

IN THE INDIANA SUPREME COURT
NO. _____

KS&E Sports and Edward Ellis,) Indiana Court of Appeals
Appellants/Defendants,) Cause No. 49A02-1501-CT-00042
v.)
Dwayne H. Runnels,) Interlocutory Appeal from the
Appellee/Plaintiff.) Marion Superior Court
Civil Division Room 11
The Honorable John F. Hanley, Judge
Trial Court Case
49D11-1312-CT-044030

**BRIEF OF APPELLEE/PLAINTIFF DWAYNE H. RUNNELS
IN RESPONSE TO PETITION TO TRANSFER**

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I. INTRODUCTION

Appellee-Plaintiff Indianapolis Police Officer Runnels (“Officer Runnels”) was shot in the line of a duty by a convicted felon who could not legally obtain a gun, but was able to arm himself through a negligent, illegal straw sale by Appellant-Defendant KS&E Sports (“KS&E”). In a lawsuit filed almost 2 ½ years ago, Officer Runnels alleged—and the Court must accept as true—that he was injured as a result of KS&E’s negligent and illegal sale of the firearm. Officer Runnels has a right to pursue his claims under well-established Indiana law, including this Court’s decision analyzing comparative fault in *Santelli v. Rahmatullah*, 933 N.E. 2d 167, 177 (Ind. 2013) and more than a century of precedent establishing that negligent transferors of firearms cause independent, proximate harm to shooting victims. *See, e.g., City of Gary v. Smith & Wesson Corp.*, 801 N.E.2d 1222 (Ind. 2003) (“Gary”); *Rubin v. Johnson*, 550 N.E.2d 324, 331 (Ind. Ct. App. 1990); *Binford v. Johnston*, 82 Ind. 426, 432 (Ind. 1882). However, Officer Runnels has been unable to even proceed to discovery, because KS&E has claimed that in Indiana Code § 34-12-3-3, the General Assembly *sub silentio* overturned longstanding Indiana law to give gun sellers broad, unprecedented immunity from civil liability law, even if their conduct is negligent or illegal, and constituted a legal cause of injury under Indiana law. Indeed, according to KS&E, the General Assembly provided gun sellers immunity even if they intentionally supply criminals with guns with the express purpose of wounding or killing police officers (or anyone else), and profit from that act. The trial court and the Court of Appeals properly rejected that argument, and there is no need to revisit those decisions.

KS&E’s arguments are at odds with the plain language of the law. The Court of Appeals properly held that the General Assembly meant what it said; firearms sellers may not be held liable for damages that simply result from the proper sale of a gun (that is, when the gun seller

did nothing wrong), or for damages that result from a third party's criminal or unlawful misuse of a gun (that is, the portion of damages that are not caused by the gun seller's negligent or illegal conduct). But the General Assembly was careful not to say what KS&E now attempts to insert into Indiana Code § 34-12-3-3 -- *i.e.*, firearms seller immunity for damages caused by the seller's own wrongful conduct. That reading of Indiana law is in accord with all applicable rules of statutory construction, and common sense. There is no reason to further delay Officer Runnels' case. The Petition should be denied.

II. BACKGROUND

On December 10, 2013, Officer Runnels filed this lawsuit against KS&E and other parties because KS&E supplied the felon who shot him with a gun through an illegal and negligent straw sale, for which KS&E is liable under well-established negligence, negligent entrustment, negligence per se, and public nuisance law. KS&E was no stranger to selling crime guns; while about 90% of firearms sellers sell zero (0) guns traced to crime in a given year, KS&E sold 529 crime guns in 1996-2000 alone, more than 99.9% of firearms dealers in America. Complaint and Demand for Jury Trial at 11, *Runnels v. KS&E Sports, et al.*, No. 49D11-1312-CT-044030 (Ind. Super. Ct. Marion Cty. Dec. 10, 2013). KS&E moved to dismiss, and Judge Hanley rejected KS&E's arguments on October 21, 2014. After the trial court certified the ruling for interlocutory review, the Court of Appeals affirmed the court's ruling. KS&E now petitions for transfer to this Court.

