Builder’s Liability in Colorado©
by
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Colorado builders assume unique risks because of the dangers posed by expansive soils found along the front range of the Rocky Mountains. The importance of this risk is evidenced by the statutory duty to disclose hazards attendant to construction on expansive soils. More particularly, Colorado statute requires a builder to disclose, 14 days in advance of closing, a summary report of the soils analysis and site recommendations for construction on expansive soils along with the production of a publication detailing construction problems caused by expansive soils, construction techniques used to address those problems, and methods used to maintain a property to avoid expansive soil problems. See § 6-6.5-101, C.R.S.

Because a builder is only liable for a $500.00 penalty under the statute, most fail to realize that the statutory violation constitutes a negligent omission which homeowners claim they relied on to their detriment when buying the builder’s home. When sued by a homeowner for resultant damages caused by expansive soils, the builder often asks a number of questions about the limitations on the liability he now owes to the home buyer based on the builder’s warranty and vicarious liability arising from the work of design professionals and subcontractors. This survey is intended to discuss the relevant Colorado law in these areas and what builders should consider when seeking to limit the liability they owe to home buyers.

First, builders must recognize the liability they owe to home buyers arises out of tort, not just contract. Just like the express delivery driver who mistakenly slides on the icy road and causes an accident, a builder has a personal obligation to act without negligence when

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constructing a home. See A.C. Excavating v. Yacht Club II Homeowners Ass'n, Inc., 114 P.3d 862 (Colo.2005)(holding both general contractor and subcontractors owe duty to homeowner to build without negligence); Cosmopolitan Homes, Inc. v. Weller, 663 P.2d 1041 (Colo.1983)(seminal ruling that a builder owes the duty to build without negligence to a purchaser); Sanford v. Kobey Brothers Construction Corp., 689 P.2d 724 (Colo.App.1984)(concluding that builder who conceded to using improper construction methods was personally liable for resultant damages to home). The duty to build without negligence is independent of any contractual obligations including those arising out of warranty. When a builder reaches the epiphany that they can be liable outside the provisions of any contract they have with the home buyer, they often ask what limitations on their liability might arise under the terms of their builder's warranty.

Any liability limitations arising out of a builder's warranty largely hinge on the issue of waiver. Simply put, a builder wants to know under what conjuration can a home buyer be bound to a promise to waive claims against the builder in consideration of the builder's warranty. Unfortunately, there is no clear answer under Colorado law. At a minimum, disclaimers of implied warranties of workmanlike construction and habitability by a builder-vendor must be by clear and unambiguous language and such disclaimers must be strictly construed against the builder-vendor. See Sloat v. Matheny, 625 P.2d 1031 (Colo.1981); Belt v. Spencer, 585 P.2d 922 (Colo.App.1978). Even"as is" purchase agreements will not constitute a home buyer's waiver of the builder's liability. See Dann v. Perrotti & Hauptman Development Co., 670 P.2d 448 (Colo.App.1983). In short, Colorado law recognizes that a homeowner can waive the builder's liability but has failed to rule on any language deemed acceptable.

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Once a builder understands the questions of fact surrounding waiver of the home buyer's rights under the builder's warranty, they often want to know what recourse they have against the work of design professionals and subcontractors responsible for the construction which the homeowner has placed at issue. Colorado law recognizes that subcontractors owe the same duty to build without negligence as a general contractor. A.C. Excavating, supra. Therefore, subcontractors may be liable because they contributed to the damages claimed by the home buyer. § 13-21-111.5, C.R.S. This is consistent with the general rule of agency that a principal is not liable for the negligent conduct of its independent agents. See Grease Monkey Int'l, Inc. v. Montoya, 904 P.2d 468 (Colo.1995). While some argue that theories of contribution are inconsistent with the abolishment of indemnification under Colorado law, the authority they rely upon plainly carves out the issue contribution by independent agents. See Brochner v. Western Ins. Co., 724 P.2d 1293, 1298 at fn. 6 (Colo.1986).

Moreover, builders must consider joint and several liability arising out of a claim of civil conspiracy. While the idea of a conspiracy insights thoughts of some type of deviant behavior, liability arising from a civil conspiracy is actually quite a simple concept. Under Colorado law, parties can be held jointly and severally liable for damages when they tacitly agree to a course of conduct that results in damages. See Resolution Trust Company v. Heiserman, 898 P.2d 1049 (Colo.1995); §13-21-111.5(4), C.R.S. Consequently, when a builder agrees with a subcontractor to use certain construction methods, those parties are jointly and severally liable for damages caused if the evidence shows that the construction method used caused the damages sought by the homeowner. In the end, the only clear circumstance under Colorado law where a builder is not responsible for the negligence of the subcontractors is when property damage results from

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the negligent conduct of the subcontractor, like in the case of a dry wall installer causing flood damage from breaking a fire sprinkler head. Because such negligence is plainly beyond any direction or agreement from the builder, liability for flood damages solely hinges on the subcontractors negligence excepting some viable theory of negligent hiring.

Joint and several liability arising out of the working relationship between a builder and a design professional is not as clear under Colorado law. Colorado law recognizes the apparent authority doctrine. Grease Monkey, supra. The apparent authority doctrine imposes liability on a principal based on representations made by an independent agent who has apparent authority to make such representations. When a builders hires a geotechnical engineer that mistakenly assumes that a foundation can be properly anchored in expansive soils using a drilled pier depth of twenty feet, the builder, as the geotechnical engineer's principal, can be considered jointly and severally for the geotechnical engineers misrepresentations despite the fact that the engineer is an independent agent.

However, Colorado case law has recognized that builders are not liable for the acts of independent agents who are licensed design professionals. In the case of Vikell Investors Pacific, Inc. v. Hampden Ltd., 946 P.2d 589 (Colo.App.1997), a panel of the Colorado Court of Appeals recognized the general rule that a principal is not liable for the acts of an independent subcontractors unless the work is an inherently dangerous activity which serves as one basis for establishing strict liability. However, the Colorado Supreme Court recognized in the case of Cosmopolitan Homes supra that strict liability does not apply to claims against builders. Homeowners must show some breach of a standard of care not just the existence of a defect. Based on these two legal axioms, it can be argued that a builder should not be held vicariously

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liable for the negligence of the design professional despite the fact that the builder placed the design professional in the position of apparent authority where the design professional misrepresented the proper means for constructing a stable foundation. Colorado Courts have not yet attempted to resolve this conflict in the law of agency.

In summary, the builder must be very careful to make the soils disclosures in the manner required by Colorado statute. The builder must also recognize that Colorado Courts have yet to recognize any wording under a builder's warranty that conclusively bars a homeowner from asserting liability against a builder under a theory of negligence. Nor can a builder automatically avoid liability by calling into question the negligence of subcontractors and design professionals. In the end, the best way for a builder to avoid liability for property damages posed by expansive soils is to fully disclose to homeowners information regarding the risks attendant to expansive soils on the purchased property and the construction techniques used to mitigate those risks. Only then will the builder be able to claim that the homeowner made an informed decision as to the risks assumed when the home was purchased.

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