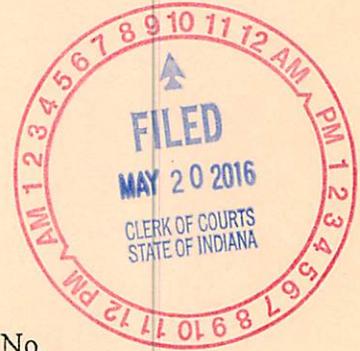


IN THE  
INDIANA SUPREME COURT



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

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This Court should grant the petition to transfer because the Court of Appeals substituted its own judgment for that of the legislature regarding whether Indiana law should provide immunity to firearms sellers in cases where a plaintiff is seeking recovery of damages resulting from the criminal or unlawful misuse of a firearm by a third party and alleges that the firearm seller independently violated the law or acted negligently. By doing so, the Court of Appeals engaged in a strained interpretation that essentially rewrote the law that the legislature had enacted to eliminate the immunity it provided and instead substitute comparative fault principles that already existed in Indiana law.

The sole basis on which defendants moved for judgment on the pleadings was pursuant to Subsection (2) of Indiana Code § 34-12-3-3 (“Immunity Statute”), which explicitly states that, subject to certain exceptions, 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.” I.C. § 34-12-3-3 (emphasis added). The decision by the Court of Appeals completely ignores the provision stating that a “person may not bring an action,” and expressly authorizes a person to bring an action against a firearms seller, and instead only provides that the seller may not be held liable “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.

Despite the Indiana Legislature’s use of language clearly stating that a “person may not bring an action,” the Court of Appeals engaged in a strained interpretation in the Immunity Statute, to conclude that the legislature had actually intended to enact a law that allows a person to bring a covered action. The strained interpretation given to Subsection (2) of the Immunity Statute by the Court of Appeals also means that the Indiana Legislature enacted a law that made no changes to Indiana law because existing comparative fault principles already prevented a firearms seller from

being held liable for that “portion of damages that results from the criminal or unlawful misuse of a firearm by a third party.” Mar. 17, 2016 Order at 15. Neither the Court of Appeals nor plaintiff has provided an explanation as to why the legislature would purposefully enact a law that made no change to existing law, or why, if that law had no effect, the legislature would amend it to make it retroactive so that it would apply to the *City of Gary* case. The reason for this is that there is no way to reconcile the language used by the legislature in enacting the Immunity Statute that expressly states that a “person may not bring an action” and the strained interpretation given to it by the Court of Appeals in order to allow this case to continue.

Plaintiff claims that defendants’ “arguments are at odds with the plain language” of the Immunity Statute, and asserts that the:

Court of Appeals properly held that the General Assembly meant what it said; firearm sellers may not be held liable . . . 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).

Pl.’s Brief at 1-2. It is plaintiff’s arguments that are at odds with the plain language of the Immunity Statute, as evidenced from their failure to quote from, or rely on, the actual language of the Immunity Statute, which states that a “person may not bring [a covered] action,” but does not contain any language about firearm sellers not being held liable for that portion of damages related to the third party’s criminal or unlawful misuse of a firearm, as opposed to their own alleged negligent or illegal conduct.

Despite plaintiff’s implicit argument, there is no requirement that the legislature reference the name of a specific case and state that a law it is enacting is intended to “overrule” that decision in order to change the law to be applied by the courts. Pl.’s Brief at 4-5. The Immunity Statute was enacted after the *City of Gary* case was filed and it was not retroactive at the time this Court issued its decision, 801 N.E.2d 1222 (Ind. 2003), allowing the *City of Gary* case to continue.

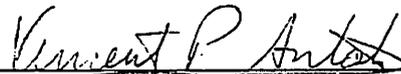
Because the Immunity Statute was not applicable to the *City of Gary* case, and was not addressed in this Court's 2003 decision, there was no reason for the legislature to "overrule" that decision when it amended the Immunity Statute in 2004. Similarly, the legislature is not required to rewrite a law every time a trial judge denies a motion to dismiss a claim pursuant to it, especially one without any reasoning or analysis; that is the purpose of the appellate process. If this Court grants defendants' petition to transfer, and applies the Immunity Statute to plaintiff's claims using the language actually used by the legislature, there would be no need for the legislature to amend the Immunity Statute to reverse Judge Hanley's order.

Plaintiff's claim that Subsection (2) of the Immunity Statute "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," Pl's Brief at 6, cannot be reconciled with the statutory language stating that a "person may not bring an action." If the Immunity Statute prohibits a covered action from even being brought, how can it implicitly allow the recovery of certain damages?

### 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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#### WORD COUNT CERTIFICATE

I, Vincent P. Antaki, verify that this Petition contains 967 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 May 20, 2016, a true and complete copy of the foregoing Reply Brief in Support of 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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