

IN THE SUPREME COURT FOR THE STATE OF DELAWARE

JOSEPH J. PEDICONE, III and  
HILMA L. PEDICONE, h/w,

Plaintiffs Below,  
Appellants,

vs.

THOMPSON/CENTER ARMS  
COMPANY, LLC f/k/a  
THOMPSON/CENTER ARMS  
COMPANY, INC., and SMITH &  
WESSON CORP.,

Defendants Below,  
Appellees.

Docket No.: 443, 2022

*On Appeal from:*  
The Superior Court for the State of  
Delaware for New Castle County

C.A. No. N17C-11-264 WCC

---

OPENING BRIEF OF PLAINTIFFS BELOW, APPELLANTS  
JOSEPH J. PEDICONE, III and HILMA L. PEDICONE

---

Charles L. Becker (*pro hac vice*)  
Michael A. Trunk  
Ruxandra M. Laidacker (*pro hac vice*)  
**KLINE & SPECTER, P.C.**  
1525 Locust Street  
Philadelphia, PA 19102  
(215) 772-1000

Joseph J. Rhoades (ID. 2064)  
Stephen T. Morrow (ID. 4891)  
**RHOADES & MORROW LLC**  
1225 N. King Street, Suite 1200  
Wilmington, DE 19899-0874  
(302) 427-9500

*Attorneys for Plaintiffs Below,  
Appellants Joseph J. Pedicone, III and  
Hilma L. Pedicone*

## TABLE OF CONTENTS

	<b>Page</b>
TABLE OF CITATIONS .....	iii
I. NATURE OF PROCEEDINGS .....	1
II. SUMMARY OF ARGUMENT .....	2
III. STATEMENT OF FACTS .....	5
A. Joseph Pedicone suffered an above-the-knee amputation when his Contender firearm unintentionally discharged without a trigger-pull .....	5
B. The Pedicones filed a negligence suit against the Thompson defendants that resulted in a jury verdict for the defendants .....	7
IV. ARGUMENT .....	8
A. The trial court wrongly excluded evidence of an alternative hammer block mechanism installed in the G2 Contender where that mechanism was developed long before Mr. Pedicone's Contender was designed and could have been incorporated into that earlier model of the Contender .....	8
1. Question presented .....	8
2. Scope of review .....	8
3. Merits of argument .....	9
a. The legal framework .....	10
b. Plaintiffs' evidence of negligent design provides context for why evidence of the G2's hammer block mechanism should not have been precluded ....	12

c.	The trial court wrongly excluded evidence of the G2 Contender that followed the original Contender when the hammer block mechanism used in the G2 was available when the original Contender was designed. ....	19
d.	The trial court’s ruling prejudiced the outcome of trial .....	24
e.	The trial court’s post-trial opinion does not support affirmance .....	25
B.	The trial court unduly injected its perspective into the courtroom when questioning Plaintiffs’ expert, Dr. Michael Knox, during his direct examination on a key issue in the litigation.....	29
1.	Question presented.....	29
2.	Scope of review.....	30
3.	Merits of argument.....	30
a.	Legal framework.....	30
b.	Dr. Knox’s testimony about the independent manual safety .....	32
c.	The trial court abused its discretion when examining Dr. Knox about the manual safety.....	35
d.	The trial court’s post-trial opinion does not support affirmance .....	39
V.	CONCLUSION.....	41

ATTACHMENT:

Trial Court Opinion (denying a new trial), entered on November 4, 2022.

## TABLE OF CITATIONS

### CASES:

<i>Barba v. Carlson</i> , 2014 WL 1678246 (Del. Super. Apr. 8, 2014) .....	12
<i>Barriocanal v. Gibbs</i> , 697 A.2d 1169 (Del. 1997) .....	9, 24, 25
<i>Lagola v. Thomas</i> , 867 A.2d 891 (Del. 2005) .....	38
<i>McLaughlin v. Dover Downs, Inc.</i> , 2008 WL 2943392 (Del. Super. Ct. July 17, 2008) .....	11
<i>New Haverford P'ship v. Stroot</i> , 772 A.2d 792 (Del. 2001) .....	11
<i>Norman v. All About Women, P.A.</i> , 193 A.3d 726, 731 (Del. 2018) .....	11
<i>Price v. Blood Bank of Delaware, Inc.</i> , 790 A.2d 1203 (Del. 2002) .....	29 30, 38, 39, 40
<i>Robelen Piano Co. v. Di Fonzo</i> , 169 A.2d 240 (Del. 1961). .....	40

### RULES:

D.R.E. 401 .....	9, 10, 24
D.R.E. 403 .....	9, 24
D.R.E. 407 .....	9
D.R.E. 614 .....	30

**OTHER:**

Del. P.J.I. Civ. § 9.5 .....11, 12

Del. P.J.I. Civ. § 21.6 .....11, 12

## I. NATURE OF PROCEEDINGS

This is a tort action arising out of injuries Joseph Pedicone suffered when his “Contender” firearm unintentionally discharged a bullet into his leg without a trigger pull. The Contender is a gun designed and sold by Thompson/Center Arms Co. and Smith & Wesson Co. (the “Thompson defendants”). In Plaintiffs’ negligence suit against the Thompson defendants, Plaintiffs alleged that the Contender’s “hammer block” mechanism had been negligently designed such that the gun could discharge without a trigger pull. They alleged that the gun’s improper design caused Mr. Pedicone’s injuries. After a seven-day trial, the jury returned a verdict that the Thompson defendants were not negligent. The jury did not reach downstream issues of Mr. Pedicone’s comparative negligence, causation, or damages. *See* A-889-91.<sup>1</sup> The trial court denied Plaintiffs’ motion for a new trial and entered judgment in favor of the Thompson defendants. Tr. Ct. Opinion (attached to Plaintiffs’ Brief). This appeal ensued.

This is Appellants’ opening brief on appeal.

---

<sup>1</sup> Pursuant to this Court’s Rule 13(a)(iii), Plaintiffs’ Appendix to the Opening Brief will be referred to as A-\_\_\_.

## II. SUMMARY OF ARGUMENT

In this appeal, Plaintiffs urge reversal based on two errors that individually and cumulatively affected the outcome of trial. Plaintiffs rely upon the following legal propositions:

1. The trial court committed error when entering a pre-trial order precluding Plaintiffs from offering evidence about a subsequent version of the Contender gun called the “G2” Contender.
  - a. This second generation G2 Contender contained a hammer block mechanism that corrected the design of the original Contender and prevented unintentional discharge of a bullet without a trigger pull.
  - b. Evidence of the G2 and its hammer block mechanism was not sought to show a *subsequent* design. The hammer block mechanism used in the G2 had been available since the 1940s and was both feasible and available long before the design of the original Contender that Mr. Pedicone owned and whose discharge caused his injury.
  - c. Plaintiffs sought to show the jury that the alternate hammer block design was available to be incorporated into the original Contender from the outset. This was probative of the argument that the Thompson defendants negligently manufactured Mr. Pedicone’s

Contender in 1978 without an available safety measure while knowing the hammer block design being used in that gun posed a serious risk of unintended discharge without a trigger pull.

- d. The trial court's wrongful preclusion of evidence about the better (but older) design used by the Thompson defendants in the G2 altered the balance of evidence pertaining to negligence and affected the outcome of trial. A new trial should be ordered on this basis.
2. The trial court committed error when undertaking to extensively examine Plaintiffs' expert Dr. Michael Knox on a key issue at trial pertaining to the Contender's independently-operated manual safety (different from the hammer block mechanism).
    - a. Dr. Knox testified as the second witness called at trial, so this examination occurred before most evidence on that issue had come before the jury.
    - b. At the time the trial judge initiated his examination, Dr. Knox had been laying the groundwork for testimony that (1) the hammer block mechanism should have been designed to prevent unintentional discharge of a bullet without a trigger-pull when the manual safety is disengaged; and (2) the Thompson defendants violated the standard of care by installing a hammer block mechanism without



taking into account that a user might inadvertently fail to engage the manual safety.

- c. As that testimony was beginning to unfold, the trial court intervened to question Dr. Knox about the manufacturer's instructions concerning use of the manual safety and Mr. Pedicone's failure to engage the manual safety.
- d. The trial court's questioning had the effect of injecting the trial court's skeptical view of the case into the courtroom, affecting the trial themes advanced by the Defendants and prejudicing the outcome as reflected in the jury's return of a "no negligence" finding. A new trial should be ordered on this basis.

### III. STATEMENT OF FACTS

**A. Joseph Pedicone suffered an above-the-knee amputation when his Contender firearm unintentionally discharged without a trigger-pull.**

Joseph Pedicone is a 64-year-old husband, father of two sons, and grandfather who has been married for forty years to Hilma Pedicone. For even longer than his 40-year marriage, Mr. Pedicone has worked as a construction crew supervisor providing renovation services in the Wilmington area. A-1725-39. Mr. Pedicone is an active man who enjoys outdoor activities. He has been an avid hunter who grew up hunting with his father and then taught his sons. In his four and a half decades of experience hunting, Mr. Pedicone undertook many gun safety training classes and served as a gun safety trainer himself. A-1739-45.

In 2008, Mr. Pedicone purchased from a friend a Contender firearm manufactured in 1978 that he planned to use for hunting. A-1745-46. Mr. Pedicone purchased the Contender because it had been recommended to him as a gun especially suitable for hunting. A-1446-51, 1746-50, 2186. On Saturday January 9, 2016, Mr. Pedicone planned to go hunting on the property of a friend. Mr. Pedicone and another friend drove in Mr. Pedicone's pickup truck to the property. They arrived around noon and waited in Mr. Pedicone's pickup truck for the property owner to arrive and open the gate to the property. Mr. Pedicone planned to enter the property and hunt for small game. A-1020-25, 1755-63.

