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Case Number 443,2022

IN THE SUPREME COURT FOR THE STATE OF DELAWARE

JOSEPH J. PEDICONE, III and HILMA L. PEDICONE, Plaintiffs Below, Appellants, v. THOMPSON/CENTER ARMS COMPANY, LLC F/K/A THOMPSON/CENTER ARMS COMPANY, INC. and SMITH & WESSON CORP., Defendants Below, Appellees.	)	No. 443,2022 On Appeal from C.A. N17C-11-264 in the Superior Court of the State of Delaware

APPELLEES' ANSWERING BRIEF

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I.

NATURE OF PROCEEDINGS

This is a product liability lawsuit involving allegations that a firearm designed in the 1960s and manufactured in the 1970s, which had been owned by an unknowable number of individuals and which had several changes from its original condition, discharged without a trigger pull while Plaintiff Joseph Pedicone was loading it in a parked car in the parking lot of a salvage yard. Plaintiffs Joseph Pedicone and his wife, Hilma, ("Plaintiffs") asserted four causes of action: (1) negligence; (2) breach of the implied warranty of merchantability; (3) breach of the implied warranty of fitness for a particular purpose; and (4) loss of consortium. Defendants' summary judgment motion resulted in dismissal of Plaintiffs' claims for breach of warranty, negligent failure to warn, and negligent manufacturing. *See Pedicone v. Thompson/Center Arms Co., LLC*, 2022 WL 521378 (Del. Super. Ct. Feb. 21, 2022).[1] As such, the matter went to trial on the issue of negligent design.

The firearm at issue – a Contender – was designed with an external manual safety on the hammer of the pistol that, when engaged, prevented the firearm discharging under any circumstances. Plaintiff Joseph Pedicone, who had purchased the firearm second-hand and without an instruction manual, did not use the external

[1] A copy of this Order is included in Defendants' Appendix ("DA"). (*See* DA-001-018.)

safety while he was attempting to load the firearm in his parked car. Plaintiff alleged that the firearm discharged without a trigger pull upon closing the action.[2] Defendants asserted that the accident occurred due to Plaintiff inadvertently pressing the trigger while attempting to load the firearm in the confined space of the driver's seat in a parked vehicle. Defendants presented objective evidence in the form of the primer indent on the fired cartridge showing that the trigger was in fact moved to discharge the pistol. It was also undisputed that if the manual safety had been utilized, the firearm could not discharge under any scenario.

After a seven-day trial, the jury returned a verdict in Defendants' favor, finding that Defendants were not negligent in the design of the firearm. (*See* A-889.) The Trial Court subsequently denied Plaintiffs' motion for a new trial and entered judgment in favor of Defendants. Plaintiffs then filed this appeal.

[2] The action is the mechanism on a breech-loading firearm that handles the ammunition.

II.

SUMMARY OF ARGUMENT

Defendants Thompson/Center Arms Co., LLC and Smith & Wesson Corp. ("Defendants/Appellees") respectfully submit that the judgment below should be affirmed as Plaintiffs' purported points of error are without merit. Specifically, in responding to Plaintiffs' two points of error, Defendants state:

1. Denied. The Trial Court did not abuse its discretion in precluding Plaintiffs from offering evidence about a firearm released by Thompson/Center almost forty years after the design and introduction of the Contender firearm at issue.
2. Denied. The Trial Court did not commit plain error affecting Plaintiffs' rights by asking clarifying questions during the testimony of their liability expert, Dr. Michael Knox.

III.

STATEMENT OF FACTS

A. BACKGROUND.

Defendant Thompson/Center Arms Company, LLC ("Thompson/Center") is a manufacturer of firearms and muzzleloading rifles. The subject firearm – a Contender handgun serial number 107049 – was manufactured in 1978 by Thompson/Center.[3] (A-0965, A-1124, A-2506.)

B. THE CONTENDER.

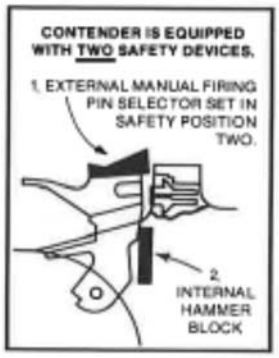
The Contender was designed by Thompson/Center's founder, Warren Center, in the 1960s and was manufactured, in various iterations, until approximately 2000. (A-2494.) The Contender's design incorporates several unique features that made it attractive to target shooters, including (1) interchangeable barrels, which allow for the use of a wide range of metallic cartridges; (2) the ability to change the position of the firing pin to switch between "rimfire" and "centerfire" cartridges;[4] (3) an adjustable trigger to allow the shooter to manually adjust the trigger pull (the

[3] At that time, the company was called K.W. Thompson Tool Company, Inc. In 2008, Thompson/Center, was acquired by non-party Smith & Wesson Holding Corporation. After the acquisition, a new corporation was formed and in 2012, Thompson/Center, Inc. was merged into Thompson/Center LLC. Defendants Thompson/Center LLC and Smith & Wesson Corp. are both subsidiaries of non-party Smith & Wesson Holding Corporation.

[4] A centerfire cartridge is one where the primer is located at the center of the base of its casing whereas a rimfire cartridge is one where the primer is located within the rim of the casing.

pressure applied to a trigger to discharge a firearm); and (4) an adjustable trigger that allows the user to adjust the let-off-travel (the length of travel of the trigger movement backward and forward). (A-0287, A-0463-0492; *see also* A-2188-2192 (defense mechanical engineering expert Derek Watkins explaining that the Contender design "is very unique").)

