

**THE STATE OF NEW HAMPSHIRE**

**SUPREME COURT**

**2022 TERM**

**OCTOBER SESSION**

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**Case No: 2022-0348**

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**RYAN HARDY & MATTHEW O'CONNOR**

**v.**

**CHESTER ARMS, LLC, & A.**

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**BRIEF FOR THE PETITIONER**

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**TEXT OF RELEVANT AUTHORITIES & STATUTES**

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New Hampshire Constitution, Part 1, Article 14:

Every subject of this State is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive in his person, property, or character; to obtain right and justice freely, without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws..... 33, 39, 40, 41, 42

New Hampshire Constitution, Part 1, Article 20:

In all controversies concerning property, and in all suits between 2 or more persons except those in which another practice is and has been customary and except those in which the value in controversy does not exceed \$1,500 and no title to real estate is involved, the parties have a right to a trial by jury. This method of procedure shall be held sacred unless, in cases arising on the high seas and in cases relating to mariners' wages, the legislature shall think it necessary to alter it..... 31

New Hampshire R.S.A. 135-C:27:

A person shall be eligible for involuntary emergency admission if he is in such mental condition as a result of mental illness to pose a likelihood of danger to himself or others.

I. As used in this section "danger to himself" is established by demonstrating that:

(a) Within 40 days of the completion of the petition, the person has inflicted serious bodily injury on himself or has attempted suicide or serious self-injury and there is a likelihood the act or attempted act will recur if admission is not ordered;

(b) Within 40 days of the completion of the petition, the person has threatened to inflict serious bodily injury on himself and there is likelihood that an act or attempt of serious self-injury will occur if admission is not ordered; or

(c) The person's behavior demonstrates that he so lacks the capacity to care for his own welfare that there is a likelihood of death, serious bodily injury, or serious debilitation if admission is not ordered.

(d) The person meets all of the following criteria:

(1) The person has been determined to be severely mentally disabled in accordance with rules authorized by RSA 135-C:61 for a period of at least one year;

(2) The person has had at least one involuntary admission, within the last 2 years, pursuant to RSA 135-C:34-54;

(3) The person has no guardian of the person appointed pursuant to RSA 464-A;

(4) The person is not subject to a conditional discharge granted pursuant to RSA 135-C:49, II;

(5) The person has refused the treatment determined necessary by a mental health program approved by the department; and

(6) A psychiatrist at a mental health program approved by the department has determined, based upon the person's clinical history, that there is a substantial probability that the person's refusal to accept necessary treatment will lead to death, serious bodily injury, or serious debilitation if admission is not ordered.

II. As used in this section "danger to others" is established by demonstrating that within 40 days of the completion of the petition, the person has inflicted, attempted to inflict, or threatened to inflict serious bodily harm on another.....

## New Hampshire R.S.A. 135-C:28:

I. The involuntary emergency admission of a person shall be to the state mental health services system under the supervision of the commissioner. The commissioner shall maintain a list of physicians, PAs, and APRNs, as defined in RSA 135-C:2, II-a, who are approved by either a designated receiving facility or a community mental health program approved by the commissioner. The admission may be ordered upon the certificate of an approved physician, approved PA, or approved APRN, as defined in RSA 135-C:2, II-a, provided that within 3 days of the completion of the petition the physician, PA, or APRN has conducted, or has caused to be conducted, a physical examination if indicated and circumstances permit, and a mental examination.

The physician, PA, or APRN must find that the person to be admitted meets the criteria of RSA 135-C:27. The certificate shall state the time and, in detail, the nature of the examinations conducted. The certificate shall also state a specific act or actions the physician, PA, or APRN has actually observed or which have been reported to him or her by the petitioner or a reliable witness who shall be identified in the certificate, and which in the physician's, PA's, or APRN's or designee's opinion satisfy the criteria set forth in RSA 135-C:27. The physician, PA, or APRN shall inform the person of the designated receiving facility in the mental health services system that he or she will be transported to upon the facility location being identified. The admission shall be made to the facility which can best provide the degree of security and treatment required by the person and shall be consistent with the placement principles set forth in RSA 135-C:15. As used in RSA 135-C:27-33, "petitioner" means any individual, including a physician, PA, or APRN completing a certificate, who has requested that a physician, PA, or APRN conduct or who has conducted an examination for

purposes of involuntary emergency admission. Every certificate shall be accompanied by a written petition signed by a petitioner.

II. Upon request for involuntary emergency admission by a petitioner, if the person sought to be admitted refuses to consent to a mental examination, a petitioner or a law enforcement officer may sign a complaint which shall be sworn to before a justice of the peace. The complaint shall be submitted to the justice of the peace with the petition. The petition shall state in detail the acts or actions of the person sought to be admitted which the petitioner has personally observed or which have been personally reported to the petitioner and in his or her opinion require a compulsory mental examination. If the justice of the peace finds that a compulsory mental examination is necessary, the justice may order the examination.

III. When a peace officer observes a person engaging in behavior which gives the peace officer reasonable suspicion to believe that the person may be suffering from a mental illness and probable cause to believe that unless the person is placed in protective custody the person poses an immediate danger of bodily injury to himself or others, the police officer may place the person in protective custody.

Any person taken into protective custody under this paragraph shall be transported directly to an emergency room of a licensed general hospital or to another site designated by the community mental health program serving the area, for the purpose of determining if an involuntary emergency admission shall be ordered in accordance with RSA 135-C:28, I. The period of protective custody shall end when a physician, PA, or APRN makes a determination as to whether involuntary emergency admission shall be ordered or at the end of 6 hours, whichever event occurs first.....

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The department of safety may become the point of contact for the federal government for the purposes of the National Instant Criminal Background Check System (NICS).....	20, 33
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III. Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits filed, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone, although there is a genuine issue as to the amount of damages.....	30, 32, 38
 New Hampshire R.S.A. 507:7-e:	
I. In all actions, the court shall:	
(a) Instruct the jury to determine, or if there is no jury shall find, the amount of damages to be awarded to each claimant and against each defendant in accordance with the proportionate fault of each of the parties; and	
(b) Enter judgment against each party liable on the basis of the rules of joint and several liability, except that if any party shall be less than 50 percent at fault, then that party's liability shall be several and not joint and he shall be liable only for the damages attributable to him.	
(c) RSA 507:7-e, I(b) notwithstanding, in all cases where parties are found to have knowingly pursued or taken active part in a common plan or design resulting in the harm, grant judgment against all such parties on the basis of the rules of joint and several liability.	



II. In all actions, the damages attributable to each party shall be determined by general verdict, unless the parties agree otherwise, or due to the presence of multiple parties or complex issues the court finds the use of special questions necessary to the determination. In any event, the questions submitted to the jury shall be clear, concise, and as few in number as practicable, and shall not prejudice the rights of any party to a fair trial.

III. For purposes of contribution under RSA 507:7-f and RSA 507: 7-g, the court shall also determine each defendant's proportionate share of the obligation to each claimant in accordance with the verdict and subject to any reduction under RSA 507: 7-i. Upon motion filed not later than 60 days after final judgment is entered, the court shall determine whether all or part of a defendant's proportionate share of the obligation is uncollectible from that defendant and shall reallocate any uncollectible amount among the other defendants according to their proportionate shares. The party whose liability is reallocated is nonetheless subject to contribution and to any continuing liability to the claimant on the judgment....

IV. Nothing contained in this section shall be construed to modify or limit the duties, responsibilities, or liabilities of any party for personal injury or property damage arising from pollutant contamination, containment, cleanup, removal or restoration as established under state public health or environmental statutes including, but not limited to, RSA 146-A, RSA 147-A and RSA 147-B.....

New Hampshire R.S.A. 507:7-f:

I. Except as provided in paragraph II, a right of contribution exists between or among 2 or more persons who are jointly and severally liable upon the same

indivisible claim, or otherwise liable for the same injury, death or harm, whether or not judgment has been recovered against all or any of them. Except as provided in RSA 507:7-g, I and IV, the right of contribution may be enforced only by a separate action brought for that purpose. The basis for contribution is each person's share of the obligation, including the proportionate share of the claimant at fault as determined in accordance with the provisions of RSA 507:7-e. No right of contribution exists against a person who is immune to the claim which would otherwise give rise to a right of contribution. No right of contribution exists against the claimant at fault.

II. Contribution is not available to a person who enters into a settlement with a claimant unless the settlement extinguishes the liability of the person from whom contribution is sought, and then only to the extent that the amount paid in settlement was reasonable..... 30

New Hampshire R.S.A. 508:21:

(c) "Qualified product" means a firearm or ammunition or a component part of a firearm or ammunition, manufactured in compliance with federal and state law, that has been shipped or transported in intrastate, interstate, or foreign commerce.

(d) "Qualified civil liability action" means a civil action, in law or in equity, brought by any person against a manufacturer or seller or a trade association of a qualified product, for damages resulting from the criminal or unlawful use of a qualified product by the person or a third party, but shall not include an action brought against a manufacturer, seller, or trade organization convicted of a felony under state or federal law, by a party directly harmed by the felonious conduct.