At some point, Mr. Pedicone decided to check and load his Contender. Pointing the gun down toward the floor, he opened the action and checked the barrel for any obstructions. While the action was open, Mr. Pedicone cocked the hammer back to see and select the firing mode. Mr. Pedicone would later explain that, without cocking the hammer back, the selector was obscured by the gun's sighting scope that he had installed according to the Thompson defendants' instructions. Once Mr. Pedicone selected "center fire," he de-cocked the gun in anticipation of loading it. A-1025-28, 1764-76.

Mr. Pedicone pointed the gun toward the door on his side of the truck as he put the bullet into the barrel. Having done so, he slightly elevated the handle of the gun with his right hand to close the action. That movement tipped the barrel of his gun toward his left leg. As the action closed, the gun fired without Mr. Pedicone touching or pulling the trigger. His hands had been on the handle and the barrel of the gun. The bullet struck his left leg above the knee. It went through his leg and the truck's door. A-1028-31, 1767-69, 87-88.

After being struck in the thigh by the bullet, Mr. Pedicone experienced severe shock and pain. He lost significant amounts of blood. Police and an ambulance arrived to transport Mr. Pedicone to the hospital, where, fortunately, he was stabilized. Over the next month, Mr. Pedicone was placed in a coma so he could go

through three surgeries that saved his life. But the surgeries did not save his leg, leading to an above-the-knee amputation. A-1034, 1769-808; 1892-904.

Both Mr. and Mrs. Pedicone testified extensively that Mr. Pedicone's injury has caused him much suffering and negatively affected both his wellbeing and his ability to enjoy life's pleasures. A-1775-808; 1904-19.

**B. The Pedicones filed a negligence suit against the Thompson defendants that resulted in a jury verdict for the defendants.**

In November 2017, Mr. and Mrs. Pedicone initiated suit against the Thompson defendants, alleging that the hammer block mechanism that was installed in his Contender had been negligently designed such that it could permit the Contender to discharge without a trigger pull and that this negligent design caused his injuries. A-209. After a seven-day trial that began on March 21, 2022, the jury returned a verdict in the defendants' favor. *See* A-889-91. Once the trial court entered judgment on the verdict, Plaintiffs moved for a new trial under Del. Super. Civ. R. 59(a). The trial court denied the motion in November 2022. *See* Tr. Ct. Opinion (attached to Plaintiffs' Brief). This appeal ensued. A-2548.

## IV. ARGUMENT

**A. The trial court wrongly excluded evidence of an alternative hammer block mechanism installed in the G2 Contender where that mechanism was developed long before Mr. Pedicone's Contender was designed and could have been incorporated into that earlier model of the Contender.**

### **1. Question presented**

Plaintiffs present this first question for the Court's consideration: Did the trial court abuse its discretion by precluding Plaintiffs from introducing evidence about the G2 and its more effective (but older) hammer block mechanism for the purpose of proving that the Thompson defendants were negligent when they used an ineffective hammer block mechanism in the original Contender owned by Mr. Pedicone, such that a new trial is warranted? Plaintiffs suggest that the answer is: Yes.

Plaintiffs preserved this issue for appellate review through their response to the Thompson defendants' motion in limine and by objection at trial. A-579-775, A-1867.

### **2. Scope of review**

Plaintiffs appeal the trial court's denial of a new trial on grounds of evidentiary error. This Court reviews the trial court's decision for error of law or abuse of discretion. If either has occurred, the Court determines "whether the mistakes constituted significant prejudice so as to have denied the appellant a fair

trial.” *Barriocanal v. Gibbs*, 697 A.2d 1169, 1171 (Del. 1997). Error is prejudicial when it goes to the “heart” of plaintiffs’ case and may have “affected the outcome of the trial.” *Id.* at 1173.

### **3. Merits of argument**

By way of summary, the Thompson defendants filed a motion in limine to exclude any evidence at trial pertaining to its second generation “G2” Contender model on the basis that it was irrelevant and prejudicial under D.R.E. 401 and 403 of the Delaware Rules of Evidence. They also argued the G2 was a subsequent remedial measure that was properly excluded under D.R.E. 407. *See* A-266. Plaintiffs responded that evidence of the G2 was probative of the Thompson defendants’ negligence with respect to the design of the hammer block mechanism. Concededly, the G2 was designed as a next-generation gun intended to succeed the original Contender owned by Mr. Pedicone. But the hammer block mechanism that the Thompson defendants used in the G2 was not new. It was an older design that had been available when the original Contender itself was designed. The use of an improved but long-standing hammer block mechanism in the G2 was probative of the Thompson defendants’ ability to use a hammer block mechanism in the original Contender that would have prevented the unintentional discharge of a bullet in Mr. Pedicone’s case. Plaintiffs further responded that the G2 Contender was introduced to the market in 2001, well before Mr. Pedicone’s 2016 injury and hence not as a

remedial measure following his injury. *See* A-579. Against the backdrop of these arguments, the trial court sustained the Thompson defendants' objection and precluded evidence of the G2 Contender as irrelevant under D.R.E. 401. The trial court reasoned that the G2 was "a subsequently produced weapon with more modern and up-to-date features" that would not establish either that the Thompson defendants were negligent or that they corrected concerns of the original Contender. A-785. Post-trial, the trial court denied Plaintiffs' motion for a new trial on the same grounds. *See* Super. Ct. Op. at 3-5. The trial court wrongly decided that this evidence was properly excluded on relevance grounds given the palpable relevance and probative value of the G2 with respect to its long-standing hammer block design that was available to be used in the original Contender. The decision should be reversed, and the case remanded for a new trial.

**a. The legal framework**

Under Delaware law, relevant evidence is generally admissible. D.R.E. 402. Evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence," and "the fact is of consequence in determining the action." D.R.E. 401.

The heart of Plaintiffs' complaint is that the Thompson defendants committed negligence when designing the original Contender's hammer block mechanism. To state a claim for negligence against a product manufacturer, a plaintiff must establish

that the “defendant owed plaintiff a duty of care; defendant breached that duty; and defendant’s breach was the proximate cause of plaintiff’s injury.” *New Haverford P’ship v. Stroot*, 772 A.2d 792, 798 (Del. 2001). “A manufacturer is negligent if it fails to exercise reasonable care in making its product.” *McLaughlin v. Dover Downs, Inc.*, 2008 WL 2943392, at \*13 (Del. Super. Ct. July 17, 2008). On the question of breach, a plaintiff is obliged to offer expert evidence about both the standard of care and how the defendant’s conduct deviated from this standard. *See Norman v. All About Women, P.A.*, 193 A.3d 726, 731 (Del. 2018). The standard of care generally requires a manufacturer to reasonably anticipate conditions for use and design a product that “minimize[s] all foreseeable risks” attending use of the product under those conditions. *McLaughlin*, 2008 WL 2943392, at \*13; Del. P.J.I. Civ. §§ 9.5, 21.6; A-2452 (jury instruction). “A foreseeable risk is one that an ordinary person, under the circumstances, would recognize or anticipate as creating a risk of injury.” *Id.* “It [is] not necessary that a particular injury suffered was itself foreseeable, but only that the risk of injury existed.” *Id.*

Here, Plaintiffs sought to offer evidence that the G2 used a different hammer block mechanism that minimized foreseeable risk of an unintentional discharge without a trigger pull and that would have prevented the discharge that caused Mr. Pedicone’s injuries. The evidence that Plaintiffs sought to introduce further included that the G2’s hammer block mechanism was not just feasible but outright available



to the Thompson defendants in 1978 when the original Contender was designed. The point of this evidence was to focus the jury on the G2's hammer block mechanism that was long-standing and readily available. It was not a leap forward from the original Contender, but the adoption of a design that had been available when the original Contender itself was designed and that the Thompson defendants did not use. This evidence would have been probative both about standard of care and how the Thompson defendants deviated from that standard in designing the original Contender's hammer block mechanism. In this regard, it is significant that Delaware law permits a plaintiff to introduce evidence of any feasible alternative design available when the product left the manufacturer's control. *Barba v. Carlson*, 2014 WL 1678246, at \*\*4-5 (Del. Super. Apr. 8, 2014); Del. P.J.I. Civ. § 9.5. A plaintiff also may establish through expert testimony that the ordinarily prudent manufacturer should have pursued the different alternative design "which would [have] substantially lessen[ed] the probability of harm." *See Barba*, 2014 WL 1678246, at \*\*4-5; Del. P.J.I. Civ. § 9.5.

**b. Plaintiffs' evidence of negligent design provides context for why evidence of the G2's hammer block mechanism should not have been precluded.**

A brief description of Dr. Knox's testimony about standard of care and breach is necessary to understand the relevance of the G2 evidence and its potential impact on a jury. As a starting point, Dr. Knox testified that a gun's firing mechanism

generally contains several components to produce the firing of a bullet. One part is the “hammer,” a piece of metal shaped like a hammer. In anticipation of firing the gun, the hammer is pulled back on a pivot. This is known as the hammer being “cocked back.” When cocked back, the hammer clicks into a notch on a vertical threaded component called a “sear” to stay in place. Pulling the trigger releases a “striker,” which swings and pushes the sear, causing the sear to rotate. The sear’s rotation releases the hammer. The hammer is set on a spring. Once released, the spring moves forward forcefully to hit the “firing pin.” The firing pin is pushed into the end of the bullet. A “primer” in the end of the bullet explodes to ignite gun powder, which creates pressure to expel the bullet through the gun’s muzzle. Dr. Knox added that a normal firing sequence requires the user to load the gun, cock the hammer, and then pull the trigger. A-1110, A-1114, A-1176-78; A-420.