The Contender utilizes two safeties, an automatic safety and a manual safety: (1) an automatic hammer block safety that pushes the hammer back and holds it away from the breech face[5] and (2) a manual "safety" position on the selector switch:



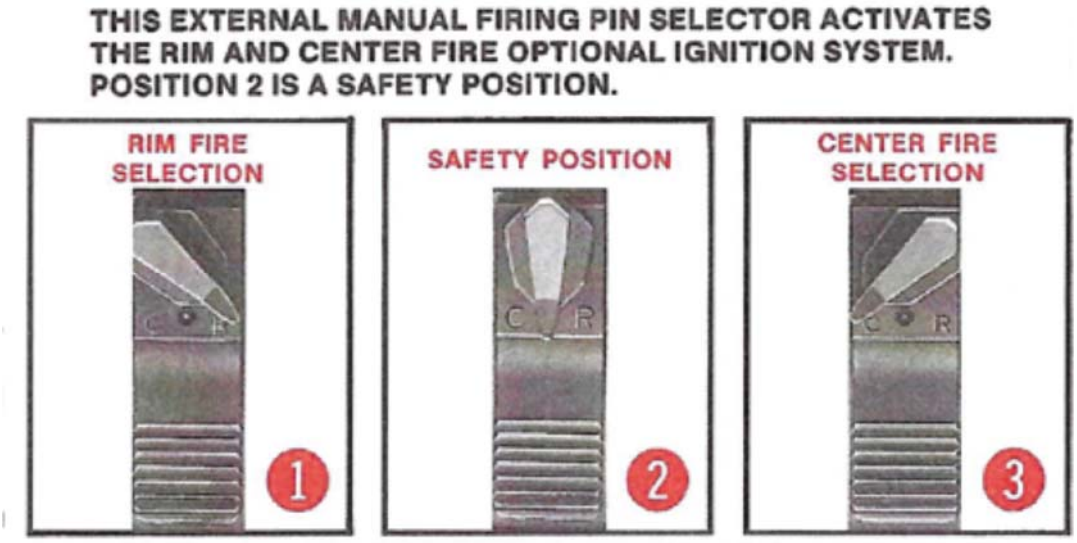
The Contender is equipped with **two safety devices** which function independently of each other (1. **Safety position on the External Manual Firing Pin Selector.** 2. **Internal Hammer Block).** When the Contender action is broken open properly, as explained on pages 5 and 6, the hammer block moves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

(A-0287, A-0437, A-0470; *see also* A-1834, A-2187.), The hammer block safety prevents an accidental discharge from a bump, drop, or accidental release of the hammer while cocking. (*Id.*) The manual safety, which is located on the hammer of the pistol, is operable by the user and should always be utilized when firing is not imminent. (*Id.*)

Originally, to change the position of the firing pin between "rim fire" and

[5] The "breech" is the end of the barrel attached to the action. The "breech face" is the area around the firing pin, which is against the head of the cartridge when loaded.

"center fire," a screwdriver was required. (A-0423.) However, by 1985, the Contender utilized an external firing pin selector on the hammer of the pistol. (A-0430.) The external selector had three positions: "rim fire," "center fire," and the "safe" position in the middle:



(*Id.*) The middle "safe" position is marked with a red dot, which is covered when the safety is engaged but is visible when either rimfire or centerfire is selected. (*Id.*)

The Contender is loaded by depressing the trigger guard spur and "breaking" the action to expose the breech of the barrel. (A-0469.) Once the breech is exposed, in a situation where the shooter is prepared to fire, a cartridge may be inserted, and the action is closed. (A-0466-0470.) After the action is closed, the shooter cocks the hammer and then, when ready to shoot, changes the safety selector from "safe" to "rim fire" or "center fire" as appropriate for the cartridge being used. (*Id.*) The safety selector should not leave the "safe" position until the shooter is ready to fire.

(*Id.*)

The Contender in this case was manufactured in 1978. (A-0965, A-1124, A-2506.) The hammer on the subject Contender was not an original part. (A-2207.) Additionally, the subject Contender contained other parts that were not available at the time it was originally manufactured and sold. (A2207-2207 (noting that the hammer, hammer block, and interlock were not original parts).)

C. MR. PEDICONE'S INCIDENT.

In 2007 or 2008, Mr. Pedicone purchased a used Contender frame from Alan McDaniel, a work colleague. (A-1446.) The subject Contender, which Mr. McDaniel had also purchased used, was thirty years old at the time. (See A-1805 (explaining that he had no knowledge of how the Contender was used or modified from 1978 to time he acquired it); *see also* A-1455-1456, A-1464-1465.)[6] The Bill of Sale between the two parties expressly stated that the Contender frame was being sold "as is." (A-1466-1467; *see also* DA-173-174.)

Although Mr. McDaniel had a manual for the Contender, he never provided it to Mr. Pedicone. (A-1465-1469.) Instead, Mr. McDaniel verbally communicated everything he knew about the Contender to Mr. Pedicone. (A-1467.) Mr. McDaniel testified that he knew that the Contender had a manual safety and that the center

[6] Mr. McDaniel also testified that he had owned numerous Contender pistols and has fired them over 6,000 times without incident. (A-1463-1464.)

position on the selector switch was "safe." (A-1470-1471.) In fact, Mr. McDaniel testified that he told Mr. Pedicone about the positions on the selector and that the middle position was "safe":

Q. Did you tell him about the safety position in the middle?
A. Well, there is a – yes.

(A-1471 (emphasis added).) After acquiring the Contender, Mr. Pedicone utilized it without incident for approximately eight years, including successfully killing a deer with it while hunting. (A-1799)

In the morning on January 9, 2016, Mr. Pedicone went hunting with his son in Cecilton, Maryland, having woken up at 4:30 a.m. (A-1806.) According to Mr. Pedicone, he then planned to hunt from a tree stand located in woods adjoining a salvage yard in New Castle, Delaware. (A-1021.) Upon returning from his morning hunt but before leaving for his afternoon hunt, Mr. Pedicone received a call from a friend, Brian Twitchell, who coincidentally was also intending to visit the same salvage yard to purchase a used car. (A-1021-1022.) So, Mr. Pedicone drove Mr. Twitchell to the location in his pickup truck. (*Id.*)

When they arrived, the salvage yard was not yet open, so Plaintiff decided to load his Contender while sitting in his pickup truck.[7] (A-1766-1768.) While he was

[7] At trial, Plaintiff conceded that this was not his normal procedure, as he typically waits until he exits the truck to load because it is safer. (A-1810-1811.) Additionally, in order to get to the location where Mr. Pedicone intended to hunt on the day in question, he would have to exit his vehicle, walk through the entire salvage

loading the pistol in the front driver's seat of the car with the firearm pointed at his leg, the Contender discharged, striking Mr. Pedicone. (A-1768-1769; *see also* DA-178 (photo of Contender).) It was undisputed that Plaintiff had not engaged the manual safety at the time of the incident. (*Id.*) Although Plaintiff testified on direct examination that he did not know that the middle position on the selector was the safe position, this testimony was contradicted by Mr. McDaniel's testimony. Additionally, Mr. Pedicone admitted on cross-examination to knowing that the Contender would not fire if the selector was in the middle or rimfire position:

> Q. You recognize this, sir?
> A. Yes. That's the hammer.
>
> Q. And you see there's like a wear area between the safe position and the centerfire position? Do you see that?
> A. I could see the C that you're pointing at. Centerfire.
>
> Q. These things. Do you see these things where it's worn? Do you see that?
> A. Yes.
>
> **Q. Just so we're clear, if you have the selector in any position other than centerfire, you couldn't fire your Contender. Right?**
> **A. Yes.**
>
> **Q. You knew that. Right?**
> **A. Yes.**

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yard, walk into the woods, where a tree stand was allegedly located, and then climb the tree stand. (A-1023-1025; DA-0177.) At trial, however, Plaintiff was confronted with photographs of the location where he intended to hunt and there was no tree stand located there. (A-1806-1807; *see also* A-1807-1808 (acknowledging that Mr. Pedicone never provided a picture of the tree stand he intended to hunt from).)

