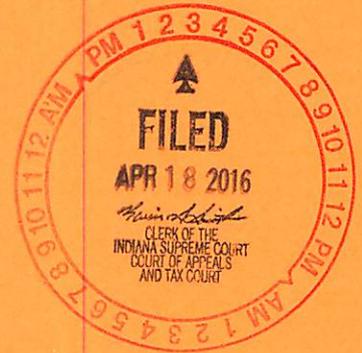


IN THE  
INDIANA SUPREME COURT

CASE NO. \_\_\_\_\_



KS&E Sports and Edward J. Ellis,	)	Court of Appeals Case No.
	)	49A02-1501-CT-00042
Appellants/Defendants,	)	
	)	Interlocutory Appeal from the
v.	)	Marion Superior Court
	)	Civil Division, Room 11
Dwayne H. Runnels,	)	
	)	Trial Court Cause No.
Appellee/Plaintiff.	)	49D11-13-12-CT-044030
	)	
	)	The Honorable John F. Hanley,
	)	Judge.

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PETITION TO TRANSFER OF APPELLANTS/DEFENDANTS  
KS&E SPORTS AND EDWARD J. ELLIS

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**QUESTION PRESENTED ON TRANSFER**

Did the Court of Appeals err in holding that Subsection (2) of Indiana Code § 34-12-3-3 (“Immunity Statute”), does not require the immediate dismissal of plaintiff’s complaint on the basis that it constitutes an action against a firearms or ammunition seller for recovery of damages resulting from the criminal or unlawful misuse of a firearm or ammunition for a firearm by a third party?

**TABLE OF CONTENTS**

QUESTION PRESENTED ON TRANSFER.....i

BACKGROUND AND PRIOR TREATMENT OF ISSUES ON TRANSFER.....1

ARGUMENT .....4

    A. Indiana Code § 34-12-3-3(2) is an Immunity Statute that Prohibits a Person from  
    Bringing an Action Against a Firearms Seller for Recovery of Damages Resulting  
    from the Criminal or Unlawful Misuse of a Firearm or Ammunition for a Firearm  
    By a Third Party.....4

    B. Indiana Code § 34-12-3-3(2) is Not a Codification of Comparative Fault.....7

    C. The Decision by the Court of Appeals Goes Against Statements Made in the  
    Indiana Attorney General’s Brief in Support of the Constitutionality of the  
    Immunity Statute Supporting Defendant’s Interpretation of the Immunity Statute....8

    D. The Legislature’s Purpose in Enacting the Immunity Statute will be Nullified  
    if the Decision by the Court of Appeals is Not Reversed.....9

CONCLUSION .....12

WORD COUNT CERTIFICATE .....13

CERTIFICATE OF SERVICE .....14

## BACKGROUND AND PRIOR TREATMENT OF ISSUES ON TRANSFER

Plaintiff commenced this action on December 10, 2013, in the Marion Superior Court, Division 11. Plaintiff alleges that defendants KS&E Sports and Edward J. Ellis (“defendants”), sold a Smith & Wesson handgun to Tarus Blackburn Jr. (“Blackburn”), who later sold it to non-party Demetrious Martin (“Martin”). Plaintiff further contends that defendants are responsible for damages resulting from the subsequent criminal misuse of that handgun by Martin approximately two months later, when he used it to intentionally shoot plaintiff.

On June 4, 2014, defendants filed a motion for judgment on the pleadings directed to all counts of the plaintiff’s Complaint on the basis that Indiana Code § 34-12-3-3(2) explicitly bars the plaintiff’s claims.

Indiana Code § 34-12-3-3 provides that subject to certain exceptions:

**[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).

Defendants’ Motion for Judgment on the Pleadings argued that plaintiff’s action is barred under the plain language of Subsection (2) of the Immunity Statute, because it seeks recovery of damages resulting from the criminal or unlawful misuse of the firearm by third-party Martin when he intentionally shot plaintiff. Plaintiff filed his Opposition to the defendants’ Motion for

Judgment on the Pleadings on July 23, 2014, in which he argued that the Immunity Statute is unconstitutional if I.C. § 34-12-3-3(2) bars his claims against defendants. Based on plaintiff's challenge to the constitutionality of the Immunity Statute, the Indiana Attorney General intervened and filed a brief supporting the constitutionality of the Immunity Statute on October 22, 2014.

