IN THE CIRCUIT COURT OF CRAIGHEAD COUNTY, ARKANSAS

MITCHELL K. WRIGHT, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF SHANNON D. (WILLIAMS) WRIGHT, DECEASED; AND RENEE BROOKS, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF NATALIE BROOKS, A MINOR DECEASED; TONY R. HERRING AND PAMELA D. HERRING, AS PERSONAL REPRESENTATIVES OF THE ESTATE OF PAIGE ANN HERRING, DECEASED; TINA MCINTYRE JOHNSON, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF STEPHANIE DAWN JOHNSON, DECEASED; AND, SUZANN MARIE WILSON, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF BRITTNEY RYEN VARNER, DECEASED — PLAINTIFFS

V. CIV-98-394(B)

ANDREW GOLDEN, A MINOR, MITCHELL JOHNSON, A MINOR, SCOTT JOHNSON, GRETCHEN WOODARD, DENNIS GOLDEN, PAT GOLDEN, DOUGLAS GOLDEN, SPORTING GOODS PROPERTIES, INC., F/K/A REMINGTON ARMS COMPANY, INC., JOHN DOE, AND JOHN DOE, INC., AS THE SUCCESSORS IN INTEREST OF UNIVERSAL FIREARMS — DEFENDANTS

BRIEF IN SUPPORT OF RESPONSE TO MOTION FOR SUMMARY JUDGMENT

FACTUAL EVENTS

The defendant's brief provides a general description of some of the facts

underlying this cause of action. However, some of the facts as stated in the defendant's brief are inartfully characterized. For instance, Mr. Golden offered testimony that a trigger lock could be removed in approximately 30 seconds without a key. What is not noted in the defendant's brief is that it would take someone with Mr. Golden's experience, expertise, tools, and strength to do so. In fact, he testified in his deposition that he did not discuss the technique to remove trigger locks because he did not want it known by the general public. Presumably, this would indicate that without such specialized knowledge, the trigger lock device is otherwise effective as a deterrent to theft and preventative device against unauthorized use.

It is also important to note that no evidence exists to indicate that Andrew Golden or Mitchell Johnson had any such knowledge about how to remove trigger locks. Nor is it indicated that even if such knowledge had been possessed, that the boys would have had access to the necessary tools or the physical strength to dislodge the locks. Mr. Golden also testified that he obtained the Remington 742 in 1972 or 1973. However, it appears that the weapon was not actually manufactured until 1975.

ARGUMENT

Certainly great attention has been given to the magnitude of this tragedy and its ramifications on both the plaintiffs and the community. However, in the legal analysis of summary judgment, it is essential to examine these facts again, and perhaps more closely. Remington seeks to shift the Court's attention from its own actions and knowledge to the obvious blameworthiness of Andrew Golden and Mitchell Johnson. Remington wrongfully asserts that the boys' criminal activity, which was certainly intentional and deliberate, is necessarily a superceding intervening cause that absolves Remington of any liability. In that the criminal misuse of firearms is absolutely foreseeable, those intentional acts do not absolve the original tortfeasor of liability. "The ultimate test in determining the existence of a duty to use due care is found in the foreseeability that harm may result if care is not exercised." Shannon v. Wilson, 329 Ark. 143, 947 S.W.2d 349 (1997). "Usually, . . . proximate causation is a question for the jury, . . .[and] the question whether an act or condition is an intervening or concurrent cause is usually a question for the jury." Id. In fact, this Court denied Motions to Dismiss by the parents and grandfather of Andrew Golden, in which they asserted this same argument. This Court ruled that the criminal conduct was not such a superceding intervening cause. The same ruling should apply here.

The defendant accuses the plaintiffs of "placing the cart before the horse" in its legal analysis of Arkansas products liability law. However, it is the defendant who has placed the proverbial cart before the horse by attempting to address the legal issues *at all* while factual issues still remain.

> Summary judgment should only be granted where there exists no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. The evidence is viewed in the light most favorable to the party opposing the judgment, and [the Court is to] resolve all inferences and doubts against the moving party.

Lovell v. Brock, 330 Ark. 206, 952 S.W.2d 161 (1997). Furthermore, summary judgment is an extreme remedy that should be granted by the trial court only when it is clear that no genuine issues of material fact exist. See, Knowlton v. Ward, 318 Ark. 867, 889 S.W.2d 721 (1994).

In that the defendant does not deny that the plaintiffs have properly pleaded a case and alleged facts on which relief could be granted, summary judgment could only be based on the absence of material facts to be determined by the jury. The lengthy brief by the defendant primarily addresses the issue of causation. "Proximate cause must be determined before fault may be assessed and . . . proximate cause is typically a question for the jury. The only time that proximate cause may become a question of law is when reasonable minds could not differ."

Lovell, supra.

The defense brief states that Remington did not cause the deaths at Westside School, the boys did. It is true that the boys caused the deaths at Westside School. However, the instrument of some of those deaths was a product manufactured, marketed, and sold by the defendant. Under the law in Arkansas, if that product was defective so as to be unreasonably dangerous and that defect had a causal relationship to the deaths, the defendant can be held liable under either a strict liability approach or a negligence theory. Ark. Code Ann. § 16-116-102, states that a product is unreasonable dangerous if it "is dangerous to an extent beyond that which would be contemplated by the ordinary and reasonable buyer, consumer or user. . ."

Summary judgment may be based only on those facts which are in the record at the time of the hearing. The defendant cannot identify any document, pleading, or item of evidence in the record that is demonstrative of the expectations of a normal and reasonable consumer. The reasonable expectation standard is uniquely an issue of fact to be determined by a jury. The only deposition taken thus far in the matter is that of Douglas Golden. He is a party to these proceedings, as well as a man who has certainly suffered personally as a result of this tragedy. His

testimony concerning his expectations and understanding of the weapon, its characteristics, its flaws and its safety devices is biased, self-serving both legally and, likely, emotionally. It would be wholly inappropriate to attempt to take the testimony of this one person and coronate it as being the absolute expectations of the reasonable consumer described in the statute.

The "reasonable man" described at law is no one person, especially not the defendant in a particular case. It is up to a jury to determine what the reasonable expectations of a reasonable consumer would be and whether or not this product conformed to those expectations. Remington alleges that everyone knows that guns can kill people and think they are inherently dangerous. Thus, they argue, no liability can attach because reasonable expectations are that the product is dangerous. However, the open and obvious danger rule is not an automatic bar to recovery on a strict liability claim in a defective design case. Lockley v. Deere & Co., 933 F.2d 1378 (8th Cir. 1991). For this reason alone, the defendant's motion for summary judgment fails in that it leaves material issues of fact to be determined. Remington neglects to address the expectations of consumers relative to a manufacturer incorporating reasonable safety technology in rifles. This is for the jury.

The defendant states that "there is nothing that Remington could have done to prevent this tragedy." This is not only an issue of fact to be determined by the jury, but is a crucial and essential fact question for the entire case. Certainly, a conclusary statement by the defendant in a summary judgment motion that it did all that could be done cannot be the standard upon which summary judgment is determined. This is wholly an issue of fact to be determined by a jury, and *reasonable minds could differ in the answer.* "Questions concerning the reasonableness of the parties' conduct, foreseeability and proximate cause particularly lend themselves to *decision by a jury.*" Rodriguez v. Glock, Inc., 28 F.Supp. 2d 1064 (N.D. Ill. 1998) (emphasis added).

