

F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). "This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof." *International Ass'n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. Factual Background

The following undisputed facts are taken from the parties' statements of material facts filed in accordance with this court's Local Rule 56.² Plaintiff David McCabe³ is the vice president and general manager of Heritage Lanterns, a metalworking business in Yarmouth, Maine. Defendant

² The plaintiffs' "challenge" to Metalcrafters' statement of material facts (Docket No. 18) fails to comply with Local Rule 56(c). Metalcrafters has appropriately objected on this basis to the plaintiffs' submission, Defendant Virginia Metalcrafters, Inc.'s Reply Statement of Material Facts ("Metalcrafters' Responsive SMF") (Docket No. 21) at 1, and accordingly all facts contained in Metalcrafters' statement not expressly admitted by the plaintiffs' response shall be deemed admitted, to the extent that they are properly supported by citations to the record, Local Rule 56(e).

³ Plaintiff Theresa McCabe, wife of David McCabe, asserts only a claim for loss of consortium, a claim that depends upon David McCabe's direct claims. Complaint (Docket No. 1(2)) at 4-5; *Gillchrest v. Brown*, 532 A.2d 692, 693 (Me. 1987). Because I will discuss, with one brief exception, only the claims of David McCabe in this recommended decision, I will refer to him as "McCabe" for ease of reference.

Virginia Metalcrafters, Inc.’s Statement of Material Facts in Support of Motion for Summary Judgment (“Defendant’s SMF”) (Docket No. 12) ¶ 1; Plaintiffs’ Statement of Material Facts in Opposition to Defendant Virginia Metalcrafters’ Motion for Summary Judgment, Part A (“Plaintiffs’ Responsive SMF”) (Docket No. 18) at 1-2.⁴ McCabe has over 22 years of experience as a tinsmith and coppersmith. *Id.* ¶ 2. McCabe alleges that he was injured in January 1999 while using a press brake, Verson Allsteel model number 2062, at his place of employment. *Id.* ¶¶ 3, 5. He suffered the amputation of two fingers on his left hand. *Id.* ¶ 3.

A press brake is a piece of industrial machinery used to bend and form pieces of metal ranging in size from the size of a matchbook to the size of a sheet of paper. *Id.* ¶ 4. The press brake at issue was designed and built by defendant Allied Products Corporation in 1949. *Id.* ¶ 7. Metalcrafters acquired the used press brake at issue in 1964 and transferred it in 1988 to Heritage Lanterns, an affiliated corporation. Affidavit of Charles Salembier in support of Defendant’s Motion for Summary Judgment (“Salembier Aff.”) (Docket No. 13) ¶ 5. Metalcrafters and Heritage Lanterns were “sister companies” controlled by common management. Plaintiffs’ Statement of Material Facts in Opposition to Defendant Virginia Metalcrafters’ Motion for Summary Judgment, Part B (“Plaintiffs’ SMF”) (Docket No. 18) ¶ 1; “Metalcrafters’ Responsive SMF” ¶ 1. Metalcrafters had no sales, warranty or other documents, aside from a depreciation schedule, relating to the press brake. *Id.* ¶ 2. During the time that it owned the press brake, Metalcrafters used it without incident or injury. Salembier Aff. ¶ 9. Metalcrafters did not modify or rebuild the press brake in any way. *Id.* ¶ 10.

After the transfer of ownership, no employees of Metalcrafters had any involvement in the installation, servicing or maintenance of the press brake. *Id.* ¶ 6. At the time Heritage Lanterns

⁴ The plaintiffs have admitted many of the numbered paragraphs in Metalcrafters’ statement of material facts in the single paragraph cited here. Future references to paragraph numbers alone will be to those paragraphs of Metalcrafters’ statement that have been so admitted by the plaintiffs.

acquired the press brake, at least two Heritage Lantern employees were somewhat familiar with its use and operation. Videotaped Deposition of David McCabe (“McCabe Dep.”), Exh. C to Metalcrafters’ SMF, at 34-35.

In 1993, all of the assets of the Heritage Lanterns business, including the press brake and the right to use the name “Heritage Lanterns,” were sold to Craig and Louise Gustafson. Metalcrafters’ SMF ¶ 14; Plaintiffs’ Responsive SMF at 1-2. The Gustafsons then re-incorporated the business, also known as Heritage Lanterns, and continued to operate it in Yarmouth, Maine. *Id.* ¶ 15. McCabe began working for Heritage Lanterns in 1978. *Id.* ¶ 16. For the first ten years of his employment, McCabe worked in the production shop. *Id.* ¶ 17. He became vice president and general manager of Heritage Lanterns in the mid-1990s and still spends most of his time on the shop floor. *Id.* ¶ 18. He is the most experienced metalworker in the Heritage Lanterns shop and at times used the press brake frequently. *Id.* ¶¶ 19-20.

