

Deconstructing Construction Defect Fault Allocation and Damages Apportionment—Part I

by Ronald M. Sandgrund and Jennifer A. Seidman

This two-part article analyzes percentage fault allocation and damages apportionment in multi-party, multiple-defect construction cases. Colorado common law and statutes offer guidance for addressing these issues; developing appropriate damages models; and crafting pretrial disclosures, trial proofs, and jury instructions. This Part I focuses on the legal theories underpinning allocation and apportionment. Part II will apply those theories in practice.

Construction defect cases typically involve many potentially responsible persons whose actions each contributed to creating defects, often with resulting property damage. Allocating percentage fault and apportioning damages among the responsible parties, who most often are construction professionals, raises difficult and important issues. These issues affect litigants' respective burdens of proof and disclosure obligations and the nature of admissible evidence, as well as the appropriate distinctions among juries' fact-finding responsibilities, experts' testimony, attorneys' arguments, and courts' jury instructions. They also affect settlement negotiations. These issues are important not only to property owner plaintiffs and construction professional defendants, but especially to builders and developers asserting multiple third-party claims and cross-claims and making nonparty designations.

Part I of this article examines relevant Colorado case and statutory law, which supports the conclusion that juries may apportion damages for divisible injury where a reasonable basis exists to do so, and that juries—not claimants—must allocate fault on a percentage basis for indivisible injuries among all potentially responsible parties and properly designated nonparties. Part II, which will be published in the December issue of *The Colorado Lawyer*, will explore the scope of claimants' and defendants' obligations to disclose and present evidence to support a jury's damages apportionment and fault allocation.

For purposes of this article, "defect" refers to a deficiency or error in a structure's design or construction. "Property damage" refers to physical injury to or the loss of use of all or part of a structure due to a defect. "Allocation" refers to the percentage fault responsibility a person bears for creating a defect, causing any resulting property damage, or causing another to incur damages, such as repair costs. "Apportionment" refers to separating damages arising from conduct that combines to create a particular defect or type of property damage from damages arising from conduct that does not create or combine to create that particular defect or type of property damage. (Note that case law and other authority may use these terms differently.) In sum, fault allocation focuses on conduct, while damages apportionment focuses on the consequences of that conduct.

Typical Construction Defect Case

Consider a typical construction defect claim involving water leaking at a single, interior building location near a window. The evidence suggests that the many persons and disparate conduct described in the accompanying sidebar, Example 1, contributed to the leak and/or caused the leak damage to worsen.

The building's owner, the construction professionals, the window manufacturer, and their respective experts all agree that water leaks damaged the framing and drywall behind the window. Each disputes: (1) the existence and extent of any alleged defects; (2)

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Water Leak Behind Window (Example 1)		
Potentially Responsible Persons	Alleged Negligence	Resulting Damage
Framing subcontractors (not clear which framing crew installed the window)	Improperly installed window flashing	Framing and drywall water damage behind window
Stucco subcontractors (second subcontractor took over when first fell behind schedule)	Stucco-window interface installation violated architect's plans	Framing and drywall water damage behind window
Architects	Did not specify building paper behind siding	Framing and drywall water damage behind window
Window manufacturers	Window installation instructions insufficient	Framing and drywall water damage behind window
General contractors	Failed to notice or require correction of above problems before substantial completion	Framing and drywall water damage behind window
Developers	Failed to take reasonable steps to prevent or resolve above problems before building's sale	Framing and drywall water damage behind window

whether a particular defect contributed to the damage; (3) each potentially responsible person's role in creating the defect(s) causing the damage; and (4) the scope of appropriate repair.

Example 1 illustrates that discrete and unrelated design and construction defects may contribute to the same, indivisible injury; that a combination of different persons' work may create such defects; and that various persons' potential negligence or fault may or may not overlap in time, place, and resulting injury.¹ Example 1 also shows the difficulty in indentifying who created a specific defect or caused specific damage. The complexity increases in projects with numerous defects in multiple buildings. Further complicating matters is that differing claims, such as negligence, breach of warranty, and misrepresentation, may give rise to identical injury, and each claim's damages measure may or may not be the same.

