

1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 Opinion Number: _____

3 Filing Date: August 30, 2018

4 **NO. A-1-CA-35677**

5 **JOSE M. HERNANDEZ,**

6 Plaintiff-Appellant,

7 v.

8 **GRANDO'S LLC,**

9 Defendant-Appellee.

10 **APPEAL FROM THE DISTRICT COURT OF EDDY COUNTY**

11 **Lisa B. Riley, District Judge**

12 Riojas Law Firm, P.C.

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14 El Paso, TX

15 for Appellant

16 Lewis Brisbois Bisgaard & Smith, LLP

17 Gregory L. Biehler

18 Ryan Goodhue

19 Albuquerque, NM

20 for Appellee

1 **OPINION**

2 **BOHNHOFF, Judge.**

3 {1} Plaintiff Jose M. Hernandez, an employee of Creed, Inc. (Creed), injured
4 himself while exiting a commercial truck that Creed had leased from Defendant
5 Grando's, LLC (Grando's). After Hernandez brought suit against Grando's based on
6 theories of negligence, strict product liability, and breach of implied warranty, the
7 district court granted summary judgment in favor of Grando's and dismissed
8 Hernandez's complaint. On appeal, Hernandez argues that the district court erred in
9 granting summary judgment on his negligence claim because (1) Grando's is bound
10 by its admission in its answer to Hernandez's original complaint that it was a motor
11 carrier and owed him a duty to maintain and repair the leased truck; (2) alternatively,
12 Grando's is a motor carrier under federal and state law and therefore owed duties
13 imposed on motor carriers by those laws; and (3) even assuming Grando's is not a
14 motor carrier, as a lessor it still owed Hernandez a common law duty of care.
15 Hernandez also argues that, because Grando's principal was aware of the condition
16 of the truck at all times, the company is strictly liable for the defect. We reverse on
17 the basis of Hernandez's third negligence argument. However, because the first and
18 second negligence arguments and the strict liability argument would be likely to arise
19 again on remand, we affirm as to them in the interest of judicial efficiency. *See*

1 *Medina v. Hunemuller Constr., Inc.*, 2005-NMCA-123, ¶ 16, 138 N.M. 472, 122 P.3d
2 839, *overruled on other grounds by Hidalgo v. Ribble Contracting*, 2008-NMSC-028,
3 ¶ 22, 144 N.M. 117, 184 P.3d 429; *Sena v. N.M. State Police*, 1995-NMCA-003, ¶ 25,
4 119 N.M. 471, 892 P.2d 604.

5 **BACKGROUND**

6 {2} Hernandez worked for Creed in Loving, New Mexico, as a truck driver. On
7 June 21, 2013, while at work, Hernandez attempted to exit from a Creed truck. The
8 truck's sidestep had been kept in place with a wire and collapsed when Hernandez
9 stepped on it. Hernandez sustained injuries to his knee and back from the fall. At the
10 time of the incident, the truck was leased from Grando's to Creed pursuant to a
11 written agreement. Adan "Sonny" Granados (Granados) was the sole and managing
12 member of Grando's as well as the president of Creed, and signed the lease as both
13 lessor and lessee.

14 {3} Hernandez received workers' compensation benefits for his injuries. Hernandez
15 subsequently filed a complaint in district court against Grando's alleging strict
16 liability, negligence, and breach of warranty. In its answer, Grando's admitted the
17 following allegations of the complaint: (1) "[Grando's] had a duty to comply with all
18 statutory and regulatory provisions that pertain or apply to trucks to be used in
19 interstate commerce"; (2) "[Grando's] owed a duty to all persons who used their [sic]

1 trucks to inspect, repair, and maintain their [sic] trucks in a safe condition so that
2 persons who used its trucks would not be injured”; (3) “[Grando’s] as a provider of
3 trucks to be used in intrastate and/or interstate commerce, was required to abide by
4 state and/or federal laws, statutes, regulations, and safety codes, including Part 396
5 of the Federal Motor Carrier Safety Act, concerning systematic inspection, repair, and
6 maintenance of its trucks by a qualified inspector.” One month later, Grando’s
7 retained new counsel.

8 {4} Grando’s moved for summary judgment, arguing that (1) Grando’s did not owe
9 Hernandez any common law or statutory duty to maintain or repair the truck because
10 it is not a motor carrier, did not employ Hernandez, and delegated all duties
11 concerning the truck to Creed; (2) Hernandez could not establish a strict products
12 liability claim because there was no evidence that the truck was defective at the time
13 Grando’s leased it to Creed; and (3) Hernandez could not establish a breach of
14 implied warranty claim because Grando’s disclaimed all implied warranties. In his
15 response to Grando’s motion Hernandez argued (1) Grando’s was bound by its
16 admissions in its answer; (2) Grando’s had knowledge of the defective step and did
17 not repair it; (3) Grando’s is a motor carrier and subject to the statutory and regulatory
18 duties of a motor carrier; and (4) Granados’s affidavit submitted in support of
19 Grando’s motion was not enough evidence to disprove strict liability. In its reply

1 Grando’s further argued that (1) it is irrelevant whether Granados had knowledge of
2 the broken step because the duty to repair fell exclusively on Creed; and (2) Grando’s
3 answer was filed by its previous attorney, the admissions in question were erroneous,
4 and Grando’s would seek leave to amend its answer and correct the erroneous
5 admissions.