(e) "Seller" means, with respect to a qualified product, a person who:

(1) In the course of a business conducted for that purpose sells, distributes, rents, leases, prepares, blends, packages, labels, or otherwise is involved in placing a qualified product in the stream of commerce.

II. A qualified civil liability action shall not be brought in any court..... 18, 28, 29, 30, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 51, 52, 54

New Hampshire R.S.A. 541-B:19:

I. Without otherwise limiting or defining the sovereign immunity of the state and its agencies, the provisions of this chapter shall not apply to...

(b) Any claim based upon an act or omission of a state officer, employee, or official when such officer, employee, or official is exercising due care in the execution of any statute or any rule of a state agency. .... 18, 28, 30, 52, 53

Protection of Lawful Commerce in Arms Act (PLCAA):

15 U.S.C. § 7903(5)(A)(ii):

(5) Qualified civil liability action

**(A) In general**

The term "qualified civil liability action" means a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified or a third party, but shall not include...(ii) an action brought against a seller for

negligent entrustment or negligence per se...

**(B) Negligent entrustment:** As used in subparagraph (A)(ii), the term "negligent entrustment" means the

supplying of a qualified product by a seller for use by another person when the seller knows, or reasonably should know, the person to whom the product is supplied is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person or others.....

43, 44, 45, 46, 48

18 U.S.C. § 922 (g)(4):

§ 922. Unlawful acts

**(g) It shall be unlawful for any person—**

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien--

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26)

of the Immigration and Nationality Act

(8 U.S.C. 1101(a)(26));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to a court order that--

(A) was issued after a hearing of which such person received actual notice, and at which such

person had an opportunity to participate;  
 (B) restrains such person from harassing, stalking,  
 or threatening an intimate partner of such person or  
 child of such intimate partner or person, or engaging  
 in other conduct that would place an intimate partner  
 in reasonable fear of bodily injury to the partner or  
 child; and (CXD includes a finding that such person  
 represents a credible threat to the physical safety of such  
 intimate partner or child; or (ii) by its terms explicitly  
 prohibits the use, attempted use, or threatened use of  
 physical force against such intimate partner or child that  
 would reasonably be expected to cause bodily injury;  
 or  
 (9) who has been convicted in any court of a  
 misdemeanor crime of domestic violence, to ship or  
 transport in interstate or foreign commerce, or possess  
 in or affecting commerce, any firearm or ammunition;  
 or to receive any firearm or ammunition which has  
 been shipped or transported in interstate or foreign  
 commerce..... 18, 29, 32, 33, 34, 38, 39, 45

United States Constitution, Article VI, Clause 2

This Constitution, and the Laws of the United States  
 which shall be made in Pursuance thereof; and all Treaties  
 made, or which shall be made, under the Authority of the  
 United States, shall be the supreme Law of the Land;  
 and the Judges in every State shall be bound thereby,  
 any Thing in the Constitution or Laws of any State to  
 the Contrary notwithstanding..... 44, 46

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## QUESTIONS PRESENTED

I. WHETHER SUMMARY JUDGMENT WAS APPROPRIATE WHERE THERE WERE GENUINE ISSUES OF MATERIAL FACT AND THE DEPARTMENT OF SAFETY, GUN LINE DIVISION, DID NOT ACT WITH REASONABLE CARE TO SUPPORT A FINDING THAT GUN LINE WAS IMMUNE PURSUANT TO R.S.A. 541-B:19, I?

(The issue was preserved by the Plaintiffs' Objection to the Department of Safety's Motion for Summary Judgment, p. 3; the Plaintiffs' Motion to Reconsider the Superior Court's Grant of Summary Judgment to the Department of Safety, pp. 2-9; and the Plaintiffs' Memorandum of Law in Support of the Objection to the Department of Safety's Motion for Summary Judgment, pp. 2-17.)

II. WHETHER SUMMARY JUDGMENT IS APPROPRIATE TO THE GUN DEALER WHERE R.S.A. 508:21 IS IN VIOLATION OF THE NEW HAMPSHIRE CONSTITUTION, INCLUDING THE DUE PROCESS CLAUSE, ACCESS TO THE COURTS, AND EQUAL PROTECTION?

(The issue was preserved by Plaintiff's Objection to Chester Arms' Motion for Summary Judgment, p. 2; the Plaintiffs' Motion to Reconsider the Superior Court's Grant of Summary Judgment to Chester Arms, pp. 2, 4-7; Plaintiffs' Memorandum of Law in Support of the Objection to Chester Arms' Motion for Summary Judgment, pp. 3, 33-35 and Apx. 1, pp. 507-508; and Plaintiffs' Reply to Chester Arms' Objection to Plaintiffs' Motion to Reconsider, pp. 2-8.)

III. WHETHER SUMMARY JUDGMENT WAS APPROPRIATE WHERE R.S.A. 508:21 IS PREEMPTED WHERE FEDERAL LAWS, INCLUDING THE PROTECTION OF LAWFUL COMMERCE AND ARMS ACT, THE NATIONAL FIREARMS ACT, THE GUN CONTROL ACT, AND THE BRADY ACT COMPREHENSIVELY OCCUPIED AN ENTIRE FIELD OF FIREARMS REGULATION AND WHERE R.S.A. 508:21 CONFLICTS WITH THE PROTECTION OF LAWFUL COMMERCE AND ARMS ACT?



(The issue was preserved by Plaintiffs' Motion to Reconsider the Superior Court's Grant of Summary Judgment to Chester Arms, pp. 2-4; Defendant's Reply to Plaintiffs' Motion to Reconsider the Grant of Summary Judgment to Chester Arms, pp. 5-8; and Plaintiffs' Reply to Chester Arms' Objection to the Motion to Reconsider [filed under seal], pp. 3-9.)

**IV. WHETHER THE IMMUNITY UNDER R.S.A. 508:21 WAS  
WAIVED BY THE GUN DEALER WHERE THE STATUTE WAS NOT  
RAISED IN ITS ANSWER?**

(The issue was preserved in Plaintiffs' Objection to Chester Arms' Motion for Summary Judgment, p. 2; and Plaintiffs' Memorandum of Law in Support of the Objection to Chester Arms' Motion for Summary Judgment, pp. 24-25.)

**V. WHETHER SUMMARY JUDGMENT WAS APPROPRIATE  
THROUGH RELIANCE ON R.S.A. 508:21 TO IMMUNIZE THE GUN  
DEALER WHERE THE GUN DEALER SUBSTANTIALLY CAUSED  
THE HARM IMPOSED ON THE PLAINTIFFS?**

(The issue was preserved in Plaintiffs' Motion to Reconsider the Superior Court's Grant of Summary Judgment to Chester Arms, pp. 2, 7; the Plaintiffs' Memorandum of Law in Support of the Objection to Chester Arms' Motion for Summary Judgment, pp. 25-26; and Plaintiffs' Objection to Chester Arms' Motion for Summary Judgment, pp. 1-2.)

## STATEMENT OF THE CASE

The Plaintiffs, Ryan Hardy and Matthew O'Connor, brought negligence claims against Chester Arms, LLC and the New Hampshire Department of Safety (DOS or Gun Line). Each of the Defendants filed a Motion for Summary Judgment. The Plaintiffs filed objections. The Superior Court granted summary judgment to Chester Arms relying on R.S.A. 508:21, and summary judgment was granted to DOS based on the immunity provided by R.S.A. 541-B:19. A Motion to Reconsider was filed which was denied. This appeal was then filed.

## STATEMENT OF FACTS

On March 19, 2016, Ian MacPherson (MacPherson) attempted to purchase a handgun from Chester Arms. *Apx. I. at 276.* Chester Arms is a Federal Firearms Licensee (FFL) located in Derry, New Hampshire and is owned by John Cavaretta. *Id. at 273.* An FFL is a firearms dealer that is licensed by the federal government to sell firearms. *Apx. II at 160.* An FFL has to have the customer fill out an ATF Form 4473 to ensure that the gun is sold to a qualified purchaser. *Apx. I at 315.* A dealer has a right and duty to deny the sale to a purchaser for any reason. *Id. at 317.*

Mr. Cavaretta's daughter, Jennifer, was an employee of Chester Arms. On March 19, Ms. Cavaretta was the sole worker at Chester Arms when she interacted with MacPherson and other customers. *Id. at 313.* MacPherson wore a black trench coat over a zipped jacket, wore blue latex

gloves and had long, unkempt hair. *Id.* MacPherson announced that he wanted to purchase a high capacity pistol. *Id.* at 277.

