IN THE

Indiana Supreme Court

Court of Appeals Case No. 18A-CT-1949

SHELLEY NICHOLSON, as the, Mother of Matthew Kendall, Appellant,	)	Appeal from the Dubois Circuit Court DuBois Circuit Court
v.	)	Case No. 19C01-1805-CT306 Hon. Nathan A. Verkamp
CHRISTOPHER S. LEE, Appellee.	)	Indiana Court of Appeals Case No. 18A-CT-1949

BRIEF OF *AMICI CURIAE* GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE AND PROFESSOR JODY L. MADEIRA IN SUPPORT OF APPELLANT'S PETITION TO TRANSFER

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INTEREST OF AMICI CURIAE

Giffords Law Center to Prevent Gun Violence is a non-profit policy organization dedicated to researching, writing, enacting, and defending laws and programs proven to reduce gun violence and save lives. Founded in 1993 after a gun massacre at a San Francisco law firm, it was renamed Giffords Law Center in October 2017 after joining forces with the gun-safety organization founded by former Congresswoman Gabrielle Giffords.

Today, Giffords Law Center provides free assistance and expertise to lawmakers, advocates, legal professionals, law-enforcement officials, and citizens seeking to make their communities safer from gun violence. Its attorneys track and analyze firearm legislation, evaluate gun-violence-prevention research and policy proposals, and participate in Second Amendment litigation nationwide. Giffords Law Center has provided courts with *amicus* assistance in numerous important firearm-related cases.

Jody L. Madeira is Professor of Law and Louis F. Niezer Faculty Fellow at the Indiana University Maurer School of Law in Bloomington, Indiana, where she serves as the Co-Director of the School of Law's Center for Law, Society & Culture. One of Professor Madeira's principal areas of research involves tort and privacy law related to the regulation of firearms. She is currently involved in research assessing how Americans talk about firearms and associated benefits, risks, rights, and regulations, especially how doctor-patient discussions of firearm ownership and access impact treatment relationships and the provision of medical care across

practice fields. Her research has investigated a wide variety of topics, including the effects of legal proceedings, verdicts, and sentences upon victims' families; the role of empathy in personal-injury litigation; law and semiotics; and the impact of recent developments in capital victims' services upon the relationship between victims' families and the criminal justice system.

STATEMENT OF FACTS

On July 22, 2016, Christopher Lee parked his unlocked truck in a public area. He left a loaded 9mm Glock handgun on the seat, visible through the windows.

C.O., age 15, saw Lee's truck while walking along a public way. He saw the handgun, took it from the truck, and returned home with the loaded Glock. He showed the gun to his friend, 16-year-old Matthew Kendall. The gun discharged, killing Kendall.

Kendall's mother, Shelley Nicholson, sued Lee for Kendall's wrongful death, alleging that Lee's negligent storage of a loaded handgun inside his unlocked truck proximately caused her son's death. The trial court granted judgment on the pleadings, finding Lee immune from liability under I.C. 34-30-20-1. The Court of Appeals affirmed.

INTRODUCTION

Guns are the second-leading cause of death for Indiana children ages 1–17. From 2013 to 2017, nearly a dozen minors died of unintentional gun injuries, and nearly 70 died of self-inflicted gunshot wounds. Negligently stored firearms

