THE STATE OF NEW HAMPSHIRE

SUPREME COURT

SEPTEMBER 2017 TERM

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 MANDATORY APPEAL FROM ORDER OF
SUPERIOR COURT GRANTING SUMMARY JUDGMENT

BRIEF OF PLAINTIFF

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Matthew B. Cox on Oral Argument–15 minutes

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QUESTIONS PRESENTED

1. DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT TO THE GENERAL CONTRACTOR, JONES LANG LASALLE, IN THE CONTEXT OF A CONSTRUCTION SITE INJURY, ON THE BASIS THAT THE GENERAL CONTRACTOR OWED NO DUTY TO THE INJURED PLAINTIFF?

2. DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT TO THE PROPERTY OWNER, LIBERTY MUTUAL INSURANCE COMPANY AND/OR LIBERTY MUTUAL GROUP, INC., IN THE CONTEXT OF A CONSTRUCTION SITE INJURY, ON THE BASIS THAT THE PROPERTY OWNER OWED NO DUTY TO THE INJURED PLAINTIFF?

STANDARD OF REVIEW

Whether a duty exists in a particular case is a question of law. Carignan v. New Hampshire Intern. Speedway, Inc., 151 N.H. 409, 412 (2004). This Court reviews such questions *de novo*. Id. Where the legal issue is presented in the context of an underlying case that was dismissed on summary judgment, any factual or evidentiary matters must be viewed in the light most favorable to the plaintiff. Beckles v. Madden, 160 N.H. 118 (2010).

STATEMENT OF THE FACTS

This case arises out of a construction site accident which occurred on February 21, 2013 in Dover, New Hampshire. App. at 254. In the incident, plaintiff Steven Grady ("Grady"), who was 30 years old at the time, sustained serious burn injuries to his right hand. App. at 203. Grady's injury required an eight-day admission to Massachusetts General Hospital and multiple surgeries in the ensuing years. Id.

The underlying project involved extensive renovations to a commercial office building in Dover, New Hampshire, which is owned and occupied by defendant Liberty Mutual Insurance Company ("Liberty Mutual"). App. at 254. The general contractor which Liberty Mutual engaged for the $2.6 million renovation project was defendant Jones Lang LaSalle ("JLL"). Id., see also App. at 85. JLL elected to subcontract the roofing work to A&M Roofing Services LLC ("A&M"), who is not a party to the action. App. at 96. The subcontract price for the roofing work was $86,500. Id. At the time of the incident, Grady was employed as a roofer for A&M. App. at 204.

Several elaborate contracts promulgated by the American Institute of Architects ("AIA") were executed in connection with the project. App. at 1-119. Consistent with the traditional role of a general contractor, JLL assumed the entire responsibility for all aspects of the project. App. at 16, §3.2.5, §3.3.1. JLL buttressed its general pledge of responsibility for the entire project by assuming several specific responsibilities:

- JLL promised to supervise all work of its subcontractors (Id.);
- JLL promised to initiate, supervise and maintain all safety precautions and programs (App. at 37, §10.1);
- JLL agreed to take reasonably precautions for safety of workers and others who might be affected by the work, whether under the control of JLL, its subcontractors, or its sub-subcontractors (App. at 37, §10.2.1);
- JLL assumed responsibility for all tools, equipment, materials and supplies of subcontractors (App. at 16, §3.2.5);
- JLL specified that its supervision of subcontractors would be full-time, and that its personnel would be on site whenever work was being performed (App. at 26, §5.3.4; App. at 19, §3.9.1) ; and
- JLL promised to maintain adequate fire extinguishers at the jobsite. App. at 38, §10.2.11.

JLL may assert that after assuming the above responsibilities, it then sought to delegate certain of its obligations its subcontractor, A&M. App. at 96-119. Even assuming that those responsibilities were delegable, it is significant to note that the subcontract specifies that JLL would retain an active role in the roofing operations in several important areas. Those include:

- that the roofers would be permitted to use JLL's tools (App. at 102, §11.4);
- that JLL reserved the right to expel any A&M workers who refused to wear hard hats or otherwise adhere to the safety rules of JLL and OSHA (App. at 111, §33);
- that the entirety of the AIA contracts (in which JLL assumed sweeping responsibilities) would be expressly incorporated into the subcontract with A&M (App. at 98, §3.1);
- that JLL would supply the roofers with heat, toilets, power, water, and dumpsters (App. at 111, §40; App. at 112, §59(c)).

The incident occurred on a frigid and windy February day when Grady and other A&M workers were installing rubber membrane material on the roof of the Liberty Mutual building. App. at 120. The process involved the application of certain solvents to adhere new membrane over the existing

material, and required that the existing surface be clean and dry. App. at 158-164. The solvents in question are highly flammable. Not having been provided with protective gloves, Grady was wearing ordinary winter gloves, which presumably had become soaked with flammable solvent. App. at 120. While Grady was attempting to use an ordinary cigarette lighter – a commercial "striker" was not available – to light a propane torch to melt snow and ice on the existing roof, and to dry the surface, a gust of wind caused his gloves to catch fire. Id. Fire extinguishers were not available so an A&M coworker attempted to douse the flames by thrusting Grady's hands into a nearby bank of snow that had accumulated on the roof. Id.

STATEMENT OF THE CASE

Grady sought benefits under the workers' compensation system in an action that was handled by separate counsel. Given that New Hampshire law recognizes the right of an injured worker to also seek redress via an action in tort, Grady then filed – through present counsel – the instant "third party" action. See RSA 281-A:13. Suit was filed against the general contractor, JLL, and the building owner, Liberty Mutual. App. at 254.

In the early course of the proceedings, the plaintiff specified certain acts, practices, and omissions which, together with the general lack of project supervision, contributed to the injury. These included:

- the determination to proceed with roofing operations on a cold and windy February day (App. at 205-206);

- the determination to proceed with roofing operations when the applicable work areas were partially covered by snow and ice (App. at 205-206);
- the determination to use commercial flame torches to melt snow and ice and to dry the existing roofing material (App. at 205-206);
- the determination to use commercial flame torches in the context of windy conditions and highly flammable roofing solvents (App. at 205-206);
- the failure to provide proper protective clothing (particularly fireproof and solvent-proof gloves) (App. at 205-206);
- the failure to provide a proper "striker" to light the commercial torch (App. at 205-206) (a striker has a long handle whereas an ordinary cigarette lighter requires the worker's hand to be dangerously close to the flame); and
- the fact that proper fire extinguishing equipment was not provided (App. at 205-206).

The plaintiff also alleged that Liberty Mutual had made a conscious decision, in the context of a construction contract that was signed late in 2012, to encourage that hazardous operations press ahead during the frigid winter months, a provision which required Liberty Mutual to pay an additional "winter conditions" surcharge of $25,000. App. at 90.

At an early stage in the proceedings, counsel for the defendants informed counsel for the plaintiff that he intended to seek dismissal on the grounds that the defendants owed no duty to the plaintiff as a matter of law. Accordingly, the parties mutually agreed to defer most of the discovery and expert disclosures until after the Court had ruled on defendants' dispositive motions. With the above in mind, the stage of expert disclosure and discovery was never reached, and only limited fact discovery – Grady's interrogatories and deposition – has occurred beyond the initial automatic disclosures.

The dispositive motion filed by defendants argued that, as a matter of law, neither a general contractor nor a property owner owes a duty of care to the employee of a subcontractor injured on the jobsite. By Notice of Decision dated May 30, 2017, the trial court adopted the defendants' position and granted its motion. Because the trial court held that no duty exists as a matter of law, it ruled that any factual questions (such as whether JLL knew that improper methods and equipment were being used, whether JLL knew of the lack of safety equipment, whether JLL knew of the dangers of roofing in winter conditions, etc.) were irrelevant. Having so ruled, the trial court proceeded to dismiss the plaintiff's case in its entirety. This appeal followed.

SUMMARY OF THE ARGUMENT

This Court's decision in Butler v. King, 99 N.H. 150 (1954) explicitly holds that a general contractor owes a duty of care to employees of subcontractors at work on the jobsite. Because the circumstances in the present case are legally indistinguishable from those in Butler, it was error for the trial court to conclude that JLL did not owe any duty of care to a worker in the position of Grady. Even if this Court were to conduct a review independent of Butler, the same result would obtain, as both legal and policy considerations militate strongly in favor of a general contractor retaining a duty of care toward all individuals on its project site. Likewise, in regard to the case against defendant Liberty Mutual, because the winter roofing work in question was recognized to be inherently dangerous, and because Liberty Mutual is a commercial property owner, Liberty Mutual has a non-delegable duty to

individuals in Grady's position. As such, it was error for the trial court to dismiss the case against Liberty Mutual. The trial court's order on summary judgment should be reversed in both respects.

