

ORIGINAL

IN THE INDIANA COURT OF APPEALS
CAUSE NO. 49A02-1501-CT-00042



KS&E Sports and Edward J. Ellis,)
Appellants/Defendants below,)
v.)
Dwayne H. Runnels,)
Appellee/Plaintiff below.)

Interlocutory Appeal from the
Marion County Superior Court
Civil Division, Room 11

Trial Court Cause No.
49D11-13-12-CT-044030

The Honorable John F. Hanley,
Judge.

Opening Brief of Appellants/Defendants KS&E Sports and Edward J. Ellis

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STATEMENT OF ISSUE

Does Indiana Code § 34-12-3-3(2) require the immediate dismissal of Appellee/Plaintiff Dwayne H. Runnels' ("Runnels") claims against Appellants/Defendants KS&E Sports and Edward J. Ellis (collectively "KS&E"), both of whom are firearm sellers under the statute, where Runnels seeks damages resulting from the criminal misuse of a firearm by a third party, Demetrious Martin ("Martin"), and section 34-12-3-3(2) immunizes firearm sellers against actions for "recovery of damages resulting from the criminal or unlawful misuse of a firearm or ammunition for a firearm by a third party"?

STATEMENT OF CASE

This case comes to this Court on an interlocutory appeal from the Marion Superior Court's denial of KS&E's Motion for Judgment on the Pleadings pursuant to Ind. Tr. Rule 12(c). Runnels filed this action in Marion Superior Court, Division 11 on December 10, 2013. Runnels alleges that KS&E sold a Smith & Wesson handgun to Defendant Tarus Blackburn Jr. ("Blackburn"),¹ and is responsible for damages resulting from the criminal misuse of that handgun by third party Martin. Runnels alleges that KS&E should have known that Blackburn was merely Martin's "straw man" when he purchased the firearm from KS&E, and that KS&E is therefore liable for Martin's later criminal misuse of that firearm to injure Runnels. Runnels asserts claims of negligence, negligent entrustment, negligence *per se*, negligent hiring, training, and supervision, damages resulting from conspiracy, public nuisance, and piercing the corporate veil. Appellants' App. at p. 21-33 (Compl. ¶¶ 58-127).

After answering the Complaint, KS&E filed the Motion for Judgment on the Pleadings pursuant to T.R. 12(c) that is the subject of this appeal. Appellants' App. p. 2 & pp. 36-42.

¹ Defendant Tarus Blackburn Jr. is representing himself *pro se* in this matter and is not a party to this appeal.

KS&E's motion sought immediate dismissal of Runnels' claims under I.C. § 34-12-3-3(2). In relevant part, I.C. § 34-12-3-3 provides:

3. Except as provided in section 5(1) or 5(2) of this chapter, a person may not bring or maintain 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.

(emphasis added). Indiana Code § 34-12-3-5, which sets forth the exceptions to section 34-12-3-3, provides:

5. Nothing in this chapter may be construed to prohibit a person from bringing or maintaining 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 action seeking injunctive relief if that action is barred under section 3 of this chapter.

KS&E succinctly argued that the plain language of the statute requires dismissal of this action because it is a firearm "seller", and Runnels seeks to recover damages that resulted from the criminal misuse of a firearm by a "third party" (Martin). Appellants' App. p. 38-40.

Runnels' Brief in Opposition to Defendants' Motion for Judgment on the Pleadings attempted to circumvent the plain meaning of I.C. § 34-12-3-3(2) in order to salvage his claims. Runnels argued that I.C. § 34-12-3-3(2) does not apply because he does not seek damages resulting from a third party's (Martin's) actions. Appellants' App. p. 52. Rather, Runnels claimed to seek damages resulting from KS&E's negligent conduct, which allegedly harmed Runnels. Appellants' App. p. 52. The remainder of Runnels' arguments impermissibly relied on sources beyond the statutory language to interpret the statute – considerations that are inappropriate given the plain, unambiguous language of section 34-12-3-3(2). Appellants' App. p. 14-21.