unacceptably increase the risk of youth suicide and unintentional injury. If national estimates hold true in Indiana, more than 107,000 Hoosier children currently live in homes with loaded, unlocked firearms. *See* Deborah Azrael et al., *Firearm Storage in Gun-owning Households with Children: Results of a 2015 National Survey*, Journal of Urban Health 1-10 (2018). Improper storage of guns in plain sight or in unlocked vehicles has been on the rise in Indiana, fueling higher numbers of gun thefts in Marion County and other parts of the state, mirroring nationwide trends. *As Gun Thefts Skyrocket, Police Urge Gun Owners to Lock Up Guns*, WTHR (Sep. 12, 2018), https://www.wthr.com/article/gun-thefts-skyrocket-police-urge-gun-owners-lock-their-guns (Columbus police "reported a 65 percent increase in stolen guns between 2016 and 2017"); Russ McQuaid, *IMPD Has Received Over 800 Stolen Gun Reports So Far This Year*, CBS 4 Indy (Oct. 25, 2018), https://cbs4indy.com/2018/10/25/impd-has-received-over-800-stolen-gun-reports-so-far-this-year. Unsurprisingly, given the risks of negligent gun storage, states that have responded by imposing liability on adults who negligently fail to secure firearms around children experience substantially lower rates of youth suicide and unintentional injuries. *See, e.g.*, Emma C. Hamilton et al., *Variability of Child Access Prevention Laws and Pediatric Firearm Injuries*, 84 J. Trauma & Acute Care Surg. 613, 613-20 (2018) (child-access-prevention laws that impose liability for negligent storage reduced overall pediatric firearm injuries by 30%, unintentional injuries by 44%, and self-inflicted injuries by 54%).

SUMMARY OF ARGUMENT

I. The Court of Appeals' interpretation of I.C. 34-30-20-1 was erroneous and contradicted basic principles of statutory construction.

On its face, the statute creates an immunity "from civil liability based on an act or omission related to the use of a firearm . . . by another person if the other person directly or indirectly obtained the firearm . . . through the commission of" one or more of five enumerated crimes. Here, as in *Estate of Heck ex rel. Heck v. Stoffer*, 786 N.E.2d 265, 270 (Ind. 2003), the tortious "act or omission" alleged was not related to the *use* of a firearm, but rather to defendant's negligent *storage* of that firearm.

The Court of Appeals, however, thought that because of "the timing of the General Assembly's enactment of Indiana Code section 34-30-20-1," it could "only conclude, given this timeline, that the legislature enacted this statute in direct response to *Estate of Heck*," to legislatively overrule that decision. (Ct. App. Op. 6, 8.) That was wrong.

To start, the Court of Appeals' decision was based on a *post hoc ergo propter hoc* analysis based on inferences drawn entirely from legislative timing, rather than grounded in the text of IC 34-30-20-1. That text, the best guide to legislative intent, grants immunity for "act[s] or omission[s]"—the language of torts—"related to the *use* of a firearm." Lee's "act or omission" was "related to" the *storage* of a firearm, *not* its use.

Even were the statute ambiguous, interpretive canons point to this same understanding. *First*, as a statute in derogation of common law, the immunity statute must be strictly construed. The Court of Appeals never mentioned or applied that rule. *Second*, the Court of Appeals' sweeping interpretation of the statute is impossible to reconcile with other Indiana statutes governing gun ownership and storage, and conflicts with Indiana's juvenile-delinquency laws by concluding, without analysis, that C.O. committed "theft." *Third*, the heading of the statute—"Owner immunity for misuse of a firearm by a person who acquires the firearm by criminal act"—confirms that immunity is limited to tort claims rooted in alleged "misuse" by another, not the owner's own negligence.

II. By looking only narrowly at timing, the Court of Appeals also overlooked dispositive evidence of legislative intent. *First*, the statute says nothing about "storing" or "keeping" guns—the basis of the negligence claim in *Heck.* *Second*, the General Assembly's initial version of the statute would have immunized gun owners "from civil liability based on an act or omission related to the storage or monitoring of a firearm that is used by a third party in the commission of a crime." But that language was rejected, and a more modest immunity enacted. *Third*, like the statute, the available legislative history—other than the rejected "storage or monitoring" version—nowhere mentions *Heck*, "storage," "monitoring," or any other words demonstrating legislative intent to completely overrule *Heck*. *Fourth*, the various legislative changes to the bill that became the immunity statute confirm that only a limited immunity, for vicarious liability, was intended.

