Deconstructing Construction Defect Fault Allocation and Damages Apportionment—Part II

by Ronald M. Sandgrund and Jennifer A. Seidman

This two-part article analyzes fault allocation and damages apportionment in multi-party, multiple-defect construction cases. Colorado law offers guidance in addressing these issues; developing damages models; and crafting pretrial disclosures, trial proofs, and jury instructions. Part I discussed the legal theories underpinning allocation and apportionment. This Part II applies those theories in practice.

Colorado law permits a jury to allot damages among all parties and designated nonparties. Part I of this article, which was published in the November issue of *The Colorado Lawyer*, discussed case law suggesting that a claimant must establish a causal connection between a defendant's wrongful conduct and the claimant's damages attributable to that conduct, but not a percentage fault allocation to the defendant. Rather, claimants only need to provide a reasonable factual basis for the factfinder to make such an allocation. For indivisible injury damages, claimants may identify the persons responsible for those damages, claiming each is liable for the full amount. These issues are important to property owner plaintiffs and construction professional defendants, and are especially important to builders and developers asserting multiple third-party claims and cross-claims and making nonparty designations.

Part II of this article addresses burdens of proof, the scope of admissible evidence, Rule 26 disclosures, and jury instructions concerning damages apportionment and percentage fault allocation. For purposes of this article, fault allocation focuses on conduct and damages apportionment focuses on the consequences of that conduct. Case law suggests that, although a claimant must disclose and present evidence that provides a jury with a "reasonable basis" to causally link a defendant's wrongful conduct with damages and allocate percentage fault, a claimant generally need not disclose or prove a defendant's percentage fault allocation or indivisible damages apportionment. Additionally, although trial courts retain wide discretion to craft instructions that are administratively feasible and do not overwhelm the jury with their complexity, trial courts should use jury instructions and verdict forms from which a reviewing court may confirm that the jury considered, based on sufficient evidence, the amount of damages to which a party causally contributed, and found the percentage fault allocated to that party for those damages.

Evidentiary Concerns and Pretrial Disclosures

Courts recognize that practical problems arise from requiring claimants to disclose percentage fault allocations or specific damages apportionments. For example, such disclosures would be a significant disincentive to settlement, locking a claimant into preliminary or speculative categorizations that may have critical weight at trial. Settlement of complex construction defect cases would be exceedingly difficult if such apportionment and allocation by trade or defendant were required.[1] Moreover, even after significant discovery occurs, claimants typically lack complete information about various defendants' involvement so as to make definitive disclosures.

Because the Pro Rata Liability Act requires juries to allocate fault among parties and nonparties, claimants argue against requiring them to allocate fault or apportion damages among defendants because that invades the jury's province and may violate the indivisible injury rule (discussed in Part I). Defendants counter that because claimants must allege and prove liability and damages, claimants must disclose the damages amount and percentage fault for each defendant.

Case law supports an approach that accommodates both sides. First, as to indivisible injury, claimants must identify the defects

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and resulting damage for which they contend each defendant is liable and/or shares legal responsibility. Second, to satisfy the claimant's burdens of disclosure and proof, a claimant must provide an evidentiary basis that permits a jury to determine damages and to allocate fault among defendants. Third, if a defendant seeks to reduce the damages apportioned or fault allocated to it, that defendant bears the burden of proof. This general framework affords courts discretion to manage apportionment and allocation, to make their instructions understandable, and to accommodate uncertainties left by available evidence.[2]

Sufficient Evidence

A plaintiff asserting a damages claim must prove that a defendant's wrongful conduct was "a cause" of the plaintiff's damages and provide a "reasonable basis" for determining the amount of claimed damages. These concepts are discussed below.

