

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2022-0348

Ryan Hardy & Matthew O'Connor

v.

Chester Arms, LLC, & A.

**MEMORANDUM OF LAW FOR THE STATE OF
NEW HAMPSHIRE AS *AMICUS CURIAE***

The State of New Hampshire (the “State”), by and through the Office of the Attorney General, hereby files this Memorandum of Law in accordance with Supreme Court Rule 30. On June 23, 2022, Appellants Ryan Hardy and Matthew O'Connor (“Plaintiffs”) filed the instant appeal, giving notice to the Office of the Attorney General that they intended to make an argument that RSA 508:21 is unconstitutional. For the foregoing reasons, the State takes the position that RSA 508:21 is constitutional.

PROCEDURAL HISTORY

The relevant procedural history is summarized in the Commissioner of the Department of Safety’s Brief, which the State will not repeat here.

ARGUMENT

Plaintiffs argue that RSA 508:21 violates the New Hampshire Constitution where it places limitations on actions against firearms manufacturers or sellers, in violation of the New Hampshire and United States Constitutions. “In reviewing a legislative act, [the Court] presume[s] it to be constitutional and will not declare it invalid except upon inescapable grounds.” *Huckins v. McSweeney*, 166 N.H. 176, 179 (2014). Here, RSA 508:21 is constitutional where Plaintiffs may bring suit against

the direct tortfeasor or other actor. Moreover, the statute treats all similarly situated plaintiffs uniformly. Thus, for the reasons stated below, this Court should uphold the constitutionality of RSA 508:21.

A. RSA 508:21 does not violate Part I, Article 14 of the New Hampshire Constitution where it permits claims against a direct tortfeasor or other party.

Part I, Article 14 states:

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.

N.H. CONST. pt. I, art. 14. “The purpose of this provision is to make civil remedies available and to guard against arbitrary and discriminatory infringements upon access to courts.” *Ocasio v. Fed. Exp. Corp.*, 162 N.H. 436, 448 (2011). Where other persons or entities responsible for an injury exist and can be sued, the right to a remedy under Part I, Article 14 is not infringed. *Huckins*, 166 N.H. at 180-81. “The right to a remedy is not a fundamental right, but is relative and does not prohibit all impairments of the right of access.” *Petition of Goffstown Educ. Support Staff*, 150 N.H. 795, 803 (2004). Notably, Part I, Article 14 does not “guarantee that all injured persons will receive full compensation for their injuries.” *Occasion v. Federal Express Corp.*, 162 N.H. 436, 448 (2011).

For example, in *Huckins*, the plaintiff claimed that RSA 507-B:2 and RSA 507-B:5, two statutes limiting the liability of municipalities from suit, violated his right to a remedy. Although the plaintiff could maintain an action against the direct tortfeasor, he characterized that remedy as “constitutionally inadequate” and argued that it provided “a hollow recovery.” 166 N.H. at 180. The New Hampshire Supreme Court rejected

the argument, holding that the plaintiff had not been deprived of his right to a remedy under the New Hampshire Constitution because the plaintiff “has legal recourse to recover damages for his injuries from the party allegedly responsible for them.” *Id.* at 181.

Here, it is not disputed that Ian MacPherson is the party directly responsible for Plaintiffs’ injuries. MacPherson was the individual who purchased the weapon and used it to injure the two officers. RSA 508:21 in no way derogates a claimant’s remedies against a direct tortfeasor. Plaintiffs have not been deprived of a right to a remedy because they had the opportunity to bring a suit against MacPherson, but chose not to. Thus, the statute passes constitutional muster where a remedy is available against another defendant responsible for Plaintiffs’ injuries. *See Ocasio*, 162 N.H. at 449.

Plaintiffs first attempt to distinguish *Huckins* by stating that there, where the plaintiff maintained an action against a municipality, the Court did not strip away a right to suit where traditional notions of sovereign immunity were in play where here, RSA 508:21 bars action against a private tortfeasor. PB 41.¹ Plaintiffs’ distinction is one without merit. In *Huckins*, the Court analyzed the availability of a remedy and the impact of immunity on the access to that remedy, regardless of a defendant’s status as sovereign or private citizen. Thus, *Huckins* is applicable to the instant matter.

Further, Plaintiffs assert that Part I, Article 14 guarantees a *meaningful* right to recovery, which was not analyzed in *Huckins*. *Id.* at 41-42. Plaintiffs’ argument is in error. This Court in *Huckins* specifically rejected the assertion that a right to recovery against the direct tortfeasor

¹ Citations to the record are as follows:

“PB ___” refers to Plaintiffs’ brief and page number; and

“Appx. I ___” refers to Plaintiff’s Appendix I filed with their brief and page number.

would be a hollow one. 166 N.H. at 180-81. Further, RSA 508:21 itself only bars actions against firearms manufacturers and sellers unless they have been convicted of criminal misconduct in the sale. RSA 508:21. As illustrated above, Plaintiffs could have brought a claim against the direct tortfeasor, MacPherson, or, as they have in this case, another third party such as the State of New Hampshire Department of Safety. That certain immunities or defenses may “limit an injured plaintiff’s ability to acquire financial recompense from certain entities” does not impact the constitutionality of the statute itself. *See DeBenedetto v. CLD Consulting Engineers, Inc.*, 153 N.H. 793, 805-06 (2006).

