STATE OF NEW HAMPSHIRE
SUPREME COURT

Docket No. 2017-0371

Steven Grady

v.

Jones Lang LaSalle Construction Company, Inc.
Liberty Mutual Insurance Company
Liberty Mutual Group, Inc., and John Does I-V

RULE 7 APPEAL FROM SUMMARY JUDGMENT
ORDER OF THE STRAFFORD COUNTY SUPERIOR COURT
(Justice Steven M. Houran)

BRIEF OF APPELLEES JONES LANG LASALLE CONSTRUCTION COMPANY LIBERTY MUTUAL INSURANCE COMPANY LIBERTY MUTUAL GROUP

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Gary M. Burt will present oral argument on behalf of Appellees

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RELEVANT STATUTORY PROVISIONS

RSA 277:11 Safeguards

Whenever the nature or condition of any such place of employment, or the machinery or other appliances therein, are such as to render work therein or in proximity thereto dangerous to the safety or health of employees, it shall be the duty of the employer to provide and maintain such safeguards, safety devices, appliances and lighting facilities, and to do such other things as may be reasonably necessary and practicable to lessen the dangers of such employment.

RSA 281-A:64 Safety Provisions; Administrative Penalty

I. Every employer shall provide employees with safe employment. Safe employment includes but is not limited to furnishing personal protective equipment, safety appliances and safeguards; ensuring that such equipment, appliances, and safeguards are used regularly; and adopting work methods and procedures which will protect the life, health, and safety of the employees. For the purposes of this section, "employer" shall include railroads, even if the employees of such railroads receive compensation for work injuries under federal law rather than RSA 281-A.

II. All employers with 15 or more employees shall prepare, with the assistance of the commissioner, a current written safety program and file this program with the commissioner. After a written safety program has been filed, the program shall be reviewed and updated by the employer at least every 2 years. Employer programs shall, in addition to the specific rules and regulations regarding worker safety, include the process of warnings, job suspension, and job termination for violations of the safety rules and regulations set forth in the program.

III. Every employer of 15 or more employees shall establish and administer a joint loss management committee composed of equal numbers of employer and employee representatives. Employee representatives shall be selected by the employees. If workers are represented by a union, the union shall select the employee representatives. The joint loss management committee shall meet regularly to develop and carry out workplace safety programs, alternative work programs that allow and encourage injured employees to return to work, and programs for continuing education of employers and employees on the subject of workplace safety. The committee shall perform all duties required in rules adopted pursuant to this section.

IV. Employers subject to the requirements of paragraph III, other than employers participating in the safety incentive program under RSA 281-A:64-a, shall be placed on a list for early and periodic workplace inspections by the department's safety inspectors in accordance with rules adopted by the commissioner. Such employers shall comply with the directives of the department resulting from such inspections.

V. Notwithstanding paragraphs III and IV, an employer of 15 or more employees may satisfy the requirements of those paragraphs if such employer implements an equivalent loss management and safety program approved by the commissioner.

VI. The commissioner, in conjunction with the National Council of Compensation Insurance (NCCI), shall develop a list of the best and worst performers based on the experience modification factors promulgated by NCCI. The list shall include the top 10 lowest experience modification employers. The commissioner shall publicly recognize these low experience modification employers by presenting them with an award at the department's annual workers' compensation conference. The list of the top 10 highest and lowest experience modification employers shall be provided to the advisory council. The department shall review any specific claim against any employer listed in the top 10 highest experience modification list in conjunction with the safety program on file with the commissioner.

VII. In order to assist self-insurers in developing experience modification factors, self-insurers may submit the appropriate statistical information to the National Council of Compensation Insurance for calculating experience modifications.

VIII. The commissioner may assess an administrative penalty of up to $250 a day on any employer not in compliance with the written safety program required under paragraph II of this section, the joint loss management committee required under paragraph III of this section, or the directives of the department under paragraph IV of this section. Each violation shall be subject to a separate administrative penalty. All penalties collected under this paragraph shall be deposited in the general fund.

IX. [Repealed.]

STATEMENT OF THE CASE AND STATEMENT OF FACTS

I. The Project.

Liberty Mutual Insurance Company (collectively, with Liberty Mutual Group, Inc., "Liberty Mutual") contracted with Jones Lang LaSalle Construction Company, Inc. ("JLL" and, collectively, with Liberty Mutual, "Appellees") for construction services at 100 Liberty Way in Dover, New Hampshire (the "Project"). *See* Brief Appendix ("App.") at 1-95. The contract between Liberty Mutual and JLL (the "Liberty Mutual Contract") authorized JLL to engage subcontractors. App. at 25, §§ 5.2, 5.2.1.

