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Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

TERI SEE and DARREL SEE, husbandm and wife, Plaintiffs, v. REMINGTON ARMS COMPANY, INC., A Delaware corporation, Defendant.	No. 81-886-LE MOTION TO EXCLUDE EVIDENCE

Defendant in the above-captioned matter moves the court for an order preventing the presentation at the time of trial by the plaintiff of other incidences involving Remington rifles.

The evidence should be excluded on three grounds.

First, such evidence would be in the form of hearsay statements made by declarents whose interests were adverse to those of the defendant.

Second, evidence of other incidents is not probative of the condition or reliability of design of the gun involved in this case. Further, the evidence should not be allowed to establish

the defendant's state of knowledge, since that issue is not of consequence to the determination of this suit.

Third, even should the court find the offered evidence to be relevant, it should be excluded as unfairly prejudicial to the defendant because it would suggest to the trier of fact an improper basis upon which to decide this case.

Fourth, the court should exclude the proposed evidence on the grounds that it will open collateral issues and compel the defendant to fairly meet the prejudice of the evidence by lengthy rebuttal.

Since the proposed evidence has little or no probative value, but possesses the danger of hearsay, prejudice, delay and confusion, it should be excluded.

ARGUMENT

1. The Proposed Evidence is Hearsay.

Hearsay evidence is excluded by Federal Rule of Evidence 802. The Federal Rules define hearsay as follows:

> "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FRE 801(c).

Evidence of the 49 other incidents involving Remington Rifles constitutes hearsay since the evidence consists of out of court statements made by declarants with personal interests adverse to those of the defendant herein. Further, these statements would be offered for the truth of the matter asserted: that the Remington 700 is defectively designed. In products liability

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cases, courts have consistently found this type of evidence to be inadmissible as hearsay. *See Melville v. American Home Assurance Co.*, 584 F.2d 1306, 1315 (3d Cir. 1978); *John McShain, Inc. v. Cessna Aircraft Co.*, 563 F.2d 632, 636 (3d Cir. 1977); *Uitts v. General Motors Corp.*, 411 F. Supp. 1380, 1381 (E.D. Pa. 1974), *aff'd* 513 F.2d 626 (3d Cir. 1975).

This hearsay evidence should not be made admissible by an allegation that it would prove notice or knowledge on the part of the defendant. As discussed below, evidence on that point is not relevant to this case.

2. The Proposed Evidence is Irrelevant: It Lacks Probative Value on any Material Issue.

A. Standard of Probative Value.

Only relevant evidence is admissible in this court. FRE 402. Relevancy is defined in the immediately preceding rule.

> "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FRE 401.

The Advisory Committee Note to Rule 401 makes clear that the relevancy of an item of evidence hinges on the contents of the substantive law which governs the case; relevancy "exists only as a relation between an item of evidence and a matter properly provable in the case." The substantive law of Oregon governs this diversity action. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 74-7, 58

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S. Ct. 817, 82 L. Ed. 1188 (1938); *Forsyth v. Cessna Aircraft Co.*, 520 F.2d 608 (9th Cir. 1975).

The trial court enjoys substantial discretion when determining whether a given item of evidence has probative value on a material issue. *United States v. Brannon*, 616 F.2d 413, 418 (9th Cir. 1980); *Hill v. Rolleri*, 615 F.2d 886, 891 (9th Cir. 1980).

When a party offers evidence of "similar incidents", as the plaintiff does in the instant case, the trial court receives general guidance from Federal Rule 404(b), though the court retains its discretion.

> "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." FRE 404(b).

Thus, relevancy should be determined in the court's discretion, by reference to the materiality of the issue sought to be proven and the probative value of the offered evidence on that issue.

B. <u>The Offered Evidence is not Probative on Any Material Issue</u>.

Conceivably, the plaintiff offers this evidence of other incidents involving Remington Rifles to establish two points: the

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rifle involved in this case was defective or designed defectively; or Remington had notice of a defect in this model of rifle. The evidence should be found irrelevant on both points.

Evidence of other incidents does not make it more probable that the particular rifle in this case was defective or designed defectively. Before evidence of other incidents is probative of this point, the plaintiff must show that the other incidents occurred under circumstances very similar to those involved in this case. The age, the care taken, the number of uses, the expertise of the user, and many other factors contribute to the performance of a rifle. Only by showing that the 49 incidents occurred in a similar confluence of factors can the plaintiff establish the value of the offered evidence. When the plaintiff attempts use of this evidence to show a defect in a product, "[t]he requirement of similarity of conditions is probably at its strictest * * *." McCormick, Law of Evidence (1972) § 200.

Federal appellate courts have consistently held that "other incident" evidence lacks probative value in the absence of a showing of highly similar circumstances. In the leading products case of *Prashker v. Beech Aircraft Corp.*, 258 F.2d 602 (3d Cir.) *cert. denied* 358 U.S. 910, 79 S. Ct. 236, 3 L. Ed. 2d 230 (1958), the Third Circuit held inadmissible 45 reports of other accidents involving the defendant's aircraft. The panel noted that many factors can cause accidents and that admitting this evidence to show defect or causation would be tantamount to

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holding the plane responsible for adverse weather and "the factor of *human fallibility known inevitably to occur* in such circumstances * * *." *Id.* at 258 F.2d 608-9 [emphasis added].

More recent cases have also refused admission of "other incident" evidence. Of particular note is *McKinnon v. Skil Corp.*, 638 F.2d 270 (3d Cir. 1981). The appellate panel upheld the exclusion of the defendant's answers to interrogatories which identified six other complaints it had received from power saw customers. The panel reasoned:

> "Evidence of prior accidents is admissible on the first four issues [knowledge, defect, causation and negligent design] only if the proponent of the evidence shows that the accidents occurred under circumstances substantially similar to those at issue in the case at bar." *Id.* at 638 F.2d 277.

The appellate panel went further -- *reversing a trial court ruling* which had admitted evidence of other accidents -- in *Julander v. Ford Motor Co.*, 488 F.2d 839 (10th Cir. 1973). The disputed exhibit consisted of seven complaints filed against the defendant, all of which alleged steering failures in Ford Broncos. This was also the gravaman of the case under consideration. The panel held squarely that admission of this evidence was error.

> "Counsel also suggests that exhibit 32 is itself probative evidence of negligent design on the part of Ford in its design of the 1968 Bronco. Evidence of 'other accidents' is sometimes admissible to prove primary negligence, but such evidence should be carefully examined before being received to the end that the circumstances of the 'other accidents' bear similarity to the circumstances surrounding the accident which is the subject matter on trial. Such evidence in the instant case

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is singularly lacking." *Id.* at 488 F.2d 846-7.

These cases establish the proposition that a plaintiff cannot simply offer evidence that similar occurrences have taken place in the hope of persuading the trier of fact that a product was defective or dangerous. Especially where age, maintenance and "human fallibility" are involved, the plaintiff has been required to show a strong identity of circumstances; absent that showing, the offered evidence lacks probative value on this issue.

Nor is the offered evidence relevant on an issue of notice. The evidence is not probative of a fact "that is of consequence." FRE 401. The state of mind of this defendant, and the state of its knowledge of other complaints, is not of consequence to the determination of this suit. The substantive Oregon law is clear: notice or knowledge is irrelevant in a strict liability products case. The Oregon Supreme Court has *defined* this cause of action *in terms of presumed or constructive knowledge*.

> "A test for unreasonable danger is therefor vital. A dangerously defective article would be one which a reasonable person would not put into the stream of commerce *if he had knowledge of its harmful character*. The test, therefor, is whether the seller would be negligent if he sold the article *knowing of the risk involved*. Strict liability imposes what amounts to constructive knowledge of the condition of the product." *Phillips v. Kimwood Machine Co.*, 269 Or. 485, 492, 525 P.2d 1033 (1974) [emphasis added].

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The Oregon Supreme Court reached this conclusion after having drawn a clear distinction between products liability cases and negligence actions:

> "* * * it is generally recognized that *the basic difference* between negligence on the one hand and strict liability for a design defect on the other is that *in strict liability* we are talking about the condition (dangerousness) of an article which is designed in a particular way, while in negligence we are talking about the reasonableness of the manufacturer's actions in designing and selling the article as he did * * * the law *assumes he [the manufacturer] has knowledge* of the article's dangerous propensity * * *." *Roach v. Kononen, Ford Motor Co.*, 269 Or. 457, 465, 525 P.2d 125 (1974) [emphasis added].

The Oregon Supreme Court has consistently cited these two cases and quoted from them, establishing and applying the principle that a defendant in a products liability case is presumed to be on notice of the dangers of his product. *See Baccelleri v. Hyster Co.*, 287 Or. 3, 5-6, 597 P.2d 351 (1979); *Newman v. Utility Trailer & Equipment Co., Inc.*, 278 Or. 395, 397-9, 564 P.2d 674 *reh. den.* (1977); *Johnson v. Clark Equipment Co.*, 274 Or. 403, 416-7, 547 P.2d 132 (1976).

The offered evidence, if intended to show the defendant's state of mind or knowledge, lacks relevancy. Plaintiffs have not pled an intentional tort nor do they pray for punitive damages.

The offered evidence is not relevant either to show defect or to show notice.

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3. The Proposed Evidence is Unfairly Prejudicial.

The Federal Rules of Evidence make clear that evidence, even evidence which may possess some probative value, should be excluded nonetheless "if its probative value is substantially outweighed by the danger of unfair prejudice * * *." FRE 403. The Advisory Committee stressed the importance of this rule in its definition of unfair prejudice:

> "'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."

The rule, in practice, calls upon the trial court to weigh the probative value of evidence of prior incidents against its obvious prejudicial impact in products liability cases: the thought of different individuals receiving injuries from incidents involving the products of a large corporation. The substantive law requires more than just an incident or injury; the Oregon Supreme Court has made clear that the product must be proven "dangerously defective" lest strict liability be turned into "absolute liability." *Phillips v. Kimwood Machine Co., supra* at 269 Or. 491-2. To encourage the trier of fact to find liability based on other incidents without a primary showing of defect would be to allow undue prejudice. As one appellate panel struck the balance:

> "The most that these items [lists of similar complaints and lawsuits against the defendant] could have indicated was that absent third parties had made this claim to or against [defendant-manufacturer] from time to time. To exclude evidence of *such faint*

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probative value and high potential for unfair prejudice was well within the trial court's discretion." *Yellow Bayou Plantation, Inc. v. Shell Chemical, Inc.*, 491 F.2d 1239, 42-3 (5th Cir. 1974).

