[Cite as *Gay v. O.F. Mossberg & Sons, Inc.*, 2009-Ohio-2954.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

ROBIN GAY, AS NEXT FRIEND OF AND NATURAL PARENT AND GUARDIAN OF NATHAN GAY, A MINOR, et al.,	:	**O P I N I O N**
Plaintiffs-Appellants,	:	**CASE NO. 2008-P-0006**
- vs -	:	
O.F. MOSSBERG & SONS, INC., et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Court of Common Pleas, Case No. 2003 CV 0742.

Judgment: Affirmed in part, reversed in part, and remanded.

John R. Climaco and *David W. Neel*, Climaco, Lefkowitz, Peca, Wilcox & Garofoli Co., 55 Public Square, Suite 1950, Cleveland, OH 44113 (For Plaintiffs-Appellants).

Timothy J. Coughlin and *William J. Hubbard*, Thompson, Hine & Flory, L.L.P., 3900 Key Center, 127 Public Square, Cleveland, OH 44114-1216; *John F. Renzulli*, The Renzulli Law Firm, L.L.P., 81 Main Street, Suite 508, White Plains, NY, 10601 (For Defendants-Appellees O.F. Mossberg & Sons, Inc. and Maverick Arms, Inc.).

Kirk E. Roman and *Joseph P. Hoerig*, 50 South Main Street, Suite 502, Akron, OH 44308 (For Defendant-Appellee Bill Clayton).

James A. Sennett, Cowden & Humphrey Co., L.P.A., 4600 Euclid Avenue, Suite 400, Cleveland, OH 44103 (For Defendant-Appellee Connie Clayton).

TIMOTHY P. CANNON, J.

{¶1} Appellant, Robin Gay, as next friend of and natural parent and guardian of Nathan Gay, a minor, appeals the judgment entered by the Portage County Court of

Common Pleas. The trial court granted a motion for summary judgment filed by Appellees O.F. Mossberg & Sons, Inc. and Maverick Arms, Inc. (collectively referred to as "Mossberg"). In addition, the trial court granted a motion for summary judgment filed by Appellees William Clayton, Sr. and Constance Clayton ("the Claytons"). Further, the trial court granted in part and denied in part Mossberg's motion in limine to exclude the opinions of Gay's expert, John Butters.

{¶2} Robin Gay is the mother of Nathan Gay. On December 26, 2002, when Nathan was 16 years old, he was accidentally shot by his friend, William Clayton, Jr. ("Billy"), who was also 16 years old at the time.

{¶3} At the time of the accident, Billy lived with his parents and his sister, Jennifer, in Mantua, Ohio. His father, Mr. Clayton, is an avid gun enthusiast. Billy learned about firearms from his father at an early age. He started hunting when he was ten years old. When Billy was 13 years old, he enrolled in the Ohio Hunter's Safety Course. The course taught him how to properly handle a firearm as well as the "Ten Commandments of Firearm Safety," which include the commandments: "treat every gun with the respect due a loaded gun," "watch that muzzle," "unload guns when not in use," and "never point a gun at anything you do not want to shoot." At the end of the three-day course, Billy was awarded a certification of completion from the state of Ohio.

{¶4} After completion of the course, Mr. Clayton purchased a Mossberg 500 shotgun for his son. The Mossberg 500 is a pump-action shotgun manufactured by Mossberg & Sons, Inc. and assembled by Maverick Arms, Inc. In pump-action shotguns, a sliding forearm handle, the pump, works the operating mechanism ("the action"), extracting the spent shell and inserting a new one from the magazine, while

cocking the hammer, or striker. The shotgun has an action lock lever, which allows a user to unlock the action of the shotgun without pulling the trigger. If loaded, when the action of the shotgun is open, the user can view a shotgun shell in the chamber. The shotgun will only discharge if the action is in the closed position.

{¶5} The Mossberg 500 has a manual safety button located on the top rear portion of the receiver. When the safety is off (in the fire position), a large red dot can be seen when aiming the shotgun. When the safety is engaged, the shotgun is prevented from discharging even if the trigger is pulled with a round in the chamber. Mr. Clayton trained Billy about the safety devise on the Mossberg 500 shotgun and which position meant the gun was "ready to fire" versus when the gun was in the "safe" mode.

{¶6} Another safety feature that came with the Mossberg 500 is a cable lock. A cable lock is a device that goes through the action, locking it in the open position.

{¶7} Billy learned from his father how to load and unload the shells, how to shoot the gun, as well as safe handling practices. He was taught to always assume the shotgun was loaded and to keep his finger off the trigger unless he intended on pulling it. Billy was also trained to visually inspect the chamber and magazine tube to check for ammunition before using the gun.

{¶8} The owner's manual of the Mossberg 500 instructs users, among other things, to keep the muzzle of the firearm in a safe direction, never leave a loaded firearm unattended, never store a loaded firearm, and always treat a firearm as if it were loaded.

{¶9} The Claytons had household rules for the handling of firearms. Firearms were not to be carried through the house, they were to be unloaded before being brought into the house, and they were to be loaded outside of the house.

{¶10} Normally, all of Mr. Clayton's guns, including the Mossberg 500, were kept in a locked gun safe located in a portion of the Claytons' basement they referred to as the "gun room." The door to the gun room was not locked. Mr. Clayton was the only person with the key to the safe; Billy did not have access to the safe.

{¶11} Mr. Clayton traveled frequently for business. After Billy completed the safety course, when Mr. Clayton was scheduled to work out of town, Billy would occasionally ask Mr. Clayton to remove the Mossberg 500 from the safe in advance of his departure. After taking the shotgun out of the safe, Mr. Clayton would leave it for Billy in the same spot every time – the corner of the gun room leaning against a bookcase. Mr. Clayton would pump the action of the shotgun to ensure it did not contain ammunition prior to Billy's use. The shotgun would then be left unloaded with the action open. When Billy was finished, he was supposed to leave the shotgun in the designated spot. Upon Mr. Clayton's return, he would make sure the action was open, put the shotgun back in the gun safe, and lock it. However, when placing the shotgun in the safe, Mr. Clayton did not necessarily determine if it was loaded. This practice was followed as many as ten times prior to the accident without incident. When the Mossberg 500 was left out of the gun safe, it was not secured with a cable lock.

{¶12} The week before the accident, Billy wanted to go hunting and Mr. Clayton was leaving on a business trip. Billy asked Mr. Clayton to take the Mossberg 500 out of the safe for his use while his father was away. Mr. Clayton checked the gun for

ammunition, then left the unloaded shotgun in the designated spot in the gun room so Billy could hunt while he was away. Billy used the shotgun then returned it to the corner of the gun room. Mr. Clayton returned from his business trip on December 23 or 24, 2002. On December 26, 2002, while packing for another out-of-town trip, Mr. Clayton observed the shotgun in the gun room, leaning against the bookcase, with the action open. Mr. Clayton did not touch the shotgun or determine if it was loaded, and the shotgun was left in the gun room.

{¶13} On December 26, 2002, the evening of the incident, Billy and Nathan were in the Claytons' basement, playing pool and eating pizza. Billy entered the gun room to turn on some music. At that time, the Mossberg 500 was still in the corner of the gun room leaning against the bookcase.

{¶14} Billy claimed he picked up the shotgun and pumped it two or three times to determine if it was loaded. He claims that no ammunition came out of the gun. While he was pumping the shotgun, Billy stated he checked the safety and it was in the "safe" position. Without physically inspecting the shotgun for ammunition, Billy walked to another part of the basement where Nathan was playing pool and may have said to him, "check this out." At that time, the gun went off, spraying birdshot across the room and into Nathan. Nathan immediately fell to the floor. Nathan was hit in the neck with the birdshot.

{¶15} Billy called 9-1-1, and paramedics and members of the Portage County Sheriff's Office responded to the scene. Nathan was transported by ambulance to Robinson Memorial Hospital and, ultimately, to Metro Hospital by helicopter. As a result

of the incident, Nathan is paralyzed from the waist down. Nathan has no recollection of the incident.

{¶16} Billy maintains that he dropped the shotgun after firing it and denies pumping it after shooting Nathan. However, deputies found several rounds of ammunition, one fired and three unfired, underneath the couch in the Claytons' basement after the incident. Sergeant James Carrozzi concluded that the spent shell casing found under the couch was from the round that struck Nathan. Sergeant Carrozzi further deduced that despite Billy's denial, Billy pumped the shotgun after firing it and placed the fired and unfired rounds under the couch.[1] While Billy initially denied knowing how the shells got under the couch, he later admitted to Mr. Clayton that he put them there.