III. ARGUMENT

A. REVIEW IS NOT WARRANTED.

All considerations governing this Court's transfer decision recommend denial. IND. R. APP. P. 57(H). While KS&E inaccurately claims that the Court of Appeals' decision conflicts

with other decisions, it does not. Nor does it raise a question of great public importance. Indeed, in similar circumstances this Court declined to review the Court of Appeals' decision in *Gary* that found the Protection of Lawful Commerce in Arms Act ("PLCAA"), a purported immunity statute, did not require immediate dismissal of the City's lawsuit. *Smith & Wesson Corp. v. City of Gary*, 875 N.E.2d 422 (Ind. Ct. App. 2007), *trans. denied*, 915 N.E.2d 978 (Ind. 2009). This interlocutory order is also unsuitable for transfer.

B. THE COURT OF APPEALS CORRECTLY HELD THAT INDIANA CODE § 34-12-3-3 DOES NOT OVERRULE INDIANA PRECEDENT HOLDING THAT FIREARM SELLERS CAN BE LIABLE FOR DAMAGES RESULTING FROM NEGLIGENT OR ILLEGAL GUN SALES.

The Court of Appeals correctly applied fundamental rules of statutory construction to conclude that the General Assembly was "unambiguous" and meant precisely what it said in enacting Indiana Code § 34-12-3-3. *KS&E Sports v. Runnels*, 2016 Ind. App. LEXIS 78, 17, 18 (Ind. Ct. App. Mar. 17, 2016). As Section 3(1) bars an action "for [] Recovery of damages resulting from . . . the lawful . . . sale of a firearm . . .," the Court logically held that it "bars victims of gun violence from pursuing claims against firearms sellers who are alleged to have done nothing wrong beyond lawfully selling a firearm . . ." *Id.* at 17. As Judge Brown noted in her concurrence, "in construing a statute, '[i]t is just as important to recognize what the statute does not say as it is to recognize what it does say.'" *Id.* at 19 (quoting *Goodrich Quality Theaters, Inc. v. Fostcorp Heating & Cooling, Inc.*, 39 N.E.3d 660, 665 (Ind. 2015)). Therefore, while the law bars claims for damages when gun dealers do nothing wrong, the law does *not* bar actions for damages that result from the negligent or illegal actions of dealers. The Court's decision gives the words chosen by the legislature their plain and ordinary meaning, conforms with longstanding principles of comparative fault and proximate causation under Indiana law, and fully comports with common sense. Indeed, there are no grounds to find that the General

Assembly saw fit to provide unique and unprecedented immunity for gun dealers who negligently or illegally supply criminals, contribute to gun violence, and profit from it.

The Court's reading of Section 3(2) is similarly correct. Section 2 bars actions for "recovery of damages resulting from the criminal or unlawful misuse of a firearm . . . by a third party," which the Court held "provides that even where a firearm seller has acted unlawfully, the section limits the seller's exposure to liability by barring plaintiffs from holding him accountable for the portion of damages that results from the criminal or unlawful misuse of a firearm by a third party." *KS&E Sports*, 2016 Ind. App. LEXIS 78 at 17-18. Again, the Court properly held that the General Assembly meant what it said, and did not mean what it did not say. *See, e.g., KS&E Sports*, 2016 Ind. App. LEXIS 78 at 23 (Brown, J., concurring) (finding the statute was simply "codifying existing Indiana comparative fault law" and "freezing the common law"). Hence, the law does not bar Officer Runnels' action for recovery of those damages resulting from KS&E's wrongful conduct.

By contrast, KS&E's construction ignores key statutory language and principles of statutory construction underlying the Court's decision. For instance, as Judge Brown noted, statutes that operate in derogation of the common law must be strictly construed, and courts must presume that the legislature would not intend to change the common law without making its intent clear through express statement or unmistakable implication. *Id.* at 19, citing *JPMorgan Chase Bank, N.A. v. Claybridge Homeowners Ass'n, Inc.*, 39 N.E.3d 666, 671 (Ind. 2015), *Preferred Prof'l Ins. Co. v. West*, 23 N.E.3d 716, 727 (Ind. Ct. App. 2014). KS&E contends that the General Assembly intended to reverse over a century of Indiana common law, including this Court's unanimous decision in *Gary and Rubin*, which hold that firearms sellers can be liable for criminal shootings resulting from negligent or illegal sales. However, the General Assembly did

not clearly overturn that precedent. Therefore, the law must be read to not disturb that case law. KS&E simply ignores the Court of Appeals' correct application of Indiana law.

