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

2       **SABRINA OWENS,**

3             Plaintiff-Appellant,

4       v.

**No. 31,694**

5       **TRAMWAY RIDGE APARTMENTS, LLC;**  
6       **FABCO BUILDERS, INC.; SPRINGDOWN**  
7       **TRAMWAY, LLC; RAW TRAMWAY, LLC;**  
8       **BJ CREATIVE TRAMWAY, LLC; CAV**  
9       **TRAMWAY, LLC; MAV TRAMWAY, LLC;**  
10       **ED TRAMWAY, LLC; HLS PARTNERS**  
11       **TRAMWAY I, LLC; HLS PARTNERS**  
12       **TRAMWAY II, LLC; BMM TRAMWAY, LLC;**  
13       **KJM TRAMWAY, LLC; and HAMILTON**  
14       **ZANZE & COMPANY,**

15             Defendants-Appellees,

16       and

17       **LIBERTY MUTUAL INSURANCE COMPANY,**

18             Intervenor-Appellee.

19       **APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY**

20       **Barbara J. Vigil, District Judge**

21       Lee & Ross

1 Michael C. Ross  
2 Aaron Garrett  
3 Albuquerque, NM

4 L. Helen Bennett  
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6 for Appellant

7 Hatcher & Tebo, P.A.  
8 Scott P. Hatcher  
9 Santa Fe, NM

10 for Appellees

11 **MEMORANDUM OPINION**

12 **BUSTAMANTE, Judge.**

13 {1} Sabrina Owens (Owens) was injured while walking down some steps in the  
14 parking lot of the Las Kivas Apartment Complex (the Complex) and sought to recover  
15 from the Defendant owners of the Complex (Appellees).<sup>1</sup> Appellees moved for  
16 summary judgment arguing that they were Owens’ statutory employers and that, as  
17 such, her remedies were limited to those provided under the Workers’ Compensation

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17 <sup>1</sup>Except as required by context we will refer to Tramway Ridge Apartments,  
18 LLC and the twelve other LLCs that owned the property as “Appellees.” We note that  
19 Appellees’ answer brief did not fully comply with Rule 12-305(C)(1) NMRA.  
20 Advocates are reminded that the Appellate Rules promote the Court’s efficient and  
21 timely resolution of issues on appeal and that failure to comply with them may have  
22 serious consequences for the parties. *See* Rule 12-312(B) NMRA.

1 Act (the Act), NMSA 1978, §§ 52-1-1 to -70 (1965, as amended through 2007). The  
2 district court granted the motion and we now reverse.

### 3 **BACKGROUND**

4 {2} Appellees contracted with Bernard/Allison Management Services, Inc.  
5 (Bernard/Allison) to provide property management services at the Complex. Owens  
6 was employed by Bernard/Allison as an assistant manager and received workers'  
7 compensation benefits from Bernard/Allison after the injury. She then sought to  
8 recover tort damages from Appellees for her injuries. Appellees moved for summary  
9 judgment, arguing that the undisputed facts showed that (i) Hamilton Zanze, the sole  
10 member and manager of Tramway Ridge Apartments, LLC, was responsible for  
11 management of the Complex on behalf of the other owners; and (ii) Bernard/Allison  
12 was not an independent contractor and it was engaged in work that was part of  
13 Hamilton Zanze's work. Appellees argued that they are statutory employers under the  
14 Act. The district court agreed and dismissed the complaint.

### 15 **DISCUSSION**

16 {3} Summary judgment may be granted when "there is no genuine issue as to any  
17 material fact and that the moving party is entitled to a judgment as a matter of law."  
18 Rule 1-056(C) NMRA. Summary judgment is appropriate only when "reasonable  
19 minds cannot differ as to an issue of material fact." *Woodhull v. Meinel*, 2009-

1 NMCA-015, ¶ 7, 145 N.M. 533, 202 P.3d 126. “We are mindful that summary  
2 judgment is a drastic remedial tool which demands the exercise of caution in its  
3 application, and we review the record in the light most favorable to support a trial on  
4 the merits.” *Id.* (internal quotation marks and citation omitted). “To prevail in a  
5 summary judgment proceeding, a defendant need only make a prima facie showing  
6 of entitlement to summary judgment.” *Quintana v. Univ. of Cal.*, 111 N.M. 679, 682,  
7 808 P.2d 964, 967 (Ct. App. 1991), *overruled on other grounds by Harger v.*  
8 *Structural Servs., Inc.*, 1996-NMSC-018, 121 N.M. 657, 916 P.2d 1324. If a prima  
9 facie case is made, “the burden then shifts to the plaintiff to show at least a reasonable  
10 doubt as to whether a genuine issue of fact exists.” *Id.* In the context of cases like this  
11 one, “[t]his [C]ourt has held that, where the material facts are undisputed and  
12 susceptible of but one logical inference, it is a conclusion of law whether the status of  
13 an employer-employee relationship exists.” *Id.* In order to draw this legal conclusion,  
14 “however, there must not [exist] a disputed material fact.” *Id.* We review the district  
15 court’s grant of summary judgment de novo. *Woodhull*, 2009-NMCA-015, ¶ 7.

