

Unique Construction Defect Damages Mitigation Issues

by Ronald M. Sandgrund and Jennifer A. Seidman

This article discusses unique damages mitigation questions that arise often during residential and commercial construction defect disputes, and offers suggestions on how to handle these issues during litigation.

Failure to mitigate damages is a standard defense raised nearly automatically in construction defect cases.¹ Although extensive Colorado case law generally discusses damages mitigation and a pattern jury instruction exists, the unusual fact patterns in construction defect disputes create unique damages mitigation issues. This article discusses three such issues. The first involves the sometimes blurred distinction between mitigation of damages and comparative negligence in construction defect suits and the question of whether the two doctrines are mutually exclusive. The second addresses what common construction defect fact patterns support a failure to mitigate damages defense and the factors that affect this analysis. The third relates to whether Colorado's Construction Defect Action Reform Act (CDARA)² preempts the failure to mitigate doctrine in construction defect cases, particularly a property owner's refusal to accept a construction professional's repair offer.

Mitigation of Damages in Colorado

A person injured by the wrongful or negligent acts of another, whether as the result of a tort or of a breach of contract, must exercise reasonable care and diligence to avoid loss or to minimize or lessen the resulting damage.³

Generally, the injured party has the duty to take reasonable steps under the circumstances to mitigate damages sustained.⁴ Thus, injured parties "may not recover damages for injuries which they reasonably might have avoided."⁵ This duty to mitigate arises from the "avoidable consequences" doctrine,⁶ which is designed to discourage economic and physical waste.⁷

Various circumstances may limit a plaintiff's duty to mitigate damages.⁸ Also, a failure to mitigate damages is excused if mitigation would require inordinate or unreasonable measures or if there were reasonable grounds for the failure to mitigate.⁹

A party's failure to mitigate is an affirmative defense that may be raised by an adverse party, who bears the burden of proving the defense.¹⁰ A mitigation defense may be established by proving that the injured party failed to take reasonable steps to minimize the resulting damages.¹¹ However, unlike other affirmative defenses, "only rarely, if ever" will a failure to mitigate constitute a complete defense against a claim.¹² For this reason, an instruction setting forth the elements of and applicable affirmative defenses to a particular claim should almost never include a failure to mitigate as such a defense.¹³

Generally, what constitutes a reasonable effort to mitigate damages raises a question of fact.¹⁴ A successful plaintiff may also recover as damages those expenses incurred in taking reasonable steps to mitigate damages.¹⁵

Failure to Mitigate and Comparative Fault as Mutually Exclusive Doctrines

Both the defenses of a failure to mitigate and comparative fault (negligence)¹⁶ hinge on proof of a claimant's failure to exercise reasonable care.¹⁷ However, a plaintiff has no duty to anticipate a tortfeasor's wrongful acts and, therefore, has no duty to mitigate damages until after the original injury has occurred.¹⁸ Thus, the "doctrine of avoidable consequences is a damages principle [that] differs from the doctrine of contributory negligence," as it "applies after a legal wrong has occurred, but while damages may still be averted,

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and bars recovery only for such damages.”¹⁹ Therefore, a failure to mitigate may be viewed as a claimant’s duty to prevent “further” injury to himself or herself, while comparative fault involves a duty not to contribute to causing the “initial” injury.²⁰ However, some advocate applying proportionate fault principles to both pre-injury and post-injury conduct.²¹ Also, a few jurisdictions have merged the avoidable consequences doctrine into their comparative and proportionate fault frameworks.²² Nothing indicates that Colorado’s legislature intended to do the same.

While timing generally differentiates a claimant’s conduct as a failure to mitigate from comparative fault,²³ in some unique construction defect disputes, these distinctions may become blurred. For example, if a builder who improperly constructs a home’s foundation recommends that a new homeowner not install irrigation within ten feet of the foundation walls to mitigate the risk of foundation damage, but the homeowner ignores this recommendation and later suffers foundation movement, the builder may argue that installing the irrigation system constitutes either comparative negligence or a failure to mitigate. The former characterization rests on the fact that the homeowner’s conduct preceded the injury; the latter characterization is grounded on the fact that the builder’s wrongful conduct created a known risk long preceding the homeowner’s conduct. Regardless of which characterization is correct, the homeowner may be able to establish that the irrigation water did not substantially contribute to the movement, so the homeowner’s actions do not constitute either comparative fault or a failure to mitigate.

Some wrongful conduct by a construction professional causes continuous damage, eliminating a specific time of injury, while also delaying manifestation of the damage. Thus, a hidden construction defect may cause property damage that reveals itself much later. This delay between defective construction, the resulting injury, and discovery of the defect or consequential damage may affect whether the claimant’s intervening conduct should be deemed a failure to mitigate or comparative fault. As noted above, generally, a plaintiff must be aware that he or she has sustained injury before a duty to mitigate arises. However, even where the alleged mitigation failure occurs before the plaintiff knows of the damage, counsel may argue that in the case of latent defects, this does not convert a failure to mitigate into comparative negligence where the damage has already occurred. There is no controlling Colorado law on this point.

Practical Considerations Concerning Damages Mitigation and Comparative Fault

Both failure to mitigate and comparative fault are affirmative defenses that must be proven by the defending party.²⁴ Still, many lawyers believe that distinguishing between mitigation and comparative fault has practical consequences at trial and on appeal.