The record establishes that the Contender contains two safety features that function independently: (1) an internal hammer block mechanism, and (2) an external manual safety. *See* A-472; A-418 (illustrations); A-1834-35.<sup>2</sup> The images on the next page illustrate these independent safety features:

---

<sup>2</sup> The Thompson defendants’ manuals for the Contender dated 1978 and 2000, which included illustrations of the Contender’s parts and operation, were admitted at trial. A-1207, A-1268.

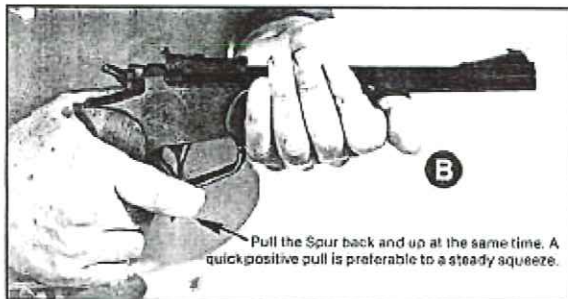
## ▶ CARRYING AND FIRING YOUR CONTENDER® PISTOL

The Contender design does not employ a half cock notch and it is extremely important that the user understand this fully. If, after reading this booklet, you still have questions write or call our customer service department (see page 15 for address).



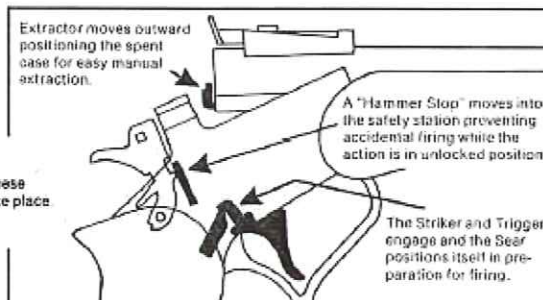
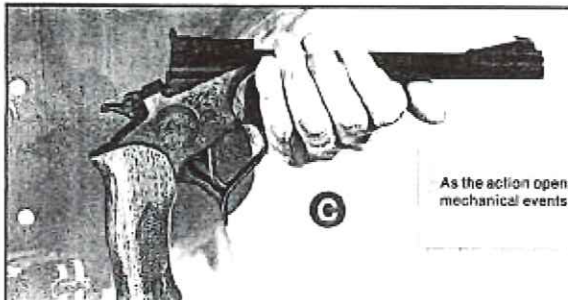
The Contender is equipped with two safety devices which function independently of each other (1. Safety position on the External Manual Firing Pin Selector. 2. Internal Hammer Block). When the Contender action is broken open properly, as explained on pages 5 and 6, the hammer block moves up into a position between the hammer and the frame. In this position the hammer cannot move forward.

A-472.



As the action opens, exposing the chamber, a full series of mechanical events take place. It is necessary for you to understand and to appreciate the significance of these moving parts if you are to use your Contender correctly.

**THE SEQUENCE OF MECHANICAL EVENTS PICTURED ARE IMPORTANT TO THE PROPER FUNCTIONING OF THIS FIREARM. INASMUCH AS THEY ARE ACCOMPLISHED BY A DIRECT AND POSITIVE PULL ON THE "SPUR", YOU MUST ALLOW THE TRIGGER GUARD TO EXPERIENCE FULL TRAVEL TO ITS POSITIVE STOP POSITION!**



A-418.

The hammer block mechanism is the internal, passive safety feature of the Contender. A-1106, A-1121, A-1183-84. As a “passive” safety, this mechanism self-actuates simply by operation of the gun’s internal components. The idea behind a passive safety is to protect a user even in the eventuality of user error. A-1121-22. In contrast, an “active” safety is external and must be specifically engaged by the user for her own protection. *Id.*

The internal hammer block engages or disengages with the rotation of the sear. A-1107, A-1122-24. When in place, the hammer block acts as a physical barrier between the hammer and the gun’s firing pin. *Id.* Its job is to prevent accidental contact between the hammer and firing pin and, therefore, unintentional discharge without a trigger-pull. *Id.*

Dr. Knox also described features specific to the firing mechanism of the original Contender. The original Contender is a “single shot” gun that requires loading each time it is fired. To load the original Contender, the user opens the mechanism by “breaking open the action” to put in a bullet. The user may load either “center fire” or “rim fire” bullets; the type of bullet indicates where the primer is located, *i.e.*, in the center or on the rim. Having loaded one of these types of bullets, the user is obliged to turn the original Contender’s selector to the appropriate type of shot such that the firing pin of the gun lines up with the primer of the bullet. A-1109-15, A-1141-47.

Against this backdrop, Dr. Knox testified that the Thompson defendants undertook the duty to make the original Contender safe against unintentional discharge without a trigger-pull when, among other things, they added the passive hammer block safety mechanism to the original Contender's design. A-1121-22; *see also* A-2495-96 (Laney), A-2011-16 (Haag). Dr. Knox then testified that the Contender discharged without a trigger-pull because the original Contender's hammer block design allowed the hammer block to be unable to prevent unintentional discharge under the circumstances presented by Mr. Pedicone's case. He opined that the Thompson defendants committed negligence in their design of the original contender's hammer block mechanism and in allowing a mechanism that might not perform its job to be installed in the original Contender. A-1104-07.

Digging more deeply into this issue, Dr. Knox explained that the standard of care pertaining to hammer block design required the hammer block to remain "in place at all times other than when the trigger is actively being pulled." A-1122. He testified that the hammer block should fall out of place *only* when the trigger is actively pulled. *Id.* And after a trigger pull, the hammer block always "should go back up in place when you let go of the trigger." *Id.*

Dr. Knox then testified why the Thompson defendants' original Contender hammer block design did not perform to this standard. He explained that the hammer block works effectively during a straightforward firing sequence. That is, the

hammer block remains in place when the hammer is cocked and falls out of place once the trigger is pulled to fire. A-1176-78, A-1187-91. As mentioned above, the trigger moves the sear, which releases both the hammer and the hammer block. *Id.* So once the Contender has fired, the user must open the action and then close the action—a process of “recycling” or resetting of the internal components. This recycling process re-engages the hammer block. In a conventional sequence where the user pulls the trigger, fires a bullet, and opens and closes the action to reengage hammer block, the hammer block will do its job just fine. A-1114-15, A-1120, A-1211-15.

Significantly, the hammer block does not work as a passive safety when a user has loaded the gun and cocked back the hammer, but then the user decides not to take the shot. In that circumstance, the original Contender’s manual recommends for the user to de-cock the hammer. This renders the trigger inert such that the Contender cannot fire by a trigger-pull. A-1116-17, A-1143-44, A-1191, A-1211-15, A-2011-16 (Haag); *see* A-421 (1978 Contender manuals). The manual’s discussion of this scenario underscores that the Thompson defendants fully understood and anticipated that there would be a circumstance where the hammer block did not serve as a passive safety. *Id.*

Unfortunately, this recommended approach also creates an extremely dangerous situation. Dr. Knox explained that de-cocking the hammer in this

circumstance requires the user to slightly pull the trigger and then let the hammer down slowly. A-1116-17, A-1143, A-1191, A-1211-15. Slightly pulling the trigger to de-cock the Contender releases the hammer and the hammer block from the sear. *Id.* As noted above, the hammer block reengages only when the user fully recycles the Contender by opening and closing the action. A-421, A-1115, A-1120, A-1213-14.<sup>3</sup> But in the meantime, there is no physical barrier between the hammer and the firing pin. The hammer is resting on the firing pin itself. According to Dr. Knox, allowing the hammer block to be disengaged in this circumstance is dangerous for obvious reason: it creates the condition where discharge without a trigger pull may occur. A-1116-17, A-1143, A-1191, A-1211-15.

Dr. Knox testified that the hammer resting on the firing pin is dangerous because the original Contender can go off without a trigger-pull in any number of ways. For instance, an original Contender could go off when trying to cock the hammer a second time; or if the hammer caught on clothing and inadvertently pivoted with sufficient force; or if anything bumped the hammer. A-1118-20. The original Contender could also fire if, as in Mr. Pedicone's case, the action is closed with sufficient force. A-1127-46, A-1214-15, A-1226-31; *see also* A-1824-29

---

<sup>3</sup> The Thompson defendants' corporate designees, Mr. Laney and Mr. Unger, and their expert witness, Mr. Haag, all acknowledged that the original Contender's hammer block mechanism operates as Dr. Knox described. A-1824-29 (Unger), 2000 (Haag); A-2495-96 (Laney).

(Unger); A-2010-17, A-2020 (Haag) (original Contender can fire without a trigger pull).

Dr. Knox testified that the Thompson defendants could have eliminated or minimized the risk of the original Contender firing without a trigger-pull by adopting a different design of the trigger-sear-hammer block mechanism. He explained that the original Contender could have been designed such that, when the trigger is released after firing or de-cocking the gun, the hammer rebounds and rotates the sear, which serves to push the hammer block back up into place between the hammer and the firing pin. A-1124-26, A-1211-12. He added that this type of design was available since the 1940s—long before the original Contender was designed in the 1960s, and long before the Thompson defendants manufactured Mr. Pedicone’s original Contender in 1978. *Id.*

- c. The trial court wrongly excluded evidence of the G2 Contender that followed the original Contender when the hammer block mechanism used in the G2 was available when the original Contender was designed.**

Against this legal and factual backdrop, it is apparent why Plaintiffs should not have been precluded from introducing relevant evidence concerning the G2 Contender and the hammer block mechanism used in that gun. *See* A-686-775 (Knox expert report). The G2 is the Thompson defendants’ current version of the original



Contender. A-768.<sup>4</sup> Around 2001, the Thompson defendants introduced the G2 to the market after discontinuing the original Contender in 2000. A-285-86. The Thompson defendants describe the G2 as a second-generation gun that was “even more user-friendly in the field” than the original Contender. *Id.* Defendants traced the G2 to the original Contender first made in 1967. They described the G2’s frame as fully compatible with system parts of the original Contender. *Id.*

Before trial, Plaintiffs proffered evidence that the Thompson defendants redesigned the G2 with a rebounding hammer block mechanism that would have eliminated the dangerous aspects of the original Contender’s design. In his expert report, Dr. Knox described the evidence as follows:

The G2 has a rebounding hammer that separates the hammer from the striker when the trigger is released, thereby eliminating the risk of an unintended discharge while closing the action, while attempting to cock the hammer, from a blow to the hammer spur, or from an inadvertent touching of the hammer.