(A-1816-1817 (emphasis added); *see also* A-2205-2206 (explaining that the photographs of the subject firearm showing "wear marks" from the safety selector being moved from a safe position to the centerfire position "back-and-forth"), A-0603, DA-179.)[8]

Defendants also presented evidence that the design of the firearm was safe and that the only way the firearm could discharge in the manner described by Mr. Pedicone was with a trigger pull. In fact, Defendants' experts showed, through the firing pin impressions on the subject ammunition casing, that only a full hammer strike could have made those impressions. (*See, e.g.*, A-1951-1955 (defense criminalist Lucien Haag testifying that the firing pin impression demonstrates that the incident occurred by a trigger pull and a hammer fall from a fully cocked position); A-2195-2235 (defense mechanical engineering expert testifying that the design was safe and that the firearm could not have discharged in the manner described by Mr. Pedicone). Defendants' expert mechanical engineer, Derek

[8] This is the selector switch on the subject Contender showing the safety on and the wear marks, indicating the selector had routinely been moved from safe to centerfire (marked with a "C"):

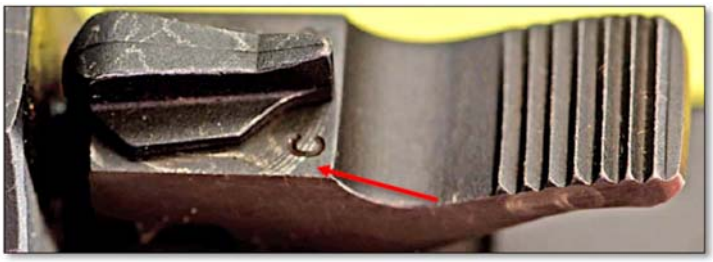

Figure 3.2: Wear Marks on the Hammer Indicating Use of the Safety Selector

Watkins – a former engineer at Remington, testified as to the exact manner in which the Contender operated, described the operation of the dual safeties (passive and active), and explained that the design was appropriate, especially given the unique nature of the firearm and its vintage. (*Id.*) Moreover, it was undisputed that if Mr. Pedicone had utilized the manual safety, the accident could not have happened under any circumstances. (A-1319 (Dr. Knox verifying that the manual safety will prevent the firearm from firing under any condition); *see also* A-2192-2193 (Mr. Watkins testifying that the manual safety will prevent the firearm from firing under any condition.)

IV.

ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN GRANTING DEFENDANTS' MOTION *IN LIMINE* TO PRECLUDE PLAINTIFFS FROM OFFERING EVIDENCE ABOUT THE G2 FIREARM.

1. Question Presented.

Did the Trial Court abuse its discretion by granting Defendants' motion *in limine* to preclude evidence of the G2, which was a firearm released by Thompson/Center almost forty years after the subject Contender was introduced. Defendants respectfully submit that the answer to this question is "no."

2. Scope of Review.

The determination of the admissibility of evidence is within the sound discretion of the trial court. *Firestone Tire & Rubber Co. v. Adams*, 541 A.2d 567, 570 (Del. 1988). A trial court's evidentiary rulings, including a ruling on a motion *in limine*, is reviewed for an abuse of discretion. *Smith v. State*, 913 A.2d 1197, 1228 (Del. 2006); *Secrest v. State*, 679 A.2d 58, 61 (Del. 1996); *see also Mercedes-Benz of N. Am. v. Norman Gershman's Things to Wear, Inc.*, 596 A.2d 1358, 1366 (Del. 1991). Abuse of discretion only occurs when a trial court has far "exceeded the bounds of reason" or "so ignored recognized rules of law or practice" to create injustice. *Lilly v. State*, 649 A.2d 1055, 1059 (Del. 1994). To constitute reversible error, there must be a clear abuse of discretion. *Robinson v. State*, 600 A.2d 356,

360 (Del. 1991). If an abuse of discretion is found, then the reviewing court "must determine whether the mistakes constituted significant prejudice so as to have denied the appellant a fair trial." *Strauss v. Biggs*, 525 A.2d 992, 997 (Del. 1987).

3. <u>Merits of Argument.</u>

a. Background.

Almost thirty years after the Contender was introduced, Thompson/Center released the Encore rifle. (A-0267, A-0285-0286.) The Encore is a large-format, single-shot rifle designed for hunters and allows consumers to change barrels to accommodate various calibers. (A-0268, A-0285-0286.) Thompson/Center subsequently released a smaller-formatted version of the Encore, which was called G2 in order to capitalize on the Contender brand name and to allow customers to utilize barrels that were already in their possession. A-0285-0292.) Since the G2 utilized the Encore platform, the design was radically different and more modern than the Contender; it operated differently than the Contender; and it did not permit the users to customize the trigger pull or travel. (*Id.*; *see also* A-0290 (the designer of the Encore and G2 testifying that the G2 was a "smaller version" of the Encore); A-0293 (explaining that "it's a different system").

Defendants filed a pretrial motion *in limine* to preclude Plaintiffs from offering evidence of the G2 at trial. Defendants argued that the G2 was not relevant to any issue in the case, it should be precluded as a subsequent remedial measure,

and any probative value was far outweighed by the prejudicial nature of the evidence. *See* Del. R. Evid. 402, 403, 407.

