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Statement of the Issue:

Whether Indiana Code § 34-12-3-3 bars Dwayne Runnells (“Runnells”) from suing KS&E Sports and Ellis (KS&E) for its unlawful sale of a firearm.

Statement of Amicus Interest:

The Indiana Trial Lawyers Association (“ITLA”) has an interest in ensuring that Hoosiers have open access to the Courts and equal protection under the law including an interest in preserving claims against unlawful and negligent gun sellers.

Summary of Argument:

Indiana Code §34-12-3-3 does not prohibit a victim of an unlawful gun sale from bringing an action against an unlawful gun seller. KS&E requests that this Court ignore the plain and ordinary language of IC § 34-12-3-3, ignore rules of statutory interpretation, and to read in an immunity that is neither expressed in the statute and is contrary to its terms. Specifically, IC 34-12-3-3 bars certain claims against gun sellers for their “lawful” conduct in the sale of a firearm. The statute, however, does not prohibit an action against a gun seller for their unlawful conduct, including theories under negligence entrustment and nuisance.

For the last sixteen years, state legislatures and Congress have enacted legislation attempting to protect firearm manufacturers, wholesalers, and retailers. The legislative language and the interpretation by Courts thereafter have differed in nearly every circumstance. There is no comparable state or federal statute that bars a claim against a retailer for an unlawful sale. In no instance has a Court specifically barred all claims against a firearm retailer or held that a law like IC §34-12-3-3 provides gun seller immunity from an unlawful act, or blanket immunity once the firearm is used in the commission of a crime.

To hold IC §34-12-3-3 bars Runnels claims, would be tantamount to a taking of Runnels property and chose in action against an unlawful actor and deny him equal protection, due course of law, and his privileges and immunities. Thus, if IC 34-12-3-3 bars Runnels claims, the statute would violate Runnels’ federal and state constitutional rights.

Argument:

I. Standard of Review

This matter arrives at this Court upon an Order denying a motion for judgment on the pleadings, and it involves an issue of first impression in the interpretation of IC §34-12-3-3.

This Court reviews the trial court's ruling on a motion for judgment on the pleadings *de novo* and accepts the well pleaded complaint's allegations as true. *Veolia Water Indianapolis, LLC v. Nat'l Trust Ins. Co.*, 3 N.E.3d 1, 5 (Ind.) on reh'g, 12 N.E.3d 240 (Ind. 2014). The trial court's denial of a motion for judgment on the pleadings will only be reversed if there is no circumstance relief could be granted. *Id.*

This Court reviews a trial court's interpretation of a statute *de novo*, and the Court owes no deference to the trial court. *Hillebrand v. Estate of Large*, 914 N.E.2d 846, 848 (Ind. Ct. App. 2009) (citing *Sec. Trust Corp. v. Estate of Fisher ex. rel. Roy*, 797 N.E.2d 792 (Ind. Ct. App. 2003), *trans. denied*). The Court's "main objective is to determine, effect and implement the intent of the legislature." *Id.* (citing *Estate of Fisher*, 797 N.E.2d at 793). Statutes that are in derogation of common law must be strictly construed. *Hillebrand*, 914 N.E.2d at 849 (citing *Durham v. U-Haul Int'l*, 745 N.E.2d 755, 759 (Ind. 2001), *reh'g denied*). However, when the Court interprets a statute, it must read the statute as a whole and ensure that no portion is rendered meaningless. *Id.*

Accepting the allegations in Runnels' complaint to be true, the question before the Court is whether IC § 34-12-3-3 prohibits Runnels from suing KS&E for its unlawful conduct.

II. The principles of statutory construction, particular, plain and ordinary meaning and *in pari materia* entitle Runnels to his action against KS&E Sports.

Indiana Code § 1-1-4-1 provides Courts legislative guidance on the interpretation of statutes. It provides in relevant part that: ". . . words and phrases [of a statute] shall be taken in their plain, or ordinary and usual, sense. Technical words and phrases having a peculiar and appropriate meaning in

law shall be understood according to their technical import.” *Id.* at (1). Courts reviewing statutes may not interpret statutes that are unambiguous but must give them their plain and ordinary meaning. *Hinshaw v. Bd. of Comm’rs of Jay Cnty.*, 611 N.E.2d 637, 639 (Ind. 1993). To the extent there is an ambiguity, it is well-settled that when statutes relate to the same subject matter or are *in pari materia*, all the statutes, even if enacted years later, must be construed together. *Elliot v. Brazil Block Coal Co.*, 25 Ind. App. 592, 596 (Ind. Ct. App. 1900) (“All statutes of the State on the subject of death by wrongful act are *in pari materia*, and must be construed together.” *Id.* at 592). When the Courts have interpreted statutes, and the legislature has been given time to abrogate the Court’s interpretation or otherwise change the statute but does not, it provides further strength that the method of the Court’s interpretation of the statute and its ultimate holding were correct. *Durham*, 745 N.E.2d at 759.

