IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

BOBBY WINDHAM and VICKIE K. WINDHAM,

Plaintiffs/Appellants,

vs.

Court of Appeals No. 29, 212

L.C.I.2., INC., a New Mexico corporation,

Defendant/Appellee,

ANSWER BRIEF OF DEFENDANT/APPELLEE L.C.I.2., INC., A NEW MEXICO CORPORATION

Appeal from the Eighth Judicial District Court
Taos County, New Mexico
Cause No. D-820-CV-200600208

The Honorable Michael E. Vigil, District Judge

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Pursuant to Rule 12-213(A)(1)(b), references to recorded transcript are by elapsed time from the start of the recording as "(Tr___)". All referenced to the Record Proper are identified as "(RP___)", with citation to the relevant page of the Record Proper.

STATEMENT OF COMPLIANCE

The body of this Answer Brief does not exceed the thirty-five page limit contained in Rule 12-213 NMRA. The font used is Times New Roman 14 point in compliance to Rule 12-305(C)(1), and the word count is 6,903 words, excluding the portions of the brief that are exempt from the relevant limitations in Rule 12-213 NMRA.

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SUMMARY OF PROCEEDINGS

I. NATURE OF CASE

This is an action in tort for personal injury and loss of consortium which arises out of an accident which occurred on a construction site on August 10, 2004 in Taos, New Mexico. Plaintiff, Bobby Windham ("Windham"), sustained injuries when he fell through an opening in a roof he was installing, and landed below in an empty swimming pool. Windham was the foreman/job superintendent for Newt and Butch's Roofing & Sheetmetal, Inc. ("Newt & Butch"), the subcontractor hired to install the roof. L.C.I.2., Inc. (L.C.I.2.) was the general contractor. The Town of Taos was the owner.

Plaintiffs' claims against L.C.I.2. are for negligence, in "failing to provide coverings of the cutouts for the skylights," and failure to implement, communicate, monitor and enforce safety rules. [RP 145, ¶9] Plaintiffs make no claim against L.C.I.2. based upon a non-delegable duty. Paragraph 10 of the Second Amended Complaint asserts a claim for vicarious liability based upon a "non-delegable duty to enforce safety regulations and to determine at all times that no dangerous conditions were allowed to exist." That claim, however, is asserted only against the Town of Taos. [RP 145, ¶10]

II. COURSE OF PROCEEDINGS AND DISPOSITION IN COURT BELOW

As supplementation to the Course of Proceedings set forth by the Appellant, L.C.I.2. states that the original Complaint was filed only by Bobby Windham, not by both Plaintiffs. [RP 24] L.C.I.2.'s Motion for Summary Judgment is found at RP 467, not RP 407. The District Court Order allowing L.C.I.2.'s Motion for Summary Judgment is found at RP 1013. The Order found at RP 1038 is a duplicate.

The primary basis for L.C.I.2.'s Motion for Summary Judgment was that L.C.I.2. did not retain control of the work premises or of the manner in which Newt & Butch installed the roof. Therefore, L.C.I.2. is not liable for injury to Newt & Butch's employee, Windham, which resulted from an unsafe work place or conditions created by Newt & Butch.

The Co-Defendant Town of Taos was dismissed from the case on November 19, 2007 [RP 222-223]

III. SUMMARY OF FACTS RELEVANT TO ISSUES PRESENTED FOR REVIEW

A. Factual Background

1. The Town of Taos contracted with L.C.I.2. to construct a new pool building, adjacent to the Town of Taos Youth and Family Center. [RP 627].

2. L.C.I.2. subcontracted with Newt & Butch to install the roof on the

building. [RP 143-144, ¶4; RP 481] Pursuant to the Subcontract, Newt & Butch agreed to provide all labor, materials, tools, equipment, and supplies necessary for performance of the subcontract, and to do so in a workmanlike manner, including compliance with all laws bearing in the work and all OSHA regulations. [RP 481-482, Sections 2, 6, 8; RP 484, ¶7]

3. At all material times, Windham was an employee of Newt & Butch. [RP 143, ¶3] He was their job foreman/superintendent for the project. [RP 486, p. 13:21-25; RP 516, p. 17:15-18; RP 524, p. 101:18-21]

4. When Newt & Butch arrived on the job, there was no roof on the building. There were only horizontal bar joists. [RP 489, p. 44:9-16; photos, RP 504-506]

5. Newt & Butch welded steel members perpendicular to the bar joists, called bulb tees. This created checkerboard framing, 4' by 8', of open space, located 35-40 feet above ground. [RP 489, p. 44:13-23, 45:24-25, 46:1-4, 47:17-24; photos, RP 504-506; diagram, RP 527]

6. After Newt & Butch installed the bulb tees, Windham and his crew installed tectum decking, which consisted of 4' by 8' wood panels, which fit into the steel framework, or open checkerboard frames, which had been created by the framing of the bar joists and steel bulb tees. [RP 489, p. 47:12-25; RP 490, p. 48:1-9; RP 517, p. 37:25, 38:1-2; diagram, RP 527].