Plaintiffs opposed the motion, arguing that admission of the G2 should be permitted because (1) it was relevant as a "continuation" of the original Contender; (2) the G2 cannot be considered a subsequent remedial measure under Rule 407; and (3) Plaintiffs could utilize the existence of the G2 to establish that Thompson/Center had knowledge of a safer alternative design. (A-0579-0584.) Importantly, in opposition, Plaintiffs did not address the Rule 403 argument; namely, that any probative value was far outweighed by the danger of unfair prejudice, confusing the issues, and misleading the jury.

In the Order dated March 7, 2022, the Trial Court granted the motion *in limine*, explaining:

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

(A-0785.)

In a post-trial Motion for New Trial, Plaintiffs argued that the Trial Court's decision was error, contending that the G2 should have been admissible as evidence

of "an alternative feasible design." (A-2516, ¶ 5.) Specifically, Plaintiffs argued that the pretrial ruling precluded their liability expert (Dr. Knox) from testifying that Thompson/Center knew that there was a different hammer block design "available well before the original Contender design went into manufacture" in the 1960s. (A-2517.)[9] The Trial Court correctly denied this claim of error:

> 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 would have made an older weapon safer. **That alone, however, does not make the older weapon defective, and allowing the testimony**

[9] In the Motion for New Trial, Plaintiffs also argued that the Court erred by not allowing the introduction of the G2 because Dr. Knox would have testified that the decision to stop manufacturing the original Contender in approximately 2000 (after a forty-year product run) was "evidence that Defendants knew the hammer block design was dangerous." (A-2517.) This argument was not raised on appeal and is therefore waived. *See* Del. Sup. Ct. R. 14(a)(vi)(A)(3). The reason this issue was not asserted on appeal is because it actually proves Defendants' point: Plaintiffs sought to introduce evidence of G2 in order to prove the existence of a defect in a firearm designed forty years earlier. Moreover, such speculative testimony would certainly create unfair prejudice and mislead the jury.

> **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.

(App. to Plt. Br., Order at p. 3-5 (emphasis added).)

On appeal, Plaintiffs argue that the Trial Court should have allowed introduction of the G2 as evidence of Defendant's knowledge of a feasible alternative design available in 1978 when the subject Contender was manufactured. However, this contention is not supported by the facts or the relevant authorities.

b. Plaintiffs Failed to Preserve This Issue for Appeal.

Plaintiffs confine the arguments on appeal to claiming that the G2 should have been permitted to show Defendants' knowledge of a feasible alternative design in 1978. However, this issue was not preserved.

First, one of Defendants' principal arguments in moving to preclude the introduction of the G2 firearm was that any probative value was far outweighed by the risk of undue prejudice, confusion of issues, and misleading the jury. Accordingly, Defendants argued that any evidence of the G2 should be precluded under Rule 403 of the Delaware Rules of Evidence. In opposing the motion *in limine*, Plaintiffs never addressed this argument. Therefore, Plaintiffs have waived this issue and cannot challenge the Court's ruling on appeal.

Second, in the Trial Court's ruling on the motion *in limine*, the Court specifically stated that it is possible that the existence of the G2 firearm may be

utilized at trial to demonstrate Defendants' "knowledge" but that such a decision "will have to wait for trial." (A-0785.) "A motion *in limine* typically concerns the admissibility of evidence and is a preliminary motion directed at establishing the 'ground rules applicable at trial.'" *Hercules, Inc. v. AIU Ins. Co.*, 784 A.2d 481, 500 (Del. 2001) (quoting 3 Moore's Fed. Prac. § 16.77(4)(d) (3d ed. 1997)). Delaware Rule of Evidence 103(b) states that when there is a definitive ruling on the record (either at or before trial), the objection need not be renewed to preserve it for appeal. However, it is also axiomatic that a motion *in limine* is ineffective to preserve a claim of error if "the trial court deferred ruling on it.'" *Washington v. State*, 153 A.3d 76, 76 n. 3 (Del. 2016) (quoting 1 Joseph M. McLaughlin, Weinstein's Fed. Evid. § 103.11(2)(b) (2d ed. 2016).) Here, the Trial Court specifically stated that any decision regarding the use of the G2 to demonstrate Defendants' "knowledge" would have to await trial. Therefore, Plaintiffs were required to raise an objection on this basis at trial or make a proffer of evidence, which was not done. Accordingly, Plaintiffs' current objections (as to Defendants' knowledge of a feasible alternative design) have not been preserved for appeal.

c. The Trial Court Correctly Ruled That the G2 Was Not Relevant.

The evidence in the record[10] established that the G2 was introduced forty years

[10] As acknowledged on appeal, during discovery, the Trial Court afforded Plaintiffs great latitude in discovery with respect to the G2 design, which included conducting a deposition of a corporate witness, responses to interrogatories, and responses to

after the Contender was originally designed and over thirty years after the subject Contender was manufactured. Further, the record evidence established that the G2 was built on an entirely different platform than the Contender as it was based on the Encore design, which was not introduced until the 1990s. As such, the design was entirely different. Moreover, the G2 did not have the features of a precision target firearm like the Contender (such as a match grade trigger and giving the user the ability to adjust the trigger pull or travel). Indeed, in their opposition to the motion *in* limine, Plaintiffs acknowledged that the G2 "was a complete redesign." (A-0580.)

Further, the fact that the G2 was marketed as the "next generation" does not make it relevant to an entirely different design from over forty years prior. The existence of the G2 in the 2000s is not relevant to a determination as to whether Thompson/Center negligently designed a firearm in the 1960s or the 1970s. *See, e.g.*, *Brink v. Ethicon, Inc.*, 2003 WL 23277272, at *2 (Del. Super. Ct. Dec. 9, 2003) (explaining that a plaintiff must show that the defect in the product existed at the time it left the manufacturer's control). As such, the Trial Court correctly concluded

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requests to produce. Thus, the Trial Court's decision on the motion *in limine* was based on a full record. Further, contrary to Plaintiffs' insinuation on appeal, the fact that the Trial Court permitted discovery related to the G2 has no bearing on the ultimate admissibility of such information, as there are two distinct standards. *See, e.g.*, *Unisys Corp. v. Royal Indem. Co.*, 2000 WL 33115694, at *1 (Del. Super. Ct. Nov. 1, 2000) ("[T]he discovery of evidence is broader than what evidence may be admissible at trial."); *see also Unisys Corp. v. Royal Indem. Co.*, 2001 WL 845666, at *1 (Del. Super. Ct. May 25, 2001) ("The role of the relevancy during discovery is broader than at trial.").

that the G2 firearm – produced nearly forty years after the Contender was designed – was not relevant. *See* Del. R. Evid. 401, 402.

d. The Trial Court Correctly Ruled That Any Probative Value Related to the G2 Was Outweighed By Concerns of Undue Prejudice, Confusion of Issues, and Misleading the Jury.

