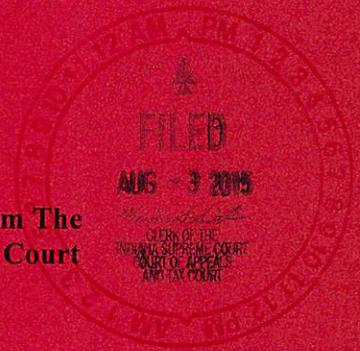


IN THE INDIANA COURT OF APPEALS
CAUSE NO. 49A02-1501-CT-00042



KS&E Sports and Edward J. Ellis)	Interlocutory Appeal From The
)	Marion County Superior Court
Appellants/Defendants)	Civil Division, Room 11
)	
v.)	Trial Court Case No.
)	49D11-1312-CT-044030
)	
Dwayne H. Runnels)	
)	
Appellee/Plaintiff)	The Honorable John F. Hanley

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STATEMENT OF THE ISSUE

Does Indiana Code § 34-12-3-3(2) provide Appellants/Defendants KS&E Sports and Edward J. Ellis (collectively “KS&E” or “Defendants”) a blanket shield of immunity for the harm they have caused Appellee/Plaintiff Officer Dwayne H. Runnels (“Officer Runnels”) by illegally and negligently selling the crime gun used to shoot Officer Runnels?

STATEMENT OF THE CASE

Officer Runnels filed this action to hold Defendants accountable for the harm *they have caused* by illegally and negligently selling the crime gun used to shoot him in the line of duty. *See, e.g.*, Appellants’ App. pp. 10, 14, 15, 20, 22, 26-27, 29, 32 (Complaint, ¶¶ 20, 29, 54, 55, 67, 95, 96, 97, 107, 108, 109, 118). Defendants do not dispute that Officer Runnels’ claims are firmly rooted in basic principles of Indiana tort law holding that gun sellers may be found liable in tort for the damages they cause by unlawfully supplying the criminal gun market. Instead, Defendants request interlocutory review of the Superior Court’s denial of its motion for judgment on the pleadings on the grounds that the Indiana General Assembly’s enactment of Indiana Code § 34-12-3-3(2) radically transformed Indiana tort law to immunize the unlawful conduct of gun sellers that engage in illegal straw sales. The trial court appropriately rejected Defendants’ unprecedented construction of I.C. § 34-12-3-3(2), as it is contrary to the statute’s plain language and would perversely immunize firearms sellers for the harm caused by *their unlawful misuse of a firearm* (e.g., the illegal or negligent sale of a firearm) whenever some third party’s criminal behavior also contributed to the injury. Appellants’ Br. at 10-11 (“[T]he plain reading of the statute is that even if conduct is *not lawful*, it is shielded from civil liability . . .”) (emphasis added). Further, to obscure the extremity of their construction, Defendants incorrectly claim that Officer Runnels’ suit seeks to recover damages resulting from the harm

caused by a third party rather than, as the Complaint makes clear, the damages resulting from Defendants' own conduct. *See, e.g., id.* at 1-2.

Before the Superior Court, Officer Runnels rebutted the same flawed arguments by demonstrating to the Honorable John Hanley that the instant suit seeks to recover damages based on the harm proximately caused by *each defendant's respective roles* in the illegal and negligent straw sale of a firearm. *See e.g.,* Appellants' App. pp. 12-23 (Compl. ¶¶ 58-121; Appellants' App. pp. 43-72 (Plaintiff's Opposition to Defendants' Motion for Judgment on Pleadings). Officer Runnels further established that the Defendants' broad, unprecedented reading of the statute is wholly at odds with the plain terms of the statute, basic canons of statutory construction, longstanding principles of Indiana tort, agency, immunity, and criminal law, and the statute's legislative history. *See, e.g., id.*; Tr. pp. 20:25-31:10. Indeed, the grant of immunity that Defendants assert for firearms sellers is not only unprecedented in the State of Indiana, but has never been authorized or recognized by any state legislature or court in the country. In fact, Defendants' interpretation of § 34-12-3-3(2) is so extreme that it would render the law unconstitutional.

After Judge Hanley had an opportunity to fully review the parties' fulsome briefing on the issue and preside over oral arguments, the Superior Court followed longstanding precedent in Indiana by appropriately denying Defendants' motion for judgment on the pleadings in a summary order issued on October 21, 2014. *See* Appellants' App. p. 6. Defendants' Opening Brief merely reprises the same arguments that Judge Hanley considered and appropriately rejected.

The incorrectness of Defendants' statutory interpretation has only been further exposed by the Indiana General Assembly's subsequent legislative acquiescence to the ruling of the

Superior Court. Critically, the Indiana General Assembly, which is charged with knowledge of how Judge Hanley applied § 34-12-3-3(2) under Indiana law, recently elected to amend the effective date of § 34-12-3-1 *et seq.* without making any amendments to the plain language of § 34-12-3-3(2). Had Judge Hanley misconstrued Indiana law, as Defendants contend, the General Assembly would have corrected that. However, it pointedly chose to leave the statutory language that Defendants rely upon for its Motion for Judgment on the Pleadings entirely untouched. The correctness of the court's interpretation of the law is confirmed by Indiana's doctrine of legislative acquiescence, which provides that "[w]hen a statute has been judicially construed and is later reenacted in substantially the same terms, the legislature is deemed to have intended the same construction." *Lewis v. Lockard*, 498 N.E.2d 1024, 1026 (Ind. Ct. App. 1986).

Officer Runnels respectfully submits this Appellee/Plaintiff's Brief and requests that the Court affirm Superior Court's order.

STATEMENT OF FACTS

I. DEFENDANTS' WRONGFUL AND UNLAWFUL CONDUCT PROXIMATELY CAUSES HARM

A. Officer Runnels Was Shot And Injured In The Line Of Duty

Officer Runnels, a fifty-two-year-old veteran and patrol officer for the Indianapolis Metropolitan Police Department, joined the Department's predecessor more than fourteen years ago. Appellants' App. p. 11 (Compl. ¶ 6). On December 12, 2011, Officer Runnels was dutifully serving his community on patrol when he stopped a maroon Chevrolet Impala matching the description of a vehicle that had been connected to a recent armed robbery and shooting incident. *Id.* at 13 (Compl. ¶¶ 15-18).

Officer Runnels exited a fully-marked police car and, in police uniform, approached the Chevrolet. *Id.* ¶ 16. A convicted felon, Demetrius Martin ("Martin"), exited from the driver seat

with a Smith & Wesson model SW40VE, .40 caliber handgun, bearing serial number DWN2241 (“Smith & Wesson Handgun”). *Id.* ¶¶ 16-17. Before Martin could be subdued, he fired two shots. One bullet missed Officer Runnels and struck the patrol car. The second bullet pierced Officer Runnels’ left hip and became lodged in his left upper pelvis. *Id.* Although Officer Runnels survived the incident with the aid of a holster that slowed the bullet, the shootout caused him serious, extensive, and permanent harm, including physical injuries and financial damages.

B. KS&E’s Firearm Used To Grievously Injure Officer Runnels

The danger that caused Officer Runnels’ injuries was created 60 days earlier at KS&E Sports (“KS&E”) when, on October 10, 2011, the felon Martin acquired the firearm used to grievously injure Officer Runnels through an illegal and wanton straw sale.¹ Appellants’ App. pp. 14-16 (Compl. ¶¶ 19-41). At the time, KS&E either knew that it was engaging in an illegal straw sale, or the conduct of Martin and the straw purchaser, Tarus E. Blackburn (“Blackburn”) inside KS&E would have put a reasonable gun dealer on notice of the crime being committed, including, *inter alia*, the communications between Blackburn and Martin, the circumstances of the sale, the type of firearm acquired, and the method of payment — *hundreds of dollars in cash*, all of which were red flags of an illegal straw sale. *Id.*

As KS&E has known for years, straw sales are one of the most common methods by which criminals and other dangerous people obtain guns from firearm sellers. Appellants’ App. pp. 17-18 (Compl. ¶ 46(a)). For Edwards J. Ellis and other KS&E employees, it was hardly the first time that one of KS&E’s firearms had found its way to a crime scene. KS&E has been found to sell an average of *twice as many crime guns* as even the most prolific crime gun sellers.