7. Approximately 565 tectum panels were installed, which formed the roof decking. [RP 496, p. 76:16-18] The whole roof was covered with decking, except for nine frames. These were left open, as they were reserved for skylights. [RP 497, p. 81:19-22; RP 501, p. 98:3-5; RP 521, p. 76:16-18; RP 526, p. 160:23-25, 161:1-3; RP 533, p. 23:4-22] Tectum panels were not installed in these nine frames, and they were left open and uncovered. [RP 492, p. 61:6-16; RP 534, p. 28:1-7]

8. The decision to place the tectum decking around the openings where the skylights were to be located, and to leave the skylight openings open and uncovered, was made by Windham. [RP 526, p. 160:23-25, 161:1-3; RP 533, p. 23:4-22; RP 534, p. 28:1-7]

9. Photos identified as RP 507 and 531 depict the typical position in which Bobby Windham and his crew work, while installing the tectum decking. [RP 493, p. 65:20-25; 66:1-4; RP 525, p. 106:10-22]

10. As the tectum decking is being installed, Newt & Butch begins to lay insulation over the tectum decking. The insulation also comes in 4' by 8' panels. [RP 493, p. 67:17-25, 68:1-13; RP 519, p. 55:13-18; photos, RP 528, 529; RP 533, p. 25:9-16]

11. As the insulation is being installed, but before it is completed, Windham and his crew began to lay the TPO membrane (vinyl) over the insulation. [RP 495, p.72:13-15; RP 520, p. 67:8-14; photo, RP 530; RP 537, p. 60:24-25]

12. As foreman, Bobby Windham instructed his crew to install the vinyl by rolling it over the skylight openings. This masked, or covered, the skylight openings, so they could not be seen. He then instructed his crew to cut the vinyl around the perimeter of the skylight, to expose the opening. [RP 522, p. 86:3-25, 87:1-14; RP 535, p. 34:16-25, 35:1-5, 22-25, 36:1-6; RP 537, p. 58:16-19]

13. Bobby Windham fell into a skylight opening which had just been covered with vinyl by his crew. He did so while they were cutting the vinyl around the skylight opening, which allowed him to fall through. [RP 536, p. 46:13-20, 48:1-5, 23-25]

14. By his own decision, Bobby Windham was not wearing a safety harness. [RP 518, p. 50:13-18]

15. Per Butch Wilson, Bobby Windham's boss, it was wrong for Bobby Windham to roll the vinyl over the skylight and cover, and thus mask, the skylight hole. Windham knew this was wrong. It created a danger, of which Windham was aware, of stepping into the hole and falling, [RP 486, p. 15:11-13, 80:7-21; RP 499, p.91:13-15]

B. Newt & Butch's Control Over Its Operations

16. Newt & Butch created their own shop drawings, and also procured shop drawings from the tectum representative, to show how they would detail and install the roof decking, which drawings were provided to the project architect for comments and approval. [RP 488, p. 41:3-14]

17. The bulb tees (steel members which are crosshatched with the bar joists) are installed by Newt & Butch 35-40 feet above ground. This work involved a fall hazard. Dealing with that fall hazard was Newt & Butch's responsibility. A plan for dealing with the hazard was formulated by Newt & Butch, without any input from L.C.I.2. [RP 489, p. 46:3-25, 47:1-11]

18. Newt & Butch and Bobby Windham knew that a 40 foot fall hazard was intrinsic to installation of the tectum deck, as well as to all of the work Newt & Butch was hired to do. [RP 491, p. 58:3-8, 66:18-20]

19. Newt & Butch determined the method and manner in which to lay the tectum around the skylights, and all safety considerations relating thereto. [RP 492, p. 63:6-23]

20. Newt & Butch determined the manner in which to install the deck and the insulation, the details and specifics of their installation, and determined all safety precautions that were to be utilized. [RP 492, p. 60:4-14; RP 494, p. 70:4-25, 71:1-3; RP 500, p. 92:6-14]

21. Newt & Butch knew that laying the TPO membrane (vinyl) around the skylight openings, and doing so safely, were part of its subcontract. Newt & Butch and Bobby Windham determined the manner and details of how to deal with that hazard. [RP 497, p. 81:15-25, 82:1-25, 83:1-13; RP 503, p.129:16-25, 130:1-12]

22. It is up to Newt & Butch and Bobby Windham to decide whether or not to use safety harnesses. [RP 491, p. 57:18-22, 58:1-15, 59:5-13] By his own decision, Windham took no personal safety precautions while working around the nine skylight openings. [RP 521, p. 76:13:18]

23. As part of its subcontract, Newt & Butch undertook to deal with all safety issues relating to fall hazards, and relied upon no one else to do so. [RP 493, p. 66:21-25, 67:1-6]

24. As part of its subcontract, Newt & Butch agreed to do all of its work in a safe manner. [RP 497, p. 83:24-25; RP 498, p. 84:1-2]