Additionally, the Trial Court's decision should be affirmed because any probative value related to the G2 was far outweighed by undue prejudice to Defendants, confusion of issues, and the likelihood of misleading the jury. *See* Del. R. Evid. 403. In this case, Plaintiffs alleged that Defendants were negligent in the design of a unique firearm from the 1960s. Introduction of a different design from forty years later could only serve to confuse the issues and create a real likelihood of misleading the jury. This is precisely what the Trial Court stated in its ruling on the Motion for New Trial – "allowing the testimony suggested by Plaintiffs would have confused the jury." This case was about whether Defendants were negligent in the design of *the Contender at issue*, which was designed in the 1960s and the specific Contender owned by Plaintiff was placed into the stream of commerce in 1978. Permitting Plaintiffs to introduce evidence of a different firearm from 40 years later would not be relevant to this inquiry and would instead inject confusion into the proceedings resulting in unfair prejudice to Defendants.

Upon a close review, the flaws in Plaintiffs' argument become clear. Plaintiffs claim that the type of hammer block design used in the G2 was available

long before the subject Contender was manufactured in 1978 or even designed in the 1960s. Plaintiffs also contend that it was widely utilized in many other firearms that were designed during the same time period as the Contender and even decades before. If the hammer block design advocated by Plaintiffs was so prevalent in 1978 (when the subject Contender was manufactured) or in the early 1960s (when the subject Contender was designed), why would Plaintiffs have to introduce evidence of a modern firearm from 40 years later to demonstrate knowledge or feasibility? The answer is they would not. Plaintiffs – through their expert, Dr. Knox – were free to present at trial any firearms that were available in the 1960s and 1970s which incorporated the hammer block design advocated by Plaintiffs.

In fact, Plaintiffs' expert, Dr. Knox, did just that in his expert report, as he discussed the availability of this hammer block design prior to the 1960s and noted that were firearms available in the 1960s which utilized such a design (such as the K-Frame revolvers). (A-0725, A-0759.) In Dr. Knox's report, he specifically stated that the hammer block safety design he advocated was available in "most other makes and models of revolvers" when the Contender was developed. (*Id.*) Dr. Knox specifically stated that "[t]he technology to design an appropriate and safe hammer block safety was available to Defendants when the incident firearm was manufactured." (A-0755.) During Dr. Knox's depositions, he also testified that

there were "many firearms in the 1960s that had hammer blocks." (DA-105.) He stated "this is not some technology that was unknown in the 1960s." (DA-105.)[11]

Given this backdrop, introducing the G2 firearm was not necessary to show knowledge or feasibility of the alternative design advocated by Plaintiffs. Therefore, the only reason to introduce the G2 would be to mislead the jury. The obvious conclusion is that Plaintiffs sought to introduce the G2 not to prove or establish feasibility of the alternative design, but in an effort to prejudice the jury against Defendants and to confuse the issues. As they acknowledged in their briefing before the Trial Court (in the motion *in limine* and for a new trial), Plaintiffs intended to have their expert testify that the introduction of the G2 forty years after the firearm at issue was designed was evidence of a defect in the Contender at issue, which is impermissible. This is precisely why the Trial Court correctly granted Defendants' pretrial motion.

e. The Trial Court's Ruling Did Not Preclude Plaintiffs From Offering Evidence of a Feasible Alternative Design at Trial.

On appeal, Plaintiffs incorrectly argue that they were prejudiced by the Trial Court's ruling because without the G2, their expert was unable to offer evidence of an alternative design available at the time the Contender was manufactured or

[11] Defendants' Appendix contains additional exhibits from Defendants' Combined Appendix to Motions in Limine, including Dr. Knox's two other depositions from 2021 and 2022.

designed. As already noted, this is incorrect. Plaintiffs' expert (Dr. Knox) opined that the hammer block safety design he advocated was prevalent and available in numerous firearms that predated the design and introduction of the Contender.

Moreover, during trial, Dr. Knox specifically addressed the hammer block design with the rebounding hammer and repeatedly testified that this design was available long before the subject Contender was ever manufactured:

> Q. [I]n a gun not designed this way [like the Contender], what should happen if you were to have the gun, the hammer cocked and decide not to shoot and decide to lower the hammer, what in a properly [sic] gun should happen?
> A. The hammer block should go back up in place when you let go of the trigger.
>
> **Q. In 1978, when this gun was manufactured, was that something that was possible and feasible in the state of the art?**
> **A. Yes.**
>
> Q. **And for how long have there been hammer blocks that would do what you just said** and that is hammer block that would – if you were to cock the gun and de-cock the gun, the hammer block would come back into place again?
> A. **Well before 1978. In fact, there is [sic] hammer block designs that go back well into the 20-century decades before this gun was made.**
>
> **Q. World War II?**
> **A. World War II. Even prior to that, there were hammer block designs.** There were a number of different designs that go back considerably further than 1978.

(A-1124-1125 (emphasis added).) Dr. Knox further testified that the hammer block design he advocated was technologically feasible in 1978 as well as for many

decades prior. (A-1125-1126.)

Despite offering examples of other firearms that utilized hammer block designs in his report, during trial, Dr. Knox did not specifically identify which firearms had this design nor did Dr. Knox discuss with any detail these other firearms. Contrary to Plaintiffs' position on appeal, however, Dr. Knox was not prohibited from doing so. For whatever reason – whether it was a trial strategy or something else – Dr. Knox described the design of a hammer block with a rebounding hammer and testified that this design was prevalent and available *decades before* the subject Contender was manufactured, but he did not offer specific examples of other firearms from that era that utilized this design. As the Trial Court correctly pointed out in the Order on the Motion for New Trial, "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."

In reality, the Trial Court provided Dr. Knox – and Plaintiffs' counsel – great latitude with respect to his testimony, which spanned two days at trial. Dr. Knox was permitted to discuss his other criticisms of the Contender design, including his opinion that the firearm could potentially discharge upon being dropped or bumped (A-1137-1139), despite the fact that there was no evidence in the record of either occurring in this case. A review of Dr. Knox's testimony shows that Dr. Knox was not prohibited – in any way – from introducing evidence of the feasibility of an

alternative design. In fact, it is undisputed that he did offer testimony on this subject. That Dr. Knox made the decision not to discuss specific firearms which incorporated his advocated alternative design during this testimony, that his testimony was confusingly ordered,[12] or that he did not spend more time discussing this topic are not valid bases for objecting on appeal.