“In construing a statutory provision, we must consider the statute as an entirety, with each part being viewed not as an isolated fragment but with reference to all the other companion provisions.” *Hinshaw v. Bd. of Comm’rs of Jay Cnty.*, 611 N.E.2d at 639. This Court presumes that “the legislature is aware of the common law and intends to make no change therein beyond its declaration either by express terms or unmistakable implication.” *Id.*

The statute at issue here is in derogation of the common law and resides under the chapter “Legal Actions Involving Firearms and Ammunition Manufacturers, Trade Associations, and Sellers.”

I.C. §34-12-3. The statute on “Prohibited Actions” provides:

Sec. 3. Except as provided in section 5(1) or 5(2) of this chapter, a person may not bring an action against a firearms or ammunition manufacturer, trade association, or seller for:

- (1) recovery of damages resulting from, or injunctive relief or abatement of a nuisance relating to, the lawful:
 - (A) design;
 - (B) manufacture;
 - (C) marketing; or
 - (D) sale;

- of a firearm or ammunition for a firearm; or
- (2) recovery of damages resulting from the criminal or unlawful misuse of a firearm or ammunition for a firearm by a third party.

I.C. § 34-12-3-3 emphasis added.¹

KS&E did not once address the statute's plain and ordinary term "lawful" and the clear declaration of the legislature that actions are only prohibited when the seller's conduct is lawful. Black's Law Dictionary defines "unlawful conduct" as "Conduct that is not authorized by law; a violation of a civil or criminal law." 7th Ed. at 1536. Since subsection (1) clearly does not prohibit Runnel's action, KS&E only argues that subsection (2) prohibits Runnel's claims.

Runnel's claims, however, are not the result of a criminal actor's misuse of a firearm. Instead, the claims are the result of KS&E's nuisance and negligence. Contrary to KS&E's *Statement of the Facts*, Runnel's injuries arise out of KS&E's unlawful sale of a firearm. *Appellant's Br.* at 4.

KS&E's theory of the meaning of the statute is wrong for a host of reasons. KS&E's requested broad interpretation of subsection (2) would constitute blanket civil immunity for all gun sellers even for their criminal conduct. Specifically, if subsection (2) were interpreted under KS&E's theory and read wholly independent of subsection (1) and the term "lawful" against all rules of statutory interpretation, then KS&E would be absolved all civil liability including for criminal conduct. Under KS&E's interpretation, a gun seller that sells a firearm for \$1 to a harden and known criminal that walked into its store and that promised to kill the first person he saw outside the store, would have no civil liability.

¹ Indiana Code § 34-12-3-5 under the section titled "Allowable actions" provides:

Sec. 5. Nothing in this chapter may be construed to prohibit a person from bringing an action against a firearms or ammunition manufacturer, trade association, or seller for recovery of damages for the following:

- (1) Breach of contract or warranty concerning firearms or ammunition purchased by a person.
- (2) Damage or harm to a person or to property owned or leased by a person caused by a defective firearm or ammunition.
- (3) Injunctive relief to enforce a valid statute, rule, or ordinance. However, a person may not bring an

Otherwise stated, under KS&E's interpretation of the statute, no civil action may ever be brought against a gun seller *if* a criminal uses the gun. Accepting KS&E's interpretation of the statute, KS&E's liability ends the moment a criminal uses a firearm purchased in its store. KS&E's interpretation is flawed and invites an absurd result. Accepting the plain terms of the statute and the term "lawful" it is unequivocal – The General Assembly only wished to prohibit actions against lawful gun sellers not unlawful gun sellers.

Secondly, it is clear the legislature did not intend to provide blanket civil immunity for a gun seller's conduct when analyzing those claims that are exceptions to section 3 of the statute. If the Court were to accept KS&E's argument about subsection 3(2) then IC § 34-12-3-5(3) would prohibit certain actions against gun sellers, including an action maintained to enjoin an unlawful gun seller's conduct because subsection (3) reads "a person may not bring an action seeking injunctive relief if that action is barred under section 3 of this chapter." A lawful consideration must be included in assessing the gun seller's conduct, not only because it expressed in the statute, but also because not considering a gun seller's lawfulness would excuse all of its conduct.

