

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

BARBARA AMBURGEY, et al.,)	
)	
Plaintiffs)	
)	
v.)	Civil No. 06-149-P-S
)	
ATOMIC SKI USA, INC.,)	
)	
Defendant)	

**RECOMMENDED DECISION ON DEFENDANT’S
MOTION FOR SUMMARY JUDGMENT**

Remaining defendant Atomic Ski USA, Inc. (“Atomic”) moves for summary judgment as to all counts against it on the basis that plaintiff Barbara Amburgey signed a release insulating it from any liability arising from paralyzing injuries she suffered during a fall at Sunday River Ski Resort (“Sunday River”) in Bethel, Maine on December 8, 2002. *See* Defendant Atomic Ski USA, Inc.’s Motion for Summary Judgment, etc. (“Defendant’s S/J Motion”) (Docket No. 62) at 1; *see generally* Complaint and Demand for Jury Trial (“Complaint”), attached to Notice of Removal (Docket No. 1).¹ For the reasons that follow, I recommend that the motion be denied.

I. Summary Judgment Standards

A. Federal Rule of Civil Procedure 56

Summary judgment is appropriate only if the record shows “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.” Fed. R. Civ. P. 56(c); *Santoni v. Potter*, 369 F.3d 594, 598 (1st Cir. 2004). “In this regard, ‘material’ means

¹ Amburgey and her husband, Leonard Amburgey, sued two other companies, Atomic Austria GmbH (“Atomic Austria”) and AMER Sports Corporation (“AMER Sports”), in addition to Atomic. *See* Complaint ¶¶ 2-4. The court granted motions by Atomic Austria and AMER Sports to dismiss on the basis of lack of personal jurisdiction. *See* Order on (continued on next page)

that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant. By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party.’” *Navarro v. Pfizer Corp.*, 261 F.3d 90, 93-94 (1st Cir. 2001) (quoting *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995)).

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. *Santoni*, 369 F.3d at 598. Once the moving party has made a preliminary showing that no genuine issue of material fact exists, the nonmovant must “produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue.” *Triangle Trading Co. v. Robroy Indus., Inc.*, 200 F.3d 1, 2 (1st Cir. 1999) (citation and internal punctuation omitted); Fed. R. Civ. P. 56(e). “As to any essential factual element of its claim on which the nonmovant would bear the burden of proof at trial, its failure to come forward with sufficient evidence to generate a trialworthy issue warrants summary judgment to the moving party.” *In re Spiegel*, 260 F.3d 27, 31 (1st Cir. 2001) (citation and internal punctuation omitted).

B. Local Rule 56

The evidence the court may consider in deciding whether genuine issues of material fact exist for purposes of summary judgment is circumscribed by the Local Rules of this District. *See* Loc. R. 56. The moving party must first file a statement of material facts that it claims are not in dispute. *See* Loc. R. 56(b). Each fact must be set forth in a numbered paragraph and supported by a

Motion[s] To Dismiss (Docket No. 44), *recon. denied*, Order (Docket No. 54).

specific record citation. *See id.* The nonmoving party must then submit a responsive “separate, short, and concise” statement of material facts in which it must “admit, deny or qualify the facts by reference to each numbered paragraph of the moving party’s statement of material facts[.]” Loc. R. 56(c). The nonmovant likewise must support each denial or qualification with an appropriate record citation. *See id.* The nonmoving party may also submit its own additional statement of material facts that it contends are not in dispute, each supported by a specific record citation. *See id.* The movant then must respond to the nonmoving party’s statement of additional facts, if any, by way of a reply statement of material facts in which it must “admit, deny or qualify such additional facts by reference to the numbered paragraphs” of the nonmovant’s statement. *See* Loc. R. 56(d). Again, each denial or qualification must be supported by an appropriate record citation. *See id.*

Failure to comply with Local Rule 56 can result in serious consequences. “Facts contained in a supporting or opposing statement of material facts, if supported by record citations as required by this rule, shall be deemed admitted unless properly controverted.” Loc. R. 56(e). In addition, “[t]he court may disregard any statement of fact not supported by a specific citation to record material properly considered on summary judgment” and has “no independent duty to search or consider any part of the record not specifically referenced in the parties’ separate statement of fact.” *Id.*; *see also, e.g., Cosme-Rosado v. Serrano-Rodriguez*, 360 F.3d 42, 45 (1st Cir. 2004) (“We have consistently upheld the enforcement of [Puerto Rico’s similar local] rule, noting repeatedly that parties ignore it at their peril and that failure to present a statement of disputed facts, embroidered with specific citations to the record, justifies the court’s deeming the facts presented in the movant’s statement of undisputed facts admitted.”) (citations and internal punctuation omitted).