During the purchase, MacPherson appeared anxious; he fidgeted and paced; occasionally he stomped; and, he repeatedly wiped his coat. Report of Joseph Vince at 461; Surveillance Video at 12:25:59 and 12:35:45 of video. MacPherson appeared restless. Apx. 1 at 575. *Id.*

The defense's psychiatric expert, Dr. Matthew Davis, reviewed the surveillance video of MacPherson at Chester Arms on March 19, 2016. Apx. I at 490. Dr. Davis testified that MacPherson was oddly dressed; he appeared anxious, restless, was pacing and he moved his wallet from pocket to pocket. *Id.* MacPherson's eye contact was a bit vacant and his speech was monotone and sparse. *Id.* Dr. Davis concluded that MacPherson had a severe psychotic disorder such as schizophrenia. *Id.* Dr. Davis explained that schizophrenia does not go away. *Id.* From a lay perspective, Dr. Davis acknowledged that MacPherson presented (at Chester Arms) with bizarre and odd behaviors and the doctor felt that this is how the world would view MacPherson. *Id.*

Eventually, MacPherson selected a Smith and Wesson Model SD40VE .40 caliber semi-automatic pistol and 50 rounds of ammunition. Apx. 1 at 277. MacPherson filled out the required ATF 4473 Form. *Id.* at 278. An FFL has an important role to ensure that the prospective purchaser understands the questions on the ATF Form. Apx. I at 315-16. Because MacPherson made a mistake on the 4473 Form by listing an old address, Ms. Cavaretta had MacPherson fill out a second Form. *Id.* at 279.

Ms. Cavaretta then called Gun Line (a division of DOS) to request a background check on MacPherson. *Id.* Gun Line assumed the federal

statutory duty, identified in 18 U.S.C. § 922 (g)(4), to conduct a background check on purchasers of a handgun. Apx. II at 534; *see*, R.S.A. 159-D:1. The NICS Index is a database system that checks the background of a firearm purchaser. Apx. I at 275.

#### MacPherson at Chester Arms

While MacPherson was at Chester Arms on March 19, 2016, and on April 1, 2016, the store had surveillance and audio recordings. Apx. I at 84, 160. Counsel is filing a contemporaneous motion to request the transfer of the video and audio recordings from the Superior Court.

MacPherson asked Ms. Cavaretta at least five times how long the background check takes. Apx. I at 282-83. Ms. Cavaretta explained that the process can take anywhere from minutes to a lot longer. *Id.* While waiting, Ms. Cavaretta placed the weapon on the counter, and eventually made sure that MacPherson would not be able to touch the gun. *Id.* at 276. She “made sure [she] was watching him.” *Id.*

With MacPherson present, two gentlemen wearing JEEP sweatshirts entered Chester Arms. *Id.* at 281. One of the gentlemen asked MacPherson if he was “packing” under his trench coat. *Id.* (Citing Apx. I. at 281; Surveillance Video at 12:32:30). MacPherson said no and left the store for a few moments. *Id.* at 281-83. While MacPherson was outside, one of the gentlemen asked Ms. Cavaretta if she knew MacPherson; Ms. Cavaretta said she did not. *Id.* at 282. The gentlemen eventually left. Apx. I at 282. According to Ms. Cavaretta’s testimony, one of the two “JEEP” gentlemen called her to let her know that they left the store because MacPherson concerned them and they were not carrying their sidearms with them. *Id.* at

314-15; 356. The men contacted a police officer to investigate MacPherson. *Id.*

MacPherson continued to pace, fidget, mumble, and leave and re-enter the store. *Id.* at 428-30. While MacPherson and Ms. Cavaretta were alone, she can be seen on video texting on her cell phone. *Id.* at 314. She would later tell customers she was texting her friend to say that someone “really creepy” was at the store. *Id.*

At this point, a male and female, followed by two Derry Police Department officers, entered Chester Arms. *Id.* at 315. (Surveillance Video at 12:53:30). The two officers were responding to a report of a suspicious person in the store. *Id.* at Apx. I at 291. One of the officers, Sergeant Belanger, spoke briefly with Ms. Cavaretta, then turned his focus to MacPherson, asking if he was making a purchase. *Id.* at 286. Sergeant Belanger asked to speak with MacPherson outside. *Id.* While MacPherson was outside with Sergeant Belanger, Ms. Cavaretta spoke with the other customers in Chester Arms: she said she was scared and she does not get scared by customers. *Id.* at 286 (citing, Apx. I, Surveillance Video at 12:52:23 to 12:55:15). One of the customers said Ian was a few French fries short of a happy meal. *Id.* at 287. One customer asked her companion if he had his gun on him. *Id.* at 315. Another customer said the long coat did not help his image. *Id.* at 287. Ms. Cavaretta also told the police officers she was freaked out. *Id.* at 296-97.

Sergeant Belanger returned to speak with Ms. Cavaretta to make sure things were “kosher.” *Id.* at 295-96. The officer stated that he had been approached by two persons who expressed concern about a male at Chester Arms. *Id.* at 322. Sergeant Belanger later testified that

MacPherson “appeared to have some mental health issues,” from a lay person’s perspective. *Id.*; Apx. I at 422.

On March 19, 2016, Ms. Cavaretta told one or more customers:

- “he [the shooter] was scary...I don’t usually get *scared*;”
- “[the shooter] definitely *scared* me a little;”
- She was “a little freaked out right now;”
- The store “get[s] some [] sketchy people, but not that sketchy;”
- She “understand[s]” why somebody called the police;
- She needs to take a moment to update a male friend she had previously texted about “the real creepy” customer [MacPherson] so as to let him know everything had resolved;
- She “*didn’t let [the shooter] touch the [subject pistol]*;” and,
- She “*made sure [she] was watching [the shooter]*.”

*Id.* at 498.

Ms. Cavaretta expected that a customer was going to call the police. *Id.* at 295. While Sergeant Belanger was in the store, Gun Line called back and informed Ms. Cavaretta to “delay” the sale. *Id.* at 295-96. She told Sergeant Belanger this information. MacPherson re-entered the store after Sergeant Belanger left, and Ms. Cavaretta told MacPherson the sale was delayed. MacPherson left the store after getting a receipt and leaving his contact information. *Id.* at 297.

Chester Arms’ expert witness, John Yule, testified that gun shop owners or managers have life experiences which allow the dealer to make a lay assessment about someone’s mental health with respect to the ability of possessing a firearm. *Id.* at 317; 382-83. Mr. Yule testified that because

New Hampshire does not release information about persons who have been involuntarily committed, a gun dealer has to fill in the gaps to assess a customer's mental health. Apx. I at 316; 381. The appearance and presentation of a purchaser are important factors in the sale of a firearm. *Id.* at 316; 381. A gun dealer has to make a lay person's assessment of a customer's mental health. *Id.* at 316; 381. Another defense expert, retired ATF Officer Thomas McDermott, testified that it is important that a gun dealer know if the purchaser comprehends the ATF Form's questions, and the time with the purchaser is important. *Id.* at 302; 365-66. The gun dealer is the only one who interacts with the potential purchaser, acting as the "eyes and ears" in the review process. *Id.* at 302; 371.

Unfortunately, Mr. Cavaretta acknowledged that it was not his practice to make sure that a customer understands the questions on the ATF form (including if one has been adjudicated as a mental defective or involuntarily committed). Apx. I at 317; 349. Mr. Cavaretta testified that he had no idea if MacPherson knew the meaning of "mental defective" on the ATF Form 4473. *Id.* at 319.

#### Background Check at Gun Line

When Ms. Cavaretta first called Gun Line, the NICS Index database was accessed to look at MacPherson's background. Gun Line accesses the NICS Index database and other New Hampshire-based databases to search for potential federal disqualifiers. Apx. I at 869-70. Gun Line may deny, delay or approve the firearm transfer. Apx. II at 179. When the sale is delayed, Gun Line has three (3) business days to research the reason for the delay before an FFL is allowed to transfer the firearm, if a denial is not issued. *Id.*

Tiffany Foss, the civilian supervisor of Gun Line, testified there are ten (10) federal disqualifiers to consider when someone seeks to purchase a firearm, including domestic violence convictions, being adjudicated as mentally defective, and being involuntarily committed to a mental institution. *Id.*

Gun Line's NICS background check revealed that MacPherson was disqualified from purchasing a firearm. Apx. I at 870; 1115. According to DOS, MacPherson was disqualified, at least in part, because of a misdemeanor conviction; curiously, Gun Line felt it necessary to research the domestic violence convictions and did not issue a "denial." *Id.* at 870-71. This was so even though the FBI previously audited the New Hampshire domestic violence entries made to the NICS database, Apx. II at 541, and the civilian supervisor testified that Gun Line had more confidence in the accuracy of the database as of 2016. Apx. I at 871.

Three business days after the delay status would be March 24, 2016. Gun Line did not begin the follow-up to the background search until March 23, 2016. Apx. I at 1109. During this period of time, Gun Line did not have enough worker hours to get the job done, and sometimes, the research would not get done. Apx. I at 1110. Ms. Foss acknowledged that Gun Line set up a goal to respond to delays within 30 days, (not three), but even the 30-day deadline was not met. Apx. I at 871; 1117. Ms. Foss testified that Gun Line was inundated with requests for background checks, they were short-staffed, those who were working were new, and they did not have sufficient man hours to get the job done. Apx. I at 1109-10.