The plaintiffs allege that the defendant should have incorporated an internal safety device that would prevent the unauthorized use of a firearm. That unauthorized use would include accidental use, *e.g.*, by children, and intentional misuse, *e.g.*, by thieves. Such misuses were foreseeable, and Remington had a duty to incorporate design features that would have addressed them. In Forrest City Machine Works Inc. v. Aderhold, 273 Ark. 33, 616 S.W.2d 720 (1981), the Arkansas Supreme Court held that

> a manufacturer who fails to use reasonable care in the

> design and manufacture of a product is liable not only for the harm which may come to users of the product, but also for harm which may come to a person who may reasonably be expected to come in contact with the product.

The attached Affidavit of Steve Teret (Exhibit A) indicates that the technology was available at the time this weapon was manufactured in 1975 for such integrated locking devices. This device could not have been thrown away by a consumer nor lost when the gun was sold and resold by a string of consumers. The Fox Carbine was manufactured before Mr. Golden's Remington 30-06 Model 742 and had a combination lock within its frame that disabled the firing mechanism. It is a question of fact as to whether or not a reasonable consumer would have expected the manufacturer to conform with the state of the art designs concerning safety of its product. To prevail, the plaintiff

> must produce evidence that an alternative design was available at the time of manufacture or that the design employed by the manufacturer failed to comply with industry standards. The fact that an alternative design exists, however, does not require the manufacturer to change his design or subject the manufacturer to liability. The alternative design must be practical, economical and effective in preventing the injury in question.

Rodriguez, supra. (citations omitted)

In DeRosa v. Remington Arms, 509 F. Supp. 762 (E.D. N.Y. 1981) the U.S. District Court held that

> a manufacturer is obligated to exercise that degree of care in his plan or design so as to avoid any unreasonable risk of harm to anyone who is likely to be exposed to the danger when the product is used in the manner for which it is intended . . . as well as an unintended yet reasonably foreseeable use.

Furthermore, The Arkansas Supreme Court has stated in Forrest City Machine Works, Inc, supra, that

> compliance with industry customs is not a defense as a matter of law to a negligence action . . . while we consider this evidence . . . pertinent and relative to the determination reached, such evidence is not controlling, i.e., customary methods, or excepted standards, are not all conclusive and negligence may exist notwithstanding the fact that the method adopted was in accordance with customary procedures.

The plaintiffs allege that external trigger lock devices also should have been included. These devices would similarly prevent the unauthorized use of firearms. Mr. Golden testified in his deposition that he would not have used an external trigger lock device, even if one had been provided. As indicated earlier, his testimony is self-serving, and the jury would be under no obligation to accept it at

face value. Mr. Golden himself in this action faces allegations of negligence. The jury may infer that his testimony serves his defense in seeking to avoid liability for not purchasing such external trigger lock devices on his own on the open market. Ultimately, it is a question of fact for the jury as to whether or not either (a) such features should have been incorporated in the design of the product and, (b) whether the failure to integrate such features was a proximate cause of the damages incurred in this case. See, LeMaster v. Glock, 610 So.2d 1336 (Fla. App. Ct. 1992). In LeMaster, the trial court erroneously ruled that the lack of an external safety was not a defect. The appellate court held that whether the absence of an external safety constituted a design defect rendering weapon unreasonably dangerous was a question of fact precluding summary judgment. This Court should apply the LeMaster logic, which is squarely in point, and deny this motion.

In that the plaintiffs have stated a cause of action on which relief can be granted, the legal argument that there has been a failure to prove one element of that claim (causation) is better suited for a jury than summary judgment. If the Court must infer all doubts and view all evidence in the light most favorable to the plaintiffs, which it must, then the Court must determine that issues of fact do exist and that reasonable minds on a jury may differ concerning those facts. Therefore,

summary judgment must be denied.

The defendant places much reliance on the argument that the intentional criminal acts of the boys broke any causal chain leading back to Remington. Yet, the criminal acts of third parties are not always superceding causes. "The fact that the intervening acts that injured appellants were criminal rather than negligence is immaterial in light of their foreseeability. California courts have rejected the blanket rule that an intervening criminal act is by its very nature a superceding cause." Merrill v. Navegar, Inc., 89 Cal. Rptr. 2d 146 (1999). The defendant cites AMI 503 on this point. However, the clear language of 503 states that an intervening cause *does not* relieve the defendant of liability if the damage is "reasonably foreseeable as a natural and probable result of any act or omission on the part of the defendant." In fact, cited within the annotations to AMI 503 is Franco v. Bunyard, 261 Ark. 144, 547 S.W.2d 91 (1977). This case held that the intervening *criminal* act of a purchaser of a gun from a retailer in violation of a federal gun control law could not eliminate fact questions as to liability of the retailer. In that case, the court held that the reasonable and foreseeable consequence of the sale of a firearm to a convicted felon was murder.

Last month, the California Court of Appeals handed down a landmark

decision in Merrill v. Navegar, Inc., supra. In that case, a criminal used Navegar's product, a semi-automatic handgun, to massacre several people in a downtown San Francisco law firm. Navegar was granted summary judgment on its argument, *inter alia*, that the criminal acts of the third party broke the chain of causation and insulated the manufacturer from liability. The Navegar court disagreed and reversed. In its opinion, the Navegar Court stated that

> whether a particular defendant owes a tort duty to a given plaintiff depends upon a variety of factors, of which the major ones are the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, and the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

The Navegar Court's holding is compatible with AMI 503, Franco, and the majority position regarding intervening causes. If the cause itself is foreseeable and may have been addressed by the original tortfeasor, the chain of causation remains in tact. "In finding foreseeability, the Trial Court specifically noted the testimony of Navegar's president that he knew the guns he produced 'end up

killing people' but that he was 'not responsible for that . . .'" Navegar. The Court continued, saying that

> it must be acknowledged that the risk of harm from the criminal misuse of firearms is always present in a society such as ours, in which the presence of firearms is fairly widespread and many individuals possess the capacity to criminally misuse them. It follows that the manufacturer and distributor of a legal and non-defective firearm may not be found negligent merely because it manufactured and/or distributed the weapon. This does not mean, however, that those who manufacture, market and sell firearms have no duty to use care to minimize the risks which exceed those necessarily presented by such commercial activities, which can be accomplished without unreasonably depriving responsible citizens of the right to purchase and use firearms.

Id.

The defendant's brief properly notes that the Arkansas Supreme Court's treatment of causation in Shannon v. Wilson, supra, is enlightening in the instant case. However, the defendant mischaracterizes the holding in that case in its attempt to buttress its own summary judgment arguments. Extracting three or four words from the case, out of context, does not necessarily mean that the case itself supports the defendant's position. In overturning 100 years of dramshop immunity, Shannon went to great lengths to clarify the effects of third party actors

on proximate cause. The case is, in fact, supportive of the plaintiffs and clearly stands for the proposition that if the actions of the third party are foreseeable, then those actions do not break the chain of causation, nor do they relieve liability from the original negligent or wrongful act. See, DRAMSHOP LIABILITY IN ARKANSAS – ILLEGAL SALE OF LIQUOR TO MINORS MAY EXPOSE ALCOHOL VENDORS TO EXPENSIVE LIABILITY, 20 U.A.L.R. L.J. 985 (1998).

