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Theories of Homebuilder Liability for Subcontractor Negligence - Part II

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Residential homebuilders' liability for their subcontractors' negligence may exist under various legal theories, discussed in Part I of this article. Part II examines the policies underlying these liability theories, particularly the vicarious liability doctrine. It addresses possible distinctions among subcontractors, especially design professionals, relevant to imposing liability for their conduct. Part II also discusses related practical matters, including insurance coverage considerations and sample jury instructions.

This two-part article analyzes whether and when homebuilders may be liable for their subcontractors' negligence. Although these issues generally have not found their way to Colorado's appellate courts, 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 article focuses on the liability of residential builders, not commercial builders, because of different legal duties the law imposes on each.2

Part I, which appeared in this column in June 2005, discussed various legal theories that may support imposing liability on homebuilders for their subcontractors' negligence.3 This Part II focuses on the policies underlying the vicarious liability doctrine and their potential application to the activities of homebuilding subcontractors. Part II discusses possible distinctions between imposing such liability on homebuilders for the acts of subcontractors who are design professionals versus those who are not. Part II also discusses how the imposition of liability on homebuilders for their subcontractors' negligence may affect liability insurance coverage.

Finally, the Appendices to this article provide sample jury instructions and a verdict form. These samples may be useful when instructing a jury charged with deciding whether the facts necessary to impose homebuilder liability for subcontractors' negligence are present if the issues relating to such liability are not decided as a matter of law by the court.

Vicarious Liability Analysis

"Vicarious liability" is the liability that a supervisory party (such as an employer) bears for the actionable conduct of a subordinate or associate (such as an employee) based on the relationship between the two parties.4 None of the theories of homebuilder liability for subcontractor negligence discussed in Part I of this article squarely fits within the vicarious liability doctrine, because none arises simply from and due to the relationship between the homebuilder and its subcontractors.5 Instead, such liability arises from:

1) public policies or statutes giving rise to independent or non-delegable duties;

2) contracts giving rise to assumed tort duties or express and implied warranties; or

3) special types of tortious conduct, such as acting in concert with other tortfeasors or engaging in inherently dangerous activities.

The legal relationship between a homebuilder and its subcontractors bears on the analysis of whether the imposition of vicarious liability on the homebuilder for its subcontractors' negligence is proper. Principal-agent, master-servant, and employer-independent contractor concepts each refer to distinct legal relationships that may or may not overlap and are relevant to analyzing vicarious liability.6

There are arguments against imposing vicarious liability that is based on an employer-employee or master-servant relationship between a homebuilder and its subcontractors. This is because subcontractors often are characterized as independent contractors and the employer-independent contractor relationship typically is considered the antithesis of the employer-employee or master-servant relationship that historically has given rise to vicarious liability.

However, Colorado appellate courts have not yet addressed whether it is proper to impose vicarious liability on a homebuilder for its subcontractors' negligence. The issue requires examination of the policies underlying the vicarious liability doctrine. That doctrine reaches back to some of Colorado's earliest reported cases. Deciding if such vicarious liability should arise suggests consideration of the question of whether the policies supporting imposition of analogous "enterprise liability" in the context of defective products apply to homebuilding activities.

Respondeat Superior *Analysis*

One form of vicarious liability is *respondeat superior*. The r*espondeat superior* doctrine holds an employer or principal liable for an employee's or agent's wrongful acts committed within the scope of the employment or agency.7 *Respondeat superior* holds a master liable "for the unauthorized torts of his servant committed while the servant is acting within the scope of his employment."8

The primary public policy goals underlying imposition of liability based on *respondeat superior* liability are to

prevent the recurrence of tortious conduct, to give greater assurance of compensation for the victim, and to ensure that the victim's losses will be equitably borne by those who benefit from the enterprise that gave rise to the injury.9

Generally, *respondeat superior* requires the existence of an employer-employee or principal-agent relationship.10

In an 1893 case, the Colorado Court of Appeals described the underpinnings of *respondeat superior*.11 The court held that a principal contracting for the work is not liable for the negligence of the contractor in the performance of work if: (1) the principal uses due care in selecting a person to perform the task; (2) the principal enters into a contract with that person to undertake to accomplish a given result; (3) the person is at liberty to select and employ his or her own means and methods; and (4) "the principal retains *no right or power to control or direct the manner in which the work shall be done*."12 (*Emphasis added.*) Instead, the employment is regarded as independent because the person rendering the service in the course of his or her occupation represents "the will of his employer *only as to the result of his work, and not as to the means* by which it is accomplished."13 (*Emphasis added.*)

It follows that the independent contractor rule should have less force where the principal retains the right or power to control or direct the manner in which the work is done, perhaps even if such right or power is not exercised. In *Grease Monkey Int'l Inc. v. Montoya* ,14 a principal was held liable for its agent's fraud in securing loans under the guise of using the funds for investment rather than personal benefit. The Colorado Supreme Court noted that vicarious liability on the basis of *respondeat superior* does not mean that "the master must stand by constantly and observe and supervise the work"; it merely means that the relationship of servant "presupposed a right" on the part of the master to have the work performed in such a manner as he or she directs.15

