IN THE COURT OF APPEALS FOR THE STATE OF NEW MEXICO

BOBBY WINDHAM and VICKIE K. WINDHAM,

Plaintiffs,

vs.

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

Defendant,

Court of Appeals No. ~~29,609~~
Cause No. CV 2006-208 29212

APPEAL FROM THE EIGHTH JUDICIAL DISTRICT COURT, COUNTY OF TAOS
THE HONORABLE MICHAEL E. VIGIL PRESIDING

APPELLANTS' BRIEF IN CHIEF
ORAL ARGUMENT REQUESTED

WILL FERGUSON & ASSOCIATES
David M. Houliston
1720 Louisiana Blvd NE, Suite 100
Albuquerque, NM 87110
Telephone: 505-243-5566
Facsimile: 505-243-5699

SAUNDERS AND WESTBROOK, PC
Maureen Sanders
102 Granite Ave NW
Albuquerque, NM 87102
Tel: 505-2243

Counsel for Plaintiffs-Appellants

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29 C.F.R. §1926.501(a)(4)(i)

29 C.F.R. § 1926.501(b) (1)

29 C.F.R. §1910.23(a) (4)

OTHER SOURCES

Washington, D.C.: U.S. Department of Labor, Bureau of Labor Statistics http://www.bls.gov/iif/oshwc/cfoi/cftb0153.pdf.

U.S. Department of Health and Human Services, Public Health Service, Centers for Disease Control and Prevention, National Institute for Occupational Safety and Health, DHHS (NIOSH) Publication No. 90-100

Restatement 2nd of Torts, § 414 (1965)

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SUMMARY OF PROCEEDINGS

NATURE OF THE CASE

This is an action for personal injuries arising out of a near-fatal construction site accident. The construction site was an indoor swimming pool addition for the City of Taos. Plaintiff, Bobby Windham ("Plaintiff") was working on a roof deck (which had numerous uncovered and unguarded large holes) some thirty five feet above the empty swimming pool ("pool project") when he fell. The "hole" through which he fell was actually a prefabricated opening for the installation of a skylight. At the time of accident there were nine such holes on the roof. The actual hole or opening Plaintiff fell through was not designed, created or controlled by Plaintiff or his employer. Plaintiff fell after he was instructed by an employee of LCI2 to

get off the roof. When he climbed back up, he fell through a hole which had been covered over with vinyl after we went down the ladder.

COURSE OF PROCEEDINGS

Plaintiffs filed the initial Complaint for Personal Injuries on May 25, 2006 (RP 24). Plaintiffs then filed a Second Amended Complaint for Personal Injuries and Loss of Consortium on May 10, 2007 (RP 143). Defendant L.C.I.2 ("LCI2") filed a Motion for Summary (RP 407) and the court granted Defendant's Motion for Summary Judgment dismissing Plaintiffs' Complaint and all claims set forth therein (RP 1013). In the underlying case, the insurance carrier for the Defendant also intervened (RP 544) but none of the issues raised by the carrier are involved in the instant appeal.

The District Court filed its Order granting Defendant's Motion for Summary Judgment on November 24th, 2008 (RP 1038). Plaintiffs' instant appeal is taken from that Order. Plaintiffs filed their Notice of Appeal on December 23rd 2008 (RP 1036) and thus Plaintiffs' appeal is timely. This appeal is taken by Plaintiffs, Bobby and Vickie K. Windham, pursuant to NMRA 12-202.

STANDARD OF REVIEW

Summary judgment is proper if there are no genuine issues of material facts and the movant is entitled to judgment as a matter of law. ***Roth v. Thompson***, 113

N.M. 331, 334, 825 P.2d 1241, 1244 (1992). In ruling on a motion for summary judgment under Rule 1-056, NMRA 2006, the trial courts must resolve all reasonable inferences in favor of a non-movant and must view the pleadings, affidavits, depositions, and answer to interrogatories in the light most favorable to the non-movant. *See* ***Carrillo v. Rostro***, 114 N.M. 607, 615, 845 P.2d 130, 138 (1992). Summary judgment is a drastic remedy that should be used with great caution. ***Pharmaseal Lab, Inc. v. Goeff***, 90 N.M. 753, 756, 568 P.2d 589, 592 (1977). Because summary judgment involved a question of law, the court of appeals reviews the district court's ruling *de novo*. ***Phoenix Indemnity Ins. Co. v. Pulis***, 2000-NMSC-023, ¶6, 129 N.M. 395, 9 P.3d 639. Once the moving party has made a *prima facie* showing of entitlement, the burden shifts to the non-moving party to demonstration by admissible evidence that there are material issues of facts as to each element of the claim. ***Koenig v. Perez***, 104 N.M. 664, 666, 726 P.2d 341, 343 (1986); ***Goradia v. Hahn Co.***, 111 N.M. 779, 810 P.2d 798 (1991).

