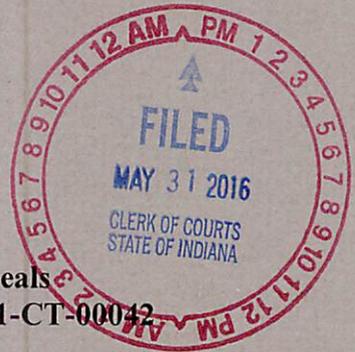


IN THE INDIANA SUPREME COURT  
NO. \_\_\_\_\_



KS&E Sports and Edward Ellis,  
Appellants/Defendants,

v.

Dwayne H. Runnels,  
Appellee/Plaintiff.

) Indiana Court of Appeals  
) Cause No. 49A02-1501-CT-00042  
)  
) Interlocutory Appeal from the  
) Marion Superior Court  
) Civil Division, Room 11  
)  
) Trial Court Cause No.  
) 49D11-1312-CT-044030  
)  
)  
) The Honorable John F. Hanley,  
) Judge  
)  
)  
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)  
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REPLY BRIEF OF APPELLEE/PLAINTIFF DWAYNE H. RUNNELS IN RESPONSE  
TO BRIEF OF AMICUS CURIAE NATIONAL SHOOTING SPORTS FOUNDATION

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**TABLE OF CONTENTS**

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ..... ii

ARGUMENT .....1

    A.    NSSF’s Asserted Legislative History is Inaccurate .....1

    B.    This Case Concerns Defendants’ Own Alleged Wrongful Conduct, Which Is  
          Not Immunized by Indiana Law .....2

    C.    The General Assembly Did Not Abrogate the Common Law .....3

CONCLUSION.....4

WORD COUNT CERTIFICATE .....5

CERTIFICATE OF SERVICE .....6

**TABLE OF AUTHORITIES**

**STATE CASES**

*Caesars Riverboat Casino, LLC v. Kephart*, 934 N.E.2d 1120 (Ind. 2010).....3

*City of Gary v. Smith & Wesson*, 801 N.E.2d 1222 (Ind. 2003).....2, 3

*Heck v. Stouffer*, 786 N.E.2d 265 (Ind. 2003).....2, 3

*Hinshaw v. Bd. of Comm'rs*, 611 N.E.2d 637 (Ind. 1993).....3

*McIntosh v. Melroe Co.*, 729 N.E.2d 972 (Ind. 2000).....2, 3

**FEDERAL CASES**

*Butz v. Economou*, 438 U.S. 478 (1978).....3

**STATUTES, RULES AND REGULATIONS**

Ind. Code §34-12-3-3.....1

Ind. Code §34-12-3-3(2).....3

Ind. Code §34-30-20-1.....2, 3

15 U.S.C. §7901(a)(6).....2

## ARGUMENT

Plaintiff (“Runnels”) submits this brief in response to National Shooting Sports Foundation’s (“NSSF’s”) Brief of Amicus Curiae (“Br.”).

**A. NSSF’s Asserted Legislative History Is Inaccurate.**

NSSF’s Brief is replete with unsubstantiated claims about the meaning and purpose of Indiana Code § 34-12-3-3 (“the Gun Law”). NSSF’s errors begin in the opening sentence of its argument, which claims that the Court of Appeals’ decision “leaves federally-licensed firearm manufacturers and sellers exposed to the burdens of litigation in Indiana *whenever a criminal misuses a firearm and causes harm.*” Br. at 2 (emphasis added). In fact, the Court merely held that the General Assembly did not disturb well-established Indiana law that imposes gun companies’ liability for damages *caused by their own negligent or illegal conduct.* While NSSF insists that the General Assembly intended to shield NSSF members from liability for their own negligence whenever firearms violence occurs, Br. 5, the Gun Law’s plain language only proscribes the “recovery of damages resulting from” (i) the “lawful” conduct of a firearm seller, and (ii) the “criminal or unlawful” conduct of “a third party.” Ind. Code § 34-12-3-3.

The law has no legislative history, but NSSF invents one to claim an intent to broadly immunize negligent and illegal conduct. While NSSF questions why the General Assembly would enact a law that reaffirmed comparative fault and vicarious liability law, Br. at 9-10, NSSF answers its own question by noting fears that lawsuits could expand liability for firearm sellers to punish blameless sellers. *See* Br. at 3-4, 6. The law prevented such expansion. The federal law on which NSSF relies actually supports Runnels, for Congress similarly sought to prevent “[t]he possibility of imposing liability on an entire industry for harm *that is solely caused by others...*” and actions “based on theories *without foundation in hundreds of years of the common law* and jurisprudence of the United States and do not represent a bona fide expansion

of the common law.” 15 U.S.C. § 7901(a)(6), (7) (emphasis added). The Court properly found that the General Assembly had similar intent, and did not, as NSSF argues, attempt to rewrite over a century of common law.