In the context of the typical homebuilder-subcontractor relationship, the homebuilder often retains or exercises significant control over the work. This usually includes providing detailed plans and specifications for the work, scheduling the work, integrating the work of the various trades, supervising and inspecting the work pursuant to a quality control program, and approving the work and payment for the services rendered. The homebuilder-supplied plans and specifications often are accompanied by precise details and sketches as to the manner in which the work is to be done, usually incorporating by reference industry standards, building code provisions, manufacturer instructions and advice, and design engineer requirements and recommendations.

A few courts, including one Colorado district court, have relied on the homebuilder's right to "supervise" a subcontractor's work in concluding that the homebuilder is vicariously liable for the negligence of its subcontractors, despite the general rule of employer non-liability for the torts of independent contractors.16 Other courts have justified imposition of such vicarious liability based on the policy goal of holding the homebuilder liable for the end result of the construction project. In imposing liability, for example, a Georgia court noted:

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.17 (*Citations omitted.*)

A Delaware court stated:

[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.18 (*Citations omitted.*)

These cases reflect judicial concern regarding a homebuilder effectively seeking to obtain tort immunity where it contracts to build a home but then relegates performance of the work to a subcontractor.

The Homebuilder's Special Role

The homebuilder has the unique ability to ensure quality home construction because it is posi-tioned to:

* Examine and evaluate the credentials of all subcontractors, including design professionals

* Negotiate the terms and conditions of all subcontracts

* Select among varying degrees of risk associated with various alternative construction sites, building techniques, and design alternatives

* Choose building products

* Refuse a subcontractor's payment unless the work or materials provided meet the homebuilder's specifications and quality control standards

* Set home pricing

* Demand indemnification from others in the construction pyramid

* Carry liability insurance or insist others carry such insurance

* Allocate various risks in home purchase, warranty, and subcontractor agreements

* Formulate and exercise adequate quality control procedures.

Enterprise Liability Analysis

The theoretical underpinnings of enterprise liability in tort are that "losses to society created or caused by an enterprise" or, more simply, by an activity, ought to be borne by that enterprise or activity.19 The theory contemplates that losses historically recognized as compensable when caused by an enterprise or activity, such as producing, distributing, and using automobiles, ought to be borne by those persons who have some logical relationship with that enterprise or activity.20

In *Wright v. Creative Corporation,*21 the Colorado Supreme Court rejected enterprise liability as a basis for imposing *strict liability* on builders of mass-produced homes because it is "easier to trace a defect to a builder than to a manufacturer as there is more opportunity to make a meaningful inspection of a structure on real property."22 Nevertheless, reasonable arguments can be made that relying on principles of enterprise liability to impose *vicarious liability* on homebuilders for their subcontractors' negligence may serve important policy goals while not imposing the onerous burden of strict liability without fault on such builders.

In *Cosmopolitan Homes, Inc. v. Weller,*23 the Colorado Supreme Court identified several factors supporting recognition of an independent duty of care on a homebuilder in constructing a home:

1) the homebuyer's relative lack of knowledge and sophistication regarding home construction;

2) the homebuyer's lack of access to the underlying structural work;

3) the homebuyer's inability to detect latent defects which, by their nature, are hidden or slow to manifest;

4) the significant risk to the homebuyer presented by a latent defect that completely destroys the family budget, inasmuch as the purchase of a home typically is the largest single investment most Coloradans make in their lives; and

5) the mobility of most potential homebuyers, with the foreseeable result that a home will be sold to subsequent purchasers, and any structural defects are as certain to harm a subsequent purchaser as the first.24

Taken together, these factors could provide sufficient justification for imposing vicarious liability on a homebuilder for its subcontractors' negligence based on the doctrinal underpinnings of enterprise liability.25

In support of this theory, few would dispute that a homebuilder is in the best position to ensure quality home construction. As set forth in the accompanying sidebar, "The Homebuilder's Special Role," the homebuilder sits atop the construction pyramid, and can mitigate or spread the risk of liability for negligent construction.

The Colorado Supreme Court has not squarely addressed the question whether a builder is liable for its subcontractors' negligence. The doctrines discussed in Part I

of this article may allow imposition of such liability.26 In addition, the doctrine of vicarious liability may be broader and flexible enough to justify imposition of such liability, whether expressed in the homebuilding context as *respondeat superior* or as a species of enterprise liability.