Defining reasonable basis. Claimants must provide a "reasonable, albeit imprecise, basis on which to apportion damages" among multiple defendants.[3] "Reasonable basis" means more than a "scintilla" of evidence, but less than a preponderance of evidence.[4]

Some Colorado district courts have held that a claimant may establish a reasonable basis for construction defect damages by identifying: (1) each defect; (2) the corresponding repair; and (3) each defendant whose conduct contributed to causing the defect, any resulting damage, and required repairs.[5] Evidence that permits apportionment and allocation from being arbitrary may satisfy this standard.[6] For example, the Colorado Court of Appeals has held that dividing damages among eighteen defect categories provided a reasonable basis for the jury to apportion damages and allocate fault without distinguishing patent from latent defects.[7]

In contrast, the court of appeals also has held that an unitemized total replacement cost did not provide sufficient basis.[8] An unpublished case held that presenting evidence that provides only a basis for apportionment is inadequate, and that a defendant asserting third-party claims must present a specific damages apportionment.[9] This heightened standard apparently arose from several unique factors, including: (1) the third-party plaintiff developer's access to information and direct knowledge regarding the third-party defendant subcontractors' construction activities and involvement; (2) the developer's sworn representation promising to apportion damages among the responsible parties; and (3) the developer's prior settlement of the underlying claims for an unallocated lump sum with the property owner.[10]

Establishing a reasonable basis. Courts relax "the quality and quantity of evidence" required to apportion damages, allowing apportionment "[a]s long as there is some evidence that would permit such a determination."[11] Nearly all courts impose on defendants the burden to prove damages apportionment after the plaintiff proves that the defendant's wrongful conduct was a contributing cause of an indivisible injury.[12]

To the extent a claimant seeks to prove another's negligence or fault regarding a particular injury, the claimant should identify the probable cause(s) of, and a reasonable method for repairing, the defect and any resulting property damage or loss of use, as well as the identities of the potentially responsible parties. The repair plan should explain how to fix the defects and damage, which may involve removing and replacing non-defective building elements, and identify in reasonable detail the costs associated with the repair plan's discrete tasks. The plan should identify, if possible, which repairs are necessary to remedy the combined damage resulting from construction and design errors and which repairs remedy only design or only construction errors.[13]

With multiple buildings, the repair cost estimate should provide sufficient detail to apportion repair costs relating to particular defects or to the repairs overall (such as project-wide mobilization costs). The jury may simply allocate percentage fault for the total damages on a party-by-party basis rather than a defect-by-defect basis.

Practitioners should recognize that a detailed repair cost breakdown may be necessary even if the damages are limited by the fair-market-value or replacement-cost caps of the Construction Defect Action Reform Act (CDARA),[14] or if damages are measured by diminution in value rather than cost of repair. These detailed repair costs may supply the reasonable basis for the jury to allocate percentage fault or apportion damages among different defendants for different problems. Defendants may defeat plaintiffs' claims or reduce their liability by establishing that they did not cause, or that others caused, a particular injury.

Expert testimony. Expert testimony frequently is unnecessary to determine who created a particular defect or whether a causal connection exists between a particular defect and resulting property damage or loss of use. Moreover, the Pro Rata Liability Act neither expressly contemplates nor requires expert witness testimony allocating percentage fault among defendants and nonparties.[15] Indeed, because percentage fault allocation includes a subjective evaluation of the blameworthiness of a party's conduct,[16] expert testimony regarding a specific percentage fault allocation likely exceeds permissible boundaries of such testimony under the Colorado Rules of Evidence and improperly invades the jury's role.[17] Expert testimony oversteps acceptable bounds if it usurps the court's function in determining the law or the jury's function in determining facts by, for example, assessing witness credibility or a party's blameworthiness.[18]

Expert opinions allocating a specific percentage fault among defendants for an indivisible injury are likely to be stricken. Because allocating fault requires assigning subjective values to the parties' relative culpability, such expert opinions may not satisfy basic admissibility standards under CRE 401 (defining relevant evidence); 602 (testimony must be based personal knowledge); 701 (lay opinions must be based on witness's rational perception); and, most strong and direct, 702 (describing threshold admissibility standards for expert testimony). Still, expert testimony, even if not required, may be proper and advisable if suitably limited in scope and if it will help the trier of fact understand the evidence or determine a fact,[19] such as complex technical construction, design, and causation issues. For example, although a claimant may not be required to apportion each defendant's causal contribution to indivisible damages because of the indivisible injury rule, it is an undecided question in Colorado whether a claimant or defendant may offer an expert's opinion purporting to apportion damages causation (as opposed to allocating fault) among the responsible parties.[20] Also, expert standard-of-care and "custom and practice" testimony is admissible[21] and may assist a jury in allocating fault.