The Trial Court's ruling also did not deprive Plaintiffs of the opportunity to provide "a visual refence point to help the jury understand the long-standing hammer block design," as they now contend. (App. Br. at p. 26.) Again, nothing stopped Plaintiffs or Dr. Knox from providing demonstratives or exhibits (photographs, diagrams, other firearms, etc.) explaining the operation of the hammer block design on the Contender and the other firearms that implemented a different design which existed "decades from before the [Contender] was made." (A-1124-1125.) The record is clear: Dr. Knox had every opportunity to offer detailed testimony about the alternative design that – according to him – had been in existence on other firearms for *decades* prior to the introduction of the Contender firearm at issue in this case. He did not do so. On this record, there is simply no basis to conclude that

[12] During the direct examination of Dr. Knox on the morning of the second day of his testimony, Plaintiffs' counsel's first statement to Dr. Knox was, "It's been brought to my attention that in all the stuff I discussed with you yesterday, I didn't go over the very basics of how a bullet or how the Contender makes a bullet fire." (A-1175.) Thus, it was clear that Dr. Knox's testimony was confusing as he discussed the existence of alternative designs *prior to* adequately explaining how the Contender at issue actually operated.

Plaintiffs were prejudiced in any way. Therefore, the decision to preclude evidence related to the G2 should be affirmed.

B. THE TRIAL COURT DID NOT COMMIT PLAIN ERROR BY ASKING CLARIFYING QUESTIONS TO PLAINTIFFS' EXPERT DURING TRIAL.

1. Question Presented.

Did the Trial Court commit plain error by asking clarifying questions to Plaintiffs' expert during trial? Defendants respectfully submit that the answer to this question is "no."

2. Scope of Review.

Generally, the failure to object during trial does not preserve an issue for appeal and constitutes a waiver. *See* Del. Sup. Ct. R. 8; *Pierce v. State*, 270 A.3d 219, 229 (Del. 2022). However, when an error was not brought to the attention of the trial court, an appellate court may sometimes still take notice of "plain errors affecting substantial rights." *See* Del. R. Evid. 103(d); *Ferguson v. State*, 642 A.2d 772, 773 (Del. 1994). Under the plain error standard of review, the error complained of must be so clearly prejudicial to a party's substantial rights as to jeopardize the fairness and integrity of the trial process. *Dutton v. State*, 452 A.2d 127, 146 (Del. 1982). Moreover, the doctrine of plain error is limited to material defects which are apparent on the face of the record; which are basic, serious, and fundamental in their character; and which clearly deprive a party of a substantial right or which clearly show manifest injustice. *Wainwright v. State*, 504 A.2d 109, 113 (Del. 1986). For example, claims of error involving constitutional rights have been accorded appellate review despite the failure of a contemporaneous objection. *Id.*

3. Merits of Argument.

a. Plaintiffs Waived This Issue on Appeal.

Plaintiffs never objected to the Court's questioning during the trial. Del. R. Evid. 614(c) ("A party may object to the court's calling or examining a witness either at the time or at the next opportunity when the jury is not present."). Therefore, Defendants respectfully submit that this issue has been waived.

On appeal, Plaintiffs contend that their counsel did not object to the questioning of Dr. Knox because he was "put in the tenuous position of objecting and contradicting the trial court in circumstances where the trial court had been palpably critical already." (App. Br. at p. 29.) However, the pages of the transcript cited to support this proposition (1244, 1311, and 1316) all came *after* the questions the Trial Court posed to Dr. Knox. Moreover, the cited discussions with counsel occurred outside the presence of the jury and involved (1) a warning *to both Plaintiffs' and Defendants' counsel* not to argue in front of the jury (A-1244); (2) expressing displeasure with *both Plaintiffs' and Defendants' counsel* because they had not yet met-and-conferred on the objections and counter-designations to a deposition that was intended to be introduced at trial (A-1309-1311); and (3) a warning to *both Plaintiffs' and Defendants' out-of-state counsel* that they are admitted pro hac vice and need to abide by the practice procedures in Delaware (A-

1311, 1316).[13] It is disingenuous to insinuate that the Trial Court singled-out Plaintiffs' counsel or to suggest that these admonishments from the Trial Court, which occurred after the Court's clarifying questions to Dr. Knox, somehow justify the failure to timely object. [14]

It is also worth noting that Dr. Knox's testimony started in the afternoon on March 21, 2022 (A-1079) and then continued into the morning the next day (which is when the Trial Court asked the clarifying question Plaintiff now complains about) and then concluded in the afternoon. During this time, there were breaks for the jury and for lunch, and Plaintiffs had ample opportunity to raise an objection outside the presence of the jury. However, Plaintiffs never raised any concern or objection regarding the questions posed by the Trial Court. Given this backdrop, this issue should be considered waived on appeal.

b. The Trial Court Properly Asked Clarifying Questions During Trial.

As Plaintiffs acknowledge, a trial judge may ask clarifying questions of a witness during trial. Del. R. Evid. 614(b); *see also Price v. Blood Bank of Del., Inc.*,

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[13] The Trial Court subsequently apologized for being short with counsel for both parties with respect to this issue. (A-1316.)

[14] In fact, prior to that point in time, only Defendants' counsel had been admonished by the Trial Court for expressing displeasure with a decision to overrule Defendants' objection to the admission of a video prepared by Dr. Knox. (A-1172-1173 (advising counsel, "[D]on't do that again because if you look at me like 'what are you talking about, Judge?', you and I are going to have a long two weeks" and "Don't be disrespectful to me at all.").)

790 A.2d 1203, 1212 (Del. 2002) (explaining that a judge can ask clarifying questions to supplement the questioning of counsel). Only in situations fraught with adverse implications – such as when a judge's questions carry a "tone of skepticism" or when the judge has "peremptorily rejected the expert's opinion" in front of the jury – will the questioning of a witness be considered improper. *Lagola v. Thomas*, 867 A.2d 891, 898 (Del. 2005). No one disputes that it is appropriate to ask questions when the presentation of evidence is "confusing, misleading, or otherwise requires clarification." *Middlebrook v. Ayres*, 2003 WL 21733015, at *1 (Del. Super. Ct. June 3, 2003).