Design ProfessionalSubcontractors: Unique Issues

If Colorado were to impose vicarious liability on a homebuilder for its subcontractors' negligence, the question arises as to whether such vicarious liability should be extended to subcontractors who are design professionals. Arguments in favor of imposing such liability are strongest if the design work was within the homebuilder's menu of services, and the homebuyer did not contract directly with the design professional for the work.27

Generally, the homebuilder is in a far superior position to the homebuyer to investigate the qualifications and competence of the responsible design professionals. Further, a homebuilder can negotiate an appropriate scope of work and responsibility, such as whether the design professional also will inspect and approve the work as conforming to his or her design. Moreover, the homebuilder can bargain for contractual indemnity from, and liability limitations on, the design professional, as well as imposing minimum professional liability insurance requirements.

These factors lend support to the argument that the risk of loss due to a design error as between the homebuilder and homeowner may properly be allocated to the homebuilder as part of the homebuilder's vicarious liability. This is because it is the homebuilder's "enterprise" that gave rise to its retention of the design professional, as well as any ensuing loss due to that professional's errors and omissions.

Imposing vicarious liability on the homebuilder under these circumstances arguably is consonant with those policies underlying vicarious liability resting on the ability of the homebuilder, particularly a production homebuilder, to "spread the risk of loss" across the market. This may be accomplished through the homebuilder's pricing and by purchasing (and contracting with financially competent design professionals to purchase) adequate insurance to mitigate this economic risk.

Nonetheless, reasonable arguments also exist against imposing such vicarious liability against homebuilders for negligence of design professionals. Such arguments are grounded in the fact that the "control" a homebuilder can or does exercise over most subcontractors might not apply to a design professional, because a builder is neither trained nor licensed to evaluate or reject deficient design work. A homebuilder can hire persons with the necessary expertise to properly supervise, inspect, evaluate, and accept or reject the work of nearly all tradesmen. However, the homebuilder generally cannot do the same as to the work of design professionals unless the builder also is a design professional or employs such professionals on staff, as do some production builders.

Jury Instructions

Drafting jury instructions in the context of construction defect negligence claims against a homebuilder can be difficult. Counsel often needs to consider some of the following questions:

* Is it necessary to apportion negligence to others in the construction pyramid, including both named and unnamed parties?

* Is a theory for imposing liability on the homebuilder for its subcontractors' negligence implicated; if so, what theory?

* Do indemnity and contribution issues need to be addressed in the verdict?

* Must joint liability under CRS § 13-21-111.4 be decided; if so, as to which defendants and non-parties?

* Are there elements of liability under the inherently dangerous doctrine to be resolved; if so, which ones?

* Do some defendants share responsibility with the homebuilder for only limited aspects of the construction?

For purposes of providing a conceptual guideline in crafting such instructions, the Appendices contain sample proposed jury instructions and a sample verdict form. The samples are for a case involving negligence claims by a homeowner's association against a homebuilder who is a builder-vendor, and the builder-vendor's general contractor. The instructions and verdict form assume the homebuilder has a non-delegable and non-allocable duty of care in constructing the common elements of a multi-family development.

The samples make provision for allocation of responsibility for any resulting damages between the homebuilder and its contractor, where the contractor had responsibility only for limited aspects of the construction. The samples allow for evaluation of the defendants' joint liability under CRS § 13-21-111.4, and for allocation of liability between the defendants for purposes of the court determining indemnity and contribution issues. Note that the samples do not consider any limitations on the awarded damages that may apply under Colorado's Construction Defect Action Reform Act.28 The samples can be revised to include the determination of the liability of various subcontractor trades and the apportionment of fault and damages among them.

Collection and Insurance Coverage Considerations

Before homeowner counsel incurs the significant legal fees and litigation costs involved in obtaining a construction defect verdict, it is important to take appropriate steps to maximize the chances of satisfying any resulting judgment. Counsel should pursue defendants who have the financial wherewithal to satisfy, or whose liability insurance covers a significant part of, the anticipated judgment. Suing a homebuilder for its own negligence, as well as for the negligence of subcontractors for whom the homebuilder is liable, increases the likelihood of satisfying a judgment based on the negligent acts of an impecunious subcontractor who lacks insurance coverage.

"Your Work" ExclusionAnd Exception

A homebuilder and homeowner share an interest in identifying any potentially applicable insurance coverage in place between the date the home was first sold to the date of the filing of the complaint. Many standard-form commercial liability policies afford coverage for liabilities arising from the "completed operations" of the insured.

Completed operations coverage typically indemnifies an insured homebuilder or subcontractor against its legal liability to pay damages due to property damage occurring during a policy period. The coverage should apply if property damage occurs after the earliest of the following times: (1) after all of the work called for in the insured's contract has been completed; (2) when all of the work to be done at the site has been completed if the insured's contract calls for work at more than one site; or (3) when that part of the work done at a job site has been put to its intended use by any person other than another contractor or subcontractor working on the same project.29 Work that may need service, maintenance, correction, repair, or replacement, but that is otherwise complete, will be treated as completed.30

Such property damage coverage often is limited by the following exclusion. Known as the "your work" exclusion, it typically provides that the insurance policy coverage does not apply to "'property damage' to 'your work' arising out of it or any part of it and included in the 'products-completed operations hazard.'"31 However, the exclusion does not apply "if the damaged work or the work out of which the damage arises *was performed on your behalf by a subcontractor*."32 (*Emphasis added.*)

