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Theories of Homebuilder Liability for Subcontractor Negligence - Part I

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Residential homebuilders' liability for their subcontractors' negligence may exist under various legal theories, as discussed in Part I of this article. Part II will more closely examine the policies underlying these liability theories, particularly the vicarious liability doctrine; cover possible distinctions among subcontractors relevant to imposing liability for their conduct; and discuss related practical matters, including insurance coverage considerations and sample jury instructions. Issues surrounding the question of whether homebuilders are liable for their subcontractors' negligence generally have not found their way to Colorado's appellate courts. Nonetheless, the authors have observed that Colorado's district courts regularly rule or instruct juries that homebuilders are liable for their subcontractors' negligence in constructing a home.1 As such, an analysis of the legal theories available for imposing such liability is useful. This two-part article focuses on the liability of residential builders, not commercial builders, because of different legal duties the law imposes on each.2

Part I of this article focuses on various legal theories that may support imposing liability on homebuilders for their subcontractors' negligence. These concepts are listed in the accompanying sidebar, "Potential Theories Underlying Homebuilder Liability."

Part II, which will appear in this column in July 2005, details the policies underlying various liability theories, particularly the vicarious liability doctrine, and sets forth possible distinctions between liability for acts of subcontractors who are design professionals and those who are not. Part II also addresses related insurance coverage issues and provides sample jury instructions that may be useful when instructing a jury charged with deciding whether the facts necessary to impose such liability are present, if the issues relating to such liability are not decided as a matter of law by the court.

Independent Duty Analysis

Homebuilders owe an independent tort duty of reasonable care in constructing a home. In the seminal 1983 case, *Cosmopolitan Homes, Inc. v. Weller*,3 the Colorado Supreme Court stated, "An obligation to act without negligence in the construction of a home is independent of contractual obligations such as an implied warranty of habitability."4 The Court added:

The fact that a contract may have existed between a builder and the original purchaser of the home does not transform the builder's contractual obligation into the measure of its tort liability arising out of its contractual performance. . . . The principle . . . that a negligence claim, not limited by privity of contract, may lie against a contractor - requires a builder to use reasonable care in the construction of a home in light of the apparent risk. . . . Negligence requires that a builder or contractor be held to a standard of reasonable care in the conduct of its duties to the foreseeable users of the property. Negligence in tort must establish defects in workmanship, supervision, or design as a responsibility of

the individual defendant.5

The Court held that the *Cosmopolitan Homes* plaintiffs-homeowners, who were the fourth owners of the home at issue, could maintain a negligence action for latent defects in their home based on the builder's independent duty to act without negligence in the construction of a home.6 This independent duty existed because buyers would not likely have access to inspect the structural aspects of a home.7

The Court noted that a purchaser cannot afford to find a latent defect in his or her home that destroys the family's budget and have no remedy, particularly given the mobility of most potential homeowners. According to the Court, it is foreseeable that a house will be sold to subsequent purchasers and any structural defects are as certain to harm the subsequent purchaser as the first purchaser.8 In 2003, in *Stiff v. BilDen Homes, Inc.*,9 the Colorado Court of Appeals expressly held that the builder's liability begins with the first purchaser and extends to subsequent buyers.10

Generally, "a party suffering only economic loss from the breach of an express or implied contractual duty may not assert a tort claim for such a breach."11 However, this rule does not apply to home construction because of the existence of an independent tort duty of care, independent of any contract.12

In another 2003 case, *Yacht Club II Homeowners Association, Inc. v. A.C. Excavating*,13 the Colorado Court of Appeals applied this independent duty to subcontractors who helped build a home. The *Yacht Club II* court noted the Supreme Court's decision in *Cosmopolitan Homes* as "strongly endorsing a policy favoring quality construction of homes."14 Further, the *Yacht Club II* court stated:

. . . Subcontractors play an important part in the construction of homes; they are aware that their work is, ultimately, for the benefit of homeowners and that harm to homeowners from negligent construction is foreseeable. To discourage misconduct and provide an incentive for avoiding preventable harm, we conclude that subcontractors owe homeowners a duty of care, independent of any contract provision, in connection with the construction of homes.15

In July 2004, the Colorado Supreme Court granted *certiorari* in *Yacht Club II*. The Court will soon address whether a homeowners association's damages claim asserted directly against subcontractors arising from the subcontractors' negligent construction work is barred by the economic loss rule.16

Potential Theories Underlying Homebuilder Liability

Independent duty

Assumed duty

Joint liability when "acting in concert"

Non-delegable duty

Express and implied warranty duties

Non-delegable duty arising from inherently dangerous activities

Vicarious liability.

Regardless of how the Colorado Supreme Court decides the issues before it in *Yacht Club II*, such decision should not affect the analysis of whether a homebuilder bears liability for the negligence of its subcontractors due to the homebuilder's independent tort duty of care. For instance, if the Court holds that subcontractors do not owe an independent tort duty of care, this arguably strengthens the policy reasons for imposing liability for subcontractor negligence on builders so as to ensure that homeowners are made whole.17 Conversely, if subcontractors are found to owe an independent tort duty of care, there are a number of reasons this result should not materially affect imposing such liability on the homebuilder as well. (*See* "Non-Delegable Duties and *Pro Rata* Liability Act," *below*.)