Ms. Field explained that a person's mental health history can be learned from the criminal history from a court or other agencies, and that



information they learn about can be added to the NICS database, which can result in an immediate denial. Apx. I at 873; 953-55. The NICS Law Enforcement Guide allows for a Gun Line employee to add information to the NICS database. Apx. I at 922. There are several examples in the Guide where information can be added to NICS; the examples are a non-exhaustive list. *Id.*

With regard to MacPherson, Tiffany Foss received information from Detective Scott Park of the Merrimack Police Department that MacPherson was delusional, schizophrenic, and had many previous contacts with Merrimack Police. Apx. I at 1057; 1089. Detective Park told Gun Line that if MacPherson were to have access to a firearm, it would cause police significant concern. *Id.* Separately, Ms. Foss had concerns about MacPherson's mental health history. Apx. I at 1111-12. She knew of an involuntary emergency admission, but did not know the circumstances. Apx. II at 180. Detective Park testified that he was aware that MacPherson was involuntarily committed in 2007<sup>1</sup>. Apx. I at 1100. He testified that no one at Gun Line requested documentation about MacPherson's mental health, but rather, Detective Park was told that Gun Line would not authorize the sale of a weapon to MacPherson. Apx. I at 1097. Detective Park had never been more concerned about someone potentially getting a firearm. Apx. I at 1094. He sent a letter to Gun Line outlining his numerous previous contacts with MacPherson. Apx. I at 1095. Detective

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<sup>1</sup> The Superior Court was under the impression that Detective Park did not know whether MacPherson had been adjudicated as a mental defective or involuntarily committed, Apx I at 1010, but this was incorrect.

Park notified other law enforcement agencies about MacPherson's effort to buy a firearm. Apx. I at 1186.

Ms. Foss described MacPherson's background information to be eye-opening; and, Gun Line documented that Chester Arms should be urged not to transfer the firearm to MacPherson. Apx. I at 1104, 1111. Norinne Field, a Gun Line employee, notified Chester Arms not to transfer as they were still working on the background check. Apx. I at 320-21. Ms. Field, on the day that the Plaintiffs were shot, told ATF Special Agent Ernest Yerrington that Gun Line urged the dealer not to sell the firearm to MacPherson during the federal investigation.<sup>2</sup> Apx. I at 1104. The electronic database at Gun Line also indicated that the dealer was urged not to sell the firearm, and Tiffany Foss authored an e-mail on the day of the shootings to her superiors wherein she stated that the gun dealer was urged not to sell the firearm. Apx. I at 489.

#### Events After Gun Line Delayed the Transfer

On March 19, 2016, just a few hours after the attempt to purchase the firearm, MacPherson's mental health issues were laid bare when police and medical personnel were summoned to assist MacPherson because he required emergency medical help. Apx. I at 303-04. This information supports the concerns expressed by Jennifer Cavaretta, the concerns of customers in the store, and the observations made by the defense expert, Dr. Davis. *See, Discussion, supra*, at pp. 2-6.

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<sup>2</sup> Chester Arms contested that Gun Line urged it not to sell the firearm to MacPherson. Apx. I at 1058.

Despite Gun Line's concerns about MacPherson's mental health history, and Gun Line's stated intention to research MacPherson's mental health background, neither Tiffany Foss - nor anyone else at Gun Line - could recall or demonstrate that requests were made to the Merrimack Police, a court, or to MacPherson<sup>3</sup> to learn about MacPherson's mental health history. Apx. I at 872. Gun Line did not investigate MacPherson's mental health issues as they did with regard to the misdemeanor assaults. Detective Park was clear – he was not asked to supply mental health documentation relating to MacPherson. Apx. I at 1099-1101.

On April 1, 2016, MacPherson returned to Chester Arms to retrieve his firearm. Apx. 1 at 304. This time, MacPherson interacted with John Cavaretta, the owner of Chester Arms. *Id.* Previously, Ms. Cavaretta shared her concerns about MacPherson with her father. Apx. I at 290. There was another mistake on MacPherson's ATF 4473 Form. *Id.* at 305. MacPherson filled out a third 4473 Form. *Id.* Mr. Cavaretta handed MacPherson the boxed firearm and ammunition, and MacPherson left Chester Arms within five minutes after entering the store. *Id.* at 343.

Mr. Cavaretta understood he had no obligation to sell a firearm to any prospective purchaser, even if the law permitted the transfer. *Id.* at 319; 331. He chose to transfer the firearm to MacPherson after the statutory waiting period despite MacPherson's atypical presentation; the police response to the store; the concerns raised by his daughter; the concerns by customers; and, the pending delay status at Gun Line. *Id.* at

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<sup>3</sup> MacPherson's background check stayed in "delay," until he was indicted for the attempted murders one year after the shootings. Apx. II at 108.

320. Chester Arms did not call Gun Line to check on the status of the delay on the day that the firearm was transferred. *Id.* at 322.

Importantly, Chester Arms never reported to Gun Line that the Derry Police appeared in its store because of the concerns raised by customers. *Id.* at 319. Chester Arms did not disclose that Ms. Cavaretta was scared by MacPherson, nor were his appearances and actions reported to Gun Line. *Id.* Mr. Cavaretta admitted that it would be dangerous if a prohibited person was able to possess a firearm. Apx I. at 333.

In the early hours of May 13, 2016, both Ryan Hardy and Matthew O'Connor were shot by MacPherson with the weapon he had purchased from Chester Arms. Apx. I at 310.

Subsequently, MacPherson was found not guilty by reason of insanity. Apx. I at 324. During the plea and sentencing hearing, MacPherson acknowledged that he committed the attempted murders by firing the gun at the police officers; that he was suffering from mental disease or defect; and, that the attempted murder was the product of the mental disease or defect. *Id.* Honorable Andrew R. Schulman said "That's a really bad mixture: delusional paranoid thinking and a .40 caliber handgun. It's a very sad case." *Id.*

### **SUMMARY OF ARGUMENT**

The Supreme Court should vacate the grant of summary judgment to DOS and to Chester Arms. Summary judgment was improperly granted where the Superior Court adjudged contested, important facts and the Court erroneously applied R.S.A. 541-B:19 and R.S.A. 508:21. The Supreme

Court should, on a *de novo* basis, consider the application of the statutes to the facts. Belanger v. MMS Ins. Co., 153 N.H. 584, 586 (2006).

The Appellants, Ryan Hardy and Matthew O'Connor, filed separate negligence claims against the DOS and Chester Arms where the Defendants contributed to the transfer of a firearm to Ian MacPherson; MacPherson subsequently shot the Appellants as they were in the scope of their employment as police officers.

The DOS assumed federal, statutory duties to investigate the background of MacPherson as a purchaser of a firearm. The background investigation work was incomplete due to staffing challenges, and DOS failed to document "eye-opening" mental health information that it was supplied by the Merrimack District Court and the Merrimack, New Hampshire Police Department based on historical contacts with MacPherson.

The federal law, 18 U.S.C. § 922 (g)(4), identifies disqualifiers which serve to bar the transfer of a firearm. The information provided to DOS reasonably demonstrates that MacPherson was prohibited from purchasing a firearm; he had been "adjudicated as a mental defective," and he had been involuntarily committed. The Superior Court's Order failed to give effect to the facts which supported the finding that MacPherson was a disqualified person.

Likewise, the Superior Court erroneously granted summary judgment to Chester Arms where the Court misinterpreted R.S.A. 508:21. The Court interpreted the statute to bar subject matter jurisdiction, even though the statute is, at best, ambiguous such that it allows two reasonable interpretations.

R.S.A. 508:21 attempts to bar all claims in state court “resulting from” the unlawful or criminal use, by a third-party of a firearm. The “resulting from” language is ambiguous with one interpretation being that the damages caused must be solely related to the actions of a third-party. In this case, the shooter only had the firearm because of the negligent actions of the gun dealer and the State. Due to a negligence attributable to the gun dealer and the State, the statute simply does not apply.

Also, the fact that all claims are barred from state courts is a violation of the constitutional right to a remedy and access to the courts. Equally important, in our state, claims are allowed against any party who substantially contributes to the harm of another. *See*, R.S.A. 507:7-e and R.S.A. 507:7-f. The effort to immunize gun dealers without regard to the acts and omissions of a gun dealer, is in contradiction to the equal protection safeguards of the New Hampshire Constitution.

The summary judgment orders must be vacated.

## ARGUMENT

I. THE SUPERIOR COURT WRONGLY GRANTED SUMMARY JUDGMENT WHERE THE DEPARTMENT OF SAFETY DID NOT ACT WITH REASONABLE CARE TO SUPPORT THE IMMUNITY UNDER R.S.A. 541-B:19.

Summary judgment is appropriate when there are no genuine issues of material fact and only where the moving party is entitled to judgment as a matter of law. R.S.A. 491:8-a, III. The Superior Court concluded that Gun Line investigated MacPherson’s application to purchase the firearm

with due care and that NHDOS is entitled to sovereign immunity. Apx. I at 1012. This was in error.