ARGUMENT

I. THE PLAIN TEXT OF I.C. 34-30-20-1, ON ITS FACE AND AS READ USING ORDINARY CANONS OF CONSTRUCTION, DOES NOT CREATE IMMUNITY FOR AN OWNER'S NEGLIGENT STORAGE OF FIREARMS

The statute provides:

> **Owner immunity for misuse of a firearm by a person who acquires the firearm by criminal act**
>
> Sec. 1. A person is immune from civil liability based on an act or omission related to the use of a firearm or ammunition for a firearm by another person if the other person directly or indirectly obtained the firearm or ammunition for a firearm through the commission of the following:
>
> (1) Burglary (IC 35-43-2-1).
>
> (2) Robbery (IC 35-42-5-1).
>
> (3) Theft (IC 35-43-4-2).
>
> (4) Receiving stolen property (IC 35-43-4-2).
>
> (5) Criminal conversion (IC 35-43-4-3).

I.C. 34-30-20-1.

Ms. Nicholson's complaint alleges that Lee is liable for the death of her son based on an act or omission related to Lee's own negligent storage of a firearm, not "the use of a firearm by another person." The tort alleged here was Lee's own negligent decision to store a loaded Glock 9mm gun on the seat of an unlocked truck, in plain view. That tort is outside the clear, unambiguous language of the statutory immunity.

"If a statute is clear and unambiguous, we put aside various canons of statutory construction and simply require that words and phrases be taken in their

plain, ordinary, and usual sense." *KS&E Sports v. Runnels*, 72 N.E.3d 892, 898-99 (Ind. 2017) (quoting *Basileh v. Alghusain*, 912 N.E.2d 814, 821 (Ind. 2009)). Here, the text begins and ends the inquiry. Ms. Nicholson's complaint is based on an act or omission related to the *storage* of a firearm, not its "use": Lee's failure to store and maintain his firearm in a manner consistent with the common-law standard of care.

Even were the statute ambiguous, making judicial construction necessary, several canons of construction, all endorsed by this Court, confirm that the statute does not confer the sweeping immunity found by the Court of Appeals.

First, statutes in derogation of the common law "must be strictly construed against limitations on the claimant's right to bring suit." *Hinshaw v. Bd. of Comm'rs of Jay Cty.*, 611 N.E.2d 637, 639 (Ind. 1993) (citing cases). The reason behind this rule is the sensible presumption that the legislature is aware of the common law, and will only alter it "either by express terms or unmistakable implication." *Id.* Accordingly, a statute must contain a "clear and concise expression of intent" to "modify a fundamental rule of the common law." *Id. See also* Antonin Scalia & Bryan A. Garner, *The Interpretation of Legal Texts* § 52, at 318-19 (2012) ("statutes will not be interpreted as changing the common law unless they effect the change with clarity").

The Court of Appeals did not apply this canon. It cited *Hinshaw*, but found it "inapposite" because "the language of the statute in *Hinshaw* is clear that immunity attaches only when the claim is based on the negligence of another." (Ct. App. Op.

9-10.) But the Court of Appeals still should have applied *Hinshaw*'s rule of strict construction, and demanded "clarity" from the statute before finding that there had been an alteration to the common law.

Section 34-30-20-1 creates some kind of immunity. The statute's opening words make that clear. But the *scope* of that immunity requires a careful parsing of the rest of the statutory language—"immune from civil liability *based on an act or omission related to the use of a firearm . . . by another person*." And here, the General Assembly's use of "liability based on an act or omission related to the use of a firearm by another person" is telling. The words "act or omission" invoke tort law: Under standard negligence doctrine, a defendant is liable for a plaintiff's injury where the defendant's tortious act or omission is deemed a cause of that injury. *E.g.*, *City of Gary ex rel. King v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1243-44 (Ind. 2003). So the statute creates an immunity for civil liability based on a tort ("act or omission") that is related to the use of a firearm.

Because the immunity statute uses this tort-liability language, it must be applied with reference to the particular tort alleged. The inquiry then becomes whether the tort alleged against Mr. Lee—his "act or omission"—is "related to the use of a firearm by another person." It is not: The "act or omission" alleged is Mr. Lee's negligence in leaving his loaded firearm on the seat of his unlocked truck, in plain view. That negligence tort relates entirely to storage of the firearm, not negligent "use of a firearm by another person." Furthermore, that "act or omission" is his alone, not one committed "by another person."