6 {5} Following the filing of Hernandez’s summary judgment response, Grando’s
7 moved to amend its answer and rescind the previous admissions. The district court
8 never ruled on that motion and instead granted Grando’s motion for summary
9 judgment and dismissed the case.¹

10 **DISCUSSION**

11 {6} Summary judgment is appropriate when “the pleadings, depositions, answers
12 to interrogatories and admissions on file, together with the affidavits, if any, show
13 that there is no genuine issue as to any material fact and that the moving party is

14 ¹Before addressing Hernandez’s arguments, we note that his brief in chief and
15 Grando’s answer brief both fail to comply with the requirement in Rule 12-305(D)(1)
16 NMRA to use fourteen-point or larger font. Further, Hernandez failed to comply with
17 Rule 12-318(A)(4) NMRA by not including a statement in his brief in chief
18 explaining how any of the issues were preserved in the court below, and Grando’s
19 answer brief exceeded the 11,000-word limit established by Rule 12-318(F)(3).
20 Grando’s request that we sanction Hernandez for his failure to comply with the Rules
21 of Appellate Procedure is denied. Both parties are admonished to comply with these
22 rules.

23 Notwithstanding his failure to comply with Rule 12-318(A)(4), Hernandez
24 preserved his three arguments by advancing them in either his complaint or his
25 response to Grando’s summary judgment motion.

1 entitled to a judgment as a matter of law.” Rule 1-056(C) NMRA. After the moving
2 party makes a prima facie showing that he or she is entitled to summary judgment, the
3 party opposing the motion has the burden to show “by affidavit or other admissible
4 evidence that there is a genuine issue of material fact.” *Associated Home & RV Sales,*
5 *Inc. v. Bank of Belen*, 2013-NMCA-018, ¶ 29, 294 P.3d 1276 (internal quotation
6 marks and citation omitted). “An issue of fact is ‘genuine’ if the evidence before the
7 court considering a motion for summary judgment would allow a hypothetical fair-
8 minded fact[-]finder to return a verdict favorable to the non-movant on that particular
9 issue of fact.” *Id.* ¶ 23 (internal quotation marks and citation omitted). Courts
10 reviewing a motion for summary judgment must review the facts and make all
11 reasonable inferences in the light most favorable to the non-moving party. *Phx.*
12 *Funding, LLC v. Aurora Loan Servs., LLC*, 2017-NMSC-010, ¶ 17, 390 P.3d 174.
13 “Our review is conducted in light of our traditional disfavor of summary judgment
14 and our preference for trials on the merits.” *Madrid v. Brinker Rest. Corp.*, 2016-
15 NMSC-003, ¶ 16, 363 P.3d 1197.

16 {7} “However, if no material issues of fact are in dispute and an appeal presents
17 only a question of law, we apply de novo review and are not required to view the
18 appeal in the light most favorable to the party opposing summary judgment.” *City of*
19 *Albuquerque v. BPLW Architects & Eng’rs, Inc.*, 2009-NMCA-081, ¶ 7, 146 N.M.

1 717, 213 P.3d 1146. “We review questions of statutory interpretation de novo.” *Cobb*
2 *v. State Canvassing Bd.*, 2006-NMSC-034, ¶ 33, 140 N.M. 77, 140 P.3d 498 (internal
3 quotation marks and citation omitted). “Whether a duty exists is a question of law for
4 the courts to decide.” *Herrera v. Quality Pontiac*, 2003-NMSC-018, ¶ 6, 134 N.M.
5 43, 73 P.3d 181 (internal quotation marks and citation omitted).

6 **A. Grando’s Admissions of Hernandez’s Conclusions of Law in His**
7 **Complaint Were Not Material to the District Court’s Summary Judgment**
8 **Analysis**

9 {8} Hernandez argues that the district court erred in granting summary judgment
10 because Grando’s admitted in its answer to Hernandez’s complaint that it was a motor
11 carrier and owed him duties to maintain its trucks in safe condition. Hernandez
12 maintains that Grando’s should be bound by its answer.

