

The Burden of Proving Actual Damages Under CDARA

By: Gene Commander and Rebecca Ross

The Construction Defect Action Reform Act (“CDARA”), C.R.S. 13-13-801, *et seq.*, governs all Colorado construction defect actions against construction professionals. With few exceptions, CDARA limits the amount of damages recoverable from construction professionals to the claimant’s “actual damages,” which are defined as the lesser of: 1) the fair market value of the real property without the alleged construction defect; 2) the replacement cost of the real property; or 3) the reasonable cost to repair the alleged construction defect.

By enacting CDARA, the Legislature sought to provide alternative ways for claimants to measure their alleged damages depending on the circumstances of any given project. Typically claimants present expert testimony on the estimated reasonable cost to repair the alleged construction defect and any resulting damage that it might have caused. The construction professionals are then left with the burden of proving some lesser amount of damages. Again, this typically is attempted through the presentation of expert testimony challenging the proposed scope of repairs and/or the reasonableness of the estimated repair costs. However, this approach frequently ends with mixed results.

That makes noteworthy the Colorado Court of Appeals’ recent decision in *Hildebrand v. New Vista Homes*, where the Court considered a jury’s award of repair cost damages to homeowners in a construction defect action involving movement of a basement floor slab. The homeowners introduced expert testimony on the cost of repair. The builder countered with evidence of the fair market value of the property without the alleged defects, claiming that the market value approach represented the lesser and more reasonable measure of the homeowners’ “actual damages.”

The homeowners contested the opinions of two of the builder’s expert witnesses because, among other things, one expert merely assumed that the homes he used as comparables did not have similar construction defects and the other one conceded that such defects “were never fully explained to him.” Ultimately, the jury determined that the builder failed to prove the lower fair market value of the property, and the jury awarded damages to the homeowners based on the alleged cost of repair.

The Court of Appeals upheld the jury’s award and, in doing so, noted that although CDARA provides three alternative measures of damages, the homeowners were not required to present evidence on all three theories. Instead, the Court held that after the homeowners presented damages based upon a repair cost theory, the burden shifted to the builder to convince the jury that another lesser statutory measure of damage was appropriate under the unique facts of the case. Since the relevant damage evidence was in dispute, the Court of Appeals concluded that the factual determination was best left for the jury, and it affirmed the trial court result.



While unsuccessful in this instance, it is not out of the realm of possibility that under the right circumstances construction professionals will succeed in future efforts to convince juries to enforce one of the alternative statutory theories of damage.

If you have questions or would like additional information, please do not hesitate to contact Gene Commander at 720-931-1160 or Rebecca Ross at 720-931-1171.

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