¹ A straw sale is a sale where “a person who buys a gun on someone else’s behalf while falsely claiming that it is for himself.” *See Abramski v. United States*, 134 S. Ct. 2259, 2263 (2014).

Id. p. 19, ¶¶ 49-50. The volume of crime guns sold by KS&E has been so alarming that it was once ranked as the 34th top crime-gun seller in the entire nation. *Id.* ¶ 50. Despite that track record, to this day, Defendants have eschewed the sales practices recommended by the firearms industry and the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) in favor of dangerous and irresponsible business practices that allow KS&E to profit from straw sales that arm the Indianapolis crime scene. *Id.* ¶¶ 53-54.

C. Officer Runnels’ Complaint

For his role in KS&E’s unlawful transfer of the Smith & Wesson Handgun to Martin, Blackburn was criminally prosecuted and ultimately pled guilty to making false statements on the federal form used to facilitate the straw purchase. Appellants’ App. p. 20, ¶ 57. The instant suit was filed to hold the Defendants and Blackburn civilly accountable for the harm proximately caused by each of *their respective roles* in the unlawful straw sale. Based on Defendants’ unlawful conduct, Plaintiff has asserted claims of negligence (Count I); negligent entrustment (Count II); negligence per se (Count IV); negligent hiring, training, and supervision (Count V); damages resulting from a conspiracy (Count VI); and public nuisance (Count VII). Appellants’ App. pp. 21-32, ¶¶ 58-121. Plaintiff also seeks to pierce KS&E’s corporate veil (Count VIII). Appellants’ App. p. 24, ¶¶ 122-127. In support of each of the asserted counts, the Complaint is replete with factual allegations explaining that Defendants’ “*negligent entrustment, knowing violations of firearms laws, and failure to exercise reasonable care* in its sale of the Smith & Wesson Handgun *proximately caused the injuries to Officer Runnels.*” Appellants’ App. p. 17, ¶ 42; *see, e.g.*, Appellants’ App. pp. 14, 15, 20, 22, 26, 27, 29, 30, 32 (Complaint ¶¶ 20, 29, 54, 55, 67, 95, 96, 97, 107, 108, 109, 118.)² To remedy the harm to Officer Runnels caused by

² Page 1 of Appellee’s Appendix details factual allegations from the Complaint that allege how

Defendants' wrongful, wanton and unlawful conduct, the Complaint seeks, *inter alia*, compensatory damages, punitive damages, and injunctive relief. Appellants' App. p. 14, ¶ 25.

II. INDIANA CODE § 34-12-3

In 2001, the Indiana General Assembly passed Indiana Code § 34-12-3-1 *et seq.* to prevent firearm manufacturers or sellers from being held civilly liable for harm caused by criminal third parties where the firearm company had done nothing wrong, but simply manufactured or sold the firearm that ultimately fell into the hands of criminals. The law restricts absolute liability cases through two complementary provisions that, *inter alia*, shield sellers of firearms from lawsuits that allege damages based on the wrongful acts of others. See I.C. § 34-12-3-3(1), (2). Subsection 3(1) bars victims from bringing suits against firearm sellers for the “recovery of damages *resulting from*, or injunctive relief or abatement of a nuisance relating to, the *lawful* . . . sale . . . of a firearm or ammunition for a firearm.” (Emphasis added.) Subsection 3(2) further clarifies that gun sellers that make an unlawful sale may not be held financially responsible for the damages caused by the criminal acts of third parties by precluding the “recovery of damages *resulting from* the criminal or unlawful misuse of a firearm or ammunition for a firearm by a *third party*.” (Emphasis added.) In relevant part, section 34-12-3-3 provides:

3. Except as provided in section 5(1) or 5(2) [IC 34-12-3-5(1) or IC 34-12-3-5(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;

Defendants' illegal, wrongful, and negligent activity proximately caused Officer Runnels harm.

(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.

Section 34-12-3-5 provides a non-exhaustive list of allowable actions against firearms sellers that complements the structure of Section 3, including in Section 5(3), which allows injunctive actions that do not fall within the plain meaning of the statute. In relevant part, it provides that:

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 [IC 34-12-3-3] of this chapter.

In May 2015, the Indiana General Assembly amended § 34-12-3-1 *et seq.* to apply “to actions filed before, after, or on April 18, 2001.” *See* I.C. § 34-12-3-0.1. Critically, the Assembly left § 34-12-3-3(2) completely unaltered.

SUMMARY OF ARGUMENTS

The Complaint expressly and unequivocally alleges liability based on the harm that Defendants proximately caused Officer Runnels through *their* wrongful, unlawful and unreasonable misuse of a firearm — *i.e.*, entrusting the Smith & Wesson Handgun to a straw

purchaser. Appellants' App. 17, ¶ 42; *see, e.g.*, Appellants' App. pp. 14, 15, 20, 22, 26, 27, 29, 30, 32 (Compl. ¶¶ 20, 29, 54, 55, 67, 95, 96, 97, 107, 108, 109, 118). Officer Runnels' cause of action and theory of liability is firmly supported by long-standing Indiana law. No plausible construction of § 34-12-3-3(2) applies here to protect Defendants' unlawful conduct from civil liability. On its face, § 34-12-3-3 does not bar the recovery of damages resulting from a defendant's *own* unlawful conduct and is limited to prohibiting actions where the plaintiff seeks damages resulting from either a lawful sale or damages resulting from the shooter's criminal conduct. In other words, the plain language serves the reasonable and rational purpose of protecting gun sellers from being held responsible for the damages they did not proximately cause (*e.g.*, damages that are caused by a criminal), while preserving liability for gun sellers' wrongful conduct. There is no indication in the text, the statutory scheme or the legislative history that the Indiana General Assembly intended to radically rewrite more than a hundred years of Indiana common law and take the unprecedented step of providing legal protection for unlawful conduct. Defendants ask this Court to impermissibly disregard binding precedent on proximate cause and to create novel law that is unprecedented in Indiana and the nation, and is contrary to established Indiana tort law, the Indiana Constitution and the United States Constitution.

STANDARD OF REVIEW

Under the Indiana Trial Rules, Defendants' Motion operates as a Rule 12(B)(6) motion filed after an answer. Dismissal under Rule 12(C) is "rarely appropriate." *Obremski v. Henderson*, 497 N.E.2d 909, 910 (Ind. 1986). When evaluating a Rule 12(C) motion, courts are to "accept the facts alleged in the complaint as true and view the pleadings in a light most favorable to [plaintiff] and with every reasonable inference in [plaintiff's] favor." *Wertz v. Asset*

Acceptance, LLC, 5 N.E.3d 1175, 1178 (Ind. Ct. App. 2014). A Rule 12(C) Motion should be denied in all but the limited circumstances “where it is clear from the face of the complaint that under no circumstances could relief be granted.” *Culver-Union Twp. Ambulance Serv. v. Steindler*, 629 N.E.2d 1231, 1235 (Ind. 1994); *see, e.g., Forte v. Connerwood Healthcare, Inc.*, 745 N.E.2d 796, 801 (Ind. 2001).

ARGUMENT

I. DEFENDANTS’ WRONGFUL AND UNLAWFUL TRANSFER OF THE SMITH & WESSON HANDGUN PROXIMATELY CAUSED HARM TO OFFICER RUNNELS

Under well-established Indiana law, Defendants’ negligent, unlawful, wanton and wrongful transfer of the Smith & Wesson Handgun to Martin via a straw buyer constitutes an independent proximate cause of the harm Officer Runnels has suffered. *See, e.g.,* Appellants’ App. pp. 12-24 (Compl. ¶¶ 58-127). Each of Officer Runnels’ claims seeks relief based on the legally cognizable and discernible injuries caused by Defendants’ wrongful conduct. (*Id.*) They do not, as Defendants incorrectly insist, seek to recover damages that “resulted from the criminal misuse of a firearm” by Martin. Appellants’ Br. at 1, 5.