25. Unless a general contractor knows that a subcontractor is doing something nonsensical, a general contractor who hires a competent subcontractor has the right to assume that the subcontractor is following proper safety procedures with respect to the work the subcontractor is hired to do. [RP 499, p. 91:3-12]

26. From commencement of the job until Windham's accident, no one else had worked in or around the skylights. [RP 523, p. 90:18-21]

IV. STANDARD OF REVIEW

Summary judgment is reviewed on appeal de novo. *Celaya v. Hall*, 2004-NMSC-005 ¶7, 135 N.M.115, 85 P.3d 239, *Self v. United Parcel Serv., Inc.,* 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582. "This Court will affirm the grant of summary judgment when there is no evidence raising a reasonable doubt about any genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Cain v. Champion Window Co. of Albuquerque*, 2007-NMCA-085 ¶6, 142 N.M. 209, 164 P.3d 90. "[i]f no material issues of fact are in dispute and an appeal presents only a question of law, we apply de novo review and are not required to view the appeal in the light most favorable to the party opposing summary judgment. *City of Albuquerque v. BPLW Architects & Engineers, Inc.*, 2009-NMCA-081 ¶7, __N.M.__, __P.3d__ (No. 27,837, June 9, 2009).

ARGUMENT

I. SUMMARY OF ARGUMENT

Plaintiffs' claim against L.C.I.2. is for negligence, in "failing to provide coverings of the cutouts for the skylights," and failure to implement, communicate, monitor and enforce safety rules. New Mexico law is well-settled law that a general contractor, who does not retain control of the work premises or of the manner in which a subcontractor's work is performed, is not liable for injuries to the subcontractor's employee, which result from an unsafe work place or condition

created by the subcontractor. *Fresquez v. Southwestern Industrial Contractors & Riggers, Inc.*, 89 N.M. 525, 530-531, 554 P.2d 986, 991-992, (Ct. App. 1976), *Tipton v. Texaco, Inc.*, 103 N.M. 689, 694, 712 P.2d 1351, 1356 (1985), *Hinger v. Parker & Parsley Petroleum Co.*, 120 N.M. 430, 902 P.2d 1033 (Ct. App. 1995). L.C.I.2. did not retain control of Newt & Butch's work premises or of the manner in which New & Butch's work was performed, and a genuine issue of material fact with respect thereto was not established in the District Court. Therefore, the judgment of the District Court should be affirmed.

A. The Plaintiffs' theory of vicarious liability based upon a non-delegable duty to enforce safety regulations and ensure that no dangerous conditions were allowed to exist, was not asserted against L.C.I.2. It was asserted only against the Town of Taos. In any event, absent control of the manner and details of the independent contractor's work, an employer of an independent contractor has no duty to employees of an independent contractor, even if inherently dangerous work is involved. *New Mexico Electric Service Co. v. Montanez*, 89 N.M. 278, 554 P.2d 634 (1976) L.C.I.2. did not control the manner and details of Newt & Butch's work. Moreover, New Mexico has never held that roofing is an inherently dangerous activity. L.C.I.2. has no liability to the Plaintiffs based upon this theory, and the judgment of the District Court should be affirmed.

II. APPLICABLE LAW

A. The law as set forth in *Fresquez* is well settled in New Mexico and is dispositive of the instant case. In *Fresquez*, an employee of a subcontractor was killed when a piece of the subcontractor's equipment broke and fell on him. The Plaintiff's estate sued (among others) the general contractor. The general contractor was granted summary judgment, which was affirmed on appeal. In so ruling, the Appeals Court "assumed" that the general contractor had a duty to provide a safe place to work for an employee of an independent contractor. *Id.* at 530. However, the seminal question was in what situations does that duty arise? The Court answered, by stating that,

> Absent control over the job location or direction of the manner in which the delegated tasks are carried out, the general contractor is not liable for injuries to employees of the subcontractor resulting from either the condition of the premises or the manner in which the work is performed.

Id. at 530-31.

With respect to "control over the job location," the Court stated that this refers to the "physical location where the work was being performed," and includes the materials being worked upon. *Id.* at 531 In the instant case, that is the roof. L.C.I.2. contends that Newt & Butch was in control of the roof. However, even if the Plaintiff could contend that the roof constituted "common premises," the

Plaintiff would still have to prove that the hazard was created by someone other than Windham or Newt & Butch. *Id.*

With respect to liability based upon "direction of the manner in which the delegated tasks are carried out," the issue is whether the general contractor had the "right to control" the subcontractor's operations. *Id.* Relying upon and citing the Restatement of the Law, Torts 2d, § 414 (1965), comment (c), *Fresquez* further defined the "right to control" as requiring "such a right of supervision so that [the sub-contractor] was not entirely free to do the work in its own way. *Id.* Comment (c) describes the degree of control necessary to subject the general contractor to liability in this situation. It states:

> ...the employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way.