Nor does KS&E address the fact—also properly relied on by the Court—that the General Assembly “knew how to write a statute expressly derogating the common law and granting immunity from civil liability, and it chose not to do so regarding the unlawful sale of firearms for firearms sellers in Ind. Code § 34-12-3-3.” *KS&E Sports*, 2016 Ind. App. LEXIS 78 at 22-23. As Judge Brown explained, this is demonstrated by the General Assembly’s response, in the 2004 legislative session, to two 2003 rulings by this Court, one recognizing liability of negligent firearms owners in *Heck v. Stoffer*, and the other recognizing liability of negligent firearms sellers in *Gary*. The General Assembly in 2004 unmistakably modified *Heck*, providing “Immunity for Misuse of a Firearm or Ammunition by a Person Other Than the Owner” in Pub. L. No. 80-2004. *Id.* at 21-22. In the same session, it amended Ind. Code § 34-12-3-3. If the General Assembly actually intended to provide the broad immunity for negligent and illegal firearms sellers that KS&E contends, it would have clearly overruled *Gary*. It did not. KS&E simply ignores the Court’s clear logic.

The Court also properly rejected KS&E’s argument that the General Assembly’s recent amendment to the law somehow changed its meaning. It did not. *Id.* at 25-26. The amendment only changed the effective date of the law, purporting to apply it retroactively. Indeed, the amendment was passed after Judge Hanley rejected KS&E’s argument that the law provided it with immunity, yet the General Assembly pointedly did not amend the substance of the law, as it would have if it disagreed with Judge Hanley’s ruling.

KS&E’s analysis of the law is both unreliable and flawed. As an initial matter, KS&E is wrong to inexplicably insist that § 34-12-3-3 uses the term “prohibits a person from bringing an

action.”¹ Pet. at 5; *see also id.* (“each of them explicitly ‘prohibits a person from bringing an action’”). No such language appears in that section. To the contrary, the legislature made it clear that, in parallel, both Section 1 and Section 2 of the law only limits the “recovery of damages” against firearms sellers for harm that do not result from their wrongful conduct. Section (1) disallows damages resulting from, *inter alia*, a “lawful” firearm sale – implicitly allowing recovery of damages resulting from an unlawful firearms sale, such as Officer Runnels’ case. Section (2) disallows damages resulting from the “criminal or unlawful misuse” by a third party of a firearm – implicitly allowing recovery of damages resulting from other causes, such as negligent sales. Whether entire cases or certain damages claims are barred depends on the breadth of the claims asserted. KS&E’s argument that the law “is [n]ot a Codification of Comparative Fault,” Pet. at 7, ignores the plain language of the law.

C. **THE COURT PROPERLY FOLLOWED PRECEDENT, AND DID NOT CONTRADICT PRECEDENT AS KS&E CLAIMS.**

KS&E makes an unfounded claim that “the decision by the Court of Appeals conflicts with prior decisions of both the Supreme Court and the Court of Appeals” Pet. at 4. But each case that KS&E claims conflicts with the Court’s decision is actually consistent with it.

For instance, KS&E’s reliance on *Foster v. Percy*, 387 N.E.2d 446 (1979) to claim that “the purpose of an *immunity statute* is to protect a particular group from having to even defend themselves against certain claims. . . .” is misplaced. Pet. at 10 (emphasis added). Indeed, the Court in *Foster* made clear that its analysis was primarily rooted in common law immunity. *Foster*, 387 N.E.2d at 449 (“While we base our decision primarily on the common law immunity traditionally accorded to prosecuting attorneys, we also note that the duty to inform the public

¹ The quoted language (with a tense change that KS&E does not account for) is from § 34-12-3-5, which is not at issue in this case, and even there the phrase is used to state actions for recovery of damages that are *allowable*, not prohibited.