The trial court held a hearing on defendants' Motion for Judgment on the Pleadings on September 22, 2014, and denied the motion in an Order dated October 21, 2014. The Order was not accompanied by any reasoning or opinion. On November 24, 2015, defendants filed a Motion Requesting Certification for an Interlocutory Appeal of the October 21, 2014 Order, which the trial court granted on December 18, 2014. Defendants filed a Motion for Acceptance of Jurisdiction on January 13, 2015, which the Court of Appeals granted on February 20, 2015. After briefing on the appeal was completed, the Court of Appeals held a hearing on December 15, 2015.

On March 17, 2016, the Court of Appeals, in a split decision, affirmed the trial court's order denying defendant's Motion for Judgment on the Pleadings. The majority decision was issued by Judge Riley. She concluded that the Immunity Statute:

provides two distinct layers of protection for firearm sellers. Section 1 bars victims of gun violence from pursuing claims against firearms sellers who are alleged to have done nothing wrong beyond lawfully selling a firearm, whereas section 2 provides that even where a firearms 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.

Mar. 17, 2016 Order at 15. In a footnote, Judge Riley stated that the court was not deciding "whether I.C. § 34-12-3-3 should be characterized as an immunity statute," concluding that a "decision on that issue is better left for another day and should be made outside the province of an initial T.R. 12(C) analysis." *Id.* at 15 n.4.

In her concurring opinion, Judge Brown concluded that “Section 3 does not bar bringing an action seeking damages relating to unlawful activity on the part of the firearms seller. The implication of the absence of such language is obvious: the legislature did *not* intend to bar actions against firearms sellers relating to their own *unlawful* activity.” Mar. 17, 2016 Order at 15 (Brown, J., concurring) (emphasis in original). Judge Brown acknowledged the legislature’s recent amendment to the Immunity Statute “to change its effective date, seemingly so as to apply that statute to the issues being litigated in *City of Gary*,” but concluded that this did not mean that the legislature intended to “immunize guns sellers from liability stemming from the unlawful sale of firearms.” *Id.* at 22.

In his dissenting opinion, Judge Altice correctly framed the issue that the Court of Appeals had been asked to decide as “whether Ind. Code § 34-12-3-3(2) immunizes firearms sellers, like KS&E, against civil actions for damages where plaintiff was injured by the criminal misuse of a firearm by a third party regardless of whether the firearm was sold lawfully by the firearms seller.” Mar. 17, 2016 Order at 25 (Altice, J. dissenting). Judge Altice carefully analyzed the language of the Immunity Statute, and noted that it expressly states that a “person may not *bring* an action against a firearms seller for recovery of damages resulting from the criminal misuse of a firearm,” observing it is a “quintessential immunity provision.” *Id.* at 27 (emphasis in original).

The dissenting opinion noted that Subsection (2) of the Immunity Statute “clearly prohibits a plaintiff from bringing certain actions – in this case bringing actions against firearms sellers for ‘recovery of damages resulting from the criminal...misuse of a firearm...by a third party,’” but that the majority decision had instead “relegate[d] it to a recodification of comparative fault principles” as they had “existed prior to the enactment of the statute.” Mar. 17, 2016 Order at 28, 30 (Altice, J. dissenting). Judge Altice observed that in the *City of Gary* case, the “complaint

generally alleged that the firearms dealers had knowingly sold to illegal buyers through intermediaries in straw purchases,” *i.e.*, that they had engaged in unlawful conduct. *Id.* at 28. Like Judge Brown, Judge Altice concluded that the “clear purpose of [the legislature’s 2015] amendments [to the Immunity Statute to make it retroactive] was to effect a dismissal of the City’s case, which lingered unresolved in the trial court” since this Court denied the defendants’ petition to transfer in 2009. *Id.* at 29. The dissenting opinion raised a question that currently remains unresolved “what actions would be barred under the majority’s interpretation of” the Immunity Statute?

### ARGUMENT

#### **THE COURT OF APPEALS ERRED IN ALLOWING PLAINTIFF’S ACTION TO PROCEED BECAUSE IT SEEKS RECOVERY OF DAMAGES FROM A FIREARMS SELLER RESULTING FROM THE CRIMINAL OR UNLAWFUL MISUSE OF A FIREARM BY A THIRD PARTY**

Defendant’s Petition to Transfer should be granted because the Court of Appeals has decided an important question of law that has not been, but should be, decided by this Court. In addition, the decision by the Court of Appeals conflicts with prior decisions of both the Supreme Court and the Court of Appeals, and significantly departed from accepted law by holding that whether a statute provides immunity from suit “should be made outside the province of an initial T.R. 12(C) analysis.” Mar. 17, 2016 Order at 15 n.4.