On October 21, 2014, Judge Hanley denied KS&E's Motion for Judgment on the Pleadings.² Appellants' App. p. 6. Judge Hanley's Order provided no basis for the denial and included no accompanying opinion. Judge Hanley then granted KS&E's Motion to Certify for Interlocutory Appeal Order Denying Defendants' Motion for Judgment on the Pleadings on December 18, 2014. Appellants' App. p. 134. This Court granted KS&E's Motion for Acceptance of Jurisdiction on February 20, 2015. Appellants' App. p. 136-37. KS&E filed its Notice of Appeal on March 6, 2015. Appellants' App. p. 138-42. The parties received notice from the Clerk of the Marion County Superior Court on June 1, 2015 that the transcript for the trial court was complete. Appellants' App. p. 121.

KS&E now submits this Opening Brief in support of its request that the Court reverse Judge Hanley's denial of its Motion for Judgment on the Pleadings.

² Runnels also argued to the trial court that KS&E waived its I.C. § 34-12-3-3 defense because it is an affirmative defense not pled in the Answer, and KS&E sought to amend its Answer accordingly. Judge Hanley's October 21, 2014 Order granted KS&E's Motion to Amend its Answer to include I.C. § 34-12-3-3 as an affirmative defense. Appellants' App. p. 6. KS&E then filed its Amended Answer, which explicitly includes I.C. § 34-12-3-3 as a defense, on November 5, 2014. Appellants' App. p. 132.

STATEMENT OF FACTS

Plaintiff's injury arises out of a criminal shooting that occurred in late 2011. On December 12, 2011, Runnels, a patrol officer for the Indianapolis Metropolitan Police Department, stopped a maroon Chevrolet Impala matching the description of a vehicle that had been connected to a recent armed robbery and shooting incident. Appellants' App. p. 13 (¶ 15). The driver of the vehicle was Demetrious Martin. Appellants' App. p. 13 (¶ 16). Martin exited from the driver seat with a handgun and, before Runnels could subdue him, fired two shots at Runnels, the second of which pierced Runnels' left hip and lodged in his upper pelvis. Appellants' App. p. 13 (¶ 16). Runnels then returned fire, killing Martin. Appellants' App. p. 13 (¶ 16). Police recovered the Smith & Wesson handgun Martin used to shoot Runnels at the scene of the crime. Appellants' App. p. 13 (¶ 17).

During the police investigation, an ATF trace on the Smith & Wesson handgun revealed that the pistol was purchased at KS&E's retail store in Indianapolis on October 10, 2011, two months prior to the shooting. Appellants' App. p. 13 (¶ 17). At that time, the Complaint alleges that an employee of KS&E sold the Smith & Wesson handgun to Blackburn. Appellants' App. p. 14 (¶ 21). The Complaint further alleges that Martin was in the store at the time Blackburn purchased the handgun, but Blackburn filled out the paperwork and paid \$325 for the pistol. Appellants' App. p. 14-15 (¶¶ 26, 30). The Complaint then alleges that Blackburn sold the pistol to Martin for \$375 after they exited the store. Appellants' App. p. 15 (¶ 31). On September 28, 2012, Blackburn pled guilty to one count of making a false and fictitious written statement in connection with the acquisition of a firearm, in violation of 18 U.S.C. § 922(a)(6). Appellants' App. p. 12 (¶ 12). He was sentenced to twelve months in prison. Appellants' App. p. 12 (¶ 12).

Runnels now asserts claims against KS&E for negligence, negligent entrustment, negligence *per se*, damages resulting from a conspiracy, public nuisance, and piercing the

corporate veil. Appellants' App. p. 21-24 (¶¶ 58-127). Runnels alleges that KS&E should have known that Blackburn was a "straw buyer" for Martin and is therefore liable for his injuries resulting from the criminal shooting. *See, e.g.*, Appellants' App. p. 22 (¶ 68).

SUMMARY OF ARGUMENT

Plaintiff's claims fit squarely within the plain language of I.C. § 34-12-3-3(2), and this Court should therefore reverse the trial court's decision denying KS&E's Motion for Judgment on the Pleadings and dismiss his complaint under T.R. 12(c) for failure to state a claim upon which relief can be granted. I.C. § 34-12-3-3(2) prohibits an action against a firearm seller for "recovery of damages resulting from the criminal or unlawful misuse of a firearm or ammunition for a firearm by a third party." KS&E is a firearms "seller" under the statute. *See* Appellants' App. p. 11 (¶ 7), p. 12 (¶ 9). Plaintiff's damages, moreover, resulted from the criminal misuse of a firearm by a third party – Martin. *See* Appellants' App. p. 13 (¶ 18).

