



A Deeper Look at CDARA's Scope

BY RONALD M. SANDGRUND AND LESLIE A. TUFT

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This article expands on a previous article addressing the scope of Colorado's Construction Defect Action Reform Act. It takes a deeper look at inherent limitations on the Act's reach and examines the extent to which it applies to personal or bodily injury, wrongful death, and personal property damage claims.

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A March 2021 *Colorado Lawyer* article titled "The Scope of CDARA: Time and Place Limitations" (hereinafter *CDARA's Scope*)¹ examined potential limitations on the reach of Colorado's Construction Defect Action Reform Act (CDARA or "the Act"). *CDARA's Scope* noted that while CDARA does not include explicit time or place limitations, some circumstances raise the question whether the statutory scheme contains inherent limitations. The article explored whether CDARA applies to construction defects observed early in the construction process,

before the work-in-progress becomes a substantially completed real property improvement; and whether CDARA applies to construction defects located on one property that cause damage or injury on another property.

Shortly after *CDARA's Scope* was published, the Champlain Towers Condominiums in Surfside, Florida, collapsed on June 24, 2021, killing 98 people.² The collapse may have been related to construction defects or construction on a nearby parcel.³ If a similar tragedy were to occur in Colorado, how would CDARA affect the claims of those injured or killed? This article

follows up on *CDARA's Scope* by looking more closely at the Act's time and place limitations and examining the extent to which CDARA applies to personal or bodily injury, wrongful death, and personal property damage claims.

Targeting CDARA's Scope

In 2020, the Colorado Court of Appeals decided *Warembourg v. Excel Electric, Inc.*,⁴ which examined whether a personal injury claim was governed by CDARA, the Colorado Premises Liability Act (PLA),⁵ or both. The case raises the following issues:

- Does *Warembourg* affect whether CDARA applies to construction defects on one property that cause damage or injury on another property?
- Does *Warembourg* affect whether CDARA applies only to claims asserted by the owners of property where defects occur?
- Does CDARA apply to all personal injury and wrongful death claims caused by construction defects?

The Construction Defect's Location

CDARA's Scope questioned whether the Act applies to construction defects on one property that cause damage or injury on another property. In *Warembourg*, the Court concluded that CDARA did not apply to the plaintiff's personal injury claims, noting in dicta: "The General Assembly enacted CDARA to proscribe the rights and remedies of *property owners* who allege that [construction professionals] are responsible for construction defects *on their property*."⁶ However, because of its facts, *Warembourg* does little to clarify whether CDARA applies to construction defects on one property that cause damage or injury on another or to defects that injure persons who have no ownership or other beneficial interest in the defective property.

Warembourg involved a flooring subcontractor who was electrocuted after opening a temporary electrical box serving a home under construction. The Court characterized the case as a "quintessential premises liability action"⁷ governed by the PLA. It rejected the defendant utility company's argument that CDARA's noneconomic damages cap applied to the verdict, holding that the temporary electrical box was not a permanent fixture and thus *not a real property improvement subject to CDARA*.⁸

The Court elaborated in dicta that CDARA did not apply because the plaintiff "was not a *property owner* and his claims did not arise from a defect impacting *his property*."⁹ The case made clear that the temporary electrical box "was located outside the home,"¹⁰ but did not reveal its exact location. The defendant "presented evidence that [its employee] inspected and tested the box before installing it *at the construction site*";¹¹ and the Court vaguely referenced a "temporary power pole that was set

up," suggesting the box may have been located off-site.¹² But the case did not make clear whether the box was on the subject parcel.

Accordingly, *Warembourg's* holding did not turn on whether the defective electrical box was located on the same property where the plaintiff was injured. Therefore, the Court's dicta does not shed light on whether an injury or damage must occur on the same property as the construction defect for CDARA to apply.

The Importance of a Property Interest

Considering *Warembourg's* holding, its dicta, and the opinion's unclear description of where the construction defect was located and who owned that parcel, the case does not offer clear guidance for whether CDARA only governs personal injury claims if they are asserted by the owner of the defective property. But *Warembourg's* dicta that CDARA did not apply to the plaintiff's personal injury claim because he "was *not a property owner* and his claims did not arise from a defect impacting *his property*"¹³ raises the question whether CDARA would apply to a construction defect claim where the claimant did not own the defectively constructed property.