This case involved a unique fifty-year-old firearm and an examination of ammunition (including firing pin impressions), which required discussions of numerous unfamiliar terminology related to internal parts of a firearm (sear, hammer block, etc.) and topics well beyond the knowledge of an ordinary person. The Contender was a single-shot, break-open firearm, which included both a passive safety as well as a manual safety, and the ability to interchange barrels to fire either rimfire or centerfire ammunition. As such, during trial, the Court asked clarifying questions to witnesses, including Plaintiffs' design expert (Dr. Knox) and Defendants' design expert (Derek Watkins).

In terms of the questions posed to Dr. Knox, it is evident that the Trial Court was asking clarifying questions so it and the jury could fully understand how the

firearm operated.[15] (*See* A-116 (asking a question about the operation of the firearm and, specifically, whether the hammer has to be cocked back before it can discharge with a trigger pull); A-1119 (asking a clarifying question about pulling the hammer back and letting it fall); A-1135-1136 (asking a clarifying question about when the action is closed, the hammer is going to "connect with the firing pin").) At one point, the Trial Court asked Dr. Knox to demonstrate for the jury exactly how to prepare the firearm to fire, which he did. (A-1146-1147.) If anything, the Court's questioning served to bolster Dr. Knox's purported expertise, not undermine it. (*Id.*) The Court's questioning of defense expert Mr. Watkins was for similar reasons (explaining how the ammunition worked and to clarify the cut-away image in an exhibit). (A-2220-2221.)[16]

The particular questions Plaintiffs now complain about involved the Trial Court clarifying Dr. Knox's discussion of the operation of the safety (a cross-bolt safety) that was originally on the firearm and the sequence of steps as described in the manual (a 1970s version) that Dr. Knox was discussing at the time. (A-1209-1211.) The prior version of the manual safety – the cross-bolt safety – operated by pushing it and the location of the safe position was marked with an "s". (A-1210.)

[15] The Trial Court is entitled to seek clarification for his own purposes, especially considering that a court will have to rule on motions, such as a motion for directed verdict.

[16] At another point, outside the presence of the jury, the Trial Court stated that it was "[t]rying to educate myself about the gun." (A-1820.)

In other words, Dr. Knox was testifying about the procedural steps necessary to disengage the manual safety and to prepare the gun to fire. (A-1210-1212.) The testimony was confusing because Dr. Knox was testifying about the steps described in an instruction manual that was for an earlier version of the Contender that had a different type of manual safety, which is precisely why the Court sought clarification. This, again, was part and parcel of the manner in which Dr. Knox and Plaintiffs' counsel decided to present Knox's testimony.

Tellingly, in their appellate brief, Plaintiffs fail to provide the context for the Trial Court's clarifying question and do not provide Plaintiffs' counsel's questions and the response that occurred just prior to the Trial Court's questioning. Dr. Knox was testifying as to what was set forth in the 1970s manual as to the proper operating steps and what happens if a user decides not to fire the Contender:

> 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 [the manual] 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.

(A-1211-1212.) After Dr. Knox finished his response, the Trial Court asked the witness about the operation of the safeties as described in the steps in the manual being referenced:

> THE COURT: Talking about the amount of initial construction [instruction] here, which is he 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?
>
> 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.

(A-1212.) As the Trial Court noted in its decision on the Motion for New Trial, this question was posed to clarify the steps of operation as described in the manual being discussed by Dr. Knox: "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 the manual. The Court's questions were asked in a neutral and impartial manner, free from any suggestion that the Court favored one side over the other." (Order on Mot. New Trial at p. 8-9.) Such questioning is

certainly permissible. *See Middlebrook*, 2003 WL 21733015 at *1 (noting that questioning is appropriate when the presentation of evidence is "confusing, misleading, or otherwise requires clarification").

Additionally, Dr. Knox was presented as the *second* witness at trial (after only Mr. Pedicone's friend testified), and his testimony, especially with respect to how the firearm operated, was confusing. Indeed, on the morning of the second day of Dr. Knox's testimony, Plaintiffs' counsel all but acknowledged the confusing nature of Dr. Knox's testimony by asking Dr. Knox to explain to the jury the "basics" regarding "how the Contender makes a bullet fire" because that topic had not been fully discussed during the hours of Dr. Knox's testimony the day prior. (A-1175.)

Further, the clarifying questions posed by the Trial Court to Dr. Knox also included asking whether he was opining that closing the action of the firearm could cause a bullet to fire without a trigger pull. (A-1135 ("Sir, you told us when you put the gun in and put a bullet in and you slammed it shut, does it not fire? Didn't you say that?").) The Trial Court reiterated this question to be sure that the jury fully understood Dr. Knox's testimony on this point:

> THE COURT: Once he pulls the hammer back, puts a bullet in, and then slams it closed, it's going to connect to the firing pin, right?
>
> THE WITNESS. **It's going to connect to the firing pin, that's right.**

(*Id.* (emphasis added).) Clearly, this testimony (and Dr. Knox's opinion on this

point) was detrimental to the defense, but the reality is that the Trial Court endeavored to ensure that the jury (and the Court) understood the testimony that was being offered. This exchange also puts into focus the emptiness of Plaintiffs' current position, as it is clear that the Trial Court appropriately asked clarifying questions in a neutral and impartial manner. As such, the Trial Court's questions posed to Dr. Knox did not "jeopardize the fairness and integrity of the trial process" nor did it deprive Plaintiffs of a substantial right.

A full review of the trial transcript reveals that the Trial Court asked clarifying questions sparingly and solely to understand the distinctive operation of a unique firearm. The Trial Court maintained an impartial attitude and a status of neutrality, asking only minimal questions in front of the jury for purposes of clarifying the record. *Lagola*, 867 A.2d at 898; *see also Lawrence v. State*, 925 A.2d 504, 510 (Del. 2007) (explaining that the questioning of a witness to resolve confusion was fair and impartial); *Quirico v. State*, 841 A.2d 308, 312 (Del. 2004) (holding that the questioning of a police sergeant about a decision to charge the defendant did not compromise the principles of self-restraint and impartiality and was not error). In fact, the Trial Court's jury instructions specifically reiterated this point:

> Now, nothing I have said since the trial began should be taken as an opinion about the outcome of the case. You should understand that no favoritism or partisan meaning was intended in any ruling I made during the trial or even by these instructions. Further, you must not view these instructions as an opinion about the facts. You are the judge of the facts, not the Court.