13 {9} Under New Mexico law, parties are not bound by conclusions of law set forth
14 in their pleadings. “[Summary judgment] shall be rendered . . . if the pleadings,
15 depositions, answers to interrogatories and admissions on file, together with the
16 affidavits, if any, show that there is no genuine issue as to any material fact and that
17 the moving party is entitled to a judgment as a matter of law.” Rule 1-056(C). “[I]n
18 ruling on a motion for summary judgment, a court is not wed to a party’s assertion of
19 conclusions of law whether in a petition, complaint, or motion for summary judgment,
20 even if the conclusions are admitted by the opposing party.” *Vives v. Verzino*, 2009-

1 NMCA-083, ¶ 10, 146 N.M. 673, 213 P.3d 823; *see also GCM, Inc. v. Ky. Cent. Life*
2 *Ins. Co.*, 1997-NMSC-052, ¶ 13, 124 N.M. 186, 947 P.2d 143 (holding that, when a
3 party admits for purposes of summary judgment the veracity of the allegations in the
4 complaint, the appellate courts “will accept the facts as alleged . . . for purposes of
5 this motion and determine whether, as a matter of law, [the defendant] is entitled to
6 judgment”).

7 {10} Grando’s admissions in its answer upon which Hernandez predicated his
8 argument concerned its legal duties, i.e., were conclusions of law.² Under Rule 1-
9 056(C), the district court was not obligated to accept them and, on the contrary, had
10 an obligation independently to determine the accuracy of Hernandez’s assertions of
11 duty on the part of Grando’s. Therefore, Grando’s admissions as to its duty in its
12 answer were not material to the district court’s determination whether disputed issues
13 of fact precluded summary judgment in favor of Grando’s.

14 ²In admitting paragraph 17 of Hernandez’s complaint, Grando’s admitted that
15 it was required to abide by state and federal laws, including those to which motor
16 carriers are subject, concerning systematic inspection, repair, and maintenance of
17 trucks. However, Hernandez is incorrect in claiming that Grando’s admitted that it
18 was a motor carrier.

1 **B. Grando’s Is Not a Motor Carrier and Is Not Subject to the Federal and**
2 **State Statutory and Regulatory Duties of Maintenance and Repair**
3 **Imposed on Motor Carriers**

4 {11} In an affidavit submitted in support of Grando’s summary judgment motion,
5 Granados averred that Grando’s business was limited to leasing trucks to Creed. On
6 that basis, Grando’s argued that it was not a motor carrier; further, no statute or
7 regulation imposes on the owner of a truck, solely on the basis of such ownership, the
8 duties of inspection, maintenance, and repair to which motor carriers are subject.
9 Hernandez does not dispute that Grando’s business was limited to leasing trucks to
10 Creed, i.e., he does not contend that Grando’s was engaged in transportation of goods
11 or services for compensation. Instead, in his complaint, summary judgment response,
12 and on appeal, Hernandez maintains that, as an owner of a commercial vehicle,
13 Grando’s was subject to federal and state statutory and regulatory duties that are
14 imposed on motor carriers. In other words, Hernandez effectively equates ownership
15 of the subject truck with motor carrier status.

16 **1. Motor Carrier Status and Duties**

17 {12} 49 U.S.C. § 13102(14) (2012) defines a motor carrier as “a person providing
18 motor vehicle transportation for compensation.” *See also* 49 C.F.R. § 390.5 (2017)
19 (defining “motor carrier” as “a for-hire motor carrier or a private motor carrier”; “for-
20 hire motor carrier” as “a person engaged in the transportation of goods or passengers

1 for compensation”; and “private motor carrier” as “a person who provides
2 transportation of property or passengers, by commercial vehicle, and is not a for-hire
3 motor carrier”). 49 U.S.C. § 31136(a)(1) (2012) directs the Secretary of
4 Transportation to prescribe commercial motor vehicle safety regulations that will
5 ensure, at a minimum, that “commercial motor vehicles are maintained, equipped,
6 loaded, and operated safely.” 49 C.F.R. § 396.3(a) (2017) in turn provides that
7 “[e]very motor carrier and intermodal equipment provider must systematically
8 inspect, repair, and maintain, or cause to be systematically inspected, repaired, and
9 maintained, all motor vehicles and intermodal equipment subject to its control.” *See*
10 *also* 49 U.S.C. § 31502(b)(1) (2012) (authorizing Secretary of Transportation to
11 prescribe requirements for safety of equipment of a motor carrier); 49 C.F.R. §§
12 399.201, .211 (2017) (implementing § 31502(b)(1) and requiring adequate
13 maintenance of all steps on commercial motor vehicles to enhance the safety of motor
14 carrier employees). Thus, federal law requires motor carriers to repair and maintain
15 motor vehicles that are subject to their control.