{¶17} Gay commenced this lawsuit against the Claytons, alleging claims of negligence and negligent supervision.[2] Gay also advanced a negligence claim against Billy. In addition, Gay named Mossberg & Sons, Inc. in the lawsuit under theories of products liability, alleging, among other claims, the Mossberg 500 was negligently designed and defective in design and that the negligent and/or defective design proximately caused Nathan's injuries. The Claytons filed an answer to Gay's complaint. In addition, they filed a crossclaim against Mossberg & Sons, Inc. Mossberg & Sons, Inc. filed answers to Gay's complaint and the Claytons' crossclaim. Further, Mossberg & Sons, Inc. filed a crossclaim against the Claytons, to which the Claytons answered.

1. John Butters' theory of the events is different. He believes Billy pumped the shotgun multiple times when he picked it up, resulting in the live rounds being ejected. However, one round remained in the chamber. After the shot was fired in Nathan's direction, Butters believes Billy ejected the spent round.
2. The lawsuit was originally commenced in the Cuyahoga County Court of Common Pleas. However, upon motions filed by the Claytons and Mossberg, the matter was transferred to the Portage County Court of Common Pleas.

{¶18} Thereafter, Gay filed an amended complaint, which essentially advanced the same claims as the original complaint. However, in addition to the Claytons and Mossberg & Sons, Inc., the amended complaint named Maverick Arms, Inc., as well as other defendants.[3] Maverick Arms, Inc. filed an answer to the amended complaint. Further, the Claytons and Maverick Arms, Inc. filed crossclaims against each other. As they pertain to the parties involved in the instant appeal, all claims and crossclaims arising out of the amended complaint were appropriately answered.

{¶19} Gay specifically argues that the Mossberg 500 is defective because it did not have a loaded chamber indicator or a manual controlled feed mechanism. A loaded chamber indicator is a safety device in the form of a small button generally located just behind the ejection port on the side of a firearm, which pops up to indicate the presence of a round in the chamber. It does not rise enough to disrupt a shooter's sight picture, but its height is such that it can be seen or felt. A controlled feed mechanism is a feature that prevents the feeding of cartridges from the magazine unless the hammer is released to the fire position.

{¶20} Mossberg filed a motion for summary judgment and a motion in limine to exclude testimony of Gay's expert, John Butters. Gay filed a memorandum in opposition to Mossberg's motion for summary judgment.[4] Because the volume of evidentiary material was so great, the magistrate held an oral argument on the motions.

{¶21} Butters developed a prototype of a Mossberg 500 shotgun equipped with a loaded chamber indicator and field-tested it. Butters testified that the cost of

3. A discussion of the claims and crossclaims brought by or against the other defendants is not necessary for determination of this appeal.
4. Pursuant to a stipulated protective order, Gay's memorandum in opposition to Mossberg's motion for summary judgment and other documents were submitted under seal.

incorporating a loaded chamber indicator on the Mossberg 500 would be minimal and that the loaded chamber indicator would be both a technologically and economically feasible addition to the Mossberg 500. The magistrate determined that there was a genuine issue of material fact concerning the feasibility of the loaded chamber indicator. However, the magistrate concluded Gay failed to present evidence that Billy would have looked at the loaded chamber indicator or relied on it to determine if the chamber was loaded. The magistrate determined that the alternative design proposed by Butters, incorporating a loaded chamber indicator on the Mossberg 500, would not have prevented the accident. Therefore, the magistrate found there was no evidence that the lack of the loaded chamber indicator was a proximate cause of Nathan's injuries.

{¶22} In his affidavit, Butters explained how a controlled feed mechanism would be feasible; however, there was no evidence submitted demonstrating economic feasibility. In addition, there was no evidence concerning whether the addition of the controlled feed mechanism would impair the use of the gun. The magistrate further found that Butters' opinion that the shotgun was defectively designed, for lack of a controlled feed mechanism, was unreliable.

{¶23} The magistrate concluded that, based on the lack of economical and technical feasibility evidence, Gay could not establish the Mossberg 500 was defective in design or negligently designed for lack of this feature. The magistrate recommended entering summary judgment in favor of Mossberg on Gay's claims and the Claytons' crossclaims. Further, the magistrate recommended judgment barring Butters' testimony about the feasibility of a controlled feed mechanism on the Mossberg 500.

{¶24} Gay filed objections to the magistrate's decision pursuant to Civ.R. 53. However, the Claytons did not file any objections. On December 11, 2006, the trial court overruled Gay's objections and adopted the magistrate's findings and recommendations. The trial court entered summary judgment in favor of Mossberg on Gay's claims and on the Claytons' crossclaims against them.

{¶25} The Claytons also filed a motion for summary judgment. This motion was not referred to the magistrate. On January 17, 2007, the trial court granted the Claytons' motion for summary judgment. The court found that the Claytons were entitled to judgment as a matter of law on Gay's claims against them and on Mossberg's crossclaims against them.

{¶26} The court ordered that the case be placed on the trial calendar for resolution of Gay's claims against Billy.

{¶27} On December 13, 2007, Gay moved to have the two orders certified pursuant to Civ.R. 54(B). The trial court granted certification and stayed the trial proceedings pending this appeal.

{¶28} Gay raises four assignments of error, the first of which is:

{¶29} "The trial court erred to the prejudice of Appellants in granting the Claytons' motion for summary judgment on Appellants' negligence claim."

{¶30} In order for a motion for summary judgment to be granted, the moving party must demonstrate:

{¶31} "(1) [N]o genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such

evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made." *Mootispaw v. Eckstein* (1996), 76 Ohio St.3d 383, 385. (Citation omitted.)

{¶32} Summary judgment will be granted if "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of facts, if any, *** show that there is no genuine issue as to any material fact ***." Civ.R. 56(C). Material facts are those that might affect the outcome of the suit under the governing law of the case. *Turner v. Turner* (1993), 67 Ohio St.3d 337, 340, quoting *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 248.

{¶33} If the moving party meets this burden, the nonmoving party must then provide evidence illustrating a genuine issue of material fact, pursuant to Civ.R. 56(E). *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. Civ.R. 56(E) provides:

{¶34} "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party."

{¶35} Summary judgment is appropriate pursuant to Civ.R. 56(E), if the nonmoving party does not meet this burden.

{¶36} Appellate courts review a trial court's entry of summary judgment de novo. *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711. "*De novo* review means that this court uses the same standard that the trial court should have

used, and we examine the evidence to determine whether as a matter of law no genuine issues exist for trial." *Brewer v. Cleveland Bd. of Edn.* (1997), 122 Ohio App.3d 378, 383, citing *Dupler v. Mansfield Journal* (1980), 64 Ohio St.2d 116, 119-120.

{¶37} In her first assignment of error, Gay argues that the Claytons owed Nathan a duty of care in their dual capacities as landowners and as Billy's parents. Further, Gay contends the Claytons' breach of their duty of care proximately caused the accident; therefore, summary judgment was not appropriate.

{¶38} The Supreme Court of Ohio has held that "in order to establish a cause of action for negligence, the plaintiff must show (1) the existence of a duty, (2) a breach of duty, and (3) an injury proximately resulting therefrom." *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573, at ¶8, citing *Menifee v. Ohio Welding Prod., Inc.* (1984), 15 Ohio St.3d 75, 77.

{¶39} Under common law, parents are not typically responsible for torts committed by their children. *Huston v. Konieczny* (1990), 52 Ohio St.3d 214, 217. "Liability may arise, however, based upon the parents' conduct where the 'injury committed by the child is the foreseeable consequence of (the) parent's negligent act.'" *Midwestern Indemn. Co. v. Wiser* (2001), 144 Ohio App.3d 354, 358, quoting *Huston v. Konieczny*, supra, at 217.

{¶40} Initially, we determine what Nathan's legal status was on the day in question. "Invitees are persons who rightfully come upon the premises of another by invitation, express or implied, for some purpose which is beneficial to the owner." *Gladon v. Greater Cleveland Regional Transit Auth.* (1996), 75 Ohio St.3d 312, 315. (Citations omitted.) However, "[a] trespasser is '*** one who unauthorizedly goes upon

the private premises of another without invitation or *inducement, express or implied*, but purely for his own purposes or convenience. ***.'" *Jeffers v. Olexo* (1989), 43 Ohio St.3d 140, 145. (Citation omitted and emphasis added by *Jeffers* Court.)