CDARA's Scope observed that CDARA applies to personal and bodily injury claims based, in part, on CDARA's definition of "action" as "a civil action or an arbitration proceeding . . . brought against a construction professional to assert a claim . . . for . . . *personal injury* caused by a defect in the design or construction of an improvement to real property."¹⁴ The Act's legislative declaration states an intent to preserve "adequate rights and remedies for *property owners* who bring and maintain [construction defect] actions."¹⁵ However, CDARA's definitions of "action" and "claimant" encompass *any person's* damages claim against a construction professional "for damages or loss to, or the loss of use of, real or personal property or personal injury caused by a defect in the design or construction" of a real property improvement.¹⁶

If CDARA only applies when the claimant has an ownership or similar beneficial property interest in the defectively constructed property, many personal injury claims against construction professionals arising from construction

defects, such as claims by invitees, licensees, non-owner occupants (e.g., family members and guests), or trespassers would not be subject to CDARA. And at least one commentator has suggested that if CDARA contains a property ownership requirement, it may not apply to disputes between and among general contractors and subcontractors, along with other construction process participants.¹⁷

As *CDARA's Scope* noted, at least two Colorado district courts have ruled that a property damage claimant must have a "beneficial interest" in the allegedly defective property for CDARA to apply.¹⁸ And the US District Court for the District of Colorado held in a personal injury case that "CDARA's notice of claim procedure applies to 'property owners who bring claims against construction professionals for damages to their property arising out of construction defects,'" and therefore it did not apply to the plaintiffs in that case, who were hotel guests on the property where the alleged defect occurred.¹⁹ Given the limited judicial analysis of this issue so far, it remains unclear whether Colorado's appellate courts will approve this potential beneficial property interest limitation on CDARA's scope.

Significant consequences result if CDARA does not apply to personal injury claims caused by construction defects where the claimant does not own the defective property. First, the claimant would not need to satisfy CDARA's statutory notice of claim process and defect list requirements.²⁰ Further, the court could increase the claimant's personal injury damages caps to \$500,000 (as adjusted for inflation) if justified by clear and convincing evidence,²¹ an increase CDARA does not allow because it caps such damages at \$250,000 (as adjusted for inflation). (However, as one unpublished Colorado Court of Appeals case held, even if CDARA does not apply in some circumstances, the real property statutes of limitations and repose may still apply, although CDARA's tolling provisions may not.²²)

Potential PLA/CDARA Overlap

In some situations, either the PLA or CDARA, or both, may apply to the same injury (e.g., a slip and fall on a defectively constructed, unreasonably steep ramp that tends to ice up in cold weather due to poorly constructed surface

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drainage, and is not reasonably kept clear of ice by the ramp’s owner). But the PLA and CDARA differ significantly, including in

- recovery theories and liability proof requirements (e.g., the PLA contains different evidentiary requirements that depend on the plaintiff’s status while on the property where the injury occurred);
- persons potentially liable (e.g., “construction professionals” under CDARA, including prior owners of commercial property;²³ and a person and/or that person’s authorized agent “in possession of” or “legally responsible for the condition of,” property under the PLA);²⁴
- persons whose claims are subject to each law;²⁵
- applicable statutes of limitation and repose (e.g., the circumstances triggering each law’s applicable statute of limitations differ, and only CDARA contains a statute of repose);²⁶
- pre-suit filing conditions (e.g., CDARA has a mandatory notice of claim process but the PLA has none);
- recoverable damages (e.g., different noneconomic damages caps); and
- applicable affirmative defenses and other limitations, such as CDARA’s anti-waiver provisions.²⁷

Given these distinctions, counsel for each party should determine each statute’s applicability and the relative merits of characterizing the claim as subject to the PLA or CDARA, before taking a firm position in pleadings and committing to proof standards. When evaluating potential claims and defenses, attorneys should consider

- the specific case facts;
- the nature of the plaintiff’s status and activities (e.g., invitee, licensee, trespasser, owner-occupant, beneficial property interest holder, non-owner occupant, tenant, or other);
- the nature of the defendants’ (and their authorized agents’) status and activities (e.g., landowner, landlord, tenant, contractor, construction professional, design professional, or other); and
- the nature, extent, circumstances, and causes of the underlying personal injury claims and damages.

Personal or Bodily Injury and Wrongful Death

CDARA does not define personal or bodily injury or wrongful death, although it uses those terms in contexts that may shed light on their meaning. For example, CRS § 13-20-804(1) contains certain limits on negligence claims,

which do not apply when the claim results in “bodily injury or wrongful death,” or a “risk of bodily injury or death to . . . the occupants of the residential real property.”²⁸ (Emphasis added.) The use of the disjunctive “or” suggests that the terms “bodily injury” and “wrongful death” have different meanings in CDARA.