As discussed below, three principles circumscribe the damages analysis in complex construction cases. First, a wrongdoer is responsible only for those damages proven to be casually connected to the wrongdoer's conduct. Second, if the conduct of two or more wrongdoers combines to cause injury, the factfinder is charged with allocating the percentage fault for the injury among all properly identified wrongdoers.² Third, these standards must remain flexible enough to ensure that they can be understood and applied by both juries and courts in a reasonably efficient manner and that they will accommodate uncertainties arising from the available evidence.³

Causal Connection and Damages Apportionment

A jury may award damages against a defendant only if a claimant proves a causal connection between a particular defendant's wrongful conduct and some or all of the claimant's damages.⁴ The jury also must determine whether a claimant's damages resulted from an indivisible injury arising from the combined wrongful conduct of two or more persons, and either the judge or the jury must decide whether such damages are divisible and can be traced to separate wrongful acts.⁵

Indivisible Injury Rule and Percentage Fault Allocation

When the wrongful conduct of two or more persons combines to cause an indivisible injury, the injured claimant need prove only that a particular tortfeasor's conduct was a cause of the claimant's damages and the total amount of those damages (indivisible injury rule).⁶ No case law supports the notion that the injured claimant must disclose and prove how much percentage fault should be allocated to each alleged tortfeasor. Instead, Colorado's Pro Rata Liability Act (Pro Rata Act), CRS § 13-21-111.5, provides that the jury is to make this allocation.⁷

Percentage Fault Allocation and Damages Apportionment Difficulties

Even after significant discovery occurs, claimants such as property owners typically lack complete and undisputed information regarding the nature and extent of various construction professionals' involvement in the construction process. Claimants argue that it is improper to burden them with identifying specific percentage fault allocation because the Pro Rata Act requires that the jury allocate percentage fault among parties and nonparties, and that the Pro Rata Act did not "abolish the legal principle that two or more persons may concurrently cause" one indivisible injury.⁸ Claimants also argue that because the indivisible injury rule does not require a claimant to apportion indivisible damages among tortfeasors, such apportionment is effectively subsumed by the jury's percentage fault allocation under the Pro Rata Act.

Claimants assert that any requirement to prove the percentage fault of each potentially responsible person is as misguided as demanding that a person injured in a car accident disclose and prove the percentage fault of two negligent drivers who contributed to the accident and any resulting indivisible damages. Claimants recognize that they may properly be required to identify any alleged: (1) defective conditions; (2) resulting property damage; (3) persons whose conduct contributed to such defects and damage;

and (4) repairs required to remedy the defects and damage. However, claimants contend that they should not be required to prove the percentage fault of, or damages apportioned to, each potentially responsible person.

Defendants argue that a claimant must allege and prove the extent of each construction professional's liability and disclose the dollar amount sought from each construction professional. Construction professionals maintain that it is unfair to force them to defend against claims that do not specifically quantify their alleged damages liability. They also argue that a damages award to a claimant who cannot establish each construction professional's percentage share of damages liability results in speculative damages awards. Finally, they sometimes assert that a claimant must present expert testimony establishing each defendant's damages liability share.

As shown below, case law and statutes support the conclusion that, although a claimant must prove a causal connection between a defendant's wrongful conduct and the claimant's damages, and describe which damages are so connected, a claimant need not apportion indivisible damages among potentially liable persons or allocate percentage fault among potentially responsible persons for such damages.

The Negligence Framework

Simple negligence claims provide a framework to analyze damages apportionment and percentage fault allocation principles in complex cases. This framework is discussed below.

Plaintiff's Burden (Liability)

To prove negligence, a plaintiff must prove that the defendant owed a legal duty of care to the plaintiff, the defendant breached that duty, and such breach caused the plaintiff damages. Although the defendant's negligence must be a cause of the claimed damages, it need not be the sole cause, and a plaintiff need not eliminate other potential causes of the damages to prove the claim.⁹ In rare cases, the *res ipsa loquitur* doctrine may establish a presumption of negligence that the defendant may rebut.¹⁰ The Colorado Supreme Court has expressed concern in the product liability context 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," but Colorado appellate courts have not examined similar concerns in the construction defect context.¹¹

Where liability and damages as fact issues are resolved in a plaintiff's favor, difficulty or uncertainty in determining the precise damages amount does not prevent a damages award.¹² Instead, the plaintiff satisfies its burden by establishing a reasonable basis for its claimed damages.¹³

Defendant's Burden (Other Responsible Party Contribution)