The Court of Appeals thought differently: "It cannot seriously be questioned that Lee's failure to safely store his gun is 'related to' C.O.'s later use of that same gun." (Ct. App. Op. 8.) That *ipse dixit* was the entirety of the Court of Appeals' analysis of the critical statutory language. It never considered whether an "act or omission" so clearly *unrelated* to the "use" of a firearm—negligently leaving a loaded firearm on an unlocked truck's seat—fell outside the scope of the statutory immunity. It never addressed whether (as *amici* urge) "act or omission" refers to the specific tort being alleged—here, negligent storage—so as to only immunize torts sounding in the "use" of a firearm. And it never endeavored to ask, or answer, the question whether (as Ms. Nicholson argues) the "act or omission related to the use of a firearm . . . by another person" required the "act or omission" to be that of the other person. Hers is at least a reasonable—if not the clearly correct—reading of the statute, under which the immunity would be strictly from vicarious liability, but would allow for liability in cases like this one, thereby protecting children from obtaining and using negligently stored firearms in the same way that the attractive-nuisance doctrine protects them from dangerous structures or conditions on land that are especially attractive to children. *See Kopczynski v. Barger*, 887 N.E.2d 928, 932 (Ind. 2008); RESTATEMENT (SECOND) OF TORTS § 339 cmt. m.

The most that can be said for the Court of Appeals' construction is that it might—*might*—be reasonable. But so is the reading limiting the statute to vicarious liability. And in that case, the principle of strict construction of statutes in derogation of the common law—like the "tie goes to the runner" rule of baseball

umpiring—means that a negligence claim "based on an act or omission related to" the storage, not the use, of a gun, is outside the statutory immunity.

Second, the expansive immunity endorsed by the Court of Appeals is difficult, if not impossible to square with the language of other Indiana laws. "[S]tatutes concerning the same subject matter must be read together to harmonize and give effect to each." *Merritt v. State*, 829 N.E.2d 472, 475 & n.10 (Ind. 2005) (citing *Freeman v. State*, 658 N.E.2d 68, 70 (Ind. 1995)); Scalia & Garner § 55, at 327.

a. The Court of Appeals' ruling is inconsistent with I.C. 35-47-2-7(a), Indiana's child-access law, which provides that "a person may not sell, give, or in any other manner transfer the ownership or possession of a handgun or assault weapon to any person under eighteen (18) years of age." The Court of Appeals tried to reconcile its interpretation of the immunity statute with the child-access law by holding that a firearm that is "taken through commission of a crime and without the gun owner's knowledge or consent" necessarily cannot be "transfer[red]" within the meaning of I.C. 35-47-2-7 and its strict-liability approach. (Ct. App. Op. 10-11.) But the Court of Appeals improperly ignored the broad language of the transfer statute ("sell, give, or *in any other manner transfer* the ownership *or possession* of a handgun . . . *to any person* under eighteen (18) years of age") (emphasis added). The ordinary, dictionary meaning of "transfer," when used in the context of "possession," means "convey." Transfer, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2426-27 (2002). Because this broad, general word is used with the broad phrase "in any other manner," it could cover any kind of conveyance of a gun,

including negligently leaving it in plain sight of a curious child in an unlocked truck.

b. There is more. Indiana Code 35-47-2-1(b)(3) provides: "[A] person may carry a handgun without being licensed under this chapter to carry a handgun if: * * * the person carries the handgun in a vehicle that is owned, leased, rented, or otherwise legally controlled by the person, if the handgun is: (A) unloaded; (B) not readily accessible; and (C) secured in a case." The pleadings contain no indication whether Lee was licensed to carry a handgun; if not, then leaving a loaded gun accessible from his unlocked truck was negligence *per se*. *Kho v. Pennington*, 875 N.E.2d 208, 212-13 (Ind. 2007) ("[T]he unexcused violation of a statutory duty constitutes negligence *per se* 'if the statute or ordinance is intended to protect the class of persons in which the plaintiff is included and to protect against the risk of the type of harm which has occurred as a result of its violation."). The obvious purpose of the statute was to prevent unlicensed users of firearms from being able to fire them immediately, and to protect innocent persons from firearms violence at the hands of an unlicensed user—exactly the harm suffered by the dead minor here.