JLL subcontracted with A&M Roofing and Sheet Metal ("A&M") to perform roofing and sheet metal work on the Project ("A&M Contract"). *See* App. at 96-117. Section 6.4 of the A&M Contract provided:

> **The Subcontractor. . . shall maintain all work areas in a safe manner and shall furnish all safety equipment required by the Contract Documents and by law. . . . . The Subcontractor assumes full responsibility for the management and implementation of its safety and health programs on the Project and for assuring compliance with all such safety and health programs and all other safety requirements specified herein, in the Contract Documents and in any other safety or health requirements specified by the Contractor and in the Contract Documents by its sub-subcontractors, suppliers and all elements of labor used or employed on the project.**

App. at 100, § 6.4 (emphasis added). A&M was responsible for providing safety equipment to its employees; implementing a safety program for its employees; and ensuring that its employees followed safety protocols while working on the Project. *See* App. at 100. JLL was expressly relieved of any obligation to provide safety equipment to subcontractors or subcontractors' employees. *See* App. at 38, § 10.2.9 ("The Contractor shall supply all protective equipment

(protective clothing, safety glasses, hard hats, etc.) for all its employees, the Owner, Project Manager, Architect and authorized visitors.").

The A&M Contract further declared that JLL was not responsible for monitoring A&M's employees' adherence to safety protocols:

> The Subcontractor shall be liable to Contractor for any additional costs which the Contractor incurs as a result of the Subcontractor's failure to operate safely. Contractor may conduct safety inspections at any time. **Such inspections shall not relieve Subcontractor from its obligation to adhere to safety requirements nor shall such inspections create any Contractor liability.**

App. at 100, § 6.6 (emphasis added). The Liberty Mutual Contract specifically provided that Liberty Mutual has no responsibility or liability for the Project. *See* App. at 16, § 3.2.5.

II. The Accident.

Steven Grady ("Appellant"), an A&M employee, worked on the Project. *See* App. at 154-55, 204. Appellant had to remove dirt from a roofing membrane using a cleaner. App. at 158. As ice covered some of the areas that needed to be cleaned, Appellant used a torch to melt the ice. *See* App. at 163-64. After igniting the torch without incident several times, Appellant's right glove caught on fire as he lit the torch using a lighter, causing burns to his right hand. *See* App. at 120, 164, 167.

Appellant claimed that he did not have access to certain safety equipment to be supplied by A&M including a striker tool to light the torch, rubber gloves to apply the membrane cleaner, and fireproof gloves to hold the torch. *See* App. at 204-06. Appellant explained that he often worked without necessary safety equipment while employed by A&M, as the company was "always just rushing, rushing, rushing." App. at 178. Appellant testified that he had questioned his supervisor, another A&M employee, whether it was safe to work on the day of the Accident,

see App. at 178-79, but did not know if Appellees were ever informed of his concerns. App. at 179.

A&M was responsible for providing safety equipment to and monitoring the work of its employees on the Project. *See* App. at 100, §§ 6.4, 6.6. Appellant testified that A&M was the only company responsible for overseeing its employees' safety. *See* App. at 145.

Appellees moved for summary judgment, maintaining that they owed no duty to Appellant. By order dated May 18, 2017 (the "Order"), the trial court granted Appellees' motion, ruling that:

> While Jones Lang and Liberty Mutual owed a duty of care to [Appellant] to provide a safe workplace on the premises, the court finds that the defendants did not owe a duty to [Appellant] to provide supervision, training, or safety equipment to him. Because the undisputed facts show that [Appellant] was injured by the propane torch provided by A&M to perform the required roofing work rather than any condition on the premises, the court finds that [Appellant] cannot maintain his negligence claims against the defendants.

Order, p. 16. Appellant appealed to this Court.

SUMMARY OF THE ARGUMENT

The Court should affirm the trial court's decision, as Appellees did not owe any duty to supply safety equipment to, nor monitor the practices of subcontractor's employees. A general contractor and a landowner have no duty to provide safety equipment to a subcontractor's employees; have no duty to provide safety training to a subcontractor's employees; and have no duty to supervise a subcontractor's employees' work. These duties are the sole obligation of the subcontractor, absent Appellees affirmatively assuming by contract or some other agreement to undertake and supplant the subcontractor's duties to its employees.

JLL, a general contractor, did not owe a legal duty to train, supervise or supply safety equipment to Appellant, as New Hampshire law and the A&M Contract place those obligations squarely on Appellant's employer, A&M. Liberty Mutual, the landowner, similarly breached no duty to Appellant, as the Accident occurred as a result of allegedly unsafe acts by the subcontractor and its employees, not because of a dangerous condition of the property itself. As the undisputed material facts demonstrate that Appellees breached no duty to Appellant, the trial court was correct to grant Appellees' motion for summary judgment.