STATEMENT OF FACTS

At the time of the accident, August 10th 2004, Plaintiff was employed at Newt & Butch as a roofer and was working in Taos, New Mexico at a construction site owned by the City of Taos (RP 143). The project called for the construction of a large, Olympic swimming pool and an accompanying community center (RP

144). The roof over the pool had hundreds of unguarded openings that were actually skylights. Plaintiff's employer Newt & Butch did not design, construct or install the skylight openings, nor did the roofing subcontractor cut out the skylight openings from an existing roof deck (RP 728). Rather, the roof structure was made of prefabricated panels and the skylights were framed out *before* Newt & Butch's work on the roof (RP 728). Thus, the large skylight openings were in existence for at least 30 days before the accident (RP 728).

Plaintiff worked on the roof for more than 30 days before his fall (RP 728). For more than 30 days before the accident, all of the skylight openings remained uncovered by screens or covers, as required by federal Occupational Safety & Health Administration (OSHA) regulatory standards. 29 C.F.R. § 1910.23(a) (4), nor were the skylight openings guarded by a fixed standard railing, also per OSHA federal regulatory standards. *Id* (RP 682-684). This highly dangerous condition of the roof is what led to the accident of August 10th, 2004. *Id.*

At the time of the accident, Defendant LCI2 was the General Contractor on the pool project (RP 627). LCI2 had an onsite superintendent for the construction of an indoor swimming pool addition to the Taos Youth and Family Center ("project"). (RP 922) Pursuant to a contract with the City of Taos. (RP 635) LCI2 employed Dave Sauble ("Sauble") to be the project superintendant and to be responsible for overseeing the construction project, including all aspects

concerning the safety of subcontractors and material men on the site (RP 635). Sauble worked on-site daily, and was the representative of LCI2 at the project (RP 922).

Before LCI2 entered into the contract with the City of Taos, LCI2 contracted with Safety Counseling, Inc.("Safety Counseling"), to provide safety consultations on a bi-monthly basis (RP 664-666). Under the express terms of their contract, Safety Counseling was to perform two (2) site inspections a month and make recommendations for improving job site safety and thereby minimizing and/or eliminating safety hazards on the site. *Id.*

Under the contract, Safety Counseling was also to provide specific job site hazard analysis and such other support deemed necessary. *Id.* Despite offering safety expertise and knowledge, Safety Counseling was not allowed to perform a specific Hazard Analysis for the pool project, and its efforts to perform regular site visits to identify hazards was curtailed by LCI2 before the date of Plaintiff's accident (RP 669, 676).

On the day of Plaintiff's fall, Safety Counseling alerted LCI2 to the dangers posed by the unprotected skylight openings in the roof (RP 923). The accident actually happened after LCI2 had been notified of the danger, and its agent, Eppie Ortega of Safety Counseling, climbed up on the roof to discuss the situation. *Id.* For reasons which remain unexplained, Plaintiff's crew were **not** told to get off the

roof. Instead, LCI2 continued to operate the worksite, and kept Plaintiff and his co-workers on the roof while the hazards remained. No safety precautions were taken while Plaintiff was kept on the roof. *Id.* Rather, Mr. Ortega got down off the roof while the hazards were still present and shortly thereafter, Plaintiff fell, nearly to his death. (RP 682) When Plaintiff got back up on the roof and someone had covered the opening with a piece of vinyl (RP 144, 522).

LCI2, despite being made aware of the dangers associated with the uncovered skylight openings in the roof deck, neither instructed its employees or its subcontractors' employees to get off the roof until the skylight openings were covered, nor took any corrective action other than instructing Plaintiff to find a way to cover the holes (RP 923).