First, once a jury assesses percentage comparative fault, all damages under the Pro Rata Liability Act²⁵ are reduced by that percentage fault. By contrast, a jury will reduce a claimant’s damages due to a failure to mitigate by the fixed dollar of damages the claimant failed to mitigate. In other words, while comparative negligence apportions losses between parties, the mitigation doctrine allocates the loss entirely to one party. This distinction may mean lower net jury damages awards if the jury considers only a failure to mitigate defense rather than a comparative fault defense. Never-

theless, as noted above, Colorado has not decided whether the Pro Rata Liability Act encompasses and subsumes the common law failure to mitigate defense.²⁶

Conversely, the jury’s focus when considering comparative negligence is the claimant’s share of the blame in causing harm to himself or herself. In contrast, in evaluating a mitigation defense, the jury does not consider the claimant’s blame for the original injury, but only whether an innocent victim of injury should have done something to reduce the extent of the injury. Some lawyers believe that this distinction may translate to higher net jury damages awards if the jury considers only a failure to mitigate defense, rather than a comparative fault defense founded on blame.

Second, the relative risks of reversible error for a comparative fault defense compared to a failure to mitigate defense may differ.²⁷ If error occurs in how comparative fault was allocated by the jury, such as fault being assessed to a party or non-party later found to have owed the plaintiff no legal duty,²⁸ a nearly complete retrial may be necessary for a proper fault allocation because the second jury may need to consider nearly all the same evidence of conduct, causation, and damages in recalculating the fault allocation. In contrast, if error occurs in the mitigation instruction, it is reasonable to conclude that a considerably more limited retrial on this very narrow damages issue would be necessary.

Third, defendants risk juror alienation by raising weak mitigation defenses, appearing to blame the victim. For example, class actions were filed in the mid-1990s about using floating concrete slab-on-grade floors over expansive soils.²⁹ One builder’s trial strategy illustrated this problem when it argued that cracking and differential heaving of this slab flooring and the resulting damage to a home’s interior finishes was caused by the homeowners’ failure to mitigate their damages by: (1) planting and watering a single tomato plant within five feet of the home’s foundation; and (2) failing to remove and replace (at significant cost) more than 150 linear feet of finished interior wallboard and restore the void space between the bottom of the suspended wall stud and the wood plate attached to the floor. The builder argued that the tomato plant violated written landscaping instructions it gave the homeowners, causing the damage. The same builder argued that this same damage also arose from not performing ordinary maintenance—that is, ensuring that the void space was maintained so that it would not close up and allow damaging expansive soil pressures to be exerted directly on the wall bottoms.

The homeowners responded that the foundation failure arose from the use of a slab-on-grade floor when a structural floor, suspended from the foundation eighteen inches above the ground, would have avoided any damage, and that restoring the void would not permanently solve the problem or address all its consequences. The jury rejected the builder’s mitigation arguments. Still, damages defenses based on a failure to maintain drainage facilities and waterproofing have found some success in water intrusion and mold cases.³⁰

Mitigation of Damages in Construction Defect Disputes

The jury must decide whether the plaintiff’s failure to mitigate was reasonable or unreasonable. The reasonableness of this failure depends on the specific facts, but some general principles may affect the analysis: (1) whether remedial work that would have lim-

ited damages involves maintenance or repairs; (2) whether the plaintiff could afford the remedial work; (3) whether the remedial work would have actually limited the plaintiff's damages or was the only reasonable way to do so; and (4) whether other extenuating circumstances justify a plaintiff's alleged failure to mitigate, such as refusing a construction professional's offer to perform repairs.

Maintenance Versus Repair

Characterization of remedial work as maintenance or repair may affect whether a plaintiff's failure to perform the work constitutes a failure to mitigate. For example, juries appear to be less sympathetic to plaintiffs who fail to perform ordinary maintenance that leads to damage than to those who do not repair defects, where the damage arises from a contractor's shoddy work or negligence.

"Preventative," "recurring," "component," "corrective," and "emergency" maintenance; "major" and "minor" repair; and "capital improvements" are all terms of art within the construction field, and the lines distinguishing one from the other may blur. The U.S. Department of Interior uses many of these terms.³¹ Repair and maintenance have been variously defined and distinguished, while the term "repair" itself has been divided into major and minor repairs and capital improvements. Moreover and confusingly, the word "repair" is often found within technical definitions of various types of maintenance, further blurring the distinctions between maintenance and repair. As a result, while the characterization of work as maintenance or repair may seem to have practical or strategic implications, the distinctions may be much less significant when considered by a jury.

Financial Inability to Repair

A plaintiff's failure to mitigate may be excused if justified, such as by a financial inability to pay for needed repairs.³² In *Burt v. Beautiful Savior Lutheran Church*,³³ a property owner sued a neighbor who caused water damage to the owner's basement foundation due to the neighbor's leaking drainpipe. Repairs to the plaintiff's

house were complex and expensive; estimated in 1987 at \$26,000, this estimate doubled by 1989 and included some additional work. The defendant claimed that the plaintiff should have performed the repairs in 1987 to mitigate damages. The Colorado Court of Appeals held that because the record did not show that the plaintiff could have prevented the need for this additional work and the defendant failed to prove that the plaintiff could pay the initial repair cost, an instruction on damages mitigation would not have been proper.³⁴