**A. Indiana Code § 34-12-3-3(2) is an Immunity Statute that Prohibits a Person from Bringing an Action Against a Firearms Seller for Recovery of Damages Resulting from the Criminal or Unlawful Misuse of a Firearm or Ammunition for a Firearm by a Third Party**

There are two separate and distinct provisions in the Immunity Statute, each of which prohibits a person from bringing an action against a firearms or ammunition manufacturer, trade association, or seller for recovery of damages resulting from specified actions. I.C. § 34-12-3-3.

Subsection (1) prohibits actions seeking “recovery of damages resulting from . . .the lawful: (A) design; (B) manufacture; (C) marketing; or (D) sale; of a firearm or ammunition for a firearm.” *Id.* § 34-12-3-3(1). Subsection (2) uses the exact same language to prohibit actions seeking “recovery of damages resulting from the criminal or unlawful misuse of a firearm or ammunition for a firearm by a third party.” *Id.* § 34-12-3-3(2). The Court of Appeals held that the language of the Immunity Statute is “unambiguous.” Mar. 17, 2016 Order at 15.

Despite the fact that both subsections use identical language, and each of them explicitly “prohibits a person from bringing an action,” the majority decision concluded that:

Section 1 bars victims of gun violence from pursuing claims against firearms sellers who are alleged to have done nothing wrong beyond lawfully selling a firearm, whereas section 2 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.

Mar. 17, 2016 Order at 15.

As noted above, each of the subsections of the Immunity Statute prohibits a person from bringing certain types of actions against a firearms seller. There is absolutely no support for, or way to justify, the majority’s conclusion that when the legislature used the term “prohibits a person from bringing an action” in Subsection (1) it intended to bar potential plaintiffs “from pursuing claims against sellers,” but when it used that exact same term in the Subsection (2), it intended to allow potential plaintiffs to pursue the specified claims against sellers, and only limit the damages that they could recover. Subsections (1) and (2) of the Immunity Statute were enacted at the same time, by the same legislature, as part of the same bill.

There is no way to explain why the legislature would have used the exact same language in a statute to bar potential plaintiffs from pursuing some claims, while simply limiting the potential damages that they could recover on other claims. The majority decision makes no attempt

to explain how it was able to determine that the legislature could have possibly intended a statute to bar certain claims from even being pursued, while only limiting the potential damages that could be recovered on other claims by using the exact same language. As the dissenting opinion noted, each subsection of the Immunity Statute “clearly prohibits a plaintiff from bringing certain actions. . . .” Mar. 17, 2016 Order at 30 (Altice, J. dissenting). The majority’s decision, while concluding that the language used by the legislature is unambiguous, completely ignores the clear intention of the legislature and allows a person to bring 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.”

In enacting the Immunity Statute, the legislature made a policy decision that could potentially prevent a plaintiff from recovering damages from a firearms seller that may have violated a law. In making that decision, the legislature carefully weighed the ease with which a plaintiff could deprive an innocent firearms seller of the intended immunity, simply by alleging that it violated a law, thereby forcing it to engage in discovery to disprove plaintiff’s claim. The legislature also weighed the fact that criminal prosecution and license revocation provide a far stronger deterrence to a firearm seller violating the law than the possibility of a civil suit by a private plaintiff. After weighing these considerations, the legislature made its policy choice. The only rational explanation for the decision reached by the majority of the Court of Appeals is that they substituted their own policy choice for that of the legislature, then engaged in a “strained interpretation of the statute” in an attempt to justify it. Mar. 17, 2016 Order at 27 (Altice, J. dissenting). As the dissenting opinion recognized, the policy choice embodied in the Immunity Statute is an issue for the legislature, not the courts. *Id.* at 32.

**B. Indiana Code § 34-12-3-3(2) is Not a Codification of Comparative Fault**

The majority decision by the Court of Appeals concluded that Subsection (2) of the Immunity Statute allows a person to bring an action against a firearms seller for recovery of damages resulting from the criminal or unlawful misuse of a firearm or ammunition for a firearm by a third party, and simply prevents that person from holding the firearms seller “accountable for the portion of damages that results from the criminal or unlawful misuse of a firearm by a third party.” Mar. 17, 2016 Order at 15. The concurring opinion by Judge Brown concluded that by enacting the Immunity Statute, the legislature was simply “codifying existing Indiana comparative fault law” and “freezing the common law” to prevent the imposition of absolute liability against firearm sellers. *Id.* at 21 (Brown, J., concurring) (quoting oral argument by plaintiff’s counsel).