Accordingly, although expert testimony may be helpful to establish the facts that provide a reasonable basis for a jury's fault allocation, expert testimony directly allocating percentage fault is likely improper. The admissibility of expert testimony regarding the respective causal contribution of various parties' conduct and

apportioning damages is uncertain, and will be highly dependent on the adequacy of the evidentiary foundation on which the expert relies. If this foundation is not strong, potentially serious damage to the expert's credibility regarding all his or her opinions could result following an effective cross-examination.

Rule 26 Disclosures

A claimant should disclose all facts, including any anticipated expert testimony, concerning each defendant's acts causing injury and bearing on fault allocation and damages apportionment. Disclosure must occur early in the case and a party must supplement its disclosures if its investigation reveals additional relevant information.[22] Moreover, a plaintiff must disclose "the categories of damages sought and a computation of any category of economic damages claimed. . . ."[23] Because Rule 26 requires only that the disclosure include a computation of "any category of economic damages," a claimant arguably may need only categorize its repair costs, not allot liability for their payment.

Still, a claimant may need to disclose evidence allowing defendants to estimate their potential responsibility and damages exposure.[24] Several Colorado District Court case management orders have addressed this exposure, requiring disclosure of "a separate, estimated repair cost figure (including any associated mark-up costs) for each defect category," and "a description of each specific task, a breakdown of the type and quantity of materials used, and the identity of the defect or problem being addressed."[25]

Such disclosure provides detailed information and a reasonable basis for fault allocation and damages apportionment, and allows defendants to estimate their exposure, to prepare summary judgment motions, and to engage in meaningful settlement discussions. Claimants also may need to identify the defects, resulting damage, and claimed damages for which each defendant is liable or shares liability.

When repairs coincidentally require the removal and replacement of other work—both defective and non-defective—for the repairs to be effected,[26] claimants should disclose this information. For example, a plaintiff might consider "protectively" disclosing that damages attributed to several defendants are:

> being assessed to them in equal shares *for disclosure purposes only*, but that the actual damages apportionment and percentage fault allocation will be based on the facts adduced at trial as found by the jury, without waiver of plaintiff's right to have the court impute additional or joint liability to a defendant.

Jury Instructions

No specific, approved pattern Colorado jury instructions exist for allocating fault and apportioning damages in construction defect cases. The *Restatement (Third) of Torts* notes that "Dividing damages by causation and apportioning liability by responsibility in the same case has not been widely addressed by statute or case law."[27] Courts have struggled with damages apportionment and fault allocation when dealing with complicated facts. Trends suggest that: (1) trial courts should initially determine which damages may be reasonably apportioned by the jury; (2) juries should allocate percentage fault among potentially responsible parties for indivisible damages; and (3) the instructions and verdict forms should allow a reviewing court to determine that the jury allotted damages based on sufficient evidence. Trial courts retain wide discre-

tion to craft instructions that do not overwhelm the jury with their complexity.[28]

The *Restatement (Third) of Torts* suggests two approaches, neither of which has yet been analyzed or adopted by Colorado courts. First, when the damages can be divided by causation, the *Restatement* suggests a two-step process where the factfinder first divides the damages into indivisible parts and then separately allocates liability (percentage fault) for each indivisible component.[29] Dividing damages by causation is permitted only where the evidence provides a reasonable basis for the factfinder to determine that a person's legally culpable conduct was a legal cause of less than the entire damages and also to determine the amount of damages separately caused by the conduct.[30] Second, where it is uncertain who caused what damages, allotting total damages among all persons who caused at least part of the damages may be appropriate.[31]

Also, a trial court must decide whether a single instruction for a percentage fault allocation for all claimed damages is preferable to separate instructions for separate claims for relief. This decision may be influenced by whether the damages measures differ among the claims for relief.