Elsewhere, CRS § 13-20-802.5 defines “action” to include claims for “*personal injury* caused by a defect in the design or construction of an improvement to real property,” and “actual damages” “as to *personal injury*” as “those damages recoverable by law, except as limited by the provisions of section 13-20-806(4).” (Emphasis added.) Neither definition mentions “bodily injury,” although CRS § 13-20-802.5(2) cross-references CRS § 13-20-806(4), which refers to both “personal injury” and “bodily injury,” as does subsection 806(5).²⁹ Because CDARA does not define “personal injury” and “bodily injury,” it is unclear what distinctions may exist between the terms, and whether one or the other arguably may include claims for wrongful death caused by a construction defect.

Courts may also look to other statutes defining these terms to give them meaning in CDARA. For example, Colorado’s criminal code defines “bodily injury” as “physical pain, illness, or any impairment of physical or mental condition.”³⁰ In another context, the Colorado

Supreme Court held that because the Colorado Governmental Immunity Act (CGIA) defines “injury” to include “death,” the “operative ‘injury’ to which the [CGIA’s] \$150,000 damages cap applies is the wrongful death itself . . .”³¹ Of course, this CGIA case does not clarify whether “personal injury” includes wrongful death under CDARA because the CGIA expressly defines “injury” to include “death,” and CDARA does not. Moreover, neither the criminal code nor the CGIA relate directly to CDARA.

The Damages Cap

CDARA’s lack of clear definitions impacts how damages caps in personal or bodily injury and wrongful death claims are applied. CRS § 13-20-806(4)(a) contains CDARA’s noneconomic damages caps, and provides:

In an action asserting *personal injury* or *bodily injury* as a result of a construction defect in which damages for noneconomic loss or injury or derivative noneconomic loss or injury may be awarded, such damages shall not exceed the sum of two hundred fifty thousand dollars.

(Emphasis added.)

Generally, a “personal” injury “impairs the well-being or the mental or physical health of the victim.”³² Colorado’s common law allows residential property owners to recover damages for their “personal injury” arising from a residential real property injury, including “annoyance and discomfort.”³³ Because CDARA does not make clear whether a wrongful death claim qualifies as a claim for “personal injury or bodily injury,” it is unclear whether CDARA’s noneconomic damages caps apply to wrongful death claims caused by construction defects.

The Superseding Issue

No case has yet determined whether CDARA’s references to “personal injury” or “bodily injury” include wrongful death. But even if CDARA’s noneconomic damages caps arguably apply to wrongful death claims, Colorado’s wrongful death statute, CRS §§ 13-21-201 et seq., may supersede CDARA. The Colorado Supreme Court has stated that “the cause of action created by the [wrongful death] statute is separate and distinct from the action which the deceased would have

for *personal injuries* had he survived.”³⁴ The US District Court for the District of Colorado relied on that holding in ruling that the wrongful death statute’s two-year statute of limitations, rather than the three-year motor vehicle statute of limitations for “tort actions for *bodily injury*,” controls in wrongful death cases.³⁵ However, in a different context, the Colorado Supreme Court held that the Ski Safety Act’s monetary damages cap prevailed over the wrongful death statute’s cap.³⁶ Thus, it is unclear whether the wrongful death statute would preempt CDARA’s damages limitations.

Conversely, it could be argued that CDARA’s “actual damages” definition strictly limits the damages available in actions governed by CDARA, and because the definition does not expressly refer to damages for wrongful death claims, the Act does not permit these damages. This is similar to the argument that because CDARA’s “actual damages” definition does not expressly include punitive damages, CDARA does not allow recovery of punitive damages.³⁷ A Texas appellate court examining Texas’s analogous construction defect statutory scheme rejected a similar punitive damages argument.³⁸ Moreover, the Colorado Supreme Court has held that despite the Ski Safety Act’s compensatory damages cap, which does not explicitly address the availability of exemplary damages, the wrongful death statute’s exemplary damages provisions applied in a Ski Safety Act case.³⁹ Given the lack of controlling law, whether and how CDARA affects damages available for wrongful death claims resulting from construction defects remains an open question.