Under the plain language of the statute, the inquiry ends there – if a third party's criminal actions damaged the plaintiff, the seller of the firearm is immune from liability. Indeed, well-settled Indiana case law establishes that a court may go no further than the language of the statute if that language is clear and unambiguous. *See, e.g., Bourbon Mini-Mart, Inc. v. Comm'r, Indiana Dep't of Env'tl. Mgmt.*, 806 N.E.2d 14, 20 (Ind. Ct. App. 2004). The plain language of the statute evidences an intent by the General Assembly to remove liability for actions over which firearm sellers have no control (i.e. the criminal acts of third parties). When read in the context of the entire statute, I.C. § 34-12-3-3(2) provides a separate layer of protection to firearm sellers in the event that a third party's criminal or unlawful actions caused the harm at issue. This is the only interpretation that gives section 3(2) any meaning. An interpretation that a seller's

conduct must be “lawful”³ in order to receive immunity under either 3(1) or 3(2) – the interpretation that Runnels argued to the trial court – renders section 3(2) superfluous and severely restricts the plain language of the statute. *See Warner Press, Inc. v. Review Bd. of the Ind. Employment Sec. Div.*, 413 N.E.2d 1005, 1005-06 (Ind. Ct. App. 1980); *N. Miami Educ. Ass’n v. N. Miami Cmty. Sch.*, 746 N.E.2d 380, 381-82 (Ind. Ct. App. 2001). The statute as a whole treats sections 3(1) and 3(2) as separate grants of immunity, and any interpretation to the contrary disrupts the entire statutory scheme.

The *City of Gary v. Smith & Wesson Corp.*, 801 N.E.2d 1222 (Ind. 2003), case is inapposite. Although the Court in *City of Gary* leaves open the possibility of holding a firearm retailer liable for negligence when it sells a firearm that is later used in a criminal act, I.C. § 34-12-3-3(2) was not considered or addressed in that decision because the case preceded the statute.⁴ The General Assembly recently amended the statute to apply retroactively to cases filed “before, after, or on April 18, 2001” (*see* I.C. § 34-12-3-0.1). The complaint in the *City of Gary* case was filed on August 30, 1999 – and was signed and dated on August 27, 1999 – and thus the timing of the amendment – and the fact that the language of the statute was otherwise unchanged – implies an intent to apply I.C. § 34-12-3-3(2) to “straw-man” claims such as Plaintiff’s and those made in the *City of Gary* case.

³ The facts in the complaint must be taken as true for purposes of KS&E’s motion, and thus it was premature for KS&E to raise the issue of whether KS&E’s sale of the pistol to Blackburn was “lawful” to the trial court. KS&E reserved its right to argue at a later juncture that the sale of the pistol from KS&E to Blackburn was lawful (and therefore that Plaintiff’s causes of action are also barred, pursuant to section 34-12-3-3(1)(D) of the Indiana Code).

⁴ The court did not apply I.C. § 34-12-3-3(2) to the plaintiff’s claims in the *City of Gary* case because that case was filed prior to the enactment of the statute. As discussed *infra*, the General Assembly has recently amended I.C. § 34-12-3-3 to be retroactive such that it applies to the *City of Gary* case. Indiana courts have not yet addressed application of the amended statute to the *City of Gary* case.

For these reasons, KS&E respectfully requests that the Court reverse the trial court's decision denying its Motion for Judgment on the Pleadings.

ARGUMENTS

I. Standard of Review

The trial court erred when it failed to dismiss Runnels' claims under I.C. § 34-12-3-3(2). Matters of statutory interpretation are questions of law. *See Smith & Wesson Corp. v. City of Gary*, 875 N.E.2d 422, 429 (Ind. Ct. App. 2007) ("Where the trial court's judgment depends on the interpretation of a statute, the review of that judgment is a matter of law."). This Court reviews questions of law *de novo* on appeal. *Linger v. State*, 508 N.E.2d 56, 59 (Ind. Ct. App. 1987).