NSSF’s concession that “[t]he General Assembly was surely aware of” lawsuits such as *City of Gary v. Smith & Wesson*, 801 N.E.2d 1222 (Ind. 2003), also supports the Court’s decision. Br. at 6. As Judge Brown explained, while the General Assembly unequivocally reversed *Heck v. Stouffer*, 786 N.E.2d 265 (Ind. 2003), by clearly granting immunity to firearms owners for criminal uses of stolen guns in I.C. §34-30-20-1, it did not modify *Gary*, thus retaining liability for negligent gun companies. While NSSF cites *Gary* for the proposition that gun companies “cannot fairly be charged with causing criminal firearms violence under any recognized theory of liability,” Br. 5, *Gary* actually recognizes that negligent gun companies can be liable for causing third party criminal gun crimes.

**B. This Case Concerns Defendants’ Own Alleged Wrongful Conduct, Which Is Not Immunized By Indiana Law.**

While NSSF asserts – without citation – that the General Assembly intended to preclude actions “regardless of whether the manufacturer or seller is alleged to have acted unlawfully and contributed to the harm caused by the criminal,” Br. at 9, the Court properly held that the Gun Law only shields gun companies from liability for damages they did not cause, but not for damages caused by their *own* wrongful conduct. There is no basis to find that the General Assembly intended, for example, to protect a gun dealer who *purposefully* transfers firearms to known terrorists, to profit from and aid terrorism.

NSSF omits critical language from *McIntosh v. Melroe Co.*, 729 N.E. 2d 972, 978 (Ind. 2000). In full, *McIntosh* said “[t]here is not and never has been a right to redress for every injury, as *victims of natural disasters* or *faultless* accidents can attest.” *Id.* (emphasis added).

Runnels was not injured by an act of God or a “faultless” accident, but by negligent actors. Further, *McIntosh* involved a ten-year statute of limitations, not an alleged immunity statute, and the Court noted that, “in the vast majority of cases, failure of products over ten years old is due to wear and tear or other causes *not the fault of the manufacturer. . . .*” *Id.* at 980 (emphasis added). That does not support immunizing manufacturers who are at fault.

NSSF misidentifies *Butz v. Economou*, 438 U.S. 478 (1978), labeling as a concurrence what is the dissenting portion of an opinion concurring in part, dissenting in part. Contrary to the *dissent* relied on by NSSF, the *majority* understood that a court must inquire into whether or not a defendant has immunity. *See id.* at 507-508. This is what properly happened here.

**C. The General Assembly Did Not Abrogate the Common Law.**

Courts may not read a statute in derogation of common law unless the Legislature, through express intent or unmistakable implication, declared that intention. *Hinshaw v. Bd. of Comm’rs*, 611 N.E.2d 637, 640 (Ind. 1993). Section 34-12-3-3(2) fails both tests.

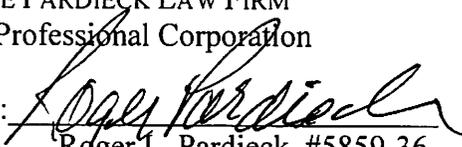
NSSF implicitly concedes that the Law evinces no express intent to derogate from the common law. NSSF’s claim that the Law derogates from the common law through unmistakable implication is unavailing. The law does not, as NSSF claims, cover the entire field of firearms regulation. That stands in contrast to *Caesars Riverboat Casino, LLC v. Kephart*, 934 N.E.2d. 1120 (Ind. 2010), on which NSSF relies, where the General Assembly made clear that the statute governed all riverboat gambling in Indiana. Unlike Indiana Code § 34-30-20-1, which reversed *Heck* and provided express immunity to gun owners, there is no “unmistakable implication” that the Gun Law was intended to derogate from the common law. The failure to similarly reverse *Gary* must be read as an intention to uphold it.

CONCLUSION

This Court should deny Appellant's Petition to Transfer.

Respectfully submitted,

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WORD COUNT CERTIFICATE

I verify that this Brief of Appellee/Plaintiff Dwayne H. Runnels in Response to Petition to Transfer contains no more than 1,000 words, and I certify that the Brief contains 967 words, according to the word processing program used to create this document.

  
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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on May 31, 2016, the foregoing was filed with the Clerk of the Indiana Supreme Court, Court of Appeals, and Tax Court, by depositing the foregoing in the US. Mail, postage prepaid.

I certify that a copy of the above and foregoing pleading was deposited in the United States mail, with postage prepaid on May 31, 2016, addressed to:

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