Metalcrafters disposed of another, virtually identical, press brake in the late 1980s by selling it to a metal processing company. Salembier Aff. ¶ 14; Plaintiffs’ SMF ¶ 3, Metalcrafters’ Responsive SMF ¶ 3. It has never sold any other press brakes at any time. Salembier Aff. ¶ 14. Metalcrafters also provided a used exhaust fan and a radial saw to Heritage Lanterns, Plaintiffs’ SMF ¶ 39; Metalcrafters’ Responsive SMF ¶ 39, at an unspecified time. In general, Metalcrafters does not sell any used equipment that it owns, other than as scrap metal. Salembier Aff. ¶ 15.

Aside from two warnings that are on the press brake, Metalcrafters provided no other warnings, disclaimers, instructions or warranty limitations to Heritage Lanterns in connection with the transfer. Plaintiffs’ SMF ¶ 7; Metalcrafters’ Responsive SMF ¶ 7. There were no safety switches, interlock devices or other guards on the press brake. *Id.* ¶ 12. Metalcrafters did not provide Heritage Lanterns with an operator’s manual or any other instruction in the use of the machine. *Id.* ¶ 16.

Metalcrafters did not conduct a safety investigation prior to the transfer to see if there were patents or other inventions that might have made the press brake safer. *Id.* ¶ 24.

At all relevant times, Charles Salembier was president and general manager of Metalcrafters. Salembier Aff. ¶ 1. In 1988 McCabe reported directly to Salembier. Plaintiffs' SMF ¶ 21; Metalcrafters' Responsive SMF ¶ 21.

III. Discussion

The complaint asserts four claims against Metalcrafters: strict liability under 14 M.R.S.A. § 221 (Count I); breach of warranty (Count II); negligence (Count III); and loss of consortium (Count IV). Metalcrafters seeks summary judgment on each claim. Defendant Virginia Metalcrafters, Inc.'s Motion for Summary Judgment ("Motion") (Docket No. 11) at 1.

A. Strict Liability

Maine's strict liability statute provides, in its entirety:

One who sells any goods or products in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to a person whom the manufacturer, seller or supplier might reasonably have expected to use, consume or be affected by the goods, or to his property, if the seller is engaged in the business of selling such a product and it is expected to and does reach the user or consumer without significant change in the condition in which it is sold. This section applies although the seller has exercised all possible care in the preparation and sale of his product and the user or consumer has not bought the product from or entered into any contractual relation with the seller.

14 M.R.S.A. § 221. Metalcrafters contends that it is not "engaged in the business of selling" used press brakes, so the statute does not apply to its transfer of the press brake to Heritage Lanterns; the plaintiffs respond that the evidence demonstrates the possibility that Metalcrafters is engaged in the business of selling used machinery.

The Maine Law Court has stated that section 221 “derives almost verbatim from the black letter of section 402A of the *Restatement (Second) of Torts* (1965).” *Austin v. Raybestos-Manhattan, Inc.*, 471 A.2d 280, 286 (Me. 1984). In the absence of case law construing the term “engaged in the business of selling such a product,” commentary to that section of the Restatement is “instructive.” *Id.* at 287. Metalcrafters relies on comment f to section 402A, which provides in relevant part as follows:

The rule stated in this Section applies to any person engaged in the business of selling products for use or consumption. . . .It is not necessary that the seller be engaged solely in the business of selling such products. . . .

The rule does not, however, apply to the occasional seller of food or other such products who is not engaged in that activity as a part of his business. . . . The basis for the rule is the ancient one of the special responsibility for the safety of the public undertaken by one who enters into the business of supplying human beings with products which may endanger the safety of their persons and property, and the forced reliance upon that undertaking on the part of those who purchase such goods. This basis is lacking in the case of the ordinary individual who makes the isolated sale, and he is not liable to a third person, or even to his buyer, in the absence of his negligence.

Restatement (Second) of Torts (1965), § 402A, comment f. The parties cite numerous cases from other jurisdictions construing this provision of the Restatement in support of their respective positions on the question whether Metalcrafters could be found to have been engaged in the business of selling press brakes, or used machinery in general, on the basis of the evidence in the summary judgment record.

Ultimately, whether the term “such a product” in the Maine statute is construed in this case to mean press brakes or used machinery makes no difference, although the former interpretation appears to me to be more in keeping with the intent of the statute. The courts deciding the cases cited by the parties in some instances refer to the specific product at issue and in others to a broader category of products, like used machinery, without at any time addressing the question of which is appropriate. Here, if “such a product” refers only to press brakes, the sale of two such machines in a period of at