But even assuming that CDARA’s noneconomic damages caps supersede parts of the wrongful death statute’s damages provisions, the caps probably do not affect recovery of “net pecuniary loss” under the wrongful death statute. “Net pecuniary loss” to the decedent’s heirs is a major component of wrongful death damages, and these damages likely do not constitute “noneconomic” or “derivative noneconomic” loss as used in CDARA’s personal damages caps, CRS § 13-20-806(4)(a). Section 806(4)(a) incorporates by reference the meaning of “noneconomic” and “derivative noneconomic” loss set forth in CRS § 13-21-102.5(2)(b), and neither

term contemplates economic (pecuniary) loss. Section 102.5(2)(b) defines noneconomic loss as “*nonpecuniary harm* for which damages are recoverable by the person suffering the direct or primary loss or injury, including pain and suffering, inconvenience, emotional stress, and impairment of the quality of life”; and derivative noneconomic damages as “*nonpecuniary harm* or emotional stress to persons other than the person suffering the direct or primary loss or injury.”⁴⁰ Because CDARA’s damages caps pertain only to nonpecuniary losses for personal injury claims, they should not affect recovery of net pecuniary loss under the wrongful death statute.

In addition to net pecuniary loss, the wrongful death statute permits recovery for noneconomic damages such as grief, hardship, and so on. Thus, these damages may be subject to CDARA’s noneconomic damages caps rather than CRS § 13-21-102.5’s general noneconomic damages cap.⁴¹ The wrongful death statute also allows a claimant to elect to receive a “loss of solatium” recovery equaling \$50,000, typically chosen when the decedent and claimant were estranged and little or no net pecuniary loss arose from the decedent’s death.⁴² All the noneconomic damages caps discussed here exceed this \$50,000 amount.

Personal Property Damage Claims

CDARA expressly refers to recovery of “actual damages” in two places, and neither specifically lists personal property damages among the recoverable damages.⁴³ Therefore, *CDARA’s Scope* observed that CDARA may not permit recovery of certain tenant damages, such as those for the tenant’s personal property, inventory, equipment, and non-fixture tenant finishes.⁴⁴ If these limitations on a tenant’s recovery exist under CDARA, they likely apply to all owners, renters, and others’ personal property damage claims. And if CDARA prohibits all personal property damage claims caused by construction defects, it would completely bar recovery by the property owner (and the owner’s subrogated property insurer⁴⁵) for damages caused by a construction defect resulting in an electrical fire or plumbing flood that substantially destroys personal property, which could total hundreds of thousands of dollars.

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Property owners have raised counter-arguments in support of their position that CDARA permits recovery of personal property damages caused by construction defects. Their first line of argument begins with CDARA's several references to “personal property” claims resulting from construction defects. CDARA defines an “action” to include “a claim . . . for damages or loss to, or the loss of use of, real or *personal property* . . . caused by a defect in the design or construction of an improvement to real property.”⁴⁶ CDARA then expressly limits certain negligence claims to those involving “[a]ctual damage to real or *personal property*,” “[a]ctual loss of the use of real or personal property,” and “bodily injury or wrongful death.”⁴⁷ And CDARA states it is intended to preserve “*adequate rights and remedies for property owners who bring and maintain [construction defect] actions.*”⁴⁸ Thus, personal property owners urge that these provisions, together, support the conclusion that the General Assembly intended for CDARA to redress personal property claims arising from construction defects.

Moreover, in light of these provisions, property owners argue that common law damages measures survive CDARA because, “nothing in the language of [CDARA] is exclusionary of other damages measurements,”⁴⁹ the General Assembly simply inadvertently omitted the term “personal property” from the “actual damages” definition during CDARA's drafting, and the term should be read into the definition based on its use elsewhere throughout CDARA.⁵⁰ Construction professionals respond to all these arguments by pointing out that CDARA fails to describe personal property damages among its recoverable damages and urging that such recovery is simply not allowed.

One state senator's comments concerning recovery under an early version of HB 03-1161 suggest that at some point the General Assembly contemplated recovery for personal property damages under CDARA: “[I]f I build a barn and there is something wrong with it and . . . it collapses and kills a herd of cattle then I've got an actual economic damages that I can sue for.”⁵¹ Again, a construction professional would likely respond by arguing that CDARA's omission of personal property damage in the

“actual damages” definition means CDARA does not permit recovery of these damages, courts should not rewrite the statute's plain meaning, and any remedy for any omission resides with the legislature.