An act or omission is the proximate cause of an injury if the harm suffered is a “natural and probable consequence which, in light of [the] circumstances, should reasonably have been foreseen or anticipated.” *Rubin v. Johnson*, 550 N.E.2d 324, 331 (Ind. Ct. App. 1990). Any injury may have more than one proximate cause, and “[t]he mere intervention, however, of an independent act . . . will not in and of itself relieve the original negligent actor of legal responsibility.” *Stauffer v. Ely*, 270 N.E.2d 889, 892 (Ind. Ct. App. 1971); *see also Bd. of Comm’rs of Adams Cnty. v. Price*, 587 N.E.2d 1326, 1333 (Ind. Ct. App. 1992) (explaining Indiana standard of proximate causation). Indiana common law has long recognized that a

negligent transferor of dangerous goods may be held individually accountable even when the acts of multiple intermediaries also contribute to the inflicted harm. *See, e.g., Terre Haute Brewing Co. v. Newland*, 70 N.E. 190, 191 (Ind. 1904) (finding that a brewing company's unlawful sale of alcohol to an unlicensed saloon proximately caused a saloon patron's death).

Indiana's well-established principles of proximate causation and foreseeability have long ensured that the chain of causation initiated by the wrongful and unlawful conduct of a firearm seller may not be broken by the criminal or intentional acts of an unauthorized buyer or shooter. *See, e.g., Binford v. Johnston*, 82 Ind. 426, 432 (Ind. 1882) (finding a firearm seller may be held civilly liable for negligently and unlawfully selling to two minors a pistol which, when left unattended, was used by another minor in a fatal shooting); *Rubin*, 550 N.E.2d at 332 (same for negligent and unlawful transfer of firearm to unauthorized purchaser); *City of Gary v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1249 (Ind. 2003) (holding the City of Gary's public nuisance and negligence claims against gun manufacturers and sellers were supported by Indiana law and defendants could be the proximate cause of a later criminal act).

Officer Runnels' claims against Defendants are rooted in the basic principles of proximate causation that underlie Indiana tort law. He seeks to recover for the foreseeable harm that Defendants proximately caused by illegally and negligently participating in an illegal straw sale of the Smith & Wesson Handgun, in violation of various federal and state firearm statutes governing the sale and marketing of firearms, including 18 U.S.C. §§ 922(a)(6), 922(d), 922(m), 18 U.S.C. § 924(a)(1)(A), and Indiana Code § 35-47-2.5-16(b). *See, e.g.,* Appellants' App. pp. 21-24, 26-27, 30, 32, 33 (Compl. ¶¶ 62, 66-67, 75, 82, 95, 97, 109, 119-120, 125). The injuries alleged are precisely the type of harm that both the United States Congress and the Indiana General Assembly sought to prevent when they developed comprehensive criminal schemes to

combat the transfer of firearms to unauthorized criminals, such as Martin, through straw buyers. *See, e.g., Abramski v. United States*, 134 S. Ct. 2259, 2263 (2014) (federal law “forbids a licensed dealer from selling a gun to anyone it knows, or has reasonable cause to believe, is such a prohibited buyer”); *see e.g., United States v. Carney*, 387 F.3d 436, 449 (6th Cir. 2004) (affirming convictions of two FFLs for aiding and abetting the felonious utterance of knowingly false transfer records and of the felonious creation or maintenance of willful omissions and/or falsehoods in firearms transaction records).

II. INDIANA CODE § 34-12-3-3(2) IS WHOLLY UNRELATED TO OFFICER RUNNELS’ CLAIMS

Despite the Complaint’s explicit and narrow focus on the divisible, legally cognizable harm that Defendants’ illegal and negligent conduct has proximately caused Officer Runnels, Defendants nevertheless contend that the Indiana legislature intended to repeal more than a century of Indiana case law without even stating that it was doing so, and that § 34-12-3-3(2) bars this action because Martin’s criminal conduct contributed to Officer Runnels’ injuries. Appellants’ Br. at 5-6. Defendants’ reliance on § 34-12-3-3(2) to abrogate longstanding Indiana law is wholly inconsistent with the plain language of the statute, Indiana canons of statutory construction, Indiana common law, and the legislative history.

A. The Plain Language of Indiana Code § 34-12-3-3(2) Does Not Shield Firearm Sellers From Liability For Harm Caused by Their Own Unlawful Activity

“The cardinal rule of statutory construction is to determine and give effect to the true intent of the legislature.” *State v. Ray*, 886 N.E.2d 43, 46 (Ind. Ct. App. 2008). To discern that intent, courts must “examine the statute as a whole and also read sections of an act together so that no part is rendered meaningless if it can be harmonized with the remainder of the statute.” *Alvey v. State*, 10 N.E.3d 1031, 1033 (Ind. Ct. App. 2014). The language of the statute

constitutes the best evidence of legislative intent, and words are typically given their plain and ordinary meaning. *See id.* However, due consideration must also be given to the nature and subject matter of the act, corresponding terms of art, and the object of the statute. *See id.; Ray*, 886 N.E.2d at 46. When construing statutory text, courts “presume that the legislature intended logical application of the language used in the statute, so as to avoid unjust or absurd results.” *Ray*, 886 N.E.2d at 46.

Here, the statutory text of § 34-12-3-3(2) and the surrounding provisions show that subsection 3(2) has no application to Office Runnels’ suit. The plain language of § 34-12-3-3(2) is clear. Subsection 3(2) expressly restricts the rights of victims to bring suit against firearms sellers to recover 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(2) (emphasis added). In conjunction with subsection 3(1), which protects firearms dealers from suits to recover “damages resulting from ... the lawful” sale of a firearm or ammunition, subsection 3(2) operates to shield firearms sellers from lawsuits that seek to recover damages that are not attributable to their own misconduct, but result from the misconduct of a true, unrelated third party who does not have an agency or conspiratorial relationship to the defendant. The differing scopes of subsections 3(1) and 3(2) underscore the legislature’s intent to only protect gun sellers from damages resulting from a sale when the sale is entirely lawful. Indeed, there is nothing in subsection 3(2) to suggest that it prevents the recovery of damages caused by the sale of a firearm; as it is entirely focused on preventing recovery of damages caused by the criminal act of a third party. The Indiana General Assembly could have easily included any language that supports barring recovery of damages *resulting from a firearm seller’s* illegal or negligent *misuse* of a firearm — *i.e.*, the unlawful transfer of the Smith & Wesson Handgun to a straw buyer. *See, e.g., Smith v.*

United States, 508 U.S. 223, 234-35 (1993) (explaining that analogous federal firearm laws construe the term “use” of a firearm as including the transfer of firearms). But it did no such thing.

That omission is not inadvertent. Had the Indiana General Assembly intended to grant unprecedented “immunity” to firearms dealers that unlawfully sell guns to straw purchasers in derogation of the common law, as Defendants claim, it would have said so explicitly. *See, e.g., Bartrom v. Adjustment Bureau, Inc.*, 618 N.E.2d 1, 10 (Ind. 1993) (there is a presumption that statutes do not make any change to the common law “beyond what it declares either in express terms or by unmistakable implication”); *Mooney v. Anonymous M.D.*, 991 N.E.2d 565, 580 (Ind. Ct. App. 2013). Indeed, it has proven that it knows how to grant immunity, and it only does so through clear, unequivocal language. For instance, to broadly immunize firearms owners who lose possession of a firearm against their will, the General Assembly adopted Article 30 of the Indiana code entitled “Immunity for Civil Liability” that, *inter alia*, expressly makes gun owners “immune from civil liability” when another person acquires the firearm or ammunition through burglary, robbery or theft; regardless of any other facts. *See* I.C. § 34-30-20-1, Appellee’s Addendum at 1. The Indiana General Assembly pointedly chose not to include comparable language whenever a gun seller sells a firearm that is subsequently criminally misused by a third party. Instead, it elected to focus on limiting the subset of damages attributable to the misconduct of “a third party” pursuant to Indiana’s well-established principles of comparative fault, drawing a clear distinction between the proximate harm caused by Defendants and the injuries precipitated by any nonparty, such as Martin. *See* I.C. § 34-51-2-8(b)(1) (allocating responsibility between individual defendants and nonparties who contributed to those injuries);

see, e.g., *Santelli v. Rahmatullah*, 993 N.E.2d 167, 177 (Ind. 2013) (analyzing comparative fault in mixed case of intentional and negligent actors).