The trial court in a products liability case should weight the slight *(or lack of)* probative value of this type of evidence against its prejudicial effects. FRE 403. In the instant case, this balance favors clearly exclusion of the evidence.

4. The Proposed Evidence is Confusing and Misleading, and will Cause Undue Delay.

Even should the trial court find that the proposed evidence has some probative value and that the probative value outweighs its prejudicial effects, the court should exclude the evidence on the ground that it will confuse and mislead the jury and necessitate lengthy attempts to prove various collateral issues. FRE 403. The trial court has broad discretion to exclude such collateral evidence. *Morita v. Southern California Permanente Medical Group*, 541 F.2d 217, 220 (9th Cir. 1976); *United States v. Manning*, 503 F.2d 1230, 1234 (9th Cir. 1974).

Evidence of other incidents has often been excluded on these grounds, including evidence where a much higher degree of similarity of circumstances has been present. *See, e.g., McKinnon v. Skil Corp, supra* at 638 F.2d 277; *Yoham v. Rosecliff Realty Co.*, 267 F.2d 9, 10 (3d Cir. 1959) (upholding exclusion of evidence of similar accidents *on same rollercoaster* as "diligent effort to keep the issues before the jury from being obfuscated);

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Uitts v. General Motors Corp., 411 F. Supp. 1380, 1383, *aff'd.* 513 F.2d 626 (3d Cir. 1975) (reports of prior, similar steering malfunctions in same model of car excluded to avoid "unfair prejudice, consumption of time and distraction of the jury to collateral matters").

The reason for excluding the evidence offered in the instant case is the same. These other incidents, though not probative, are highly prejudicial to defendant's case. Defendant would be forced to try not only the case at bar, but also each case suggested by each other incident admitted into evidence. It would be necessary, for example, to determine which of the other rifle owners soaked gun parts in diesel oil, and, more generally, the age and condition of each rifle. The credibility of each report would have to be questioned, in each instance requiring the defendant to point out the legal action, if any, that the gun owner took or is in the process of taking against the defendant.

One court has described this situation:

> "Defendant, in order to minimize the prejudicial effect of these reports, would have had to go through each one individually with the jury. The result would have been a mini-trial on each of the thirty-five reports offered by plaintiffs. This would lengthen the trial considerably and the minds of the jurors would be diverted from the claim of the plaintiffs to the claims contained in these reports." *Uitts v. General Motors Corp.*, *supra* at 411 F. Supp. 1383.

In effect, admission of the proposed evidence will require the defendant to try the instant case and 49 others. The

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issues at trial would thereby be confused and the rights of the defendant prejudiced.

CONCLUSION

For these reasons, the proposed evidence should be excluded.

Respectfully submitted,

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MOORE & ROBERTS
JAMES D. HUEGLI

By: _____
James D. Huegli
Of Attorneys for Defendants

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CERTIFICATE — TRUE COPY

I hereby certify that the foregoing copy of ..... *is a complete and exact copy of the original.*

Dated ....., *19*.....

.....

Attorney(s) for .....

ACCEPTANCE OF SERVICE

Due service of the within ..... *is hereby accepted on* ....., *19*....., *by receiving a true copy thereof.*

.....

Attorney(s) for .....

CERTIFICATES OF SERVICE

Personal

I certify that on February 14, *19*83, *I served the within* Motion to Exclude Evidence *on* Peter Chamberlain *attorney of record for* plaintiff *by personally handing to said attorney a true copy thereof.*

.....

Attorney(s) for defendant

At Office

I certify that on ....., *19*....., *I served the within* ..... *on* ..... *attorney of record for* ....., *by leaving a true copy thereof at said attorney's office with his/her clerk therein, or with a person apparently in charge thereof, at* ....., *Oregon.*

.....

Attorney(s) for .....

Mailing

I hereby certify that I served the foregoing ..... *on* ..... *attorney(s) of record for* ..... *on* ....., *19*....., *by mailing to said attorney(s) a true copy thereof, certified by me as such, contained in a sealed envelope, with postage paid, addressed to said attorney(s) at said attorney(s) last known address, to-wit:* .....

.....

.....

.....

and deposited in the post office at ....., *Oregon, on said day.*

Dated ....., *19*.....

.....

Attorney(s) for .....

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BACKING SHEET

1/1/80-B
FORM No. 100½—STEVENS-NESS LAW PUB. CO., PORTLAND, ORE.

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Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

TERI SEE & DARREL SEE, wife and husband, Plaintiffs, v. REMINGTON ARMES COMPANY, INC., a Delaware corporation, Defendant.	No. Civil No. 81-886 LE MOTION TO EXCLUDE EVIDENCE

Defendant moves to exclude any evidence of subsequent remedial measures, pursuant to Federal Rule of Evidence 407.

Respectfully submitted,

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By: _____
W. A. JERRY NORTH, OSB #75279
Trial Attorney
Of Attorneys for Defendant

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CERTIFICATE OF SERVICE

I hereby certify that on February 15, 1983, I served the within MOTION TO EXCLUDE EVIDENCE on:

PETER R. CHAMBERLAIN
229 Mohawk Building
222 SW Morrison Street
Portland, OR 97204

Attorney for Plaintiffs

by leaving a true copy thereof at said attorney's office with his clerk therein, or with a person apparently in charge thereof, at the above address.

DATED this 15th day of February, 1983.

W. A. JERRY NORTH
Of Attorneys for Defendant

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Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

TERI SEE & DARREL SEE, wife and husband, Plaintiffs, v. REMINGTON ARMES COMPANY, INC., a Delaware corporation, Defendant.	No. Civil No. 81-886 LE MEMORANDUM IN SUPPORT OF MOTION TO EXCLUDE EVIDENCE

I.

BACKGROUND

On October 27, 1979, Mrs. See was accidentally shot through both legs by Mr. Boudreau as he attempted to unload his Model 700 Remington rifle (hereafter "the gun") inside his house with the muzzle pointed at Mrs. See and with his finger possibly on the trigger.

The design of the safety mechanism on the gun was intended to accomplish several "risk reduction" functions, one of which was to lock the bolt in the closed position. Remington had arrived at this design choice after carefully reviewing various

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alternatives and considering the safety trade-offs of each. Therefore, in order to open the bolt so as to unload the gun, it was necessary for Mr. Boudreau to release the bolt lock by flipping the safety mechanism from the "on safe" position to the "fire" position.

Several years after the original design of the gun was made, the Remington designers again considered the question of whether or not to continue to offer the "bolt lock" feature on the Model 700 Remington rifle. The decision was made by Remington designers to eliminate the "bolt lock" feature, and the design change was implemented after the accident in this case.

Plaintiffs have indicated that they intend to offer evidence of this design change. The defendant manufacturer has moved to exclude this evidence of a subsequent design change pursuant to Federal Rule of Evidence 407.

II.

ARGUMENT

(A)The Rule.

Rule 407 of the Federal Rules of Evidence states as follows:

> "When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control or feasibility of precautionary measures, if controverted, or impeachment.

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The two bases for this general exclusionary rule are as follows:

(1) The prejudicial effect of such evidence overweighs the relevance of that proof; and

(2) The exclusionary rule encourages the reduction of risks and promotes product improvements.

Defendant contends that the rule requires the exclusion of evidence regarding the design change.

(B) *The Rule Applies in a Strict Liability Design Case.*

Undoubtedly, the plaintiffs will argue that, although the rule would apply in a negligence case, it does not apply to a strict liability in tort case since the issue is the condition of the product and not the conduct of the manufacturer. There is a split of authority on this issue, and the various cases on both sides are collected in the annotation "Admissibility of Evidence of Subsequent Remedial Measures Under Rule 407 of Federal Rules of Evidence", 50 ALR Fed 935 (1980) and the annotation "Admissibility of Evidence of Subsequent Repairs or Other Remedial Measures in Products Liability cases", 74 ALR 3d 1001 (1976).

The principal case holding that Rule 407 does not apply to strict liability in tort is *Farner v. Paccar, Inc.* 562 F2d 518 (8th Cir. 1977). The principal cases which hold that Rule 407 does apply to strict liability in tort are *Werner v. Upjohn Co.*, 628 F.2d 848 (4th Cir. 1980), cert denied 449 U.S. 1080 (1981); *Cann v. Ford Motor Co.*, 658 F.2d 54 (2nd Cir. 1981); and *Oberst v. International Harvester Co.*, 640 F.2d 863 (7th Cir. 1980).

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Since Rule 407 is essentially a codification of the common law general exclusionary rule which has long been followed in virtually every state in the union, the principal cases which apply the common law general exclusionary rule are also of interest. In *Caprara v. Chrysler Corp.*, 417 N.E.2d 545 (N.Y. 1981), the court concluded that the general exclusionary rule does not apply to a strict liability in tort action. However, in *Rainbow v. Albert Elia Building Co., Inc.*, 436 N.Y.S.2d 480 (1981), the court concluded that the rule does apply to strict liability in tort.

Despite the fact that the courts are in general disagreement on this issue, we are fortunate that there is one common thread in the various cases on both sides of this issue that applies with full force to the instant case. Even the cases which hold that the general exclusionary rule (or Rule 407) does not apply to a strict liability in tort action based on a defect in manufacturing theory recognize that a different problem exists when the plaintiff is contending that the product was defectively designed. *Comprara v. Chrysler Corp., supra.* The rationale for this distinctive treatment of a strict liability in tort claim for defective design or for failure to warn is discussed in *Werner v. Upjohn Co., supra,* and in *Rainbow v. Elia Building Co., supra.*

In the *Werner* case, the Fourth Circuit explicitly responded as follows to the argument that the exclusionary rule should not apply to strict liability in tort cases since those cases focus on the condition of the product and not on the conduct

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of the manufacturer:

> "The reasoning behind this asserted distinction we believe to be hypertechnical, for the suit is against the manufacturer, not against the product." *Werner*, *supra*, at 857.