{¶41} On the night in question, the undisputed evidence demonstrates that Nathan was in the Clayton home upon the express invitation of Billy and with the consent and approval of Mrs. Clayton. Accordingly, he was an invitee. "[T]o an invitee the landowner owes a duty 'to exercise ordinary care and to protect the invitee by maintaining the premises in a safe condition.'" *Bennett v. Stanley* (2001), 92 Ohio St.3d 35, 38, quoting *Light v. Ohio Univ.* (1986), 28 Ohio St.3d 66, 68.

{¶42} In a negligence action, whether a duty exists is a question of law that depends on the foreseeablity of the injury. *Midwestern Indemn. Co. v. Wiser*, 144 Ohio App.3d at 358. (Citation omitted.) An "'[i]njury is foreseeable if the defendant knew or should have known that his act was likely to result in harm to someone.'" Id. (Citation omitted).

{¶43} Both parties, as well as the trial court, address the claims against the Claytons in a consolidated fashion. However, we will independently address Gay's claims against Mr. and Mrs. Clayton.

{¶44} Mrs. Clayton had no interest in firearms. She did not have access to the gun safe. She did not leave the Mossberg 500 out of the gun safe for Billy to use. Therefore, she did not owe a duty to Nathan, and Gay cannot assert a successful claim of negligence against her. Mrs. Clayton was entitled to judgment as a matter of law.

{¶45} Mr. Clayton controlled all of the firearms in the Clayton home. He was the only person who possessed a key to the gun safe. He was the person who made the decision to allow his young teenage son to use firearms without adult supervision.

{¶46} There was evidence that the Mossberg 500 came with a free cable lock. Alan Mossberg, Jr., the Chief Executive Officer of Mossberg, stated in his deposition that cable locks are included in the packaging of every Mossberg 500. Mr. Clayton acknowledged that the carton his Mossberg 500 was packaged in stated it contained a cable lock. When Mr. Clayton was asked during his deposition if he used cable locks, he responded that he did not, because he had a gun safe. However, Mr. Clayton repeatedly left the Mossberg 500 out of the safe, without a cable lock. Also, there was evidence presented that the lack of a cable lock was the proximate cause of the accident. Alan Mossberg stated: "[a]nd again, I can't stress enough, that the cable lock would assure that that gun [was] stored in a very safe condition, because it locks the action open."

{¶47} The practice of leaving the shotgun in the gun room against the bookcase may have contributed to the accident. Mr. Clayton established a specific practice of leaving the gun unloaded in this condition. Then, when he returned from his travels, he would return the gun to the safe. Mr. Clayton acknowledged that it was "[p]ossible, but not probable" that the gun would be returned to the safe loaded. He emphasized that he would normally ensure the gun was not loaded when he would remove it for Billy's use. Obviously this was of importance to him. On the day in question, Mr. Clayton observed the gun against the bookcase with the action open where it had been left for Billy's use days earlier. However, on this occasion, he did not return the gun to the

safe, nor did he do anything to determine if it was loaded. Instead, he did not touch the gun and left it leaning against the bookcase. Thus, Mr. Clayton left the gun accessible to Billy *without* checking to see if the gun was loaded. As Gay notes, this practice violated Mr. Clayton's self-instituted safety protocol for leaving the gun for Billy. Accordingly, when Billy picked up the gun on the night in question, he expected it to be unloaded, since that was the condition in which Mr. Clayton always left it for him.

{¶48} Moreover, pursuant to the above analysis, there was evidence in the record suggesting Mr. Clayton left a loaded firearm out of the gun safe. If Mr. Clayton did leave the gun out for Billy while it was loaded, he stored a loaded firearm in the house, violating the ten commandments of gun safety, the Mossberg 500 owner's manual, and his own household rules for storing firearms. The unsecured, loaded shotgun was accessible to Billy, Nathan, Billy's younger sister, and her friend.

{¶49} There was evidence that Mr. Clayton left a loaded firearm out of his gun safe, in contravention of his established practice. Further, he did not secure the loaded Mossberg 500 with a cable lock. There is a genuine issue of material fact as to whether Mr. Clayton's actions of leaving the loaded shotgun in the house, fully accessible to minors, constituted a breach of the duty he owed to Nathan.

{¶50} In addition, there is a genuine issue of material fact as to whether Mr. Clayton's breach of the duty he owed to Nathan was the proximate cause of Nathan's injuries. By leaving the loaded shotgun unsecured in the basement, it was foreseeable that one of the children could be hurt by it. In fact, Nathan was severely injured when Billy improperly handled the loaded shotgun, which was left unattended by Mr. Clayton.

{¶51} Gay's first assignment of error is without merit is it relates to Mrs. Clayton. Gay's first assignment of error has merit as it relates to Mr. Clayton.

{¶52} Gay's second assignment of error is:

{¶53} "The trial court erred to the prejudice of Appellants in granting the Claytons' motion for summary judgment on Appellants' negligent supervision claim."

{¶54} Gay asserts the trial court erred in entering summary judgment in favor of the Claytons on her claim of negligent supervision.

{¶55} "To prevail in a negligent supervision complaint, plaintiffs must show that: (1) the parents knew of their child's particular reckless or negligent tendencies (thus knew they needed to exercise control over him); (2) the parents had the ability to exercise control; and (3) the parents did not exercise that control." *Hau v. Gill* (July 14, 1999), 9th Dist. No. 98CA007061, 1999 Ohio App. LEXIS 3258, at *5. (Citations omitted.) "Plaintiffs must also show that the alleged parental negligence was the proximate and foreseeable cause of the injury suffered." *Cogswell v. Clark Retail Ent*., 11th Dist. No. 2003-G-2519, 2004-Ohio-5640, at ¶19.

{¶56} "To establish the foreseeability of the act or injury [pursuant to negligent supervision], plaintiff must prove that specific instances of prior conduct were sufficient to put a reasonable person on notice that the act complained of was likely to occur." *Haefele v. Phillips* (Apr. 23, 1991), 10th Dist. No 90AP-1331, 1991 Ohio App. LEXIS 2038, at *4. (Citations omitted.) Thus, whether the Claytons owed Nathan a duty turns on whether a reasonably prudent person would have been put on notice by Billy's prior acts that it was likely he would injure someone.

{¶57} Again, Mrs. Clayton had no interest in firearms. She did not have access to the gun safe. She never left the Mossberg 500 for Billy to use. Therefore, she did not owe a duty to Nathan to protect him from Billy's actions. Since she did not owe Nathan a duty, Gay cannot assert a successful claim of negligent supervision against Mrs. Clayton. Mrs. Clayton was entitled to judgment as a matter of law.

{¶58} Mr. Clayton owned the firearms in question. He had sole access to the gun safe, as he possessed the only keys. Finally, Mr. Clayton specifically left the Mossberg 500 out of the gun safe for Billy's use.

{¶59} The trial court determined that since Billy "was sixteen years old, a hunter, and somewhat experienced with firearms," allowing him to have access to a shotgun and ammunition was not negligent. We believe the trial court's statement oversimplifies the issue.

{¶60} Gay claims the accident was foreseeable because Mr. Clayton witnessed Billy, on more than one occasion, "dry-fire" the Mossberg 500 and other firearms in the basement. Dry-firing is a practice that involves raising an unloaded firearm to the firing position and pulling the trigger with the safety in the fire position. This results in the gun making a "click" noise; however, there is no discharge, since the gun is unloaded. Mr. Clayton stated Billy did this to get a feel for different guns.

{¶61} Billy testified that dry-firing violates several gun safety rules, including: never point the muzzle of the gun at anything you do not intend to shoot; treat every gun as if it is loaded; and never pull the trigger unless you intend to shoot the gun. Despite witnessing Billy violate these rules, Mr. Clayton never corrected or punished Billy for dry-firing in the basement. In addition, by dry-firing in the basement, Billy learned to

expect that he could pull the trigger of a gun, with the safety off, and nothing would happen. Thus, it was foreseeable that Billy would attempt to engage in dry-firing and an accident would occur because the firearm was actually loaded.

{¶62} Butters reviewed the report of Emanuel Kapelsohn, an expert retained by Mossberg. Butters noted that both he and Kapelsohn believe that, on the night in question, Billy pulled the trigger on purpose, to engage in dry-firing.

{¶63} As previously noted, Billy stated that dry-firing violates several gun safety rules. Thus, there is evidence that dry-firing a firearm is at least negligent conduct. Further, there is evidence that Mr. Clayton had knowledge of Billy's negligent or reckless conduct, as he stated he witnessed Billy dry-fire several firearms in the basement of the home.

{¶64} Mr. Clayton had the ability to control Billy's behavior. He could have corrected and/or punished Billy for dry-firing in the basement. Alternatively, he could have prevented Billy from having unsupervised access to the shotgun. There was evidence in the record that Mr. Clayton did not undertake either of these measures to control Billy's behavior.