Where a plaintiff's injuries are divisible, a defendant may limit its damages responsibility by proving that its actions were not a cause of one or more of the divisible parts.¹⁴ In an appropriate case, the jury may determine whether an injury is divisible when assess-

ing whether particular conduct caused a particular injury, although this may be a question of law for the court in some cases.¹⁵ A defendant may reduce its liability for an indivisible injury pursuant to the Pro Rata Act by proving that the blameworthy conduct of other parties or nonparties also caused the injury.¹⁶ A defendant's liability may be reduced by a nonparty's percentage fault if: (1) the defendant properly designates nonparties at fault, including any settling parties;¹⁷ (2) a basis for the nonparties' legal liability is established (breach of duty and causation);¹⁸ and (3) evidence supports a nonparty damages apportionment or percentage fault allocation.¹⁹ As discussed below, however, the Pro Rata Act does not allow reduction of a defendant's damages liability if fault is allocated to a nonparty for whose wrongful conduct the defendant is liable.

Complex Construction Defect Claims

Complex construction defect cases typically involve multiple parties, often with overlapping responsibilities, whose actions are alleged potential causes of some or all of a claimant's damages. Colorado's Construction Defect Action Reform Act²⁰ (CDARA), which usually applies to such claims,²¹ does not alter the common law negligence claim elements.²² CDARA applies only to defect claims against construction professionals.²³ Because CDARA does not address damages liability apportionment or percentage fault allocation among construction professionals, the Pro Rata Act and indivisible injury rule should continue to control.²⁴

Pursuant to the Pro Rata Act, each party's damages liability is determined by multiplying the damages attributable to an indivisible injury to which that party contributed by the percentage fault the jury allocates to that party.²⁵ Discussion of damages apportionment and fault determination problems unique to complex construction disputes follows.

Determining Total Damages

In addition to allocating percentage fault and apportioning any divisible damages, a jury determines total damages. Uncertainties regarding the measure and amount of such damages add another layer of difficulty to calculating a particular defendant's damages liability.

The repair cost is the presumptive damages measure for injury to residential property caused by construction defects.²⁶ Typically, repair cost—or, in cases of unreasonable economic waste, diminution in value—is the damages measure for nonresidential property injury.²⁷ However, CDARA may cap aspects of the property owner's total damages at the least of the repair cost, the property's fair market value in a non-defective condition, or the property's replacement cost.²⁸ As a result, the total damages to be apportioned cannot be resolved until the jury first determines recoverable damages.

Determining Cause

In complex construction defect cases, homeowners or homeowner associations usually lack information needed to establish the extent to which each responsible person caused a particular defect, resulting property damage, or the need for a particular repair. In Example 1, the water leak may have resulted from the negligence of one or more of the persons identified. Moreover, this damage may have resulted from other defects related to the window installation for which other parties may be responsible, and the same

repairs may remedy different underlying defects. Thus, although water intrusion behind the window, permeating and rotting the building's framing and drywall, may be due to the conduct of any of the potentially liable persons identified in Example 1, such water intrusion also may have been caused by the singular or combined conduct of others creating a roof leak running through interior wall and floor cavities; leaky flashing at the roof-edge siding interface; or a pipe leak located in an interior building cavity, where some or all of the roof, roof-edge, and plumbing leaks coincidentally exit at the same drywall location.

On these facts, the claimant should allege that each defendant's wrongful conduct was a cause of the indivisible injury described and that it is seeking 100% of the repair cost from each defendant.²⁹ The claimant also should allege that a smaller subset of defendants' wrongful conduct was a cause of any separate indivisible injury—for example, drywall damage located above, rather than behind, the window caused only by the roof and pipe leaks, and that it is seeking 100% of the repair cost for this damage from this subset of defendants.³⁰ Also, the claimant should allege which defendants' conduct contributed to any claimed indivisible repair damages and that it is seeking 100% of the cost of performing that repair from each of those defendants. Finally, claimants should allege which defendants' conduct contributed to the creation of the underlying defects and that it is seeking 100% of the cost of remedying those defects from each of those defendants.³¹

The Pro Rata Act does not require claimants to prove that a particular defendant was solely responsible for particular defects or resulting damage or its percentage fault. Instead, as discussed below, claimants must provide only a reasonable basis to make such a determination.³²

Determining Percentage Fault

After the factfinder determines the causes of an indivisible injury and its resulting damages and the judge determines the persons to whom the jury may apportion fault, the jury must determine "the percentage of negligence or fault" attributable to each party and nonparty.³³ Juries have broad discretion to allocate fault that is "not subject to exact mathematical computations,"³⁴ and juries can consider the alleged contributing factors and different legal theories,³⁵ including the nature of the risk-creating conduct, any intent to harm or awareness of the risk, and the conduct's relationship in time and place to the resulting injury.³⁶ The Pro Rata Act does not specify the allocation method, which requires only a reasonable basis.