ARGUMENT

I. THE COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE GENERAL CONTRACTOR, JONES LANG LASALLE, ON THE BASIS THAT THE GENERAL CONTRACTOR OWES NO DUTY TO A SUBCONTRACTOR EMPLOYEE IN THE POSITION OF THE INJURED PLAINTIFF.

A. Longstanding New Hampshire Supreme Court Precedent Holds That a General Contractor Does Owe a Duty of Care to Workers on the Jobsite, Including Employees of Subcontractors

In Butler v. King, 99 N.H. 150 (1954), this Court considered a jobsite injury case in which the configuration of the parties was identical to that of the case at hand – an employee of a subcontractor bringing suit against the general contractor on the jobsite. In reviewing a dispositive motion filed by the general contractor, this Court began its analysis by affirming the basic duty that a general contractor owes to the employees of its subcontractors. Exhibiting both clarity and simplicity, the Butler opinion begins as follows:

> "The defendants *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. (emphasis supplied)

The Butler Court considered the circumstances of a general contractor presiding over a construction site to be legally indistinguishable from those of any other entity in charge of a physical location. Id., citing Cartier v. F. M. Hoyt

Shoe Corporation, 92 N.H. 263 (1942), Holmes v. Clear Weave Hosiery Stores, 95 N.H. 478 (1949), and Monier v. Belzil, 97 N.H. 176 (1951).

In short, Butler refutes the defendants' legal position in entirely unambiguous terms – under New Hampshire law, a general contractor *does* owe a duty of care to employees of its subcontractors. It also bears mentioning that Butler represents a longstanding legal precedent in this State, and the doctrine of stare decisis suggests that established legal standards of this nature ought to be afforded substantial deference. Ford v. New Hampshire Dept. of Transp., 163 N.H. 284 (2012). As such, and at the possible risk of oversimplifying the appellate proceedings herein, it would appear that Butler alone compels the conclusion that the trial court's dismissal of JLL – which is based solely on the proposition that a general contractor has no duty to employees of its subcontractors – must be reversed, and the analysis need go no further.

B. The Defendants and the Trial Court Have Misconstrued Butler to Contain Qualifications that Simply Do Not Exist in the Decision

In attempting to distinguish Butler, the defendants argue that the duty found to exist on the part of the general contractor was a fact-specific determination narrowly tailored to the circumstances of that particular jobsite. More specifically, they argue that Butler makes a critical distinction between a case where the general contractor creates a physical hazard as opposed to situations in which the general contractor is charged with negligently failing to supervise the practices and procedures underway at its jobsite. The defendants

understand Butler to have held that it is only in the former scenario that the general contractor would owe a duty to the employee of its subcontractor, and that no general contractor duty would exist in the latter scenario. The trial court adopted defendants' assertion in both respects.

The problem is that Butler supports neither the factual nor the legal proposition ascribed to it by the defendants and the trial court. There is no indication whatsoever that the Butler Court was interested in any possible distinction between a general contractor's construction activities and its responsibility to supervise the jobsite. The underlying injury in Butler occurred when an employee of a painting contractor fell through a porch railing in the context of a hotel renovation project. Butler, 99 N.H. at 150. Contrary to the description vigorously advanced in the defendants' papers, Butler does not state that **"the general contractor had installed the railing in question"** (see Defendants' Reply Memorandum, App. at 246)(emphasis in defendants' original). The trial court somehow adopted the same mischaracterization of Butler. See Order at 6 (erroneously stating that porch railing had been "installed by the general contractor").

In fact, the plaintiff in Butler did not even allege that the railing in question was a new installation – on the contrary, it was agreed that the railing in question was a porch railing that was in existence before the hotel renovation project even began. Id. at 151. What the plaintiff in Butler did allege was that the railing in question was in "a dangerous condition" due to the negligence of the general contractor. Id. at 150-151. While it does appear that

one of the plaintiff's arguments was that the railing's insecure condition was caused by other work undertaken by the general contractor (the general contractor had replaced posts in that same area of the porch), there was evidence that the general contractor never disturbed the portion of the railing that collapsed and caused the plaintiff's fall. Id. at 151. In any event, in terms of evaluating the underlying existence of a legal duty, there is no indication that the Butler Court was concerned with any possible distinction between a general contractor's construction activities and its supervisory activities – it found that a general contractor duty exists in the context of a basic allegation that a "dangerous condition" was allowed to exist on the jobsite. Id. at 150-151. If anything, in describing the general contractor's duty as the responsibility "to maintain reasonable conditions of safety" at the jobsite, Butler strongly suggests that the Court considered the duty of the general contractor to include the general oversight of jobsite safety, and did not see the duty as being limited to situations in which the general contractor created some physical hazard. Again, the inescapable conclusion is that Butler alone compels reversal of the trial court's ruling.

C. A Legal Analysis Independent of Butler Would Likewise Compel the Conclusion That a General Contractor Owes a Duty of Care to Employees of its Subcontractors

Notwithstanding the apparent clarity of the Butler precedent and its controlling application to the issue under review, the same result would attach if one were to cast aside Butler and undertake a *de novo* legal review of the question of whether a contractor owes a duty of care in this context.

This Court has long held that a duty of care can arise from the relationship of the parties. Sintros v. Haman, 148 N.H. 478 (2002). Likewise, a duty of care can be assumed by a party. Walls v. Oxford Management Co., 137 N.H. 653 (1993); Carignan v. New Hampshire Intern. Speedway, Inc., 151 N.H. 409, 412 (2004). In the particular context of construction site dynamics, some courts have simply concluded that the general contractor assumes a duty of care by virtue of the leadership role it undertakes in regard to the project. See, e.g., Ryan v. TCI Architects/Engineers/Contractors, Inc., 72 N.E.3d 908 (Ind. 2017). The Ryan court evaluated the specific question herein presented, holding simply that the general contractor assumes a duty of care in the specific context of injury claims brought by employees of subcontractors injured on the jobsite. Id; see also Alloway v. Bradlees, Inc, 157 N.J. 221 (1999); Afoa v. Port of Seattle, 296 P.3d 800 (Wash. 2013); Gerasi v. Gilbane Building Co., 75 N.E.3d 305 (Ill. 2017); Yeats v. Polygon Northwest Co., 379 P.3d 445 (Ore. 2016); Shannon v. Howard S. Wright Constr. Co., 181 Mont. 269 (1979).

From a philosophical standpoint, it hardly seems outlandish to suggest that a general contractor should retain basic tort duties in regard to the construction project it is presiding over. After all, as the seminal authority on workplace safety, OSHA reaches this same conclusion – a general contractor may delegate certain responsibilities to subcontractors, but the general contractor nevertheless retains joint responsibility for jobsite safety. See 29 C.F.R. §1926.16. It also bears mentioning that a rather stark contrast appears

to exist between the scenario in Grady – a rather direct relationship between a general contractor and the workers on its site – and the very attenuated factual scenarios in which this Court has found no duty to exist. Cf. Macie v. Helms, 156 N.H. 222 (2007) (traffic light repairman, injured while repairing traffic signal, attempts to sue motorist who had originally broken the signal during an entirely separate incident); England v. Brianas, 166 N.H. 369 (2014) (homeowner who had contentious relationship with her ex-boyfriend did not owe duty to houseguest who was stabbed after ex-boyfriend broke into homeowner's residence). In short, a review of the rather unusual cases in which this Court has found that no duty exists provides no support for the proposition that a duty does not exist in the very basic jobsite setting at issue in both the present case and Butler.

It also bears mentioning that in addition to applying a flawed legal analysis, the trial court inaccurately describes Grady's claim as being limited to an allegation that he was supplied with improper tools. See Order at 12. While it is certainly true that Grady has alleged that he was not provided with proper tools and equipment, the trial court's description overlooks the fact that Grady has clearly alleged negligence in regard to many other areas - the supervision of the jobsite in general, the decision to proceed with rooftop work under the weather conditions existing on the morning in question, the decision to proceed with rooftop work when the work surface was partially covered by snow and ice, etc.