II. The Plain Language of Indiana Code § 34-12-3-3(2) Requires Dismissal of the Complaint.

Plaintiff's claims fall squarely within the plain, unambiguous language of I.C. § 34-12-3-3(2). Indiana Code § 34-12-3-3 provides that a "person may not bring or maintain an action against a firearms ... seller for: ... (2) recovery of damages resulting from the criminal or unlawful misuse of a firearm or ammunition for a firearm by a third party." Because KS&E is a firearms seller and Runnels seeks damages resulting from the criminal acts of Martin, a third party, his claims are barred by the statute and must be dismissed.

a. Indiana Code § 34-12-3-3(2) applies to Runnels' causes of action.

Indiana courts "may not construe a statute when its plain language is unambiguous." *Wabash Grain, Inc. v. Bank One, Crawfordsville, NA*, 713 N.E.2d 323, 326 (Ind. Ct. App. 1999). "Plain language" means the common, ordinary meaning to terms found in everyday speech. *See, e.g., Herron v. State*, 729 N.E.2d 1008, 1010 (Ind. Ct. App. 2000) (refusing to expand the plain language within I.C. § 35-46-1-1 to create an exception thereto). *See also* Indiana Code § 1-1-4-1(1) (governing the construction of all Indiana statutes and stating that "[w]ords and phrases

shall be taken in their plain, or ordinary and usual, sense”). Section 34-12-3-3(2) is unambiguous and therefore the plain language of the statute applies to Plaintiff’s claims.

As referenced in section 34-12-3-3, Runnels is a “person” (Indiana Code § 35-31.5-2-234 defines “Person” as “a human being...”) and KS&E is a firearms seller. *See* Appellants’ App. pp. 11 (¶ 7) (labeling KS&E Sports as a retail store engaged in the distribution of firearms in the State of Indiana); 12 (¶ 9) (labeling Ellis as an officer, director, shareholder, owner and/or employee of KS&E).

Runnels, likewise, seeks to recover damages resulting from the criminal misuse of a firearm by a third party (Martin). The Complaint states that “[a]s a result of the shooting on December 12, 2011, Officer Runnels suffered serious, extensive, and permanent harm, including physical injuries and financial damages.” Appellants’ App. p. 13 (¶ 18). *See also* Appellants’ App. p. 16 (¶ 41) (“On December 12, 2011, Martin used the Smith & Wesson Handgun to shoot and seriously injure Officer Runnels.”); Appellants’ App. p. 13 (¶ 17) (“To fire the shots at Plaintiff, Martin used a Smith & Wesson Handgun, model SW40VE, .40 caliber handgun, bearing serial number DWN2241....”). Runnels’ injuries and any resulting damages were the direct result of the shots that Martin fired. As such, his claims fall under the clear language of § 34-12-3-3(2).

b. The exceptions set forth in Indiana Code § 34-12-3-5 are inapplicable to this case.

There are certain limited exceptions to I.C. § 34-12-3-3 found in I.C. § 34-12-3-5. Those exceptions are not applicable here. The Complaint does not contain claims for breach of contract or warranty or based on an alleged defect in the firearm, and thus the exceptions in I.C. § 34-12-3-5(1) and (2) do not apply. I.C. § 34-12-3-5(3) provides that a person may bring a cause of action for injunctive relief to enforce a valid statute, rule, or ordinance, but not if that action is

barred under §34-12-3-3. Although Plaintiff's cause of action for public nuisance seeks an injunction against KS&E in addition to damages (Appellants' App. p. 34), the claim for injunctive relief still falls outside of the exception because it is prohibited under section 34-12-3-3(2).

In sum, there are no exceptions applicable to the instant matter.

c. Indiana Code § 34-12-3-3(2) immunizes firearm sellers from liability for a third party's criminal acts.

