



IN THE SUPREME COURT OF THE STATE OF DELAWARE

LISA SUMMERS, Personal Representative of)
the Estate of KESHALL ANDERSON, KISHA)
BAILEY, Individually and as the Legal)
Guardian of JORDAN DOMINIQUE)
ROBINSON, JR., a minor, and MICHAEL)
BAILEY, Individually,)
) No. 170, 2019
Plaintiffs Below,)
Appellants,)
) On appeal from the Superior
v.) Court of the State of Delaware
) C.A. No. N18C-07-234 VLM
CABELA’S WHOLESALE, INC., a Nebraska)
Corporation registered in Delaware, now doing)
business as CABELA’S WHOLESALE, LLC, a)
Nebraska Limited Liability Company registered)
in Delaware,)
)
Defendants Below,)
Appellees.)

APPELLEE’S ANSWERING BRIEF

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NATURE OF PROCEEDINGS

Appellee, Cabela's Wholesale, LLC ("Cabela's"), is a federally-licensed firearms dealer engaged in the business of selling many products, including firearms, from a retail store at the Christiana Mall. On July 28, 2016, Cabela's sold a firearm to Brilena Hardwick after completing a criminal history background check on her through the FBI-administered National Instant Criminal Background Check System ("NICS") -- and only after also receiving permission from the FBI to "proceed" with the sale. The firearm sold to Hardwick was later used by a non-party to this case in a drive-by shooting that killed Keshall Anderson.

Appellants (hereafter "Summers") brought suit against Cabela's seeking damages under a variety of common law tort theories. Cabela's moved to dismiss the First Amended Complaint under Rule 12(b)(6) for failure to state a cause of action. Superior Court Judge Vivian L. Medinilla granted Cabela's motion, reasoning in a 32-page memorandum opinion that Section 1448A(d) of Title 11 of the Delaware Code provides Cabela's a "complete defense" to the claims of Summers. Judge Medinilla also held that Section 1448A(d) does not violate the Open Courts Provision of the Delaware Constitution, or the Due Process and Equal Protection Clauses of the United States Constitution. This appeal followed.

SUMMARY OF ARGUMENT

1. Denied. Before transferring the firearm to Hardwick, Cabela's initiated a background check on her through NICS in accordance with applicable United States Department of Justice regulations -- and also before the transfer Cabela's received from the FBI approval for Cabela's to "proceed" with the transfer of the firearm to Hardwick. Under Section 1448A(d), Cabela's compliance with the NICS-FBI background check procedures resulted in a "compliant transfer," and provided Cabela's with a "complete defense" to Summers' claim for damages arising from the subsequent actions of Hardwick. Summers' argument that the sale was not in compliance with the requirements of Section 1448A because Cabela's was allegedly negligent in not recognizing Hardwick as a straw purchaser would place an extra condition on the statute's "complete defense" that does not exist in the statute's language. Also, Summers' argument that Cabela's furnished incorrect information to NICS regarding Hardwick is contradicted by Summers' own allegations, and her argument that Cabela's purposefully misused the NICS system to obtain a "proceed" response and help Hardwick obtain the firearm illegally is based on conclusory allegations, unsupported by specific facts or reasonable inferences, and should not be accepted.

2. Denied. Section 1448A(d) expressly provides a "complete defense" to federally-licensed firearms dealers -- such as Cabela's -- who sell, transfer or deliver

firearms from their inventories in compliance with Section 1448A and applicable NICS regulations regardless of whether the transfer is alleged to have been otherwise negligently completed.

3. Denied. The “complete defense” provided by Section 1448A(d) to federally-licensed firearms dealers who sell, transfer or deliver firearms from their inventories in compliance with Section 1448A and applicable NICS regulations applies on its face “to any claim or cause of action” for damages arising from the transferee’s actions, including Summers’ public nuisance claim. Notwithstanding the broad application of the “complete defense,” Summers did not preserve, and has not properly developed the argument that Delaware courts should “make new law” and recognize a public nuisance cause of action for sales of products.

4. Denied. Section 1448A(d) does not violate the Open Courts Provision of the Delaware Constitution because the provision does not create vested rights in common law causes of action or guarantee remedies against preferred persons, but only assures that a method exists by which injured persons may be compensated. Section 1448A(d) also does not violate the Due Process Clause of the United States Constitution because no one has a vested right in a common law cause of action. Legislatures may constitutionally abolish common law causes of action to achieve permissible legislative objectives without creating a substitute remedy. Section 1448A(d) also does not violate the Equal Protection Clause of the United States

Constitution because it was rational for the legislature to conclude that firearms dealers would be encouraged to complete background checks and make “compliant transfers” of firearms from their inventories if given immunity for damage claims arising from those transfers.

STATEMENT OF FACTS

A firearms dealer's background check responsibilities in Delaware are set forth in Section 1448A and the Code of Federal Regulations at 28 C.F.R. §§ 25.1 – 25.11. When a firearms dealer contacts the National Instant Criminal Background Check System (“NICS”) to initiate a background check on a person applying to purchase a firearm, the dealer must provide to NICS specific information supplied by the purchaser. 28 C.F.R. § 25.7. The information is referred to in the regulations as “search descriptors.” *Id.* They include the purchaser's name, sex, race, date of birth and state of residence. *Id.*

The search descriptors are supplied by the purchaser on the Firearms Transaction Record, otherwise known as the ATF Form 4473, which is completed by the purchaser and the dealer during the transaction. 27 C.F.R. § 478.124; NICS, Federal Firearms Licensee Manual. A-239.

Hardwick completed the Form 4473 and supplied the search descriptors—her name, sex, race, date of birth and state of residence. A-126 (Questions 1, 2, 6, 7 and 10b). Cabela's then transmitted that information to NICS to learn whether there was anything in Hardwick's background that disqualified her from acquiring the firearm. A-124-125 (Question 21a).