A. The Superior Court Did Not View The Evidence In The Light Most Favorable To The Plaintiffs As The Non-Moving Party.

When considering motions for summary judgment, the Superior Court "...cannot weigh the contents of the parties' affidavits and resolve factual issues [citation omitted]. It must determine whether a reasonable basis exists to dispute the facts claimed in the moving party's affidavit at trial. If so, summary judgment must be denied." Ianelli v. Burger King, 145 N.H. 190, 193 (2000). "The reviewing court must consider the evidence in the light most favorable to the party opposing the motion giving that party the benefit of all favorable inferences that may be reasonably drawn from the evidence. *Id.* While summary judgment can at times be a useful avenue to pursue in order to eliminate baseless claims..., trial courts must be wary of its application..." *Id.* at 192. Summary judgment was not appropriate: the Superior Court failed to construe the evidence favorably to the Plaintiffs; and, there are several factual questions as to whether the DOS acted reasonably in carrying out the statutory duties to complete a background check on MacPherson.

Summary judgment should be reserved to those rare cases where the circumstances underlying an action are clear; a deliberate effort must be made to ensure that a party's constitutional right to a jury trial is afforded substantial protection. *See*, N.H. Cont. Pt. 1, Art. 20; Ianelli, *supra*, at 192.

In this case, the Superior Court found that DOS could have taken more action than they did when researching MacPherson's mental health history, such as contacting MacPherson directly. Apx. I at 1011. However,

the Court erroneously explained that “there were competing considerations at play, including protecting New Hampshire’s citizen’s right to bear arms, the right to have privacy in one’s medical records, and the need to comply with federal firearms regulations.” Apx. I at 1011, 1238. The Court’s analysis should have been limited to whether Gun Line acted reasonably in evaluating MacPherson’s mental health concerns as shared by the Merrimack Police and as detailed in the district court’s docket card. Also, the Court should have considered the factual issues in the light most favorable to the Plaintiffs; the Superior Court should have found that Gun Line’s failure to pursue alternative efforts to learn of MacPherson’s mental health issues constituted a lack of due care or, that the reasonableness of Gun Line’s efforts must be weighed by a jury. *See*, R.S.A. 491:8-a.

The Superior Court did not rely on law to support its “competing considerations” analysis. Apx. I at 1011. The Court’s focus on the right to bear arms was misplaced where a citizen’s right to purchase a firearm is subject to disqualifiers under 18 U.S.C. § 922 (g)(4), and a sale can be refused, for whatever reason and under the gun dealer’s sole discretion. Apx I. at 317. While individuals do have a right to privacy in their medical records, that right is reasonably limited where a person’s health is called into question and their health history is a federal disqualifier under 18 U.S.C. § 922 (g)(4). *See, Desclos v. Southern New Hampshire Regional Hospital*, 153 N.H. 607, 615 (2006) (access to privileged medical records is allowed where a party injects the privileged material into the case and a resolution requires the information).

Additionally, the safety to the public, to MacPherson, and to law enforcement, are contemplated through the disqualifiers enacted in 18



U.S.C. § 922 (g)(4). The Superior Court did not address the important safety considerations raised by the Plaintiffs. Apx. I at 1056. John Cavaretta admitted that it could be dangerous if a prohibited person was able to possess a firearm. *Id.* at 333. The civilian supervisor of Gun Line testified that MacPherson's mental health history information was eye-opening and concerning. *Id.* at 871. The Superior Court chose to weigh the "competing considerations" in favor of DOS, without considering the harm to the Plaintiffs (and the public) suffered, and the Court ignored the Plaintiffs' right to recourse as a result of the Defendants' negligence. *See*, N.H. Const, Pt 1, Art. 14.

Additionally, the Court found that "[b]ecause Detective Park reached out to Gun Line of his own accord, it would be reasonable to assume that he had relayed all of the information he knew at the time." Apx. I at 1241. Detective Park knew that MacPherson was involuntarily committed in 2007; he testified that a police record was available to him in 2016, if Gun Line would have requested it. *Id.* at 1099-1101. No request was made to Park.

Gun Line employees are familiar with the federal disqualifiers associated with the sale of a firearm. *See*, R.S.A. 159-D:1. Here, MacPherson sought to purchase a firearm which required a determination as to whether MacPherson was adjudicated as a mental defective or if he had been involuntarily committed to an institution. Law enforcement officials informed Gun Line that MacPherson had a mental health history (schizophrenia) and that he was delusional. To move ahead with the background information, Gun Line should have reasonably investigated the mental health history known to the police, the courts or to MacPherson.

Viewing the evidence in the light most favorable to the Plaintiffs, the Superior Court should have found that Gun Line failed to reasonably investigate whether MacPherson was either adjudicated as a mental defective or involuntarily committed.

The facts before the Superior Court demonstrated that the information supplied to Gun Line by Detective Park, and detailed in the district court's criminal history about MacPherson, should have been added to the NICS Index to cause an immediate denial. Apx. I at 1055; 1059-60; 1081. The Law Enforcement Guide to NICS, supplied by Gun line, states that when disqualifying mental health information is gained from a reliable source, without documentation, that information can be added to gain an immediate denial. *Id.* at 1078.

However, the Superior Court determined that the Law Enforcement Guide was inapplicable. Apx. 1 at 1242. The Law Enforcement Guide should have been construed to consider the information in a non-exhaustive manner; for instance, one example in the Guide mentions Jane Doe being involuntarily committed for treatment of drug abuse; that is not the only reason someone could be involuntarily committed. Someone could be involuntarily committed for having a hallucination, or wanting to commit suicide or murder. Apx. I at 1078.

Addressing MacPherson's mental health history, the Superior Court referenced that MacPherson was subject to a mental health admission and/or treatment at Mount Sinai Hospital in Chicago, Illinois in 2014. *Id.* at 1244. In the context of the Chicago admission, the Superior Court failed to consider whether MacPherson was "adjudicated as a mental defective." 18 U.S.C. § 922 (g)(4).

Adjudicated as a mental defective is broader than the disqualifier which applies to a person who has been involuntarily committed. Apx. I at 1085-87. “ATF interprets ‘adjudicated as a mental defective’ to include anyone adjudicated to be a ‘danger to him or herself,’ ‘a danger to others;’ or lacking ‘the mental capacity to contract or manage their own affairs.’ For purposes of federal law, ‘danger’ means any danger, not simply ‘imminent’ or ‘substantial’ danger as is often required to sustain an involuntary commitment under state law. Thus, for example, adjudication that a person was mentally ill and a danger to himself or others would result in a federal firearms disability, whether the court-ordered treatment was on an inpatient or outpatient basis. This is because the adjudication itself (a finding of danger due to mental illness) is sufficient to trigger disability. “. . . [W]hether a person has been adjudicated a mental defective or committed to a mental institution, the firearms disability is permanent.” Apx. I at 1087. (Emphasis supplied.) *See also*, 27 C.F.R. § 470.11. The Chicago hospitalization was an adjudication that MacPherson was a mental defective which barred the firearm transfer; the Superior Court wrongly considered the effect of this evidence.

While in Chicago at the Mount Sinai Hospital, MacPherson was determined to be a danger to himself. Apx. II at 511, 513-14. In Illinois, court clerks, DHS, and all public or private hospitals and mental health facilities are required to inform the State Police of any individual prohibited from possessing a firearm pursuant to Illinois or federal law. 740 Ill. Comp. Stat. 110/12(b); 430 Ill. Comp. Stat. 65/8.1(b). The State Police must report the information into the NICS database. 430 Ill. Comp. Stat.

651/2.1(e)(2). If a physician, clinical psychologist, or examiner determines a person poses a clear and present danger to himself or others, the professional must notify DHS and, in turn, DHS tells the State Police for firearm background check purposes. 740 Ill. Comp. Stat. 110/12(b); 430 Ill. Comp. Stat. 65/8.1(b); 405 Ill. Comp. Stat. 5/6-103.2-103.3. The Mount Sinai admission and concerns would have been entered into the NICS Index; this information was likely available to Gun Line in 2016.

Moreover, in 2007, MacPherson was involuntarily committed to the New Hampshire State Hospital after being evaluated by a doctor at Southern New Hampshire Regional Hospital because he refused medication, he was paranoid and suffering a psychosis. Apx. I at 1059; R.S.A. 135-C:27-28. As part of this involuntary commitment process, MacPherson was also adjudicated as a mental defective where he was taken into custody by the Merrimack Police because he threatened to kill his father and threatened to kill himself. Apx. I at 1119-1121. He was determined to be a danger to his father and a danger to himself. *Id.*

Also, in February 2012, involving an assault on his father, MacPherson was taken into custody and held at the Hillsborough County House of Corrections until a mental health competency evaluation was completed. Apx. I at 978-79. This related to MacPherson's assault on his father where he also threatened to kill his father. Apx. II at 79. Here again, under the ATF standards, MacPherson was adjudicated as a mental defective. Apx. I at 1087.

The record before the Superior Court well documented that MacPherson was adjudicated as a mental defective on several instances: he was found to be a danger to his father and himself because of mental

illness. As such, MacPherson was disqualified from owning a firearm, and all of the referenced information about MacPherson was provided to Gun Line by the Merrimack Police, by the Merrimack District Court or was available from the police or court. Apx. I at 1085-87.