The *Werner* court also noted that the application of the exclusionary rule to a strict liability in tort case was supported by the close similarity between negligence and strict liability. Id at 8158. The similarity is even stronger in a defective design case or a failure to warn case. *Id.*

In our brief in the *Callaham v. Chrysler Motors Corp.* action in the Ninth Circuit, another attorney in this firm argued that the rule should not apply in a strict liability in tort case. The basis for that argument was the case of *Roach v. Kononen/Ford Motor Co.*, 269 Or. 457, 525 P.2d 125 (1974) and the balancing test advocated by Professor Wade in "Products Liability and Evidence of Subsequent Repairs", 1972 Duke L.J. 837.

However, Professor Wade's seven criteria (*see Meyer v. G.M. Corp.*, unpublished, 9th Cir. 1982) and *Roach v. Kononen*, *supra*, are no longer the Oregon law of strict liability in tort. The Oregon legislature has now codified Section 402A of the Restatement (Second) of Torts, together with Comment a through m, and those standards must be applied to measure plaintiff's contentions - not Professor Wade's critera. ORS 30.920. Therefore, the arguments advanced by the court in *Werner* apply since the language of the Restatement itself is the law.

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IV.

CONCLUSION

Defendant's motion to exclude plaintiff's evidence of a design change should be granted.

Respectfully submitted,

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By: _____
W. A. JERRY NORTH, OSB #75279
Trial Attorney
Of Attorneys for Defendant

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CERTIFICATE OF SERVICE

I hereby certify that on February 15, 1983, I served the within MEMORANDUM IN SUPPORT OF MOTION TO EXCLUDE EVIDENCE on:

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229 Mohawk Building
222 SW Morrison Street
Portland, OR 97204

Attorney for Plaintiffs

by leaving a true copy thereof at said attorney's office with his clerk therein, or with a person apparently in charge thereof, at the above address.

DATED this 15th day of February, 1983.

W. A. JERRY NORTH
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Kathryn R. Janssen
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Of Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

TERI SEE and DARREL SEE, wife and husband, Plaintiffs, v. REMINGTON ARMS COMPANY, INC., a Delaware corporation, Defendant.	Civil No. 81-886-LE PLAINTIFFS' SUPPLEMENTAL EXHIBIT LIST

No. 111 - Mossberg Model 800A Cal. 308 Win.

No. 112 - Stevens (Savage Arms) Model 34

No. 113 - Remington Model 591M

BODYFELT, MOUNT, STROUP & CHAMBERLAIN

By /s/ PETER R. CHAMBERLAIN
Peter R. Chamberlain, Of
Attorneys for Plaintiffs

CERTIFICATE — TRUE COPY

I hereby certify that the foregoing copy of Plaintiffs' Supp. Exhibit List *is a complete and exact copy of the original.*

Dated February 16, 1983

Attorney(s) for Plaintiffs

ACCEPTANCE OF SERVICE

Due service of the within ..... *is hereby accepted on* ....., *19*....., *by receiving a true copy thereof.*

.....

Attorney(s) for .....

CERTIFICATES OF SERVICE

Personal

I certify that on February 16, *19* 83, *I served the within* Plaintiffs' Supp. Exhibit List *on* James D. Huegli *attorney of record for* defendant *by personally handing to said attorney a true copy thereof.*

/s/ PETER R. CHAMBERLAIN

Attorney(s) for Plaintiffs

At Office

I certify that on ....., *19*....., *I served the within* ..... *on* ..... *attorney of record for* ....., *by leaving a true copy thereof at said attorney's office with his/her clerk therein, or with a person apparently in charge thereof, at* ....., *Oregon.*

.....

Attorney(s) for .....

Mailing

I hereby certify that I served the foregoing ..... *on* ....., ...

.....

attorney(s) of record for .....

on ....., *19*....., *by mailing to said attorney(s) a true copy thereof, certified by me as such, contained in a sealed envelope, with postage paid, addressed to said attorney(s) at said attorney(s) last known address, to-wit:* .....

.....

.....

.....

and deposited in the post office at ....., *Oregon, on said day.*

Dated ....., *19*.....

.....

Attorney(s) for .....

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BACKING SHEET

1/1/80-B
FORM No. 100½—STEVENS-NESS LAW PUB. CO., PORTLAND, ORE.

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Of Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

TERI SEE and DARREL SEE, wife and husband, Plaintiffs, v. REMINGTON ARMS COMPANY, INC., a Delaware corporation, Defendant.	Civil No. 81-886-LE PLAINTIFFS' MEMORANDUM REGARDING EVIDENCE ISSUES

FACTS

This is a products liability action based upon strict liability in tort. The main thrust of plaintiffs' claims is that defendant's product was defective in its design and that this defect was made all the more hazardous by defendant's failure to warn.

Plaintiffs will offer evidence at trial that Teri See was seriously injured by a gunshot wound when a third person, handling a Remington Model 700 rifle, moved the rifle's safety from the "safe" position to the "fire" position. Through production of documents, plaintiffs have received documents (Gun

Examination Reports) which reflect 49 instances where owners of substantially similar Remington rifles have complained to Remington of an identical product defect. Part I of this memorandum addresses the admissibility of these 49 reports.

I. Evidence of other similar incidents is admissible to prove defect.

Reiger v. Toby Enterprises, 45 Or App 679, 609 P2d 402 (1980), was a products liability action wherein the plaintiff contended defendant's meat slicer was unreasonably dangerous. Defendant offered evidence of the slicer's prior safe use. The Oregon Court of Appeals held that proof of the frequency or infrequency of use of a product with or without mishap is relevant to proving a defective design. Thus, proof of other occurrences involving rifles substantially similar to the rifle involved in this case should be admissible to prove that the design of the accident rifle is defective and unreasonably dangerous.

In Croft v. Gulf & Western Industries, Inc., 12 Or App 507, 506 P2d 541 (1973), the plaintiff brought an action under the Oregon Tort Claims Act to recover for personal injuries received in a motor vehicle collision at an intersection where the traffic signal malfunctioned, showing green in both directions. Testimony of a police officer that, on two prior occasions, he had seen and reported malfunctions of that particular light was held to be admissible. The prior malfunctions were not the same as on the date of the accident.

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On one occasion, the signal was completely out, and on the other it was locked on green in one direction. The similarity of conditions which made the testimony admissible was that it was the same signal and that the malfunctions occurred under similar wet-weather conditions.

The Oregon Court of Appeals is in agreement with a majority of other jurisdictions in allowing evidence of other similar incidents to prove defect. Vlahovich v. Betts Machine Co., 260 NE2d 230 (Ill 1970), was an action against a manufacturer by a truck driver seeking recovery for injuries to his eye which he sustained when a plastic clearance light lens shattered as he was attempting to remove it. The court held, reversing the trial court, that evidence of other instances of lens breakages in similar cases was admissible.

In Ginnis v. Mapes Hotel Corporation, 470 P2d 135 (Nev 1970), plaintiff brought suit against the defendant hotel after being caught and injured in an automatic door on defendant's premises. At trial, plaintiff offered in evidence 19 repair orders for the automatic doors at the defendant's hotel. The trial court allowed in evidence only three repair orders relating to the very door which injured plaintiff. On appeal, the Nevada Supreme Court held that upon retrial, when the case was tried under a strict liability theory, the repair orders would be admissible to prove faulty design. The court went on to state that whether such repairs were before or after the accident in question did not affect their admissibility.

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Rucker v. Norfolk & W. Ry. Co., 396 NE2d 534 (Ill 1979), was an action for wrongful death and personal injuries based upon strict liability against the manufacturer and lessor of liquified gas tank cars. There, the trial court admitted evidence of 42 prior accidents involving punctures of tank cars for the purpose of showing the danger of the design. Only 26 of the accidents involved the same situation as was presented in Rucker (puncture of the tank by a coupler). The Illinois Supreme Court held that whether the puncture was by coupler or by other means was irrelevant. If the trial court determined that all 42 accidents were sufficiently similar and relevant to the issue of whether the car was dangerous then it need not be shown that the accidents occurred in an identical manner. Substantial similarity is all that is required.

As pointed out in Ginnis, supra, whether the other similar incidents occurred before or after the accident in question does not affect the admissibility of the evidence. See, e.g., Independent Sch. Dist. No. 181 v. Celotex Corp., 244 NW2d 264 (Minn 1966) and Uitts v. General Motors Corporation, 58 FRD 450 (E D Pa 1972).

During the recent pretrial conference in this case, the Court indicated that Meyer v. G. M. Corp. (unpublished opinion dated April 16, 1982) was in point. Plaintiffs have reviewed the cited case and certainly agree that it is supportive of plaintiffs' position that the evidence of other similar incidents is admissible to prove defects.

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Defendant has admitted that the accident rifle and the rifles described in the 49 gun examination reports were all the same or substantially similar (see, interrogatory answer Nos. 7, 8, 28, 29, 30, 34 and 35, attached). They all involved Remington Model 700s manufactured between 1972 and 1982. The trigger mechanism, bolt and safety mechanism design is the same on all the rifles. Therefore, evidence of other similar incidents should be admissible to prove the defective design of the accident rifle. The next four subsections of this memorandum address four potential forms that this evidence may take:

Depositions.

Eleven depositions were taken of individuals identified through the gun examination reports produced by defendant. Of these depositions, nine involve substantially identical rifles and identical functioning of the rifles resulting in the rifle firing when the safety was moved from the "on safe" position to the "fire" position while the gun handler was making no contact with the trigger. The depositions can be summarized as follows:

(1) Fred J. Avila - Twice the rifle fired when safety was pushed from "on safe" position to "fire" position. Nothing was touching the trigger.

(2) Helmut G. Bentlin - Three times the owner pushed the safety from the "on safe" position to the "fire" position and the rifle fired despite the fact that nothing was touching the trigger.

(3) Gerald Cunningham - Touched safety and rifle fired.