The G2 hammer block remains in place at all times unless the trigger is pulled and held.

A-707. Significantly, Dr. Knox would have testified that this different hammer block mechanism was not new to the G2. It was not subsequent to the design of the original Contender. Rather, that design had been “available and feasible” since the 1940s

---

<sup>4</sup> See A-580 (referring trial court to Thompson/Center, “T/C G2 Contender” and “T/C G2 Contender Complete Pistol and Rifle System,” online at [www.tcarms.com/firearms](http://www.tcarms.com/firearms) (last visited on Feb. 10, 2023)).

and for many years before Mr. Pedicone's Contender was designed, manufactured, and sold. Further, this old (not new) technology fully resolved "all of the potential hazards associated with the Contender's propensity to discharge without the trigger being pulled." A-759.

In addition to Dr. Knox's testimony about the G2's hammer block design that preceded the original Contender, and could have been used in the original Contender, Plaintiffs also would have offered deposition testimony about the G2 from the Thompson defendants' corporate designee and the designer of the G2, Mark Laney. A-285-94. Mr. Laney's deposition testimony about the G2 would have reinforced by Dr. Knox's testimony concerning the Thompson defendant's ability to install a hammer block mechanism in the original Contender that worked consistently to prevent unintentional discharges (without a trigger pull), such as the discharge that injured Mr. Pedicone. Like Dr. Knox, Mr. Laney testified that in circumstances when a user cocks and then de-cocks the original Contender, the hammer block stays down until and unless the gun is recycled by opening and closing the action. *Id.* He agreed that under the circumstance where the original Contender is cocked and then de-cocked, the gun indeed could fire unintentionally without a trigger-pull. A-294.

Mr. Laney's deposition testimony also included the acknowledgment that the original Contender's mechanism was the subject of user complaints, leading the Thompson defendants to change the design in the G2. A-294. And Mr. Laney agreed

with Dr. Knox's description that the G2 contains a trigger-sear-hammer block mechanism that reengages automatically (without need to recycle) once the G2 Contender is de-cocked. A-293. Mr. Laney acknowledged that the (old, not new) hammer block design used in the G2 was effective such that this gun could fire without a trigger-pull only in "extreme" circumstances. A-302. Mr. Laney also testified about whether the G2 Contender was safer than the original Contender in relation to the hammer block design. He provided a qualified answer that relied on the user not committing error, rather than being able to rely on the passive safety that the hammer block was supposed to represent precisely because it is understood that users sometimes make a mistake:

Counsel: Your testimony today is that a gun with a design where it is not possible for the hammer block to be out of position so long as that -- so long as your finger's not on the trigger, that's not safer than a gun where it's possible to have your finger not on the trigger and yet the hammer block to be out of position?

Mr. Laney: It is not safer if the proper operation isn't executed. That's what I'm saying. If the gun is used as designed and described in instructions, is used properly, it's every bit as safe as the G2.

A-294.

Here, Mr. Pedicone testified that he had de-cocked the hammer as described in the Contender's instructions. The hammer block thus disengaged and would not reengage absent a full recycling of the gun. Yet because the hammer block is a

passive safety, Mr. Pedicone had no opportunity to re-engage the internal hammer block. Thus, the hammer was able to hit the firing pin. And when it did, the result was an unintentional discharge of the Contender. Given these factual circumstances, Mr. Laney's qualified answer would have given rise to the inference that the original Contender's hammer block design was not "as safe as the G2." *Id.* It would have supported a conclusion that the Thompson defendants failed to minimize the risk of unintentional discharge in the original Contender by using a design that did not protect the user in all circumstances when they had access to an alternate design that was far more effective. A-325-27; A-421 (1978 Contender Manual).

Finally, Plaintiffs would have offered into evidence the G2 itself and related corporate documents to give texture to the testimony of Dr. Knox and Mr. Laney. The G2 would have provided a physical illustration for the jury about the older but safer trigger-sear-hammer block technology that Dr. Knox testified was feasible and available before Mr. Pedicone's original Contender was manufactured in 1978. The evolution away from the original Contender's trigger-sear-hammer block design into the more effective (but still decades old) design used in the G2 also would have illustrated the Thompson defendants knew that the original Contender posed an unreasonable risk of injury to users like Mr. Pedicone. It would have been probative of the heart of Plaintiffs' case—that the Thompson defendants violated the standard

of care by using a substandard hammer block mechanism when they had an alternative design that was feasible, in existence, and far more effective.

Given the nature and limited scope of this potential evidence, it is apparent that trial court erred in precluding Plaintiffs from introducing the evidence at trial. The evidence concerning the G2's hammer block mechanism was undoubtedly probative of the issues the jury was being asked to decide and hence relevant under D.R.E. 401 and 402. The trial court thus wrongly precluded the evidence on relevance grounds alone. Further, had the trial court precluded the evidence under a Rule 403 balancing test, that also would have been error given the extremely valuable and probative character of the evidence concerning the adequacy of the hammer block mechanism used in the original Contender and the availability of alternate feasible designs. Further, this evidence clearly was not offered as a subsequent remedial measure. The focus was the G2's use of a hammer block design that went back to the 1940s, not new developments not contemplated when the original Contender was designed and sold. The trial court erred for all these reasons in precluding evidence of the G2 for the limited purposes that Plaintiffs sought.

**d. The trial court's ruling prejudiced the outcome of trial.**

Under Delaware law, evidentiary error is reversible if the evidence precluded went to the heart of plaintiffs' case and may have "affected the outcome of the trial." *See Barriocanal*, 697 A.2d at 1173. Evidence and testimony about the G2 Contender

described above would have altered the balance of proof available for the jury to decide the question of negligence that was at the heart of Plaintiffs' case. It would have bolstered Dr. Knox's testimony by providing a concrete example of how the original Contender might have been designed differently to prevent an accidental discharge without a trigger-pull using preexisting design. *See* A-1124-26 (Knox). It would have provided the jury with a more complete picture of the Thompson defendants' decision-making around the original Contender. It would have helped the jury appreciate that the Thompson defendants were able to design the original Contender with hammer block that eliminated the risk of unintentional discharge without a trigger-pull. *Compare* A-2494-98 *with* A-285-94 (Laney). Overall, preclusion of evidence about the G2 left the jury to decide the issue of negligence against a truncated record that omitted important evidence about the Thompson defendants' ability to produce the original Contender with a preexisting and effective hammer block mechanism that would have prevented Mr. Pedicone's injuries. For all these reasons, the trial court's error prejudiced the outcome of the case and supports a new trial. *See Barriocanal*, 697 A.2d at 1173.

**e. The trial court's post-trial opinion does not support affirmance.**

In its post-trial opinion, the trial court explicated the two bases for its decision. *First*, the trial court concluded that the G2 contained modern technology irrelevant

to whether the original Contender was negligently designed. *See* Super. Ct. Op. at 3-5. But Plaintiffs never argued that the original Contender was negligently designed because it failed to anticipate modern technology; they did not seek to prove negligence by reference to advances in product development. Instead, Plaintiffs' negligence theory was more straightforward. They argued that the Thompson defendants were negligent because the original Contender's hammer block mechanism failed to minimize a foreseeable risk of unintentional discharge without a trigger-pull. The hammer block mechanism used in the G2 was probative of this factual theory because that mechanism had been available since the 1940s and would have prevented Mr. Pedicone's injuries. Not only was the fact of the G2's hammer block mechanism valuable evidence to support Plaintiffs' case, introduction of an exemplar G2 into evidence would have provided a visual reference point to help the jury understand the long-standing hammer block design used in that product, illustrating Dr. Knox's testimony about the standard of care and the Thompson defendants' knowledge of the risks that the original Contender's hammer block mechanism posed to users. Preclusion of this evidence was not just error; it affected the outcome of trial.

*Second*, the trial court wrongly justified its preclusion decision on the basis that Mr. Pedicone "failed to exercise reasonable care in the handling of this older firearm which led to this accident." *See* Trial Ct. Op. at 5. This observation either

seeks to justify an erroneous decision by reference to the jury's eventual verdict (which was prejudiced by the trial court's decision) or misapprehends the significance and probative value of the G2's hammer block mechanism to Plaintiff's theory of the Thompson defendants' negligence as opposed to Mr. Pedicone's comparative negligence. The Plaintiffs' theory as to the Thompson defendants' negligence focused on the design of the original Contender's hammer block mechanism—that is, the passive safety mechanism that should have prevented unintentional discharge even in the presence of user inadvertence. Of course, Mr. Pedicone did not design or modify that mechanism. He had nothing to do with the gun's design and production. A-1296. It is conceded that Mr. Pedicone's *handling* of the original Contender may have been a basis for comparative negligence; but that issue runs downstream of the threshold question of the Thompson defendants' negligence with respect to the hammer block design.