NICS received the information and provided Cabela's with a NICS transaction number, and a response that the sale to Hardwick could "proceed." A-127 (Questions 21b – 21c).

Upon completion of these steps, Cabela's complied with Section 1448A and the applicable NICS regulations: thus, subsequent sale of the firearm by Cabela's to Hardwick met the definition of a "compliant transfer" under Section 1448A(d).¹

The FBI instructs firearms dealers that there are limited circumstances in which a dealer should not initiate a NICS background check. A-241. One circumstance is when a potential buyer admits she is not the "actual" buyer of the firearm. *Id.* In this case, Hardwick stated on the Form 4473 that she was the "actual transferee/buyer" of the firearm; she was not acquiring the firearm for another person; and she understood that falsely representing herself to be the actual buyer was "a crime punishable as a felony." A-12 (Questions 11a & 16).

Only after a subsequent law enforcement investigation by several agencies, over many weeks, was it later determined that Hardwick lied on the Form 4473 and deceived Cabela's into believing she was the actual buyer. App. Op. Br., Ex. B (trial court opinion) at 4. After investigation by law enforcement agencies, it was learned

¹ Summers incorporated the completed Form 4473 by reference in her First Amended Complaint, and the trial court properly considered its factual content in deciding the Motion to Dismiss. *See DecisivEdge, LLC v. VNU Group, LLC*, 2018 WL 1448755 (Del. Super. Mar. 19, 2018).

that she acquired the firearm for a convicted felon, who thereafter “supplied the firearm to the criminal market,” where it was acquired and used to kill Keshall Anderson. A-091-94.

ARGUMENT

I. A FIREARMS DEALER HAS A “COMPLETE DEFENSE” TO COMMON LAW CLAIMS ARISING FROM THE CRIMINAL MISUSE OF A FIREARM SOLD FROM ITS INVENTORY IN COMPLIANCE WITH SECTION 1448A

A. QUESTION PRESENTED

Did Cabela’s conduct a NICS background check in compliance with Section 1448A, and therefore, have a complete defense to Summers’ common law claims for damages arising from the actions of the firearm’s buyer? (Preserved: A-174-79).

B. SCOPE OF REVIEW

This Court reviews the trial court’s order dismissing the case under Rule 12(b)(6) *de novo* to “determine whether the trial judge erred as a matter of law in formulating or applying legal precepts.” *Gantler v. Stephens*, 965 A.2d 695, 703-04 (Del. 2009) (quoting *Feldman v. Cutaia*, 951 A.2d 727, 730-31 (Del. 2008)). *See also KT4 Partners LLC v. Palantir Technologies, Inc.*, 203 A.3d 738, 748-49 (Del. 2019) (holding that fact-intensive and judgment-based determinations are reviewed for abuse of discretion); *Cf.* App. Op. Br., Ex. B (trial court opinion) at 2-5 (factual findings).

C. MERITS OF ARGUMENT

The stated purpose of Section 1448A(d) is to provide “legal protections ... to gun sellers and dealers who perform background checks in accordance with Delaware law,” specifically Section 1448A. *See* A-133 (Synopsis, House

Amendment No. 7 to House Bill No. 35). The legislature’s goal was to “encourage compliance” with background check obligations by ensuring that persons who fulfill those obligations “cannot be held liable for damages” for the actions that occur after a firearm transfer. *Id.* The legislature clearly manifested its intent to supersede common law causes of action arising from firearm sales by dealers that were completed in compliance with the requirements of Section 1448A.

Section 1448A(a) provides that a licensed dealer shall not “sell, transfer or deliver from inventory any firearm ... to any other person ... without conducting a criminal history background check in accordance with regulations promulgated by the United States Department of Justice pursuant to the National Instant Criminal Background Check System (“NICS”), 28 C.F.R. 25.1 – 25.11 ... to determine whether the transfer of a firearm to any person who is not licensed ... would be in violation of federal or state law.” 11 *Del. C.* § 1448A(a).

Section 1448A(b) next provides that a licensed dealer shall not “sell, transfer or deliver from inventory any firearm ... to any other person ... until being informed that it may “proceed” with the sale ... by the Federal Bureau of Investigation ... pursuant to the request for a criminal history record check required by” Section 1448A. 11 *Del. C.* § 1448A(b).

Section 1448A(d) provides that “[c]ompliance with the provisions of [Section 1448A] ... shall be a complete defense to any claim or cause of action under the

laws of this State for liability for damages allegedly arising from the actions of the transferee subsequent to the date of said compliance wherein the claim for damages is factually connected to said compliant transfer.” 11 *Del. C.* § 1448A(d). The legislature did not place any other conditions on the availability of a “complete defense” to such claims -- including the claims made by Summers in this case.

1. The Plain Language of Section 1448A Controls its Interpretation

The most basic rule of statutory construction is that the plain meaning of statutory language controls its interpretation. *CMC V, LLC v. Bax*, 28 A.3d 1037, 1041 (Del. 2011). Sections 1448A(a) and 1448A(b) plainly describe a firearm dealer’s responsibilities with regard to criminal background checks in Delaware. Section 1448A(d) just as plainly states that a dealer who meets those responsibilities when selling firearms from its inventory has made a “compliant transfer” and has a “complete defense” to claims arising from subsequent actions of the firearm buyer. 11 *Del. C.* § 1448A(d).

Summers’ allegations themselves support the finding that the transfer of the firearm to Hardwick was a “compliant transfer” as defined in Section 1448A. The sale was made by Cabela’s from its inventory only after it complied with Section 1448A(a) by submitting to NICS the specific information on Hardwick required under the applicable federal regulation—her name, sex, race, date of birth and state of residence. 28 C.F.R. § 25.7; *see also* A-059 at ¶ 54. Summers’ allegations also

demonstrate that Cabela's complied with Section 1448A(b) by completing the transaction only after NICS responded with approval to "proceed" with the sale. A-126-28.

