



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

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

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## I. ARGUMENT

Defendants have argued for affirmance of the judgment in their favor on a variety of grounds. To start, they argue that evidence of the G2 Contender was properly precluded as irrelevant because this subsequently manufactured gun was different from the original Contender whose unintentional discharge caused Mr. Pedicone’s injuries. This argument misses the point: the hammer block safety design used in the G2 Contender had been developed decades *before* the original Contender was designed, manufactured, and sold. The use of that preexisting design in the G2 underscored that the design was available to be used in the original Contender as well. The evidence was germane to a crucial issue at trial—the availability of an alternate feasible design. It certainly should not have been precluded on “relevance” grounds.

Defendants next argue that the trial court did nothing wrong when it questioned Plaintiffs’ expert witness, Dr. Knox, about the original Contender’s manual safety during Dr. Knox’s direct examination. The trial court’s questioning of Dr. Knox inadvertently but prejudicially injected a defense-oriented perspective into a key issue in the case: whether the gun’s user manual directed use of the manual safety. This intervention both undermined Plaintiffs’ theory and went to the heart of the case, necessitating a new trial. These arguments are addressed more fully below.

- A. The trial court wrongly excluded evidence relating to the G2 Contender.**
- 1. The Thompson defendants' arguments illustrate why this case should be remanded for a new trial.**

The Thompson defendants argue for affirmance on several bases. *First*, they wrongly claim that evidence concerning the G2 Contender was properly excluded as irrelevant because the G2 is a subsequent iteration of the Contender and that represented a “complete redesign” of the Contender series of guns. *See* Appellees’ brief at 17-20.

There is no doubt that the original Contender and G2 had certain differences. Most notably, the Thompson defendants constructed the G2 using the “Encore” gun as the platform, although the G2 remained similar in profile to the original Contender and used the same interchangeable barrels as the original Contender. A-285-86, A-330, A-768, A-580 (referring the trial court to the 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 Apr. 10, 2023)).

Perhaps the most notable difference between the two guns is that the G2 is markedly safer than the original Contender. As Dr. Knox explained, the G2 has a rebounding hammer block that securely and consistently separates the hammer from the striker until there has been an intentional trigger pull. This eliminates the risk of an unintended discharge while closing the action. A-707. Not only does the

rebounding hammer block mechanism used in the G2 completely eliminated the dangerous aspects of the original Contender's design, but it does so by using an *old* design that had been around for decades—a design that had been available when the original Contender was developed, marketed, and sold. A-1104-07, A-1116-17, A-1143, A-1191, A-1211-15, A-1124-26, A-1211-12.

So the Thompson defendants designed the original Contender with a hammer block safety mechanism that permitted unintentional discharge without a trigger pull despite the availability and feasibility of a different hammer block design that would have prevented unintentional discharge altogether.<sup>1</sup> Evidence of how the Thompson defendants used that same design in the G2 was at least probative of the Thompson defendants' ability to use this design in the original Contender. Allowing introduction of this evidence would have underscored the Thompson defendants' ability to incorporate the design into a firearm. It also would have provided a visual reference point to help the jury understand the older-but-better hammer block design that would have prevented Mr. Pedicone's injury. The evidence was certainly relevant from both standpoints.

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<sup>1</sup> The less-safe design used in the original Contender enabled the gun to have a light trigger pull that helped with shooting accuracy. A-289-90. After introduction of the G2, the Thompson defendants received complaints that the trigger was "not as nice of a refined trigger like the generation one Contender." *Id.*