least 24 years (from 1964, when Metalcrafters purchased the used press brake, to 1988, when it sold the press brake to Heritage Lanterns) cannot possibly be construed as establishing that Metalcrafters was “engaged in the business of selling” press brakes. *See, e.g., Geboy v. TRL, Inc.*, 159 F.3d 993, 996, 998-99 (7th Cir. 1998) (defendants who purchased and briefly used vertical boring mill, then sold it to a buyer who sold it the next day to employer of plaintiff’s decedent held to be occasional sellers under Wisconsin law and section 402A); *Balczon v. Machinery Wholesalers Corp.*, 993 F.Supp. 900, 902, 905-06 (W.D.Pa. 1998) (press alleged to have caused plaintiff’s injury in 1991 was bought by defendant from manufacturer in 1950 and sold to plaintiff’s employer in 1983; defendant held not to be engaged in business of selling presses under Pennsylvania law and section 402A); *Bailey v. ITT Grinnell Corp.*, 536 F.Supp. 84, 85, 88-89 (N.D.Ohio 1982) (defendant that sold punch press alleged to have injured plaintiff to plaintiff’s employer six years before injury and nineteen years after buying it from manufacturer held not to be engaged in business of selling punch presses when assistant general manager’s affidavit asserted that defendant was not a seller of punch presses and plaintiff responded only that size of corporate defendant allowed inference that it was more than an occasional seller of punch presses); *Ortiz v. HPM Corp.*, 234 Cal.App.3d 178, 189 (1991) (one-time sale of unspecified number of plastic injection molding machines did not make defendant more than “occasional seller” under section 402A); *Sukljian v. Charles Ross & Son Co.*, 503 N.E.2d 1358, 1359, 1361 (N.Y. 1986) (defendant that sold grinding mill as part of sale of surplus property not liable under section 402A to plaintiff injured while cleaning mill five years later); and *Santiago v. E.W. Bliss Div.*, 492 A.2d 1089, 1100 (N.J. Super. 1985) (disposal of punch press by sale to plaintiff’s employer after 23 years of use makes defendant only an “occasional seller” under section 402A).

Assuming *arguendo* that Metalcrafters’ admitted sale of unspecified types and amounts of used equipment as scrap metal, Salembier Aff. ¶ 15, could reasonably be construed to be the selling of such

material “for use or consumption,” a highly unlikely conclusion given the fact that sale for scrap means that the equipment is no longer to be used for the purpose for which it was created, and that the radial saw and exhaust fan provided to Heritage Lanterns were sales of used machinery, the conclusion with respect to Metalcrafters’ status remains the same. In *Geboy*, a defendant that admitted it participated in transactions involving the sale of used industrial machinery was nonetheless found not to be liable under section 402A when the vertical boring mill at issue was the only such machine in the sale of which it had been involved; the court found that the sale of the vertical boring mill was not “a primary activity of” this defendant’s business. 159 F.3d at 999-1000. In *Santiago*, there was evidence that defendant Western Electric “always sells its unneeded equipment . . . to brokers who specialize in equipment of that type,” 492 A.2d at 1093, and that it used and disposed of “manufacturing equipment such as punch presses, press brakes and shears,” *id.*, yet the court still found that the sale of the punch press at issue was an occasional sale under section 402A, *id.* at 1100. In *Sukljian*,⁵ third-party defendant General Electric included the grinding mill at issue in a sale of surplus property of several hundred lots and held two or three such sales a year, 503 N.E.2d at 1359, yet the court held that General Electric was an occasional seller under section 402A with respect to the grinding mill, *id.* at 1360-61.

The plaintiffs rely on two cases that merit specific mention. In *Nelson v. Nelson Hardware, Inc.*, 467 N.W.2d 518, 519 (Wisc. 1991), the product at issue for a section 402A analysis was a used shotgun purchased from the defendant store. The evidence “[made] it clear that firearms were sold by [the defendant] and used firearms were purchased and then resold.” *Id.* at 523. The court held that the

⁵ The plaintiffs attempt to distinguish *Sukljian* on the grounds that the opinion begins with the statement that the seller was “not liable to remote purchasers . . . in strict liability,” 503 N.E.2d at 1358, arguing that because Heritage Lanterns and Metalcrafters were related corporations at the time of the sale, the purchaser was not “remote.” Opposition of Plaintiffs to Virginia Metalcrafters’ Motion for Summary Judgment, etc. (“Plaintiffs’ Opposition”) (Docket No. 17) at 12. However, there is no suggestion in the *Sukljian* opinion that the number of purchasers of the punch press between General Electric and the plaintiff’s employer had any bearing on the court’s (continued on next page)

particular shotgun at issue was “such a product” under section 402A. *Id.* A shotgun in particular and firearms in general are clearly more closely related than a brake press and used industrial machinery in general. In *Nelson*, the defendant attempted to avoid strict liability by arguing that it was not a dealer in the particular brand of shotgun that caused the plaintiff’s injury. *Id.* Here, Metalcrafters does not contend that it was not engaged in the business of selling Verson press brakes; rather, it argues that it was not engaged in the business of selling any press brakes, a very different and distinguishing situation.