Practical Considerations

In apportioning fault, the jury considers disputed evidence of wrongdoing and causation for each claim. Therefore, a jury may allocate more fault to the sophisticated, intentional, or reckless tortfeasor than to the less-sophisticated or merely negligent tortfeasor. Courts must consider whether the record logically allows the jury to allocate fault on a claim-by-claim basis or as a whole based on the following considerations:

1. Does the damages measure vary by claim? For residential construction, damages usually are based on repair cost. However, in commercial cases, damages measures may vary. CDARA often caps this damages component in both cases.
2. If the damages measure is the same for all claims, may the jury allocate fault for some claims but not for others?[32] The U.S. District Court for the District of Colorado permitted a jury to apportion fault on a claim-by-claim basis for the same injury, and allowed the plaintiff to recover under either claim as long as the plaintiff did not obtain a double recovery.[33] In another case, the Colorado Court of Appeals affirmed, without discussion, a defendant being allocated 25% and 100% fault for a negligent construction and a negligent misrepresentation claim, respectively.[34]

The Lump Sum Damages Approach

Permitting a lump sum damages award with each defendant allocated a percentage of the total damages simplifies jury instructions and analysis, reducing the chances of inconsistent verdicts. Each party then argues why it is liable for only a percentage of the lump sum damages. Such an approach could present problems on appeal if a reviewing court decides that it needs to know both the damages amount and the percentage fault allocated to a party for each separate, indivisible injury. Conversely, crafting separate jury

instructions for each discrete injury could require a plethora of special verdicts overwhelming the jury with their complexity, and may violate the indivisible injury rule. Trial courts have broad discretion to craft instructions and verdict forms that are reasonably suited for each situation.

Suggested Related Instructions

When claims other than negligence are submitted to a jury, a non-pattern instruction that defines "fault" as requiring proof of all the liability elements for one or more defined claims for relief found elsewhere in the instructions may be appropriate. Thereafter, the defined term fault may be used in any verdict forms allocating percentage fault among potentially liable persons, regardless of the legal theory pled.

If only a repair-cost damages measure applies, a damages-apportionment and fault-allocation verdict form might be used to ask the jury to find the claimant's total damages caused by the combined fault of all parties and nonparties, and then to ask the jury to state the percentage of those damages caused by the fault of each. A court then could enter judgment against each party later for the sum of the percentage fault damages awarded against that party plus that awarded against all other parties and nonparties for whose conduct that party is imputedly, jointly, or otherwise also liable.[35]

If a jury returns a verdict against a particular defendant on a breach of contract/warranty or intentional tort claim, the claimant should ask the court to enter judgment for all damages for which the breach or intentional tort was found to be a cause, without reduction for any other person's percentage fault.[36] In cases of "acting in concert" liability, a claimant should tender an instruction asking the jury to find what percentage of the total damages was caused by the concerted action of specified parties, and the claimant should ask the court to enter judgment for those damages jointly against those parties found to have acted in concert.[37] Where an entity's employee is sued individually for the entity's tortious conduct in which that individual participated, authorized, directed, or ratified,[38] the claimant should seek an instruction asking the jury to find what percentage of the total damages attributable to the entity employer's tortious conduct was caused by that individual employee's participation, authorization, direction, or ratification, and the claimant should ask the court to enter judgment against the employee for that portion of the damages.

Conclusion

Practitioners must analyze issues relating to percentage fault allocation and damages apportionment in complex construction cases during the disclosure, discovery, motions practice, and trial phases. Although Colorado law offers guidance in addressing these issues, no controlling authority exists.

Part I of this article concluded that although a claimant must establish a causal connection between a defendant's wrongful conduct and the claimant's damages attributable to that conduct, the claimant need not establish a percentage fault allocation to the defendant. The claimant need only provide a reasonable factual basis for the factfinder to do so. In the case of indivisible injury damages, whether those damages are for the cost of correcting defective work, repairing resulting property damage, or making a repair that addresses different problems coincidentally, the claimant may properly identify the persons responsible for those indivisible injury damages and claim that each is legally liable for all those damages; the jury then apportions damages and allocates fault among the parties based on all the evidence.