A logically distinct line of argument personal property owners sometimes pursue starts with CDARA's provision that, “with respect to residential property,” “actual damages” include “*other direct economic costs related to loss of use, if any.*”⁵² Property owners urge that this language is not expressly limited to damage to real property, and the statute's damages limitations, being in derogation of the common law, must be narrowly construed.⁵³ Thus, particularly when read in conjunction with CDARA's repeated references to “personal property” claims, property owners maintain that “direct economic costs related to loss of use” include damages caused by a construction defect to personal property located on or within residential property, including compensation for the “loss of use” of that personal property, including the complete loss of its use if it is irreparably damaged or destroyed.

If CDARA permits compensation for the loss of use of personal property, then recovery for the destruction—i.e., the complete loss of use—of personal property would typically be measured by its fair market value at the time of the loss.⁵⁴ Personal property loss of use damages include recovery for the reasonable rental value of the property during the time the damaged property is being repaired or restored, or for a reasonable time while replacement personal property is being located, delivered, and installed.⁵⁵

Conclusion

CDARA's Scope observed that Colorado's appellate courts have yet to address whether CDARA applies to construction defects found in works-in-progress or whether CDARA applies when construction defects in one person's real property improvement cause damage or injury on another property. The *Warembourg* decision sheds little additional light on this debate.

Difficult questions remain regarding the extent to which CDARA applies to personal or bodily injury claims and other damages claims belonging to persons with no ownership

or similar beneficial interest in the property causing their injury, wrongful death claims, or personal property damage claims. In the event of a catastrophic building collapse caused by a construction defect that results in significant loss of life and personal injuries, Colorado courts will need to harmonize the public policy of reasonably compensating those injured or killed due to the tortious conduct of others with the disparate statutory schemes discussed in this article. In the meantime, practitioners should carefully evaluate claims and defenses and consider the arguments outlined above. **CL**



Ronald M. Sandgrund and **Leslie A. Tuft** are part of Burg Simpson Eldridge Hersh Jardine PC's Construction Defect Group. The firm represents commercial and residential property owners, homeowner associations and unit owners, and construction professionals in construction defect, product liability, and insurance coverage disputes, among other practice concentrations—rsandgrund@burgsimpson.com; ltuft@burgsimpson.com.

Coordinating Editor: Leslie A. Tuft, ltuft@burgsimpson.com

NOTES

1. Sandgrund and Tuft, "The Scope of CDARA: Potential Time and Place Limitations," 50 *Colo. Law.* 30 (Mar. 2021) (discussing CDARA, CRS §§ 13-20-801 et seq.), <https://cl.cobar.org/features/the-scope-of-cdara>.
2. Osborne et al., "What we know about the victims of the Surfside building collapse," abcnews (July 27, 2021), <https://abcnews.go.com/US/victims-surfside-condo-collapse/story?id=78517075>.
3. "Condo Collapse: Champlain Towers in Surfside was Due for 40-Year Inspection," CBSMiami (June 24, 2021).
4. *Warembourg v. Excel Elec., Inc.*, 471 P.3d 1213, 1233 (Colo.App. 2020).
5. CRS § 13-21-115. The PLA is sometimes referred to as the Landowner Liability Act.
6. *Warembourg*, 471 P.3d at 1233 (emphasis added) (citing CRS § 13-20-802 ("It is the intent of the general assembly that [CDARA] apply to these types of civil actions while preserving adequate rights and remedies for property owners who bring and maintain such actions.")) (emphasis added)).
7. *Id.*
8. *Warembourg*, 471 P.3d at 1233-34 (emphasis added).
9. *Id.* at 1233 (emphasis added).