Summers does not dispute that Cabela's initiated a NICS background check and that NICS gave approval to "proceed" with the sale at issue to Harwick. Instead, Summers misconstrues Section 1448A(d) and seeks to engraft an additional condition on the "complete defense" that the transfer be otherwise "fully compliant with law." App. Op. Br. at 8. That condition does not exist in the statute's text. The many allegations Summers has made regarding so-called "red flags" suggesting Harwick was a straw purchaser are irrelevant to a determination that a "compliant transfer" of a firearm from Cabela's inventory was completed in compliance with all the plainly stated requirements of Section 1448A.

Summers' incredulity or dismay that the legislature provided a "complete defense" to firearms dealers who comply with background check obligations but are alleged to have negligently sold firearms to persons who turned out to be straw purchasers -- does not constitute a cogent legal argument. This Court's role is not to second-guess validly enacted legislative policy. *J.S. Alberici Constr. Co. v. Mid-West Conveyor Co.*, 750 A.2d 518, 521 (Del. 2000) ("[C]ourts faced with a clear legislative statement of public policy should not attempt to parse that policy or speculate concerning the degree of egregious conduct sought to be prevented.").

When the wisdom of a law is questioned, “only the elected representatives of the people may amend or repeal it.” *Public Service Com’n of State of Delaware v. Wilmington Suburban Water Corp.*, 467 A.2d 446, 451 (Del. 1983). Application of the plain meaning rule of statutory interpretation to Section 1448A is dispositive of Summers’ claims on appeal.

2. Cabela’s Did Not Provide Incorrect Information to NICS

Summers argues that Cabela’s sale of the firearm to Hardwick was not a “compliant transfer” because Cabela’s allegedly provided incorrect information to NICS in violation of 28 C.F.R. § 25.11(b)(1). Section 25.11 provides criminal penalties for dealers who “purposefully furnish[] incorrect information to the system to obtain a ‘Proceed’ response, thereby allowing a firearm transfer.” Summers argues that providing Hardwick’s name to NICS was incorrect information because Cabella’s should have known Hardwick was acting a straw purchaser and was not the actual buyer of the firearm. App. Op. Br. at 11.

Summers’ argument should be rejected. Cabela’s did not provide incorrect information to NICS, as “information” is referred to under NICS regulations. Cabela’s provided the information it was required to provide under the applicable regulations and FBI instructions—the name of the person attempting to purchase the firearm and other personal data as they were supplied by the purchaser on the Form 4473. A-231 (“[T]he FFL must ask the customer to complete the ... Form 4473 and

use the information provided on the form to initiate a background check.”); A-243 (NICS “requests the data as it appears on the ATF Form 4473 completed by the transferee”).

Even assuming as true the allegation that Cabela’s should have suspected that Hardwick was a straw purchaser, Cabela’s did not violate Section 25.11 by submitting her name and personal data to NICS. Her name appeared on the Form 4473 and her name was correctly provided to NICS for an investigation of her background.

3. Summers Has Not Pleaded that Cabela’s Purposefully Provided Incorrect Information to NICS to Allow an Illegal Sale to Proceed

Summers argues that she adequately pled that Cabela’s acted “purposefully” in violation of Section 25.11 to allow an illegal transfer when it submitted Hardwick’s name to NICS because they alleged Cabela’s “knew or should have known” Hardwick was not the actual buyer of the firearm. App. Op. Br. at 3. Summers’ argument should be rejected.

Even if the name of a person who a dealer allegedly knows or has a reason to know is a straw purchaser is considered “incorrect information” for purposes of a NICS background check, Summers has not pleaded that Cabela’s provided Hardwick’s name to NICS with the requisite criminal intent of obtaining a “proceed” response and allowing an illegal firearm transfer.

Rather, Summers makes the insufficient allegation that Cabela's submitted "Hardwick's name to law enforcement to have them run a NICS background check." A-059 at ¶ 54. Summers does not, and could not in good faith, allege that Cabela's acted criminally by submitting Hardwick's name to NICS with a *purposeful* intent to fool the system into generating a "proceed" response and allowing an illegal firearm purchase. A-047-73.

Summers places substantial emphasis on the general rule that well-pleaded allegations are to be accepted as true and reasonable inferences from those allegations are to be drawn in her favor. App. Op. Br. at 7. But the general rule is subject to qualifications that should guide the analysis of Summers' allegations.

A court need not accept as true all allegations, nor must it draw all inferences from them in a plaintiff's favor unless they are reasonable inferences. *Grobow v. Perot*, 539 A.2d 180, 187 (Del. 1988). Conclusory allegations are not accepted as true, *Alston v. Administrative Office of the Courts*, 181 A.3d 614, 614 (Del. 2018), and "strained interpretations" of allegations are to be rejected. *In re Seneca Investments LLC v. Michael P. Tierney*, 970 A.2d 259, 262 (Del. Ch. 2008). Well-pleaded allegations must include specific allegations of fact and conclusions supported by specific allegations of fact. *Spence v. Spence*, 2012 WL 1495324 at *2 (Del. Super. Apr. 20, 2012) (citing *White v. Panic*, 783 A.2d 543, 549 (Del. 2001)).

Instead, Summers alleges Cabela's "knew or should have known that a straw

purchase was underway.” A-057 at ¶ 45. From this bare allegation, Summers asks the Court to take a strained and unreasonable leap to an inference that Cabela’s submitted Hardwick’s name to NICS to *purposefully* allow a *criminal* firearm purchase to occur. There is no basis in Summers’ factual allegations to draw such an inference. Indeed, at most, Summers’ allegations describe circumstances in which Cabela’s, in the exercise of reasonable care, allegedly should have known Hardwick was a straw purchaser. However, the allegations fall considerably short of adequately pleading purposeful criminal conduct by Cabela’s.²

Summers expends considerable effort chastising the trial court for “weighing” Summers’ allegations and finding them insufficient to show that Cabela’s “knew Hardwick was a straw purchaser.” App. Op. Br. at 14. Summers misreads the trial court’s analysis. The trial court did not weigh Summers’ allegations.