Almost every court addressing the issue has held that this exception to the exclusion confers coverage for an insured's liability arising from the acts and omissions of its subcontractors, even in jurisdictions that formerly limited coverage for an insured homebuilder's defective workmanship.33 In a 2005 case, *Hoang v. Monterra Homes (Powderhorn), LLC*,34 the Colorado Court of Appeals held that the exception to the exclusion did not serve to restore coverage for property damage caused by earth movement, which damage was excluded by a separate endorsement to the policy.35 *Hoang* did not disturb that part of the trial court's order finding that the exception to the exclusion restored coverage for other property damage. Petitions for *certiorari* are pending in *Hoang*.

Significantly, the standard "your work" exclusion is written in the disjunctive. The exception restores coverage if the "work out of which the damage arises was performed on [the insured's] behalf by a subcontractor," *or* if the "damaged work . . . was performed by a subcontractor."36 (*Emphasis added.*) This latter part of the exception to the exclusion was adopted by the Insurance Services Organization, the insurance industry group responsible for drafting standard-form commercial general liability ("CGL") policy provisions. The reason for adopting this exception to the "your work" exclusion in the standard-form CGL policy was to avoid the situation where some insurers were claiming under predecessor policy forms that their policies did not cover damage to the insured's "own work," even where such work was performed by others, such as subcontractors.37

According to the authors of the standard reference text published by the National Underwriter Group, an insurance industry affiliated organization, liability insurance coverage will attach and the "your work" exclusion will not bar coverage "if the damaged work or the work out of which the damage arises was performed on [the builder's] behalf by a subcontractor."38 The effect of the words used in the "your work" exclusion means that, "a general contractor who contracts all the work to subcontractors, remaining on the job in a merely supervisory capacity, can insure complete coverage for faulty workmanship."39 Some insurers contend there is a conferral of unintended coverage under the standard CGL policy due to the exception to the "your work" exclusion and, thus, they have sought to delete this exception to the exclusion by endorsement.

Because of the coverage likely afforded by the exception to the exclusion, homeowners can improve the chances of collecting on a judgment under the proper facts. Ironically, homebuilders can improve the chances of having insurance coverage against such judgment if the homebuilder is held liable for the negligence of its subcontractors. This is because although the "your work" exclusion may limit coverage for the homebuilder's liability due to its own negligence, the exception to the exclusion restores such coverage if the homebuilder's liability is predicated on its subcontractors' negligence. Thus, to the extent any theory of homebuilder liability for subcontractor negligence discussed in this article applies, the chances of there being insurance coverage for such liability improves if the

exception to the exclusion has not been deleted.

Qualification as "Subcontractor"

Whether a person who performs some of the work for the insured qualifies as a subcontractor is important when applying the exception to the "your work" exclusion. The term "subcontractor" generally is not defined by most liability policies. Colorado often confers "non-legal" meanings on undefined policy terms, giving them the broadest, reasonable meaning possible.40 This suggests that the legal definition of the term "subcontractor" probably will not control.

The majority of courts have construed the term "subcontractor" broadly as used in the exception to the "your work" exclusion. Following are some examples:

***** In a Missouri case, a contractor built a television broadcasting tower that collapsed due to the failure of prefabricated steel components supplied by a third party. A court found the insured contractor was covered under the subcontractor exception to the exclusion for the liability of its subcontractor who fabricated the steel used in the tower.41

***** In Minnesota, coverage was found for problems in a new home due to the design and construction defects of a framing subcontractor, a truss fabricator, and a masonry subcontractor. The work of each of these subcontractors was found to be supervised and coordinated by the insured general contractor and covered by its policy.42

***** In a Louisiana case, the court held that damage from roof leaks arising from the manufacture and installation of a roof system was a covered occurrence, and that the exception to the "your work" exclusion brought the claim back into coverage.43 The court held that the supplier of the roof system was a "subcontractor" to the insured, the defendant-contractor.

***** In a Virginia case, the Fourth Circuit concluded that the custom manufacturer of a steam pipe that failed was a subcontractor to the insured builder. The court found that damage to the pipe and its surrounding backfill was covered inasmuch as it involved work subcontracted to the persons who placed the backfill, installed the pipe, and fabricated the pipe.44

***** In at least two Texas cases, engineers were found to be subcontractors of builder-insureds for purposes of applying the exception to the "your work" exclusion.45 In both cases, the engineer designed the foundations for a home built by the builder-insured.46

However, in a California Court of Appeals case, the court held that an inspector hired by an insured contractor who failed to detect defects in walls built by the contractor was not a subcontractor within the exception to the "your work" exclusion. The court noted, "While the inspector may have failed to catch defects in the retaining walls, he did not put them there."47

Thus, if a homebuilder is liable for the negligence of its subcontractors, insurance coverage available to the homebuilder will be affected by at least two factors. These are: (1) the legal and factual bases for such liability; and (2) the proper characterization of whether the person providing the defective work or material is a subcontractor.