The proposition that sound policy reasons exist to hold homebuilders liable for the negligence of their subcontractors has been articulated by courts outside Colorado. For instance, according to the Georgia Court of Appeals:

It would be too easy for a builder-seller of a house to avoid liability by hiring inexperienced crews, providing little or no supervision, and then claiming the culprit of any negligence was an independent contractor. The contract to build, with its attendant obligations, is between buyer and builder, not the buyer and any independent contractor. As for a negligence claim, having held himself out as having the ability to build a fit and proper house, *the builder generally cannot abdicate to an "independent contractor" his duty to do it*. The right to direct and control the work is assumed and retained by the builder in these cases.18 (*Emphasis added; citations omitted.*)

Another court noted:

[I]nherent in any contract on the part of a general contractor to erect or repair a building is the obligation to do the work in a careful and workmanlike manner. . . . [I]t would be *indefensible to permit the general contractor to shrug off his contractual duties in this regard by arguing*

that the negligence was not his but that of an independent subcontractor employed by him.19 (*Emphasis added; citations omitted.*)

At least one Colorado case echoes an analogous concern. In *Springer v. City and County of Denver*,20 in the context of evaluating a claim that a defendant's governmental immunity was not waived because the defective construction work at issue had been performed by the defendant's subcontractor, the Colorado Supreme Court said:

[I]mmunity waiver would seldom, if ever, apply [if a] public entity could simply hire an independent contractor for any and all public works projects and *escape answering for injuries to citizens using its buildings* .21 (*Emphasis added.*)

Colorado's appellate courts have made clear the important public policies underlying the independent tort duty to properly build a home. These same courts must decide whether the policies would be undermined if a builder is permitted to shunt a portion of its tort liability to subcontractors, even if a homeowner may sue such subcontractors directly for their negligence.22 The courts also must address whether the same public policies underlying an independent tort duty of care on the part of homebuilders support imposing liability on such builders for their subcontractors' negligence.

If the decisions of the district courts are an indicator of how Colorado's appellate courts will resolve this issue, it appears likely homebuilders are liable for their subcontractor negligence based on the homebuilder's independent duty of care. Whether this liability can be properly translated to the homebuilder as an assumed or non-delegable duty, under the rubric of the vicarious liability doctrine (as will be discussed in Part II of this article), or otherwise, is the subject of the balance of this article.

Assumed Duty Analysis

Colorado recognizes that a person may assume a tort duty of care.23 For example, the Colorado Court of Appeals has held that when an insurer assumed direct responsibility to effect repairs to a damaged home, then hired an independent contractor to perform the work, the insurer may not escape tort liability for damages accruing as a result of the negligent performance of the work. This is because it assumed the duty to ensure that the task was performed with due care.24 Even gratuitously assumed duties carry with them the responsibility to act with due care.25

In practice, a builder often expressly assumes a duty to design and build a home in construction and sale contracts, with the work to be performed either by the builder directly or through its subcontractors. Such contracts frequently provide that the power to direct and supervise all construction subcontractors rests exclusively with the builder. Thus, under proper circumstances, a court could conclude that a builder or developer has expressly or impliedly assumed a duty of care by agreeing to perform certain construction activities.

Joint Liability When "Acting In Concert" Analysis

CRS § 13-21-111.5(4) provides that "[j]oint liability shall be imposed on two or more persons who consciously conspire and deliberately pursue a common plan or design to commit a tortious act." This statute has been construed to impose joint and several liability on two or more defendants under broader circumstances than simply where defendants engage in an "active conspiracy" or "joint venture." Thus, in *Resolution Trust Corp. v. Heiserman* ,26 a case involving the negligent underwriting, approval, and later administration of various commercial loans, the Colorado Supreme Court held that if two persons expressly or impliedly agree on a course of conduct, they are jointly liable for any damages flowing from that conduct if negligently done.27

In *Heiserman*, the Colorado Supreme Court recognized that the doctrine of "joint liability" as between tortfeasors "acting in concert" was not abolished on the adoption of CRS § 13-21-111.5.28 *Heiserman* held that two or more negligent tortfeasors may be *jointly liable for their negligence* where an express or implied plan or design to act or refrain from acting results in injury to another, even if they did not intend to act tortiously.29 Thus, joint liability under CRS § 13-21-111.5(4) can be based on negligent conduct where two tortfeasors simply agree to pursue a common plan or design.

In reliance on the *Heiserman* case, homeowner counsel frequently argue that the builder and its subcontractors are jointly liable for workmanship defects, but not necessarily design defects, as a matter of law, where a builder delegates a portion of the design or construction of a home to a subcontractor. This may be especially likely where such work is inspected, approved by, and carried out pursuant to plans provided by the builder.30

One common scenario that surfaces in construction defect cases is the subcontractor's assertion of the defense that it was merely following the builder's invitation or direction when it performed its work, in violation of an applicable building code provision. Such defense may trigger application of CRS § 13-21-111.5(4), inasmuch as the subcontractor and homebuilder are conducting themselves not so differently from the classic examples of tortfeasors who "act in concert" (such as persons who agree to a drag

race in violation of law).

In one case, a Colorado district court denied summary judgment on a claim of joint liability under CRS § 13-21-111.5(4),31 as that statute has been construed by *Heiserman*. The court found that the defendant construction manager could be held "jointly liable with the developer/owner, the general contractor or others involved" in a multi-family construction project based on his participation in the allegedly negligent construction activities at issue.32 Colorado's appellate courts have not yet explored the import and breadth of CRS § 13-21-111.5(4) as to claims against builders who subcontract specific construction tasks subject to the builder's plans and specifications, supervision, quality control, and approval.

Non-Delegable Duty Analysis

Colorado recognizes that a non-delegable tort duty of care may be imposed where: (1) strong public policies support imposition of such a duty of care; (2) a party implicitly assumes such a duty of care ancillary to express contractual obligations;33 or (3) such a duty of care is expressly or impliedly imposed by statute. If a statutorily-assumed duty is recognized, a principal generally is held responsible for the wrongful conduct of its agent in performing activities within the scope of the duty.34 Although application of non-delegable duty principles has not yet been addressed in the home construction context, review of the application in other situations provides some insight into the suitability of the doctrine to homebuilders.