Another indication that the legislature did not intend to provide immunity is the term does not exist in the statute and there is a separate statute that speaks plainly to gun immunity - IC 34-30-20-1. Rules of statutory construction guide the Court to construe the statute narrowly since it is derogation of common law, and *in para materia* review asks the Court to consider similar subsections within the statute and other statutes that regard the same subject matter. IC 34-30-20-1 provides:

A person is immune from civil liability based on an act or omission related to the use of a firearm or ammunition for a firearm by another person if the other person directly or indirectly obtained the firearm or ammunition for a firearm through the commission of the following:

- (1) Burglary (IC 35-43-2-1).

action seeking injunctive relief if that action is barred under section 3 of this chapter.

- (2) Robbery (IC 35-42-5-1).
- (3) Theft (IC 35-43-4-2).
- (4) Receiving stolen property (IC 35-43-4-2).
- (5) Criminal conversion (IC 35-43-4-3).

Unlike IC § 34-12-3-3 at issues here, IC § 34-30-20-1 uses the term “immunity” and proscribes the circumstances under which a person is immune from civil liability when losing control of a firearm. Nothing in this list provides KS&E the immunity they are seeking. There is no gun seller immunity. If there is evidence KS&E knew or should have known of the straw man purchase and failed its duty of care to Runnels or otherwise acted in an unlawful manner, the legislature did not wish to provide aiders and abettors immunity for their unlawful conduct.

Our Supreme Court consistently construes statutes in derogation of common law narrowly, particularly statutes related to immunity. Indiana’s reviewing Courts have held the Indiana Tort Claims Act does not provide officer’s immunity for breaching their standard of care to claims of government negligence in operating emergency vehicles. *Patrick v. Miresso*, 848 N.E.2d 1083, 1086 (Ind. 2006) citing *Quakenbush v. Lackey*, 622 N.E.2d 1284 (Ind.1993). The Courts will not read in the removal of standard of care when it is not expressly stated in a statute. IC § 34-12-3-3 does not obviate a gun seller’s standard of care and this Court should not blue pencil it into the statute.

IC § 34-12-3-3 does not abrogate Runnels claims of KS&E’s unlawfulness, and the plain language of the statute as compared to similar sections and subsections make it clear – the statute only bars claims against a lawful gun seller.

III. There is no comparable state or federal statute or case that bars a claim against a gun retailer for its unlawful conduct.

In 1999, Georgia was the first state to enact a statute to protect gun sellers and to redefine common law products liability standards. Specifically, GA CODE ANN § 16-11-184(a)(b) (1999) defines that the “sale of firearms to the public” is not an unreasonably dangerous activity and does not

constitute a nuisance *per se*. “State Laws Forbidding Municipalities from Suing Firearms Industry: Will Firearms Immunity Laws Close the Courthouse Door.” *Journal of Health Care Law & Policy*, Vol. 4:126 Issue 1 at 129, 136 (2001).

At or about the same time, the Eastern District Court of New York held that:

it is the duty of manufactures of a uniquely hazardous product, designed to kill and wound human beings, to take reasonable steps available at the point of “their” sale to primary distributors to reduce the possibility that these instruments will fall into the hands of those likely to misuse them.”

Id. at 134 *citing* *Hamilton v. Accu-Tek*, 62 F. Supp. 2d. 802 (E.D.N.Y. 1999).

The gun industry felt the momentum of an onslaught of municipalities suing gun manufacturers and sellers for their hand in dealing deadly weapons that were destroying their communities. In response, statutes were enacted to narrow and control statutorily created municipalities from making certain claims against the gun industry. Eventually, the United States Congress stepped in and introduced legislation to corral gun sale claims.

The “Protection of Lawful Commerce in Arms Act” (“PLCAA”) bars certain claims against *lawful* gun sellers. 15 U.S.C. 7901. The federal statute not only applied to federal claims but also to state claims. The PLCAA barred what it titled “qualified civil liability action.” 15 U.S.C 7902. It, however, specifically excluded from the definition of “qualified civil liability action” claims like *Runnels* where a gun seller knew or should have known, aided or abetted, conspired, negligently entrusted, or had reasonable cause to believe a firearm would be involved in straw purchase or misused by a criminal. 15 U.S.C. 7903(5).

Before PLCAA was enacted, the Indiana Supreme Court upheld negligence and public nuisance claims against firearms manufacturers and sellers as supported by Indiana law in *City of Gary v. Smith & Wesson Corp.*, 801 N.E.2d 1222 (2003). The Court held that the a claim against a seller does not

necessarily require the violation of a statute and that its mere unreasonableness and nuisance may be grounds for an acceptable action. *Id.* at 1232-33.