The plaintiffs also rely on *Stiles v. Batavia Atomic Horseshoes, Inc.*, 579 N.Y.S.2d 790 (Sup. Ct. App. Div. 1992). That decision was overturned by the New York Court of Appeals on precisely the point for which the plaintiffs cite it. In *Stiles v. Batavia Atomic Horseshoes, Inc.*, 613 N.E.2d 572, 573 (1993), the state’s highest court held that “incidental transactions involving the purchase and resale of used industrial machinery on three occasions” could not establish that the defendant engaged in the sales of such equipment as a regular part of its business for purposes of strict liability.

Finally, the plaintiffs contend that the question whether Metalcrafters was engaged in the business of selling press brakes or used machinery for purposes of 14 M.R.S.A. § 221 is a question of fact that must be reserved for the jury. Plaintiffs’ Opposition at 3-6. However, this is an issue on which the plaintiffs bear the burden of proof and, in order to prevent the entry of summary judgment, they must point to specific facts demonstrating that there is a trialworthy issue. *National Amusements*, 43 F.3d at 735. They may not avoid summary judgment merely by identifying an issue as factual. Here, there is simply no evidence in the summary judgment record upon which a reasonable jury could conclude that Metalcrafters was, at any relevant time, engaged in the business of selling press brakes

application of section 402A. Indeed, the word itself is not used again in the majority opinion.

or used industrial machinery within the scope of 14 M.R.S.A. § 221. Accordingly, Metalcrafters is entitled to summary judgment on Count I of the complaint.

B. Breach of Warranty

The plaintiffs contend that Metalcrafters breached express warranties, the implied warranty of fitness for a particular purpose and the implied warranty of merchantability. Plaintiffs' Opposition at 3, 6-9.

The plaintiffs identify the source of the alleged express warranties both as “the label affixed to the machine” and “the warning labels on the press brake” which “suggest that [Metalcrafters] expressly promised that the machine was OSHA compliant, when in fact it was not.” *Id.* at 7-8. Only one label has been made part of the summary judgment record by the plaintiffs. It is Exhibit A to the plaintiffs' statement of material facts. The only reference to OSHA on that label is the following: “EMPLOYER — it is your responsibility to comply with OSHA and ANSI.” There is no sense in which this statement could possibly be reasonably interpreted as an express warranty that the machine to which it was attached complied with OSHA requirements. *See Cuthbertson v. Clark Equip. Co.*, 448 A.2d 315, 320 (Me. 1982); *see generally* 11 M.R.S.A. § 2-313. Even if that were not the case, the plaintiffs' only evidence to support their assertion that the press brake was not in fact “OSHA compliant” is a paragraph of McCabe's affidavit in which he states, “According to my expert's designation in this case, the press brake is not OSHA compliant or otherwise safe for use.” Plaintiffs' SMF ¶ 38; Affidavit of David McCabe in Opposition to Motion for Summary Judgment (“McCabe Aff.”) (Docket No. 19) ¶ 8. The expert is not otherwise identified and no expert designation or affidavit of any expert has been submitted to the court. Metalcrafters has appropriately objected to this entry in the plaintiffs' statement of material facts as hearsay. Metalcrafters' Responsive SMF ¶ 38. Fed. R. Civ. P. 56(e) requires all affidavits submitted in connection with a motion for summary

judgment to “set forth such facts as would be admissible in evidence.” Hearsay is by definition not admissible in evidence. Because the plaintiffs have submitted no evidence of the existence of an express warranty and no admissible evidence of a breach of such a warranty, Metalcrafters is entitled to summary judgment on any claim of breach of express warranty.

The implied warranty of merchantability is created in Maine law by 11 M.R.S.A. § 2-314(1) as follows: “Unless excluded or modified . . . , a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.” Comment 3 to this section of the Uniform Commercial Code provides that

[a] person making an isolated sale of goods is not a “merchant” within the meaning of the full scope of this section and, thus, no warranty of merchantability would apply. His knowledge of any defects not apparent on inspection would, however, without need for express agreement and in keeping with the underlying reason of the present section and the provisions on good faith, impose an obligation that known material but hidden defects be fully disclosed.

11 M.R.S.A. § 2-314, comment 3. Metalcrafters contends that it is not a merchant with respect to press brakes.⁶ Essentially for the reasons set forth in my discussion of the application of similar language in the strict liability statute to the facts of this case, I agree. *See Colopy v. Pitman Mfg. Co.*, 615 N.Y.S.2d 208, 209 (Sup. Ct. App. Div. 1994) (defendant that sold eight similar pieces of equipment in 25 years preceding accident not “merchant with respect to goods of that kind” within meaning of Uniform Commercial Code § 2-314(1)). Metalcrafters is entitled to summary judgment on any claim of breach of the implied warranty of merchantability.

Section 2-315 of the Uniform Commercial Code, found in Maine law at 11 M.R.S.A. § 2-315, creates the implied warranty of fitness for a particular purpose:

⁶ The plaintiffs refer twice to the exception provided by the comment for cases in which the seller has knowledge of a hidden defect. Plaintiffs’ Opposition at 6, 8. However, they identify no such defect in the press brake at issue and accordingly may not avoid the entry of summary judgment on this basis.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified under section 2-316, an implied warranty that the goods shall be fit for such purpose.