There is nothing in the text of the Immunity Statute suggesting that it was intended to either codify existing common law regarding comparative fault, or prevent the common law from being expanded to allow sellers to be held absolutely liable for harm caused by firearms. The dissenting opinion by Judge Altice charitably described the majority’s decision that Subsection (2) of the Immunity Statute made no change in the law and simply continues to prevent a firearms seller from being held liable for the “portion of damages that results from the criminal or unlawful misuse of a firearm by a third party” as a “strained interpretation of the statute and certainly not representative of the statute’s plain language.” Mar. 17, 2016 Order at 27 (Altice, J. dissenting).

In addition, two of the three judges on the Court of Appeals concluded that the Indiana legislature had amended the Immunity Statute in 2015 to make it retroactive so that it would apply to the *City of Gary* case, which had been sitting dormant since 2009, when this Court denied the defendants’ petition to transfer after the Court of Appeals denied their motion for judgment on the pleadings pursuant to the Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901-03.

Mar. 17, 2016 Order at 22 (Brown, J., concurring); 30 (Altice, J., dissenting). Although this conclusion was reached by a majority of the judges, only Judge Altice analyzed that decision to its logical conclusion — “if I.C. § 34-12-3-3(2) was intended to be interpreted as a comparative fault provision, there would have been no reason for the legislature to amend the statute to make it retroactively applicable to the *City of Gary* case.” *Id.* at 30.

The majority’s decision also renders I.C. § 34-12-3-5(1)-(2), which provides that nothing in the Immunity Statute:

may be construed to prohibit a person from bringing or maintaining an action against a firearms . . . seller for recovery of damages for . . . [b]reach of contract or warranty concerning firearms . . . purchased by a person [or d]amage or harm to a person or to property owned or leased by a person caused by a defective firearm

completely unnecessary and without effect. If the Immunity Statute was only intended to codify existing common law regarding comparative fault, there would be no need to state that it is not intended to prohibit a person from bringing an action against a firearm seller for recovery of certain types of damages.

**C. The Decision by the Court of Appeals Goes Against Statements Made in the Indiana Attorney General’s Brief in Support of the Constitutionality of the Immunity Statute Supporting Defendant’s Interpretation of the Immunity Statute**

The Indiana Attorney General’s Memorandum of Law in Support of the Constitutionality of the Immunity Statute (“Indiana AG Memorandum”) contains several statements confirming that the legislature intended to prohibit persons from bringing “an action against a firearms . . . seller for . . . recovery of damages resulting from the criminal or unlawful misuse of a firearm or ammunition for a firearm by a third party,” as explicitly stated by I.C. § 34-12-3-3(2). See, e.g., Indiana AG Memorandum at 8 (“There is nothing irrational or arbitrary about the General Assembly’s choice here. It saw fit to limit certain categories of cases brought against

manufacturers and sellers of firearms due to a flood of litigation....Officer Runnels has a remedy for his damages that resulted from the action of the most culpable party – the shooter, Martin.”); 5 (“Indiana’s legislature rationally determined that the excess of private and public litigation against gun sellers and manufacturers justified the special protection provided in Section 34-12-3-3(2)”); and 7 (“Officer Runnels incorrectly asserts that the General Assembly has abolished his remedies without providing any alternative which violates substantive due process.”).

The Indiana Attorney General’s brief supporting the constitutionality of the Immunity Statute supports the clear and unambiguous language used by the legislature: the Immunity Statute changed the previously applicable law so that a “person may not bring an action against a firearms . . . seller for recovery of damages resulting from the criminal or unlawful misuse of a firearm or ammunition for a firearm by a third party.” If the “strained interpretation” of the Immunity Statute by the majority of the Court of Appeals were correct, there would have been no need for plaintiff to challenge the constitutionality of the Immunity Statute. Similarly, the Indiana Attorney General would have simply submitted a brief stating that the Immunity Statute is constitutional because it only codified the existing law regarding comparative fault, and made no changes to the law that would prohibit plaintiff from bringing an action against defendants based on the allegations raised in his complaint.

**D. The Legislature’s Purpose in Enacting the Immunity Statute will be Nullified if the Decision by the Court of Appeals is Not Reversed**

The protection from litigation that the legislature provided to sellers of firearms by enacting the Immunity Statute will be rendered a nullity if this Court does not reverse the decision by the Court of Appeals. As the dissenting opinion aptly observed, the Immunity Statute states that “person may not *bring* an action against a firearms seller for recovery of damages resulting from

the criminal misuse of a firearm by a third party” and, as such, is “a quintessential immunity provision.” Mar. 17, 2016 Order at 27 (Altice, J., dissenting) (emphasis in original).