Perhaps more fundamentally, the trial court also fails to recognize that supervision is a very unique task which a supervisor cannot delegate to the entity supposedly under supervision. In connection with this extensive project, one of the many responsibilities which JLL promised to assume is the supervision of subcontractors in the position of A&M. Importantly, JLL did not just assume the responsibility to supervise the employees of subcontractors – it promised to supervise the subcontractors themselves. In an effort to evade jury review of whether it met that responsibility in the present case, JLL argued – and the trial court held – that JLL could discharge that responsibility by simply delegating the supervision of the roofing subcontractor, A&M, to A&M itself. But this determination is analytically unsound – especially in the context of a large construction project in which both the building owner and the general contractor had recognized the need to supervise subcontractors, it is nonsensical to suggest that the supervisor can delegate the supervision of A&M to A&M itself. Such an act does not constitute a *delegation* of supervision, but rather an *elimination* of supervision.

D. Section 324A of the Restatement of Torts (Second) Compels the Conclusion That a General Contractor Owes a Duty of Care to Employees of its Subcontractors.

Section 324A of the Restatement of Torts (Second) presents yet another avenue of analysis, and once again gives rise to the same conclusion that a general contractor does owe a duty of care to employees of subcontractors. As a preliminary matter, it would appear that this Court has never specifically considered Section 324A of the Restatement of Torts (Second). However, the

New Hampshire Supreme Court has traditionally looked favorably upon the Restatement of Torts. See, e.g., Buttrick v. Arthur Lessard & Sons, Inc., 110 N.H. 36 (1969) (adopting strict product liability in tort under Section 402A). Furthermore, this Court has formally adopted the Restatement position in at least one related area involving tort liability in the context of independent contractor relationships. See Valenti v. NET Properties Management, Inc., 142 N.H. 633 (1998)(holding that business operators are vicariously liable for the torts of their independent contractors and specifically adopting Section 425 of the Restatement). Accordingly, it seems clear that this Court would adopt Section 324A of the Restatement, and the trial court likewise proceeded on this assumption.

Section 324A provides as follows:

> Liability to Third Person for Negligent Performance of Undertaking
>
> 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.

In Handler Corp. v. Tlapechco, 901 A.2d 737 (Del. 2006), the Delaware Supreme Court construed Section 324A of the Restatement in the specific

context presented in the case at bar – that of a general contractor denying a legal duty to employees of subcontractors on its jobsite. Based on Section 324A, Handler held that the general contractor did owe a duty to the plaintiff, who was an employee of a painting subcontractor on a residential jobsite, and thus that the plaintiff could maintain suit against the general contractor. Id. at 747 (also citing Restatement (Second) Torts §414).

For Section 324A to apply, the defendant in question must have undertaken to render services as referenced in the preliminary language, and then at least one of the three ensuing conditions must apply. In the context of the present case, it is clear that the preliminary language is met, because there is no dispute that JLL contracted to render services, including those involving the safety of, and supervision over, the subject jobsite. JLL's contract provisions include the following:

- "The Contractor assumes the entire responsibility and liability for all Work including all supervision, labor and materials provided, whether or not erected or in place, and for all plant, scaffolding, tools, equipment, supplies and other things provided by the Contractor, its Subcontractors and Sub-subcontractors." App. at 16, §3.2.5.
- "... the Contractor shall be responsible and shall indemnify and hold harmless the Owner in respect of any loss or damage to the Work arising out of or caused by any negligent act or omission of the Contractor or Subcontractor or by anyone for whose acts it may be liable during the terms of the Contract Documents". Id.
- "The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention." App. at 16, §3.3.1.
- "The Contractor shall be responsible to the Owner for acts and omissions of the Contractor's employees, Subcontractors and their agents and employees, and other persons or entities performing

portions of the Work for, or on behalf of, the Contractor or any of its Subcontractors." App. at 16, §3.3.3.

- "The Contractor shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the Contract." App. at 37, §10.1.
- "The Contractor shall be fully responsible for full time supervision of all Subcontractors and Sub-subcontractors and for the acts, errors, omissions, defaults, and conduct of all Subcontractors and Sub-subcontractors". App. at 26, §5.3.4.
- "The Contractor shall employ a competent superintendent and necessary assistants who shall be in attendance at the Project site during performance of the Work." App. at 19, §3.9.1; *Cf.* Grady testimony that he never saw any JLL personnel at the jobsite App. at 145.

As noted above, for Section 324A to apply, in addition to the preliminary consideration, at least one of the three additional circumstances must apply. While it appears that all three apply in this case, it also bears mentioning that to the extent some of the Section 324A analysis may be fact-dependent, a dispositive motion should not have been granted while discovery was still open in the underlying case.

Section 324A (a) is based on an increase in the risk of harm. In the present case, it is clear that JLL's conduct did increase the risk of harm to the plaintiff in several ways:

- JLL promised to maintain adequate fire extinguishers at the jobsite (App. at 38, §10.2.11), and plaintiff has alleged than his injuries were exacerbated by the absence of available fire extinguishers (App. at 205-206);
- JLL assumed responsibility for all tools, equipment, materials and supplies of subcontractors (App. at 16, §3.2.5), yet the plaintiff has

alleged that proper equipment and tools (to include fireproof gloves, a striker, etc.) were not provided (App. at 205-206);

- JLL promised to initiate, supervise and maintain all safety precautions and programs, (App. at 37, §10.1), yet the plaintiff has alleged that proper safety precautions were not maintained (App. at 205-206); and
- JLL specified that its supervision of subcontractors would be full-time, and that its personnel would be on site whenever work was being performed (App. at 26, §5.3.4; App. at 19, §3.9.1), yet the plaintiff has alleged that JLL did not supervise A&M, was not on site full-time as promised, and was not on-site when the work in question was being performed (App. at 145).

In fairness, some would argue that a failure of supervision does not increase the risk of harm – it merely fails to decrease the risk of harm. But at least in the context of the supervision of ongoing construction work at a jobsite, this again ignores the unique nature of the task of supervision as discussed above – if subcontractors can sense that the general contractor is not committed to jobsite safety, the range and extent of unsafe practices will often proliferate in that climate. In this regard, it is important to note that one of Grady's specific contentions is that rooftop work should not have been allowed to proceed on this windy, frigid day in which accumulations of snow and ice were covering parts of the existing membrane. In short, it is clear that Grady has set forth a viable claim for increased risk under Section 324A (a).

Section 324A (b) applies to the situation in which the general contractor is providing services on behalf of an entity which itself owes a duty. For the reasons discussed in the ensuing section, it is clear that Liberty Mutual, having paid a surcharge for inherently dangerous roofing work to press ahead during winter conditions, thus incurred a non-delegable duty to workers on its

premises. See Elliott v. Public Service Co. of New Hampshire, 128 N.H. 676 (1986). Accordingly, the plaintiff would also prevail under the second prong of Section 324A.

Section 324A (c) is based on reliance. In the context of the present case, Grady has clearly alleged that he understood JLL and Liberty Mutual to be in charge of overall jobsite safety. App. at 205-206. Further, Grady has identified a number of JLL and Liberty Mutual transgressions that he believes contributed to his injury, including their inadvisable determination to allow rooftop construction work on a frigid day when some of the surfaces were covered with snow and ice, their failure to ensure that proper tools and materials were being used, etc. Id. Given the above, it is clear that Grady has met the reliance requirement of Section 324A (c).

In light of the above, Grady respectfully submits that this Court should reach the same conclusion as did its Delaware counterpart in Handler, and hold that Section 324A of the Restatement gives rise to a general contractor duty toward employees of subcontractors on its jobsite. Handler Corp. v. Tlapechco, 901 A.2d 737 (Del. 2006).

E. Neither the Rounds Line of Cases Nor the Exclusivity Provisions of the Workers' Compensation Statute Have Any Application to the Question Under Review.

In its summary judgement papers, the defendants sought to place significant emphasis on the inapposite question of Rounds and the exclusivity provisions of the worker's compensation bar. While it does not appear that the

provisions of the worker's compensation bar. While it does not appear that the trial court relied on those considerations in its grant of summary judgment, the plaintiff will nevertheless address the issue.

The worker's compensation bar precludes an injured worker in Grady's position from bringing suit against his employer, regardless of the employer's potential degree of negligence. See RSA 281-A:8. The bar applies not only to the employer itself, but also to all of the individual's coworkers. See RSA 281-A:8(I)(b). However, the worker's compensation statute expressly permits the injured worker to bring suit against potentially responsible third parties, as Grady did here. See RSA 281-A:13; see also P. Salafia, New Hampshire Workers' Compensation Manual § 12 (3d ed. 2008). Such suits are not just permitted, but quite frankly are encouraged so that financial responsibility is ultimately borne by the party truly at fault – unlike the tort system, the worker's compensation system is a no-fault system – and the worker's compensation carrier can then be reimbursed from the tort recovery. See, e.g., RSA 281-A:13(I)(b) (employer lien on third party recovery). Third party tort claims are extremely common – Attorney Salafia's treatise devotes an entire chapter to the subject of these claims. P. Salafia, New Hampshire Workers' Compensation Manual § 12 (3d ed. 2008).