(A-2468.)

Finally, Plaintiffs' argument that the questions posed by the Court caused Defendants' counsel to "focus more forcefully" on the design of the manual safety is simply not accurate. Contrary to Plaintiffs' contention, Defendants focused on the fact that the firearm was designed with a passive and *a manual safety* throughout the course of the trial – including in opening statements. (*See* A-0987 ("Now you are also going to hear that the firearm has a manual safety and the manual safety was not used. That's undisputed."); A-0990 ("So the manual safety is a switch. It's on the top of the hammer. It's position such that it stairs [sic] the user in the face."); A-0991 ("So what's important is using the manual safety. If you use the manual safety, put it in the center position, you cannot make a Contender fire by any means. You can't do anything. You can't make it fire."). During his own opening statement, Plaintiffs' counsel addressed the fact that the Contender design incorporated a manual safety. (A-0957 ("This gun also had a manual safety, which is – remember we are talking about the selector switch. The manual safety is if you put the selector switch in the middle spot. There's a little red dot right there. And if you put it in the middle, that also protects the hammer from hitting the firing pin.").) Moreover, the first witness – who also owned a Contender and was present at the time of Mr. Pedicone's accident – was questioned about the operation of the manual safety on the Contender. (A-1060-1061; *see also* A-1055.) The manual safety on the

Contender is part of its design, and one of Defendants' primary arguments was that the firearm was not negligently designed because it had a manual safety in addition to a passive safety.

Accordingly, there is no evidence in the record to suggest that the Court's questions to clarify the testimony impaired Plaintiffs' ability to present their case or otherwise demonstrated a lack of impartiality. Indeed, the complete trial record reflects just the opposite. Therefore, Plaintiffs' point of error is baseless.

c. Plaintiffs Inappropriately Take the Trial Record Out of Context.

Plaintiffs make the astounding argument that the Trial Court "failed to maintain its rigorous posture of neutrality" because:

> The 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 [sic] matter most in the case. As the trial court would later tell defense 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 so 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 heard the same observation as a practical matter through the court's questions. The trial court itself would later reflect on these exchanges and apologize to counsel. A-1244, 1316.

(App. Br. at p. 36-37.) This is impermissible cherry-picking by Plaintiffs and is, frankly, an improper and misdirected argument to assert.

The comment referenced above to defense counsel, which was *outside the presence of the jury*, occurred when the Court was discussing trial logistics

(remaining defense witnesses, proposed jury instruction, the date for the prayer conference, and whether Plaintiffs intended to call a rebuttal witness).[17] (A-2169-2170.) During this discussion, Plaintiffs' counsel raised an objection to Defendants' next intended witness (mechanical engineer expert, Derek Watkins) as being duplicative of a prior witness (criminalist and shooting scene reconstructionist, Lucien Haag). (*Id.*) The Court advised that it would consider an objection at the time of the testimony and would make a ruling if the testimony became too cumulative. (A-2170.) During this discussion, the Trial Court noted that it was not sure why Defendants intended to provide other explanations for how the accident happened beyond what was already discussed by Lucien Haag (who had analyzed the evidence and firing pin impressions and concluded that the accident occurred due to a trigger pull), but stated that Defendants "have this other explanation as to what may have happened, so I will let them explore it." (*Id.*) This discussion of Defendants' intended expert testimony and whether it was cumulative – which was done outside the presence of the jury – has absolutely no bearing on the arguments raised by Plaintiffs on appeal.

Plaintiffs' other citations also do not support their position. The first reference (A-1200-1201) involved a discussion with counsel *outside the presence of the* jury

[17] Plaintiffs had previously indicated that they were going to call Dr. Knox as a rebuttal witness. (A-2207.) However, Plaintiffs ultimately chose not to do so.

and related to the Court overruling Defendants' objections to Plaintiffs utilizing an older version of the instruction manual as an exhibit because that manual related to a configuration of the Contender that predated the subject Contender. (*See* A-1191-1201.) The other cited discussion also occurred *outside the presence of the jury* and related to an objection to the scope of cross-examination of one of Defendants' witnesses. (A-1837-1841.) These exchanges do not – in any way – support Plaintiffs' contentions on appeal or demonstrate that the Trial Court – a senior judge with thirty years of experience on the bench – failed to remain neutral.[18]

Moreover, it is beyond the pale for Plaintiffs to suggest that the Trial Court subsequently apologized to counsel for "these exchanges." The pages of the trial transcript cited by Plaintiffs (A-1244, A-1316) occurred outside the presence of the jury and involved a warning *to both parties' counsel* not to argue in front of the jury (A-1244) and a warning to *both parties' out-of-state counsel* that they are admitted

[18] At the time of trial, Judge Carpenter was Delaware Superior Court's most senior judge and had served in such a capacity for almost thirty years. In 2021, Judge Carpenter was awarded the Delaware State Bar Association's highest honor – the First State Distinguished Service Award – in recognition of the respect he brought to the legal profession and the Delaware Bar. Judge Carpenter retired on December 21, 2022, with Superior Court President Judge Jan R. Jurden stating that, "Judge Carpenter has devoted decades of his life to the administration of justice" and "[h]e has served this Court, the Judiciary and our State with the utmost distinction." *See* Delaware Superior Court's Senior Judge William C. Carpenter, Jr. Retires After Nearly 30 Years on the Bench, Delaware Courts, courts.delaware.gov, *available at https://courts.delaware.gov/forms/download.aspx?id=174218#:~:text=Carpenter%20has%20served%20under%20four,John%20Carney.*

pro hac vice and need to abide by the practice procedures in Delaware (A-1311). The Trial Court's apology to counsel was in reference to being short with counsel with respect to these aforementioned issues. (A-1316.) Plaintiffs' claim that this apology related to the propriety of the Trial Court's questioning of Dr. Knox is inaccurate and misplaced.

V.

CONCLUSION

For all of the foregoing reasons, Plaintiffs' claims of error are without a basis in fact or law. As such, the jury verdict and judgment in favor of Defendants should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Timothy Jay Houseal, Esquire, hereby certify that on this 3rd day of April 2023, the foregoing Answering Brief has been e-filed via File & ServeXpress and served upon the following counsel of record:

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