16 {4} In addition to providing the exclusive remedy for work-related injuries to direct  
17 employees, Section 52-1-6(E), the Act provides the exclusive remedy to employees  
18 of a subcontractor, if the subcontractor (1) is not an independent contractor, and (2)  
19 the work “done is a part or process in the trade or business or undertaking of such

1 employer.” Section 52-1-22. If both of these tests are met, an employer is deemed  
2 a statutory or constructive employer and the employees of its subcontractor are limited  
3 to remedies under the Act. *See Quintana*, 111 N.M. at 681, 808 P.2d at 966.

4 {5} In *Harger*, the Court examined the “right to control” test for determining  
5 whether a person is an independent contractor and rejected a narrow application of it.  
6 121 N.M. at 663-64, 916 P.2d at 1330-31; *see Celaya v. Hall*, 2004-NMSC-005, ¶ 14,  
7 135 N.M. 115, 85 P.3d 239. Instead, it “adopt[ed] the factors and approach contained  
8 in Restatement (Second) of Agency Section 220 [(1958)].” *Harger*, 121 N.M. at 664,  
9 916 P.2d at 1331. Section 220 counsels that “[i]n determining whether one acting for  
10 another is a servant or an independent contractor,” the fact finder may consider “the  
11 extent of control . . . the master may exercise over the details of the work[,]” as well  
12 as a number of other factors, such as “whether or not the one employed is engaged in  
13 a distinct occupation or business[,]” the way the one employed is paid, whether the  
14 parties conceive of their relationship as employee-employer or not, “whether the  
15 employer or the workman supplies the instrumentalities, tools, and the place of work  
16 for the person doing the work[,]” and “the kind of occupation, [and] whether . . . the  
17 work is usually done under the direction of the employer or by a specialist without  
18 supervision[.]” Restatement (Second) of Agency § 220(2) (hereinafter Restatement);  
19 *see Harger*, 121 N.M. at 667, 916 P.2d at 1334. Other factors include whether either

1 party has the right to terminate an employee at will and “the right to delegate the work  
2 or to hire and fire assistants.” *Harger*, 121 N.M. at 667, 916 P.2d at 1334. “[N]o  
3 particular factor should receive greater weight than any other, except when the facts  
4 so indicate, nor should the existence or absence of a particular factor be decisive.” *Id.*  
5 Finally, “the control essential to coordinate the several parts of a larger undertaking  
6 is distinguishable from control over the means and manner of performance of a  
7 contractor’s work. Thus, the right to coordinate the performance of various  
8 subcontractors on a large project is not indicative of an employment relationship.” *Id.*  
9 at 668, 916 P.2d at 1335 (citations omitted).

10 {6} In support of their motion for summary judgment, Appellees provided an  
11 affidavit by Mark Hamilton, president of Hamilton Zanze, which made a number of  
12 assertions to the effect that it had “full and complete control over all aspects of the  
13 operations of the management of the [Complex]” including the day-to-day work of  
14 Bernard/Allison employees. The affidavit addressed many of the factors in the  
15 Restatement. Attached to the affidavit was the “Property Management Agreement”  
16 between Appellees and Bernard/Allison detailing the contractual relationship between  
17 them. Appellees relied entirely on the affidavit and the contract to support their  
18 motion for summary judgment.

1 {7} Our review of the affidavit and the Property Management Agreement convinces  
2 us that the Appellees failed to make a prima facie case entitling them to summary  
3 judgment. Assuming for purposes of analysis that the affidavit and the contract  
4 provide a collection of undisputed facts, we disagree that the facts presented are  
5 “susceptible of but one logical inference.” *Quintana*, 111 N.M. at 682, 808 P.2d at  
6 967. For example, the affidavit generally asserts Hamilton Zanze is the “asset  
7 management arm of the ownership of the [Complex]” and that “[m]anagement of its  
8 properties is part and parcel of the business of Hamilton Zanze.” The affidavit also  
9 notes that if “day[-]to[-]day management of the . . . [Complex] was not carried out  
10 through Bernard/Allison, the owner would have carried out these tasks itself or hired  
11 a different third party.” Yet nowhere does the affidavit assert that Hamilton Zanze  
12 actually performs “day-to-day management” of any of its properties. And use of the  
13 term “management” in the affidavit is ambiguous at best. Management can range  
14 from actual, personal day-to-day operation to the most general oversight of an asset’s  
15 performance.

