



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 material facts are appropriately presented in the parties’ respective statements of material facts. In August 1994 Killington Ltd. executed a contract with the defendant for the purchase and installation of a new ski lift at Sugarloaf Mountain Corporation’s facility in Carrabassett, Maine (“the Contract”). Garaventa CTEC, Inc.’s Statement of Undisputed Material Facts (“CTEC’s SMF”) (Docket No. 14) ¶ 1 & Exh. A to Garaventa CTEC, Inc.’s Motion for Summary Judgment, etc. (“Motion”) (Docket No. 12); Plaintiff’s Response to Garaventa CTEC’s Statement of Material Facts (“Plaintiff’s Responsive SMF”) (Docket No. 16) ¶ 1.<sup>1</sup> The rights and obligations of Killington Ltd. under this contract have been assigned to Sugarloaf Mountain Corporation (“Sugarloaf”). Report at 1. The plaintiff was apparently employed by Sugarloaf at all relevant times.<sup>2</sup>

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<sup>1</sup> Counsel for the plaintiff has confirmed that the statement “No response” in this document is intended and may be construed as an admission where, as in paragraph 1, it appears. Report of Conference of Counsel (“Report”) (Docket No. 22) at 1.

<sup>2</sup> This fact, like others prefaced in this recitation by the word “apparently,” is assumed by both parties in their respective submissions in connection with the motion and is essential for resolution of the motion although it is not presented in either party’s statement of material facts.

On August 17, 1995 Sugarloaf maintenance personnel were rigging a haul rope on the ski lift that is the subject of the contract to allow its resplicing. Affidavit of John Diller (“Diller Aff.”) (Exh. B to Motion) ¶ 8; Affidavit of Scott Shanaman (“Shanaman Aff.”) (Exh. F to Motion) ¶ 9. The ski lift had apparently been in operation for one ski season prior to this date. The plaintiff had not been involved in rigging and splicing chair lift cable prior to this date. [Deposition of John Chasse] (“Plaintiff’s Dep.”), Exh. E to Plaintiff’s Statement of Material Facts in Opposition to Defendant’s Motion for Summary Judgment (“Plaintiff’s SMF”) (Docket No. 17), at 24.<sup>3</sup> The plaintiff was asked by Scott Shanaman, who was in charge of the job, to put an anti-spin timber into the rigging; as he did so, the timber spun and the plaintiff’s hand was caught in the haul rope and cables. *Id.* at 50, 54-55; Shanaman Aff. ¶ 9.

On and before August 17, 1995 Sugarloaf maintained its ski lifts and trained its lift maintenance personnel to rig haul ropes to resplice the wire ropes used on ski lifts. Affidavit of Tom Shaw (“Shaw Aff.”) (Exh. C to Motion) ¶ 3; Affidavit of John Roderick (“Roderick Aff.”) (Exh. D to Motion) ¶¶ 4-6.<sup>4</sup> On August 17, 1995 Sugarloaf maintenance personnel, not including the plaintiff, were using a six-part block and tackle to de-tension the wire rope of the ski lift manufactured by the defendant; they had placed six by six inch timbers approximately ten feet long as anti-spin devices. Shaw Aff. ¶ 7; Shanaman Aff. ¶ 10. The maintenance personnel involved in this operation were aware of the risk of wire rope rotation during splicing operations. Affidavit of Donald Cutler (“Cutler Aff.”) (Exh. E to Motion) ¶ 7; Roderick Aff. ¶ 6; Shaw Aff. ¶¶ 4-5; Shanaman Aff. ¶ 7. As the maintenance personnel involved in the job began to add tension to the block and tackle rigging, a block began to

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<sup>3</sup> The defendant has filed no response to the plaintiff’s statement of material facts filed in opposition to the Motion (Docket No. 17) and accordingly all the factual statements included therein are deemed admitted to the extent that they are properly supported by citations to the summary judgment record. Local Rule 56(d) & (e).