Many property owners, especially single-family homeowners and homeowner associations, respond to a mitigation defense by arguing that they are not financially able to make recommended repairs, and that temporary repairs would likely do little good and would not be cost-beneficial because they would increase the total damages, such as by adding the cost of ripping out and later replacing the stop-gap work with a permanent fix. Although a plaintiff has a duty to mitigate damages, "such duty does not necessarily require that the plaintiff repair the injury."³⁵

Plaintiff's Failure to Implement Defendant's Recommended Remedial Work

A defendant may not prescribe the mitigation measures that a plaintiff must implement. In *Holland v. Green Mountain Swim Club, Inc.*,³⁶ the plaintiff sued a pool installer for breach of contract when cracks appeared in its pool. Defendants claimed they recommended that the pool be drained after the cracks appeared and that not doing so constituted a failure to mitigate. Rather than drain the pool, the plaintiff made two attempts to seal the leak with caulk. The court of appeals affirmed the trial court's judgment for the plaintiff, holding that the plaintiff need not actually mitigate its damages but merely must take reasonable measures to alleviate the damages. The case law suggests that, generally, where plaintiffs face two reasonable mitigation approaches, defendants cannot complain about the chosen course because plaintiffs are accorded wide discretion.³⁷

Property Owner's Refusal to Accept Defendant's Repair Offer

Some construction professionals complain that refusing their repair offers, thereby increasing the damages by not promptly addressing the problem, is a failure to mitigate. Property owner counsel observe that rarely has a client refused a construction professional's offer to fix a problem at its cost absent significant extraneous factors, such as a history of defective or untimely work or unfulfilled promises, or where the repair offered is manifestly inadequate or unreasonable. Seldom would a property owner find it in his or her economic interest to decline a reasonable repair offer.

CDARA, through its Notice of Claim Process (NCP), requires parties to attempt to informally resolve a construction defect dispute before litigation is pursued.³⁸ Thus, closely related to the duty to mitigate under these circumstances is the potential statutory (and sometimes contractual) obligation³⁹ to allow a breaching party notice of and an opportunity to cure,⁴⁰ which obligation, if present, may, under some circumstances, be fulfilled by CDARA's NCP.

Property owners, especially residential property owners, may have reasonable bases to refuse a construction professional's repair offer, including the following:

- 1) as noted above, loss of faith in the construction professional's (or its designated subcontractor's) ability to competently diagnose the problem and perform the work;⁴¹
- 2) legitimate uncertainty as to whether the proposed repair will adequately resolve the problem, rather than merely serve as a "Band-Aid" that addresses the visible damage, but fails to remedy its underlying cause;⁴²
- 3) where defects and resulting damage involve the work of multiple parties and one defendant presents a reasonable repair offer directed at a single construction component, the plaintiff may reject the repair if it is not part of a comprehensive remedial plan.

A fourth concern is whether the proposed repair, if accepted, may turn out to be inadequate, prejudicing the property owner's rights later. This last concern may implicate the following:

- 1) the expiration of the statute of limitations or repose; for example, the repair may be designed to address only a latent defect in one discrete location that had caused manifested damage, but not the same, pervasive latent design or construction defect repeated in other locations that had not yet

caused damage (it is unclear under current Colorado law when the limitations period might begin to run as to these similar but unmanifested and unrepaired defects);⁴³

- 2) the ramifications of executing a release of claims in conjunction with performance of the repairs (or of the repairs being deemed an accord and satisfaction of one's claims) and what, if any, warranty might apply to the repairs;
- 3) the uncertainty that, by allowing the repair, the property owner (a) may be short-cutting CDARA's NCP by not giving notice of the problem to other potentially responsible construction professionals, such as subcontractors, thereby prejudicing the owner's rights against these subcontractors; or (b) may induce a construction professional who makes repairs not to notify its liability insurers of the claim and, if the repairs do not solve the problem, later jeopardizing coverage due to violation of its liability policies' prompt notice, consent to settle, and voluntary assumption of obligation provisions; and
- 4) the concern that if the construction professional makes limited or inadequate repairs, evidence of the defect or resulting damage may be destroyed and unavailable at trial, giving rise to a spoliation defense by other potentially liable parties, such as subcontractors and material and product suppliers, who did not participate in or accede to the repairs.⁴⁴

While some authorities suggest that a plaintiff may not recover for additional harm suffered after unreasonably refusing the tortfeasor's good faith offer to prevent that harm, a comment to the *Restatement (Second) of Torts* posits that it may not be unreasonable for such persons to decline to trust the good will or skill of the tortfeasor if the original act was intentionally wrongful or negligent.⁴⁵ In sum, a homeowner's failure to permit a construction professional to make repairs may be excused, depending on the facts. Moreover, where a construction professional offers to make repairs but insists on a release of all claims for damages, or refuses to reasonably warrant the repair work, a property owner may be able to justifiably refuse the offer.⁴⁶

Duty to Mitigate Delay and Liquidated Damages Claims

A mitigation defense may apply if a claimant does not exercise reasonable diligence to minimize its delay damages.⁴⁷ *Westec Constr. Mgmt. Co. v. Postle Enters. I, Inc.* held that although a party is not required to accept a change order addressing the delay if it requires

a waiver of the right to seek damages for a prior breach, a plaintiff fails to mitigate its damages when it refuses to sign a change order that would have remedied the defect and fails to communicate any objection to the release contained in the change order.⁴⁸ When defending a claim for delay, evidence should be offered to establish that the claimant caused the delay or had an opportunity to avoid or shorten the delay. However, a plaintiff may bear the burden of proving damages apportionment among causes for the delay, and the mitigation defense should not operate to shift this burden of proof.⁴⁹ Colorado has not decided whether a party has a duty to mitigate liquidated damages.⁵⁰

Burden to Allocate Damages Versus Duty to Mitigate

City of Westminster v. Centric-Jones Constructors held that a plaintiff was not excused from providing some basis for the jury to allocate damages between the benefit of its bargain and the defendant's alleged breaches.⁵¹ The court held that, where the plaintiff's repair costs included the cost to repair construction errors allegedly attributable to the defendant and distinct and separate costs attributable to correcting design deficiencies attributable to others, shifting the burden of allocating the plaintiff's repair costs to the defendant under the guise of the defendant's mitigation defense disregarded deficiencies in the plaintiff's damages proof.