Accordingly, to appropriately construe § 34-12-3-3(2), this Court must credit the Indiana General Assembly's decision to depart from the plain language it traditionally uses for conferring immunity and refrain from effectively inserting words into the statutory language that the Assembly could have used, but elected to intentionally omit. *Morgan Cty. Rural Elec. Membership Corp. v. Indianapolis Power & Light Co.*, 261 Ind. 323, 327 (1973) (finding that had the legislature intended the appellee's interpretation it "had merely to so state").³

B. Defendants' Interpretation Of Indiana Code § 34-12-3-3(2) Violates Numerous Canons Of Statutory Construction

The expansive construction of subsection 3(2) advanced by Defendants (*i.e.*, immunizing the unlawful and negligent activities of firearm sellers) not only lacks textual support, but contravenes well-established principles of statutory interpretation.

First, contrary to Defendants' claims, it ignores Indiana's longstanding rule against construing statutes in a manner that would render related portions of the act superfluous. See, e.g., *Warner Press, Inc. v. Review Bd. of the Ind. Emp't Sec. Div.*, 413 N.E.2d 1005, 1005-06 (Ind. Ct. App. 1980); 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."). For instance, if, as Defendants claim, subsection 3(2) broadly limited the liability of firearms dealers for *even unlawful* sales (it does not), it would have been

³ The cases related to immunity cited by the Defendants are inapposite as they all relate to the clearly defined governmental immunity granted by statute, which is inapplicable to this case. See *Clifford v. Marion Cnty. Prosecuting Attorney*, 654 N.E.2d 805, 808 (Ind. Ct. App. 1995); *Peavler v. Bd. Of Comm'rs of Monroe Cnty.*, 528 N.E. 2d 40, 46 (Ind. 1998); *Indiana Dep't of Fin. Insts. v. Worthington Brancshares, Inc.*, 728 N.E.2d 899, 902 (Ind. Ct. App. 2000).

unnecessary to include a related subsection that explicitly bars the recovery of damages resulting from the “lawful” sales of firearms. *See* I.C. § 34-12-3-3(1). *See, e.g., Robinson v. Wroblewski*, 704 N.E.2d 467, 474 (Ind. 1998) (“In construing a statutory provision, we must consider the statute in its entirety, with each part being viewed not as an isolated fragment but with reference to all the other companion provisions.”). The statute’s express immunization of liability for “lawful” activity under subsection 3(1) demonstrates the clear intent of the Indiana General Assembly to treat “lawful” and “unlawful” sales distinctly and an understanding that subsection 3(2) does not expansively shield firearms sellers from liability for the proximate consequences of their unlawful activity. *See, e.g., 2A Sutherland Statutory Construction* § 47:23 (7th ed. 2014) (“*Expressio unius* instructs that, where a statute designates a form of conduct ... courts should infer that all omissions were intentional exclusions.”). Moreover, Defendants’ proposal to construe subsection 3(2) to bar suits to enjoin *unlawful* activity by firearms sellers would effectively undermine the statute’s express allowance of actions for injunctive relief to enforce a valid statute, rule, or ordinance. There is no reason to believe that the Indiana legislature intended to read § 34-12-3-5(3) out of the statute through an expansive reading of subsection 3(2). *See, e.g., In re B.W.*, 908 N.E.2d 586, 592 (Ind. 2009) (courts must rationalize dueling statutory provisions to give effect to both).

In the Opening Brief, Defendants attempt to obscure the implications of their proposed construction of subsection 3(2) by incorrectly insisting that any consideration of the broader statutory framework would improperly introduce a “lawfulness” requirement into subsection 3(2) and, paradoxically, render it superfluous. (Appellants’ Op. Br. at 3 (“The remainder of Runnels’ arguments impermissibly relied on sources beyond the statutory language to interpret the

statute...”), 12-13. That argument not only misstates Officer Runnels’ position, but reveals a fundamental misunderstanding of how subsections 3(1) and 3(2) operate in concert.

As explained above, the plain language of § 34-12-3-3(1) and (2) provides two distinct layers of protections for firearms sellers. *First*, to protect truly blameless firearms sellers, subsection 3(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 (*i.e.*, an absolute liability claim). *See* I.C. § 34-12-3-3(1). *Second*, even where a firearms seller has acted unlawfully, subsection 3(2) limits a firearm seller’s exposure to liability by barring plaintiffs from holding the seller accountable for the portion of damages that result from the criminal or unlawful misuse of a firearm by a true third party. *Id.* § 34-12-3-3(2). For instance, where, as here, a firearms seller transfers a firearm to a third party as part of an unlawful transaction (rendering subsection 3(1) inapplicable), subsection 3(2) nevertheless ensures that a firearms seller may not be held liable for the portion of damages attributable to a third party’s criminal or unlawful misuse of a firearm (*e.g.*, the portion of damages caused by Martin’s actions). Nowhere in either provision, however, does the Indiana General Assembly proscribe the rights of gun victims to bring suit to recover damages for the harm caused by the culpable conduct of a firearms seller, or otherwise immunize a firearms seller from civil liability whenever a third party’s conduct contributes to that harm.

Second, the statutory construction advanced by Defendants would confer an unjust and absurd blanket of civil immunity on firearm sellers who supply guns to criminal straw buyers, such as Blackburn – without any indication that such a result was intended by the legislature.⁴

⁴ Because the term “gun seller” is not defined or otherwise limited to federally licensed gun stores, Defendants’ interpretation of section 3(2) could perversely enable a criminally prosecuted

See, e.g., Livingston v. Fast Cash USA, Inc., 753 N.E.2d 572, 576 (Ind. 2001) (declining to adopt party's statutory construction where it was "inconsistent with the purposes and policies of the [statutory scheme] and create[d] an absurd result which the legislature could not have intended"). Under Defendants' reading of the law, for instance, a firearm seller would be entitled to complete civil immunity even if it affirmatively directed the buyer to use the gun to shoot a police officer; as, by their reasoning, the shooter's "criminal and unlawful misuse" of the firearm cuts off the seller's liability for their own "criminal and unlawful misuse"⁵ of the weapon (*i.e.*, the unlawful sale). Appellants' Br. at 11. There is no indication that the General Assembly intended to achieve such a perverse result. *See, e.g., Ray*, 886 N.E.2d at 46; *Livingston*, 753 N.E.2d at 575 (courts must consider the "effects and repercussions" of a construction when seeking to prevent absurdity).

Defendants' interpretation of § 34-12-3-3(2) would also perversely immunize a firearm seller from liability if the unlawful straw buyer used the firearm to intentionally shoot a victim, but allow a suit to proceed if the unlawful straw buyer merely acted negligently when injuring a third party. For instance, under Defendants' construction of subsection 3(2), Officer Runnels' suit would not be barred if Martin had unintentionally injured Officer Runnels by dropping or mishandling the firearm. That scenario envisioned by Defendants is absurd; as the most foreseeable risk from an unlawful straw sale is a prohibited or otherwise dangerous person will

straw buyer to seek protection under the law by claiming that the firearm was subsequently criminally misused by the actual, third party buyer.

⁵ In the area of firearms regulation, the phrase "unlawful misuse" is a term of art that the U.S. Code defines as any "conduct that violates a statute, ordinance, or regulation as it relates to the use of a [firearm]." 15 U.S.C. § 7903(9). In *Smith v. United States*, the U.S. Supreme Court explained that the term "use" should be read to extend beyond mere use as a weapon to include unlawful transfers. 508 U.S. at 234-35 (1993); *see also Wachovia Bank, N.A. v. Schmidt*, 546 U.S. 303, 315-16 (2006) ("[U]nder the *in pari materia* canon of statutory construction, statutes addressing the same subject matter generally should be read as if they are one law.").

then criminally misuse the gun; it is not the risk that a dangerous person will drop the gun, or otherwise negligently misuse it.

