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Tort Law - New Mexico Imposes Strict Liability on a Private Employer of an Independent Contractor for Harm from Dangerous Work, but Bestows Immunity on a Government Employer: Saiz v. Belen School District

Jane Marshall Gagne

TORT LAW—New Mexico Imposes Strict Liability on a Private Employer of an Independent Contractor for Harm From Dangerous Work, but Bestows Immunity on a Government Employer: *Saiz v. Belen School District*

I. INTRODUCTION

In *Saiz v. Belen School District*,[1] the New Mexico Supreme Court departed from widely accepted principles of the nondelegable duty doctrine by making an employer of an independent contractor strictly liable for harm that results from the contractor's inherently dangerous work because a reasonable precaution was omitted. Under the previously unused "public policy" exception to several liability, the court further found that such strict liability gives rise to joint and several liability with the contractors which remains even though the contractors' liability is time-barred.[2]

Prior to *Saiz*, an employer could be held liable for reasonably foreseeable harm caused by an independent contractor's negligence in performing inherently dangerous work.[3] *Saiz* supersedes New Mexico law by imposing strict liability on an employer of an independent contractor who is attributed with retrospective knowledge of all circumstances giving rise to liability. The court's application of strict liability is especially remarkable in that the court ultimately held the school district immune from liability because the New Mexico Tort Claims Act protects a government entity from strict liability claims. Consequently, a private property owner can never avoid liability with certainty for inherently dangerous work performed by an independent contractor, while a government entity can always avoid liability by contracting out dangerous work to independent contractors.

This Note examines traditional nondelegable duty analysis, the new analysis under *Saiz*, and the ramifications of the decision.

II. STATEMENT OF THE CASE

In 1964, the Belen School District contracted with an architect, an electrical engineer, and an electric company to design and build outdoor lighting for its high school football field. The completed system consisted of wooden light poles with underground electric cable, some of which were installed directly in front of the bleachers. In about 1973, the school

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1. 113 N.M. 387, 827 P.2d 102 (1992).

2. *Id.* at 400-01, 827 P.2d at 115-16.

3. *See, e.g.*, Pendergrass v. Lovelace, 57 N.M. 661, 262 P.2d 231 (1953) (defendant landowner fully responsible for harm caused by contractor's negligence in spraying crops with inherently dangerous chemical); Budagher v. Amrep Corp., 97 N.M. 116, 637 P.2d 547 (1981) (defendant ignored notice of faulty design of dams prior to construction which later caused flooding to plaintiff's property).

district built a metal fence in front of the bleachers and near some of the light poles.

On September 2, 1988, during halftime of a football game, thirteen-year-old Jerry Saiz was electrocuted after he simultaneously touched a metal electrical conduit running up one of the poles and the metal fence. He died a few minutes later. Damaged insulation around the buried cable and the absence of a bushing, required under the state electric code, caused an electrical short and the electrocution.[4]

Lorenzo Saiz, the estate's personal representative, brought a wrongful death action under the New Mexico Tort Claims Act[5] against the school district, alleging that the school district was negligent in the installation and maintenance of the electrical system. The school district attributed fault to the contractors and architect as non-parties, who were statutorily immune from suit because the death occurred more than ten years after they installed the electrical system.[6]

The trial court instructed the jury that, under the circumstances, an employer cannot be liable for the acts of an independent contractor.[7] The jury's verdict for the plaintiff apportioned sixty-five percent of the $1,250,000 damages to the electrical contractor, twenty-five percent to the architect, and fifteen percent to the school district.[8]

Saiz appealed, arguing that since the work with electricity was inherently dangerous, the school district should be held jointly and severally liable on a theory of vicarious liability for the negligence of the electrical contractor and the architect.[9] The court of appeals affirmed the judgment on the grounds that the school district could not be held vicariously liable for the work of an independent contractor performed long ago.[10] The question of whether the school district could be held responsible for the faulty lighting system as initially installed and inspected by the independent contractors went to the supreme court on a writ of certiorari.[11] The supreme court found that the school district was strictly and jointly and severally liable for injuries caused by "the absence of precautions required in the face of peculiar risks of harm created by locating a high-voltage electrical supply line in an area of public accommodation."[12] The

4. *Saiz*, 113 N.M. at 392, 827 P.2d at 107.