In sum, the trial court wrongly sought to justify the preclusion of critical evidence probative of the Thompson defendant's original negligence based on the trial court's assessment of Mr. Pedicone's comparative negligence. These are just different issues, each one of which was entitled to be presented to the jury for distinct consideration. If Mr. Pedicone was comparatively negligent, that is a matter for apportionment. It does not justify the preclusion of evidence that would have been illustrative and highly probative of the separate issue of the Thompson defendant's



original negligence. The jury should have been permitted to weigh a *complete* record when deciding negligence—the negligence of the Thompson defendants and Mr. Pedicone alike. That complete record should have included evidence of the G2 and its long-standing hammer block mechanism available since the 1940s that could have been used in the original Contender.

**B. The trial court unduly injected its perspective into the courtroom when questioning Plaintiffs' expert, Dr. Michael Knox, during his direct examination on a key issue in the litigation.**

**1. Question presented**

Plaintiffs also present this second question for the Court's consideration: Did the trial court abuse its discretion by its questioning of Dr. Knox about the use of the manual safety, such that a new trial is warranted? Plaintiffs suggest that the answer to this question is: Yes.

Plaintiffs did not object on this basis at trial, such that this issue is presented for plain error review pursuant to the "interests of justice" exception in Rule 8. By way of further explanation, the trial court personally examined Plaintiffs' expert, Dr. Knox, during his direct examination. A-1212-13. In questioning Dr. Knox, the trial court departed from the "absolute duty of neutrality." *Price v. Blood Bank of Delaware, Inc.*, 790 A.2d 1203, 1210 (Del. 2002). Plaintiffs' counsel was therefore placed in the tenuous position of objecting and contradicting the trial court in circumstances where the trial court had been palpably critical already. A-1244 (Court stating: "You pretty much observed the Court having not a lot of patience this morning."); A-1311, A-1316 (the trial court advising that it would "have no hesitation" to revoke Plaintiffs counsel's *pro hac* admission before later apologizing to counsel). Under these circumstances, the interests of justice justify merits review of this question presented under plain error. *See Price*, 790 A.2d at 1210.

## **2. Scope of review**

Plaintiffs appeal the trial court's questioning of an expert witness based on plain error as Plaintiffs did not object to the trial court's examination of Dr. Knox at trial. *See id.* Under the plain error rubric, the Court reviews the trial court's decision to question a witness for abuse of discretion. If there is abuse of discretion, the Court will determine whether the mistake was harmless or if it may have affected the outcome of trial. *Id.* at 1211.

## **3. Merits of argument**

### **a. Legal framework**

Under Delaware law, a trial judge may examine witnesses subject to well-established limitations, as set forth in D.R.E. 614(b) and *Price*, 790 A.2d at 1210-12. In *Price*, the plaintiff died after contracting HIV through transfusion of contaminated blood distributed by the defendants. At trial, the plaintiff offered medical expert testimony that the standard of care required the defendants to screen donors' sexual habits on the basis that in 1983, the entire State of Delaware shared Philadelphia's high risk of infection given its geographical proximity to that urban center. *Id.* at 1206-07. During the expert's direct examination in the presence of the jury, the trial court interrupted plaintiffs' counsel to question the expert directly, challenging his opinion that the risk of HIV infection in the State of Delaware mirrored that of Philadelphia. *Id.* at 1208-09. Ultimately, the trial court entered an

order precluding the expert for testifying on this point. *Id.* The jury entered a defense verdict and plaintiff appealed. This Court reversed, explaining that Delaware jurists are bound by the “absolute duty of neutrality.” *Id.* at 1210. When questioning any witness, the trial court is obliged “to exercise self-restraint and preserve an atmosphere of impartiality.” *Id.* The trial court’s role as “gatekeeper” “carries with it a heightened requirement of impartiality whenever the trial judge engages in direct questioning of an expert witness.” *Id.*

This Court emphasized that a trial court’s questioning of an expert witness is especially weighty when it occurs in the presence of the jury. *Id.* at 1211. Judicial intervention to question an expert may unduly influence a jury given that “[b]y reason of his role, quickly observed by jurors, the judge is a figure of overpowering influence.” *Id.* The Court noted that such undue influence may be created and heightened by the content, scope, tone, or tenor of the trial court’s questioning. *See id.* The Court added that a trial court’s decision to inject itself into the examination of an expert witness places counsel who is presenting the witness “in an untenable position” of appearing critical of the court in front of the jury. *Id.* A trial court’s subsequent charge to the jury regarding judicial impartiality does not erase the prejudicial effect of judicial “activism.” *Id.* at 1210-11. Thus, such a mistake is grounds for reversal even under the rubric of plain error. *Id.*

**b. Dr. Knox’s testimony about the independent manual safety.**

Against this backdrop, it is necessary to review of Dr. Knox's testimony to set the stage for how the trial court's personal examination of Dr. Knox unduly injected the trial court's views into the courtroom and unduly interfered with the trial. As noted above, Plaintiffs acknowledged from the outset that Mr. Pedicone was at least partly responsible for his injury and that comparative negligence would be an issue in the case. A-957-59 (opening); A-1769. But any responsibility placed on Mr. Pedicone should not vitiate the Thompson defendants' negligence concerning the hammer block mechanism. These were separate issues requiring separate treatment. A-1208-308, A-2435 (closing). So the focus of Dr. Knox's testimony was on the Thompson's defendants decisions and the inadequate hammer block mechanism incorporated into the original Contender.

In that vein, Dr. Knox testified that the Thompson defendants had equipped the original Contender with two safeties, an internal hammer block, and an external manual safety. A-472; A-418 (illustrations); A-1208-18, A-1835, A-2186-87. As he explained, the hammer block mechanism was intended to operate independently of the manual safety and serves as a redundancy in the event of inadvertent user error. *Id.* If the manual safety is selected, the Contender cannot fire without a trigger pull; the hammer block mechanism is not needed to protect the user against unintentional discharge because the manual safety already does the work. *Id.* The passive hammer

block safety comes into play when the manual safety is not selected. *Id.* The very reason for the hammer block mechanism was that it could be reasonably anticipated that a user might fail to activate the manual safety, whether intentionally or by accident, so that it was necessary to ensure against accidental discharge of the gun without a trigger pull. *Id.*

Dr. Knox further explained that, given the available configurations and uses of the original Contender, it was completely foreseeable that a user like Mr. Pedicone might not activate the manual safety when loading an original Contender. Indeed, Dr. Knox explained, Mr. Pedicone's original Contender was configured such that the manual safety was difficult to engage without opening the action and cocking the hammer. A-1112-13.

Dr. Knox added that, when manufactured in 1978, the original Contender contained a "crossbar" manual safety that was activated by pushing a metal "stop pin" sideways in between the hammer and the firing pin. A-1208-12. Mr. Pedicone's Contender had been retrofitted with a hammer and "selector" mechanism sold by the Thompson defendants for use on that gun. *Id.* The selector allowed a user to toggle between center fire-safety-rim fire. A-1209-10. The middle position on the selector is the only user-activated manual safety on Mr. Pedicone's original Contender and would be activated from the top of the gun. A-218. Further, when he purchased his Contender in 2008, Mr. Pedicone sent the barrel to be professionally shortened by

the Thompson defendants so it would meet requirements of Delaware law. A-1446-51, A-1745-54. The Thompson defendants added a muzzle brake to the barrel. *Id.* In turn, Mr. Pedicone configured his Contender with the muzzle brake and a scope providing “long eye relief” (five inches) because the gun in this configuration could be used “like a rifle” such that the recoil can cause facial injury without the muzzle brake and scope. A-1449-50.

Mr. Pedicone’s configuration of the original Contender was nothing innovative; the Thompson defendants had shown a picture of this configuration in a product catalog. A-2265-66. What is significant is how this configuration affects the user’s ability to select the manual safety. With the scope installed using pre-drilled holes on the barrel, the scope would overhang and obscure the selector that activated the manual safety and firing modes. A-1112-13. The location of the selector also obliged users to open the action and cock the hammer; only then could a user see the selector and toggle it to the appropriate firing mode. *Id.* Having selected the firing mode, a user would have to de-cock the Contender to render the trigger inert. A-1117-18. All of this put the gun in a position where the hammer was in contact with the firing pin—the very condition that could lead to unintentional discharge without a trigger pull. A-1124-29, A-1137-38, A-1143-45.

In sum, as Mr. Knox’s testimony made clear, Mr. Pedicone’s configuration of his original Contender and his use of the gun were both foreseeable to the Thompson

defendants. In particular, the Thompson defendants knew that a user might not toggle the selector to manual safety whether by accident or when obliged by circumstances. Dr. Knox emphasized that the hammer block mechanism is a passive, self-actuating safety intended to protect a user against unintentional discharge independently of whether the user activates the manual safety; the standard of care requires that the hammer block “should be in place at all times other than when the trigger is actively being pulled.” A-1121-23. Unfortunately, the original Contender’s hammer block mechanism ultimately failed to do its job, creating conditions for discharge without a trigger-pull—the condition that led to Mr. Pedicone’s injury. A-1118-21, A-1143-46.

**c. The trial court abused its discretion when examining Dr. Knox about the manual safety.**

On March 22, as Dr. Knox was ramping up to address foreseeability issues and the implications for the negligence of the Thompson defendants, the trial court intervened to personally question Dr. Knox about the manual safety. The manual safety issue went to Mr. Pedicone’s negligence, an entirely different subject. By questioning Dr. Knox about the manual safety during his testimony about the hammer block mechanism, the trial court suggested that the two issues could be collapsed and that Mr. Pedicone’s failure to engage the manual safety was more important. A key passage of trial examination was as follows:



Court: Talking about the amount of initial construction here, which is put the gun on -- in a safe position; right? So you kind of jumped to the second one; right?