II. Factual Context

The parties' statements of material facts, credited to the extent either admitted or supported by record citations in accordance with Local Rule 56 and viewed in the light most favorable to the plaintiffs as nonmovants, reveal the following relevant to this recommended decision:²

On December 8, 2002 Amburgey fell while skiing at Sunday River, sustaining severe and permanent injuries, including vertebral fractures and spinal-cord damage. Statement of Additional Material Facts ("Plaintiffs' Additional SMF"), commencing on page 4 of Plaintiffs' Statement of Opposing and Additional Material Facts ("Plaintiffs' Responsive SMF") (Docket No. 66), ¶ 1; Defendant Atomic Ski USA, Inc.'s Reply to Plaintiffs' Statement of Material Facts Opposing Summary Judgment ("Defendant's Reply SMF") (Docket No. 75) ¶ 1. In December 2002, Sunday River was owned by American Skiing Company. Defendant Atomic Ski USA, Inc.'s Statement of Material Facts in Support of Its Motion for Summary Judgment ("Defendant's SMF") (Docket No. 63) ¶ 3; Statement of Opposing Material[] Facts ("Plaintiffs' Opposing SMF"), commencing on page 1 of Plaintiffs' Responsive SMF, ¶ 3.³

On December 8, 2002 Amburgey paid for one day's use of a pair of Atomic SX-11 skis on a "demo" basis from the Crisports ski shop at Sunday River. Plaintiffs' Additional SMF ¶ 2; Defendant's Reply SMF ¶ 2. She decided to demo the Atomic SX-11 skis because she wanted to see how they performed before making a decision whether to purchase a pair of those skis. *Id.* ¶ 3. In

² As noted above, Local Rule 56 requires a party responding to a statement of material facts to admit, deny or qualify the underlying statement. *See* Loc. R. 56(c)-(d). The concept of "qualification" presupposes that the underlying statement is accurate but in some manner incomplete, perhaps even misleading, in the absence of additional information. Except to the extent that a party, in qualifying a statement, has expressly controverted all or a portion of the underlying statement, I have deemed it admitted.

³ The defendant further states, *inter alia*, that it distributed the skis and bindings on which Amburgey was skiing at the time of the accident to Crisports, a ski shop located at Sunday River. Defendant's SMF ¶ 2. The plaintiffs deny this statement on the basis that it is not supported by the citation given, and indeed it is not. Nonetheless, the plaintiffs' memorandum of law makes clear that they do not dispute that (i) Atomic is a wholesaler of ski equipment, and (ii) Crisports is a ski shop located at Sunday River. *See* Plaintiffs' Amended Opposition to Motion for Summary (continued on next page)

connection with the rental, she signed an “Equipment Rental Form and Release from Liability.” Defendant’s SMF ¶ 7; Plaintiffs Barbara Amburgey and Leonard Amburgey’s Response to Request for Admissions (“Amburgey Admissions”), attached thereto, ¶¶ 2-3; Equipment Rental Form and Release From Liability (“Rental/Release Form”), Exh. 1 to Amburgey Admissions.⁴ The front side of the Rental/Release Form seeks certain personal information, including name, address, height, weight and skier type. Defendant’s SMF ¶ 8; Rental/Release Form at 1.⁵ Amburgey’s husband, Leonard Amburgey, had visited the ski shop the previous day to arrange and pay for her demo. Plaintiffs’ Additional SMF ¶ 4; Defendant’s Reply SMF ¶ 4.⁶ When he did so, he provided the Crisports ski technician with the information that appears at the top of the front side of the Rental/Release Form. *Id.* ¶ 5.⁷ A technician who was a Sunday River employee, John Williamson, made a determination of the settings for the demo ski bindings based upon Amburgey’s height,

Judgment (“Plaintiffs’ S/J Opposition”) (Docket No. 72) at 1 & 12 n.2. I therefore take those facts into account.