5. N.M. STAT. ANN. § 41-4-1 to -28 (Repl. Pamp. 1989).

6. N.M. STAT. ANN. § 37-1-27 (Repl. Pamp. 1990) (barring any action against construction professionals ten years after a project's completion); *see infra* notes 63-65 and accompanying text.

7. *Saiz*, 113 N.M. at 392-93, 827 P.2d at 107-08.

8. *Id.* at 393, 827 P.2d at 108. Neither the contractor nor the architect were liable as a matter of law. The jury, however, found the school district negligent in its installation of the fence and its failure to warn despite its apparent awareness that the lighting system was faulty.

9. *Id.*

10. *Id.*

11. The court granted leave to file amicus briefs to the New Mexico Trial Lawyers Association, aligned with Saiz, and to the Risk Management Division of the General Services Department of the State of New Mexico, aligned with the school district, neither of which argued a strict liability theory.

12. *Saiz*, 113 N.M. at 391, 827 P.2d at 106.

court found the school district immune from strict liability, however, under the New Mexico Tort Claims Act.[13]

III. DISCUSSION

A. *An Employers'/Owner's Traditional Liability For Harm Resulting from Dangerous Work of an Independent Contractor*

In attaching strict liability to the doctrine of nondelegable duty, the court in *Saiz* abandoned widely accepted principles, but failed to provide a sound substitute. The court rejected the traditional application of vicarious liability based on the contractors' negligence.[14] The court also rejected the application of traditional direct liability based on the employer's negligence to the extent that such liability is based on the reasonably prudent person standard of care.[15] The court's use of precedent for its finding of strict liability indicates just how radical, if not quirky, that finding is. The court rejected the approach of the Restatement (Second) of Torts and numerous modern American cases which employ traditional liabilities arising from the contractor's or the employers'/owner's negligence. Instead, the court cited only one case from another country and century, in support of its proposition that liability arises without regard to negligence.[16]

Although the general rule is that an employer/owner is not liable for the acts of an independent contractor,[17] there are several exceptions. One exception involves work that is "specially, peculiarly, or inherently dangerous."[18] The Restatement elaborates in two sections. Section 416 states:

> One who employs an independent contractor to do work which the employer should recognize as likely to create during its progress a *peculiar risk* of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise.[19]

Section 427 states:

> One who employs an independent contractor to do work involving a *special danger* to others which the employer knows or has reason

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13. *Id.* at 39, 827 P.2d at 106.

14. "We reject any coupling of the concept of vicarious liability and nondelegable duty." *Id.* at 399, 827 P.2d at 114.

15. *Id.* at 402, 827 P.2d at 117.

16. Bower v. Peate, 1 Q.B.D. 321 (1876), *cited in Saiz*, 113 N.M. at 395, 827 P.2d at 110.

17. RESTATEMENT (SECOND) OF TORTS § 409 (1965); *see also* Scott v. Murphy Corporation, 79 N.M. 697, 448 P.2d 803 (1969).

18. *Id.* § 409 cmt. b (discussing exceptions).

19. *Id.* § 416 (emphasis added), *cited in Saiz*, 113 N.M. at 394-96, 827 P.2d at 109-11.