The plaintiffs argue that Metalcrafters need not be a merchant with respect to goods of that kind for the purposes of this implied warranty and that such status may be imputed to a seller with "specialized knowledge" of the goods "as well as 'business practices,'" citing comment 2 to 11 M.R.S.A. § 2-104. Plaintiffs' Opposition at 8.⁷ It is unnecessary to reach this argument, however, because, under Maine law, proof of breach of the implied warranty of fitness for a particular purpose requires proof that the purchaser had "a particular purpose *outside* the scope of ordinary purposes." *Lorfano v. Dura Stone Steps, Inc.*, 569 A.2d 195, 197 (Me. 1990) (emphasis in original). The plaintiffs have not offered any evidence from which an inference could be drawn to the effect that Heritage Lanterns intended to use the press brake for any purpose other than its ordinary purpose, the purpose for which it had been used by Metalcrafters. See 11 M.R.S.A. § 2-315, comment 2: "A 'particular purpose' differs from the ordinary purpose for which the goods are used in that it

⁷ The plaintiffs disavow any claim that this alternate means of proof applies to a claim for breach of the implied warranty of merchantability. Plaintiffs' Opposition at 3, 7.

envisages a specific use by the buyer which is peculiar to the nature of his business.” For that reason alone, Metalcrafters is entitled to summary judgment on any claim for breach of the implied warranty of fitness for a particular purpose.

In summary, the plaintiffs have not generated any disputed issue of material fact with respect to any of their claims of breach of warranty, and Metalcrafters is entitled to summary judgment on Count II.

C. Negligence

Metalcrafters argues that it had no duty that ran to the plaintiffs and therefore cannot be liable to them on a theory of negligence. Whether a defendant owes a duty of care to a particular plaintiff is a question of law. *Bryan R. v. Watchtower Bible & Tract Soc.*, 738 A.2d 839, 844 (Me. 1999). In support of its argument, Metalcrafters cites *Sukljian*, in which the New York Court of Appeals held that “[a]t most, the duty of a casual or occasional seller would be to warn the person to whom the product is supplied of known defects that are not obvious or readily discernable.” 503 N.E.2d at 1362. At no time do the plaintiffs identify any such defect in the press brake at issue.

The plaintiffs instead respond that Metalcrafters had a duty under sections 388, 389 and 399 of the Restatement of Torts that was breached, and also that a duty existed due to “a variety of fiduciary, agency and contractual relationships,” Plaintiffs’ Opposition at 10, 13, none of which is further identified. With respect to the second argument, the plaintiffs have submitted no evidence of a contractual relationship between Metalcrafters and Heritage Lanterns other than the sale of the press brake itself and do not suggest how that sale created a duty other than through application of the Restatement sections, which will be discussed below. The plaintiffs appear to assume that there was an agency relationship between the two corporations because they were affiliated and had “common management.” *Id.* at 12. The factual assertions in the plaintiffs’ statement of material facts to the

effect that Salembier “controlled Heritage Lanterns” and “had responsibility for operations at Heritage Lanterns,” Plaintiffs’ SMF ¶¶ 4, 5, 33, 40 and that Metalcrafters had “control of Heritage Lanterns,” *id.* ¶ 15, which provide the only factual support in the summary judgment record for this argument, are contested by Metalcrafters and uniformly not supported by the citations to the record offered by the plaintiffs in support.⁸ Even if that were not the case, the plaintiffs do not explain how an agency relationship between the two corporations was involved in the transfer of the press brake or how such an agency relationship could give rise to a duty to employees of Heritage Lanterns who used the machine. The only authority cited by the plaintiffs in support of their conclusory assertion that the existence of an agency relationship gives rise to such a duty, Plaintiffs’ Opposition at 10, is *Ghiz v. Richard S. Bradford, Inc.*, 573 A.2d 379, 381 (Me. 1990). It is clear from the text of that opinion that the possible agency relationship that the Law Court suggested