Other Factors Affecting Reasonableness of a Plaintiff's Actions

A defendant's assurances that a wrong will be remedied may justify a failure to mitigate.⁵² In the construction context, this might include a promise to investigate or repair a problem. Although generally, claimants need not institute litigation to mitigate damages,⁵³ there may be limits applying this principle to construction disputes where an injured party may have indemnity rights against others, although evidence of such indemnification may be subject to the collateral source rule.⁵⁴

CDARA and Damages Mitigation Defense Preemption

Since the Colorado Supreme Court held that Colorado's Landowner Liability Act preempts certain affirmative defenses,⁵⁵ open questions remain regarding whether some or all common law defenses to construction defect claims are viable after CDARA's passage. Because the Colorado Supreme Court has held that CDARA's NCP preempts common law limitations period tolling principles,⁵⁶ it may find that CDARA preempts other common law defenses, such as the failure to mitigate. Colorado courts could find that property owners can never be charged with failing to mitigate by refusing a construction professional's offer to remedy the problem because CDARA itself addresses the property owner's rights and obligations regarding such an offer and refusing to accept it. Thus, CDARA would preempt the common law damages mitigation defense in this context.⁵⁷ Courts may be asked to consider whether CDARA preempts some common law doctrines, such as a failure to mitigate, which serve to reduce the amount of damages available to property owners, because CDARA's purpose is to "preserve adequate rights and remedies for property owners" who bring construction defect actions,⁵⁸ and because of the broad consumer protections of the Homeowner Protection Act of 2007 (HPA).⁵⁹

Pattern Jury Instruction

In light of the preceding discussion of the nuances of a failure to mitigate defense as applied to construction defect claims, some counsel believe that Colorado's civil pattern mitigation instruction (5:2) requires significant modification, or that the presiding judge should grant broad leeway to counsel when presenting evidence or making argument regarding this instruction during trial. For example, although a claimant's financial inability is a proper response to an alleged failure to mitigate, the pattern instruction does not clearly address this situation.⁶⁰ Moreover, because the Colorado Court of Appeals has held it improper to instruct a jury that a personal injury plaintiff may recover only reasonable and necessary expenses caused by the defendant's wrongful conduct and to also instruct that the jury must deduct from any award expenses the plaintiff could have reasonably avoided incurring,⁶¹ in the construction defect context, it may be error to instruct a jury to award the plaintiff's reasonable and necessary repair costs while simultaneously instructing it to deduct from its defect damages verdict any repair costs the plaintiff could have reasonably avoided.

Conclusion

Although extensive Colorado case law generally discussing mitigation exists, as does a pattern jury instruction, the unusual fact patterns in construction defect disputes create interesting damages mitigation issues. Colorado courts have treated and are likely to continue to treat mitigation of damages and comparative negligence in construction defect suits as separate and mutually exclusive affirmative defenses. Distinctions between maintenance and repair, and a property owner's financial inability to perform either, may be important when analyzing the viability and strength of a failure to mitigate defense. Plaintiff's counsel should consider tracking all mitigation expenses and claiming them as damages, and consider that a defendant's liability insurance may afford coverage for such damages. Although a property owner's refusal of a construction professional's repair offer may sometimes be raised as a failure to mitigate, CDARA's NCP and the specific circumstances surrounding the alleged failure to mitigate may bar such defense as a matter of law. Whether CDARA's NCP preempts the failure to mitigate doctrine in construction defect cases, especially as to a property owner's refusal of a construction professional's repair offer, remains an undecided question. Finally, Colorado's pattern jury instructions may require revision to adequately address the unique damages mitigation issues that arise in construction defect disputes.

Notes

1. Cf. Rai *et al.*, *Arizona Construction Law Practice Manual* § 5.9.2.4.7 (Ariz. CLE, 2011) (failure to mitigate defense usually raised against homeowners who fail to perform maintenance); Miller, *Handling Constr. Defect Claims—Western States* § 10.07—Limitation on Damages (Aspen Publishers, 2014) (failure to mitigate important in defect actions because often the longer defective construction remains, the greater the repair cost; developers and contractors quick to raise failure to mitigate as affirmative defense).
2. CRS §§ 13-20-801 *et seq.*
3. *Brenaman v. Willis*, 314 P.2d 691 (Colo. 1957).
4. *Ballow v. Phico Ins. Co.*, 878 P.2d 672, 680 (Colo. 1994) (citing *Tull v. Gundersons, Inc.*, 709 P.2d 940, 946 (Colo. 1985)).
5. *Ballow*, 878 P.2d at 680.