The contract between LCI2 and Newt & Butch ("subcontract") had no mention of any safety concerns nor does this subcontract even mention the word "safety" (RP 669-671). The subcontract is completely silent on the issue of safety precautions. *Id.*

Under the subcontract, LCI2 still retained control over the worksite and reserved the right to discharge Newt & Butch. *Id.* In the safety contract with Safety Counseling, Inc., LCI2 expressly acknowledged it would be solely responsible for the implementation of and adherence of any safety

recommendations, concerns, and/or programs, or safety-related issues brought to its attention by Safety Counseling, Inc. *Id.*

In addition, under the terms of the safety contract, Safety Counseling, Inc., had no ability to enforce safety on the job site; rather, the contract expressly provided that all safety compliance was up to LCI2, and not Safety Counseling, Inc. *Id.* LCI2 did not implement, communicate, monitor and enforce a safety program at the pool construction site (RP 923).

Expert testimony on construction site safety established:

- Had LCI2 had an effective safety program, then the skylight openings would have been covered and protected; the covers would have been secured, as required; and, the injuries to Plaintiff would not have occurred. (RP 921)
- LCI2 failed to follow standards, customs and practices required under OSHA for frequent and regular inspections of the job sites, materials, and equipment by not just anyone, but by competent persons, as required by OSHA and other standards, customs, and practices. (RP 921, 922)
- LCI2 failed to assure proper training for its employees and subcontractor employees to assure they understood the nature of hazards and the protection of employees and subcontractor employees

under the OSHA standards, or other standards and customs and practices within the industry. (RP 922)

- LCI2 had responsibilities and obligations with respect to the installation of the tectum roof by Newt & Butch. (RP 922)
- By contract, LCI2 was responsible for the safety program on the construction site. *Id.*
- Under OSHA standards, customs and practices and other standards, LCI2 had the responsibility for the overall safety program on the project, including fall protection that affected not only Newt & Butch, but also other contractors that would be proceeding with work on the structure. *Id.*
- LCI2 was the only party in a position to make sure a proper fall protection plan and program was implemented for the entire project site, which they agreed to do by signing the contract. *Id.*
- At all times during the performance of the contract, and until the work was completed and accepted, LCI2, was required to supervise the work and or assign and have on the work site a competent superintendent. *Id.*
- The contractor, LCI2, was required to be responsible for all damage to all persons and property that occur as a result of the contractor's fault

or negligence and they are required to take proper safety and health precautions to protect the work, the workers, the public, and the property of others. *Id.*

- David Sauble was not competent to supervise safety because he failed to supervise safety concerning the skylight openings on this project. *Id.*
- Newt & Butch was not a qualified subcontractor to safely perform inherently dangerous work such as installing roofing panels and materials at elevated heights given their policy of not guarding against skylight openings, floor openings or utilizing fall arrest protection systems. *Id.*
- Once Eppie Ortega got on the roof on the day of the accident, August 10, 2004, it was his responsibility on behalf of LCI2 to ensure that the hazards posed by the uncovered skylights openings were eliminated before any workers were allowed to continue working on the roof deck. (RP 923)
- Eppie Ortega's instructions to Bobby Windham constituted an exercise of control by LCI2 over the operations and methods utilized by Newt & Butch and once LCI2 undertook to exercise its right of

control it had a duty to do so reasonably and safely. It failed to do so on the day of the accident. *Id.*

ARGUMENT

I. The District Court erred in granting summary judgment in favor of Defendant when Plaintiff submitted sufficient evidence to establish a material issue of fact Defendant retained and exercised control over the means, manner, safety issues, and methods on the construction site.

The trial court's granting of summary judgment was essentially a determination that LCI2 had no duty of ordinary care. That decision is plainly wrong. ***Tafoya v. Rael,*** 2008 NMSC 57, 145 N.M. 4, 193 P.3d 551, holds that a general contractor has a duty of care, even as to the employees of an independent contractor that has been hired to perform work on a construction site. While the contractor in ***Tafoya*** was not licensed for the work it performed, that distinction is not significant. The question is one of duty, and under ***Tafoya***

To determine if there is an actionable duty, a court is to remember that "Policy determines duty," ***Torres v. State***, 119 N.M. 609, 612, 894 P.2d 386, 389 (1995), along with an analysis of foreseeability. ***Herrera v. Quality Pontiac***, 2003-NMSC-18, 134 N.M. 43, 48, 73 P.3d 181. In analyzing foreseeability, the question to examine is whether the conduct at issue is such that it creates a zone of

risk and a general unreasonable threat of harm. *Id.* Answered in the affirmative, the conclusion is that the law will recognize a duty. *Id.*