Consistent with the above, this Court has reviewed many cases involving individuals who, like the plaintiff herein, recovered benefits under the worker's compensation system and subsequently pursued a third-party action in tort. See Butler, 99 N.H. 150 (third party action by employee of painting

Gelinas v. Sterling Indus. Corp., 139 N.H. 14 (1994) (third party action involving worker at construction site who was killed while operating post-pounding machine); Tarr v Republic Corp., 116 N.H. 99 (1976) (third-party action arising out of fire and explosion at plant which builds fiberglass boats); Lupa v. Jensen, 123 N.H. 644 (1983) (third party motor vehicle action where plaintiff was operating an automobile in the course of his employment); Chambers v. Geiger, 133 N.H. 149 (1990) (third party action on behalf of worker in toll booth kiosk who was injured when motorist struck toll booth); Lakin v. Daniel Marr & Son Co., 126 N.H. 730 (1985) (third party action on behalf of employee of one subcontractor at power plant who was injured due to negligence of another subcontractor at same site). In the context of the present case, the simple takeaway is that while Grady is not permitted to bring suit against either A&M or its employees, he is expressly permitted to bring a tort suit against any third parties whose negligence may have contributed to the injury.

Against the legal backdrop outlined above, the defendants devoted significant time and attention to the inapposite references, in the Rounds line of cases, to the effect that the duty to provide a safe workplace is nondelegable and rests exclusively with the employer. App. at 226; see also Rounds v. Standex Intern., 131 N.H. 71 (1988). There are at least two reasons why that argument has no bearing on the issue currently before this Court. First, the Rounds line of cases – and the rules of law set forth therein – all arose during a period of legal turmoil when this Court was struggling to judicially define the

period of legal turmoil when this Court was struggling to judicially define the scope of the worker's compensation bar. But shortly thereafter, the legislature clarified the scope of employer immunity, and this entire line of cases has since been either expressly or impliedly overruled. See Estabrook v. American Hoist & Derrick, Inc., 127 N.H. 162 (1985), overruled by Young v. Prevue Products, Inc., 130 N.H. 84 (1987); see also Thompson v. Forest, 136 N.H. 215 (1992), questioning Rounds and Tyler v. Fuller, 132 N.H. 690 (1990).

The other reason why the defendants' references to Rounds are misplaced is that even if it could somehow be argued that the Rounds cases retain any ongoing validity regarding the scope of the workers' compensation bar, these cases were never intended to have any application outside of the immediate employer/employee relationship. See, e.g., Leeman v. Boylan, 134 N.H. 230 (1991). Not only is this conclusion clearly conveyed in the decisions, it is compelled by the concurrent existence of third party tort rights during this same period of time as noted above in Butler, Gelinas, Tarr, Lupa, Chambers, Lakin, etc. In other words, if the duty of workplace safety truly rested with the employer "exclusively," then the whole category of third-party tort suits would have been eviscerated. In short, there was never any intention that the Rounds cases would have any application whatsoever in somehow insulating third-party tort defendants as the defendants suggest. Indeed, it does not appear that a single decision of this Court has ever suggested, even during the time when the Rounds cases retained some modicum of precedential value, that these so-called "exclusivity" provisions could inure to the benefit of a third-

exclusivity provisions of the worker's compensation statute nor the Rounds line of cases has any application to the instant appeal.

II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE PROPERTY OWNER, LIBERTY MUTUAL, ON THE BASIS THAT THE PROPERTY OWNER OWES NO DUTY TO A SUBCONTRACTOR EMPLOYEE IN THE POSITION OF THE INJURED PLAINTIFF.

The trial court also erred in determining that Liberty Mutual, the owner and occupier of the building, owed no duty to Grady. Two independent theories support a duty of care on the part of Liberty Mutual. First, as noted above, this Court has long recognized that in the case of inherently dangerous construction activities, the owner/occupier retains a duty to workers at the site notwithstanding their status as employees of an independent contractor. Elliott v. Public Service Co. of New Hampshire, 128 N.H. 676 (1986). Grady has alleged that, at least during the frigid conditions presented by a New Hampshire winter, roofing work is inherently dangerous. He has further alleged that the parties recognized this phenomenon, thus giving rise to JLL requesting – and Liberty Mutual agreeing to – a $25,000 surcharge in the contract price. App. at 90. In any event, whether a particular activity is inherently dangerous is a question of fact for the jury. Elliott, 128 N.H. at 682. As such, it was error for the trial court to grant summary judgment as to the case against Liberty Mutual.

The defendants have argued that this argument is unavailable to Grady, as he has agreed in deposition testimony that roofing work is not inherently dangerous activity. This is not exactly accurate, as the question posed to Grady

was not whether roofing work is "inherently" dangerous, but rather whether such work is "unreasonably dangerous". Appendix at 180. This is not just semantics – there is a difference between an activity that is inherently or intrinsically dangerous and one that is unreasonably dangerous. But more fundamentally, the defendants would presumably agree that a plaintiff's subjective characterization of an activity is not dispositive of the issue. Again, whether a particular activity is inherently dangerous is a question of fact for the jury. Id.

Independent of the issue above, this Court has recognized that occupiers of a business premises owe a duty of care to those on the business premises. See Valenti v. NET Properties Management, Inc., 142 N.H. 633 (1998). Admittedly, it seems that the typical application of Valenti is that of a private citizen entering a commercial premises. However, it is undisputed that Liberty Mutual was the owner and occupier of the subject building, and that it remained open for commercial business at the time of Grady's injury. Thus, even though Grady admittedly presents a different factual scenario than that of a more typical Valenti fact pattern, there does not appear to be anything in the Valenti decision that precludes its application to the facts of Grady's case.

CONCLUSION

For the foregoing reasons, the trial court's order should be reversed, both as to the dismissal of JLL and as to the dismissal of Liberty Mutual.

Respectfully submitted,

STEVEN GRADY

By His Attorneys,

BURNS, BRYANT, COX, ROCKEFELLER, & DURKIN, P.A.

Date: 09/05/17

By: _____

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REQUEST FOR ORAL ARGUMENT

Plaintiff requests oral argument of fifteen (15) minutes per party.

CERTIFICATION

I hereby certify that an original and eight (8) copies of this Brief have this day been hand-delivered to the Clerk of the Supreme Court; and that two copies of this Brief have been sent by first class mail, postage pre-paid this date to Gary M. Burt, Esquire.

_____
Matthew B. Cox, Esquire

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Strafford Superior Court
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NOTICE OF DECISION

File Copy

Case Name: **Steven Grady v Jones Lang LaSalle Construction Company, Inc., et al**
Case Number: **219-2016-CV-00062**

Enclosed please find a copy of the court's order of May 18, 2017 relative to:

Order on Defendants' Motion for Summary Judgment

May 30, 2017

Kimberly T. Myers
Clerk of Court

(277)

C: Matthew B. Cox, ESQ; Gary Michael Burt, ESQ

STATE OF NEW HAMPSHIRE

STRAFFORD COUNTY SUPERIOR COURT

Steven Grady

v.

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

Docket No. 219-2016-CV-00062

ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The plaintiff, Steven Grady ("Mr. Grady"), filed this negligence action against Jones Lang LaSalle Construction Company, Inc. ("Jones Lang"), Liberty Mutual Insurance Company and Liberty Mutual Insurance Group, Inc. ("Liberty Mutual"), and John Does I through V, seeking damages resulting from an injury to his hand. (Court index #1.) Jones Lang and Liberty Mutual (collectively, "the defendants") now move for summary judgment against Grady. (Court index #12, 13, 18.) Grady objects. (Court index #16, 17.) The court held a hearing on this matter on April 12, 2017. Based on the parties' pleadings and argument, the relevant facts, and the applicable law, the court finds and rules as follows.

FACTUAL BACKGROUND

The following facts are undisputed. In 2012, Liberty Mutual entered into a construction contract with Jones Lang ("the general contract") to complete a construction project ("the project") on premises owned by Liberty Mutual at 100 Liberty Way in Dover, New Hampshire. (See generally Assented-to Mot. Supp. Record, AIA Doc. A201-2007.)[1] On January 9, 2013, Jones Lang contracted with a subcontractor, A&M Roofing and Sheet Metal Company, Inc. ("A&M"), to perform roofing work for the Liberty Mutual construction project ("the subcontract"). (See generally Defs.' Ex. B, Agreement Between Contractor and Subcontractor.)