⁴ I have set forth so much of Defendant’s SMF ¶ 7 as is supported by the citations given, the plaintiffs having denied it on the basis that it was unsupported by those citations. *See* Plaintiffs’ Opposing SMF ¶ 7.

⁵ I have set forth so much of Defendant’s SMF ¶ 8 as is supported by the citations given, the plaintiffs having denied it on the basis that it was unsupported by those citations. *See* Plaintiffs’ Opposing SMF ¶ 8.

⁶ The defendant objects to this statement, as well as to paragraphs 5-6 and 8-26 of the Plaintiffs’ Additional SMF, on the ground that they are not relevant to any genuine and material issue of fact. *See* Defendant’s Reply SMF ¶¶ 4-6, 8-26. Those objections are overruled. The statements to which the defendant objects describe the circumstances of Amburgey’s December 8, 2002 ski-equipment rental and execution of the Rental/Release Form. *See* Plaintiffs’ Additional SMF ¶¶ 4-6, 8-26. That evidence is relevant to the question whether the defendant is a third-party beneficiary of the Rental/Release Form. While “[t]here is considerable dispute concerning whether it is appropriate to consider extrinsic evidence regarding third-party beneficiary status[.]” *DeBary v. Harrah’s Operating Co.*, 465 F. Supp.2d 250, 263 (S.D.N.Y. 2006) (citation and internal quotation marks omitted), the Law Court has signaled in at least one recent case, consistent with commentary to the Restatement (Second) of Contracts § 302 (1981), that recourse to such evidence is appropriate. *See Perkins v. Blake*, 2004 ME 86, ¶ 9, 853 A.2d 752, 755 (“In applying section 302 to this case, it is necessary to determine if recognition of Blake’s right is appropriate to effectuate the intention of the parties in the 2001 release and whether the circumstances indicate that Perkins and Dairyland intended to give Blake the benefit of a complete release.”); Restatement (Second) of Contracts § 302 cmt. a (1981) (“A court in determining the parties’ intention should consider the circumstances surrounding the transaction as well as the actual language of the contract.”); *see also, e.g., Public Serv. Co. of N.H. v. Hudson Light & Power Dep’t*, 938 F.2d 338, 342 (1st Cir. 1991) (“It is clear from the focus of the section 302(1) inquiry that the requisite manifestation of the parties’ intent may be evinced in the context, as well as the text, of the contract.”). The defendant also objects to paragraphs 21-24 of the Plaintiffs’ Additional SMF on the basis that they are intended to be legal conclusions. *See* Defendant’s Reply SMF ¶¶ 21-24. Those objections also are overruled. The statements set forth facts. *See* Plaintiffs’ Additional SMF ¶¶ 21-24.

⁷ The defendant qualifies this statement, inferring from the undisputed fact that Amburgey signed the Rental/Release Form that she verified the information provided by her husband. Defendant’s Reply SMF ¶ 5 (citing Plaintiffs’ Additional SMF ¶ 11).

weight, skier type, boot sole length and age. Defendant's SMF ¶ 10; Plaintiffs' Opposing SMF ¶ 10. He determined that the bindings for Amburgey should be set at a "DIN" release value of 5.5 for a skier who weighed 128 pounds, was five feet six inches tall, was a self-professed Type III (expert) skier and was 52 years old, consistent with the international industry standard and ASTM 939 for binding release values for a skier supplying that specific height, weight, age and ability information. *Id.* ¶ 11.

The title at the top of the second side of the Rental/Release Form states: "Acknowledgement and Acceptance of Risks and Liability Release (Please Read Carefully)." *Id.* ¶ 13. The second side states, in part, above Amburgey's signature:

WARNING: Be aware that a ski-boot-binding system will not release or retain at ALL times or under ALL circumstances where releases or retention may prevent injury or death, nor is it possible to predict every situation in which it will release, and it is, therefore, no guarantee of your safety. If snowboards, nordic snowshoe or skiboard equipment is being furnished, I understand that the systems will not ordinarily release during use, nor is it specifically designed to release as a result of forces induced during ordinary operation and is therefore absolutely no guarantee for safety. The use of any ski equipment is an inherent risk of the sport. All forms of alpine skiing and alpine activities are hazardous.