The Shannon Court held

> that proximate cause is the efficient and responsible cause, but it need not be the last or nearest one. The mere fact that other causes intervene between the original act of negligence and the injury for which recovery is sought is not sufficient to relieve the original actor of liability, if the injury is the natural and probable consequence of the original negligent act or omission and is such as might reasonably have been foreseen as probable.
>
> . . .
>
> The intervening cause must be such that the injury would not have been suffered except for the act, conduct or effect of the intervening agent totally independent of the acts or omission constituting the primary negligence. . . . [A defendant] should be held accountable for *any* consequences of that action if a jury determines the results were foreseeable. (emphasis added).

In the ten years before the manufacture of this firearm 259,122 persons were

killed in the United States with guns, and 41% of those were by homicide. See, Affidavit of Stephen Teret. The defendant's own brief at page 26, cites Taylor v. Gerry's Ridgewood, Inc., 490 N.E.2d 987 (Ill. App. Ct. 1986), which held that the "primary function" of a loaded firearm is to be an "instrument of death." Based on the statistics available to Remington at the time of the manufacture of this weapon and the judicial notice taken by the Illinois Court of Appeals of facts commonly known, and which should be similarly noticed by this Court, it would be disingenuous for the defendant to argue that the intentional misuse of their products in criminally causing the deaths of innocent people was not foreseeable. Other courts have also taken judicial notice of the foreseeability of the criminal misuse of firearms. See, Navegar, supra (holding that Navegar had substantial reason to foresee that many of those to whom it made the [gun] available would criminally misuse it to kill and injure others . . ."); and Richmond v. Charter Arms Corp., 571 F. Supp.192 (E.D. La.1983) (holding that "the Court finds that in the context of this case the criminal use of a handgun is, as a matter of law, a normal use of that product.")

The defendant's brief states that the only unexpected event in this case was the criminal theft of the guns and the murder of a teacher and children at Westside

School. Although it may have been unexpected that it should happen on that date, at that time, in that place, to these people, the day that this model 742 rolled off the assembly line, it was a virtual certainty that it, (or the model 742 in the box immediately beside it) would be used to criminally or negligently cause the death of an innocent person somewhere. Remington knew that and chose not to incorporate economically feasible and technological available safety devices that would have almost certainly reduced the horrifying statistics from that day forward. Why Remington didn't do that, whether a reasonable consumer in light of all the facts would have expected Remington to do that, and whether, if Remington had done that, this tragedy could have been avoided are all material issues of fact that must be determined by a jury. In addressing this point, the California Court in Navegar held that

> while Navegar may not have been able to specifically foresee that Ferri would use the [gun] in the manner he did . . ., a court's task–in determining duty–is not to decide whether a particular plaintiff's injury was reasonably foreseeable in light of a particular defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed on the negligent party.

In Wasylow v. Glock, 975 F.Supp. 370 (D. Mass. 1996), the District Court held that the plaintiff

> has the burden to show that the manufacturer failed to exercise reasonable care to eliminate avoidable or foreseeable dangers to the user, but there is no duty to design a product that is 'risk free' or 'risk proof.' There is a case for the jury if the plaintiff can show an available design modification which would reduce the risk without undue cost or interference with the performance of the machinery.

Furthermore, Navegar held that

> if the realizable likelihood that a third person may act in a particular manner is the hazard or one of the hazards which make the actor negligent, such an act whether innocent, negligent, intentionally tortious or criminal does not prevent the actor from being liable from harm caused thereby.

The defendant also alleged it its brief that no warning could have been provided that would have in any way altered the results of that day. There are no facts yet in the record to indicate what warnings, if any, were considered by Remington to be included on the firearm itself, thus surviving after market trades and sales. *Perhaps* no warning could have been embossed on the weapon itself that would have altered the effect and consequences of that day. However, the plaintiffs allege otherwise. Thus, this is an issue of fact.

Two of the defendants to this action, Mitchell Johnson and Andrew Golden, have indicated, though not in deposition testimony yet, that the shooting deaths were not intentional. Claims have been made by them that they intended to shoot over the heads of the people in the school yard and discharged the firearms with the intent of only frightening those people. The plaintiffs are wholly unpersuaded by the boys' allegations of *accidentally* shooting 15 people and allege that the deaths caused that day were completely intentional. However, this is a question of fact. If the boys' statements are true, would a warning on the gun admonishing users of the fatal and tragic consequences of shooting anywhere in the vicinity of living human beings had made any difference? This, too, is a question of fact. If a jury believes the boys, and a causal relationship is established, liability may be imposed for failure to warn. However, under none of these circumstances is a summary judgment motion appropriate at this point in the proceedings.

The Arkansas Products Liability Act creates a consumer expectation test. However, it is important to note that within the act is a statute entitled "Considerations for the Trier of Fact," which is found at §16-116-104. This statute is frankly not consistent with a pure consumer expectation analysis. However, the Arkansas Legislature has seen fit to modify our products liability law and include

"state of the art" evidence as a consideration of the trier of fact – the jury. §16-116-104(a)(1) states that "in determining the liability of the manufacturer, the state of scientific and technological knowledge available to the manufacturer or supplier at the time the product was placed on the market, rather than the time of the injury, may be considered as evidence."

The attached Affidavit of Mr. Steve Teret indicates that the technological knowledge available to the manufacturer *at the time this weapon was produced* included integrated trigger locks. The defendant's brief goes into great detail in outlining the care and pains with which the defendant Douglas Golden stored his weapons when not in use. Although, it is an allegation of the plaintiffs that Mr. Golden was negligent, the defendant's logic implies that he did all that he could. He testified in his deposition that he would not have used external trigger locks, but did not indicate that he had any experience with nor predisposition towards the use of internal trigger locks. It would stand to reason that if Mr. Golden went to great pains to secure his unused firearms, he would have also utilized a built-in combination lock on those same firearms. Certainly, a prudent, ordinary consumer would have done so. Thus, it is not only a question of fact for the jury as to whether or not Remington should have included such devices, but also whether or

not Douglas Golden would have utilized it had it been incorporated. Ultimately both of those concerns would lead the jury to its determination of fact as to causation.

Remington says that a key is a key is a key regarding the cable lock system of Mr. Golden and external trigger locks. Does the same (somewhat faulty) logic apply to combinations? Had a model 742 that included a combination lock on the stock with tumblers similar to those on a briefcase, to which Andrew Golden did not know the combination, been stored in the gun cabinet, would Andrew Golden have killed anyone utilizing that weapon? Remington asserts that perhaps not, but the people in the school yard may have died anyway at the hands of another weapon. It is not relevant what may or may not have happened on March 24, 1998, had Remington done what it should have done 25 years ago. It is true that those who intend to commit murder may do so. However, if a manufacturer does not do all that it can to reasonably prevent its defective product from being utilized as the "instrument of death" used, civil liability may be imposed and that manufacturer may be held accountable for *its own* wrongdoing, despite the intentional misconduct of a third party. The issue is whether or not Remington failed to conform to the standard of care, thus availing itself to liability under a negligence

theory, and whether Remington placed an unreasonably dangerous product on the market that caused injuries, thus subjecting itself to strict liability under products liability law. These are questions for a jury to decide.

WHEREFORE, the plaintiffs pray that the Court deny this Motion for Summary Judgment and permit the plaintiffs to pursue their remedies at jury trial.

