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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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1 particular light had malfunctioned in the past.

2 The Oregon courts have not made the broad

3 sweeping statement that plaintiff would ask this court to

4 believe.

5 In Ginnis v. Mapes Hotel Corporation, 470 P.2d 135,

6 the court limited the repair orders to the very door which

7 injured the plaintiff. On appeal, the Nevada Supreme

8 Court did not say that evidence of 19 repair orders of

9 other automatic doors was admissible. It only addressed itself

10 to the repair orders of the particular door in question.

11 In Meyer v. G.M. Corp., which we have also reviewed,

12 the issue of similar accidents was admissible for rebuttal

13 only. In that case, G.M. took the position that it was

14 impossible for the roof of the car to collapse under those

15 circumstances. The court on appeal indicated that other

16 accidents were admissible as rebuttal only and not to

17 prove the plaintiff's case in chief.

18 Depositions.

19 The depositions are going to be offered to prove

20 that Mr. Boudreau's gun was dangerously defective. A distinction

21 must be drawn between the design defect and a manufacturing

22 defect. The fact that these other individuals may have had

23 complaints of a similar occurrence could be the result of

24 numerous things. However, this is not a manufacturing

25 defect case. It is a design defect case.

26 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

1 dangerously defective in any fashion.

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

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

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

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

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

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

1 as when it left the factory.

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

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

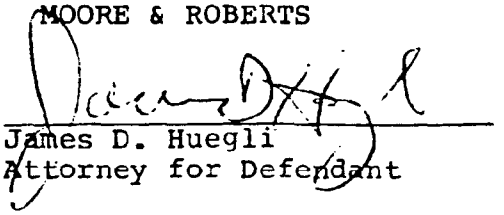
12 Exhibit 1 may have been admitted without objection
13 in the discovery deposition, but it must be noted that these
14 depositions reserved all objections until the time of trial.
15 Exhibit 1 is merely a complaint. The same objections must
16 be raised to Exhibit 1 as the other exhibits and as raised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

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

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

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

1 defect, but it will be argued that it is proof that Mr.
2 Boudreau's rifle was defective. Are we now arguing a
3 manufacturing defect case?
4 3. In Exhibit 19 Remington replaced the trigger
5 assembly as a gesture of customer good faith and good will.
6 Our manufacturer is now faced with this being an admission
7 from some type of fault? It certainly will be argued.
8 4. Exhibit 22 reflects internal rust on this
9 rifle. There is no evidence of rust, dampness or condensation
10 in the Boudreau rifle. Once again, we're trying another
11 lawsuit.
12 All of the gun examination reports address the
13 same issue. Every rifle was different. The internal
14 lubrication of the rifles is not available for the jury
15 to determine. There is no evidence that any of these
16 rifles were soaked in diesel fuel. Please note Mr.
17 Boudreau seemed to feel that this was a good idea.
18 The prejudicial effect of this type of evidence
19 which will confuse and mislead the jury far outweighs
20 its probative value. There is no reason why the plaintiff
21 cannot try his lawsuit in a direct fashion. If Remington's
22 witnesses on the witness stand state that it is impossible
23 for a rifle to discharge accidentally in this fashion, then
24 it may very well be appropriate for these gun examination
25 reports to come in as rebuttal evidence. However, that door
26 has not been opened for rebuttal. Please note in Meyer and

1 Reiger the court limited this type of evidence to that
2 of rebuttal.
3 SCHWABE, WILLIAMSON, WYATT,
4 MOORE & ROBERTS
5 By: 
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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 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. 100½—STEVENS-NESS LAW PUB. CO., PORTLAND, ORE.

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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

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

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

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1 CERTIFICATE OF SERVICE

2

3 I hereby certify that on February 15, 1983, I served

4 the within DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT (AND

5 REQUEST FOR ORAL ARGUMENT) on:

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7 222 SW Morrison Street
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8
Attorney for Plaintiffs
9

10 by leaving a true copy thereof at said attorney's office with

11 his clerk therein, or with a person apparently in charge thereof,

12 at the above address.

13 DATED this 15th day of February, 1983.

14

15

16 /s/ W. A. Jerry North
W. A. JERRY NORTH
17 Of Attorneys for Defendant

18

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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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1 B. Misdesign

2 1. Contention g(1).

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

7 Oregon products liability law requires that any claim
8 based on the theory of strict liability in tort must pass muster
9 under Comments a through m of Restatement (Second) of Torts
10 § 402A. ORS 30.920(3). Under Oregon law, in order for a product
11 to be dangerously defective, it must be "* * * in a condition not
12 contemplated by the ultimate consumer [or actual user] which will
13 be unreasonably dangerous to him". (Comment g to § 402A). In
14 order for a product to be unreasonably dangerous, it must be
15 "* * * dangerous to an extent beyond that which would be
16 contemplated by the ordinary consumer who purchases it, with the
17 ordinary knowledge common to the community as to its
18 characteristics". (Comment i to § 402A).

19 Plaintiffs' claim under Contention g(1) does not pass
20 muster under the requirements of comments g and i. Mr. Stephen
21 Boudreau, the "ultimate consumer" or "actual user" of this gun,
22 was well aware of the fact that one of the functions of the safety
23 mechanism on this gun was to serve as a bolt lock. He was also
24 well aware that the gun could not be unloaded with the safety in
25 the "on safe" position. Furthermore, he was well aware that, if
26 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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1 3. Contention g(3).