ARGUMENT

I. Under New Hampshire Law, JLL Breached No Duty To Appellant.

A general contractor has no duty to train, supervise, or supply safety equipment to a subcontractor's employee. These duties are the sole responsibility of the subcontractor. *Rounds v. Standex Int'l*, 131 N.H. 71, 76 (1988) ("The maintenance of a safe workplace, including suitable machinery and tools, is the duty of the employer."); *Wallace v. Boston & M.R.R.*, 57 A. 913, 918 (N.H. 1904) (an employer owes his employees a duty to "maintain... all these [machinery and tools] in a reasonably suitable condition and state of repair")). A subcontractor owes these duties to its employees because of its legal relationship with them. A general contractor does not have any similar relationship with its subcontractors' employees and thus is not responsible for instructing them how to perform their work, monitoring their work, or providing their tools.

A general contractor exercises very limited control over a subcontractor's employees. It has no power to hire or fire them and is not necessarily aware of what training they have received or what skills they possess. A general contractor cannot set a subcontractor's employees' hours or direct them to work at a particular location on a jobsite. A general contractor typically does not even interact with a subcontractor's employees as its primary contact is either the subcontractor itself or a supervisor.

Although a general contractor has a duty to monitor a jobsite to keep a premises generally safe, this duty does not require a general contractor to protect a subcontractor's employee from dangers created by the subcontractor's negligent training or supervision of its employees, or the subcontractor's employee's negligent performance of his work. *See* N.H. Rev. Stat. Ann. § 281-A:64. The trial court correctly determined that JLL owed Appellant no duty, as Appellant was injured directly because his employer supplied him inadequate equipment, a lighter in windy

conditions, and failed to provide fireproof gloves. *See* App. at 204-06. Under these circumstances, the only entity that owed a duty to protect Appellant from these hazards was his employer, A&M.

A. New Hampshire Law Does Not Require A General Contractor To Provide Safety Training, Equipment, Or Oversight To A Subcontractor's Employee.

"A duty of care arises out of a relation between the parties and the need for protection against reasonably foreseeable harm." *Riso v. Dwyer*, 168 N.H. 652, 654 (2016) (internal quotation omitted). "The existence and extent of that duty depends upon the nature of the relationship between the parties." *Mikell v. Sch. Admin. Unit No. 33*, 158 N.H. 723, 731 (2009). "The determination of legal duty focuses upon the policy issues that define the scope of the relationship between the parties." *Cui v. Chief, Barrington Police Dep't*, 155 N.H. 447, 449 (2007).

JLL and its subcontractors' employees had no legal relationship giving rise to a duty of care beyond JLL's general duty with respect to jobsite safety. JLL was the general contractor on the Project. JLL subcontracted with Appellant's employer, A&M, to perform roofing and sheet metal work. Appellant was one of the A&M employees who performed that work. A&M supervised its employees and was obligated to provide them with proper equipment and training. Although JLL had a duty to monitor the premises to ensure that there were no dangerous conditions present on the site, its remote relationship with Appellant did not require JLL to supplant the traditional obligations of Appellant's employer.

Appellant's safety during the Project was the responsibility of his employer, A&M, as it was best positioned to train, monitor, and supply safety equipment. "[I]n the context of the employer/employee relationship, the common law duty to provide a safe workplace is nondelegable and rests exclusively with the employer... ." *Leeman v. Boylan*, 134 N.H. 230,

234 (1991) (internal quotations omitted); *see also Rounds*, 131 N.H. at 77 (1988) (stating that "the duty to maintain a safe workplace rests exclusively with the employer"). Consistent with this authority, the New Hampshire Workers' Compensation Law, provides that "[e]very employer shall provide employees with safe employment." N.H. Rev. Stat. Ann. § 281-A:64. In defining "safe employment," the law specifies that it "includes but is not limited to furnishing personal protective equipment, safety appliances and safeguards; ensuring that such equipment, appliances, and safeguards are used regularly; and adopting work methods and procedures which will protect the life, health, and safety of the employees." *Id.* N.H. Rev. Stat. Ann. § 277:11 similarly provides that:

> Whenever the nature or condition of any such place of employment, or the machinery or other appliances therein, are such as to render work therein or in proximity thereto dangerous to the safety or health of employees, it shall be the duty of the employer to provide and maintain such safeguards, safety devices, appliances and lighting facilities, and to do such other things as may be reasonably necessary and practicable to lessen the dangers of such employment.

N.H. Rev. Stat. § 277:11. These statutes reflect the longstanding New Hampshire policy that employers have the legal duty to ensure their employees' safety.