Additional Complicating Issues

Allocating fault for indivisible damages on a percentage basis among potentially liable persons and apportioning causal responsibility for divisible damages is complicated by many factors, including design errors; repairs that better the original design due to, for example, building code changes; the effect of imputed liability; legal and factual distinctions among claims for relief; common costs attributable to the repair of more than one structure; and the potential addition, amendment, withdrawal, or dismissal of claims and nonparty designations. Each factor is compounded by the uncertainty of the factfinder's ultimate determination of fault and other matters. Thus, it is impossible to predict, and therefore impossible to disclose, fault allocation.

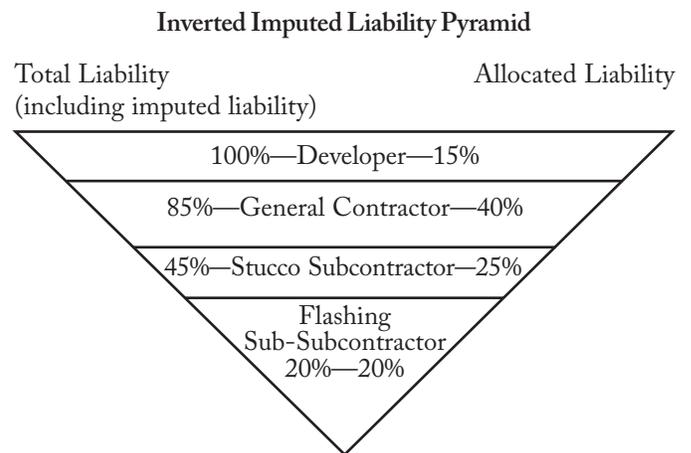
Design Defects

Generally, contractors following a design professional's defective plans are not responsible for the resulting damages.³⁷ Also, design professionals providing proper plans generally are not liable for damages caused by a contractor's defective work.³⁸ However, where disputed fact issues exist regarding who did what wrong and what wrongful conduct contributed to what alleged damage, determining whether the contractor(s) and/or the design professional(s) caused the damage depends on resolution of disputed facts.³⁹

If the jury determines a particular repair is required only as a result of a design defect, the resulting damages should be attributed only to the responsible design professional(s).⁴⁰ In contrast, if a more expensive design is required to comply with building code revisions not in effect during construction, it may be improper to impose liability on only the design professional if such added cost is not exclusively the result of a design defect.⁴¹ In these circumstances, a court may find that all persons who bear liability for the underlying defect or resulting damage that required the "improved design" should bear liability for its added cost.

Individual Fault Allocations Versus Aggregate Liability

The individual percentage fault actually allocated by the jury to responsible parties and properly designated nonparties may not exceed 100%.⁴² However, the parties' aggregate liability may exceed 100% where one party is legally responsible for another defendant's or a nonparty's share of the liability.⁴³ For example, a negligent delivery driver may be 75% responsible for an accident while the employer may be 25% responsible for its negligent hiring. The employer, however, may be vicariously liable for 100% of the damages. Thus, the sum of the defendants' individual percentage liability theoretically totals 125%, but the injured party generally may recover only one satisfaction of its damages claim.⁴⁴ The accompanying sidebar entitled "Inverted Imputed Liability Pyramid" illustrates the liability aggregation that may occur in a simple construction defect case where liability is imputed.⁴⁵



More Than One Structure

Many cases involve defects in and damage to more than one structure, such as a phased condominium project. There, different subcontractors may have performed work on different buildings, some subcontractors may have taken over for others mid-construction, and different kinds of problems may affect different build-