{¶65} There is a genuine issue of material fact as to whether Mr. Clayton's actions rose to the level of negligent supervision of Billy.

{¶66} The Claytons cite *Bilicic v. Brake* (1989), 64 Ohio App.3d 304, 309 in support of their argument that it was not foreseeable that Billy would harm Nathan. In *Bilicic*, Adam, the nine-year-old son of the appellee, Jerry Nicol, obtained a gun from his house and gave it to Edward Bauer, a frequent visitor to the household, who used it in a robbery that injured Richard Bilicic. In affirming an entry of summary judgment in favor

of Nicol, this court noted that "[i]t is obvious from all of the evidence which appears in the record that between the loan of the gun and the injury suffered by the appellant there had intervened a willful, malicious and criminal act of the three robber-assailants of the appellant." Id. at 307. In the instant matter, there was no intervening criminal act. Accordingly, the *Bilicic* case is distinguishable from the case sub judice.

{¶67} In addition, the Claytons cite *Nearor v. Davis* (1997), 118 Ohio App.3d 806 in support of their position. In *Nearor v. Davis*, the First Appellate District affirmed the summary judgment entered in favor of the parents of a 16-year-old boy who shot and killed an acquaintance with a loaded .22-caliber revolver that he removed from beneath the mattress of his parents' bed. Id. at 809. Ordinarily, the revolver was placed in a locked safe; however, before going out of town, Mr. Davis had loaded the gun and placed it between the mattress and box springs for his wife's protection and forgot to return it to the safe. Id. at 813. Mrs. Davis had informed her son of the location of the gun under her mattress, a location he had access to, and had warned him not to touch it. Id. The First District held that the decedent's death was not foreseeable. Id. at 814. The court found that the son's prior conduct did not put the parents on notice that he was likely to shoot the decedent or that the gun was a danger due to his age, judgment, or experience. Id. at 814. It is important to note that the teenager in *Nearor v. Davis* intentionally killed the victim by shooting him in the head three times and was subsequently convicted of murder. Id. at 809.

{¶68} In *Nearor*, the issue was whether it was foreseeable that the child would use the gun to commit an intentional, criminal act. Id. at 814. In the case sub judice, the issue was whether it was foreseeable that Billy would handle the shotgun unsafely,

resulting in harm to another individual. Mr. Clayton had repeatedly witnessed and approved of Billy's dry-firing of firearms in the house, a blatant violation of numerous gun safety rules.

{¶69} Also, in *Nearor*, the parents specifically told the child not to touch the gun, while Mr. Clayton left the gun for Billy to use, without his supervision.

{¶70} Billy was educated on the rules of safe handling of firearms. However, by permitting Billy to dry-fire various guns inside the home, Mr. Clayton implicitly consented to Billy's pattern of ignoring several gun safety rules, including: watch the direction of the muzzle, never touch the trigger unless you intend to shoot, and treat every firearm as if it was loaded.

{¶71} Gay's second assignment of error is without merit is it relates to Mrs. Clayton. Gay's second assignment of error has merit as it relates to Mr. Clayton.

{¶72} Gay's third assignment of error is:

{¶73} "The trial court erred to the prejudice of Appellants in granting Mossberg's motion for summary judgment on Appellants' claims of common law negligent design and statutory design defect under Ohio Revised Code 2307.7 et seq."

{¶74} Gay argues that all the elements to establish an action for negligent product design and statutory product design defect were established and, therefore, summary judgment was not appropriate.

{¶75} Initially, we will address Gay's statutory design defect claim. This matter is addressed by former R.C. 2307.73,[5] which provided, in part:

5. This statute has been amended.

{¶76} "(A) A manufacturer is subject to liability for compensatory damages based on a product liability claim only if the claimant establishes, by a preponderance of the evidence, both of the following:

{¶77} "(1) Subject to division (B) of this section, the product in question was defective in manufacture or construction as described in section 2307.74 of the Revised Code, was defective in design or formulation as described in section 2307.75 of the Revised Code, was defective due to inadequate warning or instruction as described in section 2307.76 of the Revised Code, or was defective because it did not conform to a representation made by its manufacturer as described in section 2307.77 of the Revised Code;

{¶78} "(2) A defective aspect of the product in question as described in division (A)(1) of this section was a proximate cause of harm for which the claimant seeks to recover compensatory damages."

{¶79} We note that former R.C. 2307.75 provided, in part:

{¶80} "(A) Subject to divisions (D), (E), and (F) of this section, a product is defective in design or formulation if either of the following applies:

{¶81} "(1) When it left the control of its manufacturer, the foreseeable risks associated with its design or formulation as determined pursuant to division (B) of this section exceeded the benefits associated with that design or formulation as determined pursuant to division (C) of this section;

{¶82} "(2) It is more dangerous than an ordinary consumer would expect when used in an intended or reasonably foreseeable manner.

{¶83} "(B) The foreseeable risks associated with the design or formulation of a product shall be determined by considering factors including, but not limited to, the following:

{¶84} "(1) The nature and magnitude of the risks of harm associated with that design or formulation in light of the intended and reasonably foreseeable uses, modifications, or alterations of the product;

{¶85} "(2) The likely awareness of product users, whether based on warnings, general knowledge, or otherwise, of those risks of harm;

{¶86} "(3) The likelihood that that design or formulation would cause harm in light of the intended and reasonably foreseeable uses, modifications, or alterations of the product;

{¶87} "(4) The extent to which that design or formulation conformed to any applicable public or private product standard that was in effect when the product left the control of its manufacturer.

{¶88} "(C) The benefits associated with the design or formulation of a product shall be determined by considering factors including, but not limited to, the following:

{¶89} "(1) The intended or actual utility of the product, including any performance or safety advantages associated with that design or formulation;

{¶90} "(2) The technical and economic feasibility, when the product left the control of its manufacturer, of using an alternative design or formulation;

{¶91} "(3) The nature and magnitude of any foreseeable risks associated with such an alternative design or formulation.

{¶92} "***

{¶93} "(E) A product is not defective in design or formulation if the harm for which the claimant seeks to recover compensatory damages was caused by an inherent characteristic of the product which is a generic aspect of the product that cannot be eliminated without substantially compromising the product's usefulness or desirability and which is recognized by the ordinary person with the ordinary knowledge common to the community.

{¶94} "(F) A product is not defective in design or formulation if, at the time the product left the control of its manufacturer, a practical and technically feasible alternative design or formulation was not available that would have prevented the harm for which the claimant seeks to recover compensatory damages without substantially impairing the usefulness or intended purpose of the product, unless the manufacturer acted unreasonably in introducing the product into trade or commerce."

{¶95} In a product liability case, a plaintiff must prove by a preponderance of evidence that: "'(1) there was, in fact, a defect in the product manufactured and sold by the defendant; (2) such defect existed at the time the product left the hands of the defendants; and (3) the defect was the direct and proximate cause of the plaintiff's injuries or loss.'" *State Farm Fire & Cas. Co. v. Chrysler Corp.* (1988), 37 Ohio St.3d 1, 6. (Citations omitted). See, also, *Donegal Mut. Ins. v. White Consol. Industries, Inc.*, 166 Ohio App.3d 569, 2006-Ohio-1586, at ¶15.

{¶96} The trial court found that a genuine issue of material fact exists regarding whether the Mossberg 500 shotgun is defectively designed because it lacks a loaded chamber indicator. While Mossberg contests this argument on appeal, it has not

properly phrased its argument as a cross-assignment of error. See App.R. 4(A). However, under our de novo review, we will address this issue on its merits.

{¶97} First, we will address whether there was evidence presented creating a genuine issue of material fact as to whether the alleged design defect existed when the gun left the control of the manufacturer. Gay attached a copy of Mossberg's responses to her first request for admissions to her brief in opposition to Mossberg's motion for summary judgment. Therein, Mossberg admitted Billy's shotgun left the manufacturer in 1998.

{¶98} In addition, Gay attached a copy of a report from the United States General Accounting Office ("GAO") titled "ACCIDENTAL SHOOTINGS – Many Deaths and Injuries Caused by Firearms Could Be Prevented." The report was published in March 1991.