[1] All references to the contract between Jones Lang and Liberty Mutual refer to the contracts filed with the Assented-to Motion to Supplement Record.

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Mr. Grady was an employee of A&M at the time A&M began the required subcontract work at 100 Liberty Way. (Defs.' Ex. C, Pl.'s Answer Interrog. I-3.)

On February 21, 2013, a cold and windy day, Grady began to perform flashing and insulation work on the roof, which required the use of a cleaning solvent and a propane torch. (Pl.'s Answer Interrog. P-5; Defs.' Ex. D, Grady Depo. 39:14–16, 47:15–16.) Prior to beginning work that day, Grady obtained equipment and materials from an on-site "job box" provided by A&M to its employees. (Grady Depo. 21:15–19, 36:9–11.) The equipment he obtained from the job box included flashing, cleaner, primer, seam tape, caulking, rags, and a propane torch. (Grady Depo. 36:14–15.) In order to protect a worker's hands from the cleaning solvent and the flame of the torch, Grady testified that a worker must wear rubber gloves and fire-proof leather gloves, respectively. (Grady Depo. 19:3–11, 20:1–5.) However, Grady did not find any such gloves in the job box. (Grady Depo. 36:16–37:4.) The job box also did not contain any strikers, which are typically used to light torches, nor did it contain any fire extinguishers. (Grady Depo. 20:5–14, 61:14–20.)

Although a supervisor from A&M was present on the premises when Grady worked, Grady did not see or talk to anyone from Jones Lang or Liberty Mutual. (Grady Depo. 25:2–13.) Grady asked his supervisor from A&M if there were any gloves available, but his supervisor said there were none on-site. (Grady Depo. 37:5–8.)

The roofing work required Grady to clean dirt off of the roofing membrane using a cleaning solvent prior to installing the insulation. (Grady Depo. 38:5–13.) However, Grady had to first use the torch to melt ice that was present on the areas he needed to clean. (Grady Depo. 44:6–9.) Because of the cold weather, Grady wore cotton gloves in order to keep his hands warm while he worked. (Grady Depo. 39:14–23.) After igniting the torch a few times with a lighter without incident, Grady lit the torch again as a gust of wind came, which ignited the glove on his right hand. (Grady Depo. 47:5–20, 50:1–9.) As a result, his right hand was severely burned. (Grady Depo. 50:5–6, 51:20–23.) Grady immediately went to the hospital, where he spent at least eight days. (Grady Depo. 54:21–55:2; Defs.' Ex. E, A&M Incident Report.)

Grady underwent four surgeries on his right hand and received physical therapy. (Pl.'s Answer Interrog. P-1; Grady Depo. 61:22–62:5, 62:13–19.) He also received counseling and medication for depression relating to the injury. (Pl.'s Answer Interrog. P-1; Grady Dep. 71:23–72:20; 72:21–73:23, 74:3–5.) Grady was unemployed for eighty-six weeks following his injury

and had to leave a subsequent job with another company for seven weeks due to issues arising from the injury. (Pl.'s Answer Interrog. P-5; Grady Depo. 56:4, 64:4–10.) He currently has persistent problems using his hand due to pain and sensitivity. (Pl.'s Answer Interrog. P-1; Grady Depo. 65:3–19.) Grady received worker's compensation from A&M for his injury and now seeks to recover damages from Jones Lang and Liberty Mutual.

LEGAL STANDARD

Summary judgment is proper if, in the light most favorable to the non-moving party, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits filed, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Concord Grp. Ins. Cos. v. Sleeper, 135 N.H. 67, 69 (1991); RSA 491:8-a, III (2010). To defeat summary judgment, the non-moving party "must set forth specific facts showing that there is a genuine issue [of material fact] for trial." Panciocco v. Lawyers Title Ins. Corp., 147 N.H. 610, 613 (2002) (citation omitted); RSA 491:8-a, IV. "An issue of fact is 'material' for purposes of summary judgment if it affects the outcome of the litigation under the applicable substantive law." VanDeMark v. McDonald's Corp., 153 N.H. 753, 756 (2006). Where "the parties agree that there are no genuine issues of material fact in dispute," the court must determine "whether the moving party is entitled to judgment as a matter of law." Eby v. State, 166 N.H. 321, 327 (2014).

ANALYSIS

Grady alleges that Jones Lang was negligent by failing to provide adequate supervision, equipment, and warnings to Grady while he performed work under the subcontract. (Compl. ¶ 10.) Grady alleges that Liberty Mutual was also negligent by failing to provide adequate supervision of the work conducted on the premises and is vicariously liable for Jones Lang's negligence because Jones Lang acted as an agent of Liberty Mutual. (Id. ¶¶ 15, 21–23.) As such, he alleges that both Jones Lang and Liberty Mutual are liable for his injuries. (Id. ¶¶ 13, 18, 25.)

The defendants move for summary judgment, asserting that neither Liberty Mutual nor Jones Lang owed a duty of care to Grady. (Defs.'s Mem. Supp. Mot. Summ. J. at 1–2.) The defendants argue that Liberty Mutual owed no duty of care to Grady because Grady's injury did not result from any dangerous condition on the premises and Liberty Mutual was not required to oversee the work or provide equipment to Grady. (Id. at 2, 14.) The defendants argue that

Jones Lang owed no duty of care to Grady because Grady was not Jones Lang's employee and neither the contract nor the subcontract required Jones Lang to undertake any obligations toward the employees of A&M. (Id. at 1.)

To recover on a claim of negligence, the plaintiff must demonstrate that the defendant had a duty to the plaintiff, the defendant breached that duty, and the breach proximately caused injury to the plaintiff. England v. Brianas, 166 N.H. 369, 371 (2014) (citation omitted). "Absent a duty, a defendant cannot be liable for negligence." Lahm v. Farrington, 166 N.H. 146, 150 (2014) (citation omitted). "The existence of a duty depends upon what risks, if any, are reasonably foreseeable under the particular circumstances." Cui v. Chief, Barrington Police Dept., 155 N.H. 447, 449 (2007). "Whether a defendant's conduct creates a sufficiently foreseeable risk of harm to others sufficient to charge the defendant with a duty to avoid such conduct is a question of law" for the court to decide. Macie v. Helms, 156 N.H. 222, 224 (2007) (quotation omitted).

"In general, the concept of duty arises out of the relationship between the parties and protection against reasonably foreseeable harm." Mikell v. Sch. Admin. Unit No. 33, 158 N.H. 723, 731 (2009) (citation omitted). In determining whether a duty exists in a particular case, the court must "examine the societal interest involved, the severity of the risk, the likelihood of the occurrence, and relationship between the parties, and the burden upon the defendant." Sisson v. Jankowski, 148 N.H. 503, 506 (2003) (quotation omitted). As such, the court "necessarily encounter[s] the broader, more fundamental question of whether the plaintiff's interests are entitled to legal protection against the defendant's conduct." Lahm, 166 N.H. at 150 (quotation omitted).

Pursuant to New Hampshire's worker's compensation statute, an employee who has received worker's compensation from the employer is "conclusively presumed . . . to have waived all rights of action" for negligence relating to the injury against the employer. RSA 281-A:8. However, a provision of New Hampshire's worker's compensation laws explicitly permits actions against third parties to recover from work-related injuries when "[t]he circumstances of the injury create in another person a legal liability to pay damages." RSA 281-A:13, I(a)(2). As Grady notes, this provision has resulted in many third-party actions brought by an injured employee against a person or entity who was not the employee's employer, including manufacturers of equipment, drivers on public roads, and companies other than the employee's

employer with whom the employee shared a jobsite. See, e.g., Gelinas v. Sterling Indus. Corp., 139 N.H. 14, 15 (1994) (products liability action against manufacturer of a machine operated by the deceased at the time of his work-related death); Chambers v. Geiger, 133 N.H. 149, 150 (1990) (negligence action against truck driver who struck toll booth worker); Lupa v. Jensen, 123 N.H. 644, 645 (1983) (negligence action against a driver who struck a vehicle operated by the plaintiff during the course of his employment); Lakin v. Daniel Marr & Son Co., 126 N.H. 730, 731 (1985) (negligence action against a third-party company whose employee injured the plaintiff while working on the same jobsite). Based on these third-party negligence actions brought by injured employees, Grady argues that his third-party negligence action against Jones Lang and Liberty Mutual should also proceed even though he was employed by and received worker's compensation from A&M.