6. See *Brenaman*, 314 P.2d at 692. See also *La Casa Nino, Inc. v. Plaza Esteban*, 762 P.2d 669 (Colo. 1988) (using both doctrines interchangeably). Some commentators perceive a fine difference between the two doctrines: Mitigation of damages arises when the damage can be minimized by the victim using reasonable care. More broadly, avoidable consequences arise when the victim does not act reasonably to avoid an injury resulting from the defendant's substandard conduct. See Bosler, "Comparative Fault and the Personal Injury Defenses of Mitigation and Intervening Cause," 52 *J. Mo. B.* 216, n.4 (1996). Many writers use the terms interchangeably.

7. See *Schneiker v. Gordon*, 732 P.2d 603, 608 (Colo. 1987).

8. In at least one situation, the consequences of a failure to mitigate are controlled by statute. See CRS § 42-4-237(7) (failure to wear seat belt admissible to show failure to mitigate damages for pain and suffering). Refinements to the failure to mitigate pattern instruction may be necessary depending on the circumstances. See, e.g., CJI-Civ. 5:2, ¶¶10 and 12 (CLE, 2014) (changing mitigation instruction for outrageous conduct claims if economic or noneconomic damages sought); CJI-Civ. 22:26 (CLE, 2014) (circumstances mitigating damages in defamation actions); CJI-Civ. 31:8 (CLE, 2014) (mitigation in wrongful discharge cases). Sometimes, a failure to mitigate instruction is improper as a matter of law. See, e.g., *Stone v. Satriana*, 41 P.3d 705, 712 (Colo. 2002) (in legal malpractice action, failure to appeal an adverse judgment "can never be a failure to mitigate damages caused by malpractice at trial"); *Francis v. Dahl*, 107 P.3d 1171, 1173-74 (Colo.App. 2005) (parent's failure to mitigate damages for child's accident cannot be imputed to child).

9. See *Berger v. Security Pac. Info. Sys., Inc.*, 795 P.2d 1380, 1385 (Colo. App. 1990).

10. See CRCP 8(c); *Ballow*, 878 P.2d at 680. See also *Burt v. Beautiful Savior Lutheran Church*, 809 P.2d 1064, 1068 (Colo.App. 1990); *Comfort Homes, Inc. v. Peterson*, 549 P.2d 1087, 1090 (Colo.App. 1976); CJI-Civ. 5:2 (CLE, 2014).

11. See *Burt*, 809 P.2d at 1068. See also *Berger*, 795 P.2d at 1385.

12. CJI-Civ. 5:2, ¶ 3 (CLE, 2014).

13. See, e.g., CJI-Civ. 9:1, Notes on Use, ¶ 7 (CLE ed., 2014):

Though mitigation of damages is an affirmative defense (see Instruction 5:2, [¶ 3]), only rarely, if ever, when established will it be a complete defense. For this reason, *mitigation should not be identified as an affirmative defense in the concluding paragraphs of this instruction.* Instead, if supported by sufficient evidence, Instruction 5:2 should be given along with the actual damages instruction appropriate to the claim and the evidence in the case. (Emphasis added.)

14. See *Fitzgerald v. Edelen*, 623 P.2d 418, 422 (Colo.App. 1980).

15. See *Gundersons, Inc. v. Toll*, 709 P.2d 940, 946 (Colo.App. 1983), *aff'd in part, rev'd in part on other grounds*, 709 P.2d 940 (Colo. 1985). See also *Hoehne Ditch Co. v. John Flood Ditch Co.*, 233 P. 167, 170 (Colo. 1925) (sufficient for plaintiff to establish fact of mitigation payment; defendant then bears burden of proving that means employed and the expense were unreasonable). Liability insurance coverage may exist for mitigation expense damages that arise from otherwise covered property damage. See Turner, *Insurance Coverage of Construction Disputes* § 6:14 (2d ed., West, 2014).

16. In this article, "comparative fault" refers to conduct subject to Colorado's Pro Rata Liability Act, CRS § 13-21-111.5 (Pro Rata Act). Colorado's common law defense of assumption of the risk may have been subsumed by comparative negligence principles. See CRS § 13-21-111.7 ("Assumption of a risk by a person shall be considered by the trier of fact in apportioning negligence pursuant to section 13-21-111.1").

17. Compare CJI-Civ. 9:8 (CLE, 2014) (negligence means a failure to exercise reasonable care) with CJI-Civ. 5:2 (CLE, 2014) (failure to mitigate means a failure to take reasonable steps to mitigate one's injuries, damages or losses) (emphasis added).

18. See *Burt*, 809 P.2d at 1068.

19. *Gross v. Knuth*, 471 P.2d 648, 650 (Colo.App. 1970) (citing *Dippold v. Cathlamet Timber Co.*, 225 P. 202 (Or. 1924)). See also *Restatement (First) of Torts* § 918 (1939) ("Avoidable consequences. (1) . . . a person injured by the tort of another is not entitled to recover damages for such harm as

he could have avoided by the use of due care after the commission of the tort. . .").

20. See 2 *Comparative Negligence Manual* § 1:25 (5th ed.), (West-Clark Boardman Callaghan, 2014) (discussing distinctions between and possible overlap of comparative negligence and mitigation doctrines).