In *Fresquez* the Court acknowledged that facts showed that the general contractor's superintendent had authority to see that the job was correctly done, that the superintendent would instruct sub-contractors to correct dangerous conditions of which he was aware, that he would report non-compliance to his

superior, and that the superintendent had responsibility for the total job, including decisions concerning safety. *Fresquez* at 531. Nevertheless, the Court held that these facts constituted only "a showing of the right of general superintendence necessary to insure the subcontractor performs his agreement." *Id.* The Court continued, "The right in a general contractor to stop the subcontractor from proceeding with the work if dangerous practices are observed, does not carry with it liability to the employees of the very same subcontractor causing the dangerous condition." *Id.* at 531-32.

The Plaintiffs' Brief in Chief contains a discussion of general concepts of "duty" and "forseeability." See eg., BIC pp. 15-18 where Plaintiff cites cases such as *Herrera v. Quality Pontiac*, 2003-NMSC-18, 134 N.M. 43, 48, 73 P.3d 181, *Calkins v. The Cox Estates*, 110 N.M. 59, 662, 792 P.2d 36 (1990), and *Klopp v. The Wackenhut Corp.*, 113 N.M. 153, 159, 824 P.2d 293, 299 (1992). These cases are inapposite, because the proper analysis of duty which applies in the instant case has been established in *Fresquez,* the facts of which are directly on point. In *Fresquez* the Court stated that the issue is whether a duty even arises, and that in determining so, the critical inquiry is whether L.C.I.2. exercised control over the physical location where the work was being performed or over the manner in which the delegated tasks were carried out.

The Plaintiffs' Brief in Chief contends that L.C.I.2. breached duties of care. For example the Plaintiffs allege that L.C.I.2. did not have an effective safety program, failed to follow standards, customs and practices, failed to assure proper training for its employees, etc. (See BIC p. 12-15.) These contentions are also inapposite. The Plaintiffs mistakenly frame the issue as whether L.C.I.2. breached duties. However, pursuant to *Fresquez*, the issue is whether L.C.I.2. had a duty to do any of these things in the first place. Resolution of that question involves an analysis of control, as stated above.

B. The other seminal case for purposes of this case is *Montanez*, 89 N.M. 278, 551, P.2d 634 (1976). It held that in situations in which the general contractor does not control the activities of the subcontractor, the general contractor owes no duty of care to an employee of the subcontractor, even when inherently dangerous work is involved. "The employer generally hires an independent contractor to perform work that he is not equipped or trained to do. We see no reason why the employer should become the insurer of the employees of an independent contractor." *Id.* at 282. "There does not seem to be any valid reason why an employer of an independent contractor for the performance of specific work should be subjected to a greater liability than he would have if he had utilized his own employees on that particular work." *Id.*

III. L.C.I.2. DID NOT CONTROL THE PHYSICAL LOCATION WHERE NEWT & BUTCH PERFORMED ITS WORK; NOR DID IT DIRECT THE MANNER IN WHICH NEWT & BUTCH PERFORMED ITS WORK. THEREFORE, L.C.I.2. IS NOT LIABLE FOR INJURIES TO WINDHAM RESULTING FROM THE CONDITION OF THE PREMISES OR THE MANNER IN WHICH THE WORK WAS PERFORMED.

Unless otherwise indicated, references to the record of all facts stated herein are contained in the above Summary of Facts.

The legal standard is clearly set forth in *Fresquez and the Restatement.* For liability to be imposed upon L.C.I.2., the law requires that L.C.I.2. controlled the physical location where Newt & Butch performed its work, ie., the roof, or directed the manner in which Newt & Butch performed its work. *Fresquez* at 531. L.C.I.2. did neither.

That L.C.I.2. did not exercise the requisite degree of control is made manifest by an understanding of the nature of the roof being installed, its manner of installation, and the contractual relationship between L.C.I.2. and Newt & Butch.

A. First, the nature of the roof which Newt & Butch contracted to install. Upon commencement of Newt & Butch's work, there was no roof, whatsoever. There was no roof decking. There was only the sky above, except for iron girders (bar joists), which ran horizontally, eight feet apart, 35-40 feet above ground. They are depicted in photographs identified as RP 504-507. From that point on, the

complete roof was installed solely by Newt & Butch. Per Butch Wilson, owner of Newt & Butch, the roof installation, which included installation of the bulb tees, the tectum roof deck, the roof insulation, the roofing, the roofing sheet metal, and the TPO membrane (vinyl), was to be performed by Newt & Butch pursuant to its subcontract. [RP 497, p. 81:15-18; RP 498, p. 84:6-11]

This is also evidenced by the Subcontract. It states that Newt & Butch shall "Furnish all labor, materials and equipment necessary to complete all Tectum III panels, and roofing per the Plans...." [RP 481]

Newt & Butch's involvement, however, went even deeper. It was involved in the design of the roof. Newt & Butch created their own shop drawings, and also procured shop drawings from the tectum representative, to show how they would "detail and install" the roof decking. These drawings were provided to the project architect for comments and approval. [RP 488, p. 41:3-14] This underscores Newt & Butch's intimate knowledge of both the nature of the roof and the method and manner of its installation. The record is devoid of such knowledge by any other person or entity. Plaintiffs' Brief in Chief makes no argument to the contrary.