Public Policy

Public policy often demands imposition of a non-delegable duty of care to ensure that employers remain financially responsible and morally culpable for the acts and omissions of others to whom they assign certain tasks.35 In a personal injury suit arising from a city subcontractor's creation of a dangerous condition as a result of its construction of a public building, the Colorado Supreme Court stated, "[The] core principle behind all nondelegable duties" is that "the responsibility is so important to the community that the employer should not be permitted to transfer it to another."36

Colorado applies the same rule to owners of utility poles abutting highways, installers of safety devices on mass-produced products, and owners of public ways.37 The strong public policies that gave rise to Colorado's recognition of an independent tort duty on the part of homebuilders to members of the home-owning community support the conclusion that this duty of care is non-delegable.

Statutes

Imposition of a non-delegable duty of care most frequently occurs where: (1) the conduct at issue is governed by constitution or statutes, including local ordinances; and (2) important public policies are served by imposing such a duty of care. Codifying a matter is often powerful evidence that important public policies are implicated.38 For example, Colorado imposes a non-delegable statutory duty of care on property owners under Colorado's Premises Liability Act.39

By statute, Colorado's General Assembly has authorized local authorities to adopt the Uniform Building Code ("UBC"), and many Colorado counties and municipalities have done so by local ordinance.40 The UBC, in turn, states that it is intended to

provide minimum standards to safeguard life or limb, health, property and public welfare by regulating and controlling the design, construction, quality of materials, use and occupancy, location and maintenance of all buildings and structures.41

Thus, in the context of analyzing homebuilder liability for subcontractor negligence, homeowner counsel may argue that adoption of the UBC by a local governmental entity imposes a non-delegable duty of care on builders to ensure compliance with the UBC in constructing homes in that jurisdiction to avoid actual property damage to or the loss of use of the structure. At least one Colorado municipality expressly recognizes the non-delegable duty of a contractor to ensure work is done in conformance with the minimum standards of the UBC.42

Additional support for such conclusion may be found in Colorado's Construction Defect Action Reform Act ("CDARA").43 CDARA provides that a construction defect negligence claim may be asserted if: (1) it arises from the failure to build in substantial compliance with an applicable building code; and (2) such failure results in actual damage to or loss of use of real or personal property; bodily injury or wrongful death; a risk of bodily injury or death; or a threat to the life, health, or safety of the occupants.44 Other statutes and ordinances, such as Colorado's natural hazard laws,45 may impose a non-delegable duty of care.46

Non-Delegable Duties and **Pro Rata** *Liability Act*

As part of its tort reform legislation, Colorado enacted CRS § 13-21-111.5. That statute abolished joint liability among tortfeasors under some circumstances. If a timely and proper designation of potentially liable non-parties who owed a legal duty of care to the plaintiff is made, the fact finder must allocate liability *pro rata* among the defendants and all properly designated non-parties the jury finds to be

negligent or at fault and who caused the plaintiff's damages.47

The Colorado Court of Appeals has held that where a non-delegable duty of care exists, a person who is vicariously liable (or otherwise liable as a matter of law) for the tortious conduct of a co-party or nonparty may not reduce his or her liability *pro rata* based on the other's conduct.48 Thus, although a property owner is entitled to designate its independent maintenance contractor as a nonparty at fault, because of the property owner's non-delegable duty of care under Colorado's Premises Liability Act,49 the plaintiff is entitled to an instruction that the negligence of the contractor must be imputed to the property owner.50 If Colorado courts conclude that a builder owes non-delegable duties of care regarding its construction of a home or common interest community, designations of nonparty or other party fault under CRS § 13-21-111.5 likely become irrelevant, at least insofar as measuring the builder's damages liability to the homeowner.

However, even if a court imposed a non-delegable duty on a homebuilder, rendering it liable for the negligence of its subcontractors, a *pro rata* apportionment of liability between the homebuilder and its subcontractor still would be proper. This is because the builder's responsibility includes the entire construction of a home, whereas the subcontractor's responsibility is limited to that arising from its subcontracted work. Such an apportionment of fault as to the sued subcontractor's causal share of the damages may be necessary to: (1) enforce indemnity or contribution obligations; or (2) properly limit the subcontractor's liability to the homeowner only to the portion of the damages that it caused.

Express and Implied Warranty Analysis

Generally, a contractor cannot avoid liability for breach of its express contractual duties by urging that those duties were assigned to another to perform. The Colorado Court of Appeals has noted:

[W]here a general contractor agrees with the owner of property to perform a specific task, he may not, by hiring an independent contractor to perform that task, escape liability for breach of contract for damages sustained by the owner which result from the negligence of the independent contractor.51 (*Citations omitted.*)

Presumably, then, where a homebuilder's liability is defined by contract, that liability arises from the reasonable expectations of the contracting parties as expressed or implied in the agreement. In this case, established law generally renders the homebuilder fully liable for breach of its warranties, regardless of whether the homebuilder's or its subcontractors' errors result in the breach.

Colorado recognizes the existence of implied warranties in contracts for the sale of a new home by a builder-vendor.52 Colorado's implied warranties have been likened to strict liability for faulty construction. As stated in *Cosmopolitan Homes*, "Proof of a defect due to improper construction, design, or preparation is sufficient to establish liability in the builder-vendor."53 In a case involving construction defects in a new home, the Court noted, "The position of the builder-vendor, as compared to the buyer, dictates that the builder bear the risk that the house is fit for its intended use."54

Thus, a builder who expressly or impliedly contracts to perform specified construction effectively would be strictly liable for its subcontractors' negligence that results in a breach of the builder's express or implied warranties. However, such liability generally runs only from the builder-vendor to the first purchaser of a newly-built home, with some limited exceptions. Further, unsettled questions exist whether and under what circumstances such liability, particularly as to implied warranties, may be limited or disclaimed by contract.55

Inherently Dangerous Activity Analysis

It is well settled that when work to be done is itself dangerous, or is of a character inherently dangerous unless proper precautions are taken, an employer cannot evade liability by engaging an independent contractor to do such work.56 This "inherently dangerous" activity doctrine, sometimes improperly confused with the "ultra-hazardous" activity doctrine applicable to the transmission of electricity, blasting, and propane gas storage,57 applies both to property damage and bodily injury claims under proper circumstances.58 An independent analysis resulting in the imposition of liability on a builder for its subcontractor's negligence could arise from application of the inherently dangerous activity doctrine.