{¶99} Mossberg argues that the trial court ruled the GAO report was not in evidence since it was not stipulated to. We disagree. First, the trial court's ruling pertained to the proximate cause analysis, not the issue of design defect itself. Further, we note the GOA report was properly authenticated, pursuant to Evid.R. 902(4), as Gay attached a certification from the custodian indicating it was a true copy of the official document, which is a public record. While the contents of the report would still be considered hearsay statements for some purposes, in this context they were not being offered to prove the truth of the matter asserted. See Evid.R. 801(C). Instead, in regard to this issue, the report was being offered to show Mossberg had knowledge of the existence of loaded chamber indicators prior to 1998. Accordingly, we will consider the GAO report for the limited purpose of determining whether there was evidence

presented that Mossberg knew of the existence of loaded chamber indicators before Billy's shotgun was manufactured in 1998.

{¶100} Among other items, the report provided:

{¶101} "A safety device that indicates whether a firearm is loaded could have prevented another 23 percent of the deaths. Many accidental deaths caused by firearms, other than those affecting children, involve uncertainty about whether the weapon is loaded. For example, one might empty a firearm but not notice that a round remains in the chamber, one might typically leave a weapon unloaded and so assume that it is always unloaded, or one might pull the trigger several times without discharge (dry-firing) and so assume the chamber to be empty even though it is not."

{¶102} During his deposition, Alan Mossberg, Jr. was questioned about this report and its findings regarding loaded chamber indicators.

{¶103} "Q. So, if I'm understanding your testimony correctly, [Alan Mossberg, Sr., the President of Mossberg] had the opinion back when this report came out in 1991, that the LCI was detrimental.

{¶104} "Am I understanding you correctly?

{¶105} "A. He had the opinion that anything that promoted a shortcut to safe gun handling was a detriment. And this just happened to be one device that he considered, and we still consider, to be a detriment to gun safety."

{¶106} Taken together, there was evidence submitted that Mossberg knew about loaded chamber indicators prior to the time Billy's shotgun was manufactured.

{¶107} Next, we address the evidence presented regarding the foreseeable risks of the design of the Mossberg 500 without a loaded chamber indicator.

{¶108} Former R.C. 2307.75 provided that the foreseeable risks must be determined "in light of the intended and *reasonably foreseeable* uses." R.C. 2307.75(B)(1) & (3). Accordingly, "Ohio courts have held that design defect claims may include the failure to design a product to prevent *foreseeable misuse*[.]" *Barrett v. Waco Internatl., Inc.* (1997), 123 Ohio App.3d 1, 8. (Emphasis added and citations omitted.)

{¶109} An example of foreseeable misuse is found in the case of *Perkins v. Wilkinson Sword, Inc.* (1998), 83 Ohio St.3d 507. In *Perkins*, a four-year-old child caused a fire while playing with a disposable lighter that resulted in the deaths of three people. Id. The plaintiff brought a product liability case, asserting that the manufacturer of the lighter was responsible for failing to include a child-resistant mechanism. Id. The Supreme Court of Ohio recognized that the cigarette lighter "operated properly and as intended." Id. at 510. In addition, the manufacturer of the lighter argued that it should not be liable for the deaths because the lighter was not intended to be used by children. Id. at 513. However, the Supreme Court of Ohio held that former R.C. 2307.75 "fully contemplates that a manufacturer may be liable for failing to use a feasible alternative design that would have prevented harm caused by an unintended but reasonably foreseeable use of its product." Id.

{¶110} In his deposition, Alan Mossberg Jr. stated that he believes it is foreseeable that an individual would violate one gun safety rule. However, he stated it was "far less likely" that someone would violate two commandments of gun safety. Finally, he believes that it is "inexcusable" for someone to violate three rules of gun safety. In this matter, it is undisputed that Billy violated numerous gun safety rules. Thus, according to Alan Mossberg, Jr., the incident was not foreseeable.

{¶111} Gay offered evidence that it was foreseeable that the situation in the instant matter would occur. In his deposition, Butters stated "[Billy's] action was not perfect for sure, but it was certainly a foreseeable set of events that took place."[6] Ostensibly, this would suggest that Mossberg should have foreseen these events and, therefore, should have foreseen the need for a loaded chamber indicator at the time of manufacture in 1998. This conclusion, however, would be at odds with other testimony from Butters.

{¶112} Butters testified the Mossberg 500 was "not necessarily" defective as manufactured due to the lack of a loaded chamber indicator. He then strained the bounds of foreseeability when he testified that in making the assessment, one would have to consider the "use and the environment in which whatever event takes place would control as to whether or not a particular set of features is critical to the prevention of an injury in any particular matter." This is comparable to claiming that a car without seatbelts is not defective unless there is a crash and someone goes through the windshield.

{¶113} Butters testified that the first time he ever conceived the idea of placing a loaded chamber indicator on a Mossberg 500 was sometime after the accident when counsel for appellant asked him to consider if it was "possible." He confirms that the basis for his observation and opinion is the foolproof hindsight method. He concedes this case is the first time he has ever concluded or testified that a firearm was defective

6. We note that there have been other occasions in which a shooter, while intending to dry-fire a firearm, ended up shooting another person as a result of the mistaken belief that the firearm was unloaded. See *Ramsey v. Runnels* (N.D.Ca. 2005), 2005 U.S. Dist. LEXIS 19731, at *2 and *Bell v. Glock, Inc.* (Mt. 2000), 92 F.Supp.2d 1067, 1068.

because it lacked a loaded chamber indicator. Although he owns a myriad of firearms, including rifles, none of the weapons he owns contain a loaded chamber indicator.

{¶114} There is a significant lack of evidence as to whether the incident was foreseeable, or whether this amounted to "foreseeable misuse." As a result, there is no genuine issue of material fact on this element.

{¶115} Under R.C. 2307.75(B)(4), we address whether the inclusion of a loaded chamber indicator conformed to product standards in effect in 1998, when the Mossberg 500 left the control of the manufacturer. Butters stated he did not know of any commercially produced shotguns that contained a loaded chamber indicator. However, there was evidence presented that other types of firearms were manufactured with loaded chamber indicators.

{¶116} Mossberg argues Billy's Mossberg 500 conformed to the industry standard when the shotgun left the manufacturer. The question becomes, is the test for the industry standard the manufacture of firearms in general, or specifically the manufacture of long-barreled shotguns? We believe both are relevant. For example, there are certain safety features in the automobile industry, such as rollbars, that may be part of the industry standard on certain vehicles, but not others. However, using safety glass in the windshield would be an example of a safety feature that encompasses a broader scope of vehicles.

{¶117} Alan Mossberg, Jr. stated that from 1961 through 2006, Mossberg manufactured seven to eight million Mossberg 500 shotguns. Accordingly, Mossberg is a major shotgun manufacturer and, thus, is a participant in actually setting the industry standard. Thus, the fact that loaded chamber indicators are not present on

commercially manufactured shotguns could have several meanings. First, it could mean that the loaded chamber indicator does not actually make the shotgun safer. Second, it could mean that Mossberg and other manufacturers simply chose not to include loaded chamber indicators in their shotguns for other reasons.

{¶118} It is certainly relevant that evidence was presented that there were no commercially manufactured shotguns with loaded chamber indicators. However, this is only one criterion under the analysis of the foreseeable risks associated with the manufacture of the Mossberg 500 without a loaded chamber indicator, and it is not dispositive.

{¶119} The subsequent inquiry pertains to the benefits associated with production of the Mossberg 500 without a loaded chamber indicator.

{¶120} Under R.C. 2307.75(C)(1), a relevant factor is the intended or actual utility of the product.

{¶121} This court addressed this factor in *Monaco v. Red Fox Gun Club, Inc.* (Dec. 28, 2001), 11th Dist. No. 2000-P-0064, 2001 Ohio App. LEXIS 6008. In *Monaco*, the plaintiff was injured when his uncle accidently shot him in the hip while target shooting. Id. at *2. The shooter was using a replica 1886 firearm that did not have an external safety. Id. This court held summary judgment in favor of the manufacturer was not proper since there was a genuine issue of material fact concerning whether the existence of an external safety would compromise the firearm's intended use or purpose.

{¶122} Alan Mossberg, Jr. stated that he considered loaded chamber indicators to be a "shortcut" that actually make the guns less safe. He stated the safer practice is to

actually open the action lock lever and look in the chamber to see if there is a round in it. Thus, there was evidence presented by Mossberg that the design of the Mossberg 500 without a loaded chamber indicator went to the utility of the product. Through the testimony of Butters, Gay presented evidence that the inclusion of a loaded chamber indicator would make the Mossberg 500 safer, as it would alert the user that there was a round in the chamber. Accordingly, there was conflicting testimony regarding this factor.