Even though the worker's compensation statute permits actions for damages against third parties notwithstanding the employee's receipt of worker's compensation from his employer, this provision does not automatically create the duty of the third party defendant necessary to maintain an action in negligence. See Lahm, 166 N.H. at 150 (a reasonably foreseeable risk caused by the conduct of the defendant creates a duty). As such, in order for Grady to maintain his negligence action, Jones Lang and Liberty Mutual must have owed Grady a duty of reasonable care when Grady was injured, regardless of the provision in RSA 281-A:13.

I. Duty of Jones Lang

The defendants assert that no duty exists in a general contractor to provide training, equipment, and oversight to a subcontractor's employees unless the general contractor is contractually bound to such obligations. (Defs.' Mem. Supp. Mot. Summ. J. at 7–8.) In support of this assertion, the defendants point to the nondelegable duties of employers under New Hampshire law to maintain a safe workplace for their employees. See Leeman v. Boylan, 134 N.H. 230, 234 (1991) ("in the context of an employer/employee relationship," the employer's duty to maintain a safe workplace is generally "nondelegable and rests exclusively with the employer" (quotation omitted)); see also RSA 281-A:64 (requiring an employer to "provide employees with safe employment," which includes "furnishing personal protective equipment, safety appliances and safeguards," and "ensuring that such equipment, appliances, and safeguards are used regularly").

Grady argues that the fact that he was not employed by Jones Lang is irrelevant, as general contractors have a duty of reasonable care to third parties. (Pl.'s Mem. Supp. Mot. Summ. J. at 7 (citing Russell v. Arthur Whitcomb, 100 N.H. 171, 172 (1956)). Relying on section 324A of the Restatement (Second) of Torts, Grady argues that Jones Lang had a duty of care to him as a third party. Pursuant to Restatement section 324A, one who renders services to another which "he should recognize as necessary for the protection of a third person" is liable to the third person "for physical harm resulting from his failure to exercise reasonable care" if (a) "his failure to exercise reasonable care increases the risk of such harm," (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 third person upon the undertaking." Restatement (Second) of Torts § 324A (Am. Law Inst. 1965). Grady asserts that, in rendering services to Liberty Mutual, (a) Jones Lang had a duty of reasonable care to the employees of its subcontractors which it failed to provide to Grady, (b) Jones Lang undertook the duty of A&M and Liberty Mutual to provide a safe workplace to A&M employees and failed to exercise reasonable care in providing a safe workplace, and (c) Liberty Mutual relied on Jones Lang's supervision of the worksite which Jones Lang failed to provide.

As to the first prong of section 324A, the New Hampshire Supreme Court has not directly adopted a rule that sets forth what, if any, duty of reasonable care is owed by a general contractor to a subcontractor's employees. In the context a contractor's duty of care generally, the New Hampshire Supreme Court has held that a construction contractor is "held to a general standard of reasonable care for the protection of third parties who may be foreseeably endangered by the contractor's negligence." Russell v. Arthur Whitcomb, 100 N.H. 171, 172 (1956) (construction contractor owed a duty of reasonable care to nearby building owners to avoid any foreseeable harm to buildings). General contractors may have "a duty to maintain reasonable conditions of safety" on which subcontractor employees are "entitled to place some reliance." Butler v. King, 99 N.H. 150, 152 (citations omitted).

In Butler, a general contractor hired a subcontractor to paint the premises which the general contractor was repairing. Id. at 150. The plaintiff, an employee of the subcontractor, fell and sustained an injury after leaning on a loose railing installed by the general contractor which appeared to the plaintiff to be secure. Id. at 151. In an action against the general contractor by the plaintiff, the Court ruled that the general contractor "had a duty to maintain reasonable

conditions of safety" for other workers, finding that it was "reasonably expectable" that someone might lean against the improperly installed railing. Id. at 152. Thus, under Butler, a general contractor may owe a duty of reasonable care to a subcontractor's employees when the general contractor's own acts or omissions create a foreseeable risk of injury to the subcontractor's employees when the risk is unknown to those employees.

Grady asserts that Butler, read alongside section 324A of the Restatement, shows that New Hampshire law permits a negligence action by a subcontractor employee against a general contractor for negligence in failing to secure a safe workplace. (Pl.'s Mem. Supp. Obj. at 8.) The defendants do not dispute that under New Hampshire law a general contractor has a duty to subcontractor employees to "maintain reasonable conditions of safety" on the premises to avoid any risk of foreseeable harm to other workers that may be caused by the failure to maintain reasonable conditions of safety. Butler, 99 N.H. at 152. However, the defendants argue that Grady's injury did not result from any failure of Jones Lang to maintain the safety of the premises because Grady was injured by his use of the tools provided to him by A&M. As such, the defendants argue that because Grady was not injured as a result of any unsafe condition on the premises, Jones Lang did not have a duty of reasonable care to Grady.

Here, the undisputed facts are that a gust of wind blew the flame from the Grady'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, Grady'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 Grady's injury do not implicate the duty Jones Lang owed to Grady to maintain reasonably safe workplace conditions.[2]

Grady suggests that there may be factual questions as to whether the risk of injury could have been avoided had Grady received better supervision, training, and safety equipment. Those

[2] This court recognizes that the Butler Court also determined that the railing's improper installation was not readily apparent to the plaintiff, and therefore the plaintiff "reasonably expect[ed]" the railing to stay in place when he leaned on it. Butler, 99 N.H. at 152. Grady's deposition testimony indicates that he was well aware of the dangers of using cleaning solvent and a torch without proper rubber and/or fireproof gloves but proceeded to work after learning such gloves were unavailable. (See Grady Depo. 19:10–11, 20:1–5, 22:20–23:8.) Here, Grady's employer required him to utilize hazardous tools without providing the necessary safety equipment to protect against hazards of which he was aware. Because the duty of care analysis discussed in the narrative above resolves the issue as to Jones Lang, the court need not and so does not engage in a "reasonably expectable" analysis.

questions are not, however, germane, because New Hampshire law does not support the proposition that a general contractor owes a duty of reasonable care to subcontractor employees to oversee training and supervision of workers who are not the general contractor's own employees or provide safety equipment to them. See Rounds v. Standex Intern., 131 N.H. 71 (1988) ("[t]he maintenance of a safe workplace, including suitable machinery and tools, is the duty of the employer"); Wallace v. Boston & M.R.R., 72 N.H. 504, (1904) (an employer owes his employees a duty to "maintain[] all these [machinery and tools] in a reasonably suitable condition and state of repair").

Grady also suggests there may be a factual question as to whether Jones Lang knew or should have known of the dangers of conducting roofing work in freezing and windy conditions. However, that question does not bear on whether a general contractor has a duty to subcontractor employees to protect them from any foreseeable injury created by working in harsh weather conditions. It is the subcontractor, not the general contractor who hired the subcontractor, which is the party in the position to know of and guard against the specific dangers of the specialty work it was hired to complete. See Monk v. Virgin Islands Water & Power Authority, 53 F.3d 1381, 1393 (3d Cir. 1995) ("the risks to a contractor's workers and the protections necessary to reduce such risks are often beyond the owner's expertise"); King v. Shelby Rural Elec. Co-op. Corp., 502 S.W. 2d 659, 663 (Ky. 1973) ("[e]mployers frequently farm out work which requires some special skill to an independent contractor skilled in that particular work"). The subcontractor was the party in the position to know about, and provide the appropriate resources and supervision required to safely perform, the dangerous specialty work. These responsibilities fell squarely on the subcontractor.

Although New Hampshire has not specifically addressed whether the duty of a subcontractor to provide equipment, training, and supervision to its employees is nondelegable, other jurisdictions have determined that these duties fall on the subcontractor. See Kennedy v. U.S. Const. Co., 545 F.2d 81, 84 (8th Cir. 1976) ("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"); Hooker v. Dep't of Transp., 33 P.3d 1081, 1087–88 (Cal. 2002) (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"); Fresquez v. Sw. Indus. Contractors & Riggers, Inc., 554 P.2d 986, 992 (N.M. App. Ct. 1976) ("[t]he 'place' the general contractor must keep safe does not include the equipment of the independent contractor"); Barth v. Downey Co., 239 N.W. 2d 92, 95 (Wis. 1976) ("[t]he responsibility for providing tools and equipment . . . is on the employee's immediate employer").

Grady argues that Jones Lang undertook A&M's duty to its employees by assuming "elaborate responsibilities for jobsite safety and supervision" in the general contract between Jones Lang and Liberty Mutual. (Pl.'s Mem. Supp. Obj. at 7); see also Restatement (Second) of Torts § 324A(b). The defendants argue that the plain language of the subcontract places the responsibility of job safety relating to the work A&M was hired to complete solely on A&M. In New Hampshire, "[t]he existence of a contract between parties may constitute a relation sufficient to impose a duty to exercise reasonable care."[3] Simpson v. Calivas, 139 N.H. 1, 4 (1994) (citation omitted). Thus, the court looks to the language of the contracts at issue here, giving "the language used by the parties its reasonable meaning, considering the circumstances and the context in which the agreement was negotiated, and reading the document as a whole." Found. for Seacoast Health v. Hosp. Corp. of America, 165 N.H. 168, 172 (2013) (citation omitted).