B. RSA 508:21 is also constitutional because it treats all similarly situated Plaintiffs equally and it is substantially related to an important governmental objective.

Part I, Article 14 “is basically an equal protection clause in that it implies that all litigants similarly situated may appeal to the courts both for relief and for defense under like conditions and with like protection and without discrimination.” *Opinion of the Justices*, 137 N.H. 260, 265 (1993) (quotations and citation omitted). When a plaintiff asserts both a Part I, Article 14 and equal protection argument implicating the right to a remedy, the court resolves them in a single analysis. *Lennartz v. Oak Point Associates, P.A.*, 167 N.H. 459, 462 (2015). “The first question in an equal protection analysis is whether the State action in question treats similarly situated persons differently.” *Id.* at 265-66.

Here, the statute does not seek to classify plaintiffs nor abolish a right of action for a certain class of plaintiff. Rather, RSA 508:21 solely operates to bar actions against certain defendants—namely firearm manufacturers and sellers. The statute is uniformly applicable to all plaintiffs harmed by gun violence. Plaintiffs assert that the statute treats similarly situated plaintiffs disparately because if Plaintiffs had been

harmed by a similarly dangerous weapon such as a knife or chainsaw, they could bring an action against the seller of a knife or chainsaw, but not against firearm manufacturer or seller. PB 42. Plaintiffs' equivalence of knives to guns is unavailing. Plaintiffs that are harmed by guns—sold by highly regulated and licensed dealers—are not similarly situated to victims of knife or chainsaw violence, which may be sold at the local, unregulated hardware store. When enacting RSA 508:21, the State legislature found evidence that firearm dealers were facing increased litigation from gun violence victims due to the unlawful actions of certain customers. *See infra*. There's no evidence that purveyors of knives were facing the same litigation costs. Thus, the statute properly acknowledges that gun violence victims and knife violence victims are not similarly situated. All gun violence victims are treated uniformly under the statute.

Nonetheless, even if Plaintiffs could show that RSA 508:21 treated similarly situated plaintiffs disparately, the statute remains constitutional. Laws infringing on the “right to recover for one’s injuries implicate an important substantive right” and are subject to “intermediate scrutiny.” *Lennartz*, 167 N.H. at 462-63. Under intermediate scrutiny, the State must show that the challenged legislation is “substantially related to an important governmental objective.” *Id.* at 463.

Here, RSA 508:21 is substantially related to an important governmental objective, namely, protecting the Second Amendment rights of its law-abiding citizens to obtain firearms for protection in their home. *See District of Columbia v. Heller*, 544 U.S. 570, 630 (2008) (stating that self-defense is a “core lawful purpose” of the Second Amendment). RSA 508:21 is substantially related to this purpose because it seeks to protect firearm sellers and manufacturers from insolvency due to costly litigation regarding the criminal activity of others who misuse their products. *See* Appx. 243 (“HB811 will protect our national and state’s gun and

ammunition manufacturing industries and dealers from frivolous lawsuits brought because of the actions of others that misuse their products.”). In fact, the legislature recognized the increased litigation in other states that put many firearm dealers out of business. *See* Appx. I 241 (“There have been suits in other states that have put dealers out of business with the legal fees even though they may prevail.”). Thus, where RSA 508:21 is substantially related to an important governmental interest, it is constitutional.

Plaintiffs assert that the above is not a sufficient justification to meet intermediate scrutiny because it is hypothetical and speculative. PB 42-43. However, the General Court made specific findings that suits in other states put firearms dealers out of business due to legal fees, despite the dealer ultimately prevailing. Appx. I 241. Further, the legislature found that suits in other states have affected manufacturers in New Hampshire, with one president of a New Hampshire firearm manufacturer testifying that he paid almost \$500,000 in defending two suits that were ultimately dismissed against the company. *Id.* In fact, the legislature listed a number of specific reasons for implementing RSA 508:21, including manufacturers facing many suits filed by municipalities, public interest groups, and private individuals; small manufacturers can be forced out of business through litigation costs; one manufacturer paid \$350,000 in litigation costs; and one manufacturer saw the cost of its insurance raise by \$200,000. *Id.* at 243. Where the legislature sought to protect the important governmental interest of the right to bear arms, there is ample evidence in the record that RSA 508:21 is substantially related to that interest and not based on purely hypothetical and speculative reasons. Thus, RSA 508:21 passes constitutional muster.

CONCLUSION

For the reasons stated above, RSA 508:21 is constitutional and should be upheld.

Respectfully submitted,

STATE OF NEW HAMPSHIRE,
AS *AMICUS CURIAE*

By its attorney,

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Date: December 5, 2022

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing shall be served through the New Hampshire Supreme Court's electronic filing system on counsel of record.

/s/ Anthony J. Galdieri
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