The Thompson defendants argue that the G2 is a separate firearm because it is built using the Encore platform. These arguments simply do not compel the exclusion of evidence of the G2's use of an older hammer block safety design on relevance grounds, as embraced by the trial court. These are matters for weight and credibility. And Delaware law leaves the testing of weight and credibility to cross-examination. In turn, it allows the jury to decide the persuasive value of evidence and an expert's reasoning based on that evidence. *See XL Ins. Am., Inc. v. Noranda Aluminum Holding Corp.*, 239 A.3d 390, 403 (Del. 2020) (“[T]he factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility and it is for the opposing party to challenge the factual basis of the expert opinion on cross-examination.”); *Perry v. Berkley*, 996 A.2d 1262, 1270-71 (Del. 2010) (cross-examination rather than exclusion is proper method of exploring bases of an expert's opinion and the weight ascribed to the opinion). The trial court should not have precluded evidence about the G2's hammer block design. It simply should have allowed the cross-examination to occur and let the jury deliberate.

The Thompson defendants relatedly argue that the Contender is a unique firearm such that evidence about the G2 would have confused and misled the jury. *See* Appellees' brief at 19-20. But the G2 itself illustrates the feasibility of using an improved but long-standing hammer block mechanism in the next-generation Contender. Evidence of the G2 would have helped convey the entire story of the

original Contender to the jury. The trial court could have fashioned limitations on such evidence to keep the jury focused on the issues in the case. With appropriately managed presentation to the jury, evidence that the G2 was designed with an *older and available* hammer block design would have done the opposite of misleading the jury. It would have affirmatively helped the jury to deliberate and decide the case.

*Finally*, the Thompson defendants claim that the trial court's decision was not prejudicial because Plaintiffs were permitted to prove alternate design by other means anyway. *See* Appellees' brief at 19-25. The jury did hear testimony from Dr. Knox that using a long-standing rebounding hammer mechanism would have made the original Contender safer and prevented the discharge that injured Mr. Pedicone. *See* A-1124-26 (Knox). But the jury missed hearing that this design was actually used by Defendants themselves in a related gun. The jury was deprived the opportunity to observe a concrete example of a safe hammer block safety design and how the original Contender might have been designed with preexisting technology. *Compare* A-2494-98 *with* A-285-94 (Laney). The preclusion of this evidence on relevance grounds both wrongly and unfairly denied Plaintiffs the opportunity to educate the jury regarding the issue of alternate feasible design.

The Thompson defendants also argue that Plaintiffs were not prejudiced because they could compare the original Contender with *other* firearms. *See* Appellees' brief at 23-25. If evidence could be admitted of other firearms with a



rebounding hammer block design, so could evidence have been admitted regarding the Contender's closest relative that also used that design—the G2. That evidence certainly met the test of relevance. And evidence of how the Thompson defendants used that design in another Contender model would have provide probative perspective on the parties' arguments concerning the defectiveness of the original Contender's hammer block design. At bottom, the trial court was not obliged to sanitize the record of key evidence, especially evidence of the G2's hammer-block design went to the heart of Plaintiffs' case. The Court should order a new trial for these reasons as well. *See Barriocanal*, 697 A.2d 1169, 1173 (Del. 1997).

**2. Plaintiffs did not waive arguments on appeal.**

The Thompson defendants make waiver arguments concerning evidence of the G2's hammer block design. They first argue that Plaintiffs waived arguments that evidence of the G2 established the Thomson defendants' knowledge of a feasible alternate design in 1978 and or that it established their knowledge the original Contender's hammer block was dangerous. *See* Appellees' brief at 15 n.9 & 16-17. These arguments are wrong. Plaintiffs argue on appeal that trial court wrongly excluded evidence of the G2 Contender's hammer block design at trial. Plaintiffs preserved that issue before trial through their response to the Thompson defendants' pre-trial motion. A-579-84. They further preserved it by arguing the issue during trial itself. A-1867. On appeal, Plaintiffs again argue that the trial court wrongly

excluded evidence that the G2 was designed with a preexisting hammer block design. Consistent with their post-trial motion, Plaintiffs develop their preserved arguments by emphasizing the importance of the G2 evidence to the issues in dispute. Appropriate allowance of the G2 evidence would have: (1) provided 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; (2) provided the jury with a more complete picture of the Thompson defendants' decision-making relative to the original Contender; and (3) helped the jury appreciate that the Thompson defendants were able to design the original Contender with a hammer block safety that eliminated the risk of unintentional discharge without a trigger-pull. *See* A-1124-26 (Knox); *compare* A-2494-98 *with* A-285-94 (Laney). These allegations of *prejudice* are not separate errors. They simply articulate the effect of the trial court's preclusion of evidence.