can be characterized as a discretionary function and thus would fall within the absolute immunity granted under the Indiana Tort Claims Act.”). The only tangential reference to an immunity statute in *Foster*, moreover, is entirely consistent with the Court of Appeals’ decision, as it notes that a prosecutor is only immune for conduct within the scope of his duty, but has “no opinion as to the liability of prosecuting attorneys or their deputies for acts outside the scope of their authority.” *Id.* Hence, where immunity only applies to X conduct, a plaintiff may assert a claim for conduct other than X. This is consistent with the Court of Appeals’ decision, which found that Runnels may assert a claim against KS&E for damages arising from KS&E’s own unlawful conduct, which is not precluded by Ind. Code § 34-12-3-3.

Livingston v. Indianapolis, 398 N.E.2d 1302 (Ind. Ct. App. 1979), is likewise consistent with the Court of Appeals’ decision. *Livingston* barred some claims against the government, not because the government was immune, but because the plaintiff failed to serve notice within the required 180-day period. *Id.* at 1303. To the extent that the *Livingston* court found that the government was immune from malicious prosecution claims, it is consistent with the Court of Appeals, as *Livingston* found that the police should be immune from malicious prosecution claims based on policy concerns regarding the efficient functioning of law enforcement and public safety. *Id.* at 1305-06. Here, similar public policy concerns counsel in favor of the Court of Appeals’ holding that § 34-12-3-3 does not provide blanket immunity to firearms dealers. Indeed, Officer Runnels was enforcing the law and protecting public safety when he was shot; KS&E endangered public safety by unlawfully supplying a criminal with a gun.

Finally, Defendant misrepresents *Peavler v. Board of Comm’rs*, 528 N.E.2d 40 (Ind. 1988). The statute at issue in *Peavler* provided immunity only for discretionary acts. *Id.* at 41. Consistent with the Court of Appeals, *Peavler* held that the government bore the burden of

proving that it engaged in the conduct protected by the statute. *Id.* at 48. The court noted, “[t]he discretionary nature of a decision to place a warning sign *must be determined case by case*. Immunity may be established by government defendants who can show that the challenged decision was discretionary because it resulted from a policy oriented decision-making process.” *Id.* at 47. (emphasis added). And “[t]he county simply is not shielded by immunity if the failure to erect a warning sign did not result from a policy decision consciously balancing risks and advantages.” *Id.* at 48. *Peavler* recognized that a motion for judgment on the pleadings was inappropriate where a statute provides immunity for specified conduct, and the claims rest on conduct outside of the statute.

While a decision in KS&E’s favor would conflict with precedent requiring reliance on the plain and ordinary meaning and demanding a clear statement of legislative intent to derogate from the common law, there is no precedent that conflicts with the Court of Appeals’ decision. Of course lawsuits can be dismissed if they are prohibited by immunity laws. While KS&E complains that the law, as construed, does not support dismissal based on “mere[]” allegations, Pet. at 10, that is the only way that the law can operate. The fact that KS&E seeks extraordinary protection from civil liability does not support disregarding Officer Runnels’ well-pled allegations. And when considering whether to deprive people of their civil right to seek justice, the onus is on the defendant to establish the legislature’s clear intent to derogate from the common law.

D. KS&E’S SPECULATIONS ABOUT LEGISLATIVE INTENT ARE UNSUPPORTED.

KS&E repeatedly asserts that providing broad immunity to negligent and criminal gun companies was the supposed “clear intention of the legislature,” even describing the policy considerations that it claims the legislature weighed. Pet. at 6. KS&E claims that “The

Legislature’s Purpose in Enacting the Immunity Statute will be Nullified if the Decision by the Court of Appeals is Not Reversed,” Pet. at 9-10, presupposing that the General Assembly intended to immunize negligent and criminal gun dealers. But there is no legislative history, and there is no support for KS&E’s speculations. The best way for the Court to discern the intent for this law is to consider the statutory language in context. If the General Assembly intended to overrule longstanding principles of comparative fault and proximate causation in Indiana to create the broad immunity KS&E asserts, it was perfectly capable of making that intention clear, as it did when it clearly modified *Heck* and expressly provided immunity to firearms owners in certain cases – and it was required to make its intention clear. Congress expressed a similar concern in the federal PLCAA, which was intended to prevent “maverick” judges from “expand[ing] civil liability” by adopting “theories without foundation in hundreds of years of the common law and jurisprudence of the United States” 15 U.S.C. § 7901(a)(7). The General Assembly limited recovery of damages in certain firearms cases to prevent such expansion in the areas set forth in sections (1) and (2).