⁸ The plaintiffs cite page 56 of the Rule 30(b)(6) deposition of Metalcrafters to support the assertion in paragraph 4 of their statement of material facts that Salembier “controlled Heritage Lanterns.” On that page, Salembier testifies about Heritage Lanterns’ need for a press brake and agrees that he approved the transfer of a press brake from Metalcrafters to Heritage Lanterns, neither of which even suggests that he controlled Heritage Lanterns. The plaintiffs cite the same page of that deposition to support their assertion in paragraph 5 of their statement of material facts that Salembier “had responsibility for operations at Heritage Lanterns,” and the citation is similarly insufficient to support that assertion. The plaintiffs cite page 47 of the deposition to support their assertion in paragraph 15 of their statement of material facts that Metalcrafters had “control of Heritage Lanterns,” but nothing on that page of the deposition supports that factual assertion. The plaintiffs cite paragraph 3 of McCabe’s affidavit to support their assertion in paragraph 33 of their statement of material facts that “Mr. Salembier controlled the operations of Heritage Lanterns.” McCabe does make that statement in his affidavit, but, as Metalcrafters points out, Metalcrafters’ Responsive SMF ¶ 33, that statement is inconsistent with McCabe’s deposition testimony that he did not discuss the day-to-day operations of Heritage Lanterns with Salembier. McCabe Dep. at 66-67. While this is not the direct contradiction between deposition testimony and a subsequent affidavit that the First Circuit found to require disregard of the affidavit in *Colantuoni v. Alfred Calcagni & Sons, Inc.*, 44 F.3d 1, 5 (1st Cir. 1994), the inconsistency does highlight the self-serving nature of the conclusory statement in McCabe’s affidavit. Given the lack of other sources of evidence to support the affidavit statement, it will be disregarded. *Santiago-Ramos v. Centennial P. R. Wireless Corp.*, 217 F.3d 46, 53 (1st Cir. 2000) (affidavits that merely reiterate allegations made in complaint without providing specific factual information on basis of personal knowledge are insufficient); *Medina-Munoz v. R. J. Reynolds Tobacco Co.*, 896 F.2d 5, 8 (1st Cir. 1990) (summary judgment appropriate if non-moving party rests on conclusory allegations). The plaintiffs cite paragraph 10 of McCabe’s affidavit to support their assertion in paragraph 40 of their statement of material facts that Salembier “had overall operational authority at Heritage Lanterns from 1984 to 1993.” While McCabe’s affidavit does make this identical statement, I will not credit it for the reasons just discussed with respect to the assertion in paragraph 33 of the plaintiffs’ statement of material facts.

might give rise to “fiduciary or contractual recovery” in that case was one between the person injured and the defendant. *Id.* at 380 n.1. There is no sense in which Metalcrafters could be found to be the agent of McCabe under the facts presented in the summary judgment record in this case. The plaintiffs are not entitled to present this theory to a jury.

Finally, the case law cited by the plaintiffs in support of their contention that a duty arose out of a fiduciary duty “as officers and agents of related ‘sister’ companies, and those actually assuming a duty to advise customers or clients,” Plaintiffs’ Opposition at 4, is not applicable to the circumstances in this case. First, the fiduciary duty is that of officers or directors; no officer or director of Metalcrafters is a defendant in this action, and the plaintiffs do not even suggest how or why any such duty should be imputed to Metalcrafters. Second, the fiduciary duty at issue runs to the corporation itself and its shareholders, not to employees of another corporation to which a sale was made. The authority cited by the plaintiffs, *id.*, makes this clear. 13-A M.R.S.A. § 716; *Rosenthal v. Rosenthal*, 543 A.2d 348, 352 (Me. 1988). As Metalcrafters points out, there is no evidence in the summary judgment record that Salembier, the only individual discussed in this context by the plaintiffs, was an officer or director of Heritage Lanterns. If he had no fiduciary duty to Heritage Lanterns, it is doubly difficult to discern how he could have had any fiduciary duty to an employee or officer of Heritage Lanterns as a matter of law. In addition, the plaintiffs offer no evidence that Metalcrafters assumed any duty to advise Heritage Lanterns with respect to the use of the brake press.⁹

⁹ The plaintiffs state, without citation to authority or further elaboration, that “it is axiomatic that under master and servant law, and the law of agency, Mr. Salembier had a duty to supervise, and train, employees under his direct control.” Plaintiffs’ Opposition at 9. The plaintiffs apparently assume that, because the two corporations were somehow affiliated, McCabe reported to Salembier and Salembier was “ultimately in charge of the bottom line at Heritage Lanterns,” Plaintiffs’ SMF ¶ 20; Metalcrafters’ Responsive SMF ¶ 20, at the time of the transfer of the press brake, a duty to train arose. However, a parent corporation is not responsible for the working conditions of its subsidiary’s employees merely on the basis of the parent–subsidiary relationship. *Muniz v. National Can Corp.*, 737 F.2d 145, 148 (1st Cir. 1984). If the plaintiffs’ reference to “master and servant law” is intended to suggest that McCabe was an employee of Metalcrafters, his recovery on this theory would be barred by Maine’s workers’ compensation law, 39-A M.R.S.A. § 104, assuming that the plaintiffs could establish that Heritage Lanterns was the alter ego of Metalcrafters and that piercing the corporate veil would be justified. *See generally LaBelle v. Crepeau*, 593 A.2d 653, 655 (Me. 1991).