Under New Mexico law, a general contractor is liable for its failure to provide safe working conditions if it exercises control over the premises or the work. ***Fresquez v. Southwestern Industrial Contractors & Rigors, Inc.***, 89 N.M.525, 554 P.2d 986 (Ct. App. 1976). In this case, LCI2 had control over both the premises and the work performed. The testimony in this case, coupled with the construction contracts, demonstrated, LCI2 not only had the explicit right to control, but, in fact, actually exercised its right to control on the worked performed on the day of the accident in question. LCI2's argument below and the trial court's decision that LCI2 is somehow absolved from liability because Newt & Butch constructed the roof is unsupportable under New Mexico law. *Id.*

This Court has had numerous occasions to set forth the principles underpinning New Mexico's liberal and expanding view of duty. *See* ***Calkins v. Cox Estate***, 110 N.M. 59, 662, 792 P.2d 36 (1990) (When landlord undertakes to provide a common area for the use of his tenants, he owes a duty to the child of the tenant injured by a third party because of a hole in the fence which allowed the child to leave the property); ***Klopp v. Wackenhut, Corp.***, 113 N.M. 153, 159, 824 P.2d 293, 299 (1992) (quoting ***Calkins*** and holding airline had duty to guard against unreasonable risk of danger to passenger in airline terminal); ***Kognig v.***

Perrez, 104 N.M. 664, 665-67, 726 P.2d 341, 342-44 (1986) (recognizing a cause of action on behalf of a plaintiff who knowingly walked through live electrical wires after an electrical pole had been accidentally knocked down, and determining that utility had a duty to inspect its operation for defects and a duty to use "due care in the erection, maintenance and operation of its lines for the benefit of those likely to come into contact with them."); ***N.M. Elec. Serv. Co. v. Mantanez***, 89 N.M. 278, 282, 551 P.2d 634 (1976); ***Wilschinsky v. Medina***, 108 N.M. 511, 515, 775 P.2d 713, 717 (1989) (holding physician owes a duty to person's injured by patients driving automobiles from the doctor's office when the patient has been injected with drugs that affect driving abilities).

The initial step in establishing a common law duty of care is demonstrating that a potential plaintiff is reasonably foreseeable to defendant because of defendant's actions. ***Klopp v. Wackenhut Corp.***, 113 N.M. 153, 824, P.2d 293 (1992). One of the most recent cases that considered the common law principles of duty in ***Herrera v. Quality Pontiac***, 2003-NMSC-081, ¶20, 134 N.M. 43, 48, 73 P.3d 181. In ***Herrera***, this Court carefully examined the law underlying duty and reiterated the importance of foreseeability to the existence of a duty, by stating, "Integral to both [duty and proximate cause] is a question of foreseeability.'" *Id.* ¶8. "New Mexico cases have made it clear that if it is found that an injury to that plaintiff was foreseeable, then a duty is owed to that plaintiff by the defendant."

Ramierez v. Armstrong, 100 N.M. 538, 541, 673 P;.2d 822, 825 (1983), (overruled in part on other grounds by ***Folz v. State***, 110 N.M. 457, 460, 797 P.2d 246, 249 (1990)). As noted by the Court in ***Calkins***, "in determining duty, it must be determined that the injured part was a foreseeable plaintiff – that he was within the zone of danger created by respondent's actions...." ***Calkins,*** *supra* at 61; *see also* ***Romero v. Byers***, 117 N.M. 566, 829 P.2d 645 (1992).

In addition to foreseeability, public policy must also support recognizing a duty. This Court "has consistently relied on the principle of foreseeability, along with policy concerns, to determine whether a defendant owed a duty to a particular plaintiff or class of plaintiffs." ***Herrera v. Quality Pontiac***, 2003-NMSC-018, ¶20, 134 N.M. 43, 73 P.3rd 181. The Court has indicated: "The recognition of a legal duty is dependent upon considerations of foreseeability and policy. In addition [to finding that a defendant's actions] create[] a foreseeable zone of danger which supports a duty, we must . . decide whether, as a **matter of policy**, we should impose a duty." ***Herrera***; supra ¶26 26 (emphasis added); accord ***Madrid***, 121 N.M. 133, 909 P.2d 14.

The opening through which Bobby Windom fell through on the day of this accident existed long before Newt & Butch showed up at the job site (RP 728). Bobby Windham and his crew had nothing to do with the shape, size or locations

of the openings, including the one which he fell through on the day of this accident. *Id.*

The evidence was that despite agreeing to be responsible for the safety of people at the construction site, and despite LCI2's knowledge that workers were working without Fall Arrest Systems around unguarded holes without railings, LCI2's superintendent approved and accepted by work site (RP 728). LCI2 was aware of the danger and simply decided to ignore it despite its contractual and legal obligations to provide a safe place to work for all the workers on the project.