<sup>4</sup> The plaintiff disputes this paragraph of the defendant’s statement of material facts because, he asserts, the affidavits are “insufficient” due to the fact that they do not “indicate what training, if any, was received.” Plaintiff’s Responsive SMF ¶ 4. Such detail is not (*continued on next page*)

turn. Defendant's SMF ¶ 7; Plaintiff's Responsive SMF ¶ 7. The workers realized that they had not placed a precautionary anti-spin device onto one of the blocks. *Id.* There were no employees or representatives of the defendant on the scene or involved in the operation on August 17, 1995 in which the plaintiff was injured. Diller Aff. ¶ 8; Roderick Aff. ¶ 9. Sugarloaf did not expect the defendant to provide any training in rigging and resplicing. Roderick Aff. ¶ 8. The Contract sets forth the terms of a warranty on the ski lift. Contract at 7-9. The warranty term extended to December 9, 1996. *Id.* at 7. The American National Standard for Passenger Tramways — Aerial Tramways, Aerial Lifts, Surface Lifts, and Tows — Safety Requirements published by the American National Standards Institute (Exh. H to Motion) apply to the ski lift at issue in this case. Deposition of Samuel L. Geise, Jr. (Exh. I to Motion) at 54-55. The defendant provided Sugarloaf with an operation and maintenance manual for the ski lift. [Deposition of Jan Leonard] (Exh. C to Plaintiff's Responsive SMF) at 141.

### **III. Discussion**

The plaintiff asserts three claims against the defendant: strict liability under 14 M.R.S.A. § 221, breach of warranty and negligence. First Amended Complaint (Docket No. 6) ¶¶ 15-24. The defendant seeks summary judgment on each claim.

#### **A. Strict Liability**

The state statute invoked by the plaintiff in support of Count I of the first amended complaint provides:

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

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required for purposes of this summary judgment motion. If it were, it is presented in paragraph 5 of the defendant's statement of material facts, to which the plaintiff's objection, *id.* ¶ 5, is not responsive.

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. The parties agree that the basis of the plaintiff's claim under this statute is an alleged failure to warn, Motion at 10; Opposition of Plaintiff to Defendant's Motion for Summary Judgment, etc. ("Plaintiff's Opposition") (Docket No. 15) at 8-10, although the specific substance of the allegedly required warning is not entirely clear. The plaintiff refers to the required warning as "instructions, warnings or training . . . concerning foreseeable rigging and splicing dangers," Plaintiff's Opposition at 10; "detailed maintenance instructions and procedures concerning rigging and resplicing of the haul rope," *id.*; and "warning about the tendency of wire rope to spin during the rigging process," *id.* The defendant limits its discussion to an alleged duty to warn of the possibility of twisting or spinning of the wire rope during splicing. Motion at 10-12; Garaventa CTEC, Inc.'s Reply to Plaintiff's Opposition to its Motion for Summary Judgment ("Defendant's Reply") (Docket No. 19) at 5-7.

A failure-to-warn claim sounding in strict liability subjects the supplier of a product to liability for expected users of the product for harm that results from foreseeable uses of the product if the supplier has reason to know that the product is dangerous and fails to exercise reasonable care to so inform the user. *Pottle v. Up-Right, Inc.*, 628 A.2d 672, 675 (Me. 1993).

A products liability action for failure to warn requires a three-part analysis: (1) whether the defendant held a duty to warn the plaintiff; (2) whether the actual warning on the product, if any, was inadequate; and (3) whether the inadequate warning proximately caused the plaintiff's injury.

*Id.* "[A] duty to warn arises when the manufacturer knew or should have known of a danger sufficiently serious to require a warning." *Id.*

The defendant contends that it had no duty to warn the plaintiff “that wire rope under tension may spin and that an individual should not place an object or his hand in or near a block and tackle attached to a wire rope when it is under considerable strain,” Motion at 11, because this was an open and obvious danger. A manufacturer has no duty to warn of a danger that is obvious and apparent. *Lorfano v. Dura Stone Steps, Inc.*, 569 A.2d 195, 197 (Me. 1990). The affidavits of the Sugarloaf personnel involved in ski lift maintenance and the particular incident at issue establish that they were fully aware of the danger of wire rope rotation during rigging and resplicing. Diller Aff. ¶ 6; Shaw Aff. ¶ 5; Roderick Aff. ¶ 6; Cutler Aff. ¶ 7; Shanaman Aff. ¶ 7. If the duty to warn as defined by the defendant were the only duty at issue in this case, the defendant might be entitled to summary judgment under the open-and-obvious exception. *See also* Geise Dep. at 81 (“It’s common knowledge in the industry that the ropes rotate and that it’s something to be concerned about, the rope spinning or rotating.”). However, the plaintiff has characterized the duty to include warnings and instructions on how to avoid injury during the rigging and resplicing of the wire rope on the ski lift at issue. While the affidavits offered by the plaintiffs also state that Sugarloaf or its maintenance personnel “knew the precautionary measures necessary to take to reduce the risk of wire rope rotation or spinning,” Diller Aff. ¶ 6; *see also* Shaw Aff. ¶ 5; Roderick Aff. ¶ 6; Cutler Aff. ¶¶ 7-8; Shanaman Aff. ¶ 8, the plaintiff offers the accident itself as evidence to the contrary, *see also* Shanaman Dep. at 103-04, as well as the testimony of the plaintiff’s expert witness, Robert V. Flynn, that instructions particular to the ski lift at issue were required, that the manufacturer had a duty to provide the buyer with a hazard analysis and risk assessment for maintenance purposes, and that the warning should have included identification of the specific anti-rotation measures needed during maintenance, [Deposition of Robert V. Flynn]