1. As a condition of being permitted to use the ski area premises and to use the this equipment (ski/snowboard), I hereby release, Hold Harmless and Indemnify . . . Sunday River Skiway Corporation . . . their owners, affiliates, employees and agents, the equipment manufacturers and distributors (the Releasees) for any and all liability for personal injury including death and property damage in any way arising from the use of this equipment including but not limited to any alleged NEGLIGENCE on the part of the Releasees in the selection, installation, maintenance or adjustment to this equipment and its use. This Release is intended to comply with the laws of the State in which it is used and only to the extent allowed by law. If any part of this agreement is determined to be unenforceable, all other parts shall be given full force and effect.

2. I understand and acknowledge the risks of injury and death that are a part of the alpine activities conducted at the ski resort. I am aware that all forms of alpine activities, including jumping, are hazardous, filled with high risks and that falls, collisions and injuries are common occurrences in the sport. Therefore, for myself,

my heirs and assigns I accept these risks and Promise Not To Sue the Releasees for any and all losses and injury to person or property that may result from my participation in the alpine activities at this resort and from the inherent risks such as (but not limited to) those listed in the Warning above.

5. I have made no misrepresentation in regard to my height, weight, age and skier type or clinic level and I understand that this information may be used to select or adjust my equipment.

6. I verify that the indicator setting listed on this Rental Form corresponds to the setting on my ski bindings.

Id. ¶ 14.⁸ At the bottom of the Rental/Release Form, after the language quoted above, the form states: “I, the undersigned, have carefully read and understood this Acceptance of Risk and Liability Release.” *Id.* ¶ 15. Amburgey signed the Rental/Release Form. *Id.* ¶ 16.

Amburgey went to the ski shop, which is just fifty yards from the Amburgeys’ condominium, on the morning of December 8 to pick up the skis. Plaintiffs’ Additional SMF ¶ 6; Defendant’s Reply SMF ¶ 6. She brought her ski boots to the shop that day so that the ski bindings could be properly adjusted. *Id.* ¶ 7. Sunday River’s ski-binding technicians had performed work on the Amburgeys’ skis and bindings many times before December 8, 2002. *Id.* ¶ 8. Amburgey relied on Sunday River’s ski-binding technicians to properly adjust and test the bindings she used on December 8. *Id.* ¶ 9. When she picked up the demo equipment on the morning of December 8, her plan was to ski down to her condominium, say goodbye to her two children and meet her husband so that they could ski together. *Id.* ¶ 10. She spent approximately fifteen minutes in the Crisports ski shop collecting the equipment and signing the Rental/Release Form. *Id.* ¶ 11. She left the shop with the equipment, went up a lift, skied down a short trail to meet her family, then recommenced skiing. *Id.* ¶ 12. At no time during her acquisition of the demo equipment did she have any communication

⁸ The defendant’s recitation contains some minor typographical errors, which I have corrected.

or interaction with Atomic or anyone she thought was working for Atomic. *Id.* ¶ 13. The only interaction she had was with the ski technician who worked for Sunday River. *Id.* ¶ 14.

On December 8, 2002 Amburgey was aware that Crisports was owned by Sunday River and understood that Crisports was the seller or distributor of the ski equipment that she was demoing and considering for purchase. Plaintiffs' Additional SMF ¶ 15; Affidavit of Barbara Amburgey ("Amburgey Aff.") (Docket No. 67) ¶ 15.⁹ When she signed the rental form, she believed she was entering into an agreement with Sunday River to use the ski equipment that she was demoing. Plaintiffs' Additional SMF ¶ 16; Defendant's Reply SMF ¶ 16.¹⁰ When Amburgey signed the form, she did not believe she was entering into any agreement with Atomic and did not believe that the agreement was intended to benefit Atomic or anyone other than her and Sunday River. Plaintiffs' Additional SMF ¶ 17; Amburgey Aff. ¶ 17.¹¹ When Amburgey entered into the rental agreement, she had no intention of releasing Atomic from its obligation to provide her with safe and properly functioning equipment. Plaintiffs' Additional SMF ¶ 18; Amburgey Aff. ¶ 18.¹² Although she understood that there are risks inherent in the sport of alpine skiing, such as rocks, changing weather and snow conditions, she did not understand these inherent risks to include risks associated with defectively designed, manufactured or sold ski equipment. Plaintiffs' Additional SMF ¶ 19; Amburgey Aff. ¶ 19.¹³

⁹ The defendant denies this statement, *see* Defendant's Reply SMF ¶ 15; however, I view the cognizable facts in the light most favorable to the plaintiffs, as nonmovants.