16 {13} The New Mexico Motor Carrier Safety Act (the Act) is set forth at NMSA
17 1978, Sections 65-3-1 to -14 (1989, as amended through 2009). The purpose of the
18 Act is “to protect the New Mexico traveling public by ensuring the safe operation of
19 commercial motor carrier vehicles on New Mexico’s highways.” Section 65-3-2. The

1 Act does not define “motor carrier.” However, the Motor Carrier Act, NMSA 1978,
2 §§ 65-2A-1 to -41 (2003, as amended through 2017), defines a “motor carrier” as “a
3 person offering or providing transportation of persons, property or household goods
4 for hire by motor vehicle, whether in intrastate or interstate commerce[.]” Section 65-
5 2A-3(FF). In the absence of a different definition of “motor carrier” in the Act, we
6 will apply this definition. *See United Rentals Nw., Inc. v. Yearout Mech., Inc.*, 2010-
7 NMSC-030, ¶ 22, 148 N.M. 426, 237 P.3d 728 (holding that the appellate courts will
8 “look to other statutes in pari materia”); *State v. Rivera*, 2004-NMSC-001, ¶ 13, 134
9 N.M. 768, 82 P.3d 939 (holding that the appellate courts will consider statutory
10 language “in reference to statutes dealing with the same general subject matter” and
11 will attempt to “read different legislative enactments as harmonious instead of as
12 contradicting one another” (internal quotation marks and citations omitted)).

13 {14} The Act requires the adoption of “rules and regulations concerning the
14 systematic inspection, repair and maintenance of all commercial motor carrier
15 vehicles. The regulations shall not be inconsistent with or more stringent than
16 applicable federal safety standards.” Section 65-3-12; *see also* § 65-3-4(A) (directing
17 the adoption of regulations applicable to motor carrier safety that “shall not be
18 inconsistent with or more stringent than applicable federal safety standards”); § 65-3-
19 9 (directing the adoption of regulations “not inconsistent with or more stringent than

1 applicable federal safety standards” concerning various parts and accessories
2 necessary for the safe operation of a commercial motor carrier). Regulations
3 establishing safety requirements for motor carriers and motor vehicles operated by
4 motor carriers are set forth in 18.3.4 NMAC. In particular, 18.3.4.12(F)(1) NMAC
5 (02/13/2015, as amended through 01/30/2018) adopts by reference, for vehicles other
6 than small passenger vehicles and commuter services, the inspection, repair, and
7 maintenance requirements of 49 C.F.R. § 396.3. Thus, New Mexico also requires
8 motor carriers to repair and maintain motor vehicles subject to their control.

9 {15} New Mexico courts have not addressed whether a lessor of trucks falls within
10 the foregoing federal or state definitions of a motor carrier. However, *Castro v.*
11 *Budget Rent-A-Car Sys., Inc.*, 65 Cal. Rptr. 3d 430, 437 (Cal. Ct. App. 2007),
12 provides guidance. There, the plaintiff sustained physical injuries in a traffic collision
13 allegedly caused by an overturned truck. *Id.* at 433-34. The defendant had leased the
14 truck to Carlos Diaz, doing business as Carlos Diaz Fresh Produce. *Id.* at 432. At the
15 time of the accident, Diaz’s employee was driving the leased truck. *Id.* The plaintiff
16 contended that the defendant “is a federally regulated motor carrier because it is in
17 the business of leasing to others commercial vehicles that will be used to transport
18 goods or property across state lines, and it is compensated for that activity.” *Id.* at
19 437. The court, however, reasoned that because United States Code Title 49 and its

1 regulations do not mention “lessor” in the definitions of “motor carrier,” “motor
2 private carrier,” or “for-hire” carriage, Congress and the federal Department of
3 Transportation must not have intended to extend to lessors the requirements imposed
4 on motor carriers. *Id.* at 438-39. “[T]he mere act of leasing the truck to Diaz did not
5 qualify [the defendant] as a motor carrier because it did not retain possession or
6 control over the truck or otherwise operate the truck to transport goods. . . . [The
7 defendant] was not a motor carrier within the meaning of the cited federal statutes and
8 regulations.” *Id.* at 437, 439; *accord Del Real v. U.S. Fire Ins. Crum & Forster*, 64
9 F. Supp. 2d 958, 965 (E.D. Cal. 1998). We find the reasoning of *Castro* persuasive
10 and hold that a lessor of trucks is not a motor carrier subject to the foregoing statutory
11 and regulatory duties of inspection, maintenance, and repair.

12 {16} Hernandez also points to other provisions of federal and state law governing
13 motor carriers that expressly refer to vehicle leases and contends that those statutes
14 impose duties upon lessors. 49 U.S.C. § 14102(a) (2012) provides that “[t]he
15 Secretary [of Transportation] may require a motor carrier . . . that uses motor vehicles
16 not owned by it to . . . have control of and be responsible for operating those motor
17 vehicles in compliance with requirements prescribed by the Secretary on safety of
18 operations and equipment, and with other applicable law as if the motor vehicles were
19 owned by the motor carrier.” The implementing regulation, 49 C.F.R. § 376.11(a)