If Lee was licensed, then this statute would still be evidence of Lee's negligence. In Indiana, gun permit holders are expected to obtain gun-safety education. *See* I.C. 35-47-2-3(f)(2) ("At the time a license is issued and delivered to a licensee under subsection (e), the superintendent shall include with the license information concerning handgun safety rules that: * * * is: (A) recommended by a nonprofit educational organization that is dedicated to providing education on safe

handling and use of firearms; (B) prepared by the state police department; and (c) approved by the superintendent." The Indiana State Police's firearms safety page (https://www.in.gov/isp/3105.htm) exhorts firearms users that "When not in use, a firearm should be stored unloaded in a gun safe, lock box or other secure location, separate from the ammunition. Gun locking devices are sold by locksmiths, gun dealers, firing ranges, sporting goods and discount stores." That same page further warns: "Make sure children and unauthorized users do not have access to your firearm or ammunition." This is consistent with this Court's recognition, in *Heck*, that the National Rifle Association's "Safety & Training" website contained warnings supporting a finding that "leaving a loaded handgun in a hidden but accessible location" was not the exercise of reasonable care. 786 N.E.2d at 271. Those safety provisions, those provided by the State Police by statute, and I.C. 35-47-2-3(f)(2) all demonstrate that leaving a loaded handgun in an *unhidden* and openly accessible location is, at the very least, statutory evidence of negligence, if not negligence *per se*. Neither outcome can be squared with the sweeping immunity that the Court of Appeals implied out of I.C. 34-30-20-1.

Third, the statute's heading—"Owner immunity for misuse of a firearm by a person who acquires the firearm by criminal act"—confirms that the immunity is limited to "misuse of a firearm by" another person; it does not confer immunity for the acts or omissions of the gun owner him or herself. While the heading of a statute may not "affect the meaning, application, or construction of the statute," I.C. 1-1-1-5(f), the heading confirms that the immunity is limited to claims rooted in

alleged "misuse" by another person, and was so changed as the statute was amended. *See* Section II, below.

Fourth, and finally, the act of taking the gun out of the truck committed by the 15-year-old C.O. would not have been "theft" under I.C. 35-43-4-2 (or any of the other enumerated crimes). The Court of Appeals said that "C.O. took the handgun from Lee's vehicle without permission to do so, thereby committing one of the above listed offenses" in the statute. (Ct. App. Op. 4.) But C.O. was not charged with theft or any other listed offense. Nor would he have been so charged: Juveniles in Indiana who commit criminal offenses are charged and convicted of "delinquent act[s]." I.C. 31-37-1-2: A child "commits a delinquent act if, before becoming eighteen (18) years of age, the child commits an act that would be an offense if committed by an adult." The immunity statute—which, again, receives a strict construction—requires that the third party have obtained the firearm "through the commission of" one of five specific crimes. It does not allow for immunity where a firearm is "obtained . . . through the commission of" an act of delinquency.

In sum: The plain statutory language of I.C. 34-30-20-1, and all available canons of construction, limit immunity to claims rooted in the actions or omissions of others, not the gun owner's own negligence.

II. THE HISTORY OF I.C. 34-30-20-1 CONFIRMS THAT THE INDIANA GENERAL ASSEMBLY ENACTED A NARROWER IMMUNITY THAN THE COURT OF APPEALS FOUND

In *Heck*, this Court unanimously held that leaving a loaded handgun in a hidden but accessible place was enough to state a claim for negligent storage and

monitoring of a firearm. 786 N.E.2d at 267, 268-71. By the standards of *Heck*, this case should be even easier—Lee's handgun was not "hidden," but left in plain sight.