10. *Id.* at 1217.
11. *Id.* at 1229 (emphasis added).
12. *Id.* at 1218. The defendant's trial court briefing suggested it "owned" the power pole and outlets, but it did not discuss ownership of the ground on which they were located. See "Defendant Excel Electric Inc.'s Motion for Determination of a Matter of Law Pursuant to C.R.C.P. 56(h)," *Warembourg v. Excel Elec., Inc.*, No. 2017CV30891, 2018 WL 5823505 at *1 (Boulder Cty. Dist. Ct. July 16, 2018).
13. *Warembourg*, 471 P.3d at 1233 (emphasis added).
14. CRS § 13-20-802.5(1) (emphasis added).
15. CRS § 13-20-802 (emphasis added).
16. CRS § 13-20-802.5(1), (3).
17. See CDARA Cap on Noneconomic Damages Does Not Apply to a Personal Injury Claim Asserted by a Subcontractor's Employee Against Another Contractor, Woods Aitken blog (Aug. 4, 2020), <https://www.woodsaitken.com/cdara-cap-noneconomic-damages-does-not-apply-personal-injury-claim-asserted-subcontractors-employee> (discussing *Warembourg* and arguing "This case . . . calls into question whether general contractors can invoke CDARA against their subcontractors for construction defects because general contractors are not the property owners."). Cf. *Boulder Plaza Residential, LLC v. Summit Flooring, LLC*, No. 04CV1109 (Boulder Cty. Dist. Ct. Feb. 10, 2006) (holding CDARA's damages limitations do not apply to a developer's indemnity claim against a subcontractor); *Bituminous Cas. Corp. v. Okland Constr. Co.*, No. 12CV190 (La Plata Cty. Dist. Ct. Aug. 5, 2014) (holding CDARA's notice of claim process does not apply to a contractor's indemnity claim against another contractor seeking recovery of attorney fees and litigation costs arising from a construction defect case).
- If CDARA does not apply to claims between and among general contractors and subcontractors arising during the construction process, this may moot concerns about how to deal with CDARA's notice of claim process among these parties during a work-in-progress, as discussed in *CDARA's Scope*. But it might also create chaos if CDARA's notice of claim process governs property owners' defect claims against construction professionals but does not govern such construction professionals' indemnity, contribution, and other claims against other construction professionals. The suggested "beneficial interest" requirement might still include general contractors and subcontractors given that their "work," even if incorporated in a real property improvement owned by another, could be viewed as conferring on them the requisite interest.
18. See Sandgrund and Tuft, *supra* note 1 at 33-34 (discussing *Smokebrush Found. v. City of Colo. Springs*, No. 13CV1469 (El Paso Cty. Dist. Ct. Aug. 2, 2013), and *Suncor Energy U.S.A. Inc. v. Public Serv. Co. of Colo.*, No. 2019CV34388 (Denver Cty. Dist. Ct. Aug. 7, 2020)).
19. *Clark v. Hyatt Hotels Corp.*, No. 20-cv-01236-RM-SKC, 2022 U.S. Dist. LEXIS 54553 at *18-19, 2022 WL 884282 at *6 (D.Colo. Mar. 25, 2022), accepting *Clark v. Hyatt Hotels Corp.*, No. 1:20-cv-01236-RM-SKC, 2021 U.S. Dist. LEXIS 255417 at *5, 2021 WL 8129500 at *2 (D.Colo. Dec. 14, 2021) (magistrate's recommendation) (holding "Plaintiffs are not property owners and their claims do not arise from defects impacting *their* property," so CDARA's notice of claim process did not apply) (emphasis in original).
20. See CRS §§ 13-20-802.5(5), -803, -803.5 (notice of claim process and defect list requirements).
21. CRS § 13-21-102.5(3)(a).
22. See *Michael B. Enters., Inc. v. K B Home Colo., Inc.*, No. 17CA1339, slip op. at ¶¶ 30, 35 (Colo.App. June 7, 2018) (not selected for official publication) (holding CRS § 13-80-104 applied to a property owner's claims against a builder for improperly grading adjacent lots, causing flooding and damage to the plaintiff's property; noting, in dicta, that the statute of repose "operates independently from" CDARA and may apply to a claim even when CDARA does not).
23. CRS § 13-20-802.5(4).
24. CRS § 13-21-115(7)(b).
25. *Compare Trailside Townhome Ass'n v. Acierno*, 880 P.2d 1197, 1202 (Colo. 1994) (holding the PLA did not apply to claims by a townhome owner injured in a swimming pool accident because townhome owners had "a continuing right independent of [townhome] association consent to make use of the common areas by reason of their ownership of lots in the townhome complex, whereas trespassers, licensees, and invitees have no right to enter in the absence of consent."), with *Smith v. Exec. Custom Homes, Inc.*, 230 P.3d 1186, 1190 (Colo. 2010) (retirement community patio homeowner's slip and fall claims against homebuilder subject to CDARA).
26. See CRS § 13-80-104(1)(a)-(b) (two-year statute of limitations triggered when claimant or predecessor first discovered or should have discovered the physical manifestation of the defect that ultimately causes the injury); CRS § 13-80-104(1)(a), (2) (real property improvement statute of repose begins to run upon substantial completion of the real property improvement but suit deadline can be extended up to an additional two years depending on the circumstances). The PLA does not have its own statute of limitations, but typically the two-year statute of limitations for negligence and wrongful death claims applies. See CRS § 13-80-102(1)(a) and (d) (two-year limitations period for most personal injury and wrongful death claims). See also CRS § 13-80-108(1) (limitations period for most personal injury claims accrues when both the injury and its cause are known or should have been known) and -108(2) (limitations period for wrongful death claims accrues on date of death). Cf. *Homestake Enters., Inc. v. Oliver*, 817 P.2d 979 (Colo. 1991) (subcontractor's negligent operation of a sprinkler system in freezing temperatures, creating an icy sidewalk, invoked the real property improvement statute of limitations).