1 (2017), provides that “the authorized carrier may perform authorized transportation
2 in equipment it does not own only under the following conditions: (a) Lease. There
3 shall be a written lease granting the use of the equipment and meeting the
4 requirements contained in § 376.12.” 49 C.F.R. § 376.12(c)(1), in turn, specifies that
5 such a lease shall provide that the motor carrier shall have exclusive possession,
6 control and use of the equipment, and assume complete responsibility for the
7 operation of the equipment, for the duration of the lease. Similarly, Section 65-2A-
8 24(A) provides that “[a]n intrastate motor carrier shall not lease a motor vehicle or
9 operate a leased motor vehicle in the course of its transportation service except as
10 provided by commission rule.” 18.3.9 NMAC implements Section 65-2A-24(A). In
11 2013, 18.3.9.10(B) NMAC (01/01/2005), provided, “If the equipment lease is
12 between an authorized motor carrier and a person who is not an authorized motor
13 carrier, the equipment lease shall specify that the authorized motor carrier shall be
14 responsible for complying with all applicable laws and . . . the safety requirements
15 prescribed in 18.3.4 NMAC, safety requirements.” These statutes and regulations
16 impose on a motor carrier *lessee* the obligation to enter into a written lease, pursuant
17 to which the lessee assumes full responsibility for the safe maintenance and operation
18 of the leased vehicle. Reasonably construed in *pari materia* with the statutes and
19 regulations discussed above, they do not impose any duty on the *lessor* (unless the

1 lessor is also a motor carrier), including any implied duty to maintain the vehicle
2 during the lease term.

3 **2. Grando’s Was Not Subject to the Duties of Inspection, Maintenance, and**
4 **Repair Imposed on Motor Carriers**

5 {17} It is undisputed that Grando’s business was limited to leasing trucks to Creed.
6 As a lessor of trucks, Grando’s is not a motor carrier within the plain meaning of the
7 term’s definitions set forth in the foregoing federal and New Mexico statutes and
8 regulations. That is, Grando’s does not provide transportation of persons, property,
9 or household goods for hire or provide transportation for compensation. Further, the
10 federal and New Mexico definitions of motor carrier neither explicitly nor implicitly
11 reference lessors. The absence of any such reference supports the conclusion that
12 obligations imposed on motor carriers are not meant to apply to persons who lease
13 vehicles to motor carriers. This Court “will not read into a statute any words that are
14 not there, particularly when the statute is complete and makes sense as written.” *State*
15 *v. Trujillo*, 2009-NMSC-012, ¶ 11, 146 N.M. 14, 206 P.3d 125. Thus, Hernandez did
16 not establish a disputed question of fact regarding Grando’s alleged breach of any
17 statutory or regulatory duties of a motor carrier.

1 **C. The District Court Erred in Granting Summary Judgment in Favor of**
2 **Grando's on Hernandez's Negligence Claim**

3 {18} Hernandez argues that Grando's owed a common law duty of care to ensure
4 that the vehicles it owns are maintained and repaired in a safe condition, and that
5 Grando's could not escape this duty by entering into a lease agreement with Creed.
6 Hernandez contends that Grando's breached this duty by not properly repairing the
7 defective truck step.

8 **1. Lessor's Divestiture of Duty to Maintain Land or a Chattel in Safe**
9 **Condition**

10 {19} The owner of land or a chattel who, as a result of a lease, transfers possession
11 and control of the land or chattel to the lessee, generally divests itself of a duty to
12 maintain the land or chattel in a safe condition. For example, in *Grove v. Cornell*
13 *University*, 54 N.Y.S.3d 260 (N.Y. App. Div. 2017), the court held that the lessor of
14 a boom lift from which an employee of the lessee fell and injured himself while
15 installing windows on a building under construction did not owe the employee a duty
16 of care. Similarly, in *Austin v. Walt Disney Pictures*, No. 329655, 2017 WL 694708,
17 at *1 (Mich. Ct. App. Feb. 21, 2017) (per curiam), the plaintiff, an actress, brought
18 an action alleging that, during filming, she was injured while performing a stunt. Go
19 Stunts had leased the stunt equipment used for the film to Michigan Motion Picture
20 Productions, LLC. *Id.* The plaintiff alleged that Go Stunts owed a duty to inspect and

1 maintain the equipment on site. *Id.* The court disagreed, holding that Go Stunts did
2 not owe a duty to inspect and maintain stunt equipment while the equipment was
3 leased. *Id.* at *2.