B. Gun Line Did Not Use Due Care.

“The failure to use reasonable care may take the form of action or inaction. That is, negligence may consist of either: doing something that an ordinary, prudent [actor] would not do under the same or similar circumstances; or, failing to do something that an ordinary, prudent [actor] would do under the same or similar circumstances.” State of New Hampshire v. Exxon Mobil Corporation, 168 N.H. 211, 238 (2015). Due care is what reasonable prudence would require under similar circumstances; whether the defendant breached that duty of care is a question for the trier of fact. *Id.* at 235 (*citing*, Carignan v. New Hampshire Intern. Speedway, Inc., 151 N.H. 409, 414 (2004)). “We believe it best to allow the citizenry, through the institution of the American jury, to strike the appropriate balance in these difficult cases.” Cloutier v. Great Atlantic & Pac. Tea Co., Inc., 121 N.H. 915, 924 (1981) (it is wise to obtain judgment of the jury when reasonable persons could differ as to the inferences from facts). The core of the Plaintiffs’ argument is that the Superior Court improperly decided that DOS acted reasonably, with regard to the federal statutory duties imposed on it, which is an issue that should be decided by the jury. Exxon Mobil, *supra* at 235.

The Superior Court found that the purpose of immunity is to avoid going to trial in the first place. Apx. I at 1246-47. The Court cited to

Everitt v. Gen. Elec. Co., 156 N.H. 202, 221 (2007), relying on the statement that “the purpose of immunity is to operate as a bar to a lawsuit, rather than as a mere defense against liability, and is effectively lost if a case is erroneously permitted to go to trial.” *Id.* Since reasonableness of one’s action is a question for the jury, the justification for immunity is not lost if a case is presented to a jury; rather, the jury evaluates the reasonableness of Gun Line’s efforts to assess if MacPherson was adjudicated a mental defective or involuntarily committed. The jury would be instructed on the law, if constitutional, and the jury would determine the reasonableness of Gun Line’s actions and omissions. Cloutier, *supra*, at 924.

There are genuine issues of fact that a jury must hear to determine if DOS breached their duty to complete the investigation required by 18 U.S.C. § 922 (g)(4). Additionally, the disputed facts about the actions taken by Gun Line should be viewed in a favorable light toward the Plaintiffs as the non-moving party for summary judgment. *Id.* R.S.A. 491:8-a.

In this case, due care required not just keeping MacPherson in “DELAY” status; due care required denying the firearm purchase as there was ample evidence that MacPherson had been adjudicated a mental defective and, likely, was involuntarily committed.

When Gun Line initially searched for MacPherson in the NICS Index, the database indicated that **he was disqualified**. *See*, Discussion at *supra* at p. 7. His disqualification, at least, related to domestic violence convictions. Gun Line chose to research the convictions despite the FBI’s previous auditing of the New Hampshire additions to the NICS Index. *See*,

*discussion, supra* at p. 6. Nevertheless, Gun Line had significant and eye-opening information about MacPherson's mental health struggles where he was found to be a danger to himself and others. Gun Line felt, at the time of the purchase, that more information was needed about MacPherson's mental health. Apx. I at 872. Despite this recognition, Tiffany Foss could not recall what efforts, if any, were made in follow up to gain MacPherson's mental health history, and there was nothing to show that anything was done. *See, Discussion, supra* at 10. At the same time, Gun Line researched the domestic violence convictions, but it ignored the serious concerns about MacPherson's mental health. *See, 18 U.S.C. 922 (g)(4).*

Reasonableness required either prompt follow-up on the mental health concerns or that Gun Line should have entered the information from the district court and from the Merrimack Police which would have caused an immediate denial. Apx. I at 1078.

Gun Line's actions were unreasonable and it did not meet the due care standard. *See, Exxon Mobil, supra*, at 238. As such, the Court's grant of summary judgment must be vacated.

II. THE SUPERIOR COURT WRONGFULLY GRANTED SUMMARY JUDGMENT TO CHESTER ARMS, LLC. AS R.S.A. 508:21 VIOLATES THE NEW HAMPSHIRE CONSTITUTION, INCLUDING THE DUE PROCESS CLAUSE, ACCESS TO THE COURTS, AND EQUAL PROTECTION.

A. R.S.A. 508:21 Contravenes The Guarantee Of A Remedy.

Part I, Article 14 of the New Hampshire Constitution guarantees that "[e]very subject of this State is entitled to a certain remedy, by having

recourse to the laws, for all injuries he may receive in his person, property, or character; to obtain right and justice freely, without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.” This Court has recognized that an “abolition of the rights of a class of persons to recover damages for their injuries in full would contravene the plain language of Article 14, Part I of the New Hampshire [C]onstitution, in the absence of provision of a *satisfactory substitute*.” Estabrook v. American Hoist & Derrick, 127 N.H. 162, 171 (1985) (emphasis added)<sup>4</sup>; *see also*, Nutbrown v. Mount Cranmore, Inc., 140 N.H. 675, 679-81 (1996).

Here, R.S.A. 508:21 has the impermissible effect addressed in *Estabrook*: it abolishes all recovery for victims of gun violence whose harm derives, at least in part, from negligent or unlawful misconduct by a gun seller (Chester Arms) without providing any adequate substitute remedy.<sup>5</sup> The trial court never addressed or applied *Estabrook*. Instead, the trial court reasoned that even the *nominal* availability of a claim against MacPherson “satisfies Plaintiffs’ constitutional rights” even if such a suit

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<sup>4</sup> *Estabrook* was overruled on other grounds, but due process requires that substitute remedy remains.

<sup>5</sup> The Supreme Court has similarly suggested that the Due Process Clause of the Fourteenth Amendment contains a requirement for preservation of a meaningful remedy. *See, Truax v. Corrigan*, 257 U.S. 312, 330 (1921) (“[t]o give operation to a statute whereby serious losses inflicted by . . . unlawful means are in effect made remediless, is, we think, to disregard fundamental rights of liberty and property and to deprive the person suffering the loss of due process of law”) (rejecting reading of Arizona law as preventing business owners from seeking remedy against unlawful picketers).



might result in “an unrecoverable award of damages due to Mr. MacPherson’s insolvency.” Apx. I at 1233; *see also*, Apx. I at 1004.

In applying R.S.A. 508:21, the trial court wrongly interpreted Huckins v. McSweeney, 166 N.H. 176 (2014). In Huckins, *supra*, the Court did not hold that a nominal, but empty remedy was constitutionally sufficient under Part I, Article 14 and, furthermore, Huckins, *supra*, is factually and legally inapposite to the claims by the Plaintiffs.

To clarify, in Huckins, the Court found it constitutionally permissible to bar a plaintiff from suing a municipality that had employed a police officer who had shot the plaintiff with a stun gun and limited the plaintiff to seeking recovery against the police officer. Huckins, 166 N.H. at 178. Two critical distinctions apply to Huckins. First, a suit against a state or any of its subdivisions, as in Huckins, would not have been allowed at common law under the traditional doctrine of sovereign immunity at the time that Part I, Article 14 was written. *Id.* at 182. Meanwhile, the general concept of tort law against non-state actors has been part of the fabric of American jurisprudence from the Founding Era. *See*, Cargill’s Estate v. City of Rochester, 119 N.H. 661, 665 (1979) (finding the purpose of Part I, Article 14 was to make civil remedies available and to guard against discriminatory infringements on access to the courts.) Thus, Huckins did not consider the constitutionality of a legal restriction similar to R.S.A. 508:21 which vitiates a *preexisting right of recovery*. Rather, Huckins simply affirmed that Part I, Article 14 did not protect a plaintiff from being subjected to a *preexisting limitation* that barred any right of recovery against certain actors. Huckins, 166 N.H. at 181-82. Second, a limitation requiring an injured plaintiff to seek recovery from a law enforcement

professional could have allowed a *meaningful* (i.e., non-trivial) form of redress. Huckins did not consider, and thus, did not endorse a limitation which would leave the plaintiffs to seek claims against the legally insane and insolvent actors. The New Hampshire Constitution, Part I, Article 14 has not been construed to strip away reasonable claims against private parties while leaving the Plaintiffs without recourse. *See, Nutbrown, supra*, at 679-81. Such a ruling would defy common sense and turn this important Constitutional protection into a nullity.