Conclusion

Colorado recognizes numerous legal theories that may support the imposition of liability on homebuilders for their subcontractors' negligent conduct. These theories, which are discussed in Part I of this article,48 include: independent duty; assumed duty; joint liability when "acting in concert"; common law, contractual, and statutory non-delegable duties; express and implied warranty liability; and non-delegable duties arising from inherently dangerous activities. Many of these theories have been adopted by some Colorado district courts, either expressly or impliedly, in finding a homebuilder liable for its subcontractors' negligence.

None of these theories of liability fits squarely within the common definition of the "vicarious liability" doctrine. "Vicarious liability" has been recognized in Colorado since the late 1800s, but courts have not addressed whether the doctrine should be extended to a homebuilder's liability for its subcontractors' negligence. If one of the other theories of liability discussed in Part I applies, it may not be necessary for a court to consider application of the vicarious liability doctrine, and the related principle of *respondeat superior*.

The question of whether the main policy reasons for imposing vicarious liability, spreading the risk of loss onto those who can best manage and spread that risk, and holding persons liable who can or do exercise meaningful control over how others perform their work, apply in Colorado. If Colorado's appellate courts address the question of whether to impose vicarious liability on homebuilders, they may elect to consider whether the principles supporting imposition of enterprise liability apply. Even if homebuilders are held liable for the negligence of their subcontractors, however, additional considerations affect the analysis of whether homebuilders should be liable for the errors and omissions of their subcontractor design professionals.

Moreover, if a court finds that a homebuilder is liable for the negligence of its subcontractors, either as a general rule or based on the unique circumstances before it, fact

questions may be presented demanding the crafting of appropriate jury instructions. Sample proposed instructions and a verdict form should provide some guidance on how to approach the thorny problems associated with drafting such instructions (*see* Appendices 1 and 2). Finally, where a homebuilder is liable for the negligence of its subcontractors, the legal and factual underpinnings of such liability may have a significant impact on resolving insurance issues arising from the liability.

NOTES

1. *See* Sandgrund, Sullan, and Smith, "Theories of Homebuilder Liability for Subcontractor Negligence - Part I," 34 *The Colorado Lawyer* 69 (June 2005) (*hereafter*, "Part I").

2. For a discussion of the 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. Part I, *supra*, note 1 (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; and non-delegable duties arising from inherently dangerous activities).

4. *Black's Law Dictionary*, 8th ed. (St. Paul, MN: Thomson/West, 2004) (defining "vicarious liability" within the definition of "liability").

5. Part I, *supra*, note 1.

6. *Grease Monkey Int'l, Inc. v. Montoya*, 904 P.2d 468, 472 (Colo. 1995).

7. *Black's Law Dictionary*, *supra*, note 4. One notable commentator observes that courts "have taken refuge in rather empty phrases, such as 'he who does a thing through another does it himself,' or the endlessly repeated formula of '*respondeat superior*,' which in itself means nothing more than 'look to the man higher up.'" Keeton *et al.*, *Prosser and Keeton on the Law of Torts* § 69, 5th ed. (St. Paul, MN: West Group, 1984) at 500.

8. *Grease Monkey Int'l, Inc.*, *supra*, note 6 at 473 (*quoting* Reuschlein and Gregory, *The Law of Agency and Relationship* § 52 (2d ed. 1990).

9. 27 Am.Jur.2d *Employment Relationship* § 459 (2003). *See also Johnston v. Long*, 181 P.2d 645, 651 (Cal. 1947); *Alma W. v. Oakland Unified Sch. Dist.*, 176 Cal.Rptr. 287, 292 (Cal. App. 1 Dist. 1981) (discussing bases for doctrine).

10. *See generally Grease Monkey Int'l, Inc.*, *supra*, note 6. *Cf. Erickson v. Oberlohr*, 749 P.2d 996 (Colo.App. 1987) (vendor of real property liable as a matter of law for real estate agent's misrepresentations relating to sale of real property).

11. *Chicago, R.I. & P. Ry. Co. v. Ferguson*, 3 Colo.App. 414, 417, 33 P. 684, 685 (Colo.App. 1893) (railway company not liable for trespass of contractor because it lacked required degree of control over contractor's operations, *quoting Mechem on Agency* § 747).

12. *Id.* at 684-85 (*quoting Mechem on Agency* § 747).

13. *Id.* at 685.

14. *Grease Monkey Int'l, Inc.*, *supra*, note 6.

15. *Id.* at 472.