Third, Defendants' construction would frustrate and undermine Indiana's broader statutory scheme for regulating firearms. *Livingston*, 753 N.E.2d at 576-77; *accord Gillespie v. Equifax Info Servs., LLC*, 484 F.3d 938, 941 (7th Cir. 2007) (“[W]e give words their plain meaning unless doing so would frustrate the overall purpose of the statutory scheme . . . or contravene clearly expressed legislative intent.”) To prevent gun violence, Indiana bars domestic abusers from purchasing or possessing a firearm, requires that mental health records be uploaded in the National Instant Check System (allowing law enforcement to temporarily remove firearms from dangerous individuals), and regulates firearms dealers. *See, e.g.*, Ind. Code §§ 35-47-2-1(c), 35-47-4-6; § 33-24-6-3(a)(8); § 35-47-14; § 35-47-2-15; § 35-47-2.5-4. Further, Indiana has long prohibited gun sales to people who are considered dangerous, and recently modified its criminal straw-purchasing statute to clarify that a firearm seller commits a Level 5 felony if he sells a firearm despite having knowledge of the high probability that the buyer is a straw buyer or otherwise ineligible. I.C. § 35-47-2-7. Defendants' construction of § 34-12-3-3(2) is antithetical to the reasonable steps the General Assembly has taken to keep firearms out of the possession of dangerous persons, including straw buyers.

C. Defendants' Interpretation Of Indiana Code § 34-12-3-3(2) Overturns Long-Standing Indiana Common Law

The expansive construction of subsection 3(2) advanced by Defendants would also radically abrogate more than a century of common law precedent in Indiana, which has long recognized that the chain of causation initiated by the unlawful conduct of a firearm seller may not be broken by the criminal or intentional acts of intermediaries. By doing so, Defendants ignore the Indiana principle of statutory interpretation that “statutes in derogation of the common

law are to be strictly construed.” See *Bartrom*, 618 N.E.2d at 10 (the rule has special force when the statute affects a common law right or duty). There is a presumption that statutes do not “make any change [] beyond what it declares either in express terms or by unmistakable implication.” *Id.* “In case of doubt, a statute is construed as not changing the common law.” *Id.*; see also *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (a federal law should not be read to impliedly preempt state common law “unless that was the clear and manifest purpose of Congress”).

The principles of causation that Defendants’ construction of section 3(2) proposes to abrogate may be traced back to the 19th century when, in *Binford v. Johnston*, the Supreme Court of Indiana affirmed that a firearm seller may be held civilly liable for negligently and unlawfully selling a pistol to two minors which, when left unattended, was used by another minor in a fatal shooting. 82 Ind. 426, 430-32 (Ind. 1882). By selling a firearm to unauthorized purchasers, the Supreme Court reasoned, “appellant did an unlawful act, and under settled principles is liable for the consequences naturally and proximately resulting from his unlawful act.” *Id.* at 432.

The principles of *Binford* have continued to animate the causation analysis of courts in Indiana in the many years since its decision. In *Rubin v. Johnson*, a shooting victim’s estate specifically accused the firearm seller of conduct proscribed by Indiana statutes “regulating the transfer and possession of handguns [that] were enacted by the legislature to protect the public from those who would use such weapons in a dangerous or irresponsible manner.” 550 N.E.2d 324, 329. In rejecting the firearm seller’s arguments challenging causation, the Indiana Court of Appeals explained that the intervening conduct of the shooter was not a shield to the seller’s liability “because the criminal, irresponsible, and unpredictable use of handguns is the very risk

sought to be avoided under [the relevant statute governing the transfer of firearms], the realization of this risk cannot stand as a bar to recovery.” *Id.* at 331-33.

The *Rubin* court emphasized that its decision comported with numerous courts throughout the United States, which had similarly held that “the criminal misuse of a firearm does not insulate the seller from liability arising out of a violation of similar provisions” of a statute that regulates firearm sales. *Id.* at 332 (citation omitted); *see, e.g., City of Gary v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1243-44 (Ind. 2003) (“[A]crime involving the use of a gun may be attributable in part to an unlawful sale, but it also requires an act on the part of the criminal. Among the defendants, the retailers are the closest link in the causal chain to the criminal act.”); *Decker v. Gibson Prods. Co. of Albany*, 679 F.2d 212, 216 (11th Cir. 1982) (reversing summary judgment where allegedly negligent seller sold pistol to a criminal buyer); *Franco v. Bunyard*, 547 S.W.2d 91, 93 (Ark. 1977) (same); *Kalina v. Kmart Corp.*, No. CV-90-269920 S, 1993 WL 307630, at *8 (Conn. Super. Ct. Aug. 5, 1993) (“[A]n intervening act, even if intentional or criminal, that does not change the nature of the risk created by the defendant’s negligence does not break the chain of proximate causation ... [T]he scope of risk created by the negligent sale of a firearm and ammunition encompasses acts that endanger others”); *West v. Mache of Cochran, Inc.*, 370 S.E.2d 169, 172 (Ga. Ct. App. 1988). Courts have found that “the injury took place as a direct result of [the firearm seller] selling a ‘lethal weapon’ to one whom Congress has determined to be incompetent to buy it just because of the dangers to ‘us all’ ... by the likelihood of its being misused.” *K-Mart Enters. of Florida, Inc. v. Keller*, 439 So. 2d 283, 286-7 (Fla. Dist. Ct. App. 1983).

There is no indication that Indiana courts consider the principles of *Rubin* to no longer be good law, as *Rubin* has been cited with approval in decisions that post-date the 2001 enactment

of § 34-12-3-1 *et seq.*, including the Supreme Court of Indiana’s 2011 decision in *Santelli v. Rahatullah* on the issue of comparative fault. *See* 993 N.E.2d 167, 177 (Ind. 2011). In that case, critically, the Supreme Court of Indiana relied upon *Rubin* in support of the proposition that damages can be apportioned between negligent and intentional tortfeasors and specifically stated that the criminal use of a gun sold in an unlawful sale was the “very risk sought to be avoided” and “cannot stand as a bar to recovery.” *Id.*

The Indiana General Assembly has neither “in express terms [n]or by unmistakable implication” expressed an intent to extinguish Officer Runnels’ well-established common law right to relief from the *illegal* and *negligent* conduct of Defendants. Accordingly, the legislature did not provide this Court with the clear indication that is required to do away with longstanding common law principles and precedents. *See, e.g., Bartrom*, 618 N.E.2d at 10.

D. The Indiana General Assembly Implicitly Approved of the Trial Court’s Ruling By Not Addressing It In The May 2015 Amendments To Indiana Code § 34-12-3-1 *et seq.*

Although Defendants’ Opening Brief insists that the Indiana General Assembly’s decision to amend Indiana Code § 34-12-3-1 *et seq.* supports their construction, the opposite is true. The General Assembly’s recent decision to leave the plain language of § 34-12-3-3(2) unaltered in the wake of the Superior Court’s denial of Defendants’ motion for judgment on the pleadings strongly supports Officer Runnels’ understanding of the statute.

Under Indiana’s doctrine of legislative acquiescence, “[w]hen a statute has been judicially construed and is later reenacted in substantially the same terms, the legislature is deemed to have intended the same construction.” *Lewis v. Lockard*, 498 N.E.2d 1024, 1026 (Ind. Ct. App. 1986); *see, e.g., City of Portage v. Rogness*, 450 N.E.2d 533, 535-36 (Ind. Ct. App. 1983) (applying doctrine); *Ross v. Schubert*, 388 N.E.2d 623, 628 (Ind. Ct. App. 1979) (same).

Courts in Indiana have long found this well-established canon of statutory construction to be particularly persuasive based on the longstanding view that “[t]he legislature is presumed to be aware of prevailing judicial construction of a statute....” *Lewis*, 498 N.E.2d at 1026; *see also Indiana Dept. of Revenue, Indiana Gross Income Tax Division v. Glendale-Glenbrook Assocs.*, 429 N.E.2d 217, 219 (Ind. 1981) (describing the doctrine of legislative acquiescence as a presumption that is “strongly persuasive upon the courts”).

Here, seven months after the Superior Court ruled that § 34-12-3-3(2) does not immunize unlawful gun sellers like Defendants, the Indiana General Assembly elected to only narrowly amend the effective date of Indiana Code § 34-12-3 and leave the statutory language at issue here entirely untouched. Under the doctrine of legislative acquiescence, the General Assembly may not only be charged with the Superior Court’s ruling, but its subsequent reauthorization of § 34-12-3-3(2) should be treated as a legislative repudiation of Defendants’ construction. Indeed, if the Defendants’ criticisms of the Superior Court ruling had any merit, Indiana law presumes that the General Assembly would have used the recent amendment process as an opportunity to correct the misinterpretation of the statute. The General Assembly, however, declined to make any changes to § 34-12-3-3(2). Indiana law suggests one conclusion from the legislature’s inaction; there was no error in Judge Hanley’s ruling.