Indiana Code § 34-12-3-3(2) creates a threshold question of whether a firearm seller is entitled to immunity from the claims alleged against it. Immunity must be determined at the outset of the litigation. *See Clifford v. Marion Cnty. Prosecuting Attorney*, 654 N.E.2d 805, 808 (Ind. Ct. App. 1995). This is because immunity is "an entitlement not to stand trial or face the other burdens of litigation." *Saucier v. Katz*, 533 U.S. 194, 200 (2001). Accordingly, the court must address a defendant's entitlement to immunity before it addresses any "issues of duty, breach, and causation." *Peavler v. Bd. of Comm'rs of Monroe Cnty.*, 528 N.E.2d 40, 46 (Ind. 1988). *See also Indiana Dep't of Fin. Institutions v. Worthington Bancshares, Inc.*, 728 N.E.2d 899, 902 (Ind. Ct. App. 2000) ("Immunity assumes negligence but denies liability.").

The General Assembly spoke clearly when it enacted I.C. § 34-12-3-3. Specifically, the General Assembly acknowledged the reality that retail sellers cannot control what a buyer does with a firearm after purchase. As such, the General Assembly enacted I.C. § 34-12-3-3 in order to protect firearm sellers from liability for third party criminal acts and prevent litigation over a seller's supposed ability to control how a firearm is used after it leaves the store.

Here, KS&E plainly falls under the protection of the statute. Section 3(2) prohibits claims for damages and injunctive relief "resulting from the criminal or unlawful use" of a firearm by a third party. Runnels' injuries resulted from third-party Martin's criminal acts, and KS&E,

therefore, falls under the protection of the statute.⁵ Because the threshold question has been answered in the affirmative, an inquiry into KS&E's alleged negligence is unnecessary and irrelevant. Indiana Code § 34-12-3-3(2) immunizes KS&E from liability in this instance.

d. KS&E's interpretation of Indiana Code § 34-12-3-3(2) is consistent with Indiana law regarding statutory construction.

KS&E's interpretation of Indiana Code § 34-12-3-3(2) is consistent with Indiana law regarding statutory construction. First, KS&E's interpretation gives meaning to section 3(2) by creating a separate level of protection in the case of third party criminal acts and avoids the problem of superfluous statutory provisions. Second, it avoids inserting language regarding a nonexistent "lawfulness" provision into 3(2) that simply is not there. Accordingly, the Court should adopt KS&E's interpretation of section 34-12-3-3(2).

i. The plain language of Indiana Code § 34-12-3-3(2) provides a separate layer of protection to sellers in the case of criminal acts by a third party.

The plain language of section 34-12-3-3(2) treats the instant situation – where damages result from criminal acts of a third party – differently than other suits against a firearm manufacturer or retailer. “The cardinal rule of statutory construction is to ascertain the intent of the legislature by giving effect to the ordinary and plain meaning of the language used.” *Bourbon Mini-Mart, Inc.*, 806 N.E.2d at 20. Section 34-12-3-3 shields firearms manufacturers, trade associations, and sellers in two instances. First, when a person seeks recovery for damages resulting from the lawful sale of a firearm or ammunition for a firearm. *See* I.C. § 34-12-3-3(1). Second, when a person brings an action against a firearms manufacturer, trade association, or seller for recovery of damages resulting from the criminal or unlawful conduct of a third party.

⁵ Whether Runnels may have had a right of action at common law is irrelevant because the General Assembly expressly terminated that right by enacting section 34-12-3-3(2). *See Cook v. Whitesell-Sherman*, 796 N.E.2d 271, 275 (Ind. 2003) (noting clear legislative intent to remove common law right of action).

See I.C. § 34-12-3-3(2). When read as a whole, the plain reading of this statute is that even if conduct is not lawful, it is shielded from civil liability if a third party's criminal acts caused the damages at issue.⁶

Plaintiff's interpretation of I.C. § 34-12-3-3, that the word "lawful," found only in section 3(1), applies equally to 3(2), renders section 3(2) superfluous. Indiana law, by contrast, instructs courts to effectuate all parts of a statute. *See, e.g., Warner Press, Inc.*, 413 N.E.2d at 1005-06; accord *Hibbs v. Winn*, 542 U.S. 88, 89 (2004) ("[T]he rule against superfluities instructs courts to interpret a statute to effectuate all its provisions, so that no part is rendered superfluous."). Under Plaintiff's interpretation, the end of the inquiry is whether the accused's alleged action was "lawful" under section 3(1). Allegedly "unlawful" actions do not get to move on to section 3(2). Indeed, this interpretation leaves no behavior that would fall solely under section 3(2). Runnels' interpretation, therefore, renders section 3(2) superfluous.