(“Flynn Dep.”) (Exh. G to Plaintiff’s SMF) at 65, 69-70, 95. This evidence is sufficient to raise a dispute of material fact concerning the existence of a duty to warn in this case.<sup>5</sup>

The defendant also argues that the alleged failure to warn was not a proximate cause of the plaintiff’s injury, addressing the third prong of the standard. Motion at 11-12. This is so, it contends, because the actual cause of the injury was Shanaman’s decision to “place[] the anti-spin device in the wrong location.” *Id.* at 12. However, the plaintiff’s description of the alleged duty to

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<sup>5</sup> Because the defendant has not responded to the plaintiff’s statement of material facts, *see* footnote 3 *supra*, the factual statements included therein taken from Flynn’s deposition testimony must be deemed to be admitted to the extent that they are properly supported in the summary judgment record. Local Rule 56(e). The defendant does not object to, or even mention, Flynn’s testimony in its reply memorandum. However, the defendant did file, at the same time it filed the instant motion, a motion *in limine* to exclude Flynn’s testimony. Garaventa CTEC, Inc.’s Motion *In Limine* to Exclude the Testimony of Plaintiff’s Designated Expert Witnesses, etc. (Docket No. 13). While it would have been better practice for counsel for the defendant to respond to the plaintiff’s statement of material facts and to state in connection with the motion for summary judgment its objection to Flynn’s testimony, so as to make clear the defendant’s intention to generate the issue raised *in limine* in its opposition to the summary judgment motion, I conclude that, despite this failure, I must necessarily consider the merits of the motion *in limine* in order to be sure that the plaintiff’s opposition to the motion for summary judgment relies on evidence that is “properly supported.” While Flynn’s qualifications are not specific to the ski lift industry or even to wire rope rigging, I conclude that the defendant’s objections to his qualifications go more to the weight of his testimony than to its admissibility. Flynn is not offered to testify about design or engineering issues, but rather with respect to the instructions or warnings arguably necessary to allow foreseeable maintenance of the ski lift to be conducted safely and how such information should have been obtained and presented. Under these circumstances, I conclude that his testimony should not be totally barred. *See Bogosian v. Mercedes-Benz of N. Am., Inc.*, 104 F.3d 472, 476-77 (1st Cir. 1997) (discussing necessary qualifications when expert offered to testify concerning design and engineering issues); *Tokio Marine & Fine Ins. Co. v. Grove Mfg. Co.*, 958 F.2d 1169, 1174-75 (1st Cir. 1992) (same). *See generally Marmol v. Biro Mfg. Co.*, 1997 WL 88854 (E.D.N.Y. Feb. 24, 1997), at \*4-\*5. Accordingly, I will consider Flynn’s testimony cited by the plaintiff in support of his opposition to the motion for summary judgment.

warn is broad enough to encompass a requirement that the defendant inform the buyer of its ski lift where and how to place anti-spin devices during maintenance, and Flynn testified that the failure of the defendant to do so was a “direct cause” of the accident. Flynn Dep. at 127. This evidence is sufficient to avoid the entry of summary judgment due to an alleged failure to provide proof of the third element of the legal standard for strict liability claims.

Accordingly, I conclude that the defendant is not entitled to summary judgment on Count I of the amended complaint.

### **B. Warranty Claims**

In Count II of the amended complaint, the plaintiff contends that the defendant breached express and implied warranties that the ski lift, “including the wire rope, was without defect, safe and reasonably fit for use by persons who were foreseeable users of the machine.” First Amended Complaint ¶ 20. The defendant contends that the express warranty included in the contract at issue does not extend to the plaintiff by its terms and that the plaintiff cannot establish the breach of an implied warranty as a matter of law. Motion at 6-10. The plaintiff responds that the defendant’s failure to give “instructions, warnings or training” to Sugarloaf personnel “concerning foreseeable rigging and splicing dangers” breached warranties stated in the contract and that implied warranties of merchantability and fitness for a particular purpose were also breached.<sup>6</sup> Plaintiff’s Opposition at 4-7. In addition, he contends both that he was a party to the contract and, in the alternative, that he was a third-party beneficiary of the contract. *Id.* at 7-8.<sup>7</sup>