LCI2 paid only lip service to safety, and in fact, did not allow its safety expert to perform the requisite number of inspections, as proposed on the original contact or job site hazard analysis which could have prevented the accident. In essence, LCI2 negotiated a hefty contract with the City of Taos, while making explicit and comprehensive representations as to its ability to provide for safety to everyone on the job site. But, in an attempt to gather even more profit on the job, LCI2 restricted the only entity with any safety training (Safety Counseling) from being on the job site on a regular basis, went so far after the accident to totally ignore the near fatal injuries to a worker and impose any new requirements or procedures as a result of the accident. LCI2 cannot now be allowed to shirk its responsibility for the accident by blaming the Plaintiff.

A. LCI2 Retained and Exercised Control over the Work Site and the Work

The undisputed testimony also shows that, at the time of the accident, and even on the day of the accident, LCI2 was actively exercising its ability to dictate the manner and methods in which the work was performed. LCI2 had mandated the use of safety hats, instructed Newt and Butch employees to utilize tie offs, and had thrown one subcontractor off the job site for unsafe practices (RP 728). Additionally, the accident happened just shortly after an agent acting on behalf of LCI2 gave instructions to Plaintiff about the roof openings (RP 923).

The contract between the City of Taos and LCI2 could not be clearer, that LCI2 specifically promised and expressly agreed to be responsible for safety on the job site, including those activities performed by the plaintiff on the day of the accident. There can be little doubt that there is anything more dangerous than working around large openings in a roof more than 30 feet above a concrete surface.

The testimony of the experts in this case, coupled with the testimony deduced to date, makes it clear LCI2 is not entitled to Summary Judgment given the extensive disputed issues of fact regarding the control of LCI2. Under ***Valdez v Cillessen & Son, Inc.***, 105 N.M. 575, 734 P.2d 1258 (1987) if an employer of an

independent contractor has the right to, and does, retain control of the work performed by the independent contractor, he owes a duty of care to the independent contractor's employee which, if breached, can result in injury to the employee. In this case, LCI2 had explicit and express contractual control over the work and the work site (RP 627-648).

At no time prior to Plaintiff's fatal accident did Defendant LCI2, as general contractor, comply with current Federal and State Occupational Safety and Health Administration regulatory standards and accepted safe work practices, by providing protection against falls before workers began any operations that include the potential for serious falls, pursuant to C.F.R. § 1926.28(a) (RP 921-923). Despite the express guarantees of work site safety made to the City of Taos, LCI2 failed to properly exercise its right of control and also through its agent, Safety Counseling, failed to take appropriate measures to assure work site safety on the project. *Id.*

The critical issue is one of control: If the general contractor has the right to, and does retain control of the work performed by the independent contractor, it owes the duty of care to the independent contractor's employee which, if breached, can result in liability to the employee. ***Moulder v. Brown,*** 98 N.M.71, 644 P.2d 1060 (Ct. App. 1982). That theory of liability is expressed in *Restatement (Second) of Torts Section 414 (1965).* Comment (b): of that section notes:

> The rule stated in this Section is usually, though not exclusively, applicable when a principal contractor entrusts a part of the work to subcontractors, but himself or through a foreman superintends the entire job. In such a situation, the principal contactor is subject to liability if he fails to prevent the subcontractors from doing even the details of the work in a way unreasonably dangerous to others, if he knows, or by the exercise of reasonable care should know, that the subcontractors' work is being so done, and has the opportunity to prevent it by exercising the power of control which he has retained in himself. *So too, he is subject to liability if he knows, or should know, that the subcontractors have carelessly done their work in such a way as to create a dangerous condition*, and fails to exercise reasonable care, either to remedy it himself, or by the exercise of his control, cause the subcontractor to do so. (Emphasis added.)

In some cases, the trial court can decide as a matter of law whether the employer of an independent contractor owes a duty to an employee of an independent contractor. *See* ***Moulder v. Brown***. "But where the facts are disputed... it is not the function of the trial court to weigh the evidence in a summary judgment proceeding." *Id. At 73, 644 PP.2d at 1062.* This is clearly a case where numerous facts are disputed, ranging from the degree of control exercised and retained by LCI2, to the duties and responsibilities for the holes in the roof. There are simply too many issues of fact for this case to be decided summarily.