{¶123} Under R.C. 2307.75(C)(2), Gay presented evidence that it was economically feasible to manufacture the shotguns with a loaded chamber indicator. Butters stated that it would cost "less than $5 per gun" for Mossberg to include a loaded chamber indicator on its shotguns. Mossberg did not present any evidence that the cost would be more significant. The trial court found that there was a genuine issue of material fact as to whether it was economically feasible to manufacture the shotguns with a loaded chamber indicator. On appeal, Mossberg does not contest this finding.

{¶124} Under R.C. 2307.75(C)(3), we consider the foreseeable risks associated with the inclusion of a loaded chamber indicator on the Mossberg 500. Again, Alan Mossberg, Jr. stated that he considered loaded chamber indicators to be a "shortcut" that actually make the shotgun less safe, while Butters stated a loaded chamber indicator would make the firearm safer. Thus, there was conflicting evidence pertaining to this factor.

{¶125} Pursuant to R.C. 2307.75(E), we address whether the harm caused in this matter was due to an "inherent characteristic" of the Mossberg 500 that could not be removed without compromising the usefulness of the shotgun. Again, there is

conflicting evidence regarding this element – Alan Mossberg, Jr. stated that the loaded chamber indicator would compromise the safety of the shotgun, while Butters testified that the loaded chamber indicator would assist the user in determining whether there was a round in the chamber.

{¶126} Pursuant to R.C. 2307.75(F), we again note there was evidence presented that loaded chamber indicators were in existence at the time this Mossberg 500 was manufactured. Further, we note there was evidence presented, through Butter's testimony and his videotape of the field-testing, that the inclusion of a loaded chamber indicator would not substantially impair the usefulness of the Mossberg 500.

{¶127} Next, we address whether Gay presented evidence demonstrating the alleged design defect was a proximate cause of the accident.

{¶128} "'Proximate cause is a troublesome phrase. It has a particular meaning in the law but is difficult to define. It has been defined as: "That which immediately precedes and produces the effect, as distinguished from a remote, mediate, or predisposing cause; that from which the fact might be expected to follow without the concurrence of any unusual circumstances; that without which the accident would not have happened, and from which the injury or a like injury might have been anticipated."'" *Jeffers v. Olexo*, 43 Ohio St.3d at 143. (Citations omitted.)

{¶129} "While proximate cause is often a jury question, summary judgment is proper on this issue when appellant has failed to meet his burden to produce evidence to challenge unfavorable evidence already in the record." *Vermett v. Fred Christen & Sons Co.* (2000), 138 Ohio App.3d 586, 612.

{¶130} When asked whether Nathan would have been shot if the subject Mossberg 500 had a loaded chamber indicator, Butters responded: "I can't guarantee that [Billy] would have seen and noted and paid attention, but I will say that it would have been of considerable assistance to him in the observations of the condition of his shotgun." In another part of his deposition, Butters was asked:

{¶131} "Q. If [a loaded chamber indicator had been in the Mossberg 500], can you tell me that this accident would not have occurred.

{¶132} "A. No. I would say that it would have been more likely not to have occurred. ***"

{¶133} Finally, Butters stated:

{¶134} "If [Billy] had known of [the loaded chamber indicator's] presence, and if he had seen the indication showing that the chamber was loaded, I don't think that he would have discharged the shotgun in the way in which it discharged. I think that the loaded chamber indicator would have been of considerable assistance to him in determining whether the shotgun was loaded."

{¶135} On the night of the accident, Billy's actions were contrary to the rules of firearm safety he had been taught by the Ohio Hunter's Safety Course, as well as the Mossberg 500 owner's manual safety warnings. Billy did not utilize the manual safety; had the safety been in "safe" mode, the gun would not have fired. Billy did not visually check the chamber for ammunition, like he had been taught to do. Further, it is apparent that he did not follow gun safety rules – there was evidence in the record that he did not assume the gun was loaded, he had his hand on the trigger, and he pointed

the gun at Nathan. Billy indicated at his deposition that had he followed the safety rules and handled the gun properly, it would not have fired.

{¶136} This minor child was permitted access to this firearm. The rules of proper handling and operation were not obeyed by Billy. The rules were not fully enforced or followed by the person in a position of authority that could have required compliance at all times. This is not a case of an isolated, single infraction of firearm handling. The multitude of infractions removes the case from the category of foreseeable misuse.

{¶137} Gay's claim rests on Butters' deposition testimony in which he opines that a loaded chamber indicator "would have been of considerable assistance" to Billy in knowing the condition of the shotgun and that the accident "would have been more likely not to have occurred" if the shotgun had a loaded chamber indicator. Essentially, Gay's position is that the inclusion of one additional safety feature "might have" prevented the accident, despite the fact that other safety devices were not utilized and numerous gun safety rules were not obeyed.

{¶138} The accident in this matter was "the result of a chain of events too far removed from the purported defective design" of the Mossberg 500. See, e.g., *Hunt v. Marksman Prod., Div. of S/R Industries, Inc.* (1995), 101 Ohio App.3d 760, 764.

{¶139} Put another way, appellant is requesting that Mossberg be held liable for manufacturing a firearm in 1998 that, according to even their own expert, was not necessarily defective in design, but should be deemed so because of the catastrophic series of events that took place in this case. Under the law, hindsight cannot define the duty to be obeyed, nor can it be the sole basis for concluding that the accident *might not* have occurred but for that allegedly defective design.

{¶140} The manufacturer is not an insurer against all harm that may come as a result of the operation of a firearm. It must be remembered that the Mossberg 500 is a gun. On December 26, 2002, it operated as a gun is intended to operate. There was a round in the chamber, the safety was off, and the trigger was pulled. The result of this sequence is that the gun discharged, which is exactly what it was designed to do.

{¶141} There was no genuine issue of material fact as to whether the lack of a loaded chamber indicator was a proximate cause of the underlying accident. Therefore, Mossberg was entitled to judgment as a matter of law on Gay's statutory design defect claim.

{¶142} Appellants have also presented a common law negligent design claim. This court has previously held:

{¶143} "The common-law action of negligent design survived the enactment of the Ohio Products Liability Act. *** The doctrines of strict products liability and common law negligence cases are viewed as complementary but separate. *** Common law negligence is predicated on the principle that a manufacturer of a product should use reasonable care in the design and manufacture of his product to eliminate any unreasonable risk of foreseeable injury. ***" *Monaco v. Red Fox Gun Club, Inc.*, 2001 Ohio App. LEXIS 6008, at *15-16. (Internal citations omitted.)

{¶144} Since we have previously addressed the fact that there is no genuine issue of material fact as to the foreseeability of this accident, Mossberg is entitled to judgment as a matter of law on this claim.

{¶145} The trial court properly granted Mossberg's motion for summary judgment.

{¶146} The third assignment of error is without merit.

{¶147} Gay's fourth assignment of error is:

{¶148} "The trial court erred to the prejudice of Appellants in granting Mossberg's motion to exclude the opinion of Plaintiff's expert regarding the feasibility of a controlled feed mechanism device on Model 500 shotguns."

{¶149} At oral argument, Gay withdrew the fourth assignment of error. Accordingly, we will not address it. See *Second Calvary Church of God in Christ v. Chomet*, 9th Dist. No. 07CA009186, 2008-Ohio-1463, at ¶24, and *State v. Petralia*, 11th Dist. No. 2001-L-101, 2003-Ohio-1745, at ¶39.

{¶150} The judgment of the Portage County Court of Common Pleas is affirmed as it relates to Mrs. Clayton. The judgment of the Portage County Court of Common Pleas is reversed as it relates to Mr. Clayton. In regard to Mossberg, the judgment of the Portage County Court of Common Pleas is affirmed. This matter is remanded for further proceedings consistent with this opinion.

MARY JANE TRAPP, P.J., concurs in judgment and opinion in part and concurs in judgment only in part with Concurring Opinion.

DIANE V. GRENDELL, J., concurs in part and dissents in part with a Dissenting Opinion.

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MARY JANE TRAPP, P.J., concurs in judgment and opinion in part and concurs in judgment only in part with Concurring Opinion.

{¶151} While I concur in both the judgment and opinion affirming the grant of summary judgment to Mrs. Clayton and reversing the grant of summary judgment to Mr. Clayton, and I concur in the judgment affirming the grant of summary judgment to

Mossberg, I do so upon a very narrow basis which differs in analysis and conclusions of the majority. At the outset, I note that the majority's recitation of the law of summary judgment is incomplete. "[S]ummary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Welch v. Ziccarelli*, 11th Dist. No. 2006-L-229, 2007-Ohio-4374, ¶36 (citation omitted). "In addition, it must appear from the evidence and stipulations that reasonable minds can come to only one conclusion, which is adverse to the nonmoving party." Id. (citation omitted).