16. *See St. Paul Cos. v. Construction Mgmt. Co., Ltd.*, 96 F.Supp.2d 1094, 1097 (D.Mont. 2000) (denying summary judgment on issue of general contractor's vicarious liability; general contractors "cannot escape liability" for failing to fulfill duty to build home with due care by arguing that it was an independent contractor's negligence, and not their own, that caused fire and ensuing damage), *following White Pass Co. v. St. John*, 427 P.2d 398 (Wash. 1967) (following fire loss, subcontractor held to be general contractor's agent for whose negligence general contractor is responsible to owner; fact that general contractor "exercised no supervision of control over manner" subcontractor performed work did not absolve it from responsibility); *Jacob v. W. Bend Mut. Ins. Co.*, 553 N.W.2d 800, 808 (Wis.App. 1996) (general contractor not entitled to jury instruction that he was not liable for independent subcontractors' negligence; exception to general rule of employer's non-liability for independent contractor applies if contract requires general contractor to ensure work performed with due care); Order, Feb. 24, 1998, *Mandsager v. Aller-Lingle*, No. 96-CV-415-3 (Larimer County Dist. Ct.) (jury would be instructed that builder is liable for wrongful conduct of designated non-party subcontractors if builder had duty to supervise and inspect subcontractors' work).

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

18. *Nat'l Fire Ins. Co. of Hartford v. Westgate Constr. Co.*, 227 F.Supp. 835, 837 (D.Del. 1964).

19. *Werkmeister v. Robinson Dairy, Inc.*, 669 P.2d 1042, 1045 (Colo.App. 1983), *quoting* Klemme, "The Enterprise Liability Theory of Torts," 47 *U.Colo. L.Rev.* 153, 158 (1976).

20. *Id*.

21. *Creative Corp.*, 498 P.2d 1179 (Colo.App. 1972).

22. *Id.* at 1182-83.

23. *Cosmopolitan Homes v. Weller*, 663 P.2d 1041 (Colo. 1983).

24. *Id.* The authors would add the following to the list: (6) the homebuyer's typical exclusion from the process of selecting the responsible subcontractors, including design professionals, and most building materials and products; and (7) the twin goals of discouraging misconduct and providing an incentive for avoiding preventable harm. *Cf. Yacht Club II Homeowners Ass'n, Inc. v. A.C. Excavating*, 94 P.3d 1177 (Colo.App. 2003), *cert. granted*, S.Ct. No. 03SC842 (Colo. July 26, 2004).

25. *See Creative Corp., supra*, note 21 at 1182-83.

26. Part I, *supra*, note 1.

27. *Id.* In the event a homebuilder's liability for its design professionals' negligence is recognized under one of the theories discussed in Part I of this article (such as due to the recognition of a homebuilder's assumed or non-delegable duty of care), it likely would not be necessary for a court to consider the following analysis.

28. *See* CRS §§ 13-20-801 *et seq*.

29. *Fidelity, Casualty & Surety (FC&S) Bulletin*, Public Liability, at ¶ A.2-10 (Erlanger, KY: Nat'l Underwriter Co., 2005) (*hereafter*, "*FC&S Bulletin*"). The *FC&S Bulletin* is an insurance industry publication often relied on by claims adjusters.

30. *Id*.

31. *Id.* at ¶ A.3-14.

32. *Id.*

33. A number of cases have held that the exception to the "your work" exclusion restores coverage to the insured for liability for damage arising out of or involving the work of subcontractors. *See, e.g., O'Shaughnessy v. Smuckler Corp.*, 543 N.W.2d 99, 103-05 (Minn.App. 1996), *abrogated on other grounds by Gordon v. Microsoft Corp.*, 645 N.W.2d 393 (Minn. 2002); *Am. Family Mut. Ins. Co. v. Am. Girl, Inc.*, 673 N.W.2d 65 (Wis. 2004); *Kalchthaler v. Keller Constr. Co.*, 591 N.W.2d 169 (Wis.App. 1999); *L-J, Inc. v. Bituminous Fire and Marine Ins. Co.*, 567 S.E.2d 489 (S.C.App. 2002), *rev'd on other grounds*, No. 25854, 2004 S.C. LEXIS 190, 2004 WL 1775571 (S.C. Aug. 9, 2004); *Wanzek Constr. Inc. v. Employers Ins. of Wausau*, 667 N.W.2d 473 (Minn.App. 2003); *Kvaerner Metals v. Commercial Union Ins. Co.*, 825 A.2d 641 (Pa.Super. 2003), *cert. granted* April 5, 2004; *Jacob v. Russo Builders*, 592 N.W.2d 271 (Wis.Ct.App. 1999); *Iberia Parish Sch. Bd. v. Sandifer & Son Constr. Co.*, 721 So.2d 1021 (La.App. 1998); *Nat'l Union Fire Ins. Co. v. Structural Sys. Tech., Inc.*, 756 F.Supp. 1232 (E.D.Mo. 1991); *Limbach Co. LLC v. Zurich Am. Ins. Co.*, 396 F.3d 358 (4th Cir. 2005); *Auto-Owners Ins. Co. v. Home Pride Cos.*, 684 N.W.2d 571 (Neb. 2004); *CU Lloyd's of Texas v. Main Street Homes, Inc.*, 79 S.W.3d 687 (Tex.App. 2002); *Rzepkowski v. Schuenke*, 599 N.W.2d 666 (Wis.Ct.App. 1999) (unpublished). *See also* Malecki and Flitner, *Commercial General Liability*, 7th ed. (Cincinnati, OH: Nat'l Underwriter, 2003) (industry publication similarly construing exception to exclusion).