Although there is no requirement that the damages apportionment or fault allocation be rendered building-by-building, some circumstances may warrant separate findings. However, a building-by-building damages breakdown may cause more problems than it solves because, for example: (1) many repair estimates include a lump sum for project-wide “mobilization” and other indivisible expenses common to the repair project; and (2) some repairs will be to common elements—such as grading and drainage features—that indivisibly serve two or more buildings. Even with regard to a single structure, so many repair cost line-items may overlap between discrete defects or resulting property damage that asking the jury to separate its verdict on a defect-by-defect basis is impractical, if not impossible. Courts recognize that seemingly separate problems, such as bad siding, bad windows, bad grading, and a poorly designed foundation, may require multiple, overlapping repair tasks and costs.⁴⁶

The Changing Universe of At-Fault Parties and Nonparties

The group of potentially responsible persons among whom a jury may allocate fault consists of the named defendants and any properly designated nonparties, but this group’s composition may change over time, even during trial. Thus, a defendant’s designation of a particular nonparty may fail as a matter of law even though the nonparty contributed to the plaintiff’s injury, or unique circumstances may warrant designation of a new nonparty later in a case.

A plaintiff’s claims against a particular defendant may not be presented to the jury at trial for other reasons, such as a summary judgment grant. Also, the jury generally is asked to allocate 100% of the negligence or fault causing the plaintiff’s damages among only the parties and designated responsible nonparties, even if an entity who is neither a party nor a nonparty caused or contributed to a portion of the damages.⁴⁷ However, a jury may effectively allocate no fault and exonerate a defendant if it finds that an unnamed, undesignated party’s fault was the sole cause of the plaintiff’s damages.⁴⁸

Varying Claims for Relief and Degrees of Culpable Conduct

The Colorado Supreme Court has not definitively addressed how trial courts should instruct juries regarding percentage-fault allocation when plaintiffs plead different legal theories. Its opinions suggest that proper instructions will depend on the nature of the facts and the claims, and that trial courts are vested with broad discretion in crafting instructions.⁴⁹ Generally, persons liable for breach of contract or warranty⁵⁰ and, perhaps, under some circumstances, intentional torts (such as consumer fraud),⁵¹ may not use the Pro Rata Act to reduce their liability.

Some questions arise when, for example, a homeowner sues his or her builder–vendor for negligent stucco application and repair, as well as for misrepresentation and breach of warranty, and sues the stucco contractor only for negligence. For example:

1. What Pro Rata Act instructions should be given?
2. Should the jury consider the “aggregate” culpable conduct of each defendant in light of all the asserted claims and then apportion fault among them?
3. What if the homeowner claimed that, but for the builder-vendor’s alleged misrepresentation that the builder had purchased a third-party structural warranty (where the warranty did not cover bad stucco work), the homeowner never would have bought the home and incurred the cost of redoing the deficient stucco application?

A suggested analysis that may help answer these kinds of questions will be presented in Part II of this article in the discussion of jury instructions.

Conclusion

Part I of this article discussed damages apportionment and percentage fault allocation among responsible parties and nonparties. Case law to date suggests that, although a claimant must establish a causal connection between a defendant’s wrongful conduct and the resulting damages, the claimant need not establish a percentage fault allocation but must provide only a reasonable factual basis for the factfinder to do so. For 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 simply may identify the persons responsible and claim that each is legally liable for all those damages. Part II of this article will address the practical

questions this Part I’s legal analyses raise relating to burdens of proof, the scope of admissible evidence, Colorado Rule of Civil Procedure 26 disclosures, and jury instructions for damages and fault allocation.

Notes

1. See *Regan Roofing Co. v. Super. Ct.*, 27 Cal.Rptr.2d 62, 72 (Cal.App. 1994) (defect categories inevitably overlap among trades, design professionals, and causes).

2. See *Fried v. Leong*, 946 P.2d 487, 490 (Colo.App. 1997) (one must not confuse damages apportionment with percentage fault allocation). See also Benson, “Application of the Pro Rata Liability, Comparative Negligence and Contribution Statutes,” 23 *The Colorado Lawyer* 1717, 1726 (Aug. 1994) (jury may not allocate fault to a wrongdoer who is neither a defendant nor a designated nonparty at fault).

3. *Restatement (Third) of Torts: Apportionment of Liability* § 26 cmt. a (2000). The sections from the *Restatement (Third) of Torts* cited in this article have not been adopted in Colorado, but they provide persuasive or instructive authority for some of the concepts discussed.