In his brief, Appellant relies heavily on *Butler v. King* to suggest that JLL owed a duty to him. The facts of *Butler*, however, are different from the circumstances here. As the trial court recognized:

> Here, the undisputed facts are that a gust of wind blew the flame from... [Appellant]'s propane torch onto the cotton glove he wore on his right hand, which ignited the glove and lead to severe burns on his right hand as he struggled to remove the glove without any resources to swiftly extinguish the flame. As such, unlike the plaintiff's injury in Butler, [Appellant]'s injury did not result from his contact with an unsafe condition on the premises created by the general contractor, Jones Lang. Thus, the court finds that the factual circumstances that lead to [Appellant]'s injury do not

> implicate the duty Jones Lang owed to [Appellant] to maintain reasonably safe workplace conditions.

Order, p. 7. The trial court's interpretation of *Butler* is correct.

In *Butler*, a subcontractor's employee fell and was injured after leaning against a railing that appeared to be secured. 99 N.H. 150, 151 (1954). This Court ruled that the general contractor "had a duty to maintain reasonable conditions of safety and the plaintiff was entitled to place some reliance on the performance of that duty." *Id.* at 152. To conclude that the general contractor breached this duty, this Court relied upon three circumstances present in *Butler* that are absent in this case: (1) the general contractor had **performed work on the defective railing**, (2) the railing appeared to be secured, and (3) the plaintiff could not have known that the railing was dangerous. *See id.* at 151-53.

Appellant repeatedly notes that the general contractor in *Butler* did not install the defective railing, apparently suggesting that the general contractor did not create the dangerous condition that caused the plaintiff's injuries. Appellant ignores, however, that the general contractor had disconnected much of the support for the railing where the plaintiff fell. Specifically, in *Butler*, it was undisputed that "[i]n renovating the hotel **the defendants removed the wooden posts on the front of the porch, detached the railing at the easterly end and substituted iron lally columns.**" *Id.* at 151 (emphasis added). Further, "[t]he plaintiff alleged that the said railing **was in a dangerous condition, due to the negligence of the said defendants.**" *Id.* at 150-51 (emphasis added).

Unlike the general contractor in *Butler*, JLL did not create nor contribute to any dangerous condition present at the time of the Accident. JLL did not cause the windy conditions, nor the ice on the roof. JLL also did not create the unsafe method Appellant used to treat the roofing membrane or light the torch. Although a general contractor has a duty to maintain

reasonable conditions of safety on a jobsite, it is not obligated to protect a subcontractor's employee from dangers arising from the manner in which the subcontractor's employee performs his work. *See* N.H. Rev. Stat. Ann. § 281-A:64.

Appellant was injured as a result of performing his work in a negligent manner. He lit a torch using a lighter in windy conditions after applying a flammable cleaner without fireproof gloves. JLL had no duty to train Appellant to perform his work more safely; to supervise Appellant to ensure he performed his work safely; or to supply safety equipment to Appellant.

B. Courts In Our Sister States Have Uniformly Declared That A General Contractor Owes No Duty To Provide Safety Training, Equipment, Or Oversight To A Subcontractor's Employee.

Courts from our sister states have declared that general contractors have no duty to train subcontractors' employees, to provide safety equipment to subcontractors' employees, or to oversee the day-to-day work performed by subcontractors' employees. Many of these cases involved facts similar to the circumstances here.

In *Eastlick v. Lueder Construction Co.*, the Nebraska Supreme Court analyzed a general contractor's duty to the employee of a subcontractor who was injured when the scaffolding that he was working on collapsed. 274 Neb. 467, 468-69 (2007). The plaintiff alleged that the general contractor "had control and supervision over all aspects of the construction project and had a duty to foresee that the masonry work was likely to create peculiar risks or involve peculiar or inherent dangers." *Id.* at 470-71. He claimed that the general contractor:

> (1) violated its nondelegable duty to provide a reasonably safe place to work; (2) violated its statutory duties under the requirements of the Occupational Safety and Health Administration (OSHA); (3) violated its nondelegable duties to see that the work performed by the independent contractors involving peculiar risks was done with a requisite degree of care by taking adequate safety precautions and measures; and (4) failed to ensure that the scaffolding was erected, moved, and dismantled under the supervision of or by a competent, qualified person.

Id. at 471. The general contractor had entered into two contracts for the project: one with the owner of the property and one with the subcontractor that employed the plaintiff. *Id.* at 473. Despite the general contractor's contractual duties and its general duty to provide a safe work environment, the Nebraska Supreme Court affirmed the trial court's order granting summary judgment, explaining that the plaintiff's "injuries were not the result of an **unsafe premises**, but, rather, the result of work completed in a negligent manner." *Id.* at 477-78 (emphasis added). The court noted that "the duty of a general contractor to employees of a subcontractor extends only to providing a reasonably safe place to work as distinguished from apparatus, tools, or machinery furnished by the subcontractor for the use of his own employees." *Id.* at 476 (internal quotation omitted). The court also recognized that:

> A contractual provision stating that the general contractor would take all necessary precautions for the safety of employees working on the jobsite did not enlarge the common-law duty of the general contractor to a subcontractor's employees such that the general contractor would be required to inspect tools, equipment, and apparatus furnished by the subcontractor for the exclusive use of its own employees.