This Part II concludes that claimants should disclose and present evidence that provides a jury with a reasonable basis to allocate fault on a percentage basis, and which evidence causally links a particular defendant's wrongful conduct with some or all of the claimant's damages. However, generally, a claimant need not disclose before or prove during trial, or present expert testimony regarding, a defendant's specific percentage fault allocation or apportioned share of indivisible injury damages. Additionally, although trial courts should use jury instructions and verdict forms that permit a reviewing court to be satisfied that the jury considered the amount of damages to which a party contributed causally and found the percentage fault allocated to that party for those damages, trial courts retain wide discretion to craft instructions that do not overwhelm the jury with their complexity.

Notes

1. *Regan Roofing Co. v. Superior Court*, 27 Cal.Rptr.2d 62, 72 (Cal.App. 1994).

2. *See Restatement (Third) of Torts: Apportionment of Liability* § 26 cmt. a (2000).

3. *City of Westminster v. Centric-Jones Constructors*, 100 P.3d 472, 479-80 (Colo.App. 2003).

4. *Cf. Hagberg v. Liberty Life Assurance Co. of Bos.*, 321 F.Supp.2d 1270, 1274 (N.D.Fla. 2004) (defining "reasonable basis" in context of federal statute).

5. *See McMurrain v. Rick & Krusen Design, Inc.*, No. 08CV441 (Eagle Cnty. Dist. Ct. July 16, 2010) (sufficient information required so apportionment is not arbitrary or capricious, but plaintiff need not allocate fault or apportion damages among parties). *Cf. Windmill Creek Ass'n v. Windmill Creek, LLC*, 08CV809 (Arapahoe Cnty. Dist. Ct. June 11, 2009) (only some rational basis is required for damages allotment and disclosing detailed breakdown of repair costs and the defect(s) is sufficient).

6. *See McMurrain, supra* note 5. *Cf. Windmill Creek Ass'n, supra* note 5.

7. *Park Rise Homeowners Ass'n, Inc. v. Res. Constr. Co.*, 155 P.3d 427, 432-34 (Colo.App. 2006).

8. *City of Westminster, supra* note 3 at 479-80.

9. *See D.R. Horton, Inc.-Denver v. AAA Waterproofing, Inc.*, No. 06CA1874, 2008 WL 4516292 (Colo.App. Oct. 9, 2008) (not selected for official publication). *See also* the following cases, all of which require some sort of damages allotment disclosure: *King v. Colony Park Homes, Inc.*, No. 09CV2607, slip. op. at 1-3 (Arapahoe Cnty. Dist. Ct. Jan. 13, 2011); *Fletcher v. Platinum Homes, LLC*, No. 07CV2585, slip. op. at 1-4 (Douglas Cnty. Dist. Ct. Aug. 31, 2009); *Kirch v. Weeks*, No. 08CV977, slip. op. at 1-2 (Larimer Cnty. Dist. Ct. May 1, 2009); *Kensington Townhomes Homeowners Ass'n v. Kensington Townhomes, LLC*, No. 06CV5212, slip. op. at 1-2 (Arapahoe Cnty. Dist. Ct. Mar. 26 2008); *Simpson Cherry Creek Ltd. P'ship v. Cumberland Allegiance Dev. Co.,* No. 03CV3150, slip. op. at 2-3 (Arapahoe Cnty. Dist. Ct. May 3, 2007).

10. *See D.R. Horton, Inc., supra* note 9.

11. *Restatement, supra* note 2 at § 26 cmt. h.

12. *See Wren v. Spurlock*, 798 F.2d 1313, 1323 (10th Cir. 1986), quoting Prosser, *Handbook of the Law of Torts* 318-19 (4th ed. 1971) (where harm not "obviously divisible" among defendants, courts liberally allow juries to award damages when apportionment uncertainty arises from the nature of the wrong itself, for which the defendant is responsible). *See also In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 643 F.Supp.2d 461, 469 (S.D.N.Y. 2009) (burden of providing reasonable basis for damages allotment usually on culpable party, particularly where that party is better situated to determine its contribution to injury); *Piner v. Superior*

Court, 962 P.2d 909, 916 (Ariz. 1998) (under *pro rata* liability scheme, burden shifts to defendants to prove damages allotment after plaintiff establishes indivisible injury); *A Tumbling-T Ranches v. Paloma Inv. Ltd. P'ship*, 5 P.3d 259, 266 (Ariz.App. 2000) (once plaintiff proves defendants' conduct contributed to damages, burden shifts to the defendants to apportion damages). *Cf. Prutch v. Ford Motor Co.*, 618 P.2d 657, 660 (Colo. 1980) (cautioning that "[i]njustice would result" from denying a claim for relief when "one of several defendants clearly was responsible for the defect . . . but the plaintiff cannot prove which one").