In *Huddleston v. Union Rural Electric Ass'n*,59 in holding that a jury question was presented as to whether flying a small airplane over the mountains in winter constituted an inherently dangerous activity, the Colorado Supreme Court adopted the reasoning of the *Restatement (Second) of Torts* § 427, which provides:

One who employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, or which he contemplates or has reason to contemplate when making the contract, is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such

danger.60

Examination of the elements of what is an inherently dangerous activity may assist in the analysis of whether home construction is properly characterized as such an activity under proper circumstances, thereby rendering a homebuilder liable for its subcontractors' negligence.

The **Huddleston** *Test*

According to *Huddleston*,61 an activity qualifies as inherently dangerous when three conditions exist. First, the activity presents a special or peculiar danger to others that is inherent in the nature of the activity or the particular circumstances under which it is to be performed. Second, the activity involves risks different in kind from the ordinary risks that confront persons engaged in generally similar activities in the community. Third, the employer knows or should know the risk is inherent in the nature of the activity or in the particular circumstances under which the activity is to be performed.62

Colorado district courts are being asked to apply these factors to certain unique homebuilding activities and to determine whether such activities may properly be characterized as "inherently dangerous," either as a matter of law or as a jury question. For instance, many cases involve homes located in Colorado's "Deeply Dipping Bedrock Area," a mapped geologic hazard that has been characterized as involving a "consistently higher risk" of damage for structures built in these areas.63 Failure rates have been found to exceed 75 percent for such homes.64

Other homebuilding situations that may support application of the inherently dangerous doctrine include construction in areas that: (1) are geologically dangerous, such as on unstable slopes or on potentially unsound, ancient landslides;65 (2) have highly expansive soils exhibiting swell potentials in the range of 4 percent or more at 1,000 pounds surcharge pressures;66 or (3) have high groundwater tables.67 The Colorado Supreme Court has held that whether an activity is inherently dangerous often is a question of fact for the trier of fact.68

Sometimes homeowner counsel seek to apply the inherently dangerous activity doctrine to ordinary home construction activities beyond the scope of the rule. At the same time, some builders' counsel urge that no home construction activity warrants the doctrine's application. The issues discussed below must be considered by court and counsel in any construction case involving allegations that the builder engaged in an inherently dangerous activity.

Establishing Inherently Dangerous Activity

It is necessary to evaluate whether the home construction at issue constitutes an inherently dangerous activity. For example, constructing a home atop a "geologic hazard"69 typically involves special and unique risks to home construction.

Local jurisdictions often recognize that such home construction risks are so unusual and grave that they adopt special regulations governing the activities, mandating extensive and unique geotechnical investigations to be performed as to the suitability of any particular lot for home construction versus other lots in the same jurisdiction. For example, Jefferson County adopted special Deeply Dipping Bedrock Area development and home construction regulations; Colorado Springs adopted a unique Hillside Overlay Ordinance; and Mesa County adopted various development limitations pursuant to its Land Development Code due to highly publicized landslides that damaged homes located in Grand Junction and sitting on bluffs overlooking the Colorado River.70

Inherently Dangerous Activities: Examples of Relevant Evidence

Following are some types of evidence that may be used to prove that a builder knew about inherent dangers or failed to take necessary precautions:

* Public agency reports, such as the Colorado Geologic Survey

* Development regulations

* Building codes

* Builder's internal and external engineering investigations and reports

* Construction industry custom and practices

* Past experience of the builder and its subcontractors (including design professionals)

* Industry publications and journals

* Insurance and third-party warranty company underwriting guidelines for builders.

Risks That Differ From Ordinary Risks

Homeowner counsel will need to present evidence that the dangers posed by the construction of lots on a particular site differ "in kind"71 from those encountered when constructing on typical home construction sites. The question under the *Huddleston* test is not whether builders are sometimes faced with the dangers posed by lot construction over landslide zones and unstable slopes. Instead, the question is whether the dangers inherent in constructing lots over a landslide zone or an unstable slope

differ in kind from the dangers attendant to other construction sites in which these hazards are absent. The case must involve a "peculiar risk," that is "a risk differing from the common risks to which persons in general are commonly subjected by the ordinary forms of negligence which are usual in the community."72

In *Huddleston*, the varying condition that justified a finding of the presence of an "inherently dangerous" activity was winter - a condition encountered by Colorado aircraft at least three months out of every year. Nonetheless, the *Huddleston* court remanded the case so the jury could decide under proper instructions whether flying in winter posed dangers inherently different from those encountered when flying in non-winter conditions.73

Knowledge of Inherent Dangers

Homeowner counsel must present evidence that the builder knew or should have known that the land underlying the proposed construction presented a substantially increased risk of damage.74 The test is one of objective, not subjective, knowledge.75 Examples of this kind of evidence are listed in the accompanying sidebar, "Inherently Dangerous Activities: Examples of Relevant Evidence."

Failing to Take Necessary Precautions

Homeowner counsel must prove that the builder failed to take precautions against the special dangers involved in construction of the home on the site in question. From this evidence, a jury could reasonably conclude that this special danger was or should have been contemplated by the builder at the time it contracted with subcontractors.76 (*See* the accompanying sidebar on inherently dangerous activities.)