16 {8} The type of management in play necessarily has an impact on the analysis  
17 required by *Harger* and the Restatement. The generalities noted in the affidavit can  
18 be read both to support and refute the assertion that Appellees should be deemed a  
19 statutory employer. The assertion that Hamilton Zanze and Bernard/Allison

1 employees spoke weekly by telephone and that Hamilton Zanze employees visited “as  
2 frequently as monthly” is hardly revelatory or susceptible of but one logical inference  
3 concerning the nature of the relationship. Similarly, the assertion that Bernard/Allison  
4 consulted with Hamilton Zanze about lease rates does not require any particular  
5 conclusion about the nature of the relationship. As owners of the property Appellees  
6 would have a natural interest in the cash flow from and net income of the property.  
7 That interest does not as a matter of logic lead to the sole inference that Appellees  
8 were statutory employers of Owens; it could simply mean that Appellees were careful  
9 of their investment.

10 {9} The Property Management Agreement on its face places wide responsibility on  
11 Bernard/Allison in managing the day-to-day operations of the Complex. The  
12 Agreement can also be read to give Bernard/Allison wide latitude in accomplishing  
13 its duties. For example, the listing of Bernard/Allison’s “responsibilities and rights”  
14 and Appellees’ “responsibilities and agreements” cannot be read to lead to but one  
15 logical inference as to the business relationship between the two. The Agreement  
16 does provide for consultation in some matters including budgets for the property, but  
17 on its face the Agreement is not susceptible of but one inference.

18 {10} Finally, but notably, the Agreement has no provision allowing Hamilton Zanze  
19 the power to remove Bernard/Allison employees. Paragraph eleven of the Agreement



1 stands in stark contrast to the assertion of such power in paragraph eleven of Mr.  
2 Hamilton’s affidavit. This by itself creates a question of fact about the relationship  
3 between the parties precluding summary judgment.

4 {11} The ambiguity of Appellees’ showing below coupled with Owens’ factual  
5 assertions—to which we now proceed—demonstrate that summary judgment was  
6 improper.

7 {12} Owens provided the district court testimony from the vice president of asset  
8 management at Hamilton Zanze that Hamilton Zanze did not control the day-to-day  
9 management of the property and that Hamilton Zanze did not control how  
10 Bernard/Allison attracted tenants, collected rent, ensured payment on time, or evicted  
11 tenants. In response to Appellees’ assertion that it “had authority to remove  
12 Bernard/Allison employees if they individually were performing poorly,” the same  
13 witness provided deposition testimony that Hamilton Zanze was a client of  
14 Bernard/Allison and as such had influence over the staff working at the Complex, but  
15 had no legal authority to fire a Bernard/Allison employee. The same witness testified  
16 that the president and vice president of Hamilton Zanze considered the relationship  
17 between the two companies to be a client-provider relationship, rather than employer-  
18 employee relationship. Finally, the same witness testified that Hamilton Zanze’s  
19 business was different from Bernard/Allison’s. Considering this evidence in the light

1 most favorable to Owens, we conclude that she provided sufficient evidence to create  
2 a genuine issue as to whether Bernard/Allison was an independent contractor.

3 {13} We emphasize that the testimony outlined above is not meant to be an  
4 encyclopedic review of the record. It is simply enough by itself to demonstrate that  
5 summary judgment was improperly granted.

6 {14} We turn next to the second prong of Section 52-1-22: whether Bernard/  
7 Allison's work was "a part or process" of Hamilton Zanze's business or undertaking.  
8 If it is determined at trial that Bernard/Allison is an independent contractor, there  
9 would be no reason to proceed to analyze the second prong. Even if Bernard/Allison  
10 were not an independent contractor, however, we conclude that Owens presented  
11 sufficient evidence to overcome Appellees' prima facie showing as to this part of the  
12 test. Hamilton Zanze's president stated in an affidavit that its "business [is] to ensure  
13 that the management and operations of [the Complex] are carried out in a professional,  
14 safe[,] and economically feasible manner," and argued that property management was  
15 an essential part of this mission. Again, Owens presented testimony through Hamilton  
16 Zanze's vice president that Hamilton Zanze's business was "asset management . . .  
17 acquisitions, dispositions, fund-raising, investor relations, construction management."  
18 The vice president also testified that Bernard/Allison's core business differed from  
19 that of Hamilton Zanze, that Hamilton Zanze did not delegate the tasks essential to

1 investment in new properties to property management companies, and that Hamilton  
2 Zanze does not manage its properties with its own staff. Viewing this evidence in the  
3 light most favorable to a trial on the merits, we conclude that Appellant raised genuine  
4 issues of fact precluding summary judgment as to this element as well.

5 **CONCLUSION**

6 {15} We reverse the district court's grant of summary judgment and remand.

7 {16} **IT IS SO ORDERED.**

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\_\_\_\_\_  
**MICHAEL D. BUSTAMANTE, Judge**

10 **WE CONCUR:**

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12 \_\_\_\_\_  
**JONATHAN B. SUTIN, Judge**

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14 \_\_\_\_\_  
**LINDA M. VANZI, Judge**