13. *See City of Westminster, supra* note 3 at 479-80 (failure to distinguish between design versus construction defect damages may defeat damages claim). *Cf. N. Petrochemical Co. v. Thorsen & Thorshov, Inc.*, 211 N.W.2d 159, 167-69 (Minn. 1973) (distinguishing between repair costs attributable to either design or construction defects and repair costs attributable to correction of both design and construction errors).

14. *See* CRS § 13-20-802.5(2).

15. *See Kensington Townhomes Homeowners Ass'n, supra* note 9 at 1-2.

16. *Restatement, supra* note 2 at § 8.

17. *See People v. Shreck*, 22 P.3d 68, 77-79 (Colo. 2001) (describing trial court's gatekeeper function in excluding unreliable or unhelpful expert opinions). *See also Steffensen v. Smith's Mgmt. Corp.*, 862 P.2d 1342, 1347-48 (Utah 1993) (trial court did not abuse discretion in excluding expert testimony allocating percentage negligence between parties because such allocation was exclusively the jury's responsibility); *Webb v. Omni Block, Inc.*, 166 P.3d 140, 146 (Ariz.App. 2007) (expert opinion allocating fault percentages to parties and nonparties was inadmissible under Rule 704; once expert contractor testified to parties' duties and responsibilities, distribution of fault among the parties was jury's responsibility). *Cf. Huss v. Yale Materials Handling Corp.*, 538 N.W.2d 630, 637 (Wis.App. 1995) (negligence allocation is within the jury's sole province).

18. *See, e.g., People v. Gaffney*, 769 P.2d 1081, 1088 (Colo. 1989) (expert may not testify that child's account was "very believable"); *People v. Cook*, 197 P.3d 269, 276 (Colo.App. 2008) (officer's testimony that child victims were "credible" was "clearly erroneous" because question of the victim's credibility was for the jury); *People v. Wallace*, 97 P.3d 262, 268 (Colo.App. 2004) (expert may not opine regarding witness's truthfulness). *Cf. Huss, supra* note 17 (negligence allocation is within the jury's sole province).

19. CRE 702. *See also Shreck, supra* note 17 at 78. *Accord N. Am. Capacity Ins. Co. v. Claremont Liab. Ins. Co.*, 99 Cal.Rptr.3d 225, 243-44 (Cal.App. 2009) (expert's testimony allotting responsibility among contractors based on nature of the various contractors' work, defects in the work, and resulting damage did not usurp court's fact finding function because damages apportionment by cause is beyond common experience and opinion would assist trier of fact; unclear from opinion if testimony also involved allocation by relative fault); *Kirch v. Weeks*, No. 08CV977, slip. op. at 1-2 (Larimer Cnty. Dist. Ct. May 1, 2009) (expert guidance on damages allotment proper in complex construction case even though division of fault remains jury's province).

20. *Cf., e.g., CSX Transp., Inc. v. Miller*, 46 So.3d 434, 446 (Ala. 2010) ("[a]pportionment [of damages] can be proved without expert testimony stating the percentage of injury attributable to the different causes," *quoting Sauer v. Burlington N. R.R. Co.*, 106 F.3d 1490, 1494 (10th Cir. 1996) (damages apportionment under Federal Employers' Liability Act).

21. *See Coburn v. Lenox Homes, Inc.*, 441 A.2d 620, 626 (Conn. 1982) (builder is under "a duty to exercise that degree of care which a skilled builder of ordinary prudence would have exercised under the same or similar conditions," and evidence of custom in the trade may be admitted on the issue of the standard of care, but is not conclusive).

22. *See* C.R.C.P. 16(b)(5) and 26(e).