Rather, the trial court reviewed each allegation that Cabela’s “knew or should have known” Hardwick was a straw purchaser, and carefully considered how the allegation led to an inference that Cabela’s “purposefully provided incorrect

² No court has applied Section 25.11 and addressed dealer conduct in requesting a NICS background check that is alleged to be “purposeful,” based on our research. However, the dictionary definition of “purposeful” is “having a purpose or aim.” Webster’s Ninth Collegiate Dictionary at 957 (1987). Synonyms for “purposeful” include “calculated” and “deliberate.” www.thesaurus.com/browse/purposeful (last visited Aug. 16, 2019). Plaintiffs have not alleged facts suggesting that Cabela’s submitted Hardwicks name to NICS for the calculated purpose of selling the firearm illegally.

information” to NICS in violation of Section 25.11. App. Op. Br., Ex. B (trial court opinion) at 21 (“[I]t is not clear how this fact ... establishes purposeful conduct”); *id.* (“Plaintiffs fail to assert how these facts ... support purposeful conduct”); *id.* at 22 (“It is therefore unclear how it could be established that Cabela’s was purposely submitting incorrect information that was unknown at the time”).

That courts in other jurisdictions have denied motions to dismiss based on different statutes brought by firearms dealers who were alleged to be “willfully blind” to straw purchase indicators is immaterial in this case because a “complete defense” was not available under Section 1448A in those other jurisdictions. App. Op. Br. at 17. Here, the trial court properly focused on Sections 1448A and 25.11, and whether Summers has alleged facts showing that Cabela’s acted with a purposeful intent to allow an illegal purchase to occur. The trial court correctly held that those allegations had not been made, and therefore, Cabela’s was entitled to a “complete defense” under Section 1448A(d). App. Op. Br., Ex. B (trial court opinion) at 23.

Ironically, Summers seeks to deny Cabela’s its statutory right to a “complete defense” under Section 1448A(d) by arguing that Cabela’s should not have asked the FBI to investigate Hardwick’s background at all. App. Op. Br. at 11. Summers’ argument turns Section 1448A on its head because the purpose of the statute was to

encourage firearms dealers to do exactly what Cabela's did -- request NICS background checks on would-be firearms purchasers.

The legislature made a policy decision to provide a "complete defense" to firearms sellers who responsibly conduct NICS background checks—the factual circumstances pleaded by Summers in this case. The trial court correctly dismissed Summers' claims based on that policy.

II. THE TRIAL COURT PROPERLY INTERPRETED SECTION 1448A TO PROVIDE A “COMPLETE DEFENSE” WHEN NICS BACKGROUND CHECKS ARE PROPERLY COMPLETED

A. QUESTION PRESENTED

Do the rules of statutory interpretation require a finding that Section 1448A(d) provides a firearms dealer a “complete defense” to common law claims arising from the actions of a buyer if a NICS background check is completed in compliance with Sections 1448A(a) and 1448A(b)? (Preserved: A-174-79).

B. SCOPE OF REVIEW

This Court reviews the trial court’s order dismissing the case under Rule 12(b)(6) *de novo* to “determine whether the trial judge erred as a matter of law in formulating or applying legal precepts.” *Gantler v. Stephens*, 965 A.2d 695, 703-04 (Del. 2009) (quoting *Feldman v. Cutaia*, 951 A.2d 727, 730-31 (Del. 2008)). Issues of statutory construction and interpretation are also reviewed *de novo*. *Bay Surgical Servs. v. Swier*, 900 A.2d 646, 652 (Del. 2010).

C. MERITS OF ARGUMENT

In the absence of ambiguity, a statute’s plain language controls its interpretation. *Dewey Beach Enters., Inc. v. Bd. of Adjustment*, 1 A.3d 305, 307 (Del. 2010). A statute is only ambiguous if it is susceptible to two reasonable interpretations. *Id.* If a statute is unambiguous, no statutory construction is required, and the words in the statute are given their plain meaning. *Id.* Summers does not

argue that Section 1448A(d) is ambiguous, yet they ask the Court to employ various rules of statutory construction applicable to ambiguous statutes, and to find that the legislature did not intend to provide firearms dealers a “complete defense” when compliant transfers of firearms are made from their inventories. App. Op. Br. at 20–25.

1. The Trial Court Did Not Interpret Section 1448A to Create Surplusage

Summers’ invocation of the rule against surplusage is a strawman argument and makes little sense in this case. App. Op. Br. at 21. The trial court did not conclude, as Summers argues, that “Section 1448A does not require FFLs to conduct background checks ‘in accordance with ... 28 C.F.R. § 25.11.’” *Id.*

To the contrary: the trial court clearly understood that compliance with Section 1448A required compliance with Section 25.11 and other applicable NICS regulations. The trial court thoroughly evaluated Summers’ allegations in light of Section 25.11’s requirement that firearms dealers not purposefully misuse the NICS system to allow illegal firearms transfers. App. Op. Br., Ex. B (trial court opinion) at 18 (“Plaintiffs need to prove that Cabela’s demonstrated the purposeful conduct under 28 C.F.R. § 25.11 that then served to violate the provisions of § 1448A.”).

Summers’ disagreement with the trial court is not over its interpretation of Section 1448A, but with the trial court’s application of the statute’s plain language to the insufficiency of their allegations. Indeed, Summers’ unsupported construction

of Section 1448A(d) to “mandate more” than compliance with Subsections (a) and (b) of Section 1448A actually creates the surplusage about which Summers complains.