The plaintiffs' first alternative argument in support of their negligence claim is presented under the heading "Duty based on Notice of a Risk to the Seller or Supplier of a Machine," Plaintiffs' Opposition at 10, although most of the authority cited in this section of the plaintiffs' memorandum is case law that does not deal with that particular fact pattern. It is not clear whether the plaintiffs claim that all of the sections of the Restatement of Torts to which they refer in this section of their memorandum are applicable to this case or rather merely mean to point out that the Law Court has specifically adopted several of those sections in the various opinions cited. If the plaintiffs' intent is the former, the following cited cases and the manner in which they refer to specific sections of the Restatement are inapplicable to the instant negligence claim: *Adams v. Buffalo Forge Co.*, 443 A.2d 932, 939 (Me. 1982) (referring to comment h and i to section 395 in connection with analysis of need for privity in negligence action alleging product defect); *Stanley v. Schiavi Mobile Homes, Inc.*, 462 A.2d 1144, 1148 (Me. 1983) (discussing, but not deciding, whether negligence and strict liability claims may both be brought in design defect cases, comparing section 398 of Restatement with 14 M.R.S.A. § 221); *Marois v. Paper Converting Mach. Co.*, 539 A.2d 621, 625 (Me. 1988) (discussing evidentiary issues in negligence case; no mention of Restatement); *Larue v. National Union Elec. Corp.*, 571 F.2d 51 (1st Cir. 1978) (discussing exception to privity requirement in negligence and warranty case; no mention of Restatement). If the plaintiffs merely mean to argue by citation of this case law that they may bring claims both for strict liability and for negligence in this action, it is not necessary to reach that point because I have already concluded that Metalcrafters is entitled to summary judgment on the strict liability claim. If the plaintiffs mean by their citation of *Larue* to suggest that foreseeability of the risk of McCabe's injury is an issue here, they present no argument on that point, and Metalcrafters' argument in support of summary judgment is that it had no duty to

McCabe. Motion at 11-16. Foreseeability is a separate issue, *Robert v. Consolidated Rail Corp.*, 832 F.2d 3, 6 (1st Cir. 1987), that is not before the court at this time.

The following sections of the Restatement cited by the plaintiffs appear to have relevance to their substantive argument. Section 388 provides:

One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier

(a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and

(b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and

(c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

Restatement (Second) of Torts § 388 (1965). Section 389 of the Restatement provides:

One who supplies directly or through a third person a chattel for another's use, knowing or having reason to know that the chattel is unlikely to be made reasonably safe before being put to a use which the supplier should expect it to be put, is subject to liability for physical harm caused by such use to those whom the supplier should expect to use the chattel or to be endangered by its probable use, and who are ignorant of the dangerous character of the chattel or whose knowledge thereof does not make them contributorily negligent, although the supplier has informed the other for whose use the chattel is supplied of its dangerous character.

Restatement (Second) of Torts § 389 (1965).¹⁰ The problem for the plaintiffs here, as Metalcrafters points out, Defendant Virginia Metalcrafters, Inc.'s Reply Memorandum in Support of Motion for Summary Judgment (Docket No. 20) at 4-5, is that they fail to identify any evidence that would allow a reasonable jury to conclude that Metalcrafters knew or had reason to know that the press brake was or was likely to be dangerous for the use for which it was supplied. The only evidence in the summary

¹⁰ The plaintiffs also mention section 399, which essentially refers back to the two sections already quoted: "A seller of a chattel, manufactured by a third person, who sells it knowing that it is, or is likely to be, dangerous is subject to liability as stated in §§ 388-390." Restatement (Second) of Torts § 399 (1965).

judgment record on this point is that Metalcrafters had employed the press brake for the same use for 24 years without incident or injury. Salembier Aff. ¶9. The plaintiffs state that “[t]here are a variety of press brake cases, mostly in a products liability context, documenting the unreasonably dangerous nature of the machine conveyed to H[eritage] L[anterns].” Plaintiffs’ Opposition at 11. However, they do not cite any such cases. Moreover, a defendant can reasonably be said to have notice of such a possibility when the lawsuits in question have been filed against it, *see, e.g., Marois*, 539 A.2d at 625, not when they have been filed against other defendants in other jurisdictions. Similarly, there is no evidence in the summary judgment record to support a conclusion that the press brake could not be made reasonably safe for the use that Metalcrafters expected it to be employed by Heritage Lanterns, since that use was the same use to which it had been put by Metalcrafters. In addition, the plaintiffs fail to explain why the existence of the warning label on the press brake, Exh. A to Plaintiffs’ SMF, was not sufficient to give Metalcrafters reason to believe that any users at Heritage Lanterns would be made aware of any dangerous condition or character of the machine itself, if such condition or character in fact existed.¹¹

The plaintiffs do discuss three reported decisions from two other states which they contend “are highly probative on the issue of duty.” Plaintiffs’ Opposition at 11. It may be that these are also the cases which the plaintiffs contend provide evidence of the dangerous nature of the press brake at issue in this case. Even if the plaintiffs had provided evidence that Metalcrafters was aware, or had reason to be aware of these cases, and even if such evidence were sufficient under Maine law, the cited cases are nevertheless distinguishable. In *Smith v. Verson Allsteel Press Co.*, 393 N.E.2d 598 (Ill.App. 1979), the plaintiff sued only on a theory of strict liability, *id.* at 600, and the existence of a duty accordingly was not in issue. There is no discussion in the opinion of the “unreasonably