> to know to be inherent in or normal to the work, or which he contemplates or has reason to contemplate when making the contract, is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger.[20]

For all practical purposes, the two rules "are apparently intended to mean very much the same thing. They have been used more or less interchangeably by the courts,"[21] with the distinction that the "special precautions" of section 416 pertain to "some one specific precaution," where the "inherent danger" of section 427 pertains to the need for "a whole set of precautions, against a number of hazards . . . ."[22]

Inherently or specially dangerous work gives rise to a duty which an employer may not delegate to the contractor.[23] The concepts of an employers'/owner's nondelegable duty have been widely accepted and have been adopted in New Mexico.[24] Generally, courts have followed the Restatement in applying vicarious liability.[25] Some courts have rejected vicarious liability in favor of direct liability arising from the employers'/owner's own negligence in failing to ensure reasonable precautions, particularly when the employer/owner is a government entity. Prior to *Saiz*, New Mexico courts finding liability arising from an employer/owner's nondelegable duty did not explicitly label or analyze the nature of the liability.[26] Strict liability had never been considered or suggested.[27]

Traditionally, strict liability has been restricted to "abnormally dangerous work,"[28] even though the "defendant . . . has exercised the utmost care to prevent the harm."[29] In addition, strict liability applies only if

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20. *Id.* § 427 (emphasis added), *cited in Saiz*, 113 N.M. at 394-96, 827 P.2d at 109-11.

21. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 71, at 512-13 (5th ed. 1984).

22. *Id.*; *see also* RESTATEMENT, *supra* note 17, Topic 2, at 394.

23. RESTATEMENT, *supra* note 17, Topic 2, at 394.

24. *See* Pendergrass v. Lovelace, 57 N.M. 661, 262 P.2d 231 (1953); Budagher v. Amrep Corp., 97 N.M. 116, 637 P.2d 547 (1981); *see also* Montanez v. Cass, 89 N.M. 32, 546 P.2d 1189 (Ct. App. 1975) (employer liable to third persons for harm caused by the independent contractor who was engaged in the performance of inherently dangerous work), *rev'd in part on other grounds sub nom.*, New Mexico Electric Serv. Co. v. Montanez, 89 N.M. 278, 551 P.2d 634 (1976) (employer's liability does not extend to employees of the independent contractor).

25. These are "rules of vicarious liability, making the employer liable for the negligence of the contractor, irrespective of whether the employer has himself been at fault." RESTATEMENT, *supra* note 17, Topic 2, at 394; *see, e.g.*, Deitz v. Jackson, 291 S.E.2d 282, 285-86 (N.C. 1982); Western Stock Center, Inc. v. Sevit, Inc., 578 P.2d 1045, 1049-50 (Colo. 1978), *cited in Saiz*, 113 N.M. at 396, 827 P.2d at 111.

26. *See supra* note 24.

27. There is nothing to indicate that the *Saiz* holding regarding strict liability pertains to separate rules of employer liability based on the employer's or the contractor's negligence beyond the nondelegable duty doctrine arising from inherently or specially dangerous work. *See, e.g.*, RESTATEMENT, *supra* note 17, §§ 410-429 (exclusive of §§ 416 and 427).

28. RESTATEMENT, *supra* note 17, §§ 519, 520. The First Restatement labeled the activity as "ultrahazardous."

29. Restatement, *supra* note 17, § 519 cmt. d; *see also* KEETON, *supra* note 20, § 79 (regarding work that is "dangerous in spite of all reasonable care, so that strict liability might be imposed upon the employer . . . .").

the "defendant is aware of the abnormally dangerous condition or activity, and has voluntarily engaged in or permitted it."[30] In New Mexico, the "ultrahazardous activity doctrine has been restricted . . . to the use of explosives in blasting."[31]

Then-Chief Justice Traynor, who pioneered strict products liability,[32] considered strict liability in the context of the nondelegable duty doctrine in the California case of *Maloney v. Rath*.[33] He invoked Restatement rules other than sections 416 and 427, but within the same topic concerning harm caused by the negligence of a carefully selected contractor.[34] In *Maloney*, the defendant's brakes had failed, causing a car accident and injuries to the plaintiff. The defendant "neither knew nor had reason to know"[35] of the defective brakes, and indeed had them completely overhauled three months earlier.[36] The mechanic's negligence which caused the failure was "no defense"[37] to the defendant, who was found liable under the nondelegable duty doctrine.