Respectfully submitted,

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IN THE CIRCUIT COURT OF CRAIGHEAD COUNTY, ARKANSAS

MITCHELL K. WRIGHT, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF SHANNON D. (WILLIAMS)WRIGHT, DECEASED; AND RENEE BROOKS, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF NATALIE D. BROOKS, A MINOR, DECEASED **PLAINTIFFS**

VS. **CIV 98-394(B)**

ANDREW GOLDEN, A MINOR, MITCHELL JOHNSON, A MINOR, SCOTT JOHNSON, GRETCHEN WOODARD, DENNIS GOLDEN, PAT GOLDEN, DOUGLAS GOLDEN, REMINGTON ARMS COMPANY, INC., JOHN DOE, and JOHN DOE, INC., AS THE SUCCESSORS IN INTEREST OF UNIVERSAL FIREARMS **DEFENDANTS**

COMPLAINT

Come the Plaintiffs, Mitchell Wright, as Personal Representative of the Estate of Shannon Wright, Deceased, and Renee Brooks, as Personal Representative of the Estate of Natalie Brooks, a minor, Deceased, by and through their attorney, Bobby McDaniel, and for their Complaint against the Defendants, Andrew Golden, a minor, Mitchell Johnson, a minor, Scott Johnson, Gretchen Woodard, Douglas Golden, Dennis Golden, Pat Golden, Remington Arms Company, Inc., John Doe,

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and John Doe, Inc., as successors in interest of Universal Firearms, state:

1. That at the time of the occurrence herein described and at the time of filing of this action, Mitchell Wright was and is a resident of the Western District of Craighead County, Arkansas.

2. That at the time of the occurrence herein described, Shannon Wright, Deceased, was a resident of Craighead County, Arkansas, and died on March 24, 1998.

3. That Mitchell Wright was appointed Personal Representative of the Estate of Shannon Wright, Deceased, through the Probate Court, Craighead County, Arkansas, on May 5, 1996, and he is, therefore, the proper person to bring an action for negligence, wrongful death and defectively designed products on behalf of the Estate of Shannon Wright.

4. That at the time of the occurrence herein described and at the time of filing of this action, Renee Brooks was and is a resident of the Western District of Craighead County, Arkansas.

5. That at the time of the occurrence herein described, Natalie Brooks, Deceased, was a resident of Craighead County, Arkansas, and died on March 24, 1998.

6. That Renee Brooks was appointed Personal Representative of the Estate of Natalie Brooks, a minor, Deceased, through the Probate Court, Craighead County, Arkansas, on March 30, 1996, and she is, therefore, the proper person to bring an action for negligence, wrongful death and defectively designed products on behalf of the Estate of Natalie Brooks.

7. That at the time of the occurrence referred to herein and at the time of the filing of this action, Andrew Golden, Defendant, a minor, was and is a resident of Craighead County, Arkansas.

8. That at the time of the occurrence referred to herein and at the time of the filing of this action, Mitchell Johnson, Defendant, a minor, was and is a resident of Craighead County, Arkansas.

9. That at the time of the occurrence referred to herein and at the time of the filing of this action, Scott Johnson, Defendant, father and natural guardian of Mitchell Johnson, was and is a resident of the State of Minnesota.

10. That at the time of the occurrence referred to herein and at the time of the filing of this action, Douglas Golden, Defendant, was and is a resident of Craighead County, Arkansas.

11. That at the time of the occurrence referred to herein and at the time of

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the filing of this action, Gretchen Woodard, Defendant, mother and natural guardian of Mitchell Johnson, was and is a resident of Craighead County, Arkansas.

12. That at the time of the occurrence referred to herein and at the time of the filing of this action, Dennis Golden, Defendant, father and natural guardian of Andrew Golden, was and is a resident of Craighead County, Arkansas.

13. That at the time of the occurrence referred to herein and at the time of the filing of this action, Pat Golden, Defendant, mother and natural guardian of Andrew Golden, was and is a resident of Craighead County, Arkansas.

14. That at the time of the occurrence referred to herein and at the time of the filing of this action, Remington Arms Company, Inc. (hereinafter "Remington"), was and is a foreign corporation doing business in the State of Arkansas after properly registering itself with the Secretary of State of the State of Arkansas.

15. That the Corporation Company, 425 West Capitol Street, Suite 1700, Little Rock, Arkansas, is the registered agent of Remington Arms Company, Inc., Defendant, for service of process of claims filed against it in the State of Arkansas.

16. That Universal Corporation was the manufacturer of the carbine rifle referred to herein and is believed to have filed bankruptcy and is no longer a

corporate entity.

17. That John Doe and John Doe, Inc., are the successors in interest of Universal and, upon proper identification, will be substituted as a party hereto. John Doe, John Doe, Inc., and Universal Corporation shall be referred to herein collectively as "Universal."

18. That this Court has jurisdiction of this cause of action and the parties hereto.

19. That this court is the proper venue for this action.

20. That this cause of action arises as a result of a shooting incident that occurred on the grounds of Westside Middle School, Western District, Craighead County, Arkansas, on March 24, 1998 (hereinafter referred to as "shooting incident").

21. That at the time of the shooting incident, Mitchell Johnson and Andrew Golden, Defendants, were students enrolled in Westside Middle School.

22. That at the time of the shooting incident, Shannon Wright was a teacher employed by Westside Middle School.

23. That at the time of the shooting, Natalie Brooks was a student enrolled in Westside Middle School.

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24. That on Tuesday, March 24, 1998, Mitchell Johnson and Andrew Golden, Defendants, did not board their assigned school bus and did not attend first period classes. Mitchell Johnson had access to a gray van, owned by his stepfather, Terry Woodard, which contained food, camouflage netting, ammunition, hunting knives, and survival gear. Mitchell Johnson and Andrew Golden then drove this van to the home of Andrew Golden's parents, Dennis and Pat Golden, Defendants.

25. That while Mitchell Johnson and Andrew Golden, Defendants, were in the home of Dennis and Pat Golden, Defendants, the boys retrieved three handguns that were not secured in Dennis Golden's gun vault, although they were unsuccessful in attempting to steal guns from the locked vault of Dennis Golden.

26. That Mitchell Johnson and Andrew Golden, Defendants, then drove to the home of Andrew Golden's grandfather, Douglas Golden, Defendant, and retrieved four handguns and three rifles, none of which were in a locked vault or container and none of which were secured by a trigger lock.

27. That after obtaining the guns referred to herein, Mitchell Johnson and Andrew Golden drove the van to a point near Westside Middle School.

28. That at approximately 12:35 p.m., Tuesday, March 24, 1998, Andrew Golden entered Westside Elementary School, which is on the same campus as the

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Westside Middle School, and engaged a false fire alarm in order to draw students and teachers to the outside of the building. Andrew Golden then rejoined Mitchell Johnson at an ambush site approximately one hundred yards away from the school building area where the shootings took place.

29. That upon viewing their classmates and teachers leaving the building and entering the schoolyard in response to the fire alarm, Mitchell Johnson and Andrew Golden deliberately and viciously began shooting. The innocent students and teachers were trapped in the line of fire because the doors that led back into the school locked automatically due to the fire alarm. More than twenty shots were fired in approximately four minutes. Four children were murdered; one teacher was murdered; ten other people (mostly children) were wounded.

30. That the actions of Andrew Johnson and Mitchell Johnson were such that they were co-conspirators, accomplices and joint tortfeasors in the shootings and the actions leading to and preceding the shootings.