¹⁰ The defendant qualifies this statement, asserting that Amburgey knew she was demoing Atomic-brand equipment. Defendant's Reply SMF ¶ 16 (citing Plaintiffs' Additional SMF ¶¶ 2-3).

¹¹ The defendant denies this statement, *see* Defendant's Reply SMF ¶ 17; however, I view the cognizable facts in the light most favorable to the plaintiffs, as nonmovants.

¹² The defendant denies this statement, *see* Defendant's Reply SMF ¶ 18; however, I view the cognizable facts in the light most favorable to the plaintiffs, as nonmovants.

¹³ The defendant denies this statement, *see* Defendant's Reply SMF ¶ 19; however, I view the cognizable facts in the light most favorable to the plaintiffs, as nonmovants.

Over the many years that Amburgey had been a skier, she had become accustomed to selecting what she believed to be high-quality ski equipment and relying upon the equipment to perform properly and to suit its intended purposes. Plaintiffs' Additional SMF ¶ 20; Defendant's Reply SMF ¶ 20. Before demoing the ski equipment on December 8, 2002, she received no warnings that the Centro 412 bindings were dangerous or defective or that they performed unpredictably, inconsistently or inappropriately under certain conditions. *Id.* ¶ 21. She also received no indications or warnings before demoing that equipment that the Centro 412 bindings might release under circumstances in which, if properly designed, manufactured and sold, bindings are not supposed to release. *Id.* ¶ 22. Had Amburgey been told that the Centro 412 bindings she demoed on December 8, 2002 were dangerous or defective or that they performed unpredictably, inconsistently or inappropriately under certain conditions, she would not have agreed to use them. *Id.* ¶ 23. Had she been told that the Centro 412 bindings might release under circumstances in which, if properly designed, manufactured and sold, bindings are not supposed to release, she would not have agreed to use them. *Id.* ¶ 24. Before renting the ski equipment on December 8, 2002 Amburgey was not told that as a condition of renting it, she had to agree to release Atomic from any liability it might have for failing to manufacture, design or sell safe and properly functioning ski bindings. Plaintiffs' Additional SMF ¶ 25; Amburgey Aff. ¶ 25.¹⁴ Prior to receiving the demo equipment on December 8, 2002 Amburgey received no particular instruction from anyone at Crisports or otherwise relating to the use or operation of the bindings. Plaintiffs' Additional SMF ¶ 26; Defendant's Reply SMF ¶ 26.¹⁵

¹⁴ The defendant denies this statement, *see* Defendant's Reply SMF ¶ 25; however, I view the cognizable facts in the light most favorable to the plaintiffs, as nonmovants.

¹⁵ The defendant asserts that soon after the accident, the Atomic equipment used by Amburgey was tested by Sunday River's certified technician and found to be performing in accordance with industry standards. Defendant's SMF ¶ 17. The plaintiffs deny this statement on the basis that it is unsupported by the citations given. *See* Plaintiffs' Opposing SMF (continued on next page)

III. Discussion

In connection with Amburgey's December 8, 2002 accident, the Amburgeys sue Atomic on theories of strict liability (Count I), breach of warranty (Count II) and negligence (Count III), alleging that the skis and bindings worn by Amburgey were sold in a defective and unreasonably dangerous condition that proximately caused her serious and permanent injuries. *See* Complaint ¶¶ 19-31. Leonard Amburgey also brings a claim for loss of consortium (Count IV), and the couple seeks punitive damages (Count V). *See id.* ¶¶ 32-38.