4 {20} While no New Mexico decision directly addresses the question of a chattel
5 lessor’s duty, other New Mexico decisions reflect the underlying general principle
6 that the duty of care derives from possession and control. In *Gabaldon v. Erisa*
7 *Mortgage Co.*, ¶ 1, 1999-NMSC-039, 128 N.M. 84, 990 P.2d 197, our Supreme Court
8 reversed this Court’s opinion recognizing a negligent entrustment cause of action
9 against a landlord for conditions on the land that the landlord does not control. The
10 Court stated that “the legal position of a non-possessory landlord is not one of
11 immunity or privilege[;] it is simply the same legal position offered by sellers of
12 property. [Landlords] are simply not, as a matter of law, responsible for what takes
13 place on land they do not possess, and do not have a right to control.” *Id.* ¶ 30
14 (alteration, internal quotation marks, and citation omitted). While *Gabaldon* analyzes
15 a landlord-tenant relationship, it supports the general proposition that lessors who do
16 not have possession or control owe no duty to maintain the leased property in a safe
17 condition to prevent injury to others. *Id.*; see *Gourdi v. Berkelo*, 1996-NMSC-076,
18 ¶ 15, 122 N.M. 675, 930 P.2d 812 (stating that “[t]he duty of a landowner generally
19 to keep the premises in a safe condition arises from its position of control over the

1 premises. . . [and that w]hen . . . a landowner has relinquished the right to possession
2 under a lease, he or she is no longer in the best position to discover and remedy any
3 dangerous condition—the tenant is”).

4 {21} In *Harmon v. Atlantic Richfield Co.*, 1981-NMCA-005, ¶ 1, 95 N.M. 501, 623
5 P.2d 1015, the plaintiff, an employee of an independent contractor, was injured while
6 gauging a frac tank owned by the defendant. The defendant had entered into a
7 contract with the plaintiff’s employer relieving the defendant of any job safety duty.
8 *Id.* ¶¶ 2-3. The plaintiff alleged that the defendant had been negligent in failing to
9 provide the plaintiff with a safe place to work. *Id.* ¶ 1. The opinion³ concluded that
10 the plaintiff’s work was solely under the control and supervision of his employer from
11 whom he received workers’ compensation benefits. *Id.* ¶¶ 27, 28. The opinion further
12 concluded that, because the contract between the defendant and the contractor
13 divested the owner of the right to control the contractor’s operations, the owner owed
14 no duty to the contractor’s employees to provide a safe place to work. *Id.* ¶¶ 25, 28.

15 {22} The July 1, 2011, Commercial Vehicle/Equipment Lease Agreement (the
16 Agreement) between Grando’s and Creed provided for delivery by Grando’s of seven
17 vehicles, including the 1995 blue Freightliner tractor from which Hernandez fell on
18 June 21, 2013, to Creed, for a term continuing through November 1, 2013. While not

19 ³Two judges on the panel that decided *Harmon* concurred only in the result.

1 explicitly stating that possession and control was transferred to Creed, the Agreement
2 clearly provided for Creed to take possession of and responsibility for the vehicles.
3 Further, transfer of possession and control was implicit in the term “lease.”
4 *Transamerica Leasing Corp. v. Bureau of Revenue*, 1969-NMCA-011, ¶ 16, 80 N.M.
5 48, 450 P.2d 934 (defining a “lease” as “an agreement under which the owner gives
6 up the possession and use of his property for a valuable consideration and for a
7 definite term”); *Black’s Law Dictionary* 800 (5th ed. 1979) (defining a “lease” as “a
8 contract by which one owning such property grants to another the right to possess,
9 use and enjoy it for specified period of time in exchange for periodic payment of a
10 stipulated price, referred to as rent”).

11 {23} In Section 9 of the Agreement, Grando’s expressly delegated to Creed the
12 obligation to maintain and repair the tractor: “Lessor shall not be obligated to make
13 any repairs or replacements. At Lessee’s expense, shall [sic] take good care of the
14 Vehicles, and repair or replace any and all damage done to the Vehicles. . . . Thus
15 without limitation, Lessee, at Lessee’s expense, shall provide the following: . . . (b)
16 maintenance and repairs, e.g., all labor and parts that may be required to keep the
17 Vehicles in good operating condition.” Consistent with *Harmon*, *Gabaldon*, and
18 *Gourdi*, this relinquishment and transfer of possession and control, and in particular,

1 responsibility for maintenance and repair, divested Grando's of the duty to which it
2 ordinarily would be subject as owner to inspect, repair, and maintain the trucks.

3 **2. Grando's Reservation of a Right to Inspect the Truck**

4 {24} Hernandez argues, however, that because under the lease Grando's retained a
5 *right* to inspect the leased vehicles and prevent their use by Creed if it found that the
6 vehicles were not being properly maintained, Grando's still owed such a *duty* to him.

7 The portions of the lease on which Hernandez relies state:

8 8. Lessor may at all times inspect the Vehicles and observe their use.
9 Lessee whenever requested by Lessor shall advise Lessor of the exact
10 location of all of the Vehicles and their condition. Lessor may
11 immediately remove any Vehicles from any job site, building or other
12 place, without notice or liability to Lessee, if upon inspection, Lessor
13 determines in Lessor's opinion that any of the Vehicles are being used
14 beyond capacity or in any manner improperly cared for or abused.