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(4) Gabriel A. Hernandez - Moved safety from "safe" to "fire" and gun discharged. Happened on three occasions.

(5) James Heulster - On three occasions, rifle fired when safe released despite no touching of the trigger.

(6) Sidney V. Jackson - Fired when safe released--three times.

(7) Ronald Klosowski - Fired when safe released.

(8) James Sanders - Fired when safe released--six or seven times.

(9) Tony Varnum - Fired when safe released.

Plaintiffs seek to read the above referenced depositions at the time of trial. For that purpose, the corresponding gun examination reports (Trial Exhibits 7, 8, 13, 19, 22, 24, 39, 41 and 42) would establish that the deponents' rifles were, in fact, substantially similar to the accident rifle and for giving context to their deposition testimony.

In summary, plaintiffs should be entitled to read the above referenced depositions to prove, under Reiger v. Toby, supra, that the accident rifle was defective in its design.

Gun Examination Reports.

Plaintiffs are entitled to put into evidence the gun examination reports referenced above and all gun examination reports which contain admissions by Remington that there is a problem with the design of this rifle. This latter group includes:

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(1) Exhibit 3: "Malfunction appears to have been caused by excessive oil in trigger mechanism."

(2) Exhibit 6: "Excessive molycote in action."

(3) Exhibit 8: "Fails trick test."

(4) Exhibit 11: "Malfunction possibly caused by gummed-up fire control."

(5) Exhibit 12: "Apparent cause of malfunction due to gummed-up fire control."

(6) Exhibit 13: "Sear-safety cam sticks in downward position because of accumulation of dirt and oil."

(7) Exhibit 14: Could not duplicate complaint but replaced fire control without charge.

(8) Exhibit 16: "Excessive oil and fire control could cause impaired mechanism function."

(9) Exhibit 29: "The malfunction appears to have been caused by excessive oil in trigger mechanism."

(10) Exhibit 39: Gun replaced at no charge.

Exhibit 1 (Gun Examination Report 599) should be admitted into evidence for illustrative purposes because it was used, without objection, during Marshall Hardy's deposition (which will be read at trial) to explain the function of the gun examination reports.

Finally, plaintiffs should be permitted to put into evidence all gun examination reports where the customer complaint is that the rifle fires when the safe was released and

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(2) Exhibit 15: "Main fault--fails trick test."

(3) Exhibit 19: Replaced trigger assembly at no charge. Defendant suggests that the malfuntion was caused by a finger on the trigger. The jury should be entitled to balance this contention versus the deposition of the gun owner (Sanders).

(4) Exhibit 21: "Sear-safety cam stuck in downward position because of accumulation of dirt and oil."

(5) Exhibit 22: Rust, dampners, condensation could cause accidental firing.

(6) Exhibit 25: Defendant could not duplicate customer complaint but stated, "It was discovered . . . that the trigger assembly contained an excessive amount of heavy oil. It is possible that an accumulation of this nature, coupled with cold temperatures could, possibly, cause the trigger mechanism to hang up and result in an accidental discharge when the safety is released."

(7) Exhibit 26: "We can only assume that the oil accumulation, under certain circumstances, caused the internal parts to hang-up and caused the accidental discharge."

(8) Exhibit 29: " . . . the trigger assembly contained an excessive amount of heavy oil. It is possible that the oil accumulation, coupled with the cold temperature did, in fact, cause the trigger mechanism to hang up, resulting in the accidental discharge when the safety was released."

* * *

* * *

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Remington's examination indicated that it could not duplicate the incident. These gun examination reports should come in because, as demonstrated by a comparison of the above referenced depositions with their corresponding gun examination reports, Remington frequently cannot duplicate legitimate customer complaints. The fact finder should be entitled to consider these claims along with the others, in determining if the rifle is defective in design such that it intermittently will fire when the safety is released. This evidence is admissible under FRCP 803(24). The "circumstantial guarantees of trustworthiness" required by the rule are provided by the fact that there are numerous other similar complaints and by the fact that gun owners would not intentionally make unfounded claims as to the condition of their rifles, especially where no personal injury nor substantial property damage is involved.

Correspondence.

Several of Remington's written responses to complaining customers contain admissions which should be admissible under FREV 801(d)(2). These admissions are generally found in correspondence attached to particular gun examination reports produced by the defendant. The gun examination reports in question should be admitted with the correspondence containing admissions if, for no other reason, to put into context each such admissions.

The admissions referred to are as follows:

(1) Exhibit 14: "Main fault--bad fire control."

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II. Defendant should not be permitted to impeach Mr. Boudreau by proof of conviction for larceny.

FREV 609(a)(2) limits impeachment to crimes involving dishonesty or false statements. Certainly, larceny does not involve a false statement. Defendant will argue that larceny involves dishonesty and, at first blush, that argument has a measure of logical, moral appeal. Under that logic, however, impeachment could by by any criminal conviction because it could always be argued that commission of any crime involves dishonesty. A review of the legislative history of the rule (set forth in the Federal Rules of Evidence) makes clear that such a broad interpretation was not intended. It is clear from the legislative history that the phrase "dishonesty or false statement" was intended to mean crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement or false pretense, or any other offense in the nature of crimen falsi, the commission of which involves some element of deceit, untruthfulness or falsification bearing on the witness's propensity to testify truthfully.

Clearly, larceny does not fall within the ambit of the rule. Defendant should not be entitled to impeach by use of the above referenced conviction.

III. Post-accident design change.

Plaintiffs are entitled to offer evidence of defendant's post-accident design change to prove the defective, unreasonably

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dangerous condition of the rifle on the day of the accident.

Van Gordon v. PGE Co., 59 Or App 740, ____ P2d ___ (1982), makes clear that the issue is an open question in strict liability cases in this state. If this issue were before the Oregon Supreme Court, that court would adopt the rule urged by plaintiffs and first recognized in Ault v. International Harvest Co., 117 Cal Rptr 812, 528 P2d 1148 (1975).

That rule, succinctly stated, is that a plaintiff is entitled to present evidence of the defendant's post-accident design change as substantive evidence of the defectiveness of the product. The evidence in this case will support such a proposition. Defendant's 1982 design change, if in effect in 1976, would have prevented this accident.

Defendant may contend that FREV 407 bars evidence of post-accident design changes. However, as is clear from a careful reading of that rule, it excludes evidence of subsequent remedial measures only if offered to prove negligence or other culpable conduct. Plaintiffs' claim is based upon strict liability in tort. It is not necessary to prove defendant's negligence or other fault.

This Court should follow Ault, supra, and allow plaintiffs to prove the defendant's post-accident design change.

Respectfully submitted,

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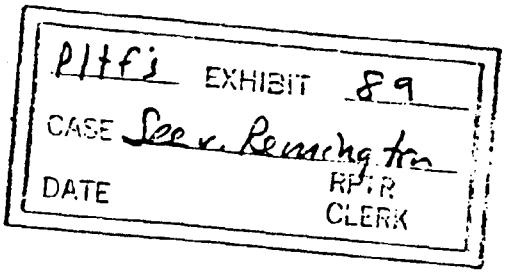

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

TERI SEE and DARREL SEE, wife and husband, Plaintiffs, vs. REMINGTON ARMS COMPANY, INC., a Delaware corporation, Defendants.	No. 81-886 DEFENDANT'S ANSWERS TO INTERROGATORIES (FIRST AND SECOND SETS)

In response to Plaintiff's Interrogatories to Defendant, Defendant Remington Arms Company, Inc. offers the following:

INTERROGATORY #1: State in detail how, if at all, the trigger mechanism of this rifle differs from the trigger mechanism of the Remington 600 rifle as it existed before being recalled.

ANSWER: See attached.

INTERROGATORY #2: State in detail how the safety mechanism of this rifle differs from the safety mechanism of the Remington 600 rifle as it existed before being recalled.

ANSWER: Functionally the same, but the shape is different.

INTERROGATORY #3: Identify what rifle models defendant has

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manufactured in the last eight years which could be unloaded (including removal of a live shell from the chamber) without disengaging the weapon's safety.

ANSWER: M/788 and M/700.

INTERROGATORY #4: Identify what rifle models defendant has manufactured in the last eight years which could not be unloaded (including removal of a live shell from the chamber) without disengaging the weapon's safety.

ANSWER: M/788, M/700 and M/600.

INTERROGATORY #5: Identify all experts you intend to call as witnesses in the trial of this matter and state the substance of their testimony.

ANSWER: Unknown.

INTERROGATORY #6: If plaintiff's request for admission #3 is denied, state the number of occasions on which it has been reported to you that a Remington Model 700 rifle fired when the safety was released.

ANSWER: Request for Admission #3 admitted.

INTERROGATORY #7: Are the Remington Model 700 rifles inspected by you (and mentioned in the 49 gun examination reports produced by you) the same or similar to the gun involved in this case?

ANSWER: Yes.

INTERROGARORY #8: If the answer to Interrogatory No. 7 is other than an unqualified "yes," state the ways in which this rifle is different from each of those rifles.

ANSWER: Not applicable.

INTERROGATORY #9: State, with as much accuracy as possible, the date (or year, if date cannot be determined) of manufacture of each of the rifles examined in the 49 gun examination reports produced by you.

ANSWER:

3/77	10/68	7/66	7/76
2/72	5/74	1/72	6/79
9/76	9/78	2/79	10/72
5/76	7/76	7/77	6/77
2/77	9/71	7/68	2/72
7/77	1/80	11/76	10/80
12/77	6/80	11/74	7/74
5/76	4/81	7/78	8/76
6/76	2/71	10/69	3/75
4/73	8/77	10/79	8/70
3/79	7/79	12/74	12/70
7/77	8/75	11/80	8/73

INTERROGATORY #10: State, with as much accuracy as possible, the date (or year, if date cannot be determined) of manufacture of this rifle.

ANSWER: December, 1976.

INTERROGATORY #11: If plaintiffs' request for admission No. 5 is denied, state, with particularity, in what respects you contend the rifle did not meet your manufacturing, design and/or performance specifications on the date of your examination.

ANSWER: As far as we could see without running tests, the gun met all design and performance specifications.