Atomic seeks summary judgment as to all of these counts on the ground that the Rental/Release Form is fully enforceable under Maine law and absolves it from any and all liability for Amburgey's personal injuries. *See* Defendant's S/J Motion at 4-5. Specifically, Atomic argues that (i) the language of the Rental/Release Form makes clear the parties' intent to absolve equipment distributors such as Atomic from any and all liability for injuries resulting from use of that equipment, (ii) enforcement of exculpatory clauses involving matters of purely recreational pursuits does not violate public policy, (iii) although Maine courts have not squarely addressed the enforceability of a liability release in favor of a ski equipment manufacturer or distributor, other courts have held them enforceable, and (iv) Maine design-defect caselaw suggests the Rental/Release Form is enforceable as to the Amburgeys' strict-liability theory as well as their negligence and breach-of-warranty theories. *See id.* at 5-14.¹⁶ The Amburgeys counter that:

1. Atomic, a non-party to the Rental/Release Form, failed to address the question of its standing to invoke that contract's benefits, thereby waiving that argument. *See* Plaintiffs' S/J

¶ 17. I concur that the statement is overly broad inasmuch as the citations the defendant provided support, at most, a finding that the equipment tested within normal limits on a so-called Wintersteiger machine. In any event, the statement is irrelevant to disposition of the instant motion.

¹⁶The defendant argues, and the plaintiffs do not contest, that the loss-of-consortium and punitive damages claims hinge on the viability of one or more of the strict-liability, breach-of-warranty and negligence causes of action. *See (continued on next page)*

Opposition at 3-4. Even assuming *arguendo* that Atomic did not waive the point, it loses on the merits inasmuch as it has not made the requisite showing that the parties intended it to be a third-party beneficiary of the Rental/Release Form. *See id.* at 3-8.

2. Even assuming *arguendo* that Atomic has standing to assert a Rental/Release Form defense, the language of the form does not clearly and unambiguously release Atomic from the claims asserted in this case. *See id.* at 8-17.

3. In any event, as a matter of law, a strict-liability claim cannot be extinguished via a contractual release. *See id.* at 17-20.

I agree with the plaintiffs that the defendant falls short of demonstrating that it has standing to invoke the protections of the Rental/Release Form. That is fatal to its bid for summary judgment. I need not and do not consider the defendant's arguments why summary judgment should be granted in its favor or the plaintiffs' remaining contentions why summary judgment should be denied.

As the plaintiffs posit, it is black-letter law in Maine, as elsewhere, that a contract generally does not bestow enforceable rights on a nonsignatory. *See* Plaintiff's S/J Opposition at 3; *McCarthy v. Azure*, 22 F.3d 351, 362 (1st Cir. 1994) (noting "the general rule that a contract does not grant enforceable rights to nonsignatories"); *Bresnahan v. Bowen*, 263 F. Supp.2d 131, 135-36 & n.4 (D. Me. 2003) (defendant, who collided on ski slope with plaintiff, a fellow skier, could not invoke protections of Sunday River release form signed by plaintiff when he was neither a party to that release nor had argued that he was a third-party beneficiary to it); *Hardy v. St. Clair*, 1999 ME 142, ¶ 9; 739 A.2d 368, 371 ("A release is a contract that can only bar a claim if the claimant was a party to the agreement."). Atomic adduces no evidence that it was a signatory to the Rental/Release Form.

Defendant's S/J Motion at 5 n.2; *see also generally* Plaintiffs' S/J Opposition.

See generally Defendant’s SMF; Defendant’s Reply SMF. Indeed, inasmuch as appears from the face of that agreement, it was not. *See* Rental/Release Form.