Further, Defendants’ speculation that the amendment to § 34-12-3-1 will lead to the dismissal of *City of Gary* is not only unfounded,⁶ but irrelevant. As an initial matter, it is wholly

⁶ The amendment § 34-12-3-1 *et seq.* only changed the effective date of the law, not the meaning of § 34-12-3-3(2). Accordingly, even if the law were to now apply to the *City of Gary* case retroactively, a Court examining the actual allegations in that case -- as opposed to the political characterizations of that suit -- can be expected to find that the law does not repeal the Indiana Supreme Court’s decision upholding the suit, as the suit does not impermissibly attempt to hold blameless gun manufacturers and sellers responsible for damages proximately caused by

outside the jurisdiction of this Court to attempt to evaluate whether the allegations of another suit run afoul of the § 34-12-3-3(2) bar on absolute liability claims. Further, on its face, the allegations set forth in Officer Runnels' Complaint are profoundly different from those averred in *City of Gary*. Unlike in *City of Gary*, critically, the Officer Runnels' Complaint identifies a *specific* victim, firearm, gun seller, and acts and omissions in connection with the sale of the individual firearm that caused harm to the victim. *Cf. City of Gary v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1244 (Ind. 2003).

E. Defendants' Construction Of Indiana Code § 34-12-3-3(2) Is Grossly Inconsistent With Analogous Statutes

Not only do Defendants ask the Court to effectively insert language into the statute that the Assembly chose not to include, Defendants ask the Court to construe subsection 3(2) as imposing the most draconian limit on the rights of firearms victims to seek justice in the entire nation – without any indication that the legislature intended to achieve such an extreme result. No state or federal law provides legal protection to gun sellers that unlawfully sell firearms like the Defendants propose here. Officer Runnels' reading of the statute makes Indiana's law consistent with other gun industry protection statutes that prohibit lawsuits seeking to hold gun companies absolutely liable for otherwise lawful conduct.

1. Defendants' Construction Would Render Indiana Code § 34-12-3-3(2) The Most Extreme Provision Of Its Kind In The Country

criminal third parties. In fact, that is precisely what happened when gun manufacturers argued that the federal Protection in Lawful Commerce in Arms Act ("PLCAA"), a federal law that provides some protection to gun manufacturers and sellers, barred the City of Gary's claims. The Indiana Court of Appeals noted that "Senator Graham, one of the PLCAA's sponsors, stated, '[y]et another example are the suits pending against members of the firearms industry by cities like Gary, IN and Cleveland, OH even though the States of Indiana and Ohio have themselves passed State laws similar in purpose and intent to [PLCAA].' 151 Cong. Rec. S9374-01, S9394." *Smith & Wesson Corp. v. City of Gary*, 875 N.E.2d 422, 434 n.13 (Ind. App. 2007), *transfer denied* 915 N.E.2d 978 (Ind. 2009). Nonetheless, the Court of Appeals found that the PLCAA did not bar the City of Gary's claims. *Id.* at 434-45.

Twelve states passed laws related to the civil liability of gun sellers at or around the same time as Indiana. Some of these laws were enacted by legislatures that have done far less than Indiana to address the causes of gun violence; Alaska, for example, has no significant laws restricting the sale of guns. Nonetheless, although the state statutes differ slightly in word choice, the universally accepted view is that a gun seller engaging in illegal conduct is not afforded legal protection from private civil liability. *See, e.g.*, Alaska Stat. § 09.65.155 (no protection for unlawful sales); Ark. Code Ann. § 16-116-202(d)(1) (same); Colo. Rev. Stat. § 13-21-501(2), 505(4) (same); Del. Code Ann. Tit. 11 §1448A (no protection when selling to straw buyer); Ky. Rev. Stat. Ann. § 411.155 (no protection for unlawful sale); La. Rev. Stat. Ann. § 2800.60(C) (same); Mich. Comp. Laws. § 28.435(7) (same); Md. Code Ann., Public Safety § 5-402(b) (same and limited to cases of strict liability); N.D. Cent. Code § 32-03-54(2), (4) (same); N.H. Rev. Stat. Ann. § 508:21(d); Ohio Rev. Code Ann. § 2305.401(B)(3) (same); S.D. Codified Laws § 21-582 (same).

The consistency in statutory approach reflects an acknowledgement that unlawful conduct by gun sellers should not be afforded special protection. This makes sense. There is no reasonable basis for a legislature to provide protection to a dealer who, for example, advises a purchaser on which firearm would be best for killing his wife, and then illegally sells him that gun without a background check. But that is precisely what Defendants contend the General Assembly did. Defendants' reading ensures that unlawful gun dealers can profit from illegal sales to criminals, precisely the opposite of the tort system's purpose in discouraging dangerous conduct and encouraging socially beneficial conduct. The Court would truly be in uncharted waters if it overturned the Superior Court and became the first court in the United States to announce that gun sellers engaging in unlawful conduct are entitled to legal protection.

2. Defendants' Construction Is Further Discredited By PLCAA

Although there is sparse legislative history relating to the statute at issue (or its amendments), the legislative history and judicial interpretation of a comparable federal law offers significant guidance regarding the intent of laws protecting gun sellers and the scope of § 34-12-3-3.

The 2001 Indiana law was passed in the shadow of congressional debate over the Protection of Lawful Commerce in Arms Act ("PLCAA"), a federal law that provides some legal protection to gun sellers. 15 U.S.C. §§ 7901-03. As articulated by the law's author and chief sponsor, Senator Craig, PLCAA "is not a *gun* industry immunity bill because it *does not protect* firearms or ammunition manufacturers, sellers, or trade associations from any other lawsuits *based on their own negligence or criminal conduct.*" 151 Cong. Rec. S9395 (July 29, 2005); *id.* at S. 9099 (July 27, 2005) (emphasis added). By its express terms, PLCAA is narrowly focused on limiting the narrow subset of cases "based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States and [that] do not represent a bona fide expansion of the common law." 15 U.S.C. § 7901(a)(7).⁷ Senator Craig and other Sponsors reiterated this purpose, emphasizing, "If manufacturers or dealers break the law or commit negligence, they are still liable." 151 Cong. Rec. S9395 (July 29, 2005); *id.* at S. 9099 (July 27, 2005) (emphasis added); *id.* at S. 9088 (July 27, 2005); *id.* at S. 9061 (July 27, 2005); *see also, e.g.*, 151 Cong. Rec. S. 9226 (July 28, 2005) (Sen. Graham) ("If you sell a gun and you don't do it right and you have it in the wrong hands, then you will have your day in court"); 151 Cong. Rec. S. 9077 (July 27, 2005) (Sen. Hatch) ("this bill carefully preserves the right of

⁷ Before passage, Congress amended the bill to make clear that its purpose was to protect gun dealers where harm was "solely" caused by the gun's criminal use – not where a gun company's misconduct was an additional cause of harm. 15 U.S.C. § 7901(b)(1).

individuals to have their day in court with civil liability actions where negligence is truly an issue”); 151 Cong. Rec. S. 8908 (July 26, 2005) (Sen. Sessions) (“Plaintiffs can go to court if the gun dealers sell to someone they know should not be sold to or did not follow steps to determine whether the individual was properly subject to buying a gun.”).