Applying Collateral Negligence Exception

An exception to the inherently dangerous activity doctrine applies where the "collateral negligence" of the contractor is implicated. According to the Colorado Supreme Court in *Huddleston*, collateral negligence is negligence

not reasonably to have been contemplated by the employer, in contrast to negligence reasonably to have been contemplated as a recognizable risk associated with the ordinary or prescribed way of doing the work under the circumstances.77

As the Court explained in a footnote, this exception represents "little more than a negative statement" of the inherently dangerous activity exception, "describing the type of situation in which the special danger is not necessarily involved in the work to be done, and not contemplated in connection with the way it is expected to be done."78

The Court also noted that, because § 426 of the *Restatement (Second) of Torts*, which section it cited with approval in its opinion, is the "converse" of § 427, a jury probably does not need to be instructed as to "collateral negligence" because the principle is already subsumed by the three elements necessary to establish the existence of an "inherently dangerous" activity.79 It may be difficult for a builder to establish that the builder did not have "reason to contemplate" its own subcontractor's negligence under § 426(c) where the builder reserves the right to inspect and approve the subcontractor's work for any errors or omissions before making payment.

Presenting **Huddleston** *Question to Jury*

If there is any reasonable doubt whether a builder is vicariously liable for the negligent acts and omissions of its subcontractors, the question should be presented to the jury. The *Huddleston* Court stated:

. . . [I]f a jury could reasonably find from the evidence, when viewed in the light most favorable to the plaintiff, that all of the above elements [of an inherently dangerous activity] have been proven by a preponderance of the evidence, *then the issue of whether the activity is inherently dangerous should be submitted to the jury*.80 (*Emphasis added*.)

One reported decision reflects that a jury was instructed to decide whether the provision of soils engineering services under the unique circumstances of that case (involving a potential rockfall) constituted an inherently dangerous activity. In *Vikell Investors Pacific, Inc. v. Kip Hampden, Ltd.*,81 the trial court gave the following instruction:

If you find that the provision of geotechnical services with regard to a geological hazard zone constitutes an inherently dangerous activity, you are instructed that one carrying on an inherently dangerous activity must exercise the highest possible degree of skill, care, caution, diligence, and foresight . . . [and] the failure to do so is negligence.82

In sum, applying the *Huddleston* analysis to homebuilding activities suggests that there are situations potentially invoking application of the "inherently dangerous" doctrine where a court should take one of two approaches. First, the court may instruct the jury that the builder is liable for the conduct of its subcontractors who performed the work as a matter of law. Second, the court may allow the jury to determine whether the homeowner has proven all elements necessary to establish the builder's vicarious liability for the conduct of its subcontractors under the doctrine and then to impose such liability.

Conclusion

Colorado recognizes many legal theories that may support the imposition of liability on homebuilders for their subcontractors' negligent conduct. These theories include: independent duty; assumed duty; joint liability when "acting in concert"; common law, contractual, and statutory non-delegable duties; express and implied warranty liability; non-delegable duties arising from inherently dangerous activities; and, to be discussed more fully in Part II, vicarious liability.

Part II of this article, which will appear in this column in July 2005, also will explore the public policy grounds under which liability, particularly vicarious liability, may properly be imposed on employers for the conduct of their agents and independent contractors. Part II will analyze whether such liability should extend to the acts and omissions of a homebuilder's design professionals under proper circumstances. In addition, Part II will cover related practical issues that must be dealt with in cases where a builder may be held liable for its subcontractors' negligence, including liability insurance coverage considerations, and preparation of jury instructions.

NOTES

1. "Colorado law prohibits a homebuilder from avoiding liability for defective construction by shifting blame to its subcontractors, either generally, or pursuant to a designation of nonparties at fault. Further, a defendant may not so attempt to shift liability even if the plaintiff's claims arise out of negligence rather than contract." Order, Dec. 7, 2001, *Township at Dakota Patio Homeowner's Ass'n, Inc. v. CMC Homes, LLC et al.*, No. 00-CV-2853 (Jefferson County Dist. Ct.). *See also* Order, Feb. 1, 2002, *Township at Dakota Patio Homeowner's Ass'n, id.*; Ruling, June 19, 2002, Transcript at pp. 2-6, *Haberer v. Peterson Constr., Inc.*, 99-CV-695 (Jefferson County Dist. Ct.); Order, May 18, 2001, *Terrace at Columbine II v. Vision Homes et al.*, No. 99-CV-2632 (Jefferson County Dist. Ct.); Order, Feb. 24, 1998, *Mandsager v. Aller-Lingle* , No. 96-CV-415-3 (Larimer County Dist. Ct.). All of these find a homebuilder liable for its subcontractors' negligence, including, in most of these cases, the negligence of its engineers. *See also Hoang v. Monterra Homes (Powderhorn) LLC*, 99-CV-2425 (Jefferson County Dist. Ct. Jan. 2002) (court approved use of jury instruction stating builder liable for conduct of its subcontractors); *Secrist v. Chapparal* , No. 99-CV-2784 (Jefferson County Dist. Ct. Dec. 2000) (approving similar jury instruction); *McCoy v. Sessions*, No. 99-CV-1409 (Adams County Dist. Ct. Oct. 2001) (same); *Parker v. Carlton Homes*, No. 95-CV-11566 (Jefferson County Dist. Ct. Mar. 1997) (same).

2. For a recent discussion of the much narrower legal duty imposed on commercial builders and limitations on that duty, *see* Phelan, "Avoiding Tort Liability in Design, Construction, and Inspection of Commercial Projects, 34 *The Colorado Lawyer* 81 (Jan. 2005).

3. *Cosmopolitan Homes, Inc.*, 663 P.2d 1041 (Colo. 1983).

4. *Id.* at 1042.

5. *Id.* at 1045.