While the defendant essentially was held to liability without personal fault, Justice Traynor declined to apply strict liability to the nondelegable duty doctrine.[38] He reasoned that making such an "abrupt change in the law . . . [would] create uncertainty" where varying facts of future cases would prevent predictability of that application.[39] In addition, "[t]o the extent that recognition of nondelegable duties tends to insure that there will be a financially responsible defendant available . . . it ameliorates the need for strict liability to secure compensation."[40]

B. *An Employer/Owner's Strict Liability Under Saiz For Harm Resulting from Dangerous Work of an Independent Contractor*

As broad as the liability arising from a nondelegable duty was to the defendant in *Maloney*, liability to future potential defendants under *Saiz* is even broader. The *Saiz* court did not fully articulate the basis for rejecting traditional liabilities arising from a nondelegable duty, although the rejection of vicarious liability makes some sense. By definition, a

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30. KEETON, *supra* note 20, § 79.

31. *Saiz*, 113 N.M. at 397, 827 P.2d at 112 (citing Thigpen v. Skousen & Hise, 64 N.M. 290, 327 P.2d 802 (1958)).

32. *See* Greenman v. Yuba Power Products Inc., 377 P.2d 897 (Calif. 1963). Chief Justice Ransom analogized strict liability of a nondelegable duty to strict products liability. *Saiz*, 113 N.M. at 394, 397, 402, 827 P.2d at 109, 112, 117.

33. 445 P.2d 513 (Cal. 1968) (en banc).

34. RESTATEMENT, *supra* note 17, at 394. Justice Traynor detailed activities that would give rise to a nondelegable duty, including "the duty to exercise due care when an 'independent contractor is employed to do work which the employer should recognize as necessarily creating a condition involving an unreasonable risk of bodily harm to others unless special precautions are taken.'" *Maloney*, 445 P.2d at 516 (quoting Courtell v. McEachen, 334 P.2d 870, 874 (Cal. 1959).

35. *Maloney*, 445 P.2d at 514.

36. *Id.*

37. *Id.* at 517.

38. *Id.* 445 P.2d at 515.

39. *Id.*

40. *Id.*

nondelegable duty is inconsistent with vicarious liability which is based on a delegation to another.[41] In addition, the *Saiz* court's specification that "[i]t should not be required that the contractor be liable"[42] is significant where, as in *Saiz*, the negligent contractor is immune from suit.[43] Less clear is the court's basis for rejecting traditional direct liability based on the employer's own negligence in not ensuring reasonably foreseeable safeguards.[44] The court in *Saiz* admonished that "the policy behind the law in torts does more than compensate victims—it encourages reasonable safeguards against the risk of harm."[45] However, the court did not discuss how strict liability would accomplish greater regard for precautions than either vicarious or direct liability based on negligence would.[46] The court merely analogized to strict products liability, and dictated that "it serves the policy underlying nondelegable duties to impose liability on the owner or occupier of land for injury proximately caused by any failure to take reasonable precautions."[47]

The new strict liability seems contradictory because the analysis implies negligence considerations even as the court rejects them:

> The test of liability is the presence or absence of precautions that would be deemed reasonably necessary by one to whom knowledge of all the circumstances is attributed; and liability is dependent on neither the lack of care taken by the contractor nor the lack of care taken by the employer to ensure that the contractor takes necessary precautions.[48]

According to this test, since neither the contractor's nor the employer's negligence is relevant, neither vicarious nor direct liability is applicable. However, negligence considerations seem inherent in the analysis. Liability arises only when "*reasonably necessary*"[49] precautions are not taken, suggesting that either an independent contractor or an employer/owner

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41. "Under vicarious liability, one person, although entirely innocent of any wrongdoing and *without regard to duty*, is nonetheless held responsible for harm caused by the act of another." *Saiz*, 113 N.M. at 399, 827 P.2d at 114 (emphasis in original).

42. *Id.*

43. *See* N.M. STAT. ANN. § 37-1-27 (Repl. Pamp. 1990) (barring any action against construction professionals ten years after a project's completion); *see also infra* notes 63-64 and accompanying text.