21. See Adar, "Comparative Negligence and Mitigation of Damages: Two Sister Doctrines in Search of Reunion," 31 *Quinnipiac L.Rev.* 783 (2013) (while comparative negligence apportions losses between parties, mitigation unfairly allocates the loss to one party). The reporter of the *Restatement (Third) of the Apportionment of Liability* at § 3, Reporter's Notes (2000), recommended abolishing the mitigation doctrine and absorbing it within comparative fault. But see Grier, "Rethinking the Treatment of Mitigation of Damages—*Tanberg v. Ackerman Inv. Co.*," 77 *Iowa L.Rev.* 1913 (1992) (suggesting changes to Iowa's comparative fault to preserve mitigation doctrine).

22. See, e.g., *Love v. Park Lane Med. Ctr.*, 737 S.W.2d 720, 724 (Mo. 1987) (comparative fault law includes avoidable consequences and diminution of damages by exercising reasonable care, citing with approval Wade, "Products Liability and Plaintiff's Fault—The Uniform Comparative Fault Act," 29 *Mercer L.Rev.* 373, 385-86 (1978)). See also Levin *et al.*, 22 *Am.Jur.2d Damages* § 343 (Thomson Reuters, 2014) (comparative negligence doctrine has been held to subsume mitigation of damages) (citing *Jacobs v. Westgate*, 766 So.2d 1175 (Fla.App. 2000)); *Uniform Comparative Fault Act* § 1(b) (National Conf. of Commissioners on Uniform State Laws, 1979) ("Fault" includes . . . unreasonable failure to avoid an injury or to mitigate damages.").

23. But see *Cox v. Lesko*, 953 P.2d 1033, 1040 (Kan. 1998) (because evidence existed indicating plaintiff's conduct helped to bring about the harm, despite the fact that plaintiff's and defendant's negligent acts did not occur simultaneously, comparative negligence statute would apply).

24. See CRCP 8(c) (listing contributory negligence and "any mitigating circumstances" as affirmative defenses).

25. But see *Core-Mark MidContinent, Inc. v. Sonitrol Corp.*, 2012 COA 120, 300 P.3d 963 (Colo.App. 2012), *cert. denied* (Pro Rata Act inapplicable to contract claims).

26. See *supra* notes 21 and 22 and accompanying text.

27. When a jury reduces damages for a failure to mitigate, the pattern jury instruction, CJI-Civ. 5:2 (CLE, 2014), simply advises them that the "amount of damages caused by the plaintiff's failure to take such reasonable steps [to mitigate its losses] . . . must not be included in your award of damages" (emphasis added). Thus, the precise amount of the failure to mitigate may be "invisible" to a reviewing court, unless a special interrogatory is supplied.

28. See *Miller v. Byrne*, 916 P.2d 566 (Colo.App. 1995) (designated non-party must have owed a duty recognized by law to the injured plaintiff).

29. See Sandgrund *et al.*, *Residential Construction Law in Colorado* § 14.4.2 at 96 n.495 (4th ed., CBA-CLE 2013). Discovery later revealed that engineers originally referred to such floors as "sacrificial" slabs. See, e.g., *Tierra South Florida, Municipal Buildings Project Experience*, www.tierrasf.com/experience/munbldg.

30. See, e.g., *Shaffer v. Debbas*, 17 Cal.App.4th 33, 41-42 (1993) (plaintiffs had contributed to damage by installing certain landscaping, overwatering, and installing solar panels).

31. Below are some working definitions used by the U.S. Department of Interior:

- Corrective maintenance: Unscheduled maintenance repairs to correct deficiencies during the year in which they occur.
- Preventive maintenance: Scheduled servicing, repairs, inspections, adjustments, and replacement of parts that result in fewer breakdowns and fewer premature replacements and achieve the expected life of constructed assets. These activities are conducted with a frequency of one year or less.
- Recurring maintenance: Preventive maintenance activities that recur on a periodic and scheduled cycle of greater than one year, but less than ten years.

- Component renewal: Preventive maintenance activities that recur on a periodic and scheduled cycle of greater than ten years.
- Emergency maintenance: Maintenance activities that are unscheduled repair, to include call outs, to correct an emergency need to prevent injury, loss of property, or return an asset to service. These repairs are begun within a very short time period from which the need is identified, usually within hours.

U.S. Department of the Interior, "Common Definitions For Maintenance and Construction Terms," www.doi.gov/pam/programs/asset_management/upload/Definitions_Maint_and_Construc_Terms.pdf.

32. See *Lascano v. Vorwell*, 940 P.2d 977 (Colo.App. 1996) (reasonable excuse); *Burt*, 809 P.2d at 1068 (financial inability). One commentator urges that a plaintiff property owner must mitigate damages "only if the harm to the property can be avoided with slight expense and reasonable effort." Gatlin, "A Focus on Unincorporated Business: Note: Reforming Residential Real Estate Transactions: An Analysis of Oklahoma's Disclosure Statute," 22 *Oklahoma City U. L. Rev.* 735 (1977) (citing *Great Am. Ins. Co. v. North Austin Mun. Util. Dist. No. 1*, 908 S.W.2d 415, 426 (Tex. 1995)). However, Colorado law may not be so kind. See *Fair v. Red Lion Inn*, 943 P.2d 431, 437 (Colo. 1997) (plaintiff's failure to mitigate is excused if mitigation would require inordinate or unreasonable measures). Cf. *Anderson v. Bauer*, 681 P.2d 1316, 1324 (Wyo. 1984) (homeowners not required to repair damage to new homes to avoid inflationary increases in repair costs) (citing *Rovetti v. City and County of San Francisco*, 131 Cal.App.3d 973 (1982)).