If a “complete defense” under Section 1448A(d) is only available when a firearms dealer complies with all conceivable and potentially applicable statutory and common law duties, the “complete defense” in Section 1448A(d) is superfluous and would be meaningless because it would be available only when there is no liability. It is self-evident that all immunity defenses presume allegations of wrongful conduct because without such allegations, there is no need for immunity. *See Otto v. Eau Claire Co.*, 815 N.W.2d 407, 407 (Wis. Ct. App. 2012) (immunity presumes negligence).

2. Section 1448A Clearly Manifests Legislative Intent to Supersede Common Law Causes of Action

Summers’ argument that Section 1448A cannot be interpreted “in abrogation of the common law” is equally unavailing. App. Op. Br. at 22. When a statute clearly manifests legislative intent to supersede or limit the common law, the statute will be given that effect. *A.W. Financial Servs., S.A. v. Empire Res., Inc.*, 981 A.2d 1114, 1122-23 (Del. 2009). The language of Section 1448A manifests unambiguous legislative intent to supersede the common law claims made against Cabela’s in this case: compliance with Sections 1448A(a) and (b) “shall be a complete defense to *any claim or cause of action under the laws of this state* for liability for damages

allegedly arising from the actions of the transferee subsequent to the date of said compliance wherein the claim for damages is factually connected to said compliant transfer.” 11 *Del. C.* § 1448A(d) (emphasis added).

This is not a case in which the Court must search a legislative scheme for an implied intent to supersede causes of action, and strictly construe statutory language to avoid abrogation of common law claims. Indeed, the legislators who proposed the 2013 amendment to Section 1448A(d) that included the language quoted above, provided the following synopsis explaining legislative intent:

This amendment expands the legal protections available to gun sellers and dealers who perform background checks in accordance with Delaware law. This provision encourages compliance by ensuring that persons who follow the law cannot be held liable for damages that take place after the lawful transfer.

A-133; *see Cede & Co. v. Technicolor, Inc.*, 758 A.2d 485, 495 (Del. 2000) (finding that a plain meaning interpretation of a statute was supported by legislative history).

The 2013 amendment to Section 1448A actually broadened the complete defense available to dealers. The prior version of Section 1448A limited the “complete defense” to causes of action arising only from the transfer of firearms to persons convicted of felonies. 11 *Del. C.* § 1448A (2012).

The amendment of Section 1448A in 2013 that broadened application of the “complete defense” is significant. “It is a respected canon of statutory construction that a legislature is presumed to mean what it says, so that if it alters a statute, it is

presumed to be making a change, rather than merely saying correctly what had been intended, but badly said, in the first place.” *Stiftel v. Malarkey*, 384 A.2d 9, 13 (Del. 1977). With the 2013 amendment, the legislature is presumed to have intended exactly what the statute says: causes of actions arising from “the actions of the transferee ... factually connected” to a “compliant transfer” are not available against compliant firearms dealers.

3. The “Complete Defense” Under Section 1448A(d) is Applicable to Sales by Federal Firearms Licensees to Unlicensed Persons

Summers’ argument that Section 1448A(d) does not even apply to sales by federal firearms licensees should be rejected. App. Op. Br. at 23. The plain language of Section 1448A belies Summers’ argument. Section 1448A applies, on its face, to sales, transfers and deliveries of firearms by a “licensed dealer ... from inventory” to unlicensed persons. 11 *Del. C.* § 1448A(a). Moreover, Section 1448A(d) states that “[c]ompliance with the provisions of this section [Section 1448A] or Section 1448B shall be a complete defense” to specified causes of action, which includes the claims made by Summers in this case. 11 *Del. C.* § 1448A(d).

Section 1448B addresses sales by unlicensed persons to other unlicensed persons. 11 *Del. C.* § 1448B. Section 1448B became law in 2013 along with the amendment to Section 1448A(d) that broadened the “complete defense” to apply to claims arising from the actions of any purchaser, not just convicted felons. Summers’ argument that the House Bill resulting in the 2013 amendments did not “alter the

rules for sales from FFLs to unlicensed parties” is baseless and wrong. App. Op. Br. at 24.

Ignoring the plain language of Section 1448A, Summers argues incorrectly that legislative floor debates support their argument that the 2013 changes to the law were only intended “to change the legal requirements for firearms transfers between two unlicensed parties.” App. Op. Br. at 24. The discussion on the floor of the legislature, however, made clear that although the bill would provide legal protection to private sellers who comply with background check requirements, the bill would also extend protections available to firearm dealers:

So what this law basically does, it extends legal protections available to gun sellers and dealers who perform background checks in accordance with Delaware law. It encourages compliance by ensuring that persons who follow the law cannot be held liable for damages or actions that take place after a lawful transfer.

A-174 (147 Gen. Assemb. HB 35 & H Am. 7 (Mar. 28, 2013) (statement of Rep. Schwartzkopf)). The bill’s sponsor added that “the bottom line” was to “provide protection” from lawsuits against “whoever has deep pockets,” surely a reference to those in the firearms business--importers, manufacturers, and dealers--not private sellers covered by Section 1448B.

The Delaware legislature has long sought to protect federally-licensed firearms dealers from litigation arising from firearm sales. Section 1448A was enacted in 1990 and originally provided firearm dealers a “complete defense” to

causes of action arising from the sale of firearms to convicted felons. 11 *Del. C.* § 1448A(i) (1990). The expanded protection given to firearms dealers in 2013 may have been a political compromise to achieve required background checks on sales between private persons under Section 1448B. Regardless, Section 1448A is the law in Delaware, it is unambiguous, and it provides Cabela's a "complete defense" in this case.