31. That Natalie Brooks was one of the four little girls killed on March 24, 1998, by Andrew Golden and Mitchell Johnson.

32. That Shannon Wright, a teacher, was shot and killed when she placed her body between a student, Emma Pittman, and Andrew Golden and Mitchell

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Johnson.

33. That construction workers on the roof of a school building witnessed Andrew Golden and Mitchell Johnson murder Natalie Brooks and Shannon Wright and assisted police in apprehending the two boys within minutes of the massacre.

34. That at the time of this filing, Andrew Golden and Mitchell Johnson are in the custody of the Craighead County Sheriff awaiting delinquency adjudication relating to five counts of Capital Murder and ten counts of Battery in the First Degree.

35. That Dennis Golden and Pat Golden are the parents of Andrew Golden.

36. That Scott Johnson and Gretchen Woodard are the parents of Mitchell Johnson.

37. That the parents of Andrew Golden and Mitchell Johnson knew or should have known that Andrew Golden and Mitchell Johnson possessed the character, lack of discipline, and propensity to commit acts which could normally be expected to cause injury to others or to put others at appreciable risk of injury. Some past incidents of antisocial or dysfunctional events in the lives of Mitchell Johnson and Andrew Golden include, but are not limited to, the following:

a. On Monday, March 23, 1998, Mitchell Johnson stated "I got a lot of killing to do."

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b. Andrew Golden was given rifles, shot guns and hand guns from the age of six years old. Dennis Golden, Defendant, a member of the Practical Pistol Shooters Club, taught Andrew Golden practical shooting, a competition to hit moving or pop up targets.

c. Andrew Golden boasted that he could get to his family's weapons anytime he wanted.

d. Mitchell Johnson had previously talked about suicide.

e. After the divorce of his parents, Mitchell Johnson's behavior continually deteriorated. Mitchell Johnson frequently got into both physical and verbal altercations and was angered easily.

f. Mitchell Johnson frequently expressed a desperate desire to be in a gang. Gangs and girls were Mitchell Johnson's obsessions.

g. Mitchell Johnson wore gang colors, proclaimed loyalty to both the Crips and the Bloods, and flashed gang signs.

h. Mitchell Johnson was described by a law enforcement officer as a "troubled" child whose parents occasionally lost track of his whereabouts. They called the police to assist in finding Mitchell. On one such occasion, a police officer saw a .357 pistol on a table in Johnson's home and advised Gretchen Johnson (now Woodward) that the gun should be secured.

i. Other parents would not allow their children to play with Mitchell Johnson.

j. Mitchell Johnson bragged about smoking heroin and marijuana, and that he had joined a gang.

k. In a press release by Scott Johnson, dated June 17, 1998, Scott Johnson stated that he "sought to get Mitchell help over the past two

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years, but was sadly unable to convince the proper authorities to follow-up . . . ."

l. Neighbors of Andrew Golden observed that he frequently walked around the neighborhood with a hunting knife strapped to his leg.

m. Several neighbors did not allow their children to play with Andrew Golden.

n. Andrew Golden frequently dressed in military fatigues.

o. On March 26, 1997, Mitchell Johnson was suspended for two days from Westside Middle School for fighting.

p. Andrew Golden shot another child in the eye with a pop gun loaded with sand while at school and his parent(s) were notified of this act.

38. Douglas Golden, Defendant, negligently stored and failed to secure the firearms used by Andrew Golden and Mitchell Johnson in the March 24, 1998 shooting incident in that the weapons were not in a locked vault or container and were not equipped with a trigger lock.

39. That Douglas Golden had not secured the rifles used in the shootings in a gun vault or other secure cabinet. Furthermore, none of the firearms taken and used by Andrew Golden and Mitchell Johnson were equipped, either by manufacturer or by after market purchase, with any kind of trigger lock device.

40. That Douglas Golden, an Arkansas Game And Fish Commission Officer, knew or should have known that unsecured firearms are subject to

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unauthorized use. Furthermore, guns are frequently stolen from private homes so that they may be used in the commission of other crimes.

41. That Defendant, Remington, was and is engaged in the business of manufacturing, assembling, selling and distributing firearms, including the 30-06 referred to herein.

42. That Defendant, Universal, was engaged in the business of manufacturing, assembling, selling and distributing firearms, including the M-1 Carbine referred to herein.

43. That the rifle used by Mitchell Johnson to kill Shannon Wright was a Remington 30.06.

44. That the rifle used by Andrew Golden to kill Natalie Brooks was a Universal M-1 Carbine.

45. That Remington and Universal supplied these firearms to the public in a defective condition which rendered the products unreasonably dangerous in that the weapons did not contain adequate warnings and were not sold with trigger locks to prevent unauthorized persons from firing the weapons.

46. That patents for devices referred to a "trigger locks" to prevent unauthorized use of firearms have been on record for more than fifty years before

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this occurrence and the Defendants knew or should have known of the existence, availability, and safety utility of trigger locks.

47. That for minimal additional cost per unit, the manufacturers herein could have provided trigger lock devices for firearms rendering them useless to unauthorized shooters.

48. That the Remington 30-06 and Universal M-1 Carbine were supplied in a defective condition and that such defective condition was a proximate cause of the Plaintiffs' damages.

49. That at the time of the manufacturer of the firearms used in the shooting incident herein, there was in existence trigger locks, which were technologically feasible and economically practical and which constituted an alternative safety design known by the Defendants, but intentionally chosen by the Defendants to not be incorporated into the design of their firearms.

50. That the Remington 30-06 rifle and the Universal M-L carbine used by Andrew Golden and Mitchell Johnson in causing the deaths of Shannon Wright and Natalie Brooks, respectively, were defective products and were unreasonably dangerous, and the Plaintiffs are entitled to recover from Remington and Universal under the theory of strict liability in that:

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(a) The weapons as supplied were in a defective and unreasonably dangerous condition since they were not equipped with trigger locks to prevent unauthorized usage of the firearms;

(b) The weapons were defectively designed in that the design failed to include integrated or supplemental trigger locks; and,

(c) The weapons were supplied without adequate warnings and instructions notifying users of the weapons to always secure and lock the weapons in a safe environment to prevent theft and/or unauthorized use.

51. That the parents of Andrew Golden and Mitchell Johnson were negligent in the training, supervision and control of Andrew Golden and Mitchell Johnson and that such negligence was a concurring proximate cause of the shootings and the damages referred to herein.

52. That all of the Defendants knew or should have known, in the light of the surrounding circumstances that their conduct, actions and inactions would naturally and probably result in injury and that such conduct was continued with malice and/or reckless disregard of the consequences from which malice may be inferred and for which punitive damages should be imposed.

53. That Andrew Golden and Mitchell Johnson intentionally fired high powered rifles in the direction of and caused the deaths of Shannon Wright and Natalie Brooks. The actions of Andrew Golden and Mitchell Johnson were

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53. That Andrew Golden and Mitchell Johnson intentionally fired high powered rifles in the direction of and caused the deaths of Shannon Wright and Natalie Brooks. The actions of Andrew Golden and Mitchell Johnson were

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intentional conduct for the purpose of causing injury or death and punitive damages should be assessed against Andrew Golden and Mitchell Johnson in such an amount as set by a jury to punish these Defendants, deter others from similar conduct, and to prevent these Defendants from reaping financial rewards from their actions. The punitive damages judgment should be set by a jury in sufficient amount in excess of that required for federal diversity jurisdiction to offset the potential income either of these Defendants may reap in the future from any book, movie, interview or other financial benefit as a result of their wrongful acts.