Id. at 477.

In *Kennedy v. U.S. Construction Co.*, the Eighth Circuit Court of Appeals reached a similar conclusion. 545 F.2d 81, 82 (8th Cir. 1976). In affirming the trial court's order, the Eighth Circuit explained that:

> Although a general contractor may be liable to an employee of a subcontractor on account of the unsafe conditions of tools and appliances which the general contractor was required to furnish, ordinarily it is the obligation of a subcontractor to supply his own employees with tools and appliances, and a general contractor is not liable for the negligence of the subcontractor in furnishing unsafe tools or appliances.

Id. at 84.

The Alabama Supreme Court reached a similar conclusion in *Barron v. Construction One*, a case where an employee of a sheet metal subcontractor was injured after falling off a ladder. 514 So.2d 1351, 1352 (Ala. 1987). The court affirmed the trial court's order granting summary judgment to the general contractor, noting that "the general contractor's duty to keep the premises reasonably safe for an employee of the subcontractor extended only to conditions existing when the employee began to work and did not apply to conditions arising during the course of work." *Id.*

Other courts have rejected the proposition that a general contractor owes a duty to train, monitor, or supply safety equipment to subcontractors' employees. *See, e.g.*, *Fresquez v. Sw. Indus. Contractors & Riggers, Inc.*, 89 N.M. 525, 531 (1976) ("The 'place' the general contractor must keep safe does not include the equipment of the independent contractor."); *Barth v. Downey Co.*, 71 Wis.2d 775, 780 (1976) ("There is no duty on the part of a general contractor to superintend the activities of the employee of a subcontractor."); *Kaczmarek v. Bethlehem Steel Corp.*, 884 F. Supp. 768, 774 (W.D.N.Y. 1995) ("[T]he duty to provide a safe place to work is not breached when the injury arises out of a defect in the subcontractor's own plant, tools and methods, or through negligent acts of the subcontractor occurring as a detail of the work." (internal quotation omitted)); *Brannan v. Lathrop Constr. Assocs., Inc.*, 206 Cal.App.4th 1170, 1177 (2012) ("A general contractor owes no duty of care to an employee of a subcontractor to prevent or correct unsafe procedures or practices to which the contractor did not contribute by direction, induced reliance, or other affirmative conduct. The mere failure to exercise a power to compel the subcontractor to adopt safer procedures does not, without more, violate any duty owed to the plaintiff." (internal quotation omitted)); *Fliginger v. Opus Nw. Constr., LLC*, 2010 WL 4286231, at *6 (Minn. Ct. App. Nov. 2, 2010) (noting that "an entity that hires a

subcontractor is not liable for injuries to the subcontractor's employees if the entity did not retain detailed control over the work project as a whole or over the specific task on which the employee was working when injured" (internal quotation omitted)).

These courts, like this Court, recognize that a general contractor does not have a sufficient legal relationship with subcontractors' employees to obligate it to train, supervise, or supply safety equipment to them. *See Kaczmarek*, 884 F. Supp. at 774. A general contractor has a duty to monitor a jobsite to ensure that the work premises are reasonably safe, but this duty is owed to every person who enters a jobsite and arises because the general contractor is the party best positioned to control the premises. *See Fresquez*, 89 N.M. at 531. This general duty does not require a general contractor to protect a subcontractor's employee from dangers created by the subcontractor's negligent training or supervision of its employees, or the subcontractor's employee's negligent performance of his work. *See Eastlick*, 274 Neb. at 476. Appellant was injured because he used a lighter to ignite a torch in windy conditions after applying a flammable cleaner without fireproof gloves. JLL owed no duty to protect him from these hazards.

C. Appellant's Reliance On Section 324A Of The Restatement Of Torts Is Misplaced.

Restatement of Torts (Second) Section 324A does not impose upon JLL the duty to train, supervise, or supply safety equipment to Appellant. Section 324A provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> (a) his failure to exercise reasonable care **increases** the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or

(c) the harm is suffered because of **reliance of the other or the third person** upon the undertaking.

Restatement of Torts (Second) § 324A (emphasis added).

Section 324A is inapplicable here, as JLL's conduct does not satisfy any of the provision's subsections. Under Section 324A(a), a defendant must have committed some act that increased the plaintiff's risk of harm. JLL did not contribute to snow being on the roof where Appellant was working or to the allegedly windy conditions at the time of Accident. The undisputed facts before the trial court established that Appellant was injured because he lit a torch without a striker in windy conditions after applying a flammable cleaner while wearing non-fireproof gloves. As the trial court noted: "the factual circumstances that lead to Grady's injury do not implicate the duty Jones Lang owed to [Appellant] to maintain reasonably safe workplace conditions." Order, p. 7.