4. See, e.g., C.J.I. Civ. 9:18 to 20 (4th ed. 2011).

5. See *Restatement*, *supra* note 3 at § 26. See also *DeBose v. Bear Valley Church of Christ*, 890 P.2d 214, 223-24 (Colo.App. 1994) (*dicta*) (damages award must be set aside where verdict forms provided to jury characterized identical injury as both indivisible, and thus subject to fault allocation, and divisible, and thus subject to damages apportionment), *rev’d on other grounds*, 928 P.2d 1315 (Colo. 1996).

6. See *Restatement*, *supra* note 3 at § 26 cmt. h. See also *Wren v. Spurlock*, 798 F.2d 1313, 1323 (10th Cir. 1986) (where harm is not “obviously divisible” among defendants, “courts have been liberal in allowing juries to

award damages in situations when the uncertainty of apportionment 'arises from the nature of the wrong itself, for which the defendant, and not the plaintiff, is responsible,'" quoting Prosser, *Handbook of the Law of Torts* 318-19 (4th ed. 1971); *Restatement*, *supra* note 3 at § D18 cmt. d (there is no temporal requirement that independent tortfeasors' actions simultaneously cause the plaintiff's indivisible injury). As mentioned in note 3, the sections from the *Restatement* cited in this article have not been adopted in Colorado. The *Restatement* presents five alternatives (or tracks), A through E, for addressing "Liability of Multiple Tortfeasors for Individual Harm." The *Restatement's* Track B appears to be generally consistent with CRS § 13-21-111.5, while Track D appears to be inconsistent with that statute. The comments cited in this article to Track D, however, describe concepts consistent with Colorado law.

7. See *Bohrer v. DeHart*, 961 P.2d 472, 476 (Colo. 1998) (Pro Rata Liability Act requires jury to determine percentages of fault and total damages).

8. *Moody v. A.G. Edwards & Sons, Inc.*, 847 P.2d 215, 217 (Colo.App. 1993).

9. See *Kaiser Found. Health Plan of Colo. v. Sharp*, 741 P.2d 714, 719 (Colo. 1987) (plaintiff need not prove cause with absolute certainty, nor must defendant's conduct be the only cause). Cf. *Wren*, *supra* note 6 at 1323.

10. See *Ochoa v. Vered*, 212 P.3d 963, 971-72 (Colo.App. 2009) (*res ipsa loquitur* applicable to claim against "captain of the ship" who did not personally commit negligent act). See generally C.J.I. Civ. 9:17 (4th ed. 2011).

11. *Prutch v. Ford Motor Co.*, 618 P.2d 657, 660 (Colo. 1980).

12. See *Palmer v. Diaz*, 214 P.3d 546, 552 (Colo.App. 2009) (uncertainty as to amount of damages does not preclude damages award); *W. Conference Resorts, Inc. v. Pease*, 668 P.2d 973, 977 (Colo.App. 1983) (same); *Cope v. Vermeer Sales & Serv. of Colo., Inc.*, 650 P.2d 1307, 1309 (Colo.App. 1982), citing *Peterson v. Colo. Potato Flake & Mfg. Co.*, 435 P.2d 237 (Colo. 1967) (bar against speculative damages "applies only where the fact of damages is uncertain, not where the amount is uncertain"). See also C.J.I. Civ. 5:6 (4th ed. 2011).

13. *Tull v. Gundersons, Inc.*, 709 P.2d 940, 943 (Colo. 1985); *Park Rise Homeowners Ass'n, Inc. v. Resource Constr. Co.*, 155 P.3d 427, 430 (Colo. App. 2006), citing *Husband v. Colo. Mountain Cellars, Inc.*, 867 P.2d 57 (Colo.App. 1993).

14. *Fried*, *supra* note 2 at 489-90 (jury must make separate award for separate injury and must apportion fault among responsible defendants for any single, indivisible injury pursuant to CRS § 13-21-111.5(1) and (2)).

15. Cf. *DeBose*, *supra* note 5 at 224 (*dicta*) (suggests jury renders separate damages award for any separate injury for which only certain defendants were responsible, without clarifying whether judge or jury makes threshold determination whether an injury is divisible).