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<sup>6</sup> The plaintiff states that “[t]he enumerated warranties on page 8 of the Contract make clear that the warranty of merchantability applies.” Plaintiff’s Opposition at 7. Since such a warranty is an implied warranty, which arises by law out of certain factual circumstances, it is not clear whether the plaintiff means to argue that the contract contains an express warranty of merchantability. Since the section of his memorandum in which this puzzling statement appears is entitled “Implied Warranties,” such an intention is unlikely. In any event, my analysis assumes that the warranties at issue are the specified implied warranties as those terms are traditionally recognized at common law and in the Uniform Commercial Code.

<sup>7</sup> As the plaintiff correctly points out, he need not be a party to or intended beneficiary of the contract in order to invoke the protection of implied warranties. Plaintiff’s Opposition at 7-8. However, it is also quite clear as a matter of very basic contract law that the  
(continued on next page)

The plaintiff lists nine specific instances of language in the contract that he contends create express warranties that were breached by the defendant.<sup>8</sup> *Id.* at 4-5. Of these nine, the following five simply cannot be construed to extend to the circumstances surrounding the plaintiff's injury: (i) "CTEC shall be responsible for the proper and timely engineering, design, manufacture, delivery and installation of the Ski Lift," Contract at 2;<sup>9</sup> (ii) "CTEC understands and acknowledges that in all phases of the Project that Killington is relying on CTEC's superior skill and judgement to select [sic] design, and construct a ski lift," *id.* at 7; (iii) "CTEC further warrants to Killington that all materials and equipment furnished under the contract will be new, unless otherwise specified, will be of good and merchantable quality, free from defects, and will be in conformance with the plans and specifications," *id.* at 8; (iv) "except as specifically provided herein to the contrary, CTEC shall be liable to Killington or Sugarloaf and its business invitees for loss, damage and expenses arising out of defects in workmanship or material," *id.*; and (v) an alleged warranty apparently implied from the absence in Attachment C to the contract of any mention of splicing and rigging in a list of responsibilities of Killington or Sugarloaf, *id.* at 2 and Plaintiff's Opposition at 5. The last item, of course, cannot be considered an express warranty at all.

The first of the remaining four alleged express warranties is the following: "CTEC shall be responsible for initiating, maintaining, and supervising safety precautions and programs in connection with the Project that are consistent with industry standards." Contract at 2. The contract defines "the Project" as follows: "The project calls for CTEC to engineer, manufacture, deliver, install and make

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plaintiff was not a party to the contract between Killington and the defendant. Since I conclude that the express warranties set forth in that contract do not extend to the plaintiff, it is unnecessary to address separately the question whether he was a third-party beneficiary of that contract.

<sup>8</sup> The plaintiff cites 11 M.R.S.A. § 2-313 in support of the assertion that express warranties can be created without use of the words warranty or guarantee or the specific intention to create a warranty, Plaintiff's Opposition a 5, but identifies no express warranties, however allegedly created, other than the nine discussed here.

<sup>9</sup> The plaintiff also cites Attachment D to the contract in this regard, Plaintiff's Opposition at 5, but nothing in that attachment could possibly be construed to create a warranty that would be applicable to the circumstances of the plaintiff's injury.

suitable for public use, for Sugarloaf/USA . . . the Super Quad, detachable chairlift, as described in the specifications attached hereto . . . .” *Id.* at [1]. Given this definition, the responsibility for safety precautions and programs set forth in the previously quoted contract language cannot be construed, as a matter of law, to extend beyond the installation and readying for public use of the ski lift. *See Triple-A Baseball Club Assoc. v. Northeastern Baseball, Inc.*, 832 F.2d 214, 220 (1st Cir. 1987) (interpretation of unambiguous contract language is matter of law for court). The plaintiff’s injury occurred during maintenance conducted by Sugarloaf well after the ski lift had been installed and used by the public. Accordingly, this warranty does not apply to the plaintiff’s injury.

The same is true of the second of the four remaining alleged express warranties cited by the plaintiff: “CTEC shall take the necessary safety precautions calculated to provide adequate protection against damage, injury, or loss to (1) all employees *on the Project* and other persons who may be affected *by the Project* . . . .” Contract at 2 (emphasis added).<sup>10</sup>

The third of the four remaining alleged express warranties listed by the plaintiff provides:

CTEC warrants to Killington that the Ski Lift shall be designed, manufactured and engineered in conformity with the specifications attached hereto and with the highest degree of care, and up to the standards of the skill and judgement exercised by those skilled in the profession, and that said design, engineering and manufacturing shall conform both to all applicable safety and engineering codes.