44. *See Saiz*, 113 N.M. at 402, 827 P.2d at 117.

45. *Id.* at 398, 827 P.2d at 113.

46. Indeed, if an independent contractor knows that the employer is strictly and jointly liable for the absence of a reasonable precaution, his or her incentive to exercise greater caution may be diminished.

47. *Saiz*, 113 N.M. at 399-400, 827 P.2d at 114-15. Accordingly, the court held that strict liability arising from a nondelegable duty results in joint and several liability under the heretofore unused public policy exception to several liability. *Id.* at 400, 827 P.2d at 115 (citing N.M. STAT. ANN. § 41-3A-1(C)(4) (Supp. 1987)).

Although the use of the public policy exception is remarkable by itself, it is less remarkable in the context of the case. Under a traditional application of vicarious liability to the doctrine of nondelegable duty, the school district could have been found jointly and severally liable under the vicarious liability exception. N.M. STAT. ANN. § 41-3A-1(C)(2) (Supp. 1987). Presumably, the court could have engaged in the same policy reasoning under traditional direct liability.

48. *Saiz*, 113 N.M. at 395, 827 P.2d at 110.

49. *Id.* at 396, 827 P.2d at 111 (emphasis added).

would foresee the need for the precaution. In addition, the court emphasized "that more than mere foreseeability of injury is required . . . . That is, there must exist a strong probability that harm will result . . . ."[50] Moreover, the "employer's nondelegable duty runs only to a hazard associated with a peculiar risk or special danger the employer as a matter of law had *reason to anticipate.*"[51]

Despite these explicit references to foreseeability, the court rejects foreseeability as a factor in favor of a full knowledge standard. The test for liability is incorporated in the jury's decision of "what precautions would be deemed reasonably necessary *by one to whom knowledge of all the circumstances is attributed.*"[52] Analogizing to strict products liability, the court asserts that:

> [T]he question is whether injury was proximately caused by a risk that a hypothetical reasonably prudent person having full knowledge of the risk would find unacceptable even though the *person to be charged in fact neither knew nor could have known of such risk at the time of the work.*[53]

The court proceeded to eliminate the element of foreseeability from traditional direct liability[54] in order to accommodate strict liability:

> Traditionally . . . direct liability (as distinguished from vicarious liability) has depended on what the party to be charged knew or should have known. Direct liability of the possessor of land under a nondelegable duty to ensure against an unreasonable risk of injury from a special danger is based not on what the possessor knew or should have known . . . . This is strict liability . . . .[55]

Because some of the court's language seems indistinguishable from traditional negligence analysis, the application of strict liability is contradictory. The "full knowledge" standard resolves that apparent contradiction. With this standard, the court made the leap from traditional

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50. *Id.*

51. *Id.* at 397, 827 P.2d at 112 (emphasis added). The RESTATEMENT provides that "the employer remains liable for injuries resulting from dangers *which he should contemplate* at the time that he enters into the contract . . . ." RESTATEMENT, *supra* note 17, § 416 cmt. a (emphasis added). Further, in *Budagher,* defendant was found liable for flooding damage to the plaintiff's property due to the faulty construction of dams done by an independent contractor on the defendant's land. Despite notice that the design of the dams was faulty, and that structural failure could result in loss of life, the defendant proceeded with construction. *Budagher,* 97 N.M. at 120, 637 P.2d at 551.

52. *Saiz,* 113 N.M. at 396, 827 P.2d at 111 (emphasis added).

53. *Id.* at 402, 827 P.2d at 117 (emphasis in original).

54. In establishing strict liability, the court repeatedly called the liability direct: "Today we address whether a nondelegable duty gives rise to direct strict liability . . . or whether it gives rise to vicarious liability . . . ." *Id.* at 394, 827 P.2d at 109. "This liability is direct, not vicarious." *Id.* at 395, 827 P.2d at 110. "The employer's liability for breach of a nondelegable duty is direct, not vicarious." *Id.* at 396, 827 P.2d at 111. "[D]irect liability is not dependent upon any apportionment to an employer of his or her concurrent negligence . . . ." *Id.* at 400, 827 P.2d at 115.