6. The Supreme Court recently reaffirmed this principle in *Town of Alma v. Azco Constr., Inc.*, 10 P.3d 1256, 1266 (Colo. 2000). *See also Stiff v. BilDen Homes, Inc.*, 88 P.3d 639, 641 (Colo.App. 2003), *as modified* ("homebuilder has an independent duty to act without negligence in the construction of a home . . . independent of contractual obligations").

7. *Cosmopolitan Homes, supra*, note 3 at 1045 ("Even if a buyer is sufficiently knowledgeable to evaluate a home's condition, he rarely has access to make any inspection of the underlying structural work, as distinguished from the merely cosmetic features.").

8. *Id.*

9. *BilDen Homes, Inc., supra*, note 6.

10. *Id.* at 641-42.

11. *Town of Alma, supra*, note 6 at 1266.

12. *Id.* at 1265-66 (distinguishing *Cosmopolitan Homes, supra*, note 3, on this basis).

13. *Yacht Club II Homeowners Ass'n, Inc.*, 94 P.3d 1177 (Colo.App. 2003), *cert. granted*, S.Ct. No. 03SC842 (Colo. July 26, 2004).

14. *Id.* at 1181.

15. *Id.*

16. For a general discussion of the economic loss rule, *see* Lawler, "Foreseeability and the Economic Loss Rule - Part I," 33 *The Colorado Lawyer* 81 (July 2004); Part II, 33 *The Colorado Lawyer* 71 (Sept. 2004).

17. Making the homeowner whole under these circumstances may be aided by the fact that if the Supreme Court holds that subcontractors owe no tort duty to the homeowner, it is unlikely a builder will be able to apportion any fault to a nonparty subcontractor because a nonparty fault designation is only proper "when the defendant has made out a *prima facie* case that the potential nonparty *breached a legal duty* to the plaintiff." (*Emphasis added.*) *Stone v. Satriana*, 41 P.3d 705, 712 (Colo. 2002). *See also*

Redden v. SCI Colorado Funeral Servs., Inc., 38 P.3d 75, 80 (Colo. 2001) (for purposes of designation statute, party must show duty, breach of that duty, causation, and damages); *Miller v. Byrne*, 916 P.2d 566 (Colo.App. 1995), *rehr'g denied, cert. denied* (1996) (apportionment of fault to nonparty improper if nonparty owed no legal duty of care to plaintiff). *Cf. Barton v. Adams Rental, Inc.*, 938 P.2d 532, 536 (Colo. 1997) ("instruction regarding nonparty liability should only be submitted to the jury when there is evidence in the record to support such a claim").

18. *Hudgins v. Bacon*, 321 S.E.2d 359, 366 (Ga.App. 1984), *rehr'g denied, cert. denied.*

19. *Nat'l Fire Ins. Co. of Hartford v. Westgate Constr. Co.*, 227 F.Supp. 835, 837 (D.Del. 1964), *relied on in Brooks v. Hayes*, 395 N.W.2d 167 (Wis. 1986) (finding source of tort duty as outgrowth of underlying contractual duty); *St. Paul Cos. v. Constr. Mgmt. Co., Ltd.*, 96 F.Supp.2d 1094 (D.Mont. 2000) (same).

20. *Springer v. City and County of Denver*, 13 P.3d 794, 801-02 (Colo. 2000).

21. *Id.* at 801.

22. *See Haberer, supra*, note 1, Ruling, June 19, 2002, Transcript at pp. 3-6 ("The general idea clearly from our courts is that when a builder is engaged to build a house and the builder elects to use subcontractors to do the work and hires those subcontractors and supervises those subcontractors, that the builder has a duty to make sure that they do the work properly and is vicariously liable for any negligent work that the subcontractors do. And that is true whether the builders' obligation is in contract to a direct purchaser or in negligence to the subsequent purchaser.").

23. *See Jefferson County Sch. Dist. R-1 v. Justus*, 725 P.2d 767, 769-72 (Colo. 1986) (discussing duties imposed by law solely on basis of relationship between parties and relationship of assumed duties to claims of negligence). *See also DeCaire v. Pub. Serv. Co.*, 479 P.2d 964, 966-67 (Colo. 1971) (someone who gratuitously or for consideration renders services to another that he or she should recognize as necessary for protection of third person or that person's things is subject to liability to third person for physical harm resulting from failure to exercise reasonable care), *adopting Restatement (Second) of Torts* § 324A (1965).

24. *Weaver v. Harmon*, 508 P.2d 418 (Colo. App. 1972), *cert. denied* (NSOP).

25. *See DeCaire, supra*, note 23.

26. *Heiserman*, 898 P.2d 1049 (Colo. 1995).

27. *Id.* at 1057.

28. *Id.* at 1054.

29. *Id*. at 1054-55. The Court held, "[W]e conclude that the General Assembly intended the term to have its full meaning, and that therefore both *negligent* and intentional *acts are sufficient to give rise to joint liability for purposes of section 13-21-111.5(4)*. . . . The defendants assert that to be subject to joint liability the actors must knowingly agree to engage in conduct that is known at the time of the agreement to be tortious. We do not agree. While there must be a conscious and deliberate decision to pursue a common plan or design, *the actors need not have a "specific intent" to commit a tortious act* to be subject to joint liability under section 13-21-111.5(4)." (*Emphasis added.*) *Id*. at 1056 and 1057.

30. *Cf. Klipfel v. Neill*, 494 P.2d 115 (Colo. App. 1972) (subcontractor who substantially complies with pertinent plans and specifications not liable for damage caused by deficiency in plans and specifications themselves).

31. *See* Order, April 4, 2005, *Villa Riva Condo. Ass'n v. Schmid*, No. 00-CV-9493 (Denver County Dist. Ct.).

32. *Id.*

33. *See* discussion *above*, in "Assumed Duty Analysis" and *below*, in "Express and Implied Warranty Analysis."

34. *See Restatement (Second) of Agency* § 216 (1958) (principal liable for agent's breach of non-delegable duties).