54. The punitive damages to be assessed against Remington should be set in such an amount as to punish Remington for its intentional refusal to supply trigger locks as an integrated or supplemental safety device with their weapons sold. Although Plaintiffs agree that Remington has the right to manufacture and sell guns, it must do so with safety as a design criteria and not continue to shift the burden of safety to the public. Remington has known that innocent people will die from their products as manufacturered and safety devices (trigger locks) have been available for decades which would render the weapons unavailable for use by an unintended user such as Andrew Golden or Mitchell Johnson. The jury should assess punitive damages in such an amount in excess of that required for federal court diversity

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jurisdiction that Remington, and other manufacturers, would be deterred from supplying guns in the future without trigger locks. Punitive damages should also be assessed, similarly against Universal.

55. That the Plaintiffs are entitled to recover from Remington and Universal under a theory of strict liability.

56. That Plaintiffs are further entitled to relief against Remington and Universal under a theory of common law negligence as applied to the design of their firearms in that the Defendants knew or should have known that trigger locks technology could and should have been made as part of the design of their guns.

57. That Remington and Universal knew or should have known that their products were not safe as designed, and was, therefore, defective. Furthermore, their products could have been made safe by integrating available trigger lock technology, at low cost, into the designs.

58. That the gravity of the risk created by the defectively designed firearms was, and continues to be, enormous and subjects innocent persons, such as the Plaintiff's decedents, to a foreseeable, and avoidable, risk of harm.

59. That the manufacturers chose to disregard implementation of the safer design trigger lock characteristics, thus rendering the rifles unreasonably dangerous.

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60. That an inference of negligence arises when a product, such as these rifles, is shown to be unreasonably dangerous.

61. That Mitchell Wright, as Personal Representative of the Estate of Shannon Wright prays that he have and recover damages and judgment from and against the Defendants, jointly and severally, as compensation to the heirs and beneficiaries at law of Shannon Wright, for pecuniary damages; conscious pain and suffering of the deceased prior to her death; medical and funeral expenses attributable to the fatal injury; past lost earnings and the present value of the loss of earnings capacity in the future for the deceased; the loss of future services to be rendered by Shannon Wright; and, for mental anguish sustained by the surviving beneficiaries of the Estate of Shannon Wright, as well as all other damages allowed by law.

62. That the surviving beneficiaries of the Estate of Shannon Wright, are:

Mitchell Keith Wright	Husband
Mitchell Zane Wright	Son
Carl H. Williams	Father
Jeanne N. Williams	Mother
Todd C. Williams	Brother

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63. That Renee Brooks, as Personal Representative of the Estate of Natalie Brooks, Deceased, prays that she have and recover damages and judgment from and against the Defendants, jointly and severally, as compensation to the heirs and beneficiaries at law of Natalie Brooks, for conscious pain and suffering of the deceased prior to her death; medical and funeral expenses attributable to the fatal injury; the present value of the loss of future services to be rendered by Natalie Brooks; and, for mental anguish sustained by the surviving beneficiaries of the Estate of Natalie Brooks, as well as all other damages allowed by law.

64. That the surviving beneficiaries of the estate of Natalie Brooks, are:

Renee Brooks	Mother
Floyd Brooks	Father
Corena B. Brooks	Sister

65. That Mitchell Wright, as personal representative of the Estate of Shannon Wright, Deceased, should have and recover judgment in an amount to be set by the jury from the Defendants, jointly and severally, as compensatory damages for the wrongful death of Shannon Wright, as well as punitive damages for the wrongful death of Shannon Wright, caused as a proximate result of the negligence, intentional conduct, strict liability and fault imposed by the Defendants.

66. That Renee Brooks, as personal representative of the Estate of Natalie Brooks, Deceased, should have and recover judgment in an amount to be set by the jury from the Defendants, jointly and severally, as compensatory damages for the wrongful death of Natalie Brooks, as well as punitive damages for the wrongful death of Renee Brooks, caused as a proximate result of the negligence, intentional conduct, strict liability and fault imposed by the Defendants.

67. That all of the acts of all of the Defendants are joint and concurring acts of negligence, supplying a defective product, intentional conduct and other fault, and that such actions of all Defendants are joint and concurring acts for which the Defendants are jointly and severally liable to the Plaintiffs for all damages as fixed by the jury.

68. That the Plaintiffs reserve the right to amend and plead further in this action.

69. That the Plaintiffs demand a trial by jury.

70. That the amount to be set by the jury for compensatory and punitive damages should be in an amount in excess of that required for federal court diversity jurisdiction.

WHEREFORE, the Plaintiffs, Mitchell Wright, as Personal Representative

of the Estate of Shannon Wright, Deceased, and Renee Brooks, as Personal Representative of the Estate of Natalie Brooks, Deceased, pray that they have and recover judgement from and against the Defendants, jointly and severally, for compensatory and punitive damages as set by a jury, and for all other relief to which they may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, do certify that I have served a copy of the foregoing pleading by posting a copy thereof, postage prepaid at Jonesboro, Arkansas, to the following address(es) shown below, on the 29 day of October, 1999.

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Mr. Martin Lilly
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STATE OF MARYLAND
CITY OF BALTIMORE

AFFIDAVIT

1. I, Stephen P. Teret, am a Professor of Health Policy and Management in the Johns Hopkins School of Hygiene and Public Health, in Baltimore, Maryland, where I have been a full-time faculty member since July 1, 1979. I presently serve as Director of the Johns Hopkins Center for Gun Policy and Research, which I founded on January 1, 1995. Prior to that, among other positions, I served as Director of the Johns Hopkins Injury Prevention Center and Deputy Director of the Johns Hopkins Program in Law, Ethics, and Health. I am a recipient of the Distinguished Career Award in Injury Prevention from the American Public Health Association. The Johns Hopkins School of Hygiene and Public Health is generally regarded as the foremost school of public health in the world. The school pioneered the inclusion of injury prevention and violence prevention within the discipline of public health.

I am an attorney, having initially been admitted to the bar of the State of New York in 1969. From 1969 to 1978, I was engaged in the practice of law in New York. In the 1978-79 academic year, I was a full-time student at the Johns Hopkins School of Hygiene and Public Health, earning a Masters of Public Health degree. Upon completion of the degree, I commenced my service as a faculty member at that institution, first as an Assistant Professor, then as an Associate Professor, and now as a full Professor.

Presently, in addition to being a Professor of Health Policy and Management, I hold joint faculty appointments in the Departments of Pediatrics and Emergency Medicine in the Johns Hopkins School of Medicine. I am also an Adjunct Professor of Health Law at the Georgetown University Law Center.

My work, for the past several years, has been principally in the field of gun violence prevention; I have devoted a substantial portion of my effort to this field beginning in about 1980. I am an author of many articles published in peer-reviewed scholarly journals on the topic of gun violence prevention. A list of my publications is contained in my curriculum vitae, which is attached as an exhibit to this Affidavit.

A particular interest that I have studied and written about is the safe design of firearms.