On a motion for summary judgment the opposing party is given the benefit of all reasonable doubt when determining whether a genuine issue of material fact exists, ***Poorbaugh v. Mullen***, *96 N.M. 598, 633 P.2d 706*

(Ct.App.1981), and the motion cannot be granted if such a factual issue is in dispute. ***Paperchase Partnership v. Bruckner****, 102 N.M. 221, 693 P.2d 587 (1985).*

At the trial court level LCI2 relied exclusively on the holding in ***Fresquez v. Southwestern Industrial Contractors & Riggers,*** Inc. 89 N.M. 525, 554 P.2d 986 (1976) to support its Motion for Summary Judgment (RP 468-469). However an examination of the court's analysis and holding in ***Fresquez*** does not support LCI2's argument. In ***Fresquez*** the subcontractor had assumed all liability for safety on the job. Likewise, the injury in ***Fresquez*** came as the result of a piece of equipment as opposed to a dangerous condition on the premises controlled by the general contractor.

Most importantly, the contract in ***Fresquez*** specifically addressed the means and manner of using the subject equipment including the manner of operating the equipment which caused the injury. In the instant case, Plaintiff's employer had nothing to do with creating the open skylight holes, and did not have any say in the manner, size or location of the openings. ***Fresquez*** is factually distinct from this case and not applicable to the facts present here.

As analyzed by the court in ***Valdez v. Cillessen & Son, Inc.***, 105 N.M. 575, 734 P.2d 1258 (1987) the issue is one of control and whether the unsafe condition and whether the contractor agreed to be responsible for the safety of the job:

> We are concerned first with Cillessen's *right to control* the work of All State. If there was such control, Cillessen could be held liable if he knew, or should have known, of the unsafe condition created by All State. *Cf.* ***Tipton v. Texaco.*** *See also Restatement (Second) of Torts § 414* comment b (1965).
>
> Evidence in the record regarding the control of Cillessen over the work of All State shows that Cillessen agreed to be ultimately responsible for any infractions by All State of labor standards provisions contained in the contract between Cillessen and Indian Housing Authority.

Id. at pg 580.

In this case, it is undisputed LCI2 not only retained total control over the job site through its contract with the City of Taos but it also agreed to be responsible for job site safety (RP 627-640). LCI2 had actively managed the job pursuant to its right of control and exercised its control by firing a subcontractor, instructing Plaintiff and other worker to use hard-hats tie-offs and gave specific instructions to Plaintiff on the day of the accident (RP 928).

The testimony to date could not be clearer: LCI2 not only retained the right to control, but specifically controlled the manner and details of how the work was done at the time of the accident. LCI2's contract with the City of Taos specifically laid out its numerous responsibilities regarding safety and its express obligation to ensure that all employees, including employees of sub-contractors such as the Plaintiff, comply with all applicable safety codes and regulations.

LCI2 cannot now attempt to lay off its responsibilities under both the contract and New Mexico law. The right of control carries with it the responsibility of seeing that unsafe conditions created by it or its subcontractors be remedied. *Id. at pg. 579.* For these reasons, LCI2 is responsible for the unsafe condition (open roof holes) which existed on the day of the accident.

Summary judgment is especially inappropriate in a case like this where fault is at issue between the parties. See ***Coca v. Areceo***, 71 N.M. 186, 193, 376 P.2d, 970, 976 (1962) ("Summary judgment is almost never appropriate in negligent actions where fault appropriation is at issue.") See also ***Bartlett v. New Mexico Welding Supply Co., Inc.***, 98 N.M. 152, 646 P.2d 579 (Ct. App.) *cert. denied* 98 N.M. 336, 648 P.2d 794 (1982) ("Under a pure comparative fault system, apportionment of causation inheres in a jury's apportionment of negligent or fault.") The issues of control and responsibility are for the jury in this case, and LCI2's Motion for Summary Judgment was not appropriate under New Mexico law.

II. A general contractor can be liable for the injuries sustained by a person due to his own negligence or the negligence of his employer, when the general contractor hired a sub-contractor to engage in inherently dangerous work. (Or, a general contractor

who hires a sub-contractor to perform an inherently dangerous job on the construction project who is not qualified to safely perform that job, and then when an employee of sub-contractor is injured, escape liability because the sub-contractor was hired as an independent contractor).

In its Motion for Summary Judgment LCI2 attempted to misstate the law in New Mexico by claiming "vicarious liability based upon a non-delegable duty. LCI2's liability to Plaintiff for the accident, with respect to its non-delegable duty, is based upon the inherently dangerous nature of the work being performed by the Plaintiff at the time of the incident. In fact, Plaintiff is entitled to Summary Judgment as a matter of law establishing that, at the time of the accident, LCI2 had a non-delegable duty to ensure a safe place to work.