The only meaningful difference between *Heck* and this case is the intervening immunity statute, which the Court of Appeals found, without any evidence other than timing, was "enacted . . . in direct response to *Heck*" (Ct. App. Op. 8), so that "the General Assembly intended to shield gun owners from liability for failing to safely store and keep guns, when the gun that was unsafely stored is procured by a crime and then later used to commit another crime." *Id.*

The Court of Appeals' "timing" rationale is untenable.

First, the immunity statute, I.C. 34-30-20-1, says nothing—not a single word—about "stor[ing] and keep[ing] guns." *Heck* was about exactly that. Had the General Assembly intended to immunize gun owners from claims relating to their storage and keeping of guns, it surely would have said so in straightforward language. But the statute's plain language says something different entirely—it immunizes gun owners from tort claims when "civil liability [is] based on an act or omission related to the *use* of a firearm . . . by another person." (Emphasis added.) Had the legislature intended to immunize gun owners from torts "based on an act or omission relating to the storage or monitoring of a firearm that is used by a third party in the commission of a crime," it knew exactly how to say that. It didn't.

Second, the General Assembly specifically rejected proposed legislation that *did* say that. Even the Court of Appeals recognized this: "[T]he original text of the proposed statute, which was revised multiple times before it passed, stated that '[a]

person is immune from civil liability based on an act or omission related to the storage or monitoring of a firearm that is used by a third party in the commission of a crime.' H.B. 1110, 113th Leg., 2d Reg. Sess. (2004)." (Ct. App. Op. 6 n.4) But the Court of Appeals just quoted this version; it otherwise did not address this striking piece of legislative evidence. "The best evidence of legislative intent is surely the language of the statute itself," *Prewitt v. State*, 878 N.E.2d 184, 186 (Ind. 2007), but the fact that the legislature considered—and rejected—language that would have yielded the result sought by appellee further indicates that the statute actually enacted does not confer the same broad immunity rejected by the legislature.

Third, the available legislative record, including the bills, motions, proposed amendments, and the various Fiscal Impact Statements to House Bills 1110 and 1349 (LS 6367 (Nov. 25, 2003); LS 7291 (Feb. 3, 2004); LS 7291 (amended; Feb. 20, 2004)), contains no reference to *Heck.* One would expect at least a reference to *Heck*, or to firearm "storage" or "maintenance," had the immunity statute really been intended to legislatively overrule *Heck.* The absence of such references is a strong indicator that the narrower version of the immunity statute that passed does not limit liability for negligent-storage cases like *Heck*, or this case.

Fourth, and finally, the changes in statutory language throughout the legislative process confirm that the immunity statute was not designed to immunize a gun owner from his or her own negligence. As noted above, the first version of the immunity bill (H.B. 1110), was entitled "Immunity of Firearm Owner if Firearm Used in a Crime." It would have done just that—granted immunity to gun owners

"from civil liability based on an act or omission related to the storage or monitoring of a firearm that is used by a third party in the commission of a crime."

But after the immunity language was amended to remove "storage or monitoring of a firearm," and moved into in H.B. 1349 (the bill ultimately enacted), the Senate made a further amendment to clarify that immunity is only available where the tortious "act or omission" alleged was rooted in the use of a firearm *by another*—consistent with the vicarious-liability interpretation of the statute.

The Senate Report, in addition to making these changes, also changed the statute's heading from "Immunity of Firearm Owner if Firearm Used in a Crime" to "Immunity for Misuse of a Firearm or Ammunition By a Person Other Than the Owner." This change, which tracks the heading of the statute as enacted, confirms that the Senate amendment intended it to address immunity for *derivative* liability—for "Misuse . . . By a Person Other Than the Owner"—not immunity for the gun owner's own misuse or negligent acts.

CONCLUSION

Amici urge that transfer be granted, and the Court of Appeals' judgment reversed.

Dated: April 1, 2019

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I verify that this brief contains 4195 words, pursuant to Ind. R. App. P. 44(E).

Dated: April 1, 2019

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CERTIFICATE OF SERVICE

I certify that on April 1, 2019, I caused a copy of the foregoing to be served via electronic filing and first-class United States Mail, postage prepaid, upon the following counsel of record:

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