23. C.R.C.P. 26(a)(1)(C).

24. *See Harmony at Madrona Park Owners Ass'n v. Madison Harmony Dev., Inc.*, 177 P.3d 755, 763 (Wash.App. 2008) (discovery response identifying defects but not allocating responsibility sufficient to apprise subcontractor of its potential liability). *See also City and County of San Francisco v. Tutor-Saliba Corp.*, 218 F.R.D. 219, 221-22 (N.D.Cal. 2003) (initial Rule 26(a) damages disclosure merely a preliminary assessment and subject to revision; however, disclosure should be sufficiently detailed to reveal potential exposure and to facilitate settlement and discovery). *But see Kensington, supra* note 9 (expert opinion apportioning damages required in complex construction defect case).

25. *See, e.g., Windmill Creek Ass'n v. Windmill Creek, LLC*, 08CV809, slip op. at 2 (Arapahoe Cnty. Dist. Ct. June 11, 2009).

26. Thus, in some circumstances, parties might share responsibility for the cost of an indivisible repair, and not simply for the cost to repair an indivisible defect or indivisible resulting damage.

27. *Restatement, supra* note 2 at § 26 cmt. a.

28. *See Auten v. Franklin*, 942 N.E.2d 500, 507 (Ill.App. 2010).

29. *See Restatement, supra* note 2 at § 26.

30. *Id.*

31. *Id.* at § 26 cmt. d.

32. For example, if a builder is sued for both negligence and fraud, and its contractor is sued only for negligence, and assuming the damages measure is the same, does the jury allocate fault just once based on the sum of the defendants' conduct, both negligent and fraudulent? If the fraud damages are measured not by cost of repair but rather by the loss of the benefit of the bargain, should this affect the jury's fault allocation? Recall that in the case of negligent misrepresentation, Colorado recognizes separate claims for relief when the misrepresentation results in physical injury to the claimant's property versus when it results only in financial loss. *See Bloskas v. Murray*, 646 P.2d 907 (Colo. 1982); *First Nat'l Bank v. Collins*, 616 P.2d 154 (Colo.App. 1980); C.J.I. Civ. 9:3-4 (4th ed. 2011).

33. *See Cook v. Rockwell Int'l Corp.*, 564 F.Supp.2d 1189, 1200 (D.Colo. 2008), *rev'd on other grounds*, 618 F.3d 1127 (10th Cir. 2010).

34. *See Sprung v. Adcock*, 903 P.2d 1224, 1225 (Colo.App. 1995) (court reversed the judgment due in part to a misapplied settlement set-off).

35. *See Ochoa v. Vered*, 212 P.3d 963, 971-72 (Colo.App. 2009) (Pro Rata Liability Act does not apply to defendant to whom liability is imputed for another's wrongful conduct because the two are not joint tortfeasors). *See also* Sandgrund and Seidman, "Deconstructing Construction Defect Fault Allocation and Damages Apportionment—Part I," 40 *The Colorado Lawyer* 37, 42 (Nov. 2011) (inverted imputed liability pyramid).

36. *See Resolution Trust Corp. v. Heiserman*, 898 P.2d 1049, 1055 (Colo. 1995) ("tortious act" as used in CRS § 13-21-111.5(4) does not include contract claims); *Toothman v. Freeborn & Peters*, 80 P.3d 804, 816 (Colo.App. 2002) (nothing in Pro Rata Liability Act suggests that plaintiff's fault or negligence should be considered when a defendant commits an intentional tort). However, where one defendant was an intentional tortfeasor and another defendant was merely negligent, the intentional tortfeasor may be entitled to have his or her damages reduced in proportion to his or her fault. *See Slack v. Farmers Ins. Exch.*, 5 P.3d 280, 288 (Colo. 2000).

37. *See* CRS § 13-21-111.5(4) (joint liability imposed on those acting in concert), which was applied in *Resolution Trust Corp., supra* note 36 at 1054-58.

38. *See Hoang v. Arbess*, 80 P.3d 863 (Colo.App. 2003) (describing grounds for imposing individual liability on an employee); *Hildebrand v. New Vista Homes II, LLC*, 252 P.3d 1159 (Colo.App. 2010) (same). ■