At no time prior to Plaintiff's accident did Defendant LCI2, as general contractor, take reasonable precautions to protect against falling through holes (including skylights) more than 6 feet (1.8 m) above lower levels by implementing personal fall arrest and/or safety net systems, covers, or guardrail systems erected around such holes as required by 29 C.F.R. ' 1926.501(a)(4)(i), 29 C.F.R. § 1926.501(b)(1) and 29 C.F.R. § 1910.23(a)(4). Instead the evidence indicates a

conscious disregard for safety by LCI2. Without appropriate safety measures, work at unprotected heights of over 30 feet is inherently dangerous.

The undisputed statistical evidence in this case indicates that working unprotected at heights greater than 6 feet (1.8 meters) is inherently dangerous because "the commission of such work is likely to cause harm if a reasonable precaution against the peculiar risk or special danger is not taken." ***Saiz v. Belen School District***, 113 N.M. 387, 391, 827 P.2d 102, 106 (1992). As recognized in Saiz, the work performed by Plaintiff was inherently dangerous since it was likely to cause harm if a reasonable precaution (guarding, covering, or eliminating the holes) was not taken.

Working on a roofing deck in which there are several large skylight holes at a height of 6 feet or more above a lower level (particularly 20 feet above a lower level) (1) involves an unusual risk of physical harm that is neither a normal nor routine matter of customary human activity; (2) is likely to case a high probability of harm in the absence of reasonable precautions; and (3) the danger or probability of harm flows from the activity itself when carried out in its ordinary, expected way, such that reasonable precautions aimed at lessening the risk can be expected to have an effect. ***Gabaldon v. Erisa Mortgage Company***, 128 N.M. 84, 87, 990 P.2d 197, 200 (1999). All of the requisite criteria espoused by the Court in

Gabaldon are present in this case. Working at great heights around unprotected holes is inherently dangerous under New Mexico law.

Under ***Tafoya v. Rael***, 2008 NMSC-057, 145 N.M. 4, 193 P.3d 551 the employer of an independent contractor who failed to take appropriate safety measures when the general contractor knew the contractor was unqualified, owed a duty to the contractor to take appropriate safety measures. Here, Plaintiff was merely an employee of the independent contractor, and was doing the work the way he had been instructed to do. Unlike ***Tafoya***, Plaintiff did not claim to have qualifications or experience which was relied upon by the general contractor.

The collective reasoning of ***Saiz***, ***Gabaldon***, and ***Tafoya*** is instructive and shows that in this case, Plaintiff was engaged in an inherently dangerous activity for which LCI2 cannot escape liability under a traditional negligence analysis. The duty owed by LCI2 was non-delegable and LCI2 completely and totally failed to take any safety precautions to prevent the tragic and entirely preventable accident. Summary judgment in favor of LCI2 was erroneous under New Mexico law.

III. The District court erred in granting summary judgment in favor of Defendant when Plaintiff submitted sufficient evidence to establish a material issue of fact that Defendant had a non-delegable duty to enforce safety regulations, or had a duty to provide a safe place to work by ensuring no dangerous conditions were allowed to exist.

The undisputed facts show that Defendant LCI2 failed to take reasonable precautions against a direct or probable consequence of engaging in an inherently dangerous activity. Therefore, under the facts of this case, it is clear that Defendant LCI2 had a *non-delegable duty* to take reasonable precautions against the peculiar risk of physical harm associated with an inherently dangerous activity and, consequently, was responsible for ensuring the safety of the people on the job site, including Plaintiff. LCI2 never argued or claimed it undertook any safety measures in this case.

Federal and State OSHA, the New Mexico Uniform Jury Instructions, and New Mexico case law make clear that LCI2, and other entities similarly situated, have a non-delegable duty to take reasonable precautions against the peculiar risk of physical harm whenever they employ an independent contractor to perform work that is inherently dangerous. See ***Saiz v. Belen School District***, 113 N.M. 387, 827 P.2d 102 (1992) ("New Mexico has long recognized a cause of action of strict liability on the grounds that an inherently dangerous activity is non-delegable").