III. THE TRIAL COURT PROPERLY DISMISSED SUMMERS' PUBLIC NUISANCE ACTION BASED ON CABELA'S COMPLIANCE WITH SECTION 1448A

A. QUESTION PRESENTED

Does compliance by Cabela's with Section 1448A provide a "complete defense" to Summers' public nuisance action. (Preserved: A-174-79).

B. SCOPE OF REVIEW

This Court reviews the trial court's order dismissing the case under Rule 12(b)(6) *de novo* to "determine whether the trial judge erred as a matter of law in formulating or applying legal precepts." *Gantler v. Stephens*, 965 A.2d 695, 703-04 (Del. 2009) (quoting *Feldman v. Cutaia*, 951 A.2d 727, 730-31 (Del. 2008)). Issues of statutory construction and interpretation are also reviewed *de novo*. *Bay Surgical Servs. v. Swier*, 900 A.2d 646, 652 (Del. 2010).

C. MERITS OF ARGUMENT

Summers did not raise in the trial court her argument that Delaware courts should now recognize public nuisance claims based on product sales. "Only questions fairly presented to the trial court may be presented for review" unless the "interests of justice so require." Del. Sup. Ct. R. 8; *Scion Breckenridge Managing Member, LLC v. ASB Allegiance*, 68 A.3d 665, 678 (Del. 2013) (a party is precluded from attacking a judgment on a theory he failed to advance before the trial judge). Summers had the opportunity at the hearing on Cabela's Motion to Dismiss to argue

for an expansion of Delaware public nuisance law, or in her trial court briefing, but did not do so. App. Op. Br., Ex. A at 3-57.

And in this Court, Summers has not adequately developed the argument that Delaware law should now recognize a public nuisance cause of action for product sales. *See Roca v. E.I. duPont de Nemours & Co.*, 842 A.2d 1238, 1242 (Del. 2004). This Court, however, need not venture into this complex area of law or consider whether the interests of justice require consideration of Summers' argument because the argument is not outcome determinative. *Scion*, 68 A.3d at 679. Whether the trial court properly dismissed Summers' public nuisance action can be decided on the same basis that Summers' other causes of action were dismissed: Summers' allegations demonstrate that Cabela's initiated a NICS background check on Hardwick that complied with Section 1448A, and thus, Cabela's has a "complete defense" to any claim or cause of action" under Delaware law. 11 *Del. C.* § 1448A(d).

IV. SECTION 1448A IS CONSTITUTIONAL

A. QUESTION PRESENTED

Did the trial court correctly hold that Section 1448A(d) does not violate the Open Courts Provision of the Delaware Constitution, or the Due Process and Equal Protection Clauses of the United States Constitution. (Preserved: A-205-19).

B. SCOPE OF REVIEW

This Court reviews the trial court's order dismissing the case under Rule 12(b)(6) *de novo* to "determine whether the trial judge erred as a matter of law in formulating or applying legal precepts." *Gantler v. Stephens*, 965 A.2d 695, 703-04 (Del. 2009) (quoting *Feldman v. Cutaia*, 951 A.2d 727, 730-31 (Del. 2008)).

C. MERITS OF ARGUMENT

Summers argues that if Section 1448A is found to provide Cabela's a complete defense in this case, the statute should be held unconstitutional under Article I, Section 9 of the Delaware Constitution, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. App. Op. Br. at 29-35. Summers carries a heavy burden to establish that the Delaware Legislature acted unconstitutionally when it provided immunity to firearms dealers who make "compliant transfers" of firearms from their inventories under Section 1448A.

A statute is presumed to be constitutional, and unless there is clear and convincing evidence of unconstitutionality, courts are “reluctant to ignore” the presumption. *Monceaux v. State*, 51 A.3d 474, 477 (Del. 2012). “One who challenges the constitutionality of a statute has the burden of overcoming the presumption of validity,” and constitutional invalidity must be “beyond doubt.” *Opinion of Justices*, 425 A.2d 604, 606 (Del. 1981) (citation omitted). “Every presumption is in favor of the validity of the legislative act and all doubts are resolved in its favor; and if the question for the reasonable necessity for the regulation is fairly debatable, legislative judgment must be allowed to control.” *Id.* (citation omitted). Summers’ arguments that Section 1448A is unconstitutional are to be judged under this heightened burden.

1. The Doctrine of Constitutional Avoidance Does Not Apply

Summers argues that under the doctrine of constitutional avoidance, Cabela’s construction of Section 1448A “would raise substantial constitutional concerns” and, for that reason, urges this Court to adopt Summers’ construction of the statute. App. Op. Br. at 34. The Court should reject that argument for two reasons.

One, courts are to rely on the doctrine only when there is a choice “between competing *plausible* interpretations of statutory text.” *Clark v. Martinez*, 542 U.S. 371, 381 (2005) (emphasis added). As explained above, the legislature’s intent is clear based on the plain meaning rule: when Section 1448A was amended in 2013,

firearms dealers received expanded “legal protections” against litigation for “compliant firearm” transfers. A-133. Summers disputes that the legislature had this intent, but cannot offer any plausible alternative interpretation consistent with the statute’s plain language and purpose.

Two, the doctrine applies only when there are “grave doubts” about the constitutionality of the statute. *Almendarez-Torres v. United States*, 523 U.S. 224, 237-38 (1998) (“[T]hose who invoke the doctrine must believe that the alternative is a serious likelihood that the statute will be held unconstitutional”). A weak constitutional claim will not support reliance on the doctrine. *Empresa Cubana Exportadora v. United States*, 638 F.3d 794, 801 (D.C. Cir. 2011); see *Ileto v. Glock*, 565 F.3d 1126, 1143-44 (9th Cir. 2009) (declining to apply the doctrine to avoid deciding the constitutionality of a federal firearm seller immunity statute because court did not have “grave doubts” regarding the constitutionality of the statute in the face of substantive due process and equal protection challenges). As described below, the Court should not have “grave doubts” about the constitutionality of Section 1448A.