The Thompson defendants also wrongly argue waiver on the basis that Plaintiffs did not answer a Rule 403 argument in their motion in *limine* response. *See* Appellees' brief at 14 & 16. The trial court excluded evidence of the G2 on the basis that it was irrelevant under D.R.E. 401 and 402, not that it was more prejudicial than probative under D.R.E. 403. In any event, Plaintiffs also argued that evidence of the G2 Contender was both probative and that its admission would not be unfairly prejudicial on Rule 403 grounds. A-584. There was no waiver on this basis either.

**B. The trial court's questioning of Dr. Knox warrants a new trial.**

**1. The trial court overstepped when questioning Dr. Knox.**

The Thompson defendants also wrongly seek to justify the trial court's improper questioning of Dr. Knox. As discussed more fully in Plaintiffs' opening brief, Plaintiffs' theory of the case featured the proposition that the original Contender had a passive safety (the hammer block) that should have acted as a reliable backup to prevent unintentional discharge without a trigger pull when the user had not engaged the active safety (the manual safety) and that the hammer block had been inadequately designed for this purpose. In this particular case, Mr. Pedicone configured his Contender with a recommended and properly-installed sighting scope that extended over the top of the selector switch. On an original Contender, the selector switch is how a user chooses to activate the manual safety or chooses a firing position. The selector switch *must* be placed into a firing position—rimfire or centerfire—and out of the manual safety position to fire the gun. When the selector switch is placed into rimfire or centerfire (when the manual safety necessarily is not engaged), the gun's passive hammer block safety needs to prevent the gun from firing unless an intentional trigger pull has occurred. That was the frame of reference here. Mr. Pedicone had set the selector switch to centerfire such that the hammer block safety alone (not the manual safety) could have prevented firing without an intentional trigger pull.

Because the sighting scope obscured the selector switch, Mr. Pedicone also was obliged to open the gun's action when checking and using the selector to switch to determine a firing position. Since changing the selector into a firing position disengaged the manual safety, Mr. Pedicone was obliged by the design of the original Contender to close the firearm with the manual safety disengaged. In view of this, Plaintiffs did not quarrel with the fact that the gun had a manual safety that, if activated, would have prevented discharge of the gun. Plaintiffs instead contended that the passive hammer block safety was defectively designed because it allowed the gun to fire without a trigger pull when the manual safety was necessarily not engaged (here, simply by the user closing the action).

That was the thrust of Dr. Knox's testimony at trial. It was against this backdrop that the trial court intervened during Dr. Knox's direct examination on the second day of trial. The trial court interrupted that direct examination to ask Dr. Knox questions about the manual safety and the fact that gun's owner manual explains that there is a manual safety on the gun. A-1212-13. Through this questioning, the trial court inadvertently introduced a defense perspective into the case as set forth in Plaintiffs' opening brief. The Thomason defendants' responsive arguments do not validate the trial court questioning of Dr. Knox. They underscore the error the trial court committed.

The Thompson defendants argue that the trial court intervened during Dr. Knox's direct examination only to clarify the operation of a complex firearm given that Dr. Knox was testifying about a 1978 version of the Contender's manual. *See* Appellees' brief at 30-31. That is an after-the-fact gloss on what actually happened in the courtroom. During his direct examination, Dr. Knox had discussed how the defective hammer block safety would fall out of place under some conditions, such as occurred here when the user released the hammer after deciding not to fire the weapon. This discussion was integral to Plaintiffs' theory that the hammer block safety was improperly designed in a fashion that permitted the unintentional discharge that injured Mr. Pedicone. During Dr. Knox's discussion of the insufficient design of the hammer block safety, the trial court intervened to completely change the subject by asking Dr. Knox to address the different facts that: (a) the original Contender had a manual safety, and (b) the gun manual directed users to use the manual safety. *See* A-1212-13. In the courtroom, this questioning highlighted the defense theory of the case during Plaintiffs' direct examination of their key expert witness. It previewed and validated the defense's theory during Plaintiffs' case-in-chief.