Consistent with the language and legislative history of the PLCAA, the Indiana Court of Appeals ruled that the PLCAA does not protect a gun seller engaging in unlawful conduct. *Smith & Wesson Corp. v. City of Gary*, 875 N.E.2d 422, 434–35 (Ind. App. 2007), *trans. denied* 915 N.E.2d 978 (Ind. 2009). The Indiana Court of Appeals ruling is in line with every other court that has ruled since the passage of PLCAA on whether unlawful conduct by a gun dealer is protected. *See, e.g., City of New York v. A-1 Jewelry & Pawn, Inc.*, 247 F.R.D. 296, 353 (E.D.N.Y. 2007); *Woods v. Steadman's Hardware*, No. BDV-2009-58, 2012 Mont. Dist. LEXIS 27, at *8–11 (Mont. Dist. Ct. Mar. 14, 2012); *Williams v. Beemiller, Inc.*, 100 A.D.3d 143, 147–50 (N.Y. App. Div. 2012), *amended by* 103 A.D.3d 1191 (N.Y. App. Div. 2013); *Estate of Kim v. Coxe*, 295 P.3d 380, 393-95 (Alaska 2013); Order on Motion to Dismiss, *Norberg v. Badger Guns, Inc.*, No. 10-cv-020655 (Wisc. Cir. Ct. July 11, 2011) (Appellee’s Add. at 34-35); Order on Motion to Dismiss, *Lopez v. Badger Guns, Inc.*, No. 10-cv-18530 (Wisc. Cir. Ct. May 25, 2011) (Appellee’s Add. at 32-33); Decision and Order on Motion to Dismiss, *Chiapperini v. Gander Mountain Co., Inc.*, No. 14/5717 (N.Y. Sup. Ct. Dec. 23, 2014) (Appellee’s Add. at 4-31); Order Granting in Part and Denying in Part Defendant’s Motion to Dismiss, *Allen v. Tanso*, No. 14-007702-CI (Fla. 6th Cir. Ct. Mar. 11, 2015) (Appellee’s Add. at 4-31.)

Defendants cannot claim that there is any serious public policy rationale that supports protecting a gun dealer that acted unlawfully and failed in its responsibility “to [e]nsure that, in the course of sales or other dispositions... , weapons [are not] obtained by individuals whose

possession of them would be contrary to the public interest.” *See Abramski v. United States*, 134 S. Ct. 2259, 2273 (2014) (internal quotations omitted). There is no indication that the Indiana General Assembly intended to radically distinguish itself from Congress and every other legislative body by providing “immunity” for unlawful conduct rather than limiting protection from novel claims of absolute liability against otherwise lawful sellers.

3. Indiana Code § 34-12-3-1 et seq. Is Preempted by Federal Law

If Defendants’ interpretation of § 34-12-3-3(2) were correct, this Indiana statute would also be preempted by the passage of the PLCAA. The PLCAA preempted state firearms immunity laws under the doctrines of field and conflict preemption. *See Arizona v. United States*, 132 S.Ct. 2492, 1501 (2012). Congress was well aware of the state laws when it passed the federal law. *See* 151 Cong. Rec. S. 9089 (July 27, 2005) (Statement of Sen. Craig) (“more than 30 States have laws on the books offering some protection for the gun industry from these extraordinary threats. Support has already grown in Congress to take action at the Federal level.”). Indeed, one of the objectives of Congress in enacting the PLCAA was to “preempt[] State law [and] to provide a uniform standard for such suits.” 151 Cong. Rec. S. 8929 (July 26, 2005) (Statement of Sen. Hatch). The purpose of the PLCAA would be subverted by Defendants’ position, which would deprive victims of gun seller misconduct of civil remedies in Indiana, while retaining those rights for victims across the border in Illinois. *See Hillman v. Maretta*, 133 S. Ct. 1943, 1953 (2013). The PLCAA simply states that it applies to every “qualified civil liability action” in federal and state courts. 15 U.S.C. § 7902. The straightforward language has set both a floor and ceiling with respect to the scope of protection that can be afforded a gun seller and, under the Supremacy Clause, a State cannot go beyond those defined limits. *See Arizona*, 132 S. Ct. at 1501.

Defendants' interpretation of § 34-12-3-3(2) goes far beyond the limits Congress delineated and, if adopted, would create an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *See Hillman*, 133 S. Ct. at 1953. Specifically, in enacting the PLCAA, Congress made a determination of what type of lawsuits constitute an "unreasonable burden on interstate and foreign commerce" and foreclosed States from making a different determination. *See* 15 U.S.C. § 7901(b)(4).

III. DEFENDANTS PROPOSE A CONSTRUCTION THAT WOULD RENDER INDIANA CODE § 34-12-3-3(2) UNCONSTITUTIONAL

Defendants' construction of § 34-12-3-3(2) would also violate Officer Runnels' fundamental rights to free and open courts, equal protection, and due process, in violation of the United States and Indiana Constitutions. To avoid raising unnecessary questions of constitutionality, this Court must narrowly interpret legislation to preserve its validity. As the Indiana Supreme Court has explained, courts have an "overriding obligation to construe our statutes in such a way as to render them constitutional if reasonably possible... ." *Brownsburg Area Patrons Affecting Change v. Baldwin*, 714 N.E.2d 135, 141 (Ind. 1999). "[A] statute is accorded every reasonable presumption supporting its validity[.]" and if the statute can possibly "be construed to support its constitutionality, such construction *must* be adopted." *Burris v. State*, 642 N.E. 961, 968 (Ind. 1994) (emphasis added) (citations omitted), *abrogated on other grounds by Wilkes v. State*, 917 N.E.2d 675 (Ind. 2009). Accordingly, the Court should adopt Officer Runnels' statutory construction as it will support the law's constitutionality, while Defendants would render it unconstitutional.

A. Indiana's Open Courts Clause

Defendants assert that the General Assembly has barred Indiana courts from hearing whether Officer Runnels is entitled to civil justice under Indiana common law, despite the fact

that Indiana courts have recognized the validity of his claims. Upholding this law would create a novel, high-water mark for legislative authority over the judiciary, and a low-water mark for the civil rights of Hoosier residents to access the courts. Under Defendants' reading, the statute would violate the Indiana Constitution by employing an irrational means to achieve an illegitimate goal. *See* Ind. Const., art. 1, § 12; *McIntosh v. Melrose Co.*, 729 N.E.2d 972, 979 (Ind. 2000). Defendants' interpretation would (i) irrationally shield from liability gun sellers who engage in illegal conduct; (ii) advance the illegitimate goal of benefitting unlawful sellers of firearms; and (iii) deprive Officer Runnels of a right to bring a claim against KS&E for its illegal conduct that proximately caused his foreseeable injuries. Indiana law may not "operate[] as an indiscriminate statutory ban ... without regard to the merits of the claims presented." *Smith v. Ind. Dep't of Corr.*, 883 N.E.2d 802, 809-10 (Ind. 2008).⁸

Defendants' claim that criminal penalties could still punish and deter unlawful gun seller underscores the irrationality of providing unlawful sellers with legal protection. Defendants' reading would perversely deprive victims of their rights against gun sellers whose conduct is sufficiently wrongful that it could subject them to fines, penalties, or jail time. Worse still, the law would create a unique profit incentive for dealers who illegally profit from the criminal gun market, making them the only class of persons or businesses under state or federal law who can violate the law without any risk of accountability to victims of their misconduct. While protecting lawful businesses from harassment and undue expense could be a potentially

⁸ Indiana statutes that abrogate private causes of action include commonsense exceptions for when the otherwise protected party is reckless in its actions and for when the otherwise abrogated party assumed no risk and had no opportunity to protect itself from the danger. *See e.g.*, I.C. § 34-30-11-1 (Indiana's Guest Statute); I.C. § 34-31-5-2(b)(4) (Equine Immunity Stat.).

legitimate governmental goal, that goal is not rationally satisfied when a statute protects unlawful conduct that Indiana has no interest in encouraging.

B. Equal Protection and Immunity Provision

Defendants' reading would also single out one class of people to be deprived of their civil rights, which would violate equal protection and immunities provisions under the Indiana and federal Constitutions. The Indiana Constitution requires that any "preferential treatment must be uniformly applicable and equally available to all similarly situated persons." *McIntosh*, 729 N.E.2d at 981; *see* Ind. Const., art. 1, § 23. If groups are accorded different rights by statute, there must be some reasonable relation between the statute and "the inherent characteristics that distinguish the unequally treated classes" *McIntosh*, 729 N.E.2d at 983. Defendants' reading affords preferential treatment to similarly situated persons on an entirely unequal basis by singling out gun sellers for immunity from negligence claims, and consigning victims of the illegal conduct of gun sellers to the status of second-class citizens, without rights for civil redress. *See also City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985); *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (classifications burdening the exercise of fundamental rights receive "the most exacting scrutiny").