16. See *Fried*, *supra* note 2 at 489-90 (jury must make separate award for separate injury and must apportion fault among responsible defendants for any single, indivisible injury pursuant to CRS § 13-21-111.5(1) and (2)). *Accord Piner v. Super. Ct.*, 962 P.2d 909, 914-17 (Ariz. 1998) (under Arizona's similar pro rata liability statute, burden shifts to defendants to prove allocation after plaintiff establishes that defendants caused indivisible injury); *A Tumbling-T Ranches v. Paloma Inv. Ltd.*, 5 P.3d 259, 266 (Ariz.App. 2000) (citing cases) (burden of proof shifts to defendants to apportion damages after plaintiff proves that defendants' conduct contributed to the plaintiff's damages).

17. See CRS § 13-21-111.5(3)(b). See also *Redden v. SCI Colo. Funeral Servs., Inc.*, 38 P.3d 75, 80 (Colo. 2001).

18. *Id.* at 80-81. See also C.J.I. Civ. 9:24 (4th ed. 2011).

19. See CRS § 13-21-111.5(3)(a) (determination of degree or percentage of fault need only be "based upon evidence thereof"). See also *Barton v. Adams Rental, Inc.* 938 P.2d 532, 536 (Colo. 1997) (court should not submit question of nonparty's proportionate fault to the jury where no evidence of nonparty's liability has been presented).

20. See CRS §§ 13-20-801 *et seq.*

21. See *id.*

22. See *Land-Wells v. Rain Way Sprinkler & Landscape, LLC*, 187 P.3d 1152 (Colo.App. 2008), followed in *Hildebrand v. New Vista Homes II, Inc.*, 252 P.3d 1159 (Colo.App. 2010).

23. See CRS § 13-20-802.5(4) (defining "construction professional").

24. Cf. *Union Pac. R.R. Co. v. Martin*, 209 P.3d 185, 190 (Colo. 2009) (CRS § 13-21-115, the Landowner Liability Act, may abrogate common law defenses, but not statutory nonparty fault defense).

25. See C.J.I. Civ. 9:29, 9:29A, 9:29B (4th ed. 2011).

26. See *Bd. of Cty. Comm'rs v. Slovek*, 723 P.2d 1309, 1316 (Colo. 1986).

27. See *Summit Constr. Co. v. Yeager Garden Acres, Inc.*, 470 P.2d 870, 875 (Colo.App. 1970).

28. See CRS §§ 13-20-802.5(2) and -806(1). See generally *Sandgrund et al.*, "Recovering 'Actual Damages' Under Colorado's Construction Defect Action Reform Act," 38 *The Colorado Lawyer* 41 (May 2009) (Part I) and 38 *The Colorado Lawyer* 25 (June 2009) (Part II).

29. Cf. *Burlington N. & Sante Fe Ry. Co. v. United States*, 129 S.Ct. 1870, 1881 (2009) (citing authorities) (where two or more persons cause a single and indivisible harm, each is subject to liability for the entire harm).

30. *Id.*

31. *Id.*

32. See CRS § 13-21-111.5(3)(a) (requiring only "evidence" of degree or percentage of negligence of fault). See also *Barton*, *supra* note 19 at 538 (apportionment cannot be "based wholly on speculation, rather than on the evidence presented"); *Antolovich v. Brown Group Retail, Inc.*, 183 P.3d 582, 594 (Colo.App. 2007) (where evidence supports inferences sufficient to establish elements of claims, issue of nonparty liability may be submitted to the jury).

33. See CRS § 13-21-111.5(2). See also *Slack v. Farmers Ins. Exch.*, 5 P.3d 280, 282 (Colo. 2000).

34. *Ransom v. Calveras Asbestos, Ltd.*, No. B207018, 2009 WL 531846 at *7-8 (Cal.App. March 4, 2009) (affirming jury's allocation of 24% fault to defendant who supplied 3% of asbestos that caused injury).

35. Cf. *Cook v. Rockwell Int'l Corp.*, 564 F.Supp.2d 1189, 1198-99 (D.Colo. 2008) (jury may apportion fault on a claim-by-claim basis for same injury and plaintiff may seek recovery under either or both apportionments as long as plaintiff does not receive a double recovery), *rev'd on other grounds*, 618 F.3d 1127 (10th Cir. 2010). Cf. *Regan Roofing Co.*, *supra* note 1 at 72-73 (in determining reasonableness of settlement, court found that defect categories inevitably will overlap among trades, design professions and causes, and that a precise allocation by construction trade is impossible).