Dr. Knox: I think -- yes. What this describes, I'm describing what happens in the gun in terms of the steps.

Court: Right. But both the gun that Mr. Pedicone owns and this manual reflect there's a safety; right?

Dr. Knox: Yes.

Court: Regardless of whether it's an S or some other, as you described, there is a safety on it. That indicates first you put that on; right?

Dr. Knox: That's what is indicated. Yes.

Court: Okay.

A-1212-13.<sup>5</sup>

These questions on the manual were not designed to elicit new information for the jury. They were leading questions that conveyed to the jury a distinct perspective on which issue matter most in the case. As the trial court would later tell counsel, "if I was the [defendants,] I would stand up and say that Mr. Pedicone had [not] used the safety, and the gun is safe as long as you use the safety, and I would sit down." A-2169-70; *see also* A-1200-01, A-1837-41. The trial court made that statement *in camera*, but the jury had heard the same observation as a practical

---

<sup>5</sup> The trial court later also questioned Mr. Pedicone extensively, including about his knowledge and use of the manual safety. A-1817-20.

matter through the court's questions. The trial court itself would later reflect on these exchanges and apologize to counsel. A-1244, 1316.

The implications for this overstepping are straightforward. In its opening argument, the Thompson defendants pursued multiple arguments when suggesting both that Mr. Pedicone was solely responsible for his injuries or at least comparatively negligent. A-987-92. After the trial court questioned Dr. Knox, the Thompson defendants began to focus more forcefully on the manual safety. After the trial court's questioning of Dr. Knox, defense counsel cross-examined Dr. Knox extensively on the manual safety, suggesting that the original Contender was safe as long as he used the safety and hence they committed no negligence as a threshold matter (in essence, that Mr. Pedicone's comparative negligence vitiated the Thompson defendants' original negligence). A-1317-22. In closing, the Thompson defendants returned to this argument when asking the jury to return a "no negligence" verdict. A-2416-22, A-2433-34. Following closings, the jury returned a verdict of "no negligence" in favor of the Thompson defendants. A-2484.

Against this backdrop, Plaintiffs moved for a new trial based on the trial court's improper questioning of Dr. Knox about the manual safety during his direct examination on March 22. A-1212-13; A-2542-44. The trial court's denial of that request should be reversed. The record makes apparent that the trial court had formed a perspective about Mr. Pedicone's failure to engage the manual safety, and that the

trial court's questioning permitted that perspective to enter the jury's hearts and minds. A-1200-01, A-1837-41, A-2169-70. The trial court failed to maintain its posture of rigorous neutrality when Dr. Knox was about to address whether Mr. Pedicone's use of original Contender could reasonably be anticipated by the Thompson defendants—a key issue in the case. A-1208-208; A-2452 (jury instruction). The trial court inserted itself into the examination and questioned Dr. Knox as to whether Mr. Pedicone's Contender had a manual safety and whether the gun's manual instructed him to use it. A-1212-13. As the jury already knew the answer to both questions, the trial court's questions made sense only as a rhetorical tool. The questions conveyed to the jury that they should focus on Mr. Pedicone's use of the manual safety as a primary issue. By their content, tone, and tenor, the questions strayed from the trial court's "absolute duty of neutrality." *Price*, 790 A.2d at 1211. *Id.*; *see also Lagola v. Thomas*, 867 A.2d 891, 898 (Del. 2005) (granting a new trial while directly criticizing trial court's direct questioning of witnesses).

In *Price*, this Court noted that when a trial court personally questions an expert witness, that question creates a substantial risk of influencing the jury. *Price*, 790 A.2d at 1211. That was the case here. The "manual safety" issue was intensely disputed by the parties. The parties should have been permitted to develop their respective prima facie cases without interference from the trial court. *See Lagola*, 867 A.2d at 900 (Berger, J. concurring, joined by Steele, C.J.). This is especially true

where the questioning by the trial court plainly had the effect of casting doubt on the credibility of Dr. Knox, of Plaintiffs' counsel, and of Plaintiffs' case. *Id.*

**e. The trial court's post-trial opinion does not support affirmance.**

In its post-trial opinion, the trial court explained its examination of Dr. Knox on the basis that the questions to Dr. Knox were simply intended to clarify for the jury that the Contender's instruction manual required a user to select the manual safety after de-cocking. Tr. Ct. Op. at 8-9. Yes, the trial court's intent was undoubtedly to emphasize the manual safety and thereby emphasize Mr. Pedicone's failure to use the manual safety. Unfortunately, the trial court failed to appreciate the outsized impact of its questions on Plaintiffs' case. The trial court's injection of its perspective before the jury was especially significant because the thrust of Dr. Knox's testimony was directed toward the hammer block mechanism and how that feature of the gun should be designed to prevent unintentional discharge without a trigger-pull even when the independent manual safety is disengaged. A-737, A-1208-18. The trial court intervention to focus Dr. Knox on the manual safety communicated that the hammer block issue was unimportant relative to the manual safety issue. It laid a practical foundation for the Thompson defendants to cross-examine Dr. Knox on the manual safety and to argue further that the original Contender was safe as long as the gun's operator used the manual safety. The trial

court's subsequent apology during trial may be well-taken, *see* A-1244, 1316, but the very need for an apology and the trial court's post-trial explanation underscores how the insertion of a palpably negative perspective on Mr. Pedicone's non-use of the manual safety warrants a new trial. *Price*, 790 A.2d at 1211.

As a final matter, where several claims of trial court error are meritorious, the cumulative prejudicial effect of those errors may further support a new trial. That also is the case here, further supporting a new trial in this case. *See Robelen Piano Co. v. Di Fonzo*, 169 A.2d 240, 248 (Del. 1961).

**V. CONCLUSION**

The judgment should be vacated and the case remanded for a new trial.

Respectfully submitted,

***KLINE & SPECTER, PC***

***RHOADES & MORROW LLC***

*/s/ Charles L. Becker*

Charles L. Becker (*pro hac vice*)  
Michael A. Trunk  
Ruxandra M. Laidacker (*pro hac vice*)  
1525 Locust Street  
Philadelphia, PA 19102  
(215) 772-1000

Dated: February 16, 2023

*/s/ Joseph J. Rhodes*

Joseph J. Rhoades (ID. 2064)  
Stephen F. Morrow (ID. 4891)  
1225 N. King Street, Suite 1200  
Wilmington, DE 19899-0874  
(302) 427-9500

*Counsel for Plaintiffs Below, Appellants  
Joseph J. Pedicone, III and Hilma L.  
Pedicone*

## **APPENDIX “A”**

Trial Court Opinion (denying a new trial), entered on November 4, 2022



**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

JOSEPH J. PEDICONE, III and )  
HILMA L. PEDICONE, H/W, )  
 )  
Plaintiff, )

v. )

C.A. No. N17C-11-264 WCC )

THOMPSON/CENTER ARMS )  
COMPANY, LLC F/K/A )  
THOMPSON/CENTER ARMS )  
COMPANY, INC., and )  
SMITH & WESSON CORP., )

Defendants.

Submitted: July 7, 2022  
Decided: November 4, 2022

**Plaintiffs' Motion for a New Trial – DENIED**

**MEMORANDUM OPINION**

Joseph J. Rhoades, Esquire and Stephen T. Morrow, Esquire, Rhoades & Morrow LLC, 1225 North King Street, Suite 1200, Wilmington, Delaware 19801. Michael A. Trunk, Esquire, and Thomas E. Bosworth, Esquire, KLINE & SPECTOR, P.C., 1525 Locust Street, Philadelphia, PA 19102. Attorneys for Plaintiffs.

Timothy Jay Houseal, Esquire and Jennifer M. Kinkus, Esquire, YOUNG CONAWAY STARGATT & TAYLOR, LLP, 1000 North King Street, Wilmington, DE 19801. Anthony M. Piscioti, Esquire and Danny C. Lallis, Esquire, PISCIOTTI LALLIS ERDREICH, 30 Columbia Turnpike, Suite 205, Florham Park, New Jersey 07932. Attorneys for Defendants.

**CARPENTER, J.**



Before the Court is Plaintiffs' Motion for a New Trial. For the reasons set forth in this Opinion, Plaintiffs' Motion is **DENIED**.

## **I. Factual & Procedural Background**

On or about January 9, 2016, Mr. Pedicone was injured while operating his Thompson/Center Contender pistol ("Contender"). The pistol discharged into his leg, resulting in serious injury and amputation.<sup>1</sup> On November 29, 2017, Mr. and Mrs. Pedicone, ("Plaintiffs") filed suit against Thompson/Center Arms Co. and Smith and Wesson Co. ("Defendants") alleging that Defendants negligently designed the Contender.<sup>2</sup> The Court held a jury trial from March 21, 2022, until March 29, 2022.<sup>3</sup> The jury returned a verdict on March 30, 2022, finding that the Defendants were not negligent with respect to the design of the Contender.<sup>4</sup> On April 13, 2022, Plaintiffs submitted a Rule 59 Motion for a New Trial.<sup>5</sup>

## **II. Standard of Review**

Pursuant to Delaware Superior Court Civil Rule 59, a new trial may be granted for all, or part of the issues decided at trial.<sup>6</sup> In considering a motion for a new trial, the Court should give the jury's verdict "enormous deference,"<sup>7</sup> and "should not set

---

<sup>1</sup> Compl. ¶¶ 18, 23.

<sup>2</sup> *Id.* ¶ 26.

<sup>3</sup> Trial Worksheet, D.I. 283, at 1 (Mar. 30, 2022).

<sup>4</sup> Verdict Sheet, D.I. 282, at 1 (Mar. 30, 2022).

<sup>5</sup> Pls.' Mot. for a New Trial, D.I. 285 (April 13, 2022). ("Pls.' Mot.")