INTERROGATORY #12: If plaintiffs' request for admission No. 6 is denied, state, with particularity, in what respects you contend the rifle was in a different condition than it was when it left your hands.

ANSWER: Dirty and not well kept.

INTERROGATORY #13: If plaintiff's request for admission No. 7 is denied, state, with particularity, in what respects you contend that it was not reasonably foreseeable.

ANSWER: We would expect owners of such rifles to take reasonable care of the physical and mechanical portions of these rifle.

INTERROGATORY #14: What do you contend caused this rifle to fire at the time of, and on the date of, Mrs. See's injury?

ANSWER: The trigger was pulled.

INTERROGATORY #15: State whether or not it is true that the side portion of the trigger mechanism on this rifle (and other Remington 700 rifles) is open such that dirt, debris and other foreign material could enter the trigger mechanism.

ANSWER: Yes, however, we are not certain as to how much dirt, debris or foreign material could enter the trigger mechanism -- it would depend on the care of the rifle.

INTERROGATORY #16: If the answer to Interrogatory No. 15 is "yes," or is qualified in any way, explain why the trigger mechanism is designed in that manner and state whether or not it could have been designed in such a manner that such contamination could be reduced or eliminated.

ANSWER: To examine the sear -- trigger engagement. The mechanism is designed for movement and could be redesigned in several ways, all of which are unknown at this time.

INTERROGATORY #17: On the date of manufacture of this rifle, how many reports had defendant received of other Remington 700 rifles

discharging when the safety was disengaged?

ANSWER: Unknown. Records that far back are no longer available due to compliance with company record retention schedules.

INTERROGATORY #18: Since the date of manufacture of this rifle, has the defendant changed the design of the trigger mechanism or the safety mechanism (or both) in any way on its Remington Model 700 rifle? If so, state with particularity what changes have been made and the reason or reasons for each such change.

ANSWER: Yes. Bolt lock feature has been removed. Marketing Department determined that bolt lock was no longer a feature that many consumers desired.

(Interrogatories No. 19, 20 and 21 deleted)

INTERROGATORY #22: Is it true that you changed the design of your Remington Model 788 from a safety which had to be disengaged to unload the gun to a safety which did not have to be disengaged to unload the gun?

ANSWER: No. (Changed bolt lock). We removed the bolt lock and one of the consequences is that you can raise the bolt without moving the safety.

INTERROGATORY #23: If the answer to Interrogatory No. 22 is "yes," state your reasons for making such a change.

ANSWER: Consumer desire for a bolt lock has been questioned. The bolt lock was removed in 1974 on one bolt action model (Model 788) to test consumer impact.

INTERROGATORY #24: If the answer to Interrogatory No. 22 is "no," state whether or not you ever made such a change

on any rifle which you manufacture, identify that rifle, and state the date such change was made.

ANSWER: M/788, M/700.

In answer to Plaintiffs' Second Set of Interrogatories to Defendant, Defendant Remington Arms offers the following:

INTERROGATORY #25: List all parts in the bolt and firing mechanism for the Model 700 that are or were interchangeable with the parts in the bolt and firing mechanism for the Model 600.

ANSWER: See attached drawings.

INTERROGATORY #26: List all parts in the safety mechanism on the Model 700 which are or were interchangeable with the parts in the safety mechanism on the Model 600.

ANSWER: See answer to #25 above.

INTERROGATORY #27: List all types of Model 700's defendant manufactured during the time period from 1976 through 1981 (such as ADL, BDL or VAR).

ANSWER: ADL, BDL, VAR, CLASSIC, C Grade, D Grade and F Grade.

INTERROGATORY #28: For each of the Model 700 types listed in the response to Interrogatory No. 27 state, with particularity, in what way the particular model type varied from the other model types.

ANSWER: The bolt and firing mechanisms and safety mechanisms are the same.

INTERROGATORY #29: For each of the Model 700 types listed in the response to Interrogatory No. 27 state whether or not there were any differences whatsoever in the trigger mechanism between each

such model type identified.

ANSWER: No difference.

INTERROGATORY #30: For each of the Model 700 types listed in the response to Interrogatory No. 27 state whether or not there were any differences whatsoever in the safety mechanism between each such model type identified.

ANSWER: No difference.

INTERROGATORY #31: Describe each of the trigger mechanism differences referenced in your response to Interrogatory No. 29 describing, with particularity, each such difference.

ANSWER: Not applicable.

INTERROGATORY #32: Describe each of the safety mechanism differences referenced in your response to Interrogatory No. 30 describing with particularity, each such difference.

ANSWER: Not applicable.

INTERROGATORY #33. State whether the drawings of the Model 600 previously provided by defendant to plaintiffs depict the Model 600 design as it existed before, or after, its major recall.

ANSWER: Before its major recall.

INTERROGATORY #34: For each of the 49 Gun Examination Reports previously produced by defendant, indicate which reports relate to rifles that are substantially the same in design and manufacture as this rifle.

ANSWER: All 49 are the same design and manufacture.

INTERROGATORY #35: For each of the 49 Gun Examination Reports previously reported by defendant which relate to rifles which are

not substantially the same as this rifle, indicate with particularity, how each such rifle differed from this rifle.

ANSWER: Not applicable.

INTERROGATORY #36: Based upon your examination of this rifle, indicate what the date of manufacture of this rifle is, with as much specificity as possible.

ANSWER: Previously answered. 12/76.

SCHWABE, WILLIAMSON, WYATT, MOORE & ROBERTS

By: _____
James D. Huegli
Attorneys for Defendant

CERTIFICATE — TRUE COPY

I hereby certify that the foregoing copy of plaintiffs' memorandum is a complete and exact copy of the original.

Dated February 15, 19 83

/s/ Peter R. Chamberlain

Attorney(s) for Plaintiffs

ACCEPTANCE OF SERVICE

Due service of the within ..... is hereby accepted on ....., 19....., by receiving a true copy thereof.

.....

Attorney(s) for .....

CERTIFICATES OF SERVICE

Personal

I certify that on ....., 19....., I served the within ..... on ..... attorney of record for ..... by personally handing to said attorney a true copy thereof.

.....

Attorney(s) for .....

At Office

I certify that on ....., 19....., I served the within ..... on ..... attorney of record for ....., by leaving a true copy thereof at said attorney's office with his/her clerk therein, or with a person apparently in charge thereof, at ....., Oregon.

.....

Attorney(s) for .....

Mailing

I hereby certify that I served the foregoing plaintiffs' memorandum on James D. Huegli, attorney(s) of record for defendant on February 15, 19 83 by ~~mailing~~ by hand delivery to said attorney(s) a true copy thereof, certified by me as such, contained in a sealed envelope, with postage paid, addressed to said attorney(s) at said attorney(s) last known address, to-wit: 1200 Standard Plaza, Portland, OR 97204 and deposited in the post office at Portland, Oregon, on said day.

Dated February 15, 19 83

/s/ Peter R. Chamberlain

Attorney(s) for Plaintiffs

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BACKING SHEET

1/1/80-B
FORM No. 1001½—STEVENS-NESS LAW PUB. CO., PORTLAND, ORE.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

TERI SEE and DARREL SEE, wife and husband, Plaintiffs, vs. REMINGTON ARMS COMPANY, INC., a Delaware corporation, Defendant.	Civil No. 81-886-LE RESPONSE TO PLAINTIFF'S MEMORANDUM REGARDING EVIDENCE ISSUES

Plaintiff's argument regarding other events and plaintiff's citation of cases is misleading.

Reiger v. Toby Enterprises, 45 Or.App. 679, does not stand for the proposition that the frequency or infrequency of mishaps of other products (not the trial product) is relevant in proving a defective design. The Court in Toby was addressing only the lack of similar accidents of this particular slicer as to whether or not that particular slicer was dangerously defective.

In Croft v. Gulf & Western Industries, Inc., 12 Or.App. 507, the same issue was raised -- whether that

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particular light had malfunctioned in the past.

The Oregon courts have not made the broad sweeping statement that plaintiff would ask this court to believe.

In Ginnis v. Mapes Hotel Corporation, 470 P.2d 135, the court limited the repair orders to the very door which injured the plaintiff. On appeal, the Nevada Supreme Court did not say that evidence of 19 repair orders of other automatic doors was admissible. It only addressed itself to the repair orders of the particular door in question.

In Meyer v. G.M. Corp., which we have also reviewed, the issue of similar accidents was admissible for rebuttal only. In that case, G.M. took the position that it was impossible for the roof of the car to collapse under those circumstances. The court on appeal indicated that other accidents were admissible as rebuttal only and not to prove the plaintiff's case in chief.

Depositions.

The depositions are going to be offered to prove that Mr. Boudreau's gun was dangerously defective. A distinction must be drawn between the design defect and a manufacturing defect. The fact that these other individuals may have had complaints of a similar occurrence could be the result of numerous things. However, this is not a manufacturing defect case. It is a design defect case.

We also point out Mr. Chamberlain's comments at

his Memorandum, page 6, line 18:

> "In summary, plaintiffs should be entitled to read the above referenced depositions to prove, under Reiger v. Toby, supra, that the accident rifle was defective in its design."

The misinterpretation of this case shows the court that we are not talking about prior accidents with the same rifle. In Reiger v. Toby it was the same meat slicer. The error of plaintiff's argument is outlined in his own Memorandum.

Gun Examination Reports.

Mr. Chamberlain would lead the court to believe that each gun examination report is identical. However, as we have argued and must emphasize to the court, the gun examination reports will be put into evidence by Mr. Chamberlain to show in fact that Mr. Boudreau's gun was defective. In reviewing those exhibits, we would point out to the court that these gun examination reports show on their face that the guns were misused, abused, modified, and were not in the same condition as when they left the hands of the manufacturer:

1. Exhibit #3: In this case the trigger mechanism had been adjusted outside the Remington specifications as evidenced by black lacquer on the adjusting screws.

2. Exhibit #6 simply states that there was excessive molycote in the action. It does not show the gun was defective in any way. It does not show that the gun was

dangerously defective in any fashion.

3. Exhibit #8 once again shows that the trigger adjusting screw seals were broken and adjusted outside factory specifications.