36. See *Restatement*, *supra* note 3 at § 8.

37. See *United States v. Spearin*, 248 U.S. 132, 136 (1918).

38. *Balcom Indus., Inc. v. Nelson*, 454 P.2d 599, 601 (Colo. 1969).

39. See *id.* See also *Spearin*, *supra* note 37 at 136. Cf. *Paine v. Spottiswoode*, 612 A.2d 235, 240 (Me. 1992) (both contractors and design professionals may be liable for independent negligent acts causing single injury); *N. Petrochemical Co. v. Thorsen & Thorsbov, Inc.*, 211 N.W.2d 159, 167-69 (Minn. 1973) (allocating repair costs attributable to either design or construction defect); *Cincinnati Riverfront Coliseum, Inc. v. McNulty, Co.*, 504 N.E.2d 415, 419-20 (Ohio 1986) (effect of contractor's deviation from design relevant to determining design professional's fault).

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

41. *But cf. Dupre v. Allstate Ins. Co.*, 62 P.3d 1024, 1030-31 (Colo.App. 2002) (replacement cost under insurance policy includes cost of upgrading to comply with current building codes).

42. Cf. C.J.I. Civ. 9:29 (4th ed. 2011); *Cook*, *supra* note 35 at 1198-99 (jury may apportion fault on a claim-by-claim basis for the same injury, resulting in apportionment of 100% per claim; plaintiff may seek recovery under different apportionments as long as plaintiff does not receive a double recovery).

43. Cf. *Restatement*, *supra* note 3 at § D18 cmt. h (defendant's attempted assignment of percentage responsibility to another inapplicable in cases of vicarious liability or failure to protect the plaintiff from an intentional tort). *But see caveat*, *supra* note 6.

44. See *Coons v. Peterson Realty, Inc.*, 695 P.2d 317, 318 (Colo.App. 1985). See also *Kidwell v. K-Mart Corp.*, 942 P.2d 1280, 1282-83 (Colo.App. 1996) (where a nondelegable duty of care exists, person imputedly liable for the tortious conduct of another may not reduce liability *pro rata* based on other's conduct). The "one satisfaction" limitation may be affected by the collateral source doctrine.

45. See generally Benson, *The Practitioner's Guide to Colorado Construction Law* § 14.5.1 (2010) (various bases on which to impute legal liability); Sandgrund *et al.*, "Theories of Homebuilder Liability for Subcontractor Negligence," 34 *The Colorado Lawyer* 69 (June 2005) (Part I), and 34 *The Colorado Lawyer* 55 (July 2005) (Part II) (same).

46. See, e.g., *Regan Roofing Co.*, *supra* note 1 at 72 (defect, damages, and repairs inevitably overlap); *N. Petrochemical Co.*, *supra* note 39 at 167-69 (some repair costs attributable to either design or construction defect; other repair costs attributable to correcting both design and construction errors).

47. Benson, *supra* note 2 at 1718.

48. See *Jones v. Caterpillar Tractor Co.*, 701 P.2d 84, 86 (Colo.App. 1984), *cert. denied* (1985) (discussing unforeseeable intervening cause defense).

49. See *Bohrer*, *supra* note 7 at 477-78 (affirming jury verdict where percentage fault allocation could be discerned from damages award, and damages award properly reflected defendants' separate liability on separate claims).

50. *Resolution Trust Corp. v. Heiserman*, 898 P.2d 1049, 1055 (Colo. 1995) ("tortious conduct" as used in CRS § 13-21-111.5(4) does not include contract claims).

51. Cf. *Toothman v. Freeborn & Peters*, 80 P.3d 804, 816 (Colo.App. 2002) (nothing in Pro Rata Act suggests that a plaintiff's fault should reduce a defendant's liability for his intentional torts); *Restatement, supra* note 3 at § 12 (intentional tortfeasors jointly and severally liable for harm they cause). But see *Slack v. Farmers Ins. Exch.*, 5 P.3d 280, 286-87 (Colo. 2000) (suggesting "fault" includes all tortious conduct, intentional or negligent, but that intentional wrongdoer has no right of contribution); *Resolution Trust Corp.*, *supra* note 50 at 1056 (same). ■