After PLCAA was enacted, the courts were faced with the question of whether those claims against firearms companies were statutorily barred. After the trial court found that PLCAA was unconstitutional, this Court, in *Smith & Wesson Corp. v. City of Gary*, 875 N.E.2d 422 (Ind. Ct. App. 2007), addressed the issue with the United States as an intervener. This Court avoided the Constitutional problems that would be faced by finding that PLCAA barred claims fully supported by Indiana law, and held that given the PLCAA's unambiguous terms, the city's claims fell within the exceptions to a qualified civil liability claim. *Id.* at 435.

Even in decisions that have dismissed claims because of the application of the PLCAA, the Courts do throw out claims like Runnels. *See Ileto v. Glock*, 565 F.3d 1126, 1138-42 (9th Cir. 2009) (since none of the claims implicated the gun seller's aiding and abetting or maintaining a nuisance, the PLCAA applied and barred the claims); *Estate of Charlot v. Bushmaster Firearms, Inc.*, 628 F. Supp. 2d 174 (D.D.C. 2009) (PLCAA barred victim of DC sniper's Estate to recover under a city ordinance of strict liability.)

Since there is no state or federal statute that has declared or even a court that has interpreted any statute to bar civil liability claims against unlawful gun sellers, KS&E's desperate attempt at blanket immunity must be denied.

IV. If the Court holds that IC § 34-12-3-3 bars Runnels claims against KS&E Sports, the statute violates Runnels federal and state constitutional rights.

"A cause of action is a species of property protected by the 14th Amendment (to the United States Constitution)" *Journal of Health Care Law & Policy*, Vol. 4:126 Issue 1 at 144 *citing Logan v. Zimmerman Brush Co.*, 339 U.S. 306 (1982) (*citing* U.S.C.A. Cons. Amend 14). A statute barring an individual's right to bring a cause of action must undergo strict review versus statutes that bar a

statutorily created municipalities cause of action. *Id. citing Lujan v. Defenders of Wild Life*, 504 U.S. 555, 559-562 (1982). Here, KS&E ask this Court to unconstitutionally interpret IC § 34-12-3-3 so as to bar all individual's civil actions against gun sellers.

To be constitutional, the statute must accord disparate treatment that is reasonably related to the inherent characteristics distinguishable to the unequally treated class and provide preferential treatment equally to all those similarly situated. *VanDam Estate v. Mid-American Sound*, 25 N.E.3d 165 (Ind. Ct. App. 2015) citing Ind. Const. art. 1 §23. The statute will be presumed constitutional, until it is challenged. *Id.* at 170-71. If the statute is subject to two interpretations, one constitutional and the other not, the Courts will hold the statutory meaning so as to preserve the constitutionality of the statute. *Id.*

Additionally, the statute must not offend an individual's right to open access to the Courts. *Id.* at 171 citing Ind. Const. art. 1 § 12. "All courts shall be open; and every person, for injury done to him in him . . . shall have remedy by due course of law." *Id.* The legislature is not prohibited from eliminating a common law tort, but section 12 requires legislation that deprives a litigant of a common law or statutory claim to relate it to a rational legislative purpose. *Id. citing McIntosh v. Melroe Co., a Div. of Clark Equip. Co.*, 729 N.E.2d 972, 980 (Ind. 2000).

The question before the Court is whether, under KS&E's interpretation of the statute, KS&E is constitutionally granted immunity from all civil actions to recover damages for its nuisance, negligence, and criminal conduct. Here, there is no rational legislative purpose to interpret IC §34-12-3-3 to bar all civil actions against gun sellers, but there is a rational purpose to eliminate those causes of action where the gun seller's conduct is lawful. Thus, the only interpretation available is to consider the totality of the statute, and the "lawfulness" of the gun seller's conduct. There is no statute and no Court on review that provides a single class of individuals, like a gun seller, total immunity from civil liability. Assuming

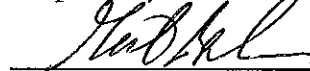
arguendo that the statute fully bars all civil actions against gun sellers, a victim of a gun seller's unlawful conduct would have absolutely no recourse in the law.

Clearly, it was the intent of the General Assembly to rationally eliminate causes of action against lawful gun sellers. To eliminate all causes of action against gun sellers even for their unlawful conduct would not have any rational basis and would be unconstitutional.

Conclusion:

Amicus, the Indiana Trial Lawyers Association, by counsel, Nicholas F. Baker, respectfully requests the Court affirm the trial court's finding that Indiana Code § 34-12-3-3 does not bar Runnels claims against KS&E Sports and Ellis.

Respectfully submitted,



Nicholas F. Baker (26248-49)

WORD CERTIFICATE

I verify that this brief contain no more than 4,200 words.



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the following counsel of record by forwarding a copy of same by First Class U. S. Mail this 3rd day of August, 2015.

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