*Id.* at 7-8. The plaintiff’s claim that CTEC failed to provide safety training or instructions or warnings about the dangers of the wire rope during routine maintenance is not within the scope of design, manufacture or engineering of the ski lift itself. This warranty does not extend to the circumstances of the plaintiff’s injury.

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<sup>10</sup> The plaintiff also cites pages 46 and 48 of the deposition of Jan Leonard in this regard. Plaintiff’s Opposition at 5. Leonard’s interpretation or understanding of unambiguous contract language is irrelevant to the court’s consideration of that contract language.

The final express warranty listed by the plaintiff is an alleged promise by CTEC in Attachment D of the contract to “install and splice haul rope.” Plaintiff’s Opposition at 5. Attachment D is entitled “Construction Tabulation, Responsibilities of CTEC” and lists as item 11 “Install and splice haul rope.” Given the title of the attachment and the other 21 “responsibilities” listed in the attachment, it is clear that the splicing of the haul rope to which this item refers is splicing during installation. In no sense can this entry be reasonably construed to extend to all splicing of the haul rope at any time during the life of the ski lift.

The defendant is entitled to summary judgment on the claims of breach of express warranties.

The plaintiff’s argument concerning implied warranties is extremely brief and less than clear. Plaintiff’s Opposition at 7. He mentions the implied warranties of merchantability and fitness for a particular purpose. Under Maine law, the implied warranty of merchantability “requires that a product be fit for the ordinary purposes for which such products are purchased. *Lorfan*, 569 A.2d at 197 (citation and internal punctuation omitted); *see also* 11 M.R.S.A. § 2-314. The plaintiff’s claim that the defendant failed to warn or train Sugarloaf or its employees concerning the dangers of wire rope spinning during splicing and how to minimize those dangers does not suggest that the ski lift was not fit for the ordinary purpose for which it was used — to transport skiers up a mountain. There is therefore no basis in the record for a claim of breach of the implied warranty of merchantability.

The implied warranty of fitness for a particular purpose, under Maine law,

requires that: (1) the purchaser have a particular purpose *outside* the scope of ordinary purposes; (2) the seller at the time of contracting has reason to know of the particular purpose; (3) the seller has reason to know that the purchaser is relying on the seller’s skill or judgment to furnish appropriate goods; and (4) the purchaser must, in fact, rely upon the seller’s skill or judgment.

*Lorfan*, 569 A.2d at 197 (emphasis in original). *See also* 11 M.R.S.A. § 2-315. The plaintiff does not even begin to suggest, in his memorandum or in his statement of material facts, that Sugarloaf or

Killington had a particular purpose in buying the ski lift that was outside the scope of the ordinary purposes of such a purchase. Accordingly, the defendant is entitled to summary judgment on any claim for breach of the implied warranty of fitness for a particular purpose.

The defendant is entitled to summary judgment on Count II of the amended complaint.

### **C. Negligence**

The defendant contends that its failure to warn, if it had a duty to do so under the circumstances of this case, was not the proximate cause of injury to the plaintiff. Motion at 12-14.

In order to show negligence under Maine law, Plaintiff must show (1) a duty owed to Plaintiff by Defendant; (2) a breach of that duty; and (3) that the breach was the actual and legal cause of Plaintiff's injury.

*Sullivan v. Young Bros. & Co.*, 893 F. Supp. 1148, 1156 (D.Me. 1995), *reversed in part on other grounds* 91 F.3d 242 (1st Cir. 1996). The defendant's argument addresses the third element of this standard. The plaintiff does not address the defendant's contentions concerning this claim. Because this is a motion for summary judgment, the court must nonetheless consider the merits of the argument. *Mullen v. St. Paul Fire & Marine Ins. Co.*, 972 F.2d 446, 452 (1st Cir. 1992). For the reasons stated in my analysis of the proximate cause element of the legal standard applicable to strict liability claims, I conclude that the defendant is not entitled to summary judgment on Count III on this basis.

### **IV. Conclusion**

For the foregoing reasons, I recommend that the defendant's motion for summary judgment be **GRANTED** as to Count II of the amended complaint and otherwise **DENIED**.

### **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 2nd day of January, 2001.

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David M. Cohen  
United States Magistrate Judge

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