35. *Cf. Johnston v. Long*, 181 P.2d 645, 651 (Cal. 1947) (main justification for application of doctrine of vicarious liability is fact that employer may spread risk of loss through insurance and carry cost as part of its cost of doing business); *Alma W. v. Oakland Unified Sch. Dist.*, 176 Cal.Rptr. 287, 293 (Cal.App. 1 Dist. 1981) ("spread the risk" concept underlying vicarious liability does not impose liability on employer merely as legal artifice invoked to reach a deep pocket; concept another way of saying that enterprise should be charged with cost of accidents directly attributable to its activities).

36. *Springer, supra*, note 20.

37. *Public Serv. Co. v. United Cable*, 816 P.2d 289 (Colo.App. 1991) (owner of utility pole has non-delegable duty of maintenance and inspection), *rev'd on other grounds*, 829 P.2d 1280 (Colo. 1992); *Pust v. Union Supply*, 561 P.2d 355, 360 (Colo.App. 1976) (public policy dictates that installer of safety device on machine has non-delegable duty of care), *aff'd in part, rev'd on other grounds sub nom, Holly Sugar v. Union Supply*, 572 P.2d 148 (Colo. 1977), *and aff'd*, 583 P.2d 276 (Colo. 1978);

Frazier v. Edwards, 190 P.2d 126, 129 (Colo. 1948), *rehr'g denied* (landlord has non-delegable duty of care to maintain premises). *But see Dufficy & Sons, Inc. v. BRW, Inc.*, 99 P.3d 66 (Colo. 2004), *rev'ing* 74 P.3d 380 (Colo.App. 2002) (design professional hired by project owner does not owe independent tort duty to subcontractors where no contract exists between design professional and subcontractors and other, interrelated, contracts sufficiently set forth parties' duties and standards of care).

38. *See Stanley v. Creighton Co.*, 911 P.2d 705, 706-07 (Colo.App. 1996) (codification of legal standard of conduct confirms that matter is issue of public concern). *See also Clark v. Assocs. Comm'l Corp.*, 877 F.Supp. 1439, 1447 (D.Kan. 1994) ("where a statute or ordinance imposes a duty to take precautions to ensure that an undertaking is performed safely . . . the statutory duty is non-delegable, rendering the person upon whom it devolves vicariously liable for the acts of its independent contractor").

39. Colorado's Premises Liability Act is codified at CRS § 13-21-115. *See also Springer, supra*, note 20.

40. *Cf.* CRS § 30-28-201 (authorizing board of county commissioners to adopt ordinances and building code consistent with Uniform Building Code).

41. *See, e.g.*, Uniform Building Code § 101.2 (1997).

42. Pikes Peak Regional Building Code, Chap. 16, § 16-6-106 (Ord. 78-120; 1968 Code, § 5A-22) ("A contractor shall be responsible for all work included in his contract whether or not such work is done by him directly or by one of his subcontractors.").

43. *See* CRS §§ 13-20-801 *et seq*.

44. CRS § 13-20-804.

45. *See, e.g.*, CRS §§ 24-65.1-101 *et seq*.

46. *See* discussion of these kinds of laws in "Inherently Dangerous Activity Analysis," *below*.

47. CRS § 13-21-111.5(2).

48. *See Kidwell v. K-Mart Corp.*, 942 P.2d 1280 (Colo.App. 1996) (although property owner entitled to designate independent maintenance contractor as nonparty at fault, because of property owner's non-delegable duty of care under Premises Liability Act, plaintiff entitled to instruction that negligence of contractor must be imputed to property owner). *Cf. Weeks v. Churchill*, 615 P.2d 74 (Colo.App. 1980) (imposing joint liability on employer for acts of employee, despite jury's apportionment; case decided before adoption of CRS § 13-21-111.5). *See also Wiggs v. City of Phoenix*, 10 P.3d 625 (Ariz. 2000) (in vicarious liability case, it does not make legal or tactical sense to name as a nonparty at fault a party whose conduct is imputed to defendant; because defendant will be fully liable for that fault, allocation is irrelevant).

49. Colorado's Premises Liability Act is codified at CRS § 13-21-115.

50. *Kidwell, supra*, note 48.

51. *Simpson v. Digiallonardo*, 488 P.2d 208, 210 (Colo.App. 1971).

52. *Carpenter v. Donohoe*, 388 P.2d 399 (Colo. 1964).

53. *Cosmopolitan Homes, supra*, note 3 at 1045 n.6; *see also Davies v. Bradley*, 676 P.2d 1242 (Colo.App. 1983), *abrogated on other grounds, Mortgage Finance, Inc. v. Podleski*, 742 P.2d 900 (Colo. 1987).

54. *Sloat v. Matheny*, 625 P.2d 1031, 1033 (Colo. 1981).

55. *Id*. at 1034. *Cf. Nastri v. Wood Bros. Homes, Inc*., 690 P.2d 158, 161 (Ariz.Ct.App. 1984) (disclaimer of implied warranties void as against public policy); *Glasser v. Am. Homes*, 535 N.Y.S. 2d 208 (N.Y.App.Div. 1988) (waiver of implied warranty void as against public policy); *Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349, 355 (Tex. 1987) (implied warranty relating to homebuilder's repairs of real property cannot be waived or disclaimed), *limited by* 18 S.W.3d 807 (Tex.Ct.App. 2000).

56. *See W. Stock Ctr., Inc. v. Sevit, Inc.*, 578 P.2d 1045 (Colo. 1978) (employer of independent contractor properly held liable for damage to property resulting from fire caused by independent contractor performing ordinary welding).

57. *See Bennett v. Greeley Gas Co.*, 969 P.2d 754, 764 (Colo.App. 1998) (distinguishing doctrines), *cert. denied*.