To owe Appellant a duty pursuant to Section 324A(b), JLL must have completely supplanted the duties of A&M, which it did not. Although a "superficial reading of subsection (b) would lead one to believe that *any* endeavor to help another in the performance of its duty to protect a third person would lead directly to liability… . It is clear that this broad and superficial reading was not intended by the drafters." *Plank v. Union Elec. Co.*, 899 S.W.2d 129, 131 (Mo. Ct. App. 1995). The Section's comments make it "apparent that merely assisting another in the performance of his duty to a third person is not enough to trigger liability. Rather, one must intend to completely *subsume* or *supplant* the duty of the other party in order to incur liability for nonperformance of that duty." *Id.*; *see also, e.g.*, *Hutcherson v. Progressive Corp.*, 984 F.2d 1152, 1156 (11th Cir. 1993) (stating for liability to be imposed under section 324A(b), a party "must completely assume a duty owed by [another] to [the third person].") *Ricci v. Quality Bakers of Am. Coop. Inc.*, 556 F. Supp. 716, 721 (D. Del. 1983) ("In order to prevail under

section 324A(b), a plaintiff must establish that the one who undertook the duty to inspect supplanted and not merely supplemented another's duty."); *Ironwood Springs Christian Ranch, Inc. v. Walk to Emmaus,* 801 N.W.2d 193, 202 (Minn. Ct. App. 2011) (explaining that "to impose liability under section 324A(b), one who undertakes a duty owed by another to a third person must completely assume the duty").

As the A&M Contract and the Liberty Mutual Contract demonstrate, JLL did not completely assume all duties with respect to Appellant's safety. *See Robinson v. Colebrook Guar. Sav. Bank*, 109 N.H. 382, 384-85 (1969) ("[A] relation created by contract may impose a duty to exercise care."). The A&M Contract provides that "[t]he Subcontractor shall confine operations at the Project to areas permitted by law, ordinance, permit and the Contract Documents, **shall maintain all work areas in a safe manner and shall furnish all safety equipment required by the Contract Documents and by law**." App. at 100, § 6.4 (emphasis added). This language requires A&M (1) to keep the area where its employees are working safe and (2) to provide all safety equipment for its employees. No provision indicates that JLL has any responsibility with respect to either of these areas. *See Foley v. Rust Int'l*, 901 F.2d 183, 185 (1st Cir. 1990) (finding that a general contractor was not liable for a subcontractor's employee's injuries where the subcontract provided that the subcontractor alone was obligated to furnish all apparel, materials, equipment, tools, labor, instruction, and supervision of employees).

Section 6.6 of the A&M Contract also demonstrates that JLL has no liability for the Accident:

> The Subcontractor shall be liable to Contractor for any additional costs which the Contractor incurs as a result of the Subcontractor's failure to operate safely. Contractor may conduct safety inspections at any time. **Such inspections shall not relieve Subcontractor from its obligation to adhere to safety requirements nor shall such inspections create any Contractor liability.**

App. at 100, § 6.6 (emphasis added). Although JLL had the right to inspect A&M's work, that right did not impose any duty on JLL. *See Tsiatsios v. Tsiatsios*, 140 N.H. 173, 178 (1995) ("In determining the actual understanding and intent of the parties, the trier of fact should consider the objective meaning of the expressed contract terms."). As the trial court recognized, "the plain language of the subcontract, to which A&M is a party, requires A&M to provide supervision of safety measures and safety equipment to its employees. The subcontract contains no language requiring Jones Lang to take any affirmative action towards A&M employees." Order, p. 11.

The Liberty Mutual Contract further supports that JLL breached no duty to Appellant as it provides that "[t]he Contractor shall supply all protective equipment (protective clothing, safety glasses, hard hats, etc.) for all its employees, the Owner, Project Manager, Architect and authorized visitors." App. at 38, § 10.2.9. Although the Liberty Mutual Contract mentions subcontractors in other provisions, *see* App. at 25-27, Art. 5, it specifically excludes them from the scope of Section 10.2.9. Thus, the project owner did not require JLL to provide "protective equipment" to subcontractors or their employees.