B. R.S.A. 508:21 Violates the Guarantee of Equal Protection.

As the trial court correctly recognized, because the right to civil redress is an important right, this Court must apply intermediate scrutiny when examining the validity of R.S.A. 508:21 under state equal protection guarantees. Apx. I at 1005, 1231. “[I]ntermediate scrutiny under the State Constitution requires that the challenged legislation be substantially related to an important governmental objective.” Cnty. Res. for Justice, Inc. v. City of Manchester, 154 N.H. 748, 762 (2007). A discriminatory scheme can only be predicated on a justification which is “exceedingly persuasive . . . not hypothesized or invented post hoc.” *Id.*

Under R.S.A. 508:21(d), had MacPherson, instead of going to Chester Arms, approached a seller of knives, chainsaws or fireworks while displaying *identical behavioral indicators of danger*, and then foreseeably used one of these other instrumentalities to harm the Plaintiffs, Plaintiffs would have had no limitation on their right of recovery. The only potential justification advanced in defense of R.S.A. 508:21’s discrimination against victims of gun violence is that special protection for the firearms industry is

designed to preserve a citizen's access to a supply of firearms and ammunition for all *lawful* purposes. Apx. I at 1005. (“R.S.A. 508:21 is substantially related to an important governmental objective: protecting the rights of its law-abiding citizens to keep and bear arms in defense of themselves, their families, their property, and the state.”) (internal quotation omitted). This justification comes nowhere close to the bar of “exceedingly persuasive” and is, instead, hypothetical and speculative for a number of reasons. Cnty. Res. for Justice, Inc., 154 N.H. at 762.<sup>6</sup>

In particular, imposing liability on firearms sellers who negligently entrust firearms to obviously mentally ill individuals displaying an increased propensity to *unlawfully* harm others would in no way curtail the availability of firearms to individuals for law-abiding purposes. Second, the Protection of Lawful Commerce in Arms Act (PLCAA) permits negligent entrustment claims against irresponsible firearms dealers (15 U.S.C. § 7903(5)(A)(ii)) because Congress recognized that allowing liability in such instances is not, in fact, deleterious to the viability of the firearms industry in a manner which would prevent anyone from exercising their Second Amendment rights. Indeed, in the almost two decades since PLCAA's passage, suits have been permitted under PLCAA's negligent entrustment exception, *e.g.*, Delana v. CED Sales, Inc., 486 S.W.3d 316 (Mo. 2016), and the firearms industry has not collapsed in Missouri or in any other state in the Union.

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<sup>6</sup> In fact, the purported justification for the discrimination would not meet the more differential rational basis standard. *See, McBride v. General Motors Corp.*, 737 F. Supp. 1563 (M.D. Ga. 1990).

Closing the courthouse to persons injured by the negligent sale of a firearm renders R.S.A. 508:21 unconstitutional as it wrongly discriminates against victims who are harmed by negligent gun dealers. Cnty. Res. for Justice, *supra*, at 762. An additional classification that bars all claims against gun dealers who act negligently, recklessly, or even intentionally, but allows claims against gun dealers where a felony conviction occurs does not meet the “exceedingly persuasive” standard. Cnty. Res. for Justice, 154 N.H. at 762. Protecting negligent gun dealers, through discriminatory classification does nothing to ensure that law-abiding citizens are able to keep and bear arms. *Id.* This additional classification is unconstitutional.

### III. THE SUPERIOR COURT WRONGLY GRANTED SUMMARY JUDGMENT TO CHESTER ARMS, LLC AS FEDERAL LAW PREEMPTS R.S.A. 508:21.

PLCAA and other federal laws preempts R.S.A. 508:21 and allows a negligent entrustment action to be brought against gun sellers and manufacturers. 15 U.S.C. § 7903 (5)(A)(ii). State law is preempted under the supremacy clause of the United States Constitution, U.S. CONST. Art. VI, cl. 2. With regard to this case, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively; and, state law is pre-empted to the extent that it actually conflicts with federal law. Mason v. Smith, 140 N.H. 696, 699 (1996) (*quoting*, English v. General Electric, 496 U.S. 72, 78 (1990)). PLCAA preempts R.S.A. 508:21 through field preemption and conflict preemption, considered with other federal laws, as the United States

Congress has adopted a scheme of federal regulation with regard to the sale of firearms.

The Superior Court did not recognize that PLCAA and other federal laws preempt R.S.A. 508:21 through field preemption. Apx I. at 1229. Yet, the Superior Court did not give effect to the vast scheme of laws which regulates the sale of firearms.

In this case, every aspect of the sale to MacPherson is determined by federal law. Chester Arms is a Federal Firearms Licensee; MacPherson had to fill out the federal ATF Form 4473; the ATF, a federal agency, investigates matters; NICS is an FBI database and a federal system that checks records on a person who may be disqualified from purchasing a firearm; and 18 U.S.C. 922 (g)(4) lists the federal disqualifiers.

Federal legislation relating to the sale of firearms, and the distribution of firearms, demonstrate that the federal government intended to occupy the field. Federal statutes include: PLCAA, 15 U.S.C. §§7901-7903 (providing broad immunity to gun manufacturers and dealers; yet, allowing negligent entrustment and negligence *per se* claims) and the Brady Act, 18 U.S.C. § 921-934, *et seq.* (federal regulatory laws on firearms including allowing law enforcement to confirm the prospective buyer is not a prohibited purchaser.) These federal enactments comprehensively occupy the entire field of firearm sales. The effect is to render R.S.A. 508:21 unenforceable due to field preemptions. Mason, *supra* at 699.

The trial court did not agree that R.S.A. 508:21 conflicted with the federal law. Apx. 1 at 1229-30. R.S.A. 508:21 squarely conflicts with PLCAA, where it prohibits causes of action for negligent entrustment and negligence *per se*, which are plainly allowed under PLCAA. 15 U.S.C.

§7903(5)(A)-(B). In fact, Chester Arms has conceded that PLCAA expressly preempts state law. Apx. I at 719. (To the extent state law would otherwise allow a prohibited civil action.) It would be illogical that PLCAA would preempt a state law from allowing a suit to come forward, but not preempt a state law that prohibits a cause of action recognized by PLCAA.

Additionally, PLCAA's chief sponsor, Senator Larry Craig, emphasized that PLCAA is "not a gun industry immunity bill because it does not protect firearms [industry actors] from...lawsuits based on their own negligence or criminal conduct." Apx. I at 492. The stated purpose of PLCAA is to prohibit causes of action against [firearms industry actors] for the harm *solely caused* by the criminal or unlawful misuse of [a firearm]." *Id.* Here again, R.S.A. 508:21 will plainly conflict with PLCAA if R.S.A. 508:21 does not recognize a negligent entrustment exception;<sup>7</sup>and if the law is interpreted such that no lawsuit may be brought if a third party played any role in the Plaintiffs' damages. The federal law limits the protection to gun dealers where the harm has to be solely caused by a third-party, but, if R.S.A. 508:21 bars all claims due to any involvement of a third-party, there is a plain conflict between the laws. In light of the conflicts between the state law and PLCAA, the state law cannot be enforced. U.S. Const., Art. VI, Cl. 2.

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<sup>7</sup> See, *infra* at p. 33-34.

IV. THE SUPERIOR COURT WRONGFULLY GRANTED SUMMARY JUDGMENT TO CHESTER ARMS UNDER R.S.A. 508:21 AS IMMUNITY WAS NOT RAISED IN THE DEFENDANT'S ANSWER AND IT WAS WAIVED.

The Defendant failed to plead R.S.A. 508:21 in its Answer and Statement of Defenses. The failure to plead any defense is a waiver of that defense. Werne v. Executive Women's Golf Assoc. & a., 158 N.H. 373, 377 (2009). Additionally, Superior Court Rule 9 requires that a defendant plead an affirmative defense or file a motion to dismiss within 30 days after being served with the complaint or the defendant will waive that defense. The lower court found it does not have subject matter jurisdiction and does not have authority to adjudicate the Plaintiffs' claim. Apx. I at 1002.

In this case, the determination of subject matter jurisdiction requires statutory interpretation. *See, Appeal of Cole*, 171 N.H. 403, 408 (2018). If R.S.A. 508:21 is interpreted as unambiguous, the statute should be found unconstitutional. *See, Discussion, supra*, at pp. 22-27 above. If R.S.A. 508:21 is ambiguous, considering the plain language of the statute, and the legislative history, such that the legislature intended that a negligence action against a gun seller would be an exception to the statute, then the Superior Court would have jurisdiction. *See, Discussion, infra*, at 34. Where the statute allows more than one reasonable interpretation, including one where the negligence of Chester Arms is before the court, the Defendant was required to assert its defense under the statute. The statute's "resulting from" clause allows for more than one reasonable interpretation and for the defense to rely on one method of interpretation, the defense needed to identify the defense. That defense was not pled by Chester Arms

at the proper time, and, thus, waived. The Superior Court has jurisdiction to consider the Plaintiffs' negligence claims against Chester Arms, and the potential defense under R.S.A. 508:21 was waived.

V. R.S.A. 508:21 DOES NOT APPLY TO THE PLAINTIFFS' CLAIMS WHERE THE HARM TO THE PLAINTIFFS WAS THE RESULT OF CONCURRENT CAUSATION.

R.S.A. 508:21 prevents a civil action, brought against a manufacturer or seller of a qualified product, for damages *resulting from* the criminal or unlawful use of a qualified product by the person or third party. "Resulting from" is undefined and ambiguous and should be read consistently with PLCAA, which indicates Congress only intended to "prohibit causes of action...for the harm solely caused by the criminal or unlawful misuse of firearm products...." 15 U.S.C. § 7901(b)(1); (a)(6) (emphasis supplied). Congress did not intend to protect gun dealers whose misconduct was one cause of the resultant harm. A claim for negligent entrustment against Chester Arms is distinct from any potential claim against MacPherson. This is consistent with the New Hampshire Legislature's intent for R.S.A. 508:21, where claims of negligence were to be excluded from any immunity for gun dealers. *See*, Discussion, *supra*, p. 34.