55. *Id.* at 402, 827 P.2d at 117.

liabilities premised upon one's negligence to strict liability, unabashedly taking along language of reasonable foreseeability. The test for liability is not what a reasonable person would have done based on what that person knew or reasonably should have known at the time of commencing the work. The test is what a reasonable person would have done had the person been bestowed with full knowledge, even though such full knowledge was unachievable by a reasonable person. From the perspective of an all-knowing, reasonably prudent person "there must exist a *strong probability* that harm will result . . ."[56] from "a peculiar risk or special danger the employer . . . had *reason to anticipate*"[57] against which that person would ensure a "*reasonably necessary*"[58] precaution. It is irrelevant that a reasonably prudent person who lacks complete knowledge may not reasonably anticipate the peculiar risk, and thus would not ensure that the independent contractor takes the precaution.[59]

C. *Conjectured Application of Direct Liability to the Defendant School District in Saiz*

It is not clear what motivated the court to reject foreseeability so completely, although conjecture about what might have happened under traditional liabilities may shed light. Because the contractors were immune from suit,[60] the plaintiff in *Saiz* could not recover full damages unless the school district was found fully liable. Under direct liability arising from a nondelegable duty, using the traditional reasonably foreseeable standard, a crucial question is whether the school district should have foreseen the need for the plastic bushing which the electrical contractor negligently omitted.[61] With a level of knowledge presumably below the electrical contractor's, the answer could very well have been no, and thus liability would not have been imposed. However, under the full knowledge

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56. *Id.* at 396, 827 P.2d at 111 (emphasis added).

57. *Id.* at 397, 827 P.2d at 112 (emphasis added).

58. *Id.* at 396, 827 P.2d at 111 (emphasis added).

59. Under strict liability, "the reasonableness of acts or omissions of [the landowner] is not a consideration." *Id.* at 402, 827 P.2d at 117.

60. *See* N.M. STAT. ANN. § 37-1-27 (Repl. Pamp. 1990) (barring any action against construction professionals ten years after a project's completion); *see also infra* notes 63-65 and accompanying text.

61. The question arises whether foreseeability goes to the general danger of the work or to the reasonably necessary precaution which eliminates that danger. Certainly, electrocution is a foreseeable danger of electrical work; however, if reasonable precautions are taken, that danger—and its foreseeability—is eliminated. "The doctrine of nondelegable duty applies only in cases in which, in the absence of reasonable precautions, a strong probability exists that harm will result from an unusual type of risk." *Saiz*, 113 N.M. at 396-97, 827 P.2d at 111-12. Therefore, foreseeability of harm should go to the reasonably necessary precaution which eliminates the risk of harm. Thus, section 416 is applied "where the employer should anticipate the need for some specific precaution." RESTATEMENT, *supra* note 18, § 416 cmt. a. Moreover, section 416 applies even though an employer has stipulated in a contract that the independent contractor "take such precautions." *Id.* cmt. c. Also see section 413, which is similar to section 416, except that it applies where no such contractual provision exists. There, "the extent of the employer's knowledge and experience in the field of work to be done is to be taken into account . . . ." *Id.* § 413 cmt. a.

standard, the school district would have been attributed with knowledge of the electrical code requiring the bushing, and of the purpose for the bushing. The effect of strict liability is to increase the likelihood that a plaintiff who has been injured or killed due to a contractor's negligence will have a remedy when that contractor is either not liable or not financially responsible.