The Liberty Mutual Contract also cannot impose a duty on JLL with respect to Appellant because neither Appellant, nor his employer is a party to or a third-party beneficiary of that agreement. *See Sisson v. Jankowski*, 148 N.H. 503, 505 (2002) (explaining that "ordinarily the scope of the duty is limited to those in privity of contract with one another"); *Robinson*, 109 N.H. at 385 (stating that "the scope of such a duty is limited to those in privity of contract with each other"); *see also Bosse v. Wolverine Ins. Co.* 88 N.H. 98, 101 (1936) (noting that generally a non-party to a contract cannot recover for a breach of that contract). The Liberty Mutual Contract "is silent as to Jones Lang's liability to any third parties," including Appellant. Order, p. 11. "Thus, the provisions cited by [Appellant] created a duty of Jones Lang to shield Liberty

Mutual from any liability that may arise from the acts of Jones Lang or its subcontractors during the course of completing the project; it did not make A&M and its employees third party beneficiaries of the general contract." *Id.* Appellant's attempt to create a duty owed to him based on JLL's contract with Liberty Mutual cannot succeed. *See Gonzalez v. VATR Constr. LLC*, 418 S.W.3d 777, 786 (Tex. App. 2013) (explaining that the plaintiff's "reliance upon contractual provisions in contracts to which [the subcontractor's employee] is not a party or third-party beneficiary is misplaced. [The subcontractor's employee] cannot rely on upstream contracts to establish the existence of a duty.").

JLL also owed no duty to Appellant pursuant to Section 324A(c) as that section imposes liability only when "the harm is suffered because of reliance of the other or the third person upon the undertaking." Restatement of Torts (Second) § 324A(c). Reliance must have induced the individual "to forego other remedies or precautions against the risk." Restatement (Second) of Torts §324A, cmt. e. The record below failed to establish any dispute of material facts concerning this issue, as there was no evidence presented to the trial court that Appellant detrimentally relied on anything JLL did. Although Appellant suggests that he relied on JLL for jobsite safety, he failed to present any evidence in his brief or before the trial court supporting that he ignored a precaution or safety measure as a result of this alleged reliance.

Appellant cites only one easily distinguishable case to support that JLL breached a duty to him pursuant to Section 324A. *See generally Handler Corp. v. Tlapechco*, 901 A.2d 737 (Del. 2006). The danger confronted by the subcontractor's employee in that case, a second-floor walkway without a safety railing, was a condition of the workplace that the general contractor admitted it had a duty to correct. *See id.* at 747. Here, Appellant was not injured as a result of a condition of the workplace. Appellant's injury was caused by how he performed his work on the

jobsite, not "contact with an unsafe condition on the premises created by the general contractor, Jones Lang." Order, p. 7. As he did with *Butler*, Appellant attempts to define JLL's duty in the broadest possible terms, again ignoring that JLL's general duty with respect to jobsite safety did not require it to train, supervise, or supply safety equipment to a subcontractor's employee.

D. As The Applicability Of Occupational Safety And Health Administration Regulations Were Not Raised Below, It Cannot Be Raised Before This Court.

This Court "will not consider on appeal issues or arguments not raised below." *State v. Westover*, 127 N.H. 130, 131 (1985). Appellant never maintained that Occupational Safety and Health Administration ("OSHA") regulations support that JLL breached a duty to Appellant. In fact, Appellant never mentioned OSHA in his objection or during a hearing on Appellees' motion for summary judgment. As Appellant failed to raise the OSHA regulations before the trial court, he cannot raise them now. *See Quirk v. Town of New Boston*, 140 N.H. 124, 128 (1995) (noting that "this court will not consider on appeal issues or arguments not raised below").

II. The Landowner, Liberty Mutual, Had No Duty To Train, Supervise, Or Supply Safety Equipment To Appellant.

"Under New Hampshire law, for a landowner to owe a duty of care to a party entering his property, it must be reasonably foreseeable that injury may occur as a result of the landowner's conduct." *White v. Asplundh Tree Expert Co.*, 151 N.H. 544, 547 (2004). A landowner is generally "not liable for injuries caused by the negligence of an independent contractor." *Elliott v. Public Serv. Co. of N.H.*, 128 N.H. 676, 678 (1986) (citation omitted). As Appellant's injuries were caused by work being performed in negligent manner, not anything Liberty Mutual did or any condition on its property, Liberty Mutual breached no duty to Appellant.

A. New Hampshire Law Does Not Impose A Duty On A Landowner To Train, Supervise, Or Supply Safety Equipment To A Subcontractor's Employee.