27. CRS § 13-20-806(7).

28. Colorado courts try to give meaning to every term used in a statute and avoid rendering any term superfluous. *Carrera v. People*, 449 P.3d 725, 729 (Colo. 2019).

29. CRS § 13-20-806(5) provides, “Claims for personal injury or bodily injury as a result of a construction defect shall not be subject to the treble damages provisions of the ‘Colorado Consumer Protection Act’”

30. CRS § 18-1-901(3)(c). The “dangerous dog” statute defines “bodily injury” as “any physical injury that results in severe bruising, muscle tears, or skin lacerations requiring professional medical treatment or any physical injury that requires corrective or cosmetic surgery.” CRS § 18-9-204.5(2)(a). See also *Serna v. Kingston Enters.*, 72 P.3d 376, 379 (Colo.App. 2002) (holding “personal injury” under Colorado’s Workers’ Compensation Act includes both physical and mental injury).

31. *Steedle v. Sereff*, 167 P.3d 135, 140-141 (Colo. 2007).

32. *Miller v. Carnation Co.*, 564 P.2d 127, 132 (Colo.App. 1977).

33. *Id.*

34. *Fish v. Liley*, 208 P.2d 930, 932 (Colo. 1949) (emphasis added).

35. *Aberkals v. Blake*, 633 F.Supp.2d 1231, 1234-37 (D.Colo. 2009) (emphasis added).

36. See *Stamp v. Vail Corp.*, 172 P.3d 437, 444-45 (Colo. 2007).

37. See generally Benson, ed., *Practitioner’s Guide to Colorado Construction Law* § 14.2.4 at 14-51 (CBA-CLE 2020).

38. *Sanders v. Constr. Equity, Inc.*, 42 S.W.3d 364, 372 (Tex.App. 2001) (Texas Residential Construction Liability Act does not bar recovery of exemplary damages, despite its damages limitations, which do not expressly mention exemplary damages).

39. *Stamp*, 172 P.3d at 448.

40. CRS § 13-21-102.5(2)(a) (emphasis added).

41. There are differences between the two caps. CDARA caps all noneconomic claims at \$250,000. CRS § 13-20-806(4)(a). The general noneconomic damages cap is \$250,000 for all non-CDARA, non-medical malpractice claims, but a court may increase this cap to \$500,000 if justified by clear and convincing evidence. CRS § 13-21-102.5(3)(a). Both caps adjust for inflation over time based on slightly different calculations.

42. CRS § 13-21-203.5. See also generally Grund et al., 7 *Colo. Practitioner’s Guide to Personal Injury Torts and Insurance* § 17:14 (West 3d ed. 2021) (discussing solatium damages, which are awarded in addition to economic damages and funeral and burial expenses, and “[a]s an alternative to putting on proof of various categories of noneconomic loss . . .”).

43. CRS §§ 13-20-802.5(2) and -806(1), (5).

44. See CRS § 13-20-802.5(2) (defining recoverable “actual damages” and not expressly including damages for injury to personal property for items such as inventory or non-fixture tenant finishes, or for lost rents

or profits).

45. *Cf. United Fire Group ex rel. Metamorphosis Salon v. Powers Elec., Inc.*, 240 P.3d 569, 573-74 (Colo.App. 2010) (because subrogated property insurer “stands in the shoes of its insured,” it can have no greater rights than its insured, and CRS § 13-80-104’s statute of limitations barred its construction defect claims). *But see Fire Ins. Exch. v. Monty’s Heating and Air Conditioning*, 179 P.3d 43, 46-47 (Colo.App. 2007) (because subrogated property insurer was not a construction professional and therefore not a “claimant” under CRS § 13-80-104(1)(b)(II), that statute of limitations did not apply). *Cf. D.R. Horton, Inc.-Denver v. Travelers Indem. Co. of Am.*, 860 F.Supp.2d 1246, 1260 (D.Colo. 2012) (holding CDARA did not apply to a construction professional’s breach of contract claims against its subcontractors’ insurers for failing to defend it because these were insurance coverage claims, not construction defect claims).