D. The Effect of Section 37-1-27 on an Employer of an Independent Contractor

Perhaps the court's rejection of a vicarious liability rationale arises from the potential effect of the "statute of repose"[62] on a plaintiff's ability to recover damages. Where injuries result from "the defective or unsafe condition of a physical improvement to real property" ten years after the completion of a project, builders, engineers, and architects are immune from suit.[63] As to the property owner, there is:

> no reason not to impose full responsibility on a joint tortfeasor subject to strict liability for breach of a nondelegable duty despite the fact that the plaintiff's direct suit against other tortfeasors is barred, and despite the fact that the joint tortfeasor upon whom full responsibility falls may lack a right of contribution from those granted the immunity.[64]

The court also discussed the historical purpose to exclude owners from the benefit of the statute of repose.[65] Implicit in the court's reasoning is that because the owner's strict liability is not predicated on the contractor's fault, that liability is therefore not extinguished by the contractor's immunity. Thus, the court avoided the possibility that under vicarious liability, the imputed liability of an employer/owner would also be barred.

E. The New Mexico Tort Claims Act and Government Immunity from Strict Liability

After devoting the bulk of its opinion to a strained and convoluted analysis to establish strict and joint liability, the court summarily concluded that the school district, though strictly liable, was immune from such liability under the New Mexico Tort Claims Act.[66] This holding has

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62. *Saiz*, 113 N.M. at 401, 827 P.2d at 116 (citing N.M. STAT. ANN. § 37-1-27 (Repl. Pamp. 1990)).

63. N.M. STAT. ANN. § 37-1-27 (Repl. Pamp. 1990).

64. *Saiz*, 113 N.M. at 401, 827 P.2d at 116.

65. *Id.*; *see also* Howell v. Burk, 90 N.M. 688, 694, 568 P.2d 214, 220 (Ct. App), *cert. denied*, 91 N.M. 3, 569 P.2d 413 (1977) (upholding the constitutionality of the statute). The *Howell* court stated:

> The difficulties of those covered by the statute in providing a reasonable defense to a claim made years after the construction project was completed, the absence of control of the premises . . . and the historical difference in liability between owners and occupiers of land and those covered by the statute provide a reasonable basis for excluding owners and tenants from the benefits of the statute.

Id. at 694, 568 P.2d at 220.

66. *Sqiz*, 113 N.M. at 402, 827 P.2d at 117.

the effect of allowing government entities to avoid liability for dangerous work by simply hiring an independent contractor to perform that work. This result is inconsistent with the court's carefully emphasized policy to "encourage conscientious adherence to standards of safety where injury likely will result in the absence of precautions."[67]

The New Mexico legislature passed the New Mexico Tort Claims Act ("TCA")[68] in 1976 with the recognition of "the inherently unfair and inequitable results which occur in the strict application of the doctrine of sovereign immunity."[69] The TCA provides:

> Liability . . . shall be based upon the traditional tort concepts of duty and the reasonably prudent person's standard of care . . . . The Tort Claims Act in no way imposes a strict liability for injuries upon governmental entities or public employees.[70]

The New Mexico Court of Appeals has held that the TCA does not waive immunity for strict liability claims.[71] The court in *Saiz* focused on the specification in the TCA that "liability is to be based soley on a reasonably prudent person standard of care."[72] Because strict liability arising from a nondelegable duty under *Saiz* lacks the element of foreseeability and the application of a reasonable person standard,[73] the court held that "the school district was immune from its joint and several liability for the acts of the independent contractors."[74]

IV. ANALYSIS AND RAMIFICATIONS

The *Saiz* court applied strict liability without regard to fault to an area of law where liability has traditionally been based on the lack of reasonable care to prevent harm. In so doing, the court added confusion and uncertainty to the law regarding employer or landowner liability for the acts of an independent contractor who is engaged in inherently dangerous work. The new strict liability has troublesome ramifications for private employers of independent contractors, who are now potentially liable for harms the prevention of which would be apparent under a

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67. *Id.* at 400, 827 P.2d at 115. In other words, a government entity *may* delegate its nondelegable duty.

68. N.M. STAT. ANN. §§ 41-4-1 to -29 (Repl Pamp. 1989).

69. *Id.* § 41-4-2(A).

70. *Id.* § 41-4-2(B).