"[A] premises owner is subject to liability for harm caused to entrants on the premises if the harm results either from: (1) the owner's failure to carry out his activities with reasonable care; or (2) the owner's failure to remedy or give warning of a dangerous condition of which he knows or in the exercise of reasonable care should know." *Rallis v. Demoulas Super Markets, Inc.*, 159 N.H. 95, 99 (2009). As the trial court summarized:

> Liberty Mutual owed a duty to [Appellant] as it owed to all entrants on the premises: to use ordinary care to avoid the risk of foreseeable harm arising from conditions on its premises. However, the general contract and subcontract placed supervision and safety responsibilities on either Jones Lang or its subcontractors. Because Liberty Mutual was not expected to exercise "control or power of discretion over the execution" of A&M's work, it did not owe A&M employees a duty of care to supervise, train or provide safety equipment to perform the work required in the subcontract. ... Thus, while Liberty Mutual owed a duty of care to maintain the premises in a reasonably safe condition, it did not owe a duty of care to [Appellant] to protect against any potential dangers that may result from the roofing work required by the subcontract, including providing supervision or safety equipment to A&M employees.

Order, Pp. 13-14.

A&M failed to provide Appellant with the appropriate safety equipment, *see* App. at 178-79, and to supervise adequately Appellant's work. *See* App. at 145. A&M's alleged breach of these duties cannot be attributed to Liberty Mutual. *See Monk v. Virgin Islands Water & Power Auth.*, 53 F.3d 1381, 1393 (3d Cir. 1995) ("[T]he risks to a contractor's workers and the protections necessary to reduce such risks are often beyond the owner's expertise").

B. As Appellant's Work Was Not Inherently Dangerous, New Hampshire Law Does Not Impose A Heightened Duty On Liberty Mutual.

"[C]onstruction projects, typically fraught with a variety of potential dangers that may arise if the work is not carefully done, do not, as a rule, fall within the inherently dangerous

category." *Arthur v. Holy Rosary Credit Union*, 139 N.H. 463, 466 (1995). Only when work is "dangerous in and of itself and not dangerous simply because of the negligent performance of the work" will it "constitute an inherent danger that places a non-delegable duty upon the one ordering it to protect third parties against resulting injury." *Id.* Appellant's work on the day of the Accident was not "inherently dangerous" as Appellant admits that it would have been safe had A&M provided additional safety equipment. *See* App. at 179-80. The work itself was not dangerous, but performing the work without a striker tool to light the torch, rubber gloves to apply the membrane cleaner, and fireproof gloves to hold the torch was dangerous. *See* App. at 178, 206; *see also* Order, p. 16 n.5 ("The danger created by the use of a propane torch without the availability of proper safety equipment is not a danger that is inherent in roofing work; it was a danger created by the tools and lack of safety equipment which A&M had the duty to supply to [Appellant].").

That the Project went forward during the winter also does not qualify Appellant's work as inherently dangerous. As the trial court recognized, "[a]lthough the weather was windy and cold, the danger posed to [Appellant] was not created by the weather, but instead was created by tools A&M chose to use to conduct the work." Order, Pp. 15-16, n.5. Appellant was injured because he lit a torch using a lighter in windy conditions after applying a flammable cleaner without fireproof gloves. This work was not "dangerous in and of itself." *Arthur*, 139 N.H. at 466; it was dangerous because of the manner in which it was being performed.

III. As The Necessity Of Additional Discovery Was Not Raised Below, It Cannot Be Raised Before This Court.

At the trial court, Appellant "agreed to defer most of the discovery and expert disclosures until after the Court had ruled on defendants' dispositive motions." Appellant's Brief, p. 4. He never argued that additional discovery was necessary. Although Appellant now suggests that "a dispositive

motion should not have been granted while discovery was still open," he waived this argument by agreeing to stay discovery pending a ruling on Appellees' motion for summary judgment. *Id.*, p. 15. "[I]t is axiomatic that a party may not urge reversal on the basis of an issue he has failed to raise below." *Treisman v. Kamen*, 126 N.H. 372, 377 (1985). As Appellant never claimed that additional discovery was necessary before the trial court, he cannot argue that additional discovery is necessary now.

CONCLUSION

For the foregoing reasons, this Court should affirm the Order and rule that Appellees did not breach any duty owed to Appellant.

Respectfully submitted,

JONES LANG LASALLE CONSTRUCTION COMPANY, LIBERTY MUTUAL INSURANCE COMPANY, and LIBERTY MUTUAL GROUP

By their attorneys,

PRIMMER PIPER EGGLESTON & CRAMER PC,

Date: October 18, 2017 By: 

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STATEMENT WITH RESPECT TO ORAL ARGUMENT

The Superior Court's decision should be affirmed as the issue on appeal is a question of law that was correctly decided. In the event the Court decides that oral argument would be of assistance to it, Appellees designate Attorney Gary Burt to represent their interests.

Date: October 18, 2017

Gary M. Burt (N.H. Bar No. 5510)

CERTIFICATION

Pursuant to Supreme Court Rule 16(10), I hereby certify that on this day two copies of this Brief have been sent via first class mail, postage prepaid, to Matthew B. Cox, Esq.

Date: October 18, 2017

Gary M. Burt (N.H. Bar No. 5510)