Nevertheless, the concurring decision by Judge Brown concluded that the legislature did not intend to provide immunity because, in I.C. § 34-30-20-1, the legislature used the phrase a “person is immune from civil liability,” instead of the language in Section 34-12-3-3 stating that a “person may not bring an action.” Mar. 17, 2016 Order at 20 (Brown, J., concurring). There is no magic language that the legislature is required to use to provide immunity. Further, despite the conclusion by Judge Brown, the language the legislature used in the Immunity Statute provides more protection to a potential defendant by providing that a potential plaintiff “may not bring an action” against it, thereby negating the need to present a defense, than the language used in Section 34-30-20-1, which provides that the defendant cannot be held liable, but does not explicitly prohibit an action from being filed against it.

As both this Court and the Court of Appeals have previously held, the purpose of an immunity statute is to protect a particular group from having to even defend themselves against certain claims, not merely to prevent them from being held liable for such claims. See, e.g., Foster v. Percy, 270 Ind. 533, 534-38, 387 N.E.2d 446, 447-50 (1979) (affirming trial court’s order granting a motion to dismiss based on the common law immunity afforded to prosecutors and the immunity provided by the Tort Claims Act, I.C. § 34-4-16.5-3(6)); Livingston v. Consolidated City of Indianapolis, 398 N.E.2d 1302, 1303-06 (Ind. Ct. App. 1979) (affirming trial court’s order granting a police officer’s motion to dismiss based on the Tort Claims Act, and holding that the language in Section 34-4-16.5-3 that a “governmental entity or an employee acting within the scope of his employment is not liable if a loss results from” specified actions). See also Peavler v. Bd. of Comm’rs of Monroe Cnty., 528 N.E.2d 40, 46 (Ind. 1988) (interpreting the Indiana Tort

Claims Act and holding that “[i]mmunity assumes negligence but denies liability. Thus, the issues of duty, breach, and causation are not before the court”).

Despite binding precedent from this Court that immunity from suit is a threshold issue that must be decided at the beginning of a case, the Court of Appeals declined to “decide whether I.C. § 34-12-3-3 should be characterized as an immunity statute” and concluded that a “decision on that issue is better left for another day and should be made outside the province of an initial T.R. 12(C) analysis.” Mar. 17, 2016 Order at 15 n.4. By declining to decide the issue of whether I.C. § 34-12-3-3(2) is an immunity statute and requiring defendants to engage in discovery and defend themselves against the alleged merits of plaintiff’s claim, the Court of Appeals deprived defendant of the very benefit of the Immunity Statute — not having to present a defense against covered claims.

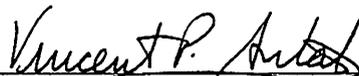
The Indiana Tort Claims Act does not use the term “immune from civil liability,” but this Court and the Court of Appeals have repeatedly held that it is an immunity statute. Foster, 270 Ind. at 534-38, 387 N.E.2d at 447-50; Livingston, 398 N.E.2d at 1303-06; Peavler, 528 N.E.2d at 46. Similarly, the Equine Activity Statute, I.C. § 34-31-5-1(1)(b), does not use the term “immunity,” but the Court of Appeals has held that its language stating that a “participant or participant’s representative may not: (1) make a claim against; (2) maintain an action against; or (3) recover from; an equine activity sponsor or equine professional for injury, loss, damage, or death of the participant resulting from an inherent risk of equine activities,” makes it an immunity statute. Perry v. Whitley County 4-H Clubs, Inc., 931 N.E.2d 933, 939 (Ind. Ct. App. 2010) (holding that the “Equine Activity Statute only requires that, in order for immunity to apply, the injury must have resulted from broad categories of risk deemed integral to equine activities, regardless of whether the sponsor was negligent”).

An immunity statute necessarily presumes that the covered defendant was either negligent, violated a law, or engaged in some other action for which it could be held liable to a potential plaintiff without the benefit of the immunity provided by the statute. If this Court does not grant the defendants' Petition to Transfer, and plaintiff's claims against them are dismissed after a motion for summary judgment or a trial, they will have lost the benefit the legislature conferred on them by enacting the Immunity Statue — not having to defend themselves against covered claims.

**CONCLUSION**

For the foregoing reasons, defendants respectfully request that this Court grant their Petition to Transfer and reverse the Court of Appeals.

Respectfully Submitted,



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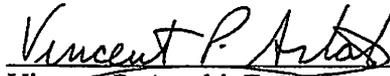
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**WORD COUNT CERTIFICATE**

I, Vincent P. Antaki, verify that this Petition contains 3,849 words, excluding the text of the sections as set forth in Ind. App. R. 44(C).

  
\_\_\_\_\_  
Vincent P. Antaki, Esq.

**CERTIFICATE OF SERVICE**

I, Vincent P. Antaki, certify that on April 18, 2016, a true and complete copy of the foregoing Petition to Transfer 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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