failure to do so cannot amount to a waiver of his right to have liability apportioned under the statute. *See Phillips v. People*, 2019 CO 72, ¶ 21, 443 P.3d 1016, 1023.

¶ 48 "The doctrine of invited error prevents a party from complaining on appeal of an error that he or she has invited or injected into the case." *Bernache*, ¶ 11, 471 P.3d at 1238. The record does not demonstrate that Taghavi invited the trial court to impose joint and several liability contrary to the provisions of

section 13-21-111.5. *Horton v. Suthers*, 43 P.3d 611, 618 (Colo. 2002). Thus, the matter is not waived or invited.

## A. Standard of Review

¶ 49 We review issues of statutory interpretation de novo. *Jordan v. Panorama Orthopedics & Spine Ctr., PC*, 2015 CO 24, ¶ 14, 346 P.3d 1035, 1039. "In construing a statute, we aim to effectuate the General Assembly's intent." *People v. Weeks*, 2021 CO 75, ¶ 25, 498 P.3d 142, 151. "Our first step in this endeavor is to inspect 'the language of the statute, giving its words and phrases their plain and ordinary meaning.'" *Id.* (quoting *McCulley v. People*, 2020 CO 40, ¶ 10, 463 P.3d 254, 257).

## B. Legal Standard

¶ 50 The General Assembly enacted section 13-21-111.5(1) to establish a pro rata division of liability. In pertinent part, for actions brought for injury to property, "no defendant shall be liable for an amount greater than that represented by the degree or percentage of the negligence or fault attributable to such defendant that produced the claimed . . . damage or loss." § 13-21-111.5(1). Overall, "[t]he adoption of [a pro rata division of liability] was intended to cure the perceived inequity under the common law

concept of joint and several liability whereby wrongdoers could be held fully responsible for a plaintiff's entire loss, despite the fact that another wrongdoer, who was not held accountable, contributed to the result." *Barton v. Adams Rental, Inc.*, 938 P.2d 532, 535 (Colo. 1997). The only exception under the statute in which joint liability should be imposed is when "two or more persons . . . consciously conspire and deliberately pursue a common plan or design to commit a tortious act." § 13-12-111.5(4). We note that there was no contention or evidence in this case supporting a common plan or conspiracy.

¶ 51 The Colorado Supreme Court has held that section 13-21-111.5(1) requires liability to be apportioned between or among tortfeasors, whether or not their tortious acts were intentional or negligent. *Slack v. Farmers Ins. Exch.*, 5 P.3d 280, 288 (Colo. 2000). It follows that the statute mandates that juries must return a special verdict or trial courts must make special findings determining the percentage of negligence or fault attributable to each party. § 13-12-111.5(2); *Miller v. Byrne*, 916 P.2d 566, 578 (Colo. App. 1995).

### C. Analysis

¶ 52 Here, the trial court recognized that section 13-21-111.5(1) mandates apportioning liability for an injury according to the actor's percentage of fault. However, the trial court cited *Northington v. Marin*, 102 F.3d 1564, 1569 (10th Cir. 1996), and the Restatement (Second) of Torts section 433B to conclude that indivisible injuries create an exception that authorizes joint and several liability. The Restatement (Second) of Torts section 433B(2) states as follows:

> Where the tortious conduct of two or more actors has combined to bring about harm to the plaintiff, and one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor.[3]

Finding the amount of contamination caused by MTBE and BTEX indivisible between Taghavi and Duggan, the trial court ruled that

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[3] Counsel for BDI conceded at oral argument that section 433B(3) was not at issue on appeal. *See* Restatement (Second) of Torts § 433B(3) (Am. L. Inst. 1965) ("Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm.").

Taghavi had not met his burden of proof under the Restatement (Second) of Torts section 433B and held him jointly and severally liable with Duggan.

¶ 53 The trial court's ruling contradicts the plain language of section 13-21-111.5(1) that precludes joint liability, except in the circumstance noted above. Neither the federal court's ruling in *Northington* interpreting a federal statute nor the Restatement (Second) of Torts section 433B(2) can supersede the plain language of section 13-21-111.5(1).

¶ 54 By contrast, in *Slack v. Farmers Insurance Exchange*, the Colorado Supreme Court held that negligent acts and intentional torts both fall under section 13-21-111.5(1). 5 P.3d at 286. The court further held that "section 13-21-111.5(1) applies even when one of several tortfeasors commits an intentional tort that contributes to an *indivisible injury*." *Id.* (emphasis added). If intentional acts are treated the same as negligent acts under the statute, and the statute applies to intentional acts that result in indivisible injuries, it follows that only the statute applies to both intentional and negligent acts that cause indivisible injuries — confirming that indivisibility of an injury is not an obstacle to

applying the statute. *See also Bohrer v. DeHart*, 961 P.2d 472, 476 (Colo. 1998).

