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

7 **FABIAN VILLAGRAN,**

8 Plaintiff-Appellant,

9 v.

NO. 30,802

10 **FRANKEN CONSTRUCTION CO., INC.,**

11 Defendant-Appellee.

12 **APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**

13 **Shannon C. Bacon, District Judge**

14 Narciso Garcia, Jr.

15 Albuquerque, NM

16 for Appellant

17 Eaton Law Office, P.C.

18 P. Scott Eaton

19 Albuquerque, NM

20 for Appellee

21 **MEMORANDUM OPINION**

22 **VIGIL, Judge.**

23 Plaintiff appeals the grant of summary judgment to Defendant in this personal
24 injury case. We proposed to affirm on the basis that there were no issues of material

1 fact relating to Defendant's right to control the work of its subcontractor (MSS) for
2 whom Plaintiff worked. Both parties have timely responded to our proposal. We
3 have considered the arguments and affirm.

4 In our notice, we proposed to conclude that there was nothing in the contract
5 between Franken and MSS indicating that Franken retained control over the work of
6 MSS. Plaintiff responds that he was relying on more than the contract to argue that
7 Franken retained the right to control the work. First, he argues that Franken had
8 prepared a fall protection plan to be used by MSS. As is clear from the record, no
9 Franken-prepared fall protection plan was presented by Plaintiff in support his
10 argument.

11 Second, Plaintiff argues that Franken provided the ropes for the fall protection
12 plan and they were totally inadequate. He also argues that Franken provided the
13 manner and means in which the roofing material was delivered to the roof, thus
14 retaining control over the work of the MSS employees. It is not clear from the record
15 that Plaintiff argued these facts to the district court. However, we have often stated
16 that the preservation requirements do not apply in an appeal from the grant of
17 summary judgment. *See Phifer v. Herbert*, 115 N.M. 135, 138, 848 P.2d 5, 8 (Ct.
18 App. 1993) (holding that a different preservation rule applies when the party opposing
19 summary judgment attempts to call to the attention of the appellate court facts in the

1 record not specifically brought to the attention of the district court), *rev'd on other*
2 *grounds by Spectron Dev. Lab.*, 1997-NMCA-025, 123 N.M. 170, 936 P.2d 852.
3 Thus, we will consider these new arguments relating to facts not specifically argued
4 to the district court.

5 With regard to the ropes for the fall protection system, the evidence was that
6 Franken provided the ropes at the request of MSS. [RP 330, 341] While it appears that
7 Franken knew what the ropes were being used for, there is nothing in the evidence
8 suggesting that Franken instructed MSS employees what to do with the ropes. Simply
9 providing the ropes that the subcontractor planned to use in its fall protection plan
10 does not give Franken control over the work of MSS employees.

11 With regard to the manner and means of delivering the roofing materials, it
12 appears that Franken provided a crane and the crane operator. [RP 566-567] It appears
13 that the crane operator was instructed “to help them out; lift their loads for them.” [RP
14 567] It also appears that after that he spoke to somebody from MSS in order to
15 coordinate the lifting of the bundles of roofing material. [RP 568] It does not appear
16 from any of the deposition testimony that the crane operator’s actual method of lifting
17 the materials was directed by Franken, but rather was directed by MSS. [RP 569, 571]
18 The crane operator picked up the loads as they were rigged by MSS employees and
19 then he lifted them to where he was directed by MSS employees.

1 Plaintiff argues that Franken had walkie-talkies that the crane operator could
2 have used so that Plaintiff would not have had to go to the edge of the roof to direct
3 the crane operator. That apparently is the case, but it is left to the crane operator to
4 determine whether he needed a walkie-talkie or not. [RP 573] They are apparently
5 only used when there was no line of sight. [RP 570] However, simply because there
6 were walkie-talkies available does not mean that Franken had control over the work
7 of the crane operator such that it could be held liable for Plaintiff's injuries.

8 Plaintiff argues that this case is just like *Fresquez v. Sw. Indus. Contractors &*
9 *Riggers, Inc.*, 89 N.M. 525, 554 P.2d 986 (Ct. App. 1976), where the crane operator
10 was an employee of the general contractor, but performed work at the direction of the
11 subcontractor. In *Fresquez*, the crane operator, although his work was entirely
12 directed by the subcontractor, was responsible for safety issues. The evidence in
13 *Fresquez* was that the crane operator complained about safety issues to the
14 subcontractor but did not then also complain to his employer. There was also
15 evidence in that case that the crane operator could stop operation if he felt that it was
16 too dangerous.

17 There is no such evidence in this case. There was no evidence that the crane
18 operator was responsible for safety issues or that he could stop the work if he felt it
19 was too dangerous. While the crane operator did testify that he uses a walkie-talkie

1 sometimes to assist direction on where to drop the load, it was only where he could
2 not see signals. Here, he was given hand signals by MSS employees so there was no
3 need for the walkie-talkies. Contrary to the facts in *Fresquez*, there is nothing here
4 creating a factual question regarding who was responsible for the manner in which the
5 crane operator conducted his work. He was directed where to lift the roofing materials
6 by MSS employees who used hand signals to direct him.

7 We conclude that Plaintiff did not create any issues of material fact regarding
8 Franken's control over the work of MSS. Therefore, summary judgment was properly
9 granted.

10 In our notice, we pointed out that Plaintiff's reliance on Franken's knowledge
11 of violations of OSHA regulations as creating a duty was misplaced. Plaintiff argues
12 that we misconstrued his argument. He appears to be arguing that violation of OSHA
13 regulations may be considered as evidence of negligence. That may be true.
14 However, the issue here is whether Franken owed any duty to Plaintiff. That duty
15 cannot be established by knowledge of OSHA violations. *See Valdez v. Cillessen &*
16 *Son, Inc.*, 105 N.M. 575, 578, 734 P.2d 1258, 1261 (1987).

17 Finally, in our notice, we proposed to conclude that the grant of summary
18 judgment was not premature here. Plaintiff argued that his motion to compel
19 disclosure by Franken of its fall protection plan had not been acted on before the

1 **WE CONCUR:**

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3 **JAMES J. WECHSLER, Judge**

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5 **TIMOTHY L. GARCIA, Judge**