The Superior Court found that the Plaintiffs' damages were a result of being shot by MacPherson and "absent damages, Plaintiffs would not have standing to bring any claim of negligent entrustment." Apx. 1 at 1235. The Court said the Plaintiffs believe the claim begins and ends with Chester Arms' sale of a firearm to MacPherson and does not result from the



criminal or unlawful use of the firearm by MacPherson. *Id.* The Superior Court took the position that the breach and the harm in a negligence action must occur at the same time. *Id.* The Court's position is in contradiction to New Hampshire law.

If there has been negligence, there is no cause of action unless and until there has been an injury. White v. Schnoebelen, 91 N.H. 273, 18 A.2d 185, 186 (1941). “[N]o action can be maintained upon an act of negligence unless the breach of duty has been the cause of damage. It is like a connecting bridge between the negligence and the harm that gives rise to the cause of action. If the bridge be unbroken from negligence to harm, the right of action will accrue when the injury is suffered...Usually the bridge is so short as to be crossed *in a matter of months* or even moments. But if the bridge be long and the passage slow, there seems to be no logical reason for saying that a right of action can accrue prior to the injury.” *Id.* “The duty of the actor is to use care for the avoidance of future injuries, whether they be immediate or deferred. There is an actionable breach of the duty only when the injury happens.” *Id.* Actors can be found negligent if they could reasonably foresee that their conduct would result in an injury to another. *See, Ianelli, supra*, at 193.

Under New Hampshire negligence law, the legal cause of harm does not require a demonstration that the defendant's conduct was the immediate and sole cause; rather, the conduct only needs to be a substantial factor in bringing about the injury, even though other factors may also have contributed to the injury. *See, Maxwell v. Maxwell*, 102 N.H. 101, 105 (1959). A plaintiff only needs to show reasonable probability, not mathematical certainty, that but for the defendant's negligence, the harm

would not have occurred. Bronson v. Hitchcock Clinic, 140 N.H. 798, 802-03 (1996).

Here, MacPherson attempted to purchase the firearm on March 19, 2016. Ms. Cavaretta was scared, nervous, thought he was freaky, would not let him touch the weapon, and thanked the police for showing up. She told other customers how she felt. She told her father about MacPherson and how she felt. John Cavaretta admitted it is foreseeable that if a prohibited person had a firearm, that could be a danger to others. *See*, Discussion, *supra*, at p. 11. Chester Arms had concerns about MacPherson and could foresee the possible harm that could take place. MacPherson picked up the firearm on April 1, 2016. He shot the Plaintiffs on May 16, 2016.

The bridge was not been broken between Chester Arms' negligence and the Plaintiffs' harm. White, 18 A.2d at 186. It took almost two months to completely cross the bridge from Chester Arms' negligence to the harm suffered by the Plaintiffs. The present action is based on Chester Arms' substantial contribution to the Plaintiffs' damages by supplying MacPherson with the firearm, separate from any action that could be brought against MacPherson.

This Court has consistently held that "we will not interpret a statute to abrogate the common law unless the statute clearly expresses that intent." Estate of Gordon-Couture v. Brown, 152 N.H. 265, 271 (2005). There is a presumption that the Legislature did not have the purpose to abolish a common law right unless clearly expressed in the statute. *Id.* at 266. A statute which affords immunity must be strictly interpreted so that only the claim identified within the statute is abrogated. *Id.*, at 271.

R.S.A. 508:21 cannot be construed to bar the Plaintiffs' claims; rather, a strict application of the "resulting from" language in the statute means that the protection is limited to a situation where the damages were solely caused by wrongful or criminal use of a firearm by a third-party. In the case at bar, the Plaintiffs' claims strongly support claims of negligence against the gun dealer and DOS; MacPherson would not have acquired the firearm used to shoot the Plaintiffs, but for the negligence of the Defendants.

The Legislature, through its committee to HB811<sup>8</sup>, documented that the Legislature intended to allow negligence actions against the gun dealers and the Legislature believed that negligence claims were an exception to the statute. The legislative history can be looked at if a statutory term is ambiguous. Sundberg v. Greenville, 144 N.H. 341, 344 (1999). Looking at the complete legislative history of R.S.A. 508:21 (or HB811), it is clear the Legislature intended for negligence to be a cause of action not contemplated by the statute. Apx. I at 1255, 1260, 1264. The members of the committee noted that the statute does not protect against dealers who are negligent, and dealers did not want to be protected if they were negligent. *Id.*

Chester Arms negligently supplied a firearm to MacPherson in light of the dealer's duties to assess if MacPherson was a qualified purchaser and because of the concerns appreciated by Ms. Cavaretta, the police and customers. R.S.A. 508:21 affords no protection to Chester Arms where it substantially contributed to the Plaintiffs' injuries.

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<sup>8</sup> HB811 was enacted to be R.S.A. 508:21.

**CONCLUSION**

For all of the foregoing reasons, Chester Arms should not be granted immunity as they do not fall under the protection under R.S.A. 508:21. Likewise, DOS should not be granted immunity as they did not act reasonably as is necessary under R.S.A. 541-B:19.

Respectfully submitted,

Ryan Hardy & Matthew O'Connor  
By and Through Their Attorneys,

Dated: October 7, 2022

By: /s/Mark D. Morrissette

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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing was delivered on the above date to all counsel of record via the Court's electronic filing system.

/s/Mark D. Morrissette

Mark D. Morrissette, Esq.

REQUEST FOR ORAL ARGUMENT OF 15 MINUTES  
BEFORE THE FULL COURT

The Superior Court granted summary judgment to the Defendants by applying two distinct statutes to bar the Plaintiffs from presenting their claims to a jury. First, the Superior Court applied R.S.A. 541-B:19 to find that the Gun Line Division of the New Hampshire State Police acted “reasonably” which, in turn, immunized the State for any contribution to the injuries suffered by the Plaintiffs. There are important findings, factual in nature, which must be evaluated in order to review the decision by the Superior Court.

Gun Line had statutory duties to assess whether Ian MacPherson was disqualified to own a firearm. Gun Line was told by a police officer, who was very familiar with Mr. MacPherson’s background, that Mr. MacPherson had a mental health condition which included delusions. Gun Line knew that a district court ordered a mental health competency evaluation; ordered Mr. MacPherson to continue with mental health treatment; that Mr. MacPherson was charged and found guilty of assaulting family members; and, the NICS Index listed Mr. MacPherson as a person who was disqualified from owning a firearm. At the same time, the Gun Line employees only “delayed” the sale without demonstrating that it investigated Mr. MacPherson’s mental health history through inquiries to law enforcement or the courts. Yet, Gun Line suggested to investigators and answered discovery by suggesting that the gun dealer was urged to not sell the firearm to Mr. MacPherson. The gun dealer strongly contested that it was urged not to sell the firearm. The determination as to whether Gun

Line acted reasonably must be presented to the Supreme Court through oral argument.

Likewise, the Superior Court applied R.S.A. 508:21 to grant immunity to the federal firearms licensee, Chester Arms, LLC. The referenced statute prevents any party from filing an action in state court, against a gun dealer or manufacturer, if the Plaintiffs' damages are "resulting from" the criminal or unlawful use of a firearm by a person or third party. The injuries to Ryan Hardy and Matthew O'Connor resulted from the negligent actions of Chester Arms, LLC, Gun Line and Ian MacPherson.

The circumstances as to whether Chester Arms substantially contributed to Plaintiffs' damages speak strongly to a joint or concurrent tortious sequence which caused the Plaintiffs' indivisible injuries. Chester Arms knew that other customers were so concerned about Mr. MacPherson's presentation at the gun dealer's store that they left the store – because they did not have a gun on their person – and they summoned the police to the gun dealer's store. Other customers had a similar reaction to Mr. MacPherson. The gun dealer's employee (and daughter of the owner) acknowledged that Mr. MacPherson scared her; that she found him to be really sketchy; that she was not comfortable giving access to the firearm; and, that the sale was not approved by Gun Line (and "delayed"). Yet, the firearm was supplied to Mr. MacPherson because the mandated three-day delay expired even though the gun dealer did not check back with Gun Line before supplying the firearm. In the end, the actions and omissions of the gun dealer strongly contributed to the Plaintiffs' damages. R.S.A. 508:21 was not intended to protect gun dealers where they act with negligence.

Oral argument will allow a full presentation of the important contested facts and the law.

Oral argument is important to emphasize the contested issues of fact, and present the adverse impact to the Plaintiffs and similarly situated civil litigants.

/s/ Mark D. Morrissette

RULE 16 (3) (I) CERTIFICATION

I certify that the decisions from which this appeal has been taken are in writing and are attached in Appendices I through II to this Brief.

/s/ Mark D. Morrissette

CERTIFICATION OF WORD LIMIT

I hereby certify that the total words in this Brief do not exceed the maximum of 9,500 words.

/s/ Mark D. Morrissette