33. *Burt*, 809 P.2d at 1068. When evaluating what constitutes "reasonable conduct," a jury may properly be directed to the definition of "reasonable care," which requires consideration of what a reasonable person would do "under the same or similar circumstances." See CJI-Civ. 9:8 (CLE, 2014). Cf. *id.* at ¶ 1 (instruction should be used when "reasonable care" is used in another instruction and needs further definition). Presumably, the plaintiff's financial condition is one of those circumstances. Of course, the plaintiff then may open the door to discovery of financial records and arguments concerning relative wealth.

34. *Burt*, 809 P.2d at 1068.

35. *Airborne, Inc. v. Denver Air Center, Inc.*, 832 P.2d 1086, 1091 (Colo.App. 1992).

36. *Holland v. Green Mountain Swim Club, Inc.*, 470 P.2d 61 (Colo.App. 1970).

37. See *Marchesseault v. Jackson*, 611 A.2d 95 (Me. 1992) (homeowner did not fail to mitigate damages by continuing home construction where decision to hire another contractor and remedy existing defects, though not wholly successful, was not unreasonable). But see *Jaeger v. Cleaver Constr., Inc.*, 201 P.3d 1028, ¶ 53 (Wash.App. 2009) (*dicta*) (mitigation defense proper where property owners could have used a relatively inexpensive method of restoring their property to its original stability).

38. See CRS § 13-20-803.5 (claimant must provide construction professional notice of defect and construction professional may offer to repair).

39. See *Ranta Constr. Inc. v. Anderson*, 190 P.3d 835, 844-45 (Colo.App. 2008) (in homebuyer's dispute with window seller, the Uniform Commercial Code recognizes seller's right to cure defect before buyer may claim breach of warranty) (citing CRS § 4-2-608(1)(a)). See also *DeRosier v. Util. Sys. of Am.*, 780 N.W.2d 1, 6 (Minn.App. 2010) (right to cure serves policy of mitigating damages) (citing *Bruner & O'Connor on Construction Law* § 19:21 (2002)). Cf. Hilman, "Keeping the Deal Together After Material Breach," 47 *U. Colorado L. Rev.* 553, 573 (1973) (listing factors to consider when gauging reasonableness of accepting or rejecting breaching party's later offer).

40. But see *Vaccaro Constr. Co., Inc. v. Schafer*, No. W2003-02515-COAR3-CV, 2004 WL 2439297 at *6, 2004 Tenn. App. LEXIS 710 at *16-17 (Tenn.App. June 24, 2004) (unpublished) (where construction defects are extensive, contractor's overall performance must be deemed unworkmanlike, and injured party may reasonably refuse to risk further injury by giving contractor opportunity to attempt repairs, and providing notice of and opportunity to cure breach is unnecessary). Cf. *Broadway Roofing & Supply*

v. Covello, 357 P.2d 356 (Colo. 1960) (homeowner who stops work and prevents contractor from remedying defective work-in-progress to contract requirements cannot recover damages for the cost of curing defect).

41. *Salley v. Pickney Co.*, 852 S.W.2d 240, 244-45 (Tenn.App. 1992) (homeowners acted reasonably under the circumstances in refusing to allow contractors to return to work on their home where record was replete with evidence of contractors' defective work). But see *Kline v. Benefiel*, 2001 WL 25750 (Tenn.App. 2001) (homeowner failed to mitigate in refusing contractor's repair of minor defects that would have avoided all damage); *Warwak v. Stewart*, 449 S.W.2d 922 (Ark. 1970) (damages reduced by the amount claimed to clean and replace damaged articles because homeowner failed to mitigate by not allowing defendant to install automatic sump pump that would have avoided most damages). Often, construction professionals rely on their own subcontractors and design professionals to prescribe repairs, rather than on a person with no vested interest in the outcome, such as an independent engineer.

42. One consideration when evaluating a failure to mitigate may include a plaintiff's unreasonable decision making, such as failing to follow the advice of a consultative expert, but actions that involve substantial hazards or only the possibility of remedying a problem may be excused. See, e.g., *Lascano*, 940 P.2d at 983 (before jury could reduce plaintiff's damages because she failed to mitigate by failing to follow doctor's advice, it was required to find plaintiff's decision making unreasonable); *Hildyard v. Western Fasteners, Inc.*, 522 P.2d 596, 600 (Colo.App. 1974) (plaintiff's duty to mitigate did not require him to submit to surgery that involved substantial hazards or offered only a possibility of cure).

43. See, e.g., *Wildridge Venture v. Rancho Roofing, Inc.*, 971 P.2d 282, 283 (Colo.App. 1998) (whether knowledge of roof leaks in eight of thirty-three apartment buildings should have led to the investigation and discovery of similar problems in the other buildings was a fact question for the jury).

44. Cf. *Fines v. Ressler Enters.*, 820 N.W.2d 688, 691-93 (N.D. 2012) (affirming dismissal of apartment owner's construction defect claim following her removal and disposal of defective siding as appropriate spoliation sanction, despite owner's claim she was mitigating her damages).

45. See *Restatement (Second) of Torts* § 918, cmt. i (1979). See also *Koutouzakis v. Orenson Constr.*, 2006 N.J. Super. Unpub. LEXIS 2296, 2006 Westlaw 3741020, NO. A-6605-04T5 (N.J.S.Ct. Dec. 4, 2006) (unpublished) (remanding case to allow hearing on property owner's evidence why he refused to allow builder to make repairs, including builder's inadequate notice of intent to repair and builder's failure to respond to owners' alternate proposed dates).