<sup>6</sup> Del. Super. Ct. R. 59.

<sup>7</sup> *Cuonzo v. Shore*, 958 A.2d 840, 844 (Del. 2008).

aside a verdict ... unless, on review of all the evidence, [it] preponderates so heavily against the jury verdict that a reasonable jury could not have reached the result.”<sup>8</sup>

A verdict should not be disrupted unless it is “manifestly and palpably against the weight of the evidence,”<sup>9</sup> the jury disregarded rules of applicable law, or the verdict was “tainted by legal error during trial.”<sup>10</sup>

### III. Discussion

In support of their argument for a new trial, the Plaintiffs claim that the Court: (1) excluded evidence of an alternative feasible design;<sup>11</sup> (2) improperly questioned an expert witness;<sup>12</sup> (3) improperly instructed the jury;<sup>13</sup> and (4) failed to discharge Juror No. 9, who was represented by the Defendants’ law firm in a different matter.<sup>14</sup> Before addressing the arguments made by Plaintiffs, a couple of general comments are in order. This was a terrible and tragic accident that caused significant injury to Mr. Pedicone. While it is clear that Mr. Pedicone is not seeking sympathy, the Court is sure it was difficult for everyone in the courtroom to totally appreciate the effect this incident has had on his life. Perhaps even more amazing is how Mr. Pedicone

---

<sup>8</sup> *Storey v. Camper*, 401 A.2d 458, 465 (Del. 1979); see also *Town of Cheswold v. Vann*, 9 A.3d 467, 472 (Del. 2010).

<sup>9</sup> *McCloskey v. McKelvey*, 174 A.2d 691, 693 (Del. Super. 1961).

<sup>10</sup> *In re Asbestos Litig. 112010JR Trial Grp.*, 2011 WL 684164, at \*4 (Del. Super. Feb. 2, 2011).

<sup>11</sup> Pls.’ Mot. ¶ 5.

<sup>12</sup> *Id.* ¶ 6.

<sup>13</sup> *Id.* ¶ 7.

<sup>14</sup> *Id.* ¶ 8.

has not let this incident hamper his joy for living, including continuing to hunt, a sport he clearly loves. The Court applauds his determination and tenacity.

That said, this is a case that the Court is confident all counsel knew would be difficult to prove. Even in the best of circumstances it would be difficult for a jury to discount the clear negligence of Mr. Pedicone, even if they contributed some liability to the gun manufacturer. The facts of this case simply would make any other conclusion difficult. The Court appreciates that Mr. Pedicone has not obtained the results desired, but the results should not have been a surprise or unexpected. The Court will now consider the arguments asserted in Plaintiffs' Motion for a New Trial.

A. Alternative Feasible Design

First, Plaintiffs contend the Court improperly excluded evidence of the Thompson/Center G2 firearm (G2) which was manufactured by Defendants nearly 35 years after the Contender weapon which is the subject of this litigation. Plaintiffs argue they should have been allowed to introduce evidence regarding the operation of the G2 firearm as it would have demonstrated that an alternative design was available, and that design would have made the Contender weapon safer.<sup>15</sup> In the Court's pretrial ruling, it stated:

“The fact that a subsequently produced weapon with more modern and up-to-date features has been manufactured by Defendants does not

---

<sup>15</sup> Pls.' Mot. ¶ 5.

equate to the initial weapon being defectively designed. Further, the marketing of the new weapon as the next generation of the Contender does not provide a basis for its introduction. Therefore, the Court rules that the introduction of the weapon simply to establish Defendants have corrected concerns of the original Contender is not admissible. It is possible that the fact that a new firearm similar to the Contender has been produced may be utilized on cross-examination to attack knowledge or credibility, but those decisions will have to wait for trial.”<sup>16</sup>

The Court finds this ruling to be correct. First, despite Plaintiffs’ counsels’ assertions otherwise, Dr. Knox was given significant latitude over days to testify about the operation of the Contender weapon, what would have caused the weapon to unintentionally discharge and why it occurred in this case. Dr. Knox was never prevented from offering testimony about designs that were available and utilized when Mr. Pedicone’s gun was manufactured in the 1970s. The Court’s ruling simply prevented Plaintiffs from asserting that because Defendants later manufactured a weapon that corrected the concerns raised by Dr. Knox, he should have been allowed to testify about these advances which he was asserting could have been considered decades before. Despite the obvious advancements in technology and the knowledge gained from decades of manufacturing weapons, a weapon manufactured in the 70s is not defectively designed because decades later a new design is implemented in a more modern firearm. The Court is sure that significant changes have occurred in manufacturing weapons over the two hundred years of our country’s history which

---

<sup>16</sup> Letter Op. from Carpenter, J., D.I. 261, at 10 (Mar. 7, 2022).

would have made an older weapon safer. That alone, however, does not make the older weapon defective, and allowing the testimony suggested by Plaintiffs would have confused the jury and allowed an unfounded assertion to be introduced into the trial issues. The Court finds the testimony as suggested by Plaintiffs irrelevant and it would have been inappropriate to allow it into evidence.

It is also clear to the Court that if properly handled, the Contender firearm would have been safe to use. Unfortunately, Mr. Pedicone failed to exercise reasonable care in the handling of this older firearm which led to this accident. This is particularly true in this case as the weapon was purchased at a gun show from a friend, the gun had been altered by its previous owners and Mr. Pedicone, and those modifications to the weapon made it more difficult and less safe to use. Here the jury was given significant evidence by both parties' experts concerning the manufacturing of this weapon. The jury's decision to find the weapon was not defectively manufactured is clearly supported by the evidence. As such, the Motion for New Trial on this ground is denied.

#### B. Court's Questions

Next, Plaintiffs claim the Court improperly questioned Dr. Michael Knox during Plaintiffs' direct examination.<sup>17</sup> The Court's questioning occurred while Plaintiffs' counsel was examining Dr. Knox on the procedural steps necessary to

---

<sup>17</sup> Pls.' Mot. ¶ 6.

disengage the weapon once it was set to fire.<sup>18</sup> The Court asked Dr. Knox whether the engagement of the safety was the first step indicated in the weapon's manual. Plaintiffs argue that the Court's mid-examination questions impaired Dr. Knox's credibility and derailed Plaintiffs' line of questioning.<sup>19</sup>

In response, Defendants assert that the Court's comments were proper and were simply clarifying questions – a practice employed by the Court for witnesses of both parties.<sup>20</sup> Further, Defendants argue that the Court maintained neutrality when asking clarifying questions and kept questioning to a minimum throughout the trial.<sup>21</sup> Defendants argue that Plaintiffs failed to object to the Court's questioning and that there is no evidence that the Court's question regarding the manual safety demonstrated a lack of impartiality or prejudice.<sup>22</sup>

It is well settled under Delaware law that a trial judge is permitted to interrupt a line of questioning on direct or cross examination of a witness to ask clarification questions.<sup>23</sup> When doing so, a trial judge must exercise self-restraint and “preserve an atmosphere of impartiality when questioning witnesses.”<sup>24</sup>

---

<sup>18</sup> *Id.*

<sup>19</sup> Pls.' Mot. ¶ 6.

<sup>20</sup> Defs.' Mot. at 5, 6.

<sup>21</sup> *Id.* at 7.

<sup>22</sup> *Id.* at 8–9.

<sup>23</sup> *Price v. Blood Bank of Delaware, Inc.*, 790 A.2d 1203, 1212 (Del. 2002).

<sup>24</sup> *Lagola v. Thomas*, 867 A.2d 961, 898 (Del. 2005).

Here, the Plaintiffs' expert, Dr. Knox, was testifying what was set forth in the weapon's manual as to the proper operating steps and what happens when the user decides not to fire the Contender after the hammer block is engaged.<sup>25</sup>

COUNSEL: Doctor, the entire process we just described there, what is happening with the gun during that process when you release the -- well, as it starts out. If you decide not to fire after the hammer has been cocked, then it takes you through this step, what is the process that's actually happening with this gun that's being described?

THE WITNESS: So what happens is that we have a hammer cock and you decide to release the hammer because you are not going to fire it, so you would hold the hammer with your thumb, pull the trigger to release the hammer from the sear. And then what this is describing is let the hammer down slowly. What has happened, when you do that, is once you pull the trigger to release the hammer, you also disengage the hammer block, so the hammer block is no longer in place, so if you were to let the hammer fall from that position with the -- without the safety pin engaged, then the hammer would strike the firing pins.<sup>26</sup>

Then, the Court briefly asked the witness about the gun's manual safety, by questioning:

THE COURT: Talking about the amount of initial construction<sup>27</sup> here, which is put the gun on -- in a safe position; right? So you kind of jumped to the second one; right?

THE WITNESS: I think -- yes. What this describes, I'm describing what happens in the gun in terms of the steps.

THE COURT: Right. But both the gun that Mr. Pedicone owns and this manual reflect there's a safety; right?

---

<sup>25</sup> Trial Tr. Mar. 22, 2022, at 54–58.

<sup>26</sup> *Id.* at 57–58.

<sup>27</sup> The Court believes that the reporter misheard the Court's question and the word "construction" should be "instruction".

THE WITNESS: Yes.

THE COURT: Regardless of whether it's an S or some other, as you described there is a safety on it. That indicates first you put that on; right?

THE WITNESS: That's what is indicated. Yes.

THE COURT: Okay.<sup>28</sup>

The instruction manual clearly states that the first step the gun operator should take after deciding not to fire the gun after it had been cocked, is to put the manual safety on. After being questioned for several minutes about the instructions in the manual, Dr. Knox failed to include this first step in the disengagement steps he was testifying about. The Court's questions were only intended to clarify that the engagement of the safety was the initial act indicated in the manual and was consistent with Dr. Knox's expertise on the operation of the firearm. Since the Court had not heard Dr. Knox include this step in his response to counsel's question, it was a proper inquiry to clarify the issue and avoid confusion.