{¶152} "Since summary judgment denies the party his or her 'day in court' it is not to be viewed lightly as docket control or as a 'little trial.' The jurisprudence of summary judgment standards has placed burdens on both the moving and the nonmoving party. In *Dresher v. Burt* [(1996), 75 Ohio St.3d 280], the Supreme Court of Ohio held that the moving party seeking summary judgment bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record before the trial court that demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. The evidence must be in the record or the motion cannot succeed. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case but must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) that affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. If the moving party has satisfied its initial burden, the nonmoving party has a reciprocal burden outlined in

the last sentence of Civ.R. 56(E) to set forth specific facts showing there is a genuine issue for trial. If the nonmoving party fails to do so, summary judgment, if appropriate shall be entered against the nonmoving party based on the principles that have been firmly established in Ohio for quite some time in *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 526 N.E.2d 798." *Welch* at ¶40.

{¶153} Further, in considering a motion for summary judgment, a court must determine only whether reasonable minds can reach more than one conclusion on the facts. The court must not weigh the evidence or determine the merits of the case or the credibility of the witnesses. *Kreais v. Chemi-trol Co.* (1989), 52 Ohio App.3d 74, 78; *Turner v. Turner* (1993), 67 Ohio St.3d 337, 341-342. The purpose of summary judgment is not to try issues of fact, but to determine whether triable issues of fact exist. *McGee v. Goodyear Atomic Corp*. (1995), 103 Ohio App.3d 236, 242-243. Not only is it the duty of the court to closely scrutinize the evidence in favor of the movant, but it must view it, as well as any inferences which may be made from that evidence, in the most favorable light to the opposing party. *Allstate Ins. Co. v. Baileys* (N.D.Ohio 1958), 192 F.Supp. 595, 596. "A summary judgment should not be granted where the facts although not in dispute are subject to conflicting inferences." *Cottrell v. Mayfield* (May 1, 1987), 11th Dist. No. 1730, 1987 Ohio App. LEXIS 6623, *3, citing 73 American Jurisprudence 2d (1974), Summary Judgment, Section 27.

{¶154} When the majority concludes that "[t]his is not a case of an isolated, single infraction of firearm handling" and that "[t]he multitude of infractions removes the case from the category of foreseeable misuse," the majority has in fact weighed the evidence to reach that conclusion instead of determining if there was a genuine issue of material

fact. It would be up to a jury to determine how many infractions it takes a case outside of the foreseeable misuse.

{¶155} As the First District Court of Appeals held in *Welch Sand & Gravel, Inc. v. O&K Trojan, Inc.* (1995), 107 Ohio App.3d 218: "Summary judgment is only appropriate where a product is used in a capacity which is clearly unforeseeable by the manufacturer and completely incompatible with the product's design." Id. at 225, citing *Cox v. Oliver Machinery Co.* (1987), 41 Ohio App.3d 28. "Foreseeable uses of a product, foreseeable risks associated with a product, benefits associated with a product, and consumer expectations regarding a product's uses and risks are ordinarily all factual questions. The determination of whether a design defect exists involves a balancing of these factual issues. Therefore, summary judgment will rarely be granted in design defect cases when any of these elements is disputed." Id. at 225.

{¶156} With that being said, the difficulty for the Gays in this case is that their expert failed to present sufficient evidence that would provide a foundation for reasonable minds to reach more than one conclusion on the facts as to the issue of the foreseeable risk.

{¶157} The statutory definition of "foreseeable risks" applicable to this case "creates a pure negligence standard which focuses not on the nature of the product, as in traditional strict liability, but instead on the defendant's conduct in designing the product." *Gilbert v. Bayerische Motoren Werke* (Dec. 17, 1993), 2d Dist No. 13819, 1993 Ohio App. Lexis 5966, *13.

{¶158} The test for determining whether a particular hazard is foreseeable is "whether a reasonably prudent person would have anticipated that an injury was likely

to result from the performance or nonperformance of an act." *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St.3d 75, 77. The question in a particular case is whether the actual harm fell within the general field of danger which should have been anticipated by the manufacturer. *Holman v. Mark Industries, Inc.* (D.C. Md. 1985), 610 F.Supp. 1195.

{¶159} This case is unique in the sense that generally it is the manufacturer that argues that the exact set of circumstances surrounding a particular accident could not have been foreseen by the manufacturer when the product left its control. In this case it is the injured party that argues that the product is not generally defective due to the lack of an LCI but under the exact set of circumstances presented in this case, the shot gun was defective.

{¶160} While it is well-established that the Gays did not have to show that Mossberg should have foreseen that the identical sequence of events of this tragic accident would cause injury due to the design of the Mossberg 500, they had to demonstrate that Mossberg, using the "attention, perception, memory, knowledge and intelligence of a reasonable auto manufacturer, should have anticipated the *general danger* to others posed by its chosen design." (Emphasis added.) *Aldridge v. Reckart Equip. Co.*, 4th Dist. No. 04CA17, 2006-Ohio-4964, ¶51, citing *Gilbert*.

{¶161} Thus, within the logical construct of the test of foreseeability, the corollary proposition arises. A plaintiff must show that the manufacturer should have anticipated the general danger to others posed by its design; a danger that arises only under a very precise set of occurrences is insufficient. Put another way, if a plaintiff is not required to show that a manufacturer should have foreseen the very sequence of events that

caused the plaintiff's injury, the manufacturer cannot be held liable for failing to foresee a very particular set of occurrences.

{¶162} The Gays' expert could opine only that "[u]nder the circumstances of this particular set of occurrences" the Mossberg 500 was defective. The Gays failed to present any evidence on the question of whether Mossberg should have foreseen injury occurring within the *general field of danger* created by the alleged designed defect. This very limited opinion was insufficient to defeat summary judgment.

DIANE V. GRENDELL, J., concurs in part and dissents in part with a Dissenting Opinion.

{¶163} I concur with the majority's disposition of the third and fourth assignments of error and that Connie Clayton was entitled to judgment as a matter of law for the claims of negligence and negligent supervision. However, respectfully, I disagree with the majority's conclusion regarding the first and second assignments of error as they relate to William Clayton.

{¶164} The majority conjectures that "[b]y leaving the loaded shotgun unsecured in the basement, it was foreseeable that one of the children could be hurt by it." I disagree with this factually unsubstantiated assertion. The fact that a gun is available to a 16 year old does not, as a matter of law, automatically constitute a danger to others. See *Nearor v. Davis* (1997), 118 Ohio App.3d 806, 813.

{¶165} At common law, parents are not ordinarily held liable for the torts of their child. *Huston v. Konieczny* (1990), 52 Ohio St.3d 214, 217. Liability may arise, however, based upon the parents' conduct where the "injury committed by the child is

the **foreseeable** consequence of [the] parent's negligent act." Id. (emphasis added). The shooting of Nathan, although a devastating and most unfortunate tragedy caused by the unfathomable conduct of Billy Clayton, was not foreseeable by William Clayton in light of Billy's safety training and prior responsible handling of the shotgun.

{¶166} In *Cogswell v. Clark Retail Enters*. *Inc*., 11th Dist. No. 2003-G-2519, 2004-Ohio-5640, this court upheld summary judgment in favor of the defendants when the plaintiff failed to show the act was foreseeable. In *Cogswell*, a minor, Jillian Holder, and two friends, Marcus Moorer and Wesley Pearson, went to a park and smoked marijuana. Shortly after, they robbed a gas station. Marcus Moorer shot and injured the plaintiff and fatally shot another store employee. The defendant's daughter, Jillian, drove the getaway vehicle. The plaintiff argued that the incident was foreseeable and the defendants were negligent in allowing their daughter to have a relationship with Pearson, a known violent person. She further argued that the case required a jury determination regarding the foreseeable consequences of the defendants' alleged negligence.

{¶167} Our court held that "[b]ased on the record, the Holders were not on notice of the possibility of any criminal activities or vicious propensities of Jillian Holder. Appellants put forth no evidence that the Holders knew about Pearson's reputation. There is no evidence that Jillian Holder's relationship with Pearson would have given the Holders reasonable cause to believe that Moorer would have shot appellant Rachael Cogswell *** or that Jillian Holder would have been involved in such a crime." Id. at ¶21. Accordingly, our court upheld the lower court's granting of summary

judgment and I would uphold the granting of summary judgment in the instant case as well, even though my empathy favors the appellant.