2. In the ten-year period (1965-1974) prior to the 1975 manufacture date of the Remington rifle involved in the Westside School shootings, there were 259,122 gun-related deaths in the United States, of which 106,451 (41%) were homicides. Of the total gun-related deaths during this period, there were 8,384 such deaths to children 14

EXHIBIT A

years of age or younger. (Source: Ikeda RM, Gorwitz R, James SP, Powell KE, Mercy JA. *Fatal Firearm Injuries in the United States, 1962-1994.* Atlanta: Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, 1997. Violence Surveillance Summary Series, No. 3.)

3. In 1997, the latest year for which complete data are available, there were 32,436 gun-related deaths in the United States, 42% of which were homicides. (Source: Hoyert DL, Kochanek KD, Murphy SL. Deaths: Final data for 1997. *National Vital Statistics Reports.* 1999; 47(19)).

4. About two-thirds of all homicides involve a firearm.

5. Guns disproportionately affect young people. In 1997, firearms were the third leading cause of death for 10 to 14 year olds, and the second leading cause of death for 15 to 24 year olds. (Source: Centers for Disease Control and Prevention website http://www.cdc.gov/ncipc/osp/usmort.htm.)

6. It is estimated that there are approximately 500,000 guns stolen from homes in the United States each year. (Source: Cook PJ, Molliconi S, Cole TB. Regulating gun markets. *J Crim L Criminology* 1995; 86:59-91.) Therefore, the theft of a gun kept in the home is a foreseeable event, as is its use by an unauthorized user, if the gun is not designed safely.

7. Remington, a defendant in this case, could have designed its gun so that an unauthorized user would not have been able to operate the weapon. Based upon reliable information, it is my belief that prior to the October 1975 manufacture date of the Remington rifle used in the Westside School shootings, there were guns manufactured by others that had built into the gun at the time of manufacture a combination lock that would prevent an unauthorized user from operating the gun. More specifically, in 1974 the Fox Tri-C corporation manufactured a carbine that contained a combination lock safety device that permitted the gun to be shot only when it was set to a predetermined number, similar to a briefcase combination lock. Thus it was clearly possible and economically feasible, in 1975, to manufacture and sell a firearm that was personalized to authorized users. Remington failed to utilize this important safety technology. Remington, therefore, did not comply with the state of the art, in that there was manufacturer knowledge of, access to, and opportunity to incorporate internal locks on the weapon at a feasible cost.

8. It is my opinion that for the safety of consumers and others, a gun manufacturer has the responsibility to use technologically and economically feasible methods to design its products so that they will not be used in a negligent or criminal fashion.

9. It is my opinion that a consumer has the right and expectation that a manufacturer

will incorporate technologically and economically feasible safety devices into the design of a rifle. The manufacturer is in a superior position of knowledge concerning the safe design of its product, and a consumer as well as the public could and should rely upon and expect a manufacturer to produce a rifle that incorporates state of the art safety equipment and design.

10. It is my opinion, based upon more than twenty years of work in the field of injury prevention, that the most effective means of preventing injuries such as those that are involved in this case is to make products as safe as possible, rather than relying upon the general good behavior of individuals.

Stephen Teret

On this 27th day of October 1999, appears before me Stephen Teret, who was duly sworn and avers to the information stated herein.

Notary Public

My commission expires January 29, 2002

SHARONANN M. WAKEFIELD
NOTARY PUBLIC STATE OF MARYLAND
My Commission Expires January 29, 2002

FILED

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CIRCUIT AND CHANCERY COURT CLERK

IN THE CIRCUIT COURT OF CRAIGHEAD COUNTY, ARKANSAS

MITCHELL K. WRIGHT, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF SHANNON D. (WILLIAMS) WRIGHT, DECEASED; AND RENEE BROOKS, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF NATALIE BROOKS, A MINOR DECEASED; TONY R. HERRING AND PAMELA D. HERRING, AS PERSONAL REPRESENTATIVES OF THE ESTATE OF PAIGE ANN HERRING, DECEASED; TINA MCINTYRE JOHNSON, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF STEPHANIE DAWN JOHNSON, DECEASED; AND, SUZANN MARIE WILSON, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF BRITTNEY RYEN VARNER, DECEASED **PLAINTIFFS**

V. **CIV-98-394(B)**

ANDREW GOLDEN, A MINOR, MITCHELL JOHNSON, A MINOR, SCOTT JOHNSON, GRETCHEN WOODARD, DENNIS GOLDEN, PAT GOLDEN, DOUGLAS GOLDEN, SPORTING GOODS PROPERTIES, INC., F/K/A REMINGTON ARMS COMPANY, INC., JOHN DOE, AND JOHN DOE, INC., AS THE SUCCESSORS IN INTEREST OF UNIVERSAL FIREARMS **DEFENDANTS**

RESPONSE TO MOTION FOR SUMMARY JUDGMENT

Come the plaintiffs, by and through their attorneys, McDaniel & Wells, P.A., and for their Response to Motion for Summary Judgment state:

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1. That this Court should deny the defendant's request for a Judgment as a matter of law on all claims based on ARCP 56(c).

2. That genuine issues of material fact do exist and must be presented to a jury.

3. That a Motion for Summary Judgment is premature in that discovery is still ongoing, including objections accompanying Remington's Answers Interrogatories.

4. In that issues of genuine fact do exist that must be determined by a jury, the causation argument offered by the defendant is premature. Furthermore, causation is an issue of fact in and of itself that is squarely situated within the purview of the jury.

WHEREFORE, plaintiffs, by and through their attorneys, McDaniel & Wells, P.A., pray and request that this Court deny the Motion for Summary Judgment.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, do certify that I have served a copy of the foregoing pleading by posting a copy thereof, postage prepaid at Jonesboro, Arkansas, to the following address(es) shown below, on the 29 day of October, 1999.

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IN THE CIRCUIT COURT OF CRAIGHEAD COUNTY, ARKANSAS

MITCHELL K. WRIGHT, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF SHANNON D. (WILLIAMS) WRIGHT, DECEASED; AND RENEE BROOKS, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF NATALIE BROOKS, A MINOR DECEASED; TONY R. HERRING AND PAMELA D. HERRING, AS PERSONAL REPRESENTATIVES OF THE ESTATE OF PAIGE ANN HERRING, DECEASED; TINA MCINTYRE JOHNSON, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF STEPHANIE DAWN JOHNSON, DECEASED; AND, SUZANN MARIE WILSON, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF BRITTNEY RYEN VARNER, DECEASED **PLAINTIFFS**

V. **CIV-98-394(B)**

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PLAINTIFFS' BRIEF IN RESPONSE TO MOTION TO RECONSIDER

On July 28, 1999, this Court properly entered an Order that applies the letter of the law as codified in Ark. Code Ann. §14-20-102, which provides in part:

> There is hereby created on the books of the treasurer of each county of the State a fund to be used for the purpose of

> paying reasonable and necessary costs incurred . . . for representation in civil and criminal matters of persons deemed incompetent by the court due to minority or mental incapacity, which have been brought in any circuit courts... including, but not limited to, investigative expenses, expert witness fees, and legal fees. (emphasis added)

Obviously, the plaintiffs agree with this Court's interpretation and application of this statute in appointing attorneys to represent the imprisoned juvenile defendants in this case. As reinforcement of that point, the plaintiffs hereby incorporate by reference the applicable portions on this issue contained in the Plaintiffs' Brief in Response to Craighead County's Motion to Intervene. Craighead County has no standing to object to this order or to request reconsideration. The General Assembly did not afford Craighead County any choice on this matter, except to follow the law as ordered by this Court.