LCI2 continually attempts to cast its non-delegable duty as a vicarious liability claim. LCI2's assertion is wholly incorrect under New Mexico law. A non-delegable duty is just that, and is not vicarious liability, as suggested by LCI2

at the trial court level. LCI2 argued that, since Plaintiff Bobby Windham's employer, Newt & Butch, was the sub-contractor hired to do the roof at the Taos pool project, that LCI2 had no right to control, or did control the manner and details of the work performed on the date of the accident.

LCI2 attempts to hide under the broadest, general proposition that New Mexico law provides that a general contractor who does not retain control of the work premises, or in the manner in which the sub-contractor's work is performed, is not liable to the injuries of the sub-contractor's employee. See e.g. ***Fresquez***, infra. However, the issue was whether the activity was inherently dangerous thereby mandating a non-delegable duty on the part of LCI2.

In ***Enriquez v. Cochran***, 1998-NMCA-157, 126 N.M. 1996, 967 P.2d 1136 the court reiterated the criteria for finding activities to be inherently dangerous and found that the falling of large trees possessed a particular risk of harm that is not common. Likewise here, the harm to which Plaintiff was exposed to was not common or customary human activity, and the probability of harm was high without appropriate precautions. Finally, the harm that naturally flowed from the danger posed by working around unprotected holes or openings, could have been lessened by reasonable precautions. See. ***Gabaldon,*** infra. Given the nature of the

work and its attendant dangers, the duty of LCI2 was non-delegable and it cannot claim it had no duty to Plaintiff on the day of the accident.

At the trial court level, LCI2 maintained that the accident did not involve an inherently dangerous activity. LCI2's argument failed to acknowledge the nature of the work Plaintiff was asked to do and the dangers involved. LCI2's argument fails to recognize that a party who employs another to do work which is inherently dangerous is responsible for the harm caused by the failure to use reasonable precautions to prevent the accident. ***Saiz*** *infra*. For the reasons articulated by the New Mexico appellate courts, LCI2 cannot escape liability when it had a non-delegable duty to enforce safety regulations, or provide a safe place to work by ensuring no dangerous conditions existed.

CONCLUSION

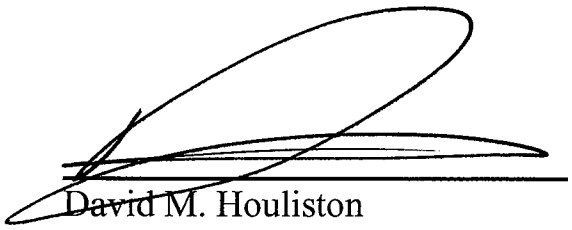
There were multiple disputed issues of material fact before the court and thus, LCI2 was not entitled to summary judgment in its favor dismissing all of Plaintiffs' claims with prejudice. The Order of the District Court granting summary judgment in favor of LCI2 should be reversed.

ORAL ARGUMENT STATEMENT

Plaintiffs/Appellants believe that Oral Argument would be helpful to the Court because of the complexity of the issues involved in this appeal.

CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

Pursuant to NMSA App. 12-312(F)(3), the undersigned hereby certifies that, according to the word-counting function of the Word system used by Appellants in the preparation of this brief, this brief contains 6,913 words, excluding the table of contents, table of authorities, statement with respect to oral argument, and the certificate of service.



David M. Houliston

CERTIFICATE OF DELIVERY TO COURT AND PARTIES

Pursuant to NMSA 12-306(D), I hereby certify that on this 27th day of August, 2009, the original and the requisite number of true and correct copies of the foregoing brief were hand-delivered to:

Clerk of the Court
New Mexico Court of Appeals
Albuquerque Satellite Office
1117 Stanford NE
Albuquerque, NM 87131

Further, I hereby certify that on this 27th day of August, 2009, a true and correct copy of the foregoing brief was forwarded by first class mail to the following counsel for the Defendant/Appellant:

Paul S. Grand
Law Office of Paul S. Grand, P.A.
460 St. Michael=s Dr., Ste. 802
Santa Fe, New Mexico 87505

Josh A. Harris
Beal & Biehler, An Association
6715 Academy Rd., NE
Albuquerque, New Mexico 87109-3365

Respectfully Submitted,

WILL FERGUSON & ASSOCIATES

DAVID M. HOULISTON
Counsel for Plaintiffs-Appellants
1720 Louisiana Blvd. NE, Suite 100
Albuquerque, New Mexico 87102
Telephone: 505-243-5566
Facsimile: 505-243-5699

SAUNDERS AND WESTBROOK, PC
Maureen Sanders
102 Granite Ave NW
Albuquerque, NM 87102
Tel: 505-2243

Counsel for Plaintiffs-Appellants