In the absence of such a showing, one wishing to invoke the protections of a contractual release must demonstrate “with special clarity” that the contract’s signatories intended it to so benefit. *See, e.g., McCarthy*, 22 F.3d at 362 (“Because third-party beneficiary status constitutes an exception to the general rule that a contract does not grant enforceable rights to nonsignatories, a person aspiring to such status must show with special clarity that the contracting parties intended to confer a benefit on him.”) (citations omitted). As the plaintiffs point out, *see* Plaintiffs’ S/J Opposition at 3-4, in moving for summary judgment the defendant made no conscious effort to do so, instead leapfrogging to the merits of the enforceability of the Rental/Release Form, *see generally* Defendant’s S/J Motion. While, in its reply brief, the defendant rejoined that it did indeed qualify as a third-party beneficiary, *see* Defendant Atomic Ski USA, Inc.’s Reply to Plaintiffs’ Memorandum Opposing Summary Judgment (“Defendant’s S/J Reply”) (Docket No. 76) at 4-6, its argument with respect to this threshold issue came too late, *see, e.g., United Musical Instruments USA, Inc. v. Gordon Music, Inc.*, 174 Fed. Appx. 582, 583 (1st Cir. 2006) (arguments not raised in primary brief are waived); *In re One Bancorp Sec. Litig.*, 134 F.R.D. 4, 10 n.5 (D. Me. 1991) (court generally will not address an argument advanced for the first time in a reply memorandum).¹⁷ For this reason alone, the defendant falls short of demonstrating entitlement to summary judgment on the basis of invocation of the protections of the Rental/Release Form.

In any event, I agree with the plaintiffs that even assuming *arguendo* the defendant preserved its right to argue this issue, it loses on the merits. *See* Plaintiffs’ S/J Opposition at 4-8. As the

¹⁷ While the defendant belatedly addressed the merits of its entitlement to third-party-beneficiary status, it did not confront the plaintiffs’ argument that, by failing to address the issue earlier, it had waived it altogether. *See* Defendant’s S/J Reply at 4-6.

defendant acknowledges, *see* Defendant’s S/J Reply at 4, Maine has adopted the test set forth in section 302 of the Restatement (Second) of Contracts to determine whether a nonsignatory to a contract qualifies as a third-party beneficiary, *see, e.g., Perkins*, 2004 ME 86, ¶ 8, 853 A.2d at 754.

That section provides:

(1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either

(a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or

(b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

(2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

Restatement (Second) of Contracts § 302 (1981). “A court in determining the parties’ intention should consider the circumstances surrounding the transaction as well as the actual language of the contract.” *Id.* cmt a.; *see also, e.g., Hudson Light & Power*, 938 F.2d at 342 (“It is clear from the focus of the section 302(1) inquiry that the requisite manifestation of the parties’ intent may be evinced in the context, as well as the text, of the contract.”); *Perkins*, 2004 ME 86, ¶ 9; 853 A.2d at 755 (“In applying section 302 to this case, it is necessary to determine if recognition of Blake’s right is appropriate to effectuate the intention of the parties in the 2001 release and whether the circumstances indicate that Perkins and Dairyland intended to give Blake the benefit of a complete release.”).

The defendant argues that the language of the contract itself, as well as the circumstances, clearly convey the intent of promisee Sunday River to anoint Atomic a third-party beneficiary inasmuch as (i) the defendant distributed Atomic equipment to Sunday River, (ii) the Rental/Release Form specified Atomic as the brand of equipment rented by Amburgey, and (iii) the Rental/Release

Form expressly and unambiguously enumerated “the equipment manufacturers and distributors” as among those to be released from liability. *See* Defendant’s S/J Reply at 4-5. As regards Amburgey, the defendant contends that she “willingly signed while knowing that she was relinquishing any claim for liability in the event of injury while using the equipment.” *Id.* at 5-6. Nonetheless, the plaintiffs make a compelling case that the defendant falls short of demonstrating with special clarity an intent on the part of the parties (particularly Amburgey) to release it from any liability in the event of an accident proximately caused by a defectively designed product (as the Amburgeys allege was the case here). This is so in view of:

1. The manner in which the form is worded and laid out. At the bottom of the first page, the Rental/Release Form states in capital letters: “PLEASE READ THE AGREEMENT ON THE BACK OF THIS FORM BEFORE SIGNING. IT RELEASES US FROM CERTAIN LIABILITY.” Release at 1. The form was executed in a Sunday River ski rental shop – a circumstance that strongly suggested that the “us” in question was Sunday River and/or its Crisports ski shop. That interpretation is reinforced by the appearance, beneath the above-quoted cautionary language, of the logos of several ski resorts, including that of Sunday River. *See id.* Mention is made only once, in fine print about a third of the way down the second page of the Rental/Release Form, of “the equipment manufacturers and distributors[.]” *See id.* at 2. That reference is buried not only on the page but also within the sentence, which reads: “As a condition of being permitted to use the ski area premises and to use this equipment (ski/snowboard), I hereby release, Hold Harmless and Indemnify Mount Snow, Killington, Ltd., Sugarbush Resort Holding Inc., Sunday River Skiway Corporation, Sugarloaf Mtn., A.S.C., Utah, D/B/A The Canyons, LBO Holding, Inc., D/B/A Attitash Bear Peak Resort, their owners, affiliates, employees and agents, the equipment manufacturers and distributors (the Releasees) for any and all liability for personal injury . . . in any way arising from the use of this