Indeed, the statute as a whole treats sections 3(1) and 3(2) as separate and distinct provisions. Section 34-12-3-4(a), which mandates an award of attorney's fees for the filing of "prohibited actions", describes sections 3(1) and 3(2) each as an individual prohibited "theory of

⁶Plaintiff argued to the trial court that KS&E's interpretation would confer a "blanket of immunity on firearm sellers who supply firearms to criminal straw buyers." Appellants' App. p. 58. This is not accurate. The potential for criminal liability or regulatory penalties remains a significant deterrent to prevent firearm sellers from engaging in unlawful sales. Firearm sales are closely regulated at the federal and state level, and retailers engaging in unlawful sales are subject to criminal penalties that could mean jail time and the loss of their livelihood (the revocation of their license to sell firearms). *See, e.g.,* 18 U.S.C. § 922 (criminalizing sale of firearms to certain ineligible buyers and requiring licensed firearm dealers to maintain sales records in accordance with regulations); I.C. § 35-47-2-7 (criminalizing the knowing sale of a firearm to an ineligible buyer). Here, Blackburn pled guilty to a violation of 18 U.S.C. § 922(a)(6) (prohibiting false and fictitious statements in connection with the acquisition of a firearm) and served twelve months in prison stemming from this incident. Appellants' App. p. 20 (¶ 57). There is no doubt that KS&E's actions, like Blackburn's, were thoroughly reviewed. If KS&E's actions were actually "unlawful" as alleged by Runnels, charges likely would have been lodged against it; no such charges were filed.

recovery” against firearm sellers. Nothing in the statutory scheme suggests that the “lawful” provision of section 3(1), or any other language found in 3(1), should be read into the separate and distinct section 3(2).

KS&E’s interpretation is consistent with the statute as a whole and avoids creating a superfluous provision that courts are loathe to read into a statute.

ii. Plaintiff’s interpretation restricts the plain meaning of Indiana Code § 34-12-3-3(2).

Plaintiff’s interpretation of section 3(2) also restricts the plain meaning of that section. A cardinal rule of statutory interpretation is that a statute’s plain meaning may not be expanded or restricted. *N. Miami Educ. Ass’n*, 746 N.E.2d at 381-82. The crux of Runnels’ argument to the trial court was that a seller’s actions must be “lawful” in order to fall under the protection of section 34-12-3-3(2). Lawfulness, however, appears nowhere in section 3(2) and the addition of that requirement ignores the disjunctive “or” between 3(1) and (2). *See Sekerez v. Youngstown Sheet & Tube Co.*, 337 N.E.2d 521, 524 (Ind. 1975) (“[T]he words ‘and’ and ‘or’ as used in statutes are not interchangeable, being strictly of a conjunctive and disjunctive nature respectively, and their ordinary meaning should be followed if it does not render the sense of the statute dubious.” (quoting 82 C.J.S. Statutes § 335, at 673)). Plaintiff’s interpretation adds a provision (the “lawfulness” requirement) to section 3(2) that simply is not there and thus impermissibly restricts the meaning of section 3(2) contrary to the clear intent of the General Assembly.

e. The General Assembly did not amend Indiana Code § 34-12-3-3(2) to include the requirement that the seller’s conduct be “lawful.”

In the 13 years since its enactment (2001), the Indiana legislature has amended I.C. § 34-12-3-1 *et seq.* twice. In 2004, the language at the beginning of I.C. § 34-12-3-3 was amended to read “Except as provided in section 5(1) or 5(2) of this chapter,…” (prior to the amendment, the

statute read “Except as provided in section 5 of this chapter,...”). This amendment was focused on clarifying the exceptions to I.C. § 34-12-3-3, which do not immunize dealers when a contract was breached or a product they sold was defective.

The General Assembly next amended the statute in May 2015 to make the statute retroactive. Specifically, section 34-12-3-0.1 was added to state that “[t]his chapter applies to actions filed before, after, or on April 18, 2001,” and section 34-12-3-3 was amended to add the words “or maintain” in the sentence “[e]xcept as provided in section 5(1) or 5(2) of this chapter, a person may not bring or maintain an action against a firearms or ammunition manufacturer, trade association, or seller” The obvious basis for these amendments was to apply the statute to plaintiff’s claims in the *City of Gary v. Smith & Wesson Corp.* case.