4. Exhibit #11 only shows that the malfunction could possibly be caused by a gummed up fire control. Once again, we do not know what was inside the fire control or what was "gumming it up." There is no evidence that it's substantially similar to Mr. Boudreau's gun.

5. The same argument is true for Exhibit #12.

6. Exhibit #13 shows that Remington found the sear-safety cam stuck in a downward position because of an accumulation of dirt and oil. Once again, we do not know how much dirt and oil and why the dirt and oil was inside the rifle. The jury's going to have to speculate. Once again, the rifle was not in the same condition as when it left the factory.

7. In Exhibit #14 Remington replaced the fire control at no charge. By simply doing so, this is not an admission of liability but it will be argued by Mr. Chamberlain that it was an admission that the fire control was defective.

8. Exhibit #16 bears the same arguments as above. Once again, we do not know what's in the fire control of this rifle and there is no evidence beyond speculation by the jury as to what's causing the fire control to be gummed up. Once again, the fire control is not in the same condition

as when it left the factory.

9. Exhibit #29 once again shows that the trigger has been adjusted outside Remington's factory specifications. Please note that Exhibit 29 is the same as Exhibit 3.

10. Exhibit #39 shows that the sear engagement was adjusted outside of Remington's specifications. The gun was replaced at no charge. By simply doing so, Remington has not admitted any liability. However, it will be argued that when Remington provides this service to an owner, they are admitting that there was something wrong with their rifle, which they have not done.

Exhibit 1 may have been admitted without objection in the discovery deposition, but it must be noted that these depositions reserved all objections until the time of trial. Exhibit 1 is merely a complaint. The same objections must be raised to Exhibit 1 as the other exhibits and as raised in our trial brief.

Mr. Chamberlain would also have the court admit exhibits of other problems with other rifles in an attempt to show a defect in Mr. Boudreau's rifle. We would offer the following comments in relationship to those exhibits:

1. Exhibit 14 apparently had a bad fire control. This might have been a manufacturing defect. This has nothing to do with Mr. Boudreau's rifle.

2. Exhibit 15 shows that this rifle apparently "failed the trick test." Once again, this might be a manufacturing

defect, but it will be argued that it is proof that Mr. Boudreau's rifle was defective. Are we now arguing a manufacturing defect case?

3. In Exhibit 19 Remington replaced the trigger assembly as a gesture of customer good faith and good will. Our manufacturer is now faced with this being an admission from some type of fault? It certainly will be argued.

4. Exhibit 22 reflects internal rust on this rifle. There is no evidence of rust, dampness or condensation in the Boudreau rifle. Once again, we're trying another lawsuit.

All of the gun examination reports address the same issue. Every rifle was different. The internal lubrication of the rifles is not available for the jury to determine. There is no evidence that any of these rifles were soaked in diesel fuel. Please note Mr. Boudreau seemed to feel that this was a good idea.

The prejudicial effect of this type of evidence which will confuse and mislead the jury far outweighs its probative value. There is no reason why the plaintiff cannot try his lawsuit in a direct fashion. If Remington's witnesses on the witness stand state that it is impossible for a rifle to discharge accidentally in this fashion, then it may very well be appropriate for these gun examination reports to come in as rebuttal evidence. However, that door has not been opened for rebuttal. Please note in Meyer and

Reiger the court limited this type of evidence to that of rebuttal.

SCHWABE, WILLIAMSON, WYATT, MOORE & ROBERTS

By: _____
James D. Huegli
Attorney for Defendant

CERTIFICATE — TRUE COPY

I hereby certify that the foregoing copy of ..... *is a complete and exact copy of the original.*

Dated ....., *19*.....

.....

Attorney(s) for .....

ACCEPTANCE OF SERVICE

Due service of the within ..... *is hereby accepted on* ....., *19*....., *by receiving a true copy thereof.*

.....

Attorney(s) for .....

CERTIFICATES OF SERVICE

Personal

I certify that on February 16, *19*83, *I served the within* Response to Plaintiff's Memorandum *on* Peter Chamberlain *attorney of record for* plaintiff *by personally handing to said attorney a true copy thereof.*

.....

Attorney(s) for Defendant

At Office

I certify that on ....., *19*....., *I served the within* ..... *on* ..... *attorney of record for* ....., *by leaving a true copy thereof at said attorney's office with his/her clerk therein, or with a person apparently in charge thereof, at* ....., *Oregon.*

.....

Attorney(s) for .....

Mailing

I hereby certify that I served the foregoing ..... *on* .....,

.....

.....

attorney(s) of record for .....

on ....., *19*....., *by mailing to said attorney(s) a true copy thereof, certified by me as such, contained in a sealed envelope, with postage paid, addressed to said attorney(s) at said attorney(s) last known address, to-wit:* .....

.....

.....

.....

and deposited in the post office at ....., *Oregon, on said day.*

Dated ....., *19*.....

.....

Attorney(s) for .....

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BACKING SHEET

1/1/80-B
FORM No. 1001½—STEVENS-NESS LAW PUB. CO., PORTLAND, ORE.

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Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

TERI SEE & DARREL SEE, wife and husband, Plaintiffs, v. REMINGTON ARMS COMPANY, INC., a Delaware corporation, Defendant.	Civil No. 81-886 LE DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT (AND REQUEST FOR ORAL ARGUMENT)

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, defendant moves for partial summary judgment against plaintiffs' contentions of fact e, f, g(1) through g(3), g(8) through g(12), g(14), g(15) and h contained in the pretrial order.

Defendant asserts that there is no material issue of fact with regard to each of the above-listed contentions, and that the defendant is entitled to judgment against each of these contentions as a matter of law. Defendant will rely on its memorandum

of law in support of this motion, together with the various deposition excerpts attached thereto.

SCHWABE, WILLIAMSON, WYATT, MOORE & ROBERTS

By: /s/ W. A. Jerry North
W.A. JERRY NORTH
Of Attorneys for Defendant

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CERTIFICATE OF SERVICE

I hereby certify that on February 15, 1983, I served the within DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT (AND REQUEST FOR ORAL ARGUMENT) on:

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229 Mohawk Building
222 SW Morrison Street
Portland, OR 97204

Attorney for Plaintiffs

by leaving a true copy thereof at said attorney's office with his clerk therein, or with a person apparently in charge thereof, at the above address.

DATED this 15th day of February, 1983.

/s/ W. A. Jerry North
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Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

TERI SEE & DARREL SEE, wife and husband, Plaintiffs, v. REMINGTON ARMS COMPANY, INC., a Delaware corporation, Defendant.	Civil No. 81-886 LE DEFENDANT'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT

I.

BACKGROUND

Plaintiffs' products liability action against the defendant gun manufacturer is based solely on the theory of strict liability in tort. Plaintiffs seek to recover damages for personal injury to Mrs. See and for loss of consortium to Mr. See.

The injury to Mrs. See occurred on October 27, 1979, when she was accidently shot through both legs by Stephen Boudreau. Mr. Boudreau was attempting to unload a gun in the living room of his house at the time the accident occurred.

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Mr. and Mrs. Boudreau, Mr. and Mrs. See (the plaintiffs), and Mr. McDermott had been deer hunting all day on October 27, 1979. They had left the Boudreaus' house about 3:00 a.m. that morning and returned there about 5:00 p.m. that evening. Mr. Boudreau carried his three guns into the house, even though he knew all three guns were still loaded (Mr. Boudreau's Depo. 28). He first attempted to unload the model 700 Remington rifle (hereafter called "the gun") by opening the bolt. One of the functions of the safety mechanism on this gun is to lock the bolt. Therefore, since the safety was on, he was unable to open the bolt. Next, he pushed the safety forward to the "fire" position to release the bolt. At that time, the gun fired. He does not know whether or not his finger was on the trigger at the time the gun fired (Mr. Boudreau's Depo. 32, 56, 57). Only a small effort was required to pull the trigger on this gun since it had a light trigger pull (Mr. Boudreau's Depo. 39).

II.

ARGUMENT

A. Introduction:

In the pretrial order, plaintiffs have alleged various contentions of fact in which plaintiffs attempt to allege that at the time of this accident the gun was in a defective condition, unreasonably dangerous to the plaintiffs. These various contentions of fact allege that the gun was dangerously defective, both as a result of the defendant's misdesign of the gun and the defendant's failure to warn the user of certain defects.

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B. Misdesign

1. Contention g(1).

In their contention of fact g(1), plaintiffs allege that the gun was dangerously defective in that the design of the gun prevented it from being unloaded with the safety in the "on safe" position.

Oregon products liability law requires that any claim based on the theory of strict liability in tort must pass muster under Comments a through m of Restatement (Second) of Torts § 402A. ORS 30.920(3). Under Oregon law, in order for a product to be dangerously defective, it must be "* * * in a condition not contemplated by the ultimate consumer [or actual user] which will be unreasonably dangerous to him". (Comment g to § 402A). In order for a product to be unreasonably dangerous, it must be "* * * dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics". (Comment i to § 402A).

Plaintiffs' claim under Contention g(1) does not pass muster under the requirements of comments g and i. Mr. Stephen Boudreau, the "ultimate consumer" or "actual user" of this gun, was well aware of the fact that one of the functions of the safety mechanism on this gun was to serve as a bolt lock. He was also well aware that the gun could not be unloaded with the safety in the "on safe" position. Furthermore, he was well aware that, if someone touches the trigger while the gun is loaded and the safety

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is in the "fire" position, the gun will fire (Mr. Boudreau's Depo. 29-32).

Therefore, the fact that the gun was designed so that the safety operated as a bolt lock and that the bolt could not be opened to unload the gun without placing the safety in the "fire" position did not result in the gun being dangerously defective. Since this allegation of misdesign by the plaintiffs did not result in the gun being "in a condition not contemplated by the ultimate consumer", defendant is entitled to summary judgment against this contention. Defendant will rely on ORS 30.920, Restatement (Second) of Torts § 402A comment g, *Askew v. Howard-Cooper Corp.*, 263 Or. 184, 502 P.2d 210 (1972), and *Bemis Co., Inc. v. Rubush*, ___ Ind. ___, 427 N.E.2d 1058 (1981).