Providing negligent or criminal gun sellers with special immunity is particularly unjustified because guns are a restricted product – and provide a far greater risk to the public – that federal and Indiana law recognize may not be sold to or possessed by certain dangerous persons. 18 U.S.C. §§ 922(d), (g); Ind. Code § 35-47-2-7. Under Defendants' proposed construction, Officer Runnels could file a negligence suit against KS&E if he were stabbed by a knife that it negligently sold, but may not do the same here because the product was a firearm. There is no rational basis for such unequal treatment, or for favoring the conduct of worse actors.

C. Due Process Clause

If Indiana Code § 34-12-3-3(2) were interpreted to immunize gun sellers from all claims, including when the gun seller engaged in illegal conduct, it would also be unconstitutional under the Due Process Clause of the Fourteenth Amendment. U.S. Const. amend. XIV. In *City of Gary*, an Indiana trial court expressly rejected PLCAA challenges to claims for damages resulting from negligent gun sales and marketing on the grounds that “Due Process is violated when Congress abolishes an existing remedy and provides no alternative.” *City of Gary ex. rel. King v. Smith & Wesson Corp.*, Case No. 45D05-0005-CT-00243, Tr. Order, at *4 (Lake Sup. Ct. Ind. 2006),⁹ Appellee’s App. pp. 2-8. A Wisconsin trial court recently reached a similar result in an analogous suit brought by police officers who were shot by a gun that a firearms dealer negligently and wrongfully sold to a straw purchaser. After denying summary judgment and finding PLCAA inapplicable, the Court stated:

[I]mmunity is a very strong bar for a plaintiff if [PLCAA] in fact has no exceptions, or no discretion left to parties reviewing the record to give someone, as someone said, “a free pass.” No matter what they do, it would be improper. ***I don't think any act should in fact, could in fact allow that. And if it did, I would find it unconstitutional. Because I don't think that is proper to bar people from coming to court because something has been lobbied by some groups to persuade Congress to do something.***

Lopez v. Badger Guns, Inc., No. 10-cv-18530, Tr. of Hearing on Mot. for SJ, 23:19-24:3 (Wisc. Cir. Ct. Mar. 24, 2014) (emphasis added), Appellee’s App. pp. 9-12.

Furthermore, the United States Supreme Court has recognized that “[i]t is the duty of every state to provide ... for the redress of private wrongs.” *Mo. Pac. R.R. Co. v. Humes*, 115 U.S. 512, 521 (1885). The Defendants’ interpretation would violate the Due Process Clause by

⁹ On appeal, the Court of Appeals avoided the question of constitutionality by ruling that PLCAA did not apply. *City of Gary*, 875 N.E.2d 422, 424 (Ind. Ct. App. 2007).

leaving legitimate claimants stranded outside the courthouse door without any recourse. No other statute has ever so broadly deprived citizens of their rights to seek civil justice in the courts – and the Supreme Court has never stated that it is Constitutional to do so. On the contrary, when the Supreme Court has upheld the elimination of a common law remedy, it has relied on the fact that the repealing act simultaneously created a reasonably just substitute system of compensation. In *New York Central RR.Co. v. White*, 243 U.S. 188 (1917), the Court unanimously found that New York State’s workers compensation law, which substituted broader no-fault liability and scheduled damages for uncertain tort liability, was a “just settlement of a difficult problem.” *Id.* at 202. Significantly, the Court noted that, although it was not necessary to decide whether a state could, consistent with due process, “suddenly set aside all common-law rules respecting liability as between employer and employee, without providing a reasonably just substitute,” “it perhaps *may be doubted whether the state could abolish all rights of action, on the one hand, or all defenses, on the other, without setting up something adequate in their stead.*” *Id.* at 201 (emphasis added).

Similarly, in *Duke Power Co. v. Carolina Evt’l Study Group, Inc.*, 438 U.S. 59 (1978), the Court upheld the Price-Anderson Act, 42 U.S.C. § 2210, which limited the liability of nuclear plants to \$560 million per nuclear incident, while ensuring compensation for injuries caused by a nuclear accident. *Id.* at 84, 86. Because the Act “provide[d] a reasonably just substitute for the common-law or state tort law remedies it replaces,” the Court did not reach the issue of whether due process requires that “a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy.” *Id.* at 88. The fact that the Court extensively considered whether the Act provided a “just substitute” (including that full compensation to each injured claimant was assured) suggests that the Court believed that

Congress could not permissibly eliminate all redress. *Id.* at 65, 66-67, 85-87, 90. Indeed, not only has the Court never held that the legislature can completely eliminate certain civil remedies without providing any alternative compensation scheme, it is even "unresolved" whether a legislatively enacted scheme that provides for compensation can be unconstitutional if it does not adequately replace the common law remedy for which it is a substitute. *Fein v. Permanente Medical Group*, 474 U.S. 892, 894-95 (1985) (White, J., dissenting from dismissal of appeal for want of federal question).

The Supreme Court has never countenanced such a complete deprivation of remedies as Defendants claim. *See, e.g.*, 42 U.S.C. §§ 300aa-1-34 (providing no-fault compensation plan); Pub.L. No. 107-42, 115 Stat. 230 (creating compensation fund and allowing alternative of tort suit); 15 U.S.C. §§ 6601-17 (capping damages and limiting venue to federal court); 42 U.S.C. § 2210(c), (n) (setting maximum liability in exchange for waiver of legal defenses); 49 U.S.C. § 28103 (limiting punitive damages while requiring insurance). This overly broad and irrational shield violates the Constitution. *See Marbury v. Madison*, 5 U.S. 137, 163 (1882) (quoting Sir William Blackstone, Commentaries 23 (1869) ("It is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded."); *Poindexter v. Greenhow*, 114 U.S. 270, 303 (1885) ("No one would contend that a law of a state, forbidding all redress by actions at law for injuries to property, would be upheld in the courts ... , for that would be to deprive one of his property without due process of law."); *Truax v. Corrigan*, 257 U.S. 312, 330 (1921) ("a statute whereby serious losses inflicted by such unlawful means are in effect made remediless [would] disregard fundamental rights of liberty and property and [] deprive the person suffering the loss of due process of law.")

Because Indiana law (under Defendants' reading) infringes on Plaintiff's First Amendment right to petition the courts,¹⁰ it must withstand strict scrutiny. But there is no compelling interest for shielding from liability gun sellers who wrongfully supply guns to illegal purchasers. As noted, the law could not even withstand rational basis review. *See, e.g., Burlington N. Ry. Co. v. Ford*, 504 U.S. 648, 653 (1992).

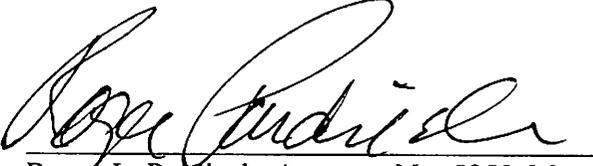
CONCLUSION

For the reasons set forth above, Officer Runnels respectfully requests that the Court affirm the Superior Court's denial of Defendants' Motion for Judgment on the Pleadings.

¹⁰ The First Amendment's petition clause protects the right to seek redress through the courts, *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972), a fundamental right. *Chambers v. Baltimore & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907); *United Mine Workers, Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 223 (1967); *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983).

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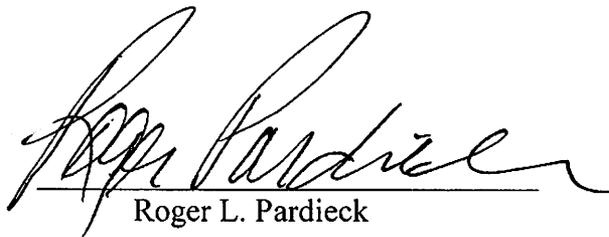
I hereby certify that on Aug. 3, 2015, the foregoing was filed with the Clerk of the Indiana Supreme Court, Court of Appeals, and Tax Court, by depositing the foregoing in the US. Mail, postage prepaid.

I certify that a copy of the above and foregoing pleading was deposited in the United States mail, with postage prepaid on Aug. 3, 2015, addressed to:

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