However inadvertent, the error affected the outcome of the case. The trial court's injection of manual safety questions at this point was especially significant because Dr. Knox's testimony was directed toward the hammer block safety and

how that feature of the gun should be designed to prevent unintentional discharge without a trigger-pull when the independent manual safety is disengaged. A-737, A-1208-18. By intervening in the middle of that testimony to compel Dr. Knox to address the manual safety, the trial court communicated to the jury that the design of the hammer block safety was unimportant and that what really mattered was Mr. Pedicone's ability to activate the manual safety. Whether or not they were intended to "clarify" the operation of the original Contender, the trial court's actions undermined Dr. Knox's credibility, undermined the credibility of Plaintiffs' counsel, and powerfully suggested to the jury that the manual safety was what really mattered rather than the design of the passive hammer block safety whose whole purpose was to prevent inadvertent discharge without a trigger pull regardless of whether the manual safety had been engaged.

Defendants next argue that the trial court's questions during Dr. Knox's direct examination actually "bolster[ed]" Dr. Knox's testimony. *See* Appellees' brief at 29-34. At trial, a trial court must act with "absolute" neutrality. *Price v. Blood Bank of Delaware, Inc.*, 790 A.2d 1203., 1210 (Del. 2002). The trial court explained that it was "educat[ing]" itself about the original Contender during the course of trial. *See* A-1820. From the standpoint of maintaining strict neutrality, however, the trial court simply had to wait for the trial testimony to unfold. By jumping the gun before Plaintiffs' counsel finished his direct examination of Dr. Knox with questioning that

highlighted the defense theory of the case, the trial court injected a defense-oriented perspective that undermined Plaintiffs and validated Defendants. *Id.*

Defendants also argue that Plaintiffs have wrongly suggested that the distinguished trial court exhibited actual bias during the trial. *See* Appellees' brief at 29-30, 36-39. Plaintiffs argue only that the trial court's questions to Dr. Knox improperly validated and anticipated the defense theory of the case while undermining Plaintiff's theory of the case during direct examination of their own expert witness. As noted in Plaintiffs' initial brief, the trial court later observed outside the presence of the jury that "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. This statement does not represent a separate error. However, it illustrates how the trial court's questioning of Dr. Knox magnified the defense theory that the presence of the manual safety vitiated any insufficiency in the design of the hammer block. It also underscores a fundamental misunderstanding of the gun's operation. As discussed in Plaintiffs' opening brief, the selector switch must be taken out of the safety position and placed in either the "rim fire" or "center fire" position to ready the gun for use. Therefore, Mr. Pedicone could not simply have placed the selector switch in the manual safe position in order to use the gun. The existence of the manual safety did not solve the problem created

by the improper hammer block safety design, because the manual safety could not have been engaged with the gun in a firing position.

Defense counsel rise to the trial court's defense in their brief. To be sure, it is proper for the bar to assail unwarranted attacks on the integrity of judicial officers. But Plaintiffs do not attack the principle of judicial independence or the integrity of the courts by suggesting that a trial court inadvertently endorsed one party's perspective on the evidence and hence overstepped the boundaries imposed by Delaware law when questioning a witness during a jury trial. Plaintiffs argue simply that the circumstances as they unfolded during Dr. Knox's direct examination warrant a new trial.