2. Contention g(2).

In their contention of fact g(2), plaintiffs allege that the gun was dangerously defective in that the design of the gun did not include a "trigger lock". However, as Mr. Boudreau (the owner of the gun) testified, this gun did have a mechanical trigger stop which was a solid stop and prevented significant trigger movement when the safety was in the "on safe" position (Mr. Boudreau's Depo. 40). There is no evidence to the contrary. Again, the "ultimate consumer" was aware of the condition of the gun in this regard. Therefore, since the gun was not in a condition not contemplated by the "ultimate consumer", it cannot be dangerously defective (comment g to § 402A).

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3. Contention g(3).

In their contention of fact g(3), plaintiffs allege that the defendant misdesigned the gun in that the safety mechanism, when placed in the "on safe" position, does not immobilize the firing pin.

Plaintiffs do not allege that this misdesign caused the accident. In fact, plaintiffs allege that the accident occurred when the safety was positioned in the "fire" position. Therefore, what features may or may not have been included in the design of the safety mechanism while in the "on safe" position are not relevant to this action.

C. Failure to Warn - Contentions g(8) through g(12) and g(14).

In these contentions of fact, plaintiffs attempt to allege that the gun was dangerously defective as the result of the defendant's failure to warn the ultimate consumer (Mr. Boudreau) of certain dangerous conditions of the gun.

Under Oregon law, a product cannot be defective if it is safe for normal handling and use (Comment h to § 402A). Where directions for use and warnings are given by the seller, then the seller is entitled to assume that such directions and warnings will be read and heeded (Comment j to § 402A). Here, Mr. Boudreau admits that he discarded the directions and warnings without reading them (Mr. Boudreau's Depo. 19, 85).

In the recent case of *Kyser Indus. Corp. v. Frazier*, ___ Colo. ___, 642 P.2d 908 (1982), the Colorado Supreme Court reversed a jury verdict for the plaintiff and held as a matter of

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law that the defendant manufacturer had no duty to warn as alleged by the plaintiff. The court carefully analyzed the interaction of the various comments to § 402A in an action based on an alleged breach of a duty to warn. The court concluded that the product was not in a defective condition because of lack of warning, as a matter of law. Likewise, in the instant case, plaintiff has no evidence of a failure to warn as a *cause* of the accident. Rather, plaintiffs have simply alleged as speculation various failures to warn which they have not tied in to any allegation of defect which caused the accident. Defendant is entitled to partial summary judgment.

D. Inferred Defect - Contention g(15).

In this contention of fact, plaintiffs attempt to allege an "inferred defect." However, Oregon has not adopted the California position that the plaintiff may infer a defect simply from the fact that an accident occurred in which the plaintiff was injured by the product. In *Wilson v. Piper Aircraft Corporation*, 282 Or. 411, 579 P.2d 1287 (1978), the Oregon Supreme Court rejected the California position enunciated in *Barker v. Lull Engineering Co., Inc.*, 20 Cal. 3d 413, 143 Cal. Rptr. 205, 573 P.2d 1443 (1978).

In *Weems v. CBS Imports*, 46 Or. App. 539, 612 P.2d 323 (1980), *rev den*, 389 Or. 659, the court reversed a jury verdict for the plaintiff where the trial court submitted to the jury the issue of an "inferred defect." In that case, as in the instant case, the plaintiff contended that the product was defective due

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to misdesign. In that case, as in the instant case, plaintiff made no contention that there was a defect which the plaintiff was unable to identify. Defendant is entitled to partial summary judgment.

E. Same Condition, Intended and Foreseeable Use - Contention h and e.

In these contentions of fact, plaintiffs allege that the gun was in substantially the same condition at the time of the accident as it was when it left the hands of the defendant manufacturer, and that it was being used and handled in a foreseeable and intended manner.

The only evidence as to the condition of the gun at the time of the accident is to that it was essentially worn out and in very poor condition (Mr. Boudreau's Depo. 87, Mr. John Stekl's Depo. 11, 16). The gun clearly was not serviced or maintained in accordance with the instructions from the manufacturer. Likewise, the attempt to unload the gun inside the house while pointed at Mrs. See with the owner's finger possibly on the trigger was not a foreseeable and intended use.

F. Notice - Contention f.

In this contention of fact, plaintiffs allege that the defendant had notice of similar accidents prior to the manufacture and sale of this gun.

Notice is not an issue in a strict liability in tort action. *Phillips v. Kimwood Machine Co.*, 269 Or. 485, 525 P.2d 1033 (1974).

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III.

CONCLUSION

For these reasons, defendant's motion for partial summary judgment should be granted.

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CERTIFICATE OF SERVICE

I hereby certify that on February 15, 1983, I served the within MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT on:

PETER R. CHAMBERLAIN
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222 SW Morrison Street
Portland, OR 97204

Attorney for Plaintiffs

by leaving a true copy thereof at said attorney's office with his clerk therein, or with a person apparently in charge thereof, at the above address.

DATED this 15th day of February, 1983.

/s/ W. A. Jerry North
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Of Attorneys for Plaintiffs

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Of Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ORGON

TERI SEE and DARREL SEE, wife and husband, Plaintiffs,	)	Civil No. 81-886
v.	)	PRETRIAL ORDER
REMINGTON ARMS COMPANY, INC., a Delaware corporation, Defendant.	)	

The following proposed Pretrial Order is lodged with the Court pursuant to L.R. 235-2.

1. Nature of Action.

This is a civil action for personal injury and loss of consortium based upon strict liability in tort. A jury was timely requested. This case will be tried before a jury.

2. Subject Matter Jurisdiction.

Jurisdiction of this Court is based upon diversity of

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citizenship and an amount in controversy in excess of $10,000, exclusive of interest and costs. 28 USC 1332 (1976).

3. Agreed Facts as to Which Relevance is Not Disputed.

The following facts have been agreed upon by the parties and require no proof:

a. Plaintiffs are individuals who, at all material times, resided within and were citizens of the state of Oregon.

b. Defendant is a Delaware corporation and is a citizen of that state.

c. The amount in controversy, exclusive of costs, exceeds $10,000.

d. Defendant is in the business of designing, manufacturing and selling firearms, including a rifle known as the Remington Model 700. Defendant designed, manufactured and sold the Remington Model 700 that is involved in this action and that is marked as plaintiffs' Exhibit 2 (hereinafter referred to as "this rifle").

e. This rifle is a Remington Model 700 BDL Varmint Special, Serial No. A6391951, and was manufactured by defendant in December, 1976.

f. This rifle, as designed, manufactured and sold by defendant, had a two-position, manually operated safety.

g. As a result of the injuries sustained when this rifle discharged, plaintiff Teri See incurred necessary medical expenses, including the charges of doctors and a hospital, in the reasonable sum of $11,789.

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h. From the date of her accident through March 17, 1980, plaintiff Teri See lost wages from part-time work totaling $1,187.24.

i. Plaintiff Darrel See is and at all material times has been, the husband of plaintiff Teri See.

4. Agreed Facts as to Which Relevance is Disputed.

Teri See and Darrel See, on the one hand, and Stephen Boudreau and Starr Boudreau, on the other hand, entered into a COVENANT NOT TO SUE, on or about April 8, 1980. A copy of the COVENANT NOT TO SUE will be marked as an exhibit in the trial of this case. The relevance of said exhibit, and the relevance of the facts recited therein, is disputed.

5. Facts Not to be Controverted.

The following facts, although not admitted, will not be controverted at trial by any evidence, but each party reserves objections as to relevance.

6. Contentions of Fact.

PLAINTIFFS

a. The design of the bolt and firing mechanism and safety mechanism on this rifle is the same as the design on all Remington Model 700 rifles, regardless of caliber, including all ADL models, BDL models and Varmints manufactured between January, 1971 and January, 1982.

b. This rifle, as designed, manufactured and sold by defendant, could not be unloaded without moving the safety from the "on safe" position to the "fire" position.

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c. The trigger on this rifle, as designed, manufactured and sold by defendant, was capable of being moved when the safety was engaged.

d. The trigger mechanism on this rifle, as designed, manufactured and sold by defendant, was designed such that it could become contaminated by dirt and debris.

e. At the time it caused plaintiff Teri See's injuries, this rifle was being used and handled in a reasonably foreseeable and intended manner.

f. [redacted]

g. At the time the Remington Model 700 rifle that caused injury to plaintiff Teri See left Remington's hands, it was unreasonably dangerous and defective in one or more of the following particulars:

(1) Defendant designed and manufactured this rifle such that the bolt could not be opened when the safety was in the "on safe" position and, therefore, the rifle could not be unloaded without moving the safety from the "on safe" position to the "fire" position.

(2) The trigger mechanism, as designed and manufactured by defendant, did not contain a trigger lock and

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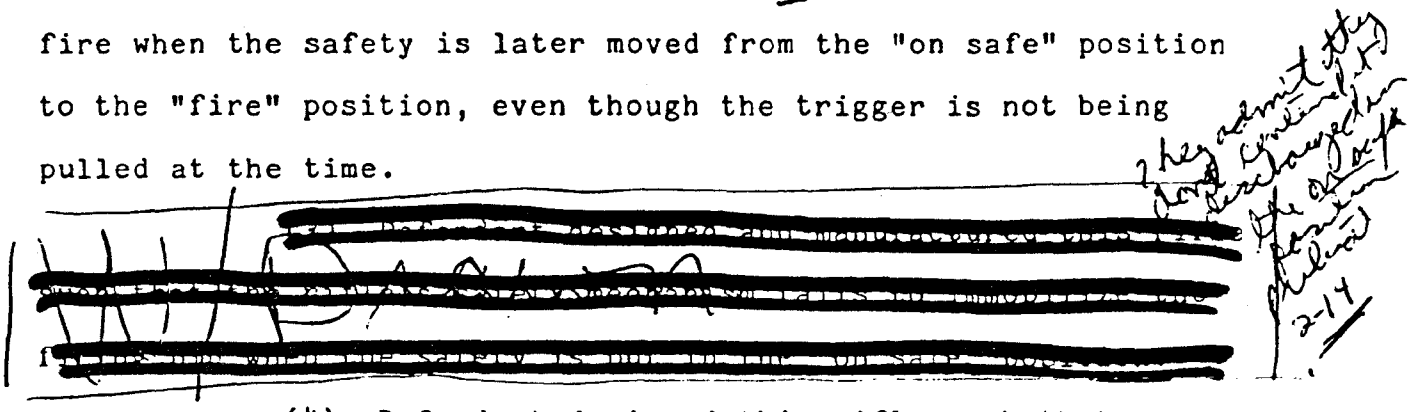
very little effort was required to pull the trigger rearward even when the safety was in the "on safe" position. With a design such as this, any time there is any condition of the rifle which causes the trigger to stay in the pulled position, the rifle will fire when the safety is later moved from the "on safe" position to the "fire" position, even though the trigger is not being pulled at the time.