KS&E’s attempt to draw support from Plaintiff’s constitutional challenge to the law and the Attorney General’s constitutional defense wholly misunderstands those issues. Plaintiff argued that *if KS&E’s reading of the law were accepted*, it was unconstitutional. Brief of Plaintiff/Appellant at 28-33, *KS&E Sports, et al., v. Runnels*, No. 49A02-1501-CT-00042 (Ind. Ct. App. Aug. 3, 2015). Hence, the challenge assumed *arguendo* that the Court did *not* hold that the law froze comparative fault principles, the exact opposite of KS&E’s arguments. Pet. at 9. And the Attorney General’s brief certainly did not offer insights into the legislative intent behind the law, or the meaning of the law. Pet. at 8-9. The Attorney General only addressed the constitutionality of the law, and not surprisingly, argued for expansive governmental powers.

The law's intent will be effectuated by the Court's decision; gun companies will not have to pay damages resulting from proper sales practices, or from criminal or unlawful third party misuse of their guns. The General Assembly's intent will be subverted if, as KS&E proposes, it is immunized from damages resulting from its own negligent or illegal acts.

Finally, KS&E makes a mountain out of a mole hill in attacking a footnote deferring whether the law "should be characterized as an immunity statute." Pet. at 11, n.4. However the law is characterized, it does not support dismissal based on the alleged facts.

CONCLUSION

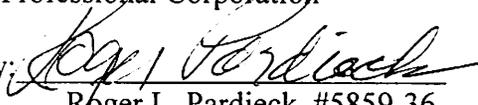
As the Court of Appeals recognized, the plain language of the law, and rules of statutory construction, do not support KS&E's argument that Indiana has given it unprecedented immunity from civil liability for negligent and illegal conduct that foreseeably caused harm. Officer Runnels' case has been delayed enough by this interlocutory appeal. It should not be revisited.²

² If the law bars this case, it would unconstitutionally deprive people of their rights to civil justice, and dictate court actions. Under the doctrine of constitutional avoidance, because KS&E's construction "would raise a multitude of constitutional problems, [the plaintiffs' construction] should prevail." *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005).

Respectfully submitted,

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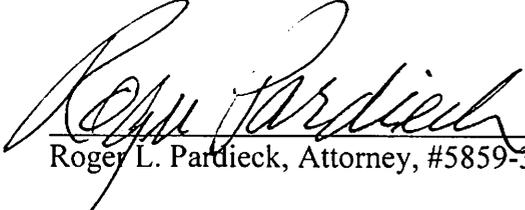
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WORD COUNT CERTIFICATE

I verify that this Brief of Appellee/Plaintiff Dwayne H. Runnels in Response to Petition to Transfer contains no more than 4,200 words, and I certify that the Brief contain 3,200 words, according to the word processing program used to create this document.



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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on May 10, 2016, the foregoing was filed with the Clerk of the Indiana Supreme Court, Court of Appeals, and Tax Court, by depositing the foregoing in the US. Mail, postage prepaid.

I certify that a copy of the above and foregoing pleading was deposited in the United States mail, with postage prepaid on May 10, 2016, addressed to:

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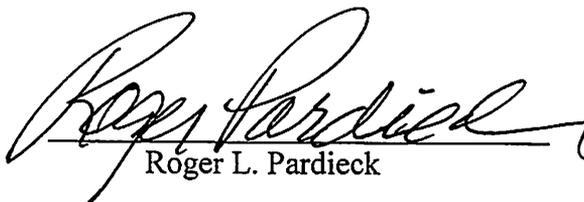
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