¹¹ McCabe himself used the machine for 11 years before he was injured.

dangerous nature” of the press brake; the issue was whether the press brake had defects of manufacture and design when it was first sold that were causally related to the plaintiff’s injury. *Id.* at 604-05. In *Lambertson v. Cincinnati Corp.*, 257 N.W.2d 679 (Minn. 1977), the plaintiff sued the manufacturer of a press brake for injuries received when he reached through the jaws of the machine while a fellow employee allowed the ram to descend, *id.* at 682. The defendant did not contest on appeal the sufficiency of the evidence concerning safety devices and features that could have been installed at the time of manufacture — five years before the injury — to support a finding of negligence. *Id.* Accordingly, the relevance of this case to the instant case, in which there is no evidence concerning the availability of safety features in 1949 and negligence is very much contested, is very limited. There is no discussion of the question whether the defendant had a duty to the plaintiff. As was the case with *Smith*, there is no discussion in the *Lambertson* opinion of the “unreasonably dangerous nature” of the press brake. *Scott v. Dreis & Krump Mfg. Co.*, 326 N.E.2d 74 (Ill. App. 1975), the third case upon which the plaintiffs rely, was also limited to a strict liability claim, *id.* at 77. The question whether the press brake involved in the plaintiff’s injury was unreasonably dangerous was in fact raised in the context of strict liability, but, unlike the present summary judgment record, the plaintiff identified a certain alleged defect in the design of the machine as the basis for his claim that the machine was unreasonably dangerous, *id.* at 83. The court discussed only the duty of a manufacturer, which it found to be nondelegable, to produce a product that is reasonably safe; the manufacturer was not allowed to introduce evidence to show that the duty to incorporate appropriate safety devices falls upon the purchaser of the product. *Id.* at 84-85. There is no discussion of negligence or mention of the Restatement in the *Scott* opinion.

Finally, the plaintiffs assert in a footnote that “[a] post-sale duty to warn might have arisen based on V[irginia] M[etalcrafters]’ experience with the new press.” Plaintiffs’ Opposition at 11 n.1.

This is an apparent reference to the undisputed facts that Metalcrafters bought a new “replacement” press brake in 1988 which had a “footshield device,” an operator’s manual, and “restraint straps” about 4 to 5 feet above the pinch point, none of which accompanied or were present on the 1949 press brake at issue. Plaintiffs’ SMF ¶¶ 14, 26-28, 32; Metalcrafters’ Responsive SMF ¶¶ 14, 26-28, 32.¹² The plaintiffs cite section 312 of the Restatement in support of this argument, Plaintiffs’ Opposition at 11, n.1, but that section deals with the intentional infliction of emotional distress, not duty to warn, Restatement (Second) of Torts § 312 (1965). The post-sale duty to warn in negligence law has almost always been discussed with respect to manufacturers. *See* Memorandum Decision on Plaintiffs’ Motion for Reconsideration, *Davies v. Datapoint Corp.*, Docket No. 94-56-P-DMC, United States District Court for the District of Maine (January 19, 1996), at 5-8 & n.5 and cases cited therein. Even if the duty were applicable to an intervening user and seller, an issue which need not be decided here, the fact that the manufacturer of a press brake provided two possible safety devices

¹² Metalcrafters qualifies its response to paragraph 32, Metalcrafters’ Responsive SMF ¶ 32, but the substance of that qualification makes no difference for the purpose of this analysis.

with a machine manufactured in 1988 that were not provided with a machine manufactured in 1949 does not mean that the 1949 machine necessarily has dangers associated with its foreseeable use that are not open and obvious to foreseeable users about which the intervening seller accordingly has a duty to warn a buyer. The plaintiffs offer no statistical evidence or empirical studies showing that injuries that could be prevented by the safety devices at issue were likely to occur in their absence. Unlike the danger of contracting cumulative trauma disorders from the use of computer keyboards that was at issue in *Davies*, the danger of injury when placing one's hand beneath the ram of a press brake is comparatively obvious and specifically mentioned in the warning label on the press brake. The plaintiffs have offered no evidence that would allow a reasonable jury to find that Metalcrafters had a post-sale duty to warn in this case.

Metalcrafters is entitled to summary judgment on Count III.

D. Loss of Consortium

Because I recommend the entry of summary judgment on the substantive claims upon which Theresa McCabe's claim for loss of consortium necessarily relies, *Gillchrest*, 532 A.2d at 639, despite Metalcrafters' failure to mention this claim in its motion for summary judgment, I recommend that summary judgment for Metalcrafters be entered on Count IV as well.

IV. Conclusion

For the foregoing reasons, I recommend that the motion of defendant Virginia Metalcrafters, Inc. for summary judgment be **GRANTED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Date this 8th day of December, 2000.

David M. Cohen
United States Magistrate Judge

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