15 9. . . . If Lessee fails to perform any maintenance required hereunder
16 within five (5) days of the occurrence of the need for maintenance
17 Lessor may at Lessor's option and without limitation perform such
18 maintenance and Lessee shall repay the costs for such work incurred by
19 Lessor immediately upon demand, or (b) terminate this Lease upon three
20 (3) days prior written notice from Lessor to Lessee. Lessee shall make
21 no alteration of any of the Vehicles without Lessor's prior written
22 consent.

23 Thus, under the lease Grando's at all times retained the right to inspect a vehicle,
24 remove it from the job site, and perform necessary maintenance that Creed failed to
25 perform.

1 {25} In *Gourdi*, a trust had leased the subject premises to the operator of a
2 restaurant. 1996-NMSC-076, ¶ 1. An employee of the tenant slipped on the restaurant
3 floor and sued the trustees for her resulting injuries, alleging that their negligence in
4 failing to maintain a drainage pipe caused liquid to back up on to the floor. *Id.* Under
5 the lease, the tenant was responsible for all maintenance and repair of the premises,
6 but the trust reserved the right to enter the premises to make inspections and repairs.
7 *Id.* ¶ 2. It was undisputed that the trustees had no prior knowledge of any drainage
8 backup problem. *Id.* ¶ 3. Under these circumstances, our Supreme Court held that
9 reservation of the right to inspect and repair did not give rise to a duty to inspect and
10 repair the drainage pipe:

11 Only when the landlord who has reserved this right has notice of facts
12 indicating the need to make an inspection should it be charged with
13 knowledge of any dangerous condition that a reasonable inspection
14 would have revealed. Here, as noted, the owner had no knowledge of
15 any accidents, any drainage backups, or any other fact that would have
16 put it on notice prior to [the plaintiff's] accident. Under these
17 circumstances, the owner had no duty to inspect after commencement of
18 the lease.

19 *Id.* ¶ 16.

20 {26} Case law from other jurisdictions reflects that a similar rule applies to lessors
21 of chattels. A lessor's reservation of the right to inspect a leased chattel and take
22 remedial action does not impose on the lessor a duty of maintenance and repair owed
23 to a third party. In *Arriaga v. CitiCapital Commercial Corp.*, 85 Cal. Rptr. 3d 143

1 (Cal. Ct. App. 2008), the plaintiff was injured when his finger became entangled in
2 a glue spreading machine that his employer leased from the defendant's finance
3 company. *Id.* at 146. The plaintiff sued the finance company, arguing that the
4 company reserved the right in the lease to inspect the glue spreader and that this right
5 gave rise to a duty to exercise reasonable care to inspect the machine for defects. *Id.*
6 at 154. On appeal, after the trial court dismissed the plaintiff's negligence claim
7 against the lessor, the California Court of Appeals rejected the argument. *Id.* After
8 noting that the lessor had no notice of the defect, the court held that "the reservation
9 of the right to inspect, in and of itself, does not vest such control over the equipment
10 as to impose on the lessor any such obligation to a third party." *Id.* Similarly, in
11 *Garner v. Todd*, 361 N.W.2d 459, 460 (Minn. Ct. App. 1985), the plaintiff's employer
12 leased a tractor-trailer rig from the defendant. The plaintiff sued the defendant after
13 he fell off the trailer and was injured. *Id.* On appeal following dismissal of the
14 plaintiff's claim, the plaintiff argued that, because the lease agreement granted the
15 lessor the right to inspect and remove the trailer, the lessor owed a duty to ensure that
16 the trailer was safe. *Id.* at 461. The Minnesota Court of Appeals disagreed: "There is
17 no support for appellant's further argument that [the lessor] owed a duty of care under
18 the principles of common law negligence. . . . There is no evidence that [the lessor]
19 . . . assumed a duty to keep the equipment in repair[.]" *Id.*; *cf. Zimprich v. Broekel*,

1 519 N.W.2d 588, 594 (N.D. 1994) (holding that, under the express terms of the
2 subject truck lease, the *lessor* retained responsibility for maintenance and repairs;
3 lessee, which had only a general right to inspect, owed no duty of maintenance and
4 repair to third party).

5 {27} The Restatement (Second) of Torts Section 414 (1965) and its comments, while
6 in the context of an independent contractor-employer relationship, further support the
7 general principle that retention of a general right to inspect is insufficient to establish
8 retained control that gives rise to a duty of care owed to third parties:

9 [T]he employer must have retained at least some degree of control over
10 the manner in which the work is done. It is not enough that he has
11 merely a general right to order the work stopped or resumed, to inspect
12 its progress or to receive reports, to make suggestions or
13 recommendations which need not necessarily be followed, or to
14 prescribe alterations and deviations. Such a general right is usually
15 reserved to employers, but it does not mean that the contractor is
16 controlled as to his methods of work, or as to operative detail.