The Court's questions were permissible clarifications regarding the significant complexities in the operation of this weapon and the steps taken to use the firearm according to its manual. The Court's questions were asked in a neutral and impartial manner, free from any suggestion that the Court favored one side over

---

<sup>28</sup> *Id.* at 58.



another. Accordingly, the Court's brief questions to Plaintiffs' expert witness were proper and free from any influential suggestions.

### C. Jury Instructions

Third, Plaintiffs assert the Court "adopted the Defendants' factual narrative when instructing the jury" by emphasizing the contentions of the Defendants relating to the claim that Mr. Pedicone was negligent.<sup>29</sup> Plaintiffs contend that the emphasis on Mr. Pedicone's contributory negligence in the jury instructions improperly misled the jury and bolstered the Defendants' theories.<sup>30</sup>

Defendants on the other hand, assert the jury instructions given by the Court were appropriate, fair, and impartial.<sup>31</sup> Defendants contend that the jury instructions combined both the Plaintiffs' and Defendants' proposed instructions, including Plaintiffs' requested instructions about reckless conduct.<sup>32</sup> Defendants explain, however, the jury found that the firearm was not negligently designed.<sup>33</sup> Therefore, the contentions of the Defendants regarding the conduct of Mr. Pedicone were never considered by the jury as the issue of comparative negligence was rendered moot by

---

<sup>29</sup> Pls.' Mot. at ¶ 7.

<sup>30</sup> *Id.*

<sup>31</sup> Defs.' Mot. at 9–10.

<sup>32</sup> *Id.* at 11.

<sup>33</sup> Verdict Sheet, D.I. 282, 1 (Mar. 30, 2022).

their decision.<sup>34</sup> As such, Defendants maintain that the jury instructions were not prejudicial and did not bolster the defense's argument.<sup>35</sup>

In reviewing a motion for new trial based on a jury instruction, the Court must determine whether “the alleged deficiency in the jury instructions undermined the jury’s ability to intelligently perform its duty in returning a verdict.”<sup>36</sup> “Generally, jury instructions must give a correct statement of the substance of the law and ‘must be reasonably informative and not misleading.’”<sup>37</sup> A jury instruction “need not be perfect, however, and a party does not have a right to a particular instruction in a particular form.”<sup>38</sup> Jury instructions must be “reasonably informative and not misleading, judged by common practices and standards of verbal communication.”<sup>39</sup>

Here, the Court crafted the jury instructions with the considerations of those submitted by Counsel and the standard pattern instructions.<sup>40</sup> The law contained therein was correct and applicable to the case, and when considered as a whole, allay alleged misleading of the jury.<sup>41</sup>

---

<sup>34</sup> Defs.’ Mot. at 11–12.

<sup>35</sup> *Id.* at 11.

<sup>36</sup> *Lisowski v. Bayhealth Medical Center, Inc.*, 2016 WL 6995365, at \*2 (Del. Super. Nov. 30, 2016).

<sup>37</sup> *Harris v. Cochran Oil Co.*, 2011 WL 3074419, at \*3 (Del. July 26, 2011).

<sup>38</sup> *Id.*

<sup>39</sup> *Lisowski*, 2016 WL 6995365, at \*2 (quoting *Lowther v. State*, 104 A.3d 840, 847 (Del. 2014)).

<sup>40</sup> Defs.’ Proposed Jury Instructions, D.I. 268 (Mar. 18, 2022); Pls.’ Proposed Jury Instructions, D.I. 277 (Mar. 24, 2022); Jury Instructions, D.I. 281 (Mar. 30, 2022).

<sup>41</sup> Jury Instructions, D.I. 281 (Mar. 30, 2022).

In the jury instruction requests made by both parties, the Court was provided with the contentions each party had regarding the liability of the other party. Plaintiffs' contentions were set forth in the proposed negligent design instruction,<sup>42</sup> and Defendants' list was in a separate instruction entitled "Defendant's Contentions."<sup>43</sup> Here, the Court gave the negligent design instruction proposed by the Plaintiffs and simply incorporated Defendants' contentions into the comparative negligence instruction.<sup>44</sup> This was a logical and common-sense place to put the "contentions" as it reflects it was the Defendants' burden to establish if the jury reached the issue of comparative negligence. The Court could have listed the Defendants' contentions in a separate instruction but connecting them to the burden of proof required of the Defendants provided better guidance to the jury and from the Court's view, a more favorable instruction to Plaintiffs. The Court also notes that the primary dispute regarding comparative negligence was not regarding Defendants' contentions but what would occur if the jury found Defendants' conduct was reckless. Plaintiffs argued that such a finding would moot the issue of comparative negligence altogether. Where in contrast, Defendants believed it would simply remove the 50% barrier to recovery. This appeared to be an issue not previously addressed by the Court and was an area of significant contention between

---

<sup>42</sup> Pl.'s Proposed Jury Instructions, D.I. 277, at 13 (Mar. 24, 2022).

<sup>43</sup> Defs.' Proposed Jury Instructions, D.I. 268, at 5-6 (Mar. 18, 2022).

<sup>44</sup> Jury Instructions, D.I. 281, at 10 (Mar. 30, 2022).

the parties and was the primary focus of the Court. The list of contentions issue was really one of form over substance.

The Court's presentation of the issues for the jury to decide through its jury instructions was fair, balanced and consistent with the requests made by the parties. Unfortunately for the Plaintiffs, they failed to establish their case, so the jury was never required to even consider Plaintiffs' clear negligence in this matter. A party is not prejudiced by an instruction that becomes immaterial based on the findings in the case. Plaintiffs' contentions here are simply unsupported.

#### D. Potential Juror Conflict

Lastly, Plaintiffs argue the Court failed to discharge Juror No. 9 who was represented by Defendants' local counsel, Young Conaway Stargatt & Taylor ("YCST") in another matter. Plaintiffs claim that, due to the previous representation, Juror No.9 was unable to render impartial jury service.<sup>45</sup> Defendants respond that there was no evidence that Juror No. 9 should have been precluded for cause because he was unable to render impartial jury service.<sup>46</sup>

Juror No. 9 was represented by an attorney from YCST in a worker's compensation action stemming from an injury suffered approximately four to five years ago.<sup>47</sup> During *voir dire*, Juror No. 9 explained that the lawsuit filed on his

---

<sup>45</sup> Pls.' Mot. at ¶ 8.

<sup>46</sup> Def.'s Mot. at 13.

<sup>47</sup> Defs.' Mot. Ex. K. Jury Selection Transcript. Mar. 17, 2022, at 145-47.

behalf had settled.<sup>48</sup> The Court then questioned whether Juror No. 9's legal representation by YCST had caused him any concern, whether he would tend to give greater weight and credibility to YCST attorneys, and whether he was familiar with the YCST attorneys in this case.<sup>49</sup> Juror No. 9 replied "no" to all of the questions posed and had no other reason for coming forward during *voir dire*.<sup>50</sup> When asked by the Court if either Plaintiffs' or Defendants' counsel had any concerns, both sides replied in the negative.<sup>51</sup> Based on the representations by Juror No. 9 and by Counsel, the Court found that Juror No. 9 could serve.<sup>52</sup>

There is nothing in the record to indicate any concern about the impartiality of Juror No. 9. His representation by YCST was in a matter which occurred several years ago, was unrelated to the matter before the Court, and involved an attorney who was not involved in the current case. Moreover, the Court highlights that the Plaintiffs did not raise any concerns during *voir dire* when asked by the Court. Accordingly, there is no legally cognizable reason to support the proposition that Juror No. 9 should have been precluded. The Court is satisfied that Juror No. 9 was fair and listened to all the evidence presented.

---

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 146–7.

<sup>50</sup> *Id.* at 147.

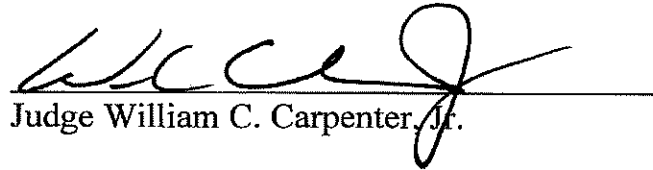
<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

**IV. Conclusion**

For the foregoing reasons, Plaintiffs' Motion for a New Trial is **DENIED**.

**IT IS SO ORDERED.**



Handwritten signature of Judge William C. Carpenter, Jr. in black ink, written over a horizontal line.

Judge William C. Carpenter, Jr.

**CERTIFICATION OF SERVICE**

I, Joseph J. Rhoades, Esquire, hereby certify that on this 2<sup>nd</sup> day of March, 2023, I caused to be served upon counsel a true and correct copy of Opening Brief of Plaintiffs Below, Appellants Joseph J. Pedicone, III and Hilma L. Pedicone, via e-file to the following:

Timothy Jay Houseal, Esquire  
Jennifer M. Kinkus, Esquire  
YOUNG CONAWAY STARGATT & TAYLOR, LLP  
1000 North King Street  
Wilmington, DE 19801

/s/ Joseph J. Rhoades \_\_\_\_\_  
Joseph J. Rhoades





Respectfully submitted,

RHOADES & MORROW LLC

/s/ Joseph J. Rhoades

Joseph J. Rhoades, Esquire (I.D. 2064)

Stephen T. Morrow, Esquire (I.D. 4891)

1225 King Street, 12<sup>th</sup> Floor

Wilmington, DE 19801

(302) 427-9500

Attorneys for Plaintiffs Below - Appellants

DATE: March 2, 2023