B. Newt & Butch proceeds by first installing bulb tees. It does so alone, with no involvement by any other person or entity. Bulb tees are steel members welded perpendicular to the bar joists. Together, they create checkerboard framing,

4' by 8', of open space, or sky, located 35-40 feet above ground. [RP 489, p. 44:13-23, 45:24-25, 46:1-4, 47:17-24; photos, RP 504-506; diagram, RP 527]

At this point, there is still no roof deck to walk or stand upon. There are only girders. This work involved a fall hazard, and a plan for addressing it was formulated by Newt & Butch. Dealing with that fall hazard was Newt & Butch's responsibility. [RP 489, p. 46:3-25, 47:1-11]

C. Windham was Newt & Butch's job foreman/superintendent for the project. He was the "head person on the job for Newt & Butch." [RP 486, p.14:1-3]

D. After Newt & Butch installed the bulb tees, Windham and his crew installed the tectum decking, which consisted of 4' by 8' wood panels, which fit into the steel framework, or open checkerboard frames, which had been created by the framing of the bar joists and steel bulb tees. They also did this alone, with no involvement by any other person or entity. Newt & Butch and Bobby Windham knew that a 40 foot fall hazard was intrinsic to installation of the tectum deck, as well as to all the work it was hired to do. Photos identified as RP 507 and 531 depict the typical position in which Bobby Windham and his crew work, while installing the tectum decking. Note that Windham is working adjacent to a 35-40 foot drop on two sides. These photographs illustrate the fall hazard which existed. It existed throughout the installation of the bulb tees, and throughout the installation of the tectum decking. This fall hazard was not created L.C.I.2. or any

other person or entity. It was intrinsic in the work which Newt & Butch was hired to do.

Approximately 565 tectum panels were installed, which formed the roof decking. As Windham proceeded with this work, a structure that began with no roof, whatsoever, and was just open sky and girders, was transformed, one 4 x 8 panel at a time, to a deck that covered the whole roof. The only exception was the frames where the skylights were to be installed. The roof was designed to have nine skylights. As Windham installed the tectum decking, when he encountered each of the nine frames where a skylight was to be installed, he left it open and uncovered. [RP 534, p. 26:25, 27:1-3, 28:1-7] One may picture a checkerboard with over 500 rectangles, all except nine of which were covered with decking.[1] The decision to leave the nine panels uncovered was made by Windham.

These facts show that Newt & Butch had complete control over the job location (roof), as well as the details of the work. However, they also illustrate an important fact about the fall hazard. Fall hazards were not created by L.C.I.2. or by any other person or entity. They were present at all stages of Newt & Butch's work, as all of the work was performed 35-40 feet above ground. They were especially present when the bulb tees were installed, as there was no decking to walk upon, and the fall hazards existed in all directions. They were present when

[1] The nine skylight frames were a bit larger than the other panels. [RP 533, p. 22:6-25, 23:1-3]

the tectum decking was installed, as shown by the photographs depicting the roofer working adjacent to the 35-40 foot drop. They were present around the perimeter of the building when the insulation and vinyl were installed. The fall hazards were intrinsic to the work that Newt & Butch had agreed to do pursuant to its subcontract. This was not a situation where another person or entity created a fall hazard, which condition was chanced upon by Windham. Rather, the fall hazard was inherent in the nature of the work Newt & Butch contracted to do.

As the tectum decking is being installed, Newt & Butch begins to lay the insulation over the tectum decking. The insulation also comes in 4' by 8' panels. As the insulation is being installed, but before it is completed, Windham and his crew began to lay the TPO membrane (vinyl) over the insulation. [photos, RP 528, 529] Installation of both the insulation and the vinyl TPO membrane were done solely by Windham and Newt & Butch. Photographs of the roof deck, complete with tectum and insulation are shown in RP 528-530. The vinyl insulation, which is in the process of being rolled out, is also shown. Not shown in the photographs are the nine skylight openings, which Windham chose to leave uncovered, even after the tectum and insulation were installed.

This set the stage for the accident. Windham instructed his crew to install the vinyl by rolling it over the insulation and over the uncovered skylight openings. By doing so, Windham masked, or covered, the skylight openings, so they could

not be seen. He then instructed his crew to cut the vinyl around the perimeter of the skylight, to expose the opening. Per Butch Wilson, it was wrong for Bobby Windham to roll the vinyl over the skylight and cover, and consequently mask, the hole. Bobby Windham fell into a skylight opening which had just been covered with vinyl by his crew. He did so while they were cutting the vinyl around the skylight opening, which allowed him to fall through.

Windham created the danger when he left the openings for the skylights with no covering, guard or warning. He then exacerbated his error twice; first by placing a vinyl material over the opening, thereby masking the opening, and then by instructing his employees to cut the vinyl around the perimeter, which allowed Windham to fall through.