71. McCurry v. City of Farmington, 97 N.M. 728, 643 P.2d 292 (Ct. App. 1982). Arguing the ultrahazardous theory, the plaintiff in *McCurry* alleged personal injury from the toxic fumes of a burning automobile, which the defendant Fire Department used for training purposes. The court found that the "traditional tort concept of duty included the theory of strict liability as adopted by our Supreme Court in Thigpen v. Skousen, 64 N.M. 290, 327 P.2d 802 (1958)." *McCurry*, 97 N.M. at 732, 643 P.2d at 296. However, the court reasoned, had the legislature intended to waive immunity for strict liability, it would have done so explicitly, since *Thigpen* was "a part of the law of torts" when the TCA was adopted, and the legislature is presumed to know the common law. *Id.*

72. *Saiz*, 113 N.M. at 402, 827 P.2d at 117.

73. *Id.*

74. *Id.*

hypothetical full-knowledge standard, but which in fact might not be apparent under a reasonably foreseeable standard.

The court explained its elimination of foreseeability under a reasonably prudent standard of care by emphasizing the necessity of encouraging reasonable safeguards against harm. That elimination, however, immunizes government employers of independent contractors engaged in inherently dangerous work. Either the *Saiz* court thought that the increase of reasonable safeguards in the private sector would outweigh the decrease in the public sector, or the court simply did not realize the inconsistency of immunizing the government. It is difficult to believe the former.

The court could have avoided the confusion, uncertainty, and inconsistency of its decision by applying traditional direct liability based on a reasonably foreseeable standard to the nondelegable duty doctrine. An employers'/owner's liability would be predicated upon his or her own negligence in not ensuring that the contractor took a reasonable precaution to prevent a foreseeable harm. Thus, the court would have avoided problems of vicarious liability based on the contractor's negligence. Instead, the employer/owner's direct liability would be independent of the contractor's liability[75] and of the contractor's immunity from suit or lack of financial responsibility.

Absent strict liability, the *Saiz* court would have needed to consider whether "liability under [traditional theories] falls within the immunity afforded governmental entities by the exclusion of independent contractors from the definition of public employees for whose torts the entity's immunity is waived."[76] The court "infer[red] that the legislature retained immunity for the tortious acts of independent contractors committed within the scope of their duties."[77] However, an employers'/owner's nondelegable duty—the operative term—is by definition independent of the contractor's duties. As have other jurisdictions, the court could have found that a nondelegable duty prevails over a governmental immunity. The result to the parties in *Saiz* may have been the same had the court found that the defendant school district was not negligent under a reasonably prudent standard of care by failing to ensure that the contractor installed the bushing. However, the law in New Mexico concerning nondelegable duties would have been clear and predictable, and consistent with the court's policy of increasing reasonable safeguards against harm.

V. CONCLUSION

Saiz has changed the law in New Mexico regarding an employer or landowner's liability for harm that results from inherently dangerous work performed by an independent contractor because a reasonable pre-

75. "It should not be required that the contractor be liable." *Saiz*, 113 N.M. at 399, 827 P.2d at 114.

76. *Id.* at 393 n.5, 827 P.2d at 108 (declining to reach the question).

77. *Id.* at 402 n.14, 827 P.2d at 117 (citing N.M. STAT. ANN. §§ 41-4-4(D)(1), -3(E) (Repl. Pamp. 1989)).

caution was omitted. The court's hypothetical "full knowledge" standard dispenses with foreseeability. An employer is now strictly liable without regard to his or her own negligence, the contractor's negligence, or to foreseeability of harm. A government entity, on the other hand, is immune from liability.

By applying a liability void of fault consideration, the court has left no clear standards for the potentially liable private employers of independent contractors. Liability should arise from an employer's lack of care with respect to foreseeable precautions in the face of inherently dangerous work. This would make the duty of a private employer/owner clear. The same is true of a government entity, with the result of encouraging both the contractor and the public or private employer/owner to take reasonable safeguards. Emphasis on the nondelegable duty doctrine as a means of attaching liability directly on an employer based on the employer's negligence would have led to results consistent with the court's policy and with precedent, and would have been comprehensible to employers of independent contractors.

JANE MARSHALL GAGNE