The general contract between Jones Lang and Liberty Mutual required Jones Lang to "assume the entire responsibility and liability for all Work including all supervision, labor and materials provided . . . and for all plant, scaffolding, tools, equipment, supplies and other things provided by [Jones Lang], its Subcontractors and Sub-subcontractors." (AIA Document A201-2007 § 3.2.5.) Other portions of the contract reiterate Jones Lang's responsibility for all work, safety measures, and any potential errors or negligence on the part of itself or the subcontractors. (See § 3.3.1 ("[Jones Lang] shall supervise and direct the Work"); § 3.3.3 ("[Jones Lang] shall be responsible for initiating, maintaining and supervising all safety precautions and programs")

[3] In similar factual circumstances, other jurisdictions have looked to the contract to determine if it creates a duty of a general contractor to supervise or provide equipment to subcontractor employees. See, e.g., Kennedy v. U.S. Const. Co., 545 F.2d 81, 84 (8th Cir. 1976) (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"); see also Foley v. Rust Int'l, 901 F.2d 183, 185 (1st Cir. 1990) (general contractor was not liable for subcontractor 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); Corsetti v. Stone Co., 483 N.E. 2d 793, 796 (Mass. 1985) (general contractor was liable for subcontractor employee's injuries because the general contractor was contractually obligated to "initiate, maintain, and supervise all safety precautions and programs in connection with the work").

§ 5.3.4 (Jones Lang was "fully responsible for full time supervision of all Subcontractors . . . and for the acts, errors, omissions, defaults, and conduct of all Subcontractors").)

The subcontract required A&M to "maintain all work areas in a safe manner and furnish all safety equipment required by the Contract Documents and by law." (Id. at Art. 6.4.) The subcontract further stated that A&M "assume[d] 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 herein." (Id.) The subcontract also required A&M to assume the risk of loss and damage to "any materials, equipment, trailers or tools stored on-site," thus indicating that the parties contemplated that A&M would bring its own materials and equipment to perform the required work. (Id.) Similar to the indemnification provision in the general contract, the subcontract contained an indemnification provision holding Jones Lang and Liberty Mutual harmless for any negligent acts or omissions of A&M. (Id. at Art. 11.1.)

Despite the clear language of the subcontract placing directly on A&M the responsibility of supervising A&M's employees and of providing safety equipment, Grady asserts that Jones Lang undertook A&M's responsibilities to A&M employees when Jones Lang assumed responsibility for the entire project in the general contract. The scope of a contractually-created duty is, however, ordinarily "limited to those in privity of contract with one another." See Sisson, 148 N.H. at 505 (citation omitted). The general contract was executed exclusively by Jones Lang and Liberty Mutual, and thus neither A&M nor its employees were in privity of the general contract. Thus, in order for Jones Lang to owe a contractual duty to them, A&M and its employees must have had the status of third-party beneficiaries contemplated by the parties to the general contract. See Spherex, Inc. v. Alexander Grant & Co., 122 N.H. 898, 903 (1982) (a contracting party may owe a duty to a third-party beneficiaries to a contract if "the contract is so expressed as to give the promisor reason to know that a benefit to a third party is contemplated by the promise as one of the motivating causes of his making the contract").

Nothing in the general contract suggests that Jones Lang and Liberty Mutual entered into the general contract to benefit subcontractors as a third party. Liberty Mutual contracted with Jones Lang for the purpose of hiring Jones Lang to build a substantial construction project on its premises in exchange for payment. With respect to Jones Lang's responsibilities on the jobsite, the contract clearly states that Jones Lang was "responsible and shall indemnify and hold

harmless [Liberty Mutual]" for any "loss or damage to the Work arising out of or caused by any negligent act or omission" of Jones Lang or its subcontractors. (AIA Document A201-2007 § 3.2.5). The contract is silent as to Jones Lang's liability to any third parties. Thus, the provisions cited by Grady 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.

Further, 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. Although the subcontract gives Jones Lang the authority to "conduct safety inspections" of A&M "at any time," this language is insufficient to place a duty on Jones Lang to the employees of A&M who may have been conducting the potentially dangerous practices. See Fresquez, 554 P.2d at 992–93 ("The right in a general contractor to stop the subcontractor from proceeding with the work if dangerous practices are observed, does not carry with it liability to the employees of the very same subcontractor causing the dangerous condition.").

In the factually similar case of Eastlick v. Lueder Const. Co., 741 N.W. 2d 628 (Neb. 2007), the Nebraska Supreme Court held that a general contractor did not owe a duty to an employee of a subcontractor who was injured from his use of the subcontractor's equipment, even where the general contractor was contractually obligated to the owner of the premises to supervise and direct all safety precautions on the jobsite. Id. at 634. Despite the general contractor's contractual duty to the owner, the Nebraska Supreme Court held that the general contractor did not owe a duty to the subcontractor employee because (1) it did not control the subcontractor's work or the equipment the subcontractor's employees used, and (2) the injury did not result from an unsafe workplace but instead resulted from the employee's use of the equipment owned and installed by the subcontractor. Id.

Here, as in Eastlick, although the general contract placed responsibility on Jones Lang to provide general supervision over the project, neither the general contract nor the subcontract required the general contractor to provide the subcontractor's employees with safety equipment or supervise the subcontractor's safety measures, nor did the general contractor exert any actual

control over the subcontractor's employees or practices.[4] Furthermore, as discussed above, Grady's injury did not result from an unsafe condition caused by Jones Lang; his injury resulted from the use of the tools A&M made available to him. Cf. Barth, 239 N.W. 2d at 96 ("if the general contractor had loaned equipment for use by the subcontractor's employees," the general contractor "might have a liability deriving from its having furnished defective or unsafe equipment"). As such, the court finds Jones Lang did not undertake a duty to Grady to provide supervision, training or safety equipment through the general contract.

Finally, Grady asserts that Jones Lang owed a duty of care to him because Liberty Mutual relied on Jones Lang to provide supervision of all workers on the jobsite pursuant to the general contract. See Restatement (Second) of Torts § 324A(c) (one who provides services to another is liable to a third party when "the harm is suffered because of reliance of the other or the third person upon the undertaking"). Liberty Mutual may have relied on Jones Lang to supervise the jobsite, but the cause of Grady's injury—his use of tools provided by A&M—did not fall within Jones Lang's supervisory duties on which Liberty Mutual relied; it fell solely within A&M's supervisory duties.

For these reasons, the court finds that Jones Lang did not owe a duty to Grady to provide supervision, training or safety equipment for the injury to his hand caused by the lack of safety equipment.

II. Duty of Liberty Mutual

Grady argues that Liberty Mutual owed him a duty of care because it was obligated to protect visitors from the risk of foreseeable harm as the owner of the premises. (Pl.'s Mem. Supp. Obj. at 6.) The defendants assert that Liberty Mutual did not owe a duty of reasonable care to Grady for the same reason Jones Lang did not owe a duty to him: Grady was not injured due to a dangerous condition on the premises. As such, the defendants argue that Liberty Mutual

[4] On the undisputed facts, there is no evidence that Jones Lang engaged in any affirmative act to control A&M's workplace or any other subcontractors' workplace as may be sufficient to create an implied duty notwithstanding the language of the contracts. See Boylan, 134 N.H. at 234 (finding a parent corporation did not have a duty to an injured employee of its subsidiary corporation because there was no evidence that the parent "specifically undertook an obligation to manage the safety of the [] workplace by some affirmative act that is distinct from its actions as the managing stockholder"). On the evidence submitted to the court, nothing shows that Jones Lang actively supervised Grady or any other A&M employees or held its employees out as supervisors of A&M employees. Furthermore, the facts indicate that the tools Grady used to perform the work were provided by A&M, not Jones Lang. As such, there is nothing indicating that Jones Lang exercised control over A&M employees' work that may have created a duty.

does not owe a duty to Grady under either the theory of premises liability or of contractual liability. (Def.'s Mem. Supp. Mot. Summ. J. at 4.)