2. Section 1448A Does Not Violate the Open Courts Provision of the Delaware Constitution

Delaware law does not forbid legislative abolition of rights previously recognized by the common law. *Gallegher v. Davis*, 183 A. 620, 624 (Del. 1936). And when a common law cause of action has been abolished, the Delaware

Constitution does not require that an alternate method of compensation be provided. *Young v. O.A. Newton & Son Co.*, 477 A.2d 1071, 1078 (Del. 1984). The “focus” of Article I, Section 9 of the Delaware Constitution—the Open Courts Provision—is to *assure a method* by which an injured person may be compensated reasonably for his injury.” *Id.* at 1077-78. (emphasis added) (finding that legislative change to workmen’s compensation law shifting direct liability from employer’s insurance carrier to employer was not unconstitutional). This Court made clear that the “thrust” of the Open Courts Provision was not “to assure that every person who is liable under common law must be liable under any substitute remedy.” *Id.*

Summers relies mistakenly on *Gallegher* to support their position that Section 1448A violates the Open Courts Provision. App. Op. Br. at 30. In *Gallegher*, the plaintiff challenged the constitutionality of the Delaware Guest Statute, which relieved automobile drivers of liability for personal injuries of their passengers, except when drivers act with “willful and wanton disregard of the rights of others.” 183 A. at 622. This Court upheld the statute’s constitutionality under Article 1, Section 9, and reasoned that “open courts” provisions are “inserted” in state constitutions “to secure the citizen against unreasonable and arbitrary deprivation of rights.” *Id.* at 624. The Court in *Gallegher* further reasoned as follows:

[N]o one has a vested interest in any rule of common law. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, within constitutional limits, may be changed at the will of the legislature. The

great office of statutes is to remedy defects in the common law as they develop, and adapt it to the change of time and circumstance. Negligence is merely the disregard of some duty imposed by law; and the nature and extent of the duty may be modified by legislation, with corresponding change in the test for negligence... . ‘We need not elaborate the rule that the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative objective.’

Id. (internal citations omitted.)

Here, the legislature’s objective was to encourage firearms dealers and private sellers in Delaware to conduct background checks and sell firearms only after NICS authorizes the sale to “proceed,” by giving them immunity from litigation when they do so. The legislature’s decision to provide firearms dealers with immunity for compliant transfers was not arbitrary or unreasonable. *See Iletto*, 565 F.3d at 1140 (holding there was “nothing irrational or arbitrary about Congress’s decision to preempt “certain categories of cases brought against federally licensed manufacturers and sellers of firearms.”); *KS&E Sports v. Runnels*, 72 N.E.2d 892, 906 (Ind. 2017) (upholding constitutionality of Indiana firearms dealer immunity statute under nearly identical “open courts” provision as not “irrational or illegitimate.”). The legislature made a policy choice, and this Court’s role is apply the law as enacted.

Courts should not invalidate legislation simply because it “rejects some cause of action currently preferred by the courts.” *Cheswold Volunteer Fire Co. v. Lumberton Constr. Co.*, 489 A.2d 413, 417-18 (Del. 1984). Doing so “offend[s] our

notion of the checks and balances between various branches of government, and the flexibility required for the healthy growth of the law.” *Id.* at 418. Regardless, Section 1448A does not deny Summers access to the courts entirely or an ability to seek compensation for damages. Section 1448A does not prevent Summers from suing Hardwick and her boyfriend, who together conspired to acquire the firearm in violation of federal and state laws. Section 1448A also does not protect the persons who were arrested and charged with the shooting from a claim for damages by Summers.

Indeed, Section 1448A does not even protect firearms dealers under all circumstances when criminals misuse firearms and cause harm. Firearm dealers who do not make compliant transfers by either failing to request a background check or transferring a firearm without receiving from NICS a “proceed,” are not entitled to a “complete defense” under Section 1448A(d). *See Young*, 477 A.2d at 1078 (finding worker’s compensation insurance carrier not completely protected by change to the statute because remedy for performance of “industrial safety inspection” was still available.); *Gallegher*, 183 A. at 622 (automobile driver remained liable to passenger based on willful or wanton conduct.); *Ileto*, 565 F.3d at 1143 (federal immunity statute “does not completely abolish plaintiffs’ ability to seek redress.”); *New York City v. Beretta U.S.A Corp.*, 524 F.3d 380, 390 (2d Cir. 2008) (right of access is not

violated by a statute that provides a complete defense to a cause of action or curtails a category of causes of action).

Section 1448A does not deprive Summers access to Delaware courts. It only prohibits Summers' preferred claim against a preferred defendant under a specific circumstance -- a compliant transfer. The legislature acted within its authority to shape the law as it saw fit, and its decision to protect firearms dealers from litigation in certain circumstances was constitutional under Article 1, Section 9 of the Delaware Constitution.

3. Section 1448A Does Not Violate the Due Process Clause of the Fourteenth Amendment

Summers' argument that Section 1448A violates the due process clause of the Fourteenth Amendment to the United States Constitution is also unavailing. App. Op. Br. at 32. "Neither the Federal nor the State Constitution forbids legislative abolition of a common law cause of action to attain a permissible legislative objective." *Cheswold*, 489 A.2d at 417 (citing *Silver v. Silver*, 280 U.S. 117, 122 (1929)). No one has a vested right in a common law cause of action. *Id.* at 418 (statute of repose did not violate due process guarantees because, *inter alia*, plaintiff did not have a vested right in cause of action that accrued after effective date of statute).