46. Cf. *Westec Constr. Mgmt. Co. v. Postle Enters. I, Inc.*, 68 P.3d 529, 533 (Colo.App. 2002) (party "need not accept a modified contract in mitigation of its damages when the modified offer includes abandonment of any right of action for a prior breach as a condition of acceptance") (citing *Stanspec Corp. v. Jelco, Inc.*, 464 F.2d 1184, 1187 (10th Cir. 1972)). Cf. *Gunn Infiniti v. O'Byrne*, 996 S.W.2d 854, 859 (Tex. 1999) (holding that a defendant offering to mitigate a plaintiff's damages "cannot implicitly or explicitly seek a release of the plaintiff's claims"), citing *Restatement (Second) of Contracts* § 350 cmt. e (1981) (plaintiff not required to accept offers from the breaching party if they are "conditioned on surrender by the injured party of his claim for breach").

47. See *Westec Constr. Mgmt. Co.*, 68 P.3d at 533.

48. *Id.*

49. See *City of Westminster v. Centric-Jones Constructors*, 100 P.3d 472, 476 (Colo.App. 2003).

50. See, e.g., *NPS, LLC v. Minihane*, 886 N.E.2d 670, 675 (Mass. 2008) (no duty to mitigate damages in the face of a liquidated damages clause). But see Fortin, "Why There Should be a Duty to Mitigate Liquidated Damages Clauses," 38 *Hofstra L. Rev.* 285 (2009) (arguing that broad rule dispensing with duty to mitigate liquidated damages is faulty under core mitigation doctrine policies). Counsel may argue that Colorado's implied covenant of good faith and fair dealing may give rise to a duty to mitigate liquidated damages. See *Amoco Oil Co. v. Ervin*, 908 P.2d 493, 498-99 (Colo. 1995) (every contract includes an implied covenant of good faith

and fair dealing). *Cf. Medema Homes, Inc. v. Lynn*, 647 P.2d 664, 667 (Colo. 1982) (liquidated damages for delay in home purchase contract will not be enforced where party seeking damages caused such delay).

51. *See City of Westminster*, 100 P.3d at 476 (“total costs” award to city grants it more than the benefit of its bargain and paid the city for mistakes by others besides contractor; liquidated damages claim failed because city was partially liable for delays and it failed to apportion damages).

52. *Berger*, 795 P.2d at 1385. *See also Sheldon v. Northeast Developers*, 238 A.2d 775, 776-77 (Vt. 1968) (builder’s repeated promises to repair excused property owner’s duty to mitigate damages for so long as owner reasonably expected defendant might act).

53. *See Stone*, 41 P.3d at 712 (“Litigation is too uncertain and costly to impose such a duty on a party.”).

54. *But see Wright v. Royal Carpet Servs.*, 29 So.3d 109, 113 (Miss.App. 2010) (no error in admitting evidence of homeowner’s failure to mitigate damage caused by water leak because evidence of insurance was offered to show that homeowner had failed to mitigate her damages and, therefore, its admission did not violate the collateral source rule).

55. *See Vigil Hill v. Franklin*, 103 P.3d 322, 325-31 (Colo. 2004) (CRS § 13-21-115, Landowner Liability Act (LLA), intended to establish comprehensive landowner duties, and eliminated common law affirmative defenses to such duties); *Lombard v. Colo. Adult Outdoor Educ. Ctr., Inc.*, 187 P.3d 565 (Colo. 2008) (negligence *per se* claims abrogated by LLA). *Cf. Union Pac. R.R. Co. v. Martin*, 209 P.3d 185, 190 (Colo. 2009) (LLA may abrogate common law defenses, but not statutory non-party fault

defense); *DeWitt v. Tara Woods, Ltd. P’ship*, 214 P.3d 466, 468 (Colo.App. 2008) (LLA does not preempt statutory comparative negligence defense).

56. *See Smith v. Exec. Custom Homes, Inc.*, 230 P.3d 1186, 1191-92 (Colo. 2010) (because CDARA provides for tolling of the limitations period, common law equitable tolling based on the repair doctrine does not apply to claim governed by CDARA).

57. CDARA has adopted a construction professional’s “right to offer” to repair or pay money to resolve construction defect claims. *See* CRS § 13-20-803.5. Some builders have advocated a “right to repair” remedy, permitting builders to enter premises and complete such repairs as they deem appropriate to address the complaint. They urge that homeowners who refuse such a proffered repair should be deemed to have waived all legal claims against their builder. In 2014, Lakewood adopted ordinance O-2012-21 (Chapter 14.26) providing for such a right to repair, although its validity is hotly disputed and its effect uncertain. Such right to repair schemes will engender further controversy, and property owner counsel may seek to attack such statutory schemes on various constitutional grounds.

58. CRS § 13-20-802 (legislative declaration).

59. Codified at CRS §§ 13-20-806(7) and -807.

60. *But see* CJI-Civ. 5:2, ¶ 8 (CLE, 2014) (citing *Burt*, 809 P.2d 1064).

61. *See Banning v. Prester*, 2012 COA 215, ¶¶ 18-20, 317 P.3d 1284, 1289 (Colo.App. 2012) (while a plaintiff must present evidence concerning the reasonableness and necessity of medical expenses, conflating those factors with a failure to mitigate instruction based on the same theory misleads the jury). ■