34. *Hoang*, No. 99CV2425 (Jefferson County Dist. Ct. Nov. 13, 2002), *aff'd in part, rev'd in part*, Nos. 02CA2544 and 03CA0379, 2005 Colo.App. LEXIS 252, 2005 WL 427936 (Colo. App. Feb. 28, 2005), *cert. pending*.

35. In *Simon v. Shelter Gen. Ins. Co*., 842 P.2d 236 (Colo. 1992), the Colorado Supreme Court held that an exception to a policy exclusion restores coverage despite the presence of other exclusions denying such coverage. Whether the reasoning of *Simon* demands a different result in *Hoang, supra*, note 35, is one issue sought to be reviewed in the pending petitions for *certiorari*.

36. *FC&S Bulletin, supra*, note 29, Public Liability, at ¶ A.3-14.

37. *Cf.* Malecki and Flitner, *supra*, note 34 at 75 (discussing history of exception to exclusion).

38. *Id*. In a different publication, National Underwriter gives as an example of the coverage restored by the exception to this exclusion coverage for stucco work that peels and chips, which was performed by the insured's subcontractor: "The insured may have hired the subcontractor and may be ultimately held legally responsible for the subcontractor's work, but when it comes to the your work exclusion, the CGL form considers the insured and the subcontractor as two separate entities." *FC&S Bulletin, supra*, note 29, Public Liability, at ¶ M.10-3.

39. *Kalchthaler, supra*, note 34 at 174.

40. *See Compass Ins. Co. v. City of Littleton*, 984 P.2d 606 (Colo. 1999) (legal definition of term "joint venture" not controlling).

41. *Nat'l Union Fire Ins. Co., supra*, note 34 at 1241.

42. *O'Shaughnessy, supra*, note 34.

43. *Iberia Parish Sch. Bd., supra*, note 34.

44. *Limbach Co. LLC, supra*, note 34.

45. *CU Lloyd's of Texas, supra*, note 34 at 698 (engineer who designed foundation that was allegedly "totally inappropriate" for soil conditions found to be subcontractor); *First Texas Homes, Inc. v. Mid-Continent Cas. Co.*, No. 3-00-CV-1048-BD, 2001 U.S. Dist. LEXIS 2397, 2001 WL 238112, *4 (N.D.Tex. March 7, 2001) (engineer accused of negligent design could qualify as a subcontractor). *Cf. Two Denver Highlands Ltd. P'ship v. Dillingham Constr. N.A., Inc.*, 932 P.2d 827, 830 (Colo.App. 1997) (discussing definition of "subcontractor" and concluding that entity is subcontractor if work relates to process of building a structure).

46. *CU Lloyd's of Texas, supra*, note 34; *First Texas Homes, Inc., supra*, note 46.

47. *See Collett v. Ins. Co. of the West*, 64 Cal. App.4th 338 (Cal.App. 1 Dist. 1998).

48. Part I, *supra*, note 1.

Appendix 1:

Proposed Jury Instructions

INSTRUCTION NO. _____

The Defendant *[Homebuilder]* is a legal entity that can act only through its respective employees, officers, agents, and subcontractors, including its subcontractor design professionals, if any. Any act or omission of an employee, officer, agent, or subcontractor, while acting within the scope of his, her, or its employment or authority by *[Homebuilder]*, is the act or omission of *[Homebuilder]*.

The Defendant *[Contractor]* is a legal entity that can act only through its respective employees, officers, agents, and subcontractors, including its subcontractor design professionals, if any. Any act or omission of an employee, officer, agent, or subcontractor, while acting within the scope of his, her, or its employment or authority by *[Contractor]*, is the act or omission of *[Contractor]*.

The Plaintiff Association is a legal entity that can act only through its officers, employees, and agents. Any act or omission of such an officer, employee, or agent, while acting within the scope of his, her, or its employment with the Association, is the act or omission of the Association.

INSTRUCTION NO. ____

You are instructed to answer the following questions. You must all agree on your answers to each question for which an answer is required:

1. Did the Association have damages? (Yes or No) *[Insert your answer on verdict form]*

2. Was either of the Defendants negligent? (Yes or No) *[Insert your answer on verdict form]*

3. Was the negligence, if any, of either of the Defendants a cause of any of the damages claimed by the Association? (Yes or No) *[Insert your answer on verdict form]*

If you find that the Association had no damages, or if you find that neither of the Defendants was negligent, or if you find that neither of the Defendants' negligence was a cause of the Association's damages, then your foreperson shall complete *Special Verdict Form A* accordingly and he or she and all jurors will sign it. **[Note to Readers:** *Special Verdict Form A*, **reflecting a defense verdict, has not been prepared.]**

On the other hand, if you find that the Association did have damages, and you further find that either of the Defendants was negligent and that such negligence was a cause of the Association's damages, then you shall answer the questions set out above on *Special Verdict Form B*, along with your answers to all of the questions in the following questions 4 - 7, and your foreperson shall complete only *Special Verdict Form B* and he or she and all jurors will sign it.