Craighead County's Brief suggests that the Court should interpret Ark. Code Ann. §16-61-109 to hold that the plaintiffs, the families of those killed by Andrew Golden and Mitchell Johnson, should be personally responsible for hiring attorneys to defend Andrew Golden and Mitchell Johnson. This is not only absurd, it is disgusting. There are three basic flaws with the County's theory. (1) Ark. Code Ann. §14-20-102 repeals by implication the statute cited by Craighead County. (2) Even if §16-61-109 is a valid act, it applies only when attorneys are appointed upon motion of the plaintiffs. In this case, the motion to appoint attorneys was made by the State of Arkansas, not by the plaintiffs. (3) It is contrary to the interests of justice to deny representation of the boys due to the

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prejudice it would cause the plaintiffs.

Repeal by Implication

Repeal by implication occurs when two statutes can not be read consistently with one another and "when there exists an invincible repugnancy between the earlier and latter statutory provisions." Alltell Mobile Comm., Inc., v. Ark. Public Service Comm'n, 63 Ark. App. 197, 975 S.W.2d 884 (1998). Ark. Code Ann. §16-61-109 (a 1947 Act that has never been amended or addressed by the Supreme Court in any case), states that attorneys and guardians appointed upon application of the plaintiff to defend infants, incompetents and prisoners "shall be allowed a reasonable fee for his services, to be paid by the plaintiff, and taxed in the costs."

In comparison, Ark. Code Ann §14-20-102 (a 1983 Act amended as recently as 1995, and addressed as recently as 1995 (See, State v. Critttenden County, 320 Ark. 356, 896 S.W.2d 881 (1995), wherein this Court utilized this statute in a criminal case)) specifically describes the creation of a fund, the specific county official who must administrate the fund, the criteria for courts to apply when utilizing the fund, and exactly to whom and under what circumstances the fund is available. This far more specific, thorough and recent statute is certainly in direct conflict with the statute cited by Craighead County in its motion. Does this conflict reach the level of repealing by implication the earlier act? Yes.

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Repeal by implication is a doctrine that is generally not favored by courts, but in some cases is unavoidable. See, e.g., Alltell Mobile Comm., Inc., supra. Several decades ago, the Supreme Court thoroughly addressed the issue in Moncus v. Raines, 210 Ark. 30, 194 S.W.2d 1 (1946). The Court said,

> The implication of a repeal, in order to be operative must be necessary, or necessarily follow from the language used . . .
>
> Except where an act covers the entire subject-matter of earlier legislation, is complete in itself, and is evidently intended to supercede the prior legislation on the subject, a latter act does not by implication repeal an earlier act unless there is such a clear, manifest, controlling, necessary, positive, unavoidable, and irreconcilable inconsistency and repugnancy, that the two acts cannot, by fair and reasonable construction, be reconciled . . . . (emphasis added).

Ark. Code §14-20-102 does in fact, meet this extremely rigid and specific test. It is not only complete in itself, thoroughly covering the entire subject matter, but it also prevents reconcilable construction with the earlier act in that they are inconsistent on their face. Furthermore, the language used by the Legislature in enacting the latter statute clearly indicates the legislative intent to repeal by implication any prior inconsistent acts. The annotations to the act indicate its history stating,

> It is hereby found that the passage of many court costs bills over several legislative sessions has caused confusion in the collection of such costs and that reasonable people can interpret the varying language of such court costs statutes differently. This legislation is necessary to standardize the language of such court costs statutes to provide that such

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costs are collected in a uniform manner statewide.

1991 Ark. Acts No. 904 § 22. Thus, this statute, which was enacted to standardize earlier inconsistent acts does, in fact, repeal by implication Ark. Code §16-61-109.

§16-61-109 Is Not Applicable, Even If Valid

"The first rule in considering the meaning of a statute is to construe it just as it reads giving words their common and usually accepted meaning in common language." Alltell Mobile Comm., Inc., supra. The express language of §16-61-109 states that it applies only when a guardian or attorney is appointed to represent an infant, incompetent or prisoner *upon application of the plaintiff*. In the instant case, the motion resulting in the appointment of Mr. Hunter and Mr. Nickle was presented to this Court and argued by the Office of Chief Counsel of the Department of Human Services of the State of Arkansas . . . not the plaintiffs. The mere fact that the plaintiffs support the State's motion does not invoke the language of this statute. Thus, even if Ark. Code. Ann. §16-61-109 was a valid statute, which it is not, the subject matter of this case falls outside its reach.

Depriving Counsel Is Contrary to the Interest of Justice

In short, the interests of justice mandate that this Court continue to enforce its July 28, 1999, ruling concerning appointed counsel. Andrew Golden and Mitchell Johnson shot 15 people at a middle school, killing four children and a teacher. The families of those victims watched as the juvenile court applied the full extent of juvenile justice that

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was inherently and fundamentally inadequate. The only remedy remaining for these families is in civil court, and that too would be denied them without attorneys to represent the jailed killers. The Constitution of this State, says that "every person is entitled to a certain remedy in the laws for all injuries or wrongs he may receive in his person, property or character; he ought to obtain justice freely, and without purchase, completely, and without denial, promptly and without delay, conformably to the laws." Ark. Const. Art. 2, §13. The spirit of this Constitutional provision would be betrayed if the defendants were denied counsel, thus preventing the plaintiffs from obtaining justice freely and without purchase or delay.

The legislature envisioned the situation that now exists and enacted a statute to deal with it. The Craighead County Treasurer has a fund with money in it for this very purpose. This Court has properly applied the law utilizing that fund so that this case can move forward. The County did not object to paying the killers' lawyers in the criminal case. For the politicians of Craighead County to suggest that a better purpose for this money exists and that they should be allowed to spend it on something else (defending other criminals) and that the families of the deceased should pay for lawyers to represent the killers of their loved ones is not only unjust . . . it is unconscionable.

WHEREFORE, the plaintiffs request that this Court deny the motion to reconsider its July 28, 1999, ruling. Alternatively, if the Court does reconsider its ruling, the Court

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should rule that the July 28, 1999, ruling was an appropriate application of the current law on this issue and uphold that prior ruling.

Respectfully submitted,

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Dustin McDaniel
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CERTIFICATE OF SERVICE

I, the undersigned, do certify that I have served a copy of the foregoing pleading by posting a copy thereof, postage prepaid at Jonesboro, Arkansas, to the following address(es) shown below, on the 24th day of August, 1999.

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January 5, 2000

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RE: WRIGHT, ET AL V GOLDEN, ET AL
Craighead County, Western District, Circuit No. CIV-98-394

Dear Mr. Marshall:

Pursuant to your letter dated December 17, 1999, to Dustin McDaniel, please be advised that Judge Burnett has agreed to hear only Remington's Motion for Summary Judgment on February 29, 2000, in Lake City.

By copy of this letter, I am requesting that all parties confirm to me their agreement for this hearing to proceed on February 29, 2000, before a Notice of Setting is sent.

Michelle Grilletta, PLS
Case Coordinator for Judge David Burnett

/mg
pc/ Mr. Dustin McDaniel
Mr. David Cahoon
Mr. David Hodges
Mr. Martin Lilly
Mr. Ray Nickle
Mr. Randel Miller
Mr. Ron Hunter
Mr. Mike Roberts
Mr. Curt Huckaby
Court file ✓

Letter from court to Dustin McDaniel about hearing date