Defendants finally argue that they had focused on the Contender's active manual safety even before the trial court's questioning of Dr. Knox, so that the trial court's questions did not improperly introduce new concepts before the jury. *See* Appellees' brief at 34-36. Surely Defendants were entitled to pick their trial strategy. Defendants' emphasis on the Contender's manual safety and blaming Mr. Pedicone only underscores the trial court's mistake by inserting itself into a key disputed issue at trial. The trial court's questioning of Dr. Knox actually elevated the defense's theory of the case, making it prejudicial for that reason as well.



**2. This Court should reach the merits of Plaintiffs' argument on the basis of plain error.**

Plaintiffs are mindful that plain error represents a significant standard. They respectfully contend that such review is appropriate with regard to the trial court's questioning of Dr. Knox under *Price*. There, the Court stated that "the need for the trial judge to exhibit impartiality is particularly important" when the judge engages in direct questioning of an expert witness "in the presence of the jury, who may later be called upon to evaluate the credibility of the expert." *Price*, 790 at 1210. The Court emphasized that "[t]he need for a judge to exercise self-restraint and preserve an atmosphere of impartiality in the questioning of an expert witnesses arises from the judge's absolute duty of neutrality." *Id.* The Court added that "[d]eparture from that rule may be grounds for reversal on the basis of plain error." *Id.*

*Price* points exactly to the circumstances that existed here. As described in their opening brief, the trial court's questioning placed Plaintiffs' counsel in the tenuous position of objecting not to the trial court's rulings but to the trial court's own questioning of the witness under circumstances when those questions were impliedly critical of counsel's theory of the case. *See* A-1212-13. As objecting before the jury would risk highlighting the import of the trial court's questions, plain error should remain available to address the trial court's actions on appellate review. *Price*, 790 A.2d 1210.

Defendants argue that the trial court's handling of counsel was even-handed and that the trial court did not single out Plaintiffs' counsel for criticism or apology. *See* Appellees' brief at 27-28, 38-39. Certainly the trial court exhibited a strong command over trial counsel during the March 22, 2022 trial day, admonishing defense counsel early in the trial day, A-1173, and shortly thereafter expressing views to Plaintiffs' counsel about the progress of Dr. Knox's direct examination concerning how the original Contender was poorly designed, saying first that "I'm not quite sure where you are getting," while also acknowledging, "but it's early." A-1195. Later that morning, the trial court admonished both trial counsel (admitted *pro hac vice*) not to argue in front of the jury and advised local counsel "not to just sit here and watch" but instead to "engage and have some discussions." A-1244. The trial court added that "[y]ou pretty much observed the Court having not a lot of patience this morning." *Id.* Near the end of the morning session, the trial court again expressed frustration with lead counsel and told all counsel that "I have no hesitation of pulling *pro hacs*" and causing local counsel to take over the trial. A-1310-11. The trial court apologized to counsel at the beginning of the March 22 afternoon session, but these represent difficult circumstances for counsel to object to the trial court's decisions, either in the jury's presence or outside of it. A-1316.

*Price* is instructive. There, counsel objected in chambers following the trial court's intervention to question counsel's expert witness and this Court went on to

apply plain error review notwithstanding the lack of contemporaneous objection. *See Price*, 790 A.2d at 1211. *Price* makes clear that the plain error doctrine is a flexible doctrine that can apply sensitively to case-specific facts. *See id.*; *Lagola v. Thomas*, 867 A.2d 891, 900 (Del. 2005) (Berger, J. concurring, joined by Steele, C.J.) (opining that a whether a judge’s questioning of a witness “crossed a line” is reviewable under plain error analysis). The flexible approach approved in *Price* underscores that plain error review balances the parties’ legitimate interests with the necessity to strive for fairness. *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986) (evidentiary decision reviewable under plain error doctrine, even where the appellants did not object at trial). Consistent with that balancing of interests, plain error review may not be available in all circumstances. But it should be available here, given the circumstances that unfolded in this case.

## II. CONCLUSION

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

Respectfully submitted,

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