(4) Defendant designed this rifle such that lubrication of the trigger assembly could result in the rifle unexpectedly firing when the safety was moved from the "on safe" position to the "fire" position despite the fact that the trigger was not being pulled at the time.

(5) The rifle was designed such that there were numerous ports through which dirt, dust and debris could enter and contaminate the trigger mechanism and safety mechanism and related parts. This contamination could cause the rifle to unexpectedly fire when the safety was moved from the "on safe" position to the "fire" position despite the fact that the trigger was not being pulled at the time.

(6) The rifle was designed such that cold weather could cause the trigger and safety mechanisms to malfunction, resulting in the rifle unexpectedly firing when the safety was moved from the "on safe" position to the "fire" position despite

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the fact that the trigger was not being pulled at the time.

(7) The rifle was designed without an automatic safety or three-position safety or other similar positive safety device.

(8) Defendant failed to warn users of this rifle that, under certain circumstances, the rifle could unexpectedly fire when the safety was moved from the "on safe" position to the "fire" position despite the fact that the trigger was not being pulled at the time.

(9) Defendant failed to warn users of the rifle that lubrication of the trigger assembly could cause the rifle to unexpectedly fire when the safety was moved from the "on safe" to the "fire" position despite the fact that the trigger was not being pulled at the time.

(10) Defendant failed to warn users of this rifle that failing to adequately clean certain parts of the rifle could cause an accumulation of gun oil or dried oil, which could build a film that could cause the rifle to unexpectedly fire when the safety was moved from the "on safe" position to the "fire" position despite the fact that the trigger was not being pulled at the time.

(11) Defendant failed to warn users of the rifle that cleaning of the trigger mechanism with certain petroleum products could cause the rifle to unexpectedly fire when the safety was moved from the "on safe" position to the "fire" position despite the fact that the trigger was not being pulled

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at the time.

(12) Defendant failed to warn users of the rifle that use of the rifle in cold temperatures could cause the rifle to unexpectedly fire when the safety was moved from the "on safe" position to the "fire" position despite the fact that the trigger was not being pulled at the time.

(13) Defendant designed the rifle such that dampners or condensation could form on the internal parts of the trigger, could freeze and could cause the internal parts of the trigger to hang up such that the rifle would unexpectedly fire when the safety was moved from the "on safe" position to the "fire" position despite the fact that the trigger was not being pulled at the time.

(14) Defendant failed to warn users of the rifle that dampers or condensation in conjunction with cold weather could cause the internal parts of the trigger of the rifle to hang up such that the rifle would fire unexpectedly when the safety was moved from the "on safe" position to the "fire" position despite the fact that the trigger was not being pulled at the time.

[redacted]

h. At the time of plaintiff Teri See's injury, this rifle was in substantially the same condition as it was when it

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left defendant's hands, and it was being used and handled in a manner foreseeable to defendant.

i. The unreasonably dangerous and defective condition of defendant's product was the legal cause of injuries suffered by plaintiff Teri See when, on October 27, 1979, she received a gunshot wound from this rifle, which one Stephen Boudreau was attempting to unload.

j. As a result of the above mentioned gunshot wound, plaintiff Teri See suffered injury, including severe and permanent injury to both of her legs. The injury was a blast injury to the medial aspect of both thighs. It damaged the skin, subcutaneous tissues of both thighs and the muscles of the right thigh. Each such wound was 8" to 10" in diameter. Plaintiff Teri See has suffered permanent muscle damage, and her injuries have required 6 surgical procedures, including a split thickness skin graft. The wounds caused permanent disfigurement and scarring of both of plaintiff's legs and caused residual muscle weakness in plaintiff's right leg, including her knee.

k. As a result of plaintiff Teri See's injuries, she has lost wages from her part-time work in the sum of $1,187.24, and her earning capacity has been impaired.

l. As a result of plaintiff Teri See's injuries, she will incur medical expenses and will need further surgery in the future.

m. As a result of Teri See's injuries, she has endured pain and suffering and has received permanent injuries to both of

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her legs, all to her general damage in the sum of $500,000.

n. The above described injuries to plaintiff Teri See caused her husband, plaintiff Darrel See, the loss of companionship, society and services of his wife, all to his damage in the sum of $25,000.

o. The trigger adjusting screws on this rifle had not been adjusted since before the rifle left Remington's hands.

p. Plaintiff Teri See's life expectancy is 49.5 years.

q. Plaintiffs deny defendant's contentions of fact.

DEFENDANT

a. Defendant denies plaintiffs' contentions of fact.

b. The proximate and legal cause of the injuries sustained by the plaintiff was the negligence of the owner of the gun, Stephen Boudreau.

c. Stephen Boudreau (hereinafter referred to as owner) was negligent in operating a loaded firearm without first ascertaining that the muzzle was pointed in a safe direction.

d. Owner was negligent in operating a loaded firearm when he knew or should have known that consuming alcohol could or would interfer with his use of said firearm, causing a dangerous condition to exist for himself and others.

e. Owner was negligent in failing to read the instruction manual provided by the defendant with said rifle.

f. Owner was negligent in throwing away the instruction manual provided by the defendant with said rifle.

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g. Owner was negligent in keeping a loaded gun in a house when he knew or should have known that an accidental discharge of said firearm would be more likely to cause serious injury to himself or any third party.

h. Owner was negligent in misusing and abusing the rifle by improper maintainence and care.

i. Owner was negligent in failing to follow all the manufacturer's manual instructions regarding the operation of the rifle.

j. Owner was negligent in pulling the trigger of a loaded rifle while it was pointed at the plaintiff with the safety in the fire position.

k. Owner was negligent in improperly adjusting the trigger pull contrary to the manufacturer's directions.

l. Owner was negligent in bringing a loaded gun into a house.

m. Owner was negligent in failing to keep guns and ammunition stored separately.

n. Any failure to warn the owner of said rifle is irrelevant under any circumstances as the owner did not read any of the material provided.

o. This particular rifle was not defectively designed, nor was it defective in any way.

7. Contentions of Law.

PLAINTIFFS

a. Evidence of defendant's post-accident design change

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is admissible as substantive evidence that defendant's prior design was defective and unreasonably dangerous.

b. Evidence of other similar complaints from other owners of substantially identical Remington Model 700 rifles is admissible as substantive evidence that defendant's design was defective and unreasonably dangerous.

c. Defendant's contentions of fact b. through m., inclusive, do not allege facts constituting defenses to plaintiffs' claims. Defendant is attempting to raise, as affirmative defenses, the alleged negligence of a third party, the person who was attempting to unload the rifle that discharged, injuring plaintiff Teri See. As a matter of law, no such defense exists.

d. No evidence is admissible as to the existence or the amount of the plaintiffs' settlement with the Boudreaus.

e. In the event that the Court rules that the jury should be informed as to the existence of the plaintiffs' settlement with the Boudreaus, the Court should then instruct the jury in unequivocal language to disregard the settlement and to return a verdict for the full amount of the plaintiffs' damages. The jury should also be instructed that the settlement credit function is for the Court, not the jury, and that the Court will reduce the jury's verdict by an amount equal to the settlement amount.

f. Defendant's contentions of fact b. through o. all allege facts which are provable, if at all, under a general

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denial. To repeat these contentions in the pretrial order does not raise them to the level of affirmative defenses. The jury should not be informed as to these contentions nor should it be instructed regarding these contentions.

g. Plaintiffs deny defendant's contentions of law.

DEFENDANT

a. Defendant denies plaintiffs' contentions.

b. Evidence of defendant's post-accident design change is inadmissible.

c. Evidence of similar complaints from other owners is inadmissible.

d. If evidence of other complaints is to be admitted, the plaintiff must first establish that this gun was, in fact, defective.

e. Evidence of other similar complaints is inadmissible on the issue of design defect as it has not been shown the guns were substantially identical.

f. Evidence of payment of $25,000.00 by Stephen Boudreau, to the plaintiffs, is admissible evidence.

g. Defendant contends that facts B through M inclusive do allege facts constituting a defense to plaintiffs' claim. Defendant raises the negligence of a third party, who was aiming the rifle when it discharged, injuring plaintiff Teri See. As a matter of law, the negligence of this third party was the direct,

* * *

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proximate and legal cause of the injuries sustained by Teri See.

h. The jury should be informed as to the existence of plaintiffs' settlement with the Boudreaus and should be instructed in unequivocal language of the reasons for Boudreau not being a participant in this particular lawsuit, including the fact that the covenant entered into between the plaintiff and Boudreau and its legal effect precludes Remington Arms from bringing Mr. Boudreau in as a third party defendant.

8. Amendments to Pleadings.

a. Plaintiff Teri See seeks to amend her complaint to allege general damages in the sum of $500,000 rather than the $250,000 set forth in the complaint as filed.

b. Plaintiff Teri See seeks to amend her complaint to allege medical specials in the sum of $11,789.00 and lost wages in the sum of $1,187.24.

Peter R. Chamberlain
Of Attorneys for Plaintiffs

James D. Huegli
Of Attorneys for Defendant

IT IS ORDERED the foregoing Pretrial Order is

_____ Approved as lodged.

_____ Approved as amended by interlineation.

DATED this ____ day of _____, 19__.

U.S. DISTRICT JUDGE/MAGISTRATE

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