E. Butch Wilson stated, in no uncertain terms, that as part of its subcontract, Newt & Butch undertook to do all of its work in safe manner, to deal with all safety issues relating to fall hazards, and relied upon no one else to do so. [RP 493, p. 66:21-25, 67:1-6] He stated that unless a general contractor knows that a subcontractor is doing something nonsensical, a general contractor who hires a competent subcontractor has the right to assume that the subcontractor is following proper safety procedures with respect to the work the subcontractor is hired to do.

Newt & Butch's involvement began with the design of the roof. Installation of the entire roof, including the bulb tees, tectum decking, insulation and vinyl

TPO membrane, was done by Newt & Butch. The tectum decking, insulation and vinyl TPO membrane were all installed by Windham and other Newt & Butch employees, under Windham's supervision and direction. Windham knew that skylights were to be installed in certain areas. It was with that knowledge that he determined the method and manner by which to perform the work.

The method chosen by Windham to deal with the areas framed for skylights was to lay tectum panels around them, leave the openings uncovered, and work around them, without using any type of fall protection. He then decided to mask the openings by laying the TPO membrane over them and cutting the vinyl around the perimeter of the skylight. The accident resulted from these decisions and choices made by solely by Windham, regarding the method, manner and detail of how to do the work which Newt & Butch had contracted to do.

The facts unequivocally establish, in accord with the law set forth in *Fresquez* and the *Restatement (Second) of Torts*, that L.C.I.2. did not control the manner in which Newt & Butch carried out its tasks, nor the methods or operative details of how it performed its work. Newt & Butch had absolute authority to, and in fact did, perform the work in its own way. From commencement of the job until Windham's accident, no one else had worked in or around the skylights. [RP 523, p. 90:18-21]

As a subcontractor, Newt & Butch was hired because of its expertise in performing this type of work and its expertise in dealing with fall hazards associated with installation of a roof 35-40 feet above ground. Newt & Butch acknowledged that fall hazards were inherent in the work. These fall hazards were not created by L.C.I.2. or by any other person or entity. Newt & Butch acknowledged that it was its responsibility to address the fall hazards, that it undertook to do so, and that it relied as no one else to do so. [RP 493, p. 66:21-25, 67:1-6] At each stage of its work, from installation of the bulb tees, to the tectum decking, to the insulation, and to installation of the vinyl TPO membrane, Newt & Butch alone determined the manner, method and details of how the work would be done, how they were going to address the skylights, and how they were going to address all of the safety hazards presented. This was intrinsic to the work for which Newt & Butch had subcontracted. [RP 492, p. 63:6-23, 60:4-19, 70:4-25, 71:1-3, 92:8-14]

For liability to be imposed upon L.C.I.2., the law requires "such a right of supervision, that [Newt & Butch] was not entirely free to do the work in its own way." Restatement, §414 comment (c). It requires L.C.I.2. to "control the method or the operative detail" by which Newt & Butch performed its work. *Id.* Conspicuously absent from the Plaintiffs' Brief in Chief are any facts relating to control by L.C.I.2., and the record is certainly devoid of any facts approaching the

level of control required by this legal standard. One sees no contention that L.C.I.2. "directed," "instructed," or otherwise "told," anyone at Newt & Butch how to perform a single aspect or detail of its work, except as may relate to L.C.I.2's general duties of superintendence, which, as discussed below, does not suffice to establish control.

IV. EXERCISING GENERAL SUPERINTENDENCE TO ENSURE THAT THE SUBCONTRACTOR PERFORMS ITS AGREEMENT DOES NOT RENDER L.C.I.2. LIABLE TO WINDHAM

In support of its contention that L.C.I.2. exercised control over the work being performed by Windham, Plaintiffs proffer the following: 1) that pursuant to its contract with the City of Taos, L.C.I.2. had a superintendent on the jobsite [BIC 9-10], and that L.C.I. 2 was responsible to have a safe worksite, 2) that "LCI2 had mandated the use of safety hats, instructed Newt & Butch employees to use tie offs, and had thrown one subcontractor off the job for unsafe practices." [BIC 20] The same contentions were addressed in *Fresquez* and rejected as a basis for a finding of control by the contractor. In *Fresquez,* the Court acknowledged that the general contractor, Bradbury, had a superintendent on the jobsite who had authority to see that the job was correctly done, that if the superintendent saw that a subcontractor produced a dangerous condition he would instruct the subcontractor to "straighten it out," and that the Bradbury superintendent had the

responsibility for the total job, including decisions concerning safety. *Id.* In response to these contentions, the Court stated that these facts did not constitute

> a showing that Bradbury retained such a right of supervision so that [subcontractor] was not entirely free to do the work in its own way. [citation] The above showing is a showing of the right of general superintendence necessary to insure the subcontractor performs his agreement. [citation] The right in a general contractor to stop the subcontractor from proceeding with the work if dangerous practices are observed, does not carry with it liability to the employees of the very same contractor causing the dangerous condition.