{¶168} The Claytons had household rules for the handling of firearms: firearms were not to be carried through the house, they were to be unloaded before being brought into the house, and were to be loaded outside of the house. Billy had taken and completed a hunter's safety course. William trained Billy about the safety device on the Mossberg 500 shotgun and which position meant the gun was "ready to fire" versus when the gun was in the "safe" mode. Billy also learned from his father how to load and unload the shells and shoot the gun, as well as safe handling practices. He was taught to always assume the shotgun was loaded, to keep his finger off the trigger unless he intended on pulling it, and not to point a gun at another human being. Billy also was trained to check for ammunition before using the gun by visually inspecting the chamber and magazine tube of the gun.

{¶169} The majority contends that *Bilicic v. Brake* (11th Dist., 1989), 64 Ohio App.3d 304, is distinguishable from the instant case due to the intervening criminal act. However, while it may be true that no intervening criminal act took place in the instant case, *Bilicic* has relevant case law applicable to the present case; specifically, that "[n]o one is bound to take care to prevent consequences, which, in light of human experience, are beyond the range of probability." Id. at 308 (citation omitted).

{¶170} Moreover, it's important to note that in *Bilicic*, the appellant argued that the court should adopt the doctrine that, when a person possesses a firearm, he should be held absolutely liable for any injury that occurs when he permits or leaves the firearms accessible to children. This court refused to hold that when a person possesses a

firearm, he should be held absolutely liable for any injury that occurs when he permits or leaves the firearm accessible to juveniles. Id. at 309. This court reasoned that there was no case law or statutory law which would justify such a position. In determining the act was unforeseeable, this court stated that all the evidence demonstrated that the child's use of the gun was always under the supervision or control of his father. Id.

{¶171} Similar to the present case, Gay was always under the control or supervision of his father when he used the Mossberg. If William was not present when his son used the gun, prior to use, Billy had to ask permission to use the gun and follow the established safety rules and protocol. William Clayton cannot be held liable merely because the Mossberg 500 was accessible to Billy. See *Nearor*, 118 Ohio App.3d at 813. William had no knowledge of any fact or circumstance to suggest that Billy was unsafe while handling the Mossberg 500 or would do something so reckless as point it at someone. He knew of no instance where Billy had ever engaged in any horseplay with the Mossberg or where Billy's use of the gun had created a safety issue or endangered anyone.

{¶172} There was no evidence presented demonstrating it was foreseeable Billy would shoot Nathan. The fact of dry firing at a wall is <u>not</u> indicative that an individual is likely to point a shotgun at another person or cause the sort of harm caused by Billy. Dry firing at a wall is not the same as aiming at, shooting at, or dry firing at a human. Dry firing at a wall is evidence Billy knew not to aim the shotgun in the direction of another person and that Billy knew how to properly empty the firearm, because he never shot a live round into the wall of the Clayton's basement.

{¶173} Gay presented no evidence that Billy was generally reckless or irresponsible, let alone with respect to firearms. Billy had been an average student, besides minor disciplinary problems stemming from cutting class. Billy displayed no behavioral problems and did not fight or otherwise engage in violence. There was no evidence presented suggesting that, prior to the incident, Billy had ever engaged in horseplay with guns or failed to handle the Mossberg 500, or any other firearm, safely when using it. Prior to the incident, Billy handled the Mossberg 500, the same gun used in the accident, for three years to hunt and shoot outside and handled the shotgun inside the home without any prior safety incident. In fact, there was no evidence, outside of Nathan's shooting, that Billy ever put another individual at risk either intentionally or negligently.

{¶174} The majority cites to *Nearor v. Davis*, 118 Ohio App.3d 806, noting that the shooting was intentional and the teenager was eventually convicted of Murder. In *Nearor*, the court held that the decedent's death was not foreseeable. Like the instant case, the parents testified that they had told their son of the danger of guns and that guns were not to be pointed at people. The father had not trained his son in the use of guns; however, he had allowed his son to "shoot firearms in the air 'a couple of times.'" Id. at 811. The appellants testified they knew their son disobeyed certain house rules, had one appearance in a juvenile court, and had him transferred to a different school when the mother heard he was using marijuana. Id. at 814. Nonetheless, the court expressly stated that they could not "conclude as a matter of law that a gun being accessible to a 16-year-old always constitutes a danger to others." Id. at 813.

{¶175} It is undisputed that William left the Mossberg 500 out of the locked safe for Billy's use. Ordinarily, upon William's return from his business trip, the Mossberg 500 would have been checked for ammunition then replaced in the locked safe in the Claytons' gun room. On the day of the accident, William failed to do so, similar to Mr. Davis' failure to return the revolver to the safe in *Nearor*, supra. Yet the court in that case refused to conclude that such failure constituted a danger, as a matter of law.

{¶176} More importantly, as mentioned above, this court has held that we were not willing to adopt a doctrine in which the owner of a gun would be held absolutely liable for any injury that occurs when he permits or leaves a firearm accessible to a juvenile. See *Bilicic*, 64 Ohio App.3d at 309. This is essentially what the majority is doing; penalizing William for leaving a gun accessible to a juvenile, even though the juvenile had firearm safety training. Conversely, the inquiry should be focused on whether William knew or should have known that, because of Billy's age, judgment, or experience, the gun could become a source of danger to others. See *McGinnis v. Kinkaid* (1981), 1 Ohio App.3d 4, 9. In this case, the answer to that inquiry is no; the mere fact that Billy had access to a firearm cannot result in liability against William.

{¶177} William educated Billy on the rules of safe handling for firearms. Billy was trained to never keep his hand on the trigger unless he intended to fire. Billy was provided safety training and received hunter's safety certification from the State of Ohio upon completion of a three day course. He scored a 99/100 on the written exam administered at the course. Billy was taught that firearms were dangerous, could harm someone, and should not be pointed at anyone. Billy had experience with firearms and had handled them for years prior to the accident, without incident. Nathan's injuries

were the result of Billy's inexplicable, but unforeseeable, disregard of his safety training and parental instruction.

{¶178} Gay has failed to present any evidence which raises an issue of genuine material fact that the unfortunate incident was foreseeable. The instances in which Billy dry fired at a wall in the basement, did not put the Claytons on notice that Billy would aim at or shoot Nathan. Dry firing involved pointing an unloaded gun at a wall, never at a person. In addition, it can be inferred that Billy never mistakenly assumed that the gun was unloaded because he did not shoot a live round at the wall of the basement. Dry firing at a basement wall is not the same as pointing a loaded gun at and shooting a person. William testified that he never witnessed Billy point a gun at a person. In fact, there was no evidence raised, outside of the incident, demonstrating that Billy had ***ever*** pointed a gun at a person or put another person in danger because of his reckless or negligent handling of a gun.

{¶179} The owner's manual of the Mossberg 500 instructs users, among other things, to keep the muzzle of the firearm in a safe direction and always treat a firearm as if it was loaded. It does not explicitly forbid dry firing as the majority opinion appears to suggest. Prior to the incident, when dry firing at the wall, Billy could and did still respect the rules of gun safety. Billy did not point the gun in an unsafe direction; Billy never pointed the gun at a person. When dry firing at the wall, Billy did intend to pull the trigger and he did so in a safe manner- never shooting a live round mistakenly. Moreover, when dry firing, Billy did treat the gun as if it were loaded; it can be inferred that Billy did take the necessary measures to insure the gun was not loaded because, as mentioned above, Billy never mistakenly shot a live round when dry firing.

{¶180} Accordingly, based on the foregoing, I would hold, as a matter of law, that Nathan's injuries, while deplorable, were not foreseeable, in that the cited specific instance of prior conduct, the dry firing at the wall, was insufficient, as a matter of law, either to put a reasonable person on notice that Billy was likely to point a loaded gun at and shoot Nathan or to show William knew or should have known that because of Billy's age, judgment, or experience, Billy would inexplicably mishandle the gun and the gun would become a source of danger to others. Therefore, because all the elements of negligence cannot be met, summary judgment in favor of Mr. Clayton was properly granted by the trial court.

{¶181} As for the second assignment of error, the claim of negligent supervision, I would also find this argument to be without merit. Since cases involving claims of negligent supervision center upon whether the aggrieved party's injuries were foreseeable, for the reasons addressed above, it cannot be said that William knew or should have known that Billy was likely to shoot Nathan, nor did William have any reason to foresee that the entrustment of the Mossberg 500 to Billy would become a source of danger to others. Hindsight is not the test. Judicial empathy cannot supplant the rule of law.

{¶182} Accordingly, I respectfully dissent as to the majority's disposition of the first and second assignments of error as to William Clayton. I would affirm the decision of the trial court in its totality.