In general, "all owners and occupiers of land are governed by the test of reasonable care under all of the circumstances in the maintenance and operation of their property." Kellner v. Lowney, 145 N.H. 195, 197 (2000) (citations omitted). In order "for a duty to exist on the part of a landowner, it must be foreseeable that an injury might occur as a result of the landowner's actions or inactions." Pesaturo v. Kinnie, 161 N.H. 550, 554 (2011) (citation omitted). In general, "persons will not be found negligent if they could not reasonably foresee that their conduct would result in an injury to another or if their conduct was reasonable in light of the anticipated risks." Kellner, 145 N.H. at 197 (citations omitted); see also Broser v. Sullivan, 99 N.H. 305, 307 (1954) (the landowner "was not an insurer and was only required to exercise reasonable care to maintain his premises in a reasonably safe condition for the use of invitees"). "Whether a landowner's challenged conduct created such a foreseeable risk of harm is a question of law." White v. Asplundh Tree Expert Co., 151 N.H. 544, 547 (citation omitted) (2004).

"A premises owner owes a duty to entrants to use ordinary care to keep the premises in a reasonably safe condition, to warn entrants of dangerous conditions and to take reasonable precautions to protect them against foreseeable dangers arising out of the arrangements or use of the premises." Rallis v. Demoulas Super Markets, Inc., 159 N.H. 95, 99 (2009) (citations omitted). However, a premises owner is generally "not liable for injuries caused by the negligence of an independent contractor," Elliot v. Pub. Serv. Co. of New Hampshire, 128 N.H. 676, 678 (1986) (citation omitted), because the premises owner "reserves no control or power of discretion over the execution of the [contractor's] work." Arthur, 139 N.H. at 465 (citation omitted); cf. Stevens v. United Gas & Electric Co., 73 N.H. 159, 160–61, 165 (1905) (building owner was liable to a contractor's employee who was injured by electrical wires while performing work on the building).

Liberty Mutual owed a duty to Grady 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. Id. 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 Grady 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.

Grady appears to assert that the ice on the roof was a dangerous condition on the premises for which Liberty Mutual had a duty to warn or take precautions to prevent. However, Grady's injury resulted from the tools he used to melt the ice, not from the ice itself. Grady also appears to assert that Liberty Mutual is liable for allowing A&M employees to conduct roofing work in harsh weather conditions. However, while a premises owner is generally "in the best position to protect against the risk of personal injury on their premises," Valenti v. NET Properties Mgmt., Inc., 142 N.H. 633, 636 (1998), the owner is not in the position to protect a subcontractor employee against the risk of injury from dangerous conditions created by the subcontractor over which the premises owner has no knowledge or control.

A&M agreed to complete the subcontracted-for work in the winter. Jones Lang hired A&M for the purpose of performing the roofing work—which is type of work in which A&M specializes—and A&M was the party in the position to know of the possible dangers of performing such work during the winter months and of the necessary safety equipment necessary to protect against those dangers. See Zueck v. Oppenheimer Gateway Properties, Inc., 809 S.W. 2d 384, 387–88 (Mo. 1991) ("[i]ndependent contractors are frequently, if not usually, hired because the landowner is aware of his own lack of expertise and seeks to have the work performed as safely and efficiently as possible by hiring those possessing the expertise he lacks"); see also New Mexico Elec. Serv. Co. v. Montanez, 551 P.2d 634, 636 (N.M. 1976) (a landowner "generally hires an independent contractor to perform work that he is not equipped or trained to do"). As such, Liberty Mutual, as the premises owner, cannot be charged with having the responsibility of preventing potential dangers presented by conducting roofing work in the winter.

Courts in other jurisdictions have reached the same conclusion. See, e.g., King v. Shelby Rural Elec. Co-op. Corp., 502 S.W. 2d 659, 664 (Ky. 1973) (imposing liability where the landowner "reserved sufficient control in its contract to control the mode, manner and method of the performance of the work"); Ortiz v. Uhl, 309 N.E. 2d 425, 425 (N.Y. 1974) (no liability where the premises owner did not furnish any tools or equipment or "ma[k]e any determination

as to the methods by which the contractor should perform the required work"); DeArman v. Popps, 400 P.2d 215, 217 (N.M. 1965) (imposing liability where the owner's superintendent "maintained control of its premises to the extent that it was superintending the work" of its contractors).

Nevertheless, Grady asserts that Liberty Mutual is vicariously liable for his injury because Liberty Mutual employed Jones Lang to conduct the work, and Jones Lang in turn employed A&M. "Under the doctrine of respondeat superior, an employer may be held vicariously responsible for the tortious acts of an employee committed incidental to or during the scope of employment." See Dupont v. Aavid Thermal Technologies, Inc., 147 N.H. 706, 714 (2002) (quotation omitted). "Absent a duty" of the employer, "there is no negligence." Id. (quotation omitted). Because the court has found that Jones Lang did not owe Grady a duty of care to supervise or provide safety equipment to him, Liberty Mutual is not vicariously liable to Grady for his injuries.[5]

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[5] However, even if Jones Lang was liable to Grady for his injury, Liberty Mutual would be vicariously liable only if (1) Liberty Mutual hired Jones Lang for the purpose of maintaining the premises, Valenti v. NET Properties Mgmt., Inc., 142 N.H. 633, 636 (citation omitted), or (2) Liberty Mutual engaged Jones Lang to perform inherently dangerous work. Elliot, 128 N.H. at 679 (citation omitted).

First, Grady argues that Jones Lang was responsible for maintaining safety on the jobsite, and thus Liberty Mutual has a nondelegable duty of care to entrants on the premises who are injured due to Jones Lang's failure to maintain a safe jobsite. Although Jones Lang had a duty to maintain a safe workplace during the duration of the construction project, it was not hired for the purpose of maintaining Liberty Mutual's premises. Cf. Valenti, 142 N.H. at 636 (a business owner who hired an independent contractor to clear ice from the walkway was liable for a patron's injuries resulting from the contractor's failure to clear the ice). Instead, Jones Lang was hired for the purpose of completing a construction project on Liberty Mutual's premises. Thus, Liberty Mutual is not liable under this theory.

Second, Grady argues that the roofing work during the winter constituted an inherently dangerous activity. A premises owner "who undertakes an inherently dangerous activity has a non-delegable duty to protect third parties against injury resulting from their activity." Elliot, 128 N.H. at 679 (citations omitted). "[W]hether an activity is inherently dangerous is a question of fact to be determined by the trier of fact." Id. at 682. However, in order for the inherent danger doctrine to apply, the alleged danger must be "naturally apprehended by the parties when they contract." Arthur v. Holy Rosary Credit Union, 139 N.H. 463, 466 (1995). Further, "[t]he inherent danger exception applies only when the danger arises directly from the work required to be done, and not from the negligent manner of its performance." Id. at 465.

Although construction projects are "typically fraught with a variety of potential dangers that may arise if the work is not carefully done," such projects "do not, as a rule, fall within the inherently dangerous activities category." Id. at 466. In Arthur, an employee of an independent contractor performing roofing work was injured when he fell through a hole in the roof that the independent contractor covered in plastic rather than wood planks. Id. at 464. Because the independent contractor failed to install wood underneath the plastic, the New Hampshire Supreme Court held that the danger caused by the independent contractor was not a "necessary and anticipated part of the work" and was not a danger the premises owner knew or should have known. Id. at 466; cf. Elliot, 128 N.H. at 681 (miner's injuries from falling rocks while performing excavation work "was caused by precisely the threat inherent in that activity").

Here, Grady's injury did not result from an activity which Liberty Mutual knew or should have known. Although the weather was windy and cold, the danger posed to Grady was not created by the weather, but instead

While Jones Lang and Liberty Mutual owed a duty of care to Grady to provide a safe workplace on the premises, the court finds that the defendants did not owe a duty to Grady to provide supervision, training, or safety equipment to him. Because the undisputed facts show that Grady 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 Grady cannot maintain his negligence claims against the defendants.

CONCLUSION

For the foregoing reasons, the defendants' motion for summary judgment is GRANTED.

So Ordered.

May 18, 2017

Steven M. Houran
Presiding Justice

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was created by the tools A&M chose to use to conduct the work. As discussed above, Liberty Mutual cannot be expected to have the knowledge and awareness of the minute details of the equipment and procedures utilized A&M to complete the specialized work it was hired to perform. As such, the threat of injury from the tools does not constitute a danger of which Liberty Mutual knew or should have known.

Furthermore, Grady's injury did not result from a necessary and anticipated part of the work. Even in Arthur, where falling from a roof could very well constitute as a threat inherent in performing roofing work, the Court held that the dangerous condition of the open hole—which the court noted was a danger created by the independent contractor—was not a necessary and anticipated part of the work. Arthur, 139 N.H. at 466. 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 Grady.