Id. at 531-532

As in Fresquez, L.C.I.2.'s alleged acts constituted only "general superintendence necessary to insure the subcontractor performs his agreement." Newt & Butch was "entirely free to do the work its own way."

V. THE CONTRACT BETWEEN L.C.I.2 AND SAFETY COUNSELLING, INC. DOES NOT ESTABLISH ANY DUTIES FROM L.C.I.2. TO THE PLAINTIFFS AND IS IRRELEVANT TO THE ISSUE OF L.C.I.2.'S CONTROL OF THE WORKSITE OR OF NEWT & BUTCH'S WORK

Plaintiffs also reference a contract between L.C.I. 2 and Safety Counseling, Inc. [BIC 10] The contract, incorrectly cited at RP 664-666 is found at RP 669-672. As stated therein, it is a contract entered into by L.C.I.2. with an outside company, to provide L.C.I.2. with certain services related to L.C.I.2.'s safety and health program, for all of L.C.I.2.'s operations. [RP 669] Its import as regards this litigation is nothing more than a reflection of L.C.I.2.'s diligence in ensuring that it had an effective safety and health program for its company. This contract was not

had an effective safety and health program for its company. This contract was not required by L.C.I.2.'s contract with the City of Taos. [RP 627] It establishes no duties or obligations from L.C.I.2. to the City of Taos or to the Plaintiffs in this litigation.

Plaintiffs' Brief in Chief references an incident involving Eppie Ortega. Mr. Ortega worked for Safety Counseling, Inc. Coincidentally, moments before Windham's accident, Mr. Ortega was on the roof and told Windham to cover the skylights to eliminate the fall hazard. [RP 681, p. 41, l. 1-13.] Windham then went to the forklift to get materials to cover the skylights. [RP 677, p. 116, l. 1-13] When Windham returned to the roof, he stepped onto the vinyl that covered the skylight opening, which his laborers were in the process of cutting. Plaintiffs state that "when [Windham] got back up on the roof and [sic] someone had covered the opening with a piece of vinyl." [BIC 11] The "someone' referred to by the Plaintiffs were Desi Diaz, and Chase Bradley, the Newt & Butch laborers who were being supervised by Windham. They had laid, and were cutting the vinyl, pursuant to Windham's instruction. [RP 536, p. 46:1-5, 13-21, p. 48:21-25] These facts represent an example of the contractor advising the subcontractor to ameliorate a dangerous condition which was created by the subcontractor. It is expressly allowed by *Fresquez*. It does not support a contention of control by the contractor.

VI. FRANK BURG'S OPINIONS AS TO "DUTY" OR "RESPONSIBILITY" ARE NEITHER ADMISSIBLE NOR PROBATIVE ON THE ISSUE OF "CONTROL."

Plaintiffs' Brief in Chief references the testimony of Frank Burg, whom the Plaintiffs have proffered as a health and safety professional. [BIC 12-15] Mr. Burg provides opinions that L.C.I.2. has breached certain duties such as failing to have an effective health and safety program, failing to follow standards, customs and practices, failing to assure proper training for its employees, etc. As stated above, however, breach of duty is not the issue. Whether a duty exists in the first place is the issue. That is a question of law for the Courts to decide. *Solorzano v. Bristow*, 2004-NMCA-136, ¶ 21, 136 N.M. 658, 103 P.3d 582. The issue is one of "control." Mr. Burg has no firsthand knowledge of, and proffers no facts, relating thereto. To the extent that Mr. Burg provides his own opinions as to "duty" or "responsibility," they are neither admissible nor probative on the issue of control.

VII. NO LIABILITY BASED UPON NON-DELEGABLE DUTY

Plaintiffs' claim based upon a non-delegable duty is found in paragraph 10 of the Second Amended Complaint. By its terms, it is directed only against the City of Taos. [RP 145] The claims against L.C.I.2. and the City of Taos, based upon negligence, are set forth in paragraph 9 of the Second Amended Complaint.

In their Brief in Chief, Plaintiffs state that L.C.I.2. "attempts to cast its non-delegable duty as a vicarious liability claim. [BIC 29] To the contrary, it is the Plaintiffs who have so characterized their claim. [RP 145, ¶10]

Even if Plaintiffs theory of non-delegable duty is construed to be asserted against L.C.I.2., it provides Plaintiffs with no avenue of recovery. *Montanez*, cited above, disposes of this claim. Employers of independent contractors, who do not control the work of the independent contractors, have no duty to employees of independent contractors, even when inherently dangerous work is involved. *Montanez* at 281, 282, *Moulder v. Brown*, 98 N.M. 71, 75, 644 P.2d 1060 (Ct. App. 1982), *Tipton,* 103 N.M. 689, 694, 712 P.2d 1351, *Valdez v. Cillessen & Son, Inc.*, 105 N.M. 575, 580, 734 P.2d 1258 (1987), *Enriquez v. Cochran*, 1998-NMCA-157 ¶112, 126 N.M. 196, 967 P.2d 1136 (1998).