17 Restatement (Second) of Torts § 414 cmt. c (1965); *see, e.g., Schaefer v. Universal*
18 *Scaffolding & Equip., LLC*, 839 F.3d 599, 606-07 (7th Cir. 2016) (holding that
19 premises owner did not retain sufficient control over construction of scaffolding to
20 subject it to negligence liability); *Harmon*, 1981-NMCA-005, ¶¶ 19-20 (holding that,
21 while the defendant retained the right to inspect the work in process at all times, it did
22 not retain any control and owed no duty to keep the workplace safe).

1 {28} Hernandez maintains that Grando’s retained control over the maintenance and
2 upkeep of the truck because the Agreement permits Grando’s to inspect the vehicle,
3 perform maintenance if Creed fails to do so and remove any vehicle it if determines
4 that the vehicle is being used beyond its capacity. In light of the foregoing authority,
5 Grando’s retention of the right to inspect, remove, or perform maintenance upon the
6 truck if Creed failed to meet its maintenance and repair obligations did not, by itself,
7 establish “retained control” sufficient to impose a duty of care on Grando’s.

8 **3. A Question of Fact Regarding Grando’s Notice of the Truck Step Defect**
9 **Precluded Summary Judgment on Hernandez’ Negligence Claim**

10 {29} As discussed above, *Gourdi* and *Arriaga* stand for the proposition that, while
11 a lessor of land or chattel, respectively, who reserves a right of inspection and repair
12 is not generally subject to a duty to do so, such a duty will arise where the lessor also
13 has notice of a defect or unsafe condition. *See Gourdi*, 1996-NMSC-076, ¶ 16
14 (holding that “[o]nly when the landlord who has reserved this right has notice of facts
15 indicating the need to make an inspection should it be charged with knowledge of any
16 dangerous condition”); *Arriaga*, 85 Cal. Rptr. 3d at 154 (noting that the lessor had no
17 notice of the defect in the glue spreading machine; holding only that “the reservation
18 of the right to inspect, *in and of itself*, does not vest such control over the equipment
19 as to impose on the lessor any such obligation to a third party” (emphasis added)).

1 {30} In an affidavit submitted with his response to Grando’s summary judgment
2 motion, Hernandez averred, “On many occasions prior to June 21, 2013 I had
3 reported problems with [the 1995 blue Freightliner’s] side-step to Carlos Ramirez, my
4 supervisor, and also to . . . Granados. I specifically informed them both that the step
5 was broken, loose. Mr. Granados’ response [sic] either to ignore me, do nothing, or
6 he would simply put wire around the step to try and hold it in place[.]” Hernandez’s
7 affidavit testimony established a question of fact whether Grando’s had notice of the
8 defect, and thus whether it owed and breached a duty to properly and adequately
9 repair the defective truck step. For this reason, the district court erred in granting
10 summary judgment in Grando’s favor on Hernandez’s negligence claim.

11 **D. The District Court Did Not Err in Dismissing Hernandez’s Strict Product**
12 **Liability Claim**

13 {31} In his affidavit filed in support of Grando’s summary judgment motion,
14 Granados stated, “At the time of the lease [by Grando’s of trucks to Creed,] the steps
15 on the 1995 blue Freightliner were made of steel and were not defective.” Hernandez
16 did not produce any evidence to contradict this assertion, i.e., that the steps were
17 broken or otherwise defective at the time Grando’s leased the trucks to Creed.
18 Instead, Grando’s argued only that as Grando’s owner, Granados necessarily would
19 have been aware at all times of the condition of the trucks.

1 {32} Strict product liability requires proof, among other elements, that the product
2 was sold or leased in a defective condition. *See Fernandez v. Ford Motor Co.*, 1994-
3 NMCA-063, ¶ 26, 118 N.M. 100, 879 P.2d 101. We can assume for purposes of
4 argument that Grando’s principal was aware of the condition of the truck’s step at the
5 time it was leased to Creed, but that simply begs the question. Because Hernandez
6 had no evidence with which to establish a question of fact as to whether the truck’s
7 steps were in an defective condition at the time the truck was leased to Creed, the
8 district court did not err in dismissing the strict liability claim.⁴

9 **CONCLUSION**

10 {33} We reverse the district court’s grant of summary judgment in favor of Grando’s
11 and remand for further proceedings consistent with this opinion.

12 {34} **IT IS SO ORDERED.**

13
14

HENRY M. BOHNHOFF, Judge

15 ⁴Hernandez challenged the district court’s dismissal of his warranty claim in
16 his docketing statement but did not address the point in his brief in chief. For that
17 reason we do not address it. *See Magnolia Mountain Ltd., P’ship v. Ski Rio Partners,*
18 *Ltd.*, 2006-NMCA-027, ¶ 34, 139 N.M. 288, 131 P.3d 675 (noting that “an issue is
19 abandoned on appeal if it is not raised in the brief in chief”).

1 **WE CONCUR:**

2

3 **M. MONICA ZAMORA, Judge**

4

5 **EMIL J. KIEHNE, Judge**