When the legislature reexamined the statute in 2004 and 2015, it could have added a “lawful” requirement to section 3(2) or added other language to allow claims against sellers where damages result from third party criminal activity. The General Assembly, however, chose not to do so. Indeed, the 2015 amendment and its connection to the *City of Gary* case, which involves “straw buyer” claims that are subject to section 3(2), suggests that the General Assembly was keenly aware of the import of the language used in 34-12-3-3 and thus further strengthens the argument that the General Assembly intended what the language in section 34-12-3-3 clearly states.

The plain meaning of section 34-12-3-3(2) requires the immediate dismissal of this case. Plaintiff’s injuries and damages result from the criminal acts of Martin, a third party. In such an instance, I.C. § 34-12-3-3 prohibits suit against the seller of the firearm. Under the statute, any allegation regarding the lawfulness of the firearm seller’s actions are irrelevant when the plaintiff’s injuries result from a third party criminal act. KS&E’s interpretation avoids the

statutory interpretation pitfalls that Indiana courts have repeatedly warned against and respects the ordinary language used in the statute.

CONCLUSION

For the foregoing reasons, KS&E respectfully requests that the Court reverse Judge Hanley's Order denying the Motion for Judgment on the Pleadings and order that Runnels' claims be dismissed pursuant to T.R. 12(c) and I.C. § 34-12-3-3(2).

Respectfully Submitted,



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STATE OF INDIANA)
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COUNTY OF MARION)

IN THE MARION SUPERIOR COURT
CIVIL DIVISION, ROOM ELEVEN
CAUSE NO. 49D11-1312-CT-044030

DWAYNE H. RUNNELS,

Plaintiff,

Vs.

KS&E SPORTS, EDWARD J. ELLIS
and TARUS E. BLACKBURN, JR.,

Defendants.

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Elizabeth A. White
CLERK OF THE MARION CIRCUIT COURT

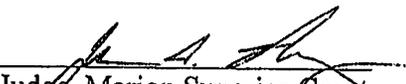
ORDER

Comes now the Court, and, having taken this matter under advisement at the close of the hearing on September 22, 2014 on all pending motions, at which hearing all parties appeared by counsel, except for Defendant Tarus D. Blackburn, Jr., who appeared in person, and the Court, having heard oral argument, having read the motions and memoranda submitted in support of and in opposition to said motions, and, being duly advised in the premises, now finds as follows:

1. Defendants KS&E Sports and Edward J. Ellis' Motion for Judgment on the Pleadings filed with the Court on June 4, 2014 is Denied.
2. Defendants KS&E Sports and Edward J. Ellis' Motion for Leave to File an Amended Answer filed with the Court on July 22, 2014 is Granted.

3. Based on the foregoing, Defendants KS&E Sports and Edward J. Ellis' Motion to Stay Discovery Pending Ruling on its Motion for Judgment on the Pleadings is now moot.

ALL OF WHICH IS ORDERED THIS 2¹ DAY OF OCTOBER, 2014.



Judge, Marion Superior Court
Civil Division, Room Number Eleven

Cc:
All counsel of record

Tarus E. Blackburn, Jr., pro se

WORD COUNT CERTIFICATE

I, Vincent P. Antaki, verify that this brief contains 4,925 words.



Vincent P. Antaki, Esq.

IN THE INDIANA COURT OF APPEALS
CAUSE NO. 49A02-1501-CT-00042

KS&E Sports and Edward J. Ellis,)	Interlocutory Appeal from the
)	Marion County Superior Court
Appellants/Defendants below,)	Civil Division, Room 11
)	
v.)	Trial Court Cause No.
)	49D11-13-12-CT-044030
)	
Dwayne H. Runnels,)	
)	The Honorable John F. Hanley,
Appellee/Plaintiff below.)	Judge.

CERTIFICATE OF SERVICE

I, Vincent P. Antaki, certify that on June 30, 2015, a true and complete copy of the foregoing Opening Brief of Appellants/Defendants KS&E Sports and Edward J. Ellis was served on the following by depositing a copy in the United States Mail, first-class postage pre-paid, in a properly addressed envelope:

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