¶ 55 Our conclusion is supported by multiple cases interpreting the plain meaning of the statute and holding that the intent of the General Assembly was to prevent tortfeasors' joint and several liability, with one limited exception not applicable here. *Moody v. A.G. Edwards & Sons, Inc.*, 847 P.2d 215, 217 (Colo. App. 1992); *see also Union Pac. R.R. Co. v. Martin*, 209 P.3d 185, 189 (Colo. 2009) ("Sections 13-21-111 and 111.5, providing for comparative negligence as a measure of damages and pro rata liability, by their own terms, apply to actions brought as the result of death or injury generally, and they *mandate* the apportionment of damages assessed against a defendant in terms of the degree or percentage of negligence or fault attributable to him.") (emphasis added). Indeed, the General Assembly's limited exception to joint liability for conspiracies and common plans implies it declined to permit other exceptions, such as for indivisible injuries. *Beeghly v. Mack*, 20 P.3d 610, 613 (Colo. 2001) ("Under the rule of interpretation *expressio unius exclusio alterius*, the inclusion of certain items implies the exclusion of others.").

¶ 56 BDI cites *Reigel v. SavaSeniorCare L.L.C.*, 292 P.3d 977, 985 (Colo. App. 2011), and *Lorenzen v. Pinnacol Assurance*, 2019 COA 54, ¶ 24, 457 P.3d 100, 104, to argue that divisions of our court have adopted the Restatement (Second) of Torts section 433B(2) standard that joint and several liability applies to cases of indivisible injuries. However, those cases narrowly address issues involving proximate cause in negligence claims, holding that a substantial factor must still satisfy the test of "but for" causation. *Reigel*, 292 P.3d at 985; *Lorenzen*, ¶ 24, 457 P.3d at 104.

¶ 57 BDI's reliance on *Fried v. Leong* is also not persuasive. 946 P.2d 487 (Colo. App. 1997). BDI accurately quotes *Fried* as stating, "If the jury is unable to separate the damages, the defendant is legally responsible for the entire amount of damages the plaintiff has incurred." *Id.* at 489. However, that statement arose within the context of determining the degree of negligence or fault for a psychological malpractice claim that involved the aggravation of a pre-existing condition created by nonparties. *Id.* at 489-90; *see* § 13-21-111.5(3)(a) ("Any provision of the law to the contrary notwithstanding, the finder of fact in a civil action may consider the degree or percentage of negligence or fault of a person not a party to

the action, based upon evidence thereof, which shall be admissible, in determining the degree or percentage of negligence or fault of those persons who are parties to such action.”). The court in *Fried* was addressing the determination of legal responsibility for an aggravated condition under the statute, and its analysis focused on the determination of negligence or fault. 946 P.2d at 490. However, the court specifically distinguished such determinations from the apportionment of damages under the statute, which must focus on the nature of an injury. *Id.* Thus, *Fried* does not apply here. Indeed, the *Fried* division explicitly acknowledged that “[s]ection 13-21-111.5 thus replaces joint and several liability with a system under which each of several wrongdoers is liable for only a portion of a plaintiff's injuries.” *Id.* at 489.

¶ 58 BDI also argues that the trial court did not violate section 13-21-111.5 because it attributed to Taghavi “100%” of the fault for the damages. However, although the trial court found Taghavi and Duggan jointly and severally liable, it did not state that Taghavi was “100% at fault.” Furthermore, we may not circumvent the statute and speculate as to the trial court’s apparent intention to hold

Taghavi 100% at fault for the damages.[4] Even if Taghavi is ultimately held fully at fault, the plain language of the statute still requires the trial court to make special findings that apportion the liability between Taghavi and Duggan. *See Miller*, 916 P.2d at 578.

¶ 59 Accordingly, Taghavi's rights were substantially affected by not receiving a determination of his pro rata liability under section 13-21-111.5(1). Therefore, the trial court erred by holding Taghavi and Duggan jointly and severally liable. We conclude that the trial court was required to make special findings that apportion liability between Taghavi and Duggan for contamination of BTEX and MTBE on Lots 7-10.

¶ 60 Therefore, we remand this matter to the trial court to make special findings that determine the percentage of fault attributable to Taghavi and Duggan for the apportionment of damages. *Miller*, 916 P.2d at 578. The trial court, in its discretion, may consider additional evidence presented by the parties.

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[4] Since the trial court found Duggan and Taghavi jointly liable, it would have been mathematically impossible for the trial court to simultaneously attribute 100% of the fault to Taghavi.

¶ 61 On remand, the trial court may consider the amount of contaminants each defendant allowed to migrate to BDI's property and the period during which such migration occurred — although the trial court is not required to apportion liability this way. We note that the amount of time during which the contamination and migration occurred is *divisible* between the parties. Therefore, the trial court could apportion damages based on the contamination caused by MTBE because it was banned before Taghavi purchased the property. Also, the trial court could determine the defendants' proportional BTEX liability by the amount of BTEX contamination caused by each owner. However, the trial court is not required to apportion liability this way, and we leave the ultimate apportionment of liability to the discretion of the trial court.

## VI. Disposition

¶ 62 The trial court's judgment as to joint and several liability is reversed, and the case is remanded with directions to make special findings apportioning fault to the liable parties in accordance with section 13-21-111.5(1). The judgment is affirmed in all other respects.

JUDGE JOHNSON and JUDGE RICHMAN concur.