> In *Montanez*, our Supreme Court held that the employer of an independent contractor owed no duty of care to the employees of the independent contractor under Sections 413, 416, and 427 of the Restatement. 89 N.M. at 281-82, 551 P.2d at 637-38. Our Court determined that the term "others" in these sections of the Restatement did not include employees of independent contractors actually doing the work.

Enriquez, 1998-NMCA-157 ¶112

In support of this claim, Plaintiffs cite *Saiz v. Belen School District*, 113 N.M. 387, 827 P.2d 102 (1992) Such reliance is misplaced. *Saiz* involved a suit by a third party. It did not involve a suit by an employee of an independent contractor

against the employer of the independent contractor. This distinction, including a reference to *Montanez*, is discussed in *Saiz* at fn. 10.

Finally, the doctrine does not apply in any event. New Mexico courts have refused to find that the operation of a wave pool, or a swimming pool, is inherently dangerous. *Gabaldon v. Erisa Mortgage Co.*, 1999-NMSC-039, ¶ 13, 128 N.M. 84, 990 P.2d 197 (holding that the operation of a wave pool is not inherently dangerous); *Seal v. Carlsbad Indep. Sch. Dist.*, 116 N.M. 101, 103-04, 860 P.2d 743, 745-46 (1993) (holding that operation of a swimming pool is not inherently dangerous). In *Valdez v. Yates Petroleum Corp.*, 2007-NMCA-038, 155 P.3d 786, it was held that the operation of an eighteen-wheeled truck to deliver water is not an inherently dangerous activity. The proper analysis depends on the nature of the activity in general and whether it is inherently dangerous, not on whether it was dangerous because of alleged negligent acts or omissions in the way it was conducted. *Gabaldon*, 1999-NMSC-039, ¶20. The risk of falling is not unique to roofing. Under the plaintiff's theory, any work performed at higher elevations would be classified as inherently dangerous, triggering the doctrine of strict liability. This would include all roofing, any work performed with ladders, any trade whatsoever, performed at heights with a fall hazard. New Mexico law does not so hold. The activity must be "rare." *Gabaldon*, ¶14. The doctrine has, in fact, been applied only in extremely limited circumstances. In the instant case,

there is nothing inherently dangerous about performing work at heights in the vicinity of skylights.

Other jurisdictions are in accord. The following cases all have held that roofing is not an inherently dangerous activity: *Olympic Products Co. v. Roof Systems, Inc.,* 88 N.C. App. 315, 334, 363 S.E.2d 367, 378 (1988), *Schoenherr v. Stuart Frankel Development Company*, 260 Mich. App. 172, 679 N.W.2d 147 (2003), *Marshalls Nashville V. Harding Mall,* 1990.TN.996 , 799 S.W.2d 239.

In the instant case, it is submitted that this Court will not reach the issue of whether roofing is an inherently dangerous activity. The specific question whether roofing is an inherently dangerous activity was not a basis for L.C.I.2.'s Motion for Summary Judgment, and never was ruled upon by the trial court. If L.C.I.2. did not control Windham's work, then L.C.I.2. has no liability to Windham, even if he was engaged in an inherently dangerous activity, and the judgment should be affirmed. If this Court holds that the Plaintiff created a genuine issue of material fact on the issue of control, then the case should be remanded, and the trial court will make a determination whether roofing is an inherently dangerous activity.

CONCLUSION

The holding in *Fresquez* is controlling in the instant case. It establishes a high standard, which requires that L.C.I.2. exercise such control over the methods and operative details of Newt & Butch's work, that Newt & Butch was not free to

do the work in its own way. The facts are to the contrary, that Newt & Butch's involvement began with the design of the roof. Installation of the roof consisted of a number of phases, all of which were done solely by Newt & Butch. Newt & Butch acknowledged responsibility for safety with respect to all phases of its work. Except for duties of general superintendence exercised by L.C.I.2., which duties do not establish control, Newt & Butch determined the method and manner in which it performed the work, including all of the operative details. L.C.I.2. did no work in or upon the skylights, and provided Newt & Butch with no instruction about how to do so. The record is devoid of any fact to the contrary.

The claim based upon an inherently dangerous activity is not asserted against L.C.I.2. It is barred in any event by the holding in *Montanez,* and because roofing is not an inherently dangerous activity.

The ruling of the District Court should be affirmed.

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CERTIFICATE OF SERVICE

It is hereby certified that on this 29th day of October, 2009, a true and correct copy of the foregoing has been mailed, via first class mail, postage prepaid and properly addressed Kevin M. Sexton, Esq. at Montgomery & Andrews, P. A., Post Office Box 36210, Albuquerque, New Mexico 87176-6210 and to David. M. Houliston, Esq. Will Ferguson & Associates, 1720 Louisiana Boulevard NE, Suite 100, Albuquerque, New Mexico 87110-7069.

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