equipment including but not limited to any alleged NEGLIGENCE on the part of the Releasees in the selection, installation, maintenance or adjustment to this equipment and its use.” *Id.* The type of negligence expressly highlighted in that sentence is negligence that one would expect to occur on the part of the ski resort or ski-rental shop (selection, installation, maintenance or adjustment), thus reinforcing the impression that the release aimed to protect that class of “distributors.” The risk of defective product design is nowhere expressly mentioned. *See generally id.*¹⁸ Atomic – the defendant company – is nowhere identified as an equipment distributor. *See generally id.*

2. Evidence of the circumstances. Nor do the circumstances described by the Amburgeys establish that Amburgey had reason when executing the Rental/Release Form to contemplate that she was releasing Atomic. As noted above, the language and layout of the agreement itself did not make clear that such a release was contemplated. Amburgey avers that during the approximately fifteen minutes she spent collecting her demo equipment and signing the Rental/Release Form, she interacted only with the Crisports technician. She knew that Crisports was owned by Sunday River and understood that Crisports was the “distributor” of the ski equipment she was renting. She was not told, before renting ski equipment on December 8, 2002, that as a condition of rental she had to agree to release Atomic from any liability it might have for failing to manufacture, design or sell safe and properly functioning ski bindings. Nor was she warned that the Centro 412 bindings she intended to use might be dangerous or defective or might perform unpredictably, inconsistently or inappropriately under certain conditions. Had she been so warned,

¹⁸ The Rental/Release Form cautions that a “ski-boot-binding system will not release or retain at ALL times or under ALL circumstances where release or retention may prevent injury or death, nor is it possible to predict every situation in which it will release, and it is, therefore, no guarantee of your safety.” Release at 2. However, acceptance of the risk that even properly designed equipment cannot guarantee safety in all circumstances is not tantamount to acceptance of the risk of use of defectively designed equipment.

she would not have agreed to use them. When she signed the Rental/Release Form, she believed she was entering into an agreement with Sunday River.¹⁹

To summarize: The defendant was not a signatory to the Rental/Release Form whose protections it now claims. It failed to argue, in moving for summary judgment, that it had standing to invoke the protections of that agreement, thereby waiving that point. In any event, even if its belated argument in favor of third-party-beneficiary status is cognizable, Atomic falls short of making the requisite showing with special clarity that the parties, in particular Amburgey, intended to release it from the liability in issue. The defendant's motion for summary judgment as to all counts against it on the basis of invocation of the protections of the Rental/Release Form accordingly should be denied.

IV. Conclusion

For the foregoing reasons, I recommend that Atomic's motion for summary judgment be **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.

¹⁹ The parties do not cite, nor can I find, a case considering whether a ski-equipment manufacturer or distributor qualifies as a third-party beneficiary for purposes of invocation of a ski-shop-rental release such as that in issue here. The defendant argues that this case is analogous to *Boulet v. Bangor Sec. Inc.*, 324 F. Supp.2d 120 (D. Me. 2004), in which this court was called upon to construe a margin agreement that explicitly provided that the plaintiffs' "broker" was a third-party beneficiary of both the agreement generally and an arbitration clause specifically. *See* Defendant's S/J Reply at 5-6; *Boulet*, 324 F. Supp.2d at 124. The court rejected the plaintiffs' argument that the term "broker" referred only to their individual broker and not to the brokerage firm for which he worked, holding that the term unambiguously covered both the person and the entity, each having acted as the plaintiffs' agent with regard to their investments. *See id.* at 122, 124-25. In this case, there is no evidence that Amburgey had any preexisting relationship with Atomic or otherwise knew of its existence at the time of formation of the contract. She averred that she understood Crisports to be the "equipment distributor."

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.

Dated this 17th day of December, 2007.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

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