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

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

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

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

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

24 In the recent case of *Kyser Indus. Corp. v. Frazier*, ___
25 Colo. ___, 642 P.2d 908 (1982), the Colorado Supreme Court
26 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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1 CERTIFICATE OF SERVICE

2

3 I hereby certify that on February 15, 1983, I served

4 the within MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY

5 JUDGMENT on:

6 PETER R. CHAMBERLAIN
229 Mohawk Building
7 222 SW Morrison Street
Portland, OR 97204
8
Attorney for Plaintiffs
9

10 by leaving a true copy thereof at said attorney's office with

11 his clerk therein, or with a person apparently in charge thereof,

12 at the above address.

13 DATED this 15th day of February, 1983.

14

15

16 /s/ W. A. Jerry North
W. A. JERRY NORTH
17 Of Attorneys for Defendant

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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

1 citizenship and an amount in controversy in excess of $10,000,
2 exclusive of interest and costs. 28 USC 1332 (1976).
3 3. Agreed Facts as to Which Relevance is Not Disputed.
4 The following facts have been agreed upon by the parties
5 and require no proof:
6 a. Plaintiffs are individuals who, at all material
7 times, resided within and were citizens of the state of Oregon.
8 b. Defendant is a Delaware corporation and is a citizen
9 of that state.
10 c. The amount in controversy, exclusive of costs,
11 exceeds $10,000.
12 d. Defendant is in the business of designing,
13 manufacturing and selling firearms, including a rifle known as
14 the Remington Model 700. Defendant designed, manufactured and
15 sold the Remington Model 700 that is involved in this action and
16 that is marked as plaintiffs' Exhibit 2 (hereinafter referred to
17 as "this rifle").
18 e. This rifle is a Remington Model 700 BDL Varmint
19 Special, Serial No. A6391951, and was manufactured by defendant
20 in December, 1976.
21 f. This rifle, as designed, manufactured and sold by
22 defendant, had a two-position, manually operated safety.
23 g. As a result of the injuries sustained when this
24 rifle discharged, plaintiff Teri See incurred necessary medical
25 expenses, including the charges of doctors and a hospital, in the
26 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.

Biggest Danger

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.

They admit they knew of the defect in the design prior to the accident 2-14

[redacted]

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

2 (7) The rifle was designed without an automatic

3 safety or three-position safety or other similar positive safety

4 device.

5 (8) Defendant failed to warn users of this rifle

6 that, under certain circumstances, the rifle could unexpectedly

7 fire when the safety was moved from the "on safe" position to the

8 "fire" position despite the fact that the trigger was not being

9 pulled at the time.

10 (9) Defendant failed to warn users of the rifle

11 that lubrication of the trigger assembly could cause the rifle to

12 unexpectedly fire when the safety was moved from the "on safe" to

13 the "fire" position despite the fact that the trigger was not

14 being pulled at the time.

15 (10) Defendant failed to warn users of this rifle

16 that failing to adequately clean certain parts of the rifle could

17 cause an accumulation of gun oil or dried oil, which could build

18 a film that could cause the rifle to unexpectedly fire when the

19 safety was moved from the "on safe" position to the "fire"

20 position despite the fact that the trigger was not being pulled

21 at the time.

22 (11) Defendant failed to warn users of the rifle

23 that cleaning of the trigger mechanism with certain petroleum

24 products could cause the rifle to unexpectedly fire when the

25 safety was moved from the "on safe" position to the "fire"

26 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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1 left defendant's hands, and it was being used and handled in a
2 manner foreseeable to defendant.
3 i. The unreasonably dangerous and defective condition
4 of defendant's product was the legal cause of injuries suffered
5 by plaintiff Teri See when, on October 27, 1979, she received a
6 gunshot wound from this rifle, which one Stephen Boudreau was
7 attempting to unload.
8 j. As a result of the above mentioned gunshot wound,
9 plaintiff Teri See suffered injury, including severe and
10 permanent injury to both of her legs. The injury was a blast
11 injury to the medial aspect of both thighs. It damaged the skin,
12 subcutaneous tissues of both thighs and the muscles of the right
13 thigh. Each such wound was 8" to 10" in diameter. Plaintiff
14 Teri See has suffered permanent muscle damage, and her injuries
15 have required 6 surgical procedures, including a split thickness
16 skin graft. The wounds caused permanent disfigurement and
17 scarring of both of plaintiff's legs and caused residual muscle
18 weakness in plaintiff's right leg, including her knee.
19 k. As a result of plaintiff Teri See's injuries, she
20 has lost wages from her part-time work in the sum of $1,187.24,
21 and her earning capacity has been impaired.
22 l. As a result of plaintiff Teri See's injuries, she
23 will incur medical expenses and will need further surgery in the
24 future.
25 m. As a result of Teri See's injuries, she has endured
26 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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1 denial. To repeat these contentions in the pretrial order does
2 not raise them to the level of affirmative defenses. The jury
3 should not be informed as to these contentions nor should it be
4 instructed regarding these contentions.
5 g. Plaintiffs deny defendant's contentions of law.
6
7 DEFENDANT
8 a. Defendant denies plaintiffs' contentions.
9 b. Evidence of defendant's post-accident design change
10 is inadmissible.
11 c. Evidence of similar complaints from other owners is
12 inadmissible.
13 d. If evidence of other complaints is to be admitted,
14 the plaintiff must first establish that this gun was, in fact,
15 defective.
16 e. Evidence of other similar complaints is inadmissible
17 on the issue of design defect as it has not been shown the guns
18 were substantially identical.
19 f. Evidence of payment of $25,000.00 by Stephen
20 Boudreau, to the plaintiffs, is admissible evidence.
21 g. Defendant contends that facts B through M inclusive
22 do allege facts constituting a defense to plaintiffs' claim.
23 Defendant raises the negligence of a third party, who was aiming
24 the rifle when it discharged, injuring plaintiff Teri See. As a
25 matter of law, the negligence of this third party was the direct,
26 * * *

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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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