46. CRS § 13-20-802.5(1) (emphasis added).

47. CRS § 13-20-804(1)(a)-(c) (emphasis added).

48. CRS § 13-20-802 (emphasis added).

49. See, e.g., *Hubbell v. Carney Bros. Constr.*, No. 05-cv-00026-CMA-KLM, 2010 U.S. Dist. LEXIS 131578 at *9-12, 2010 WL 5147567 at *5 (D.Colo. Dec. 13, 2010) (unpublished) (holding common law damages measures still apply post-CDARA, but CDARA establishes monetary caps on those damages and “nothing in the language of the CDARA is exclusionary of other damages measurements . . .”). *But see 5070 Oakland, LLC v. McDonald Consulting and Design*, No. 2017CV33283, 2018 Colo. Dist. LEXIS 958 at *4 (Denver Cty. Dist. Ct. Aug. 3, 2018) (declining to follow *Hubbell*, holding that “these are not damages ‘caps,’ they are alternative measures of damages to which a CDARA claimant is limited.”).

50. In one case involving the Colorado Consumer Protection Act (CCPA), the Colorado Court of Appeals held that given that statute’s “broad legislative purpose,” and considering the “entire statutory scheme” and the “overall purposes” of the law at issue and the “several sections involved” in the dispute, the Court would construe a statutory subsection broadly to include a term that did not appear in the subsection’s text. See *People ex rel. MacFarlane v. Alpert Corp.*, 660 P.2d 1295, 1297 (Colo. App. 1982) (holding where CCPA subsection expressly prohibits a deceptive trade practice as to “goods or services,” courts will extend the application of that subsection to the sale of “property”; “[W]e must read and consider the Act in its entirety.”).

51. Comments by Sen. Hillman, Hearings on HB 03-1161 before House Conference Committee, 65th Gen. Assemb., 1st Reg. Sess., archive CD-3, file 9f at 21’41”-22’04” (Apr. 1, 2003). The authors’ computerized search of the available hearing transcripts on HB 03-1161 for the phrase “personal property” produced no results.

52. CRS § 13-20-802.5(2) (emphasis added). *Cf. MCI Commc’ns Servs., Inc. v. B&F Co.*, No. 19-cv-01546-STV, 2020 U.S. Dist. LEXIS 123111, 2020 WL 3971641 at *3, n.7 (D.Colo. July 13, 2020)

(magistrate’s recommendation) (distinguishing residential from commercial property for purposes of recovering “loss of use” damages under CDARA).

53. See, e.g., *Brooke v. Rest. Servs.*, 906 P.2d 66, 68 (Colo. 1995) (“statutes in derogation of the common law must be strictly construed, so that if the legislature wishes to abrogate rights that would otherwise be available under the common law, it must manifest its intent either expressly or by clear implication” (citations and internal quotations omitted), *superseded by statute on other grounds as stated in Christen-Loper v. Bret’s Elec., LLC*, No. 15-cv-00496-RM-KMT, 2016 U.S. Dist. LEXIS 41302 at *5-8 (D.Colo. Feb. 11, 2016).

54. *Biosera, Inc. v. Forma Sci., Inc.*, 941 P.2d 284, 286 (Colo.App. 1996) (“Generally, the measure of damages for injury to personal property is the difference between its market value immediately before and after the injury.”).

55. See generally *Airborne, Inc. v. Denver Air Ctr., Inc.*, 832 P.2d 1086, 1089 (Colo.App. 1992) (damages for personal property injury include reasonable rental value during the time of its loss of use while the property is being repaired). *But see Power Equip. Co. v. Fulton*, 513 P.2d 234, 236 (Colo.App. 1973) (where “plaintiff is claiming that the [personal] property has been rendered unusable by defendant’s negligence, plaintiff’s damages are loss of use of the item.”). As to business property, see *Koenig v. Purco Fleet Servs. Inc.*, 285 P.3d 979, 983-84 (Colo. 2012) (plaintiff may elect between the reasonable rental value of a chattel or, alternatively, the net lost profits that could have been earned by using the chattel, as both approximate loss of use damages).