58. *See W. Stock Ctr., Inc., supra*, note 56.

59. *Huddleston*, 841 P.2d 282 (Colo. 1992).

60. *Restatement (Second) of Torts* § 427 (1965).

61. *See Huddleston, supra*, note 59 at 290.

62. *Id.*

63. Many of the cases from the Jefferson County District Court collected in note 1, *supra*, presented this issue.

64. *See* Thompson, "Performance of Foundations on Steeply Dipping Claystone," 7th Int'l Conf. On Expansive Soils (1992), Figure 1, p. 440 (source of quote and failure rate percentage); Cowart (State Geologist), *Map of Area*

Containing Expansive and Steeply Dipping Upper Cretaceous Claystones (Denver, CO: Colorado Geologic Survey, 1995) (legend reads: "compared to . . . flat-lying bedrock . . . heaving bedrock problems are more complex in nature and difficult to predict, and the resulting damage is often more locally destructive"). *See also* Jefferson County Land Development Regulations § 9.1 ("To the extent practicable, development of occupied structures in the designated Dipping Bedrock Area shall be avoided."); Noe and Dodson, *The Dipping Bedrock Overlay District: Open File Report 95-5* (Denver, CO: Colorado Geologic Survey, 1995) at 1 ("Large undeveloped areas which are underlain by potentially heaving bedrock *warrant special consideration* during all phases of site planning and development, and, in some cases, avoidance may be the most advisable land use alternative.") (*Emphasis added*.).

65. *See generally* CRS §§ 24-65.1-101 *et seq.* (defining geologic hazards). *See also* CRS § 24-65.1-103(8) ("Geologic hazard" means "a geologic phenomenon which is *so adverse to* past, current, or foreseeable *construction* or land use as to *constitute a significant hazard to* public health and safety or *to property*. The term includes but is not limited to: (a) Avalanches, landslides, rock falls, mudflows, *and unstable or potentially unstable slopes*"); CRS § 24-65.1-103(19) ("Unstable or potentially unstable slope' means an area susceptible to a landslide, a mudflow, a rock fall, or accelerated creep of slope-forming materials."). (*Emphasis added throughout.*)

66. *See* Thompson, *supra*, note 64 at Figure 1, p. 440, ¶ 6.4 (chart showing that 20 percent of homes situated on soils with a 4 percent or greater swell potential suffer damage versus less than 5 percent of homes on non-swelling soils).

67. Colorado Springs Zoning Code (Geologic Hazard Study and Mitigation) at § 210, Part 5, 7.4.501(G) (defining "shallow water tables" as a geologic hazard so that "appropriate mitigation or avoidance techniques may be implemented").

68. *Greeley Gas Co., supra*, note 57 at 764, *relying on Huddleston, supra*, note 59.

69. *See* CRS § 24-65.1-103(8) (defining "geologic hazard").

70. *See* Jefferson County Land Development Regulations, § 9.1 ("To the extent practicable, development of occupied structures in the designated Dipping Bedrock Area shall be avoided.") and other materials quoted in note 64, *supra*; Pikes Peak Regional Building Code § 15-3-1529 (Hillside Overlay Ordinance describing areas requiring "special care" to prevent "physical damage to . . . private property" and requiring that home site soils be thoroughly tested for both strengths and weaknesses and that a specific grading plan meeting the requirements of the Ordinance be submitted to the County for special review); Mesa County Resolution No. MCM 94-188 (resolution regarding development restrictions along the bluffs overlooking the Colorado River passed under authority of Mesa County Land Development Code ("MCDLC"), one of the purposes of which is to "protect the health, safety and public welfare," *id*. at § 1:3; the MCDLC expressly provides that, "Land subject to hazardous conditions such as land slides . . . rock falls, . . . shall be identified in all applications, and development shall not be permitted in the areas *unless the application provides for the elimination of the particular hazards.*" *Id*. at § 4.3.4 (*Emphasis added.*)).

71. *Huddleston, supra*, note 59 at 294.

72. *Id*. at 289.

73. *See Huddleston v. Union Rural Elec. Ass'n*, 897 P.2d 865 (Colo.App. 1995) (after remand) (*hereafter*, "*Huddleston II*").

74. *Huddleston, supra*, note 59 at 294.

75. *See Huddleston II, supra*, note 73.

76. *See Restatement (Second) of Torts* § 427, cmt. d (1965).

77. *Huddleston, supra*, note 59 at 288.

78. *Id.* at 289 n.8, *quoting with authority* Keeton *et al., Prosser and Keeton on the Law of Torts* § 71, 5th ed. (St. Paul, MN: West Group, 1984) at 515. Comment d to § 427 provides "[t]he rule stated in § 426 is the converse of the rule stated [in § 427] and the two should be read together."

79. *Id*.

80. *Id.* at 294. *Accord Greeley Gas Co., supra*, note 57 at 764.

81. *Vikell Investors Pacific, Inc.*, 946 P.2d 589 (Colo.App. 1997).

82. *Id*. at 595. The *Vikell* court's *dicta* that "one carrying on an inherently dangerous activity must exercise the highest possible degree of skill, care, caution, diligence, and foresight . . . [and] the failure to do so is negligence" is echoed in C.J.I.-Civ.4th 9:7 (2003). However, it is unclear whether this enhanced degree of care, or simply reasonable care under the circumstances, is the proper standard. *See Bayer v. Crested Butte Mountain Resort, Inc.*, 960 P.2d 70 (Colo. 1998) (applying "highest degree of care" standard to ski lift operator, similar to that imposed on common carriers and amusement park ride operators), *relied on by Greeley Gas Co., supra*, note 57 at 764. It is uncertain whether *Bayer* intended to apply this standard to inherently

dangerous activities as defined by *Huddleston*, or just to ski lift operators, and whether the reliance on *Bayer* for the former proposition is sound.