4. What is the total amount of the Association's damages, if any, for economic and other consequential damages as to each of the following categories of the Association's claimed damages? You should answer "0" if you determine there were none.

a. Home stucco exterior damages *[Insert your answer on verdict form]*

b. Community (privacy) wall damages *[Insert your answer on verdict form]*

c. South Slope damages *[Insert your answer on verdict form]*

d. Grading and drainage damages *[Insert your answer on verdict form]*

e. Other damages not described in a - d above *[Insert your answer on verdict form]*

5. Taking as 100 percent the combined negligence of the Defendants whose negligence, if any, you found was a cause of each category of the Association's damages, what was the percentage of negligence of each Defendant? (Place a "0" next to a Defendant whom you did not find to be

negligent or whose negligence was not a cause of that category of the Association's damages.)

a. Home stucco exterior damages *[Insert your answer on verdict form]*

b. Community (privacy) wall damages *[Insert your answer on verdict form]*

c. South Slope damages *[Insert your answer on verdict form]*

d. Grading and drainage damages *[Insert your answer on verdict form]*

e. Other damages not described in a - d above *[Insert your answer on verdict form]*

6. Did the Defendants consciously conspire and deliberately pursue a common plan or design that was negligent? (Yes or No) *[Insert your answer on verdict form]*

7. If your answer to question 6 was "yes," state what percentage, if any, of each category of the Association's claimed damages was caused by these Defendants consciously conspiring and deliberately pursuing a common plan or design that was negligent. You should answer "0" if you determine there was no such percentage.

a. Home stucco exterior damages *[Insert your answer on verdict form]*

b. Community (privacy) wall damages *[Insert your answer on verdict form]*

c. South Slope damages *[Insert your answer on verdict form]*

d. Grading and drainage damages *[Insert your answer on verdict form]*

e. Other damages not described in a - d above *[Insert your answer on verdict form]*

Appendix 2:

Sample Special Verdict Form B

DO NOT ANSWER THIS SPECIAL VERDICT FORM B IF YOUR FOREPERSON HAS COMPLETED SPECIAL VERDICT FORM A AND ALL JURORS HAVE SIGNED IT. **[Note to Readers:** *Special Verdict Form A***, reflecting a defense verdict, has not been prepared.]**

You are instructed to answer the following questions. You must all agree on your answers to each question for which an answer is required:

1. Did the Association have damages? (Yes or No) _____

2. Was either of the Defendants negligent? (Yes or No) _____

3. Was the negligence, if any, of either of the Defendants a cause of any of the damages claimed by the Association? (Yes or No) _____

4. What is the total amount of the Association's damages, if any, for economic and other consequential damages as to each of the following categories of the Association's claimed damages? You should answer "0" if you determine there were none.

a. Home stucco exterior damages: $_____

b. Community (privacy) wall damages: $_____

c. South Slope damages: $_____

d. Grading and drainage damages: $_____

e. Other damages not described in a - d above: $_____

5. Taking as 100 percent the combined negligence of all Defendants whose negligence if any, you found was a cause of each category of the Association's damages, what was the percentage of negligence of each Defendant? (Place a "0" next to a Defendant whom you did not find to be negligent or whose negligence was not a cause of that category of the Association's damages.)

a. *Home stucco exterior damages:*

Defendant *Homebuilder* _____%

Defendant *Contractor* _____%

b. *Community (privacy) wall damages:*

Defendant *Homebuilder* _____%

Defendant *Contractor* _____%

c. *South Slope damages:*

Defendant *Homebuilder* _____%

Defendant *Contractor* _____%

d. *Grading and drainage damages:*

Defendant *Homebuilder* _____%

Defendant *Contractor* _____%

e. *Other damages not described in a - d above:*

Defendant *Homebuilder* _____%

Defendant *Contractor* _____%

6. Did the Defendants consciously conspire and deliberately pursue a common plan or design that was negligent? (Yes or No) _____

7. If your answer to question 6 was "yes," state what percentage, if any, of each category of the Association's claimed damages was caused by these Defendants consciously conspiring and deliberately pursuing a common plan or design that was negligent: (You should answer "0" if you determine there was no such percentage.)

a. Home stucco exterior damages: _____%

b. Community (privacy) wall damages: _____%

c. South Slope damages: _____%

d. Grading and drainage damages: _____%

e. Other damages not described in a - d above: _____%