A vested right in a common law cause of action -- to the extent the right exists at all -- can exist only when the cause of action accrues before the effective date of

the statute. *Id.* Summers' causes of action against Cabela's accrued in September 2016, when the shooting occurred, three years after the legislature amended Section 1448A in 2013. Summers did not have a claim against Cabela's in 2016 that the legislature took away.

Summers' reliance on *Duke Power Co. v. Carolina Env'tl. Study Group, Inc.*, 438 U.S. 59 (1978), suggesting the Supreme Court would disapprove of legislative action denying a plaintiff a remedy that did not provide a substitute remedy, is misplaced. The Court in *Duke Power* did not rule on that question but expressed strong skepticism that such a constitutional requirement exists: "[I]t is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy." *Id.* at 88. The Court did not need to reach the question because the statute at issue provided a substitute remedy for the state tort law remedies it replaced. *Id.*

The Court in *Duke Power* observed that statutes limiting liability are relatively commonplace and have been consistently enforced. *Id.* at n. 32. The Court also noted the "Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain permissible legislative objectives." *Id.* (quoting *Silver*, 280 U.S. at 122). If the Court in *Duke Power* signaled anything, it was that substantive due process does not require a *quid pro quo* for a statutory

abrogation of common law rights because “[o]ur cases have clearly established that ‘[a] person has no property, no vested interest, in any rule of the common law.’” *Id.* (internal citations omitted).

Summers also relies on *Poindexter v. Greenhow*, 114 U.S. 270 (1885). That case did not involve a due process challenge, but a challenge to a state statute based on impairment of contract. The Court held the statute unconstitutional because it took away contract rights created by an earlier statute, and left contracting parties with no remedy at all. *Id.* at 300-01. Summers’ reliance on *Truax v. Corrigan*, 257 U.S. 312 (1921), is also inapt. There, the Court held that if a statute--barring state court injunctions in labor disputes -- were construed to grant complete immunity to striking employees, it violated due process. *Id.* at 328. *Truax*, however, is no longer good law. See *Int’l Bhd. of Teamsters, Local 695 v. Vogt, Inc.*, 354 U.S. 284, 287-88 (1957) (“[T]he considerations of that case soon had to yield, through legislation and later through litigation, to the persuasiveness of underlying facts.”). *Truax* was the product of an historical era in which “any legislative encroachment upon the existing economic order” was seen as “infected with unconstitutionality.” *Am. Fed’n of Labor v. Am. Sash & Door Co.*, 335 U.S. 538, 543-44 (1949) (Frankfurter, J., concurring). Even if *Truax* were good law, it is inapposite. Section 1448A does not resemble the statute struck down in *Truax* because it does not give complete immunity to firearms dealers, but provides protection only for compliant transfers.

Cases addressing the impact that the federal Protection of Lawful Commerce in Arms Act has on federal due process rights are instructive on whether a statute abrogating common law causes of action violates due process rights. *See District of Columbia v. Beretta U.S.A. Corp.*, 940 A.2d 163, 176 (D.C. 2008) (noting that federal appellate courts have repeatedly rejected claims that statutes abrogating state law tort actions violate due process by depriving litigants their right to proceed); *Delana v CED Sales, Inc.*, 486 S.W.3d 316, 324 (Mo. 2016) (holding that federal firearms seller immunity statute does not violate due process rights).

The “complete defense” that Section 1448A provides under certain circumstances does not violate Summers’ due process rights. The Delaware legislature had the authority to abrogate claims based on “compliant transfers,” and it could do so constitutionally without providing an alternative remedy. Indeed, providing an alternative remedy would have been contrary to the legislature’s expressed purpose of “expand[ing] the protections available to gun sellers and dealers.” A-133.

4. Section 1448A Does Not Violate the Equal Protection Clause of the Fourteenth Amendment

State legislatures have broad discretion to enact laws that effect some groups of citizens differently from others. *McGowan v. Maryland*, 366 U.S. 420, 425 (1961). The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution requires that, in the absence of a suspect classification or

fundamental right, any such legislative classification need only bear a rational relationship to a legitimate state purpose. *Zobel v. Williams*, 457 U.S. 55, 60 (1982). The Equal Protection Clause is offended under the rational basis test only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. *Id.*³

Summers argues that because those injured by the actions of sellers of other types or products are not subject to the same limitation on recovery of damages, Section 1448A denies Summers equal protection of the law. App. Op. Br. at 33. Summers engages in the wrong analysis. The test is not whether Section 1448A treats certain plaintiffs who sue firearms dealers for damages differently from other injured plaintiffs, but whether the legislature did so rationally in service of a legitimate state purpose.

In enacting Section 1448A, it was entirely rational for the legislature to conclude that firearms dealers would be encouraged to complete background checks of buyers if dealers have immunity for damages claims arising from subsequent

³ Suspect classifications deserving a higher level of scrutiny include race, sex, alienage, and national origin. *Husband M. v. Wife M.*, 321 A.2d 115, 116-17 (Del. 1974). Fundamental rights that also deserve higher scrutiny include freedom of speech and religion. *Household Finance Corp. v. Johnson*, 346 A.2d 177, 179 (Del. Super. 1975). No such suspect classifications or fundamental rights are present in this appeal.

buyer conduct. The logic behind this conclusion is clear, and the legitimacy of the state's purpose to encourage compliance with firearm sale laws is indisputable.

Summers argues that the legislature's objective does not survive the rational basis test because Section 1448A "immunizes dealers who supply the criminal market." App. Op. Br. at 33. Summers' argument fails because it is premised on an overly broad and incorrect interpretation of a "compliant transfer" under Section 1448A as a sale that complies with all federal and state firearms statutes and the common law. As already established, a dealer's sale of a firearm from its inventory sale is "compliant transfer" under Section 1448A if it is completed following a properly conducted NICS background check. There are no other stated conditions on a "compliant transfer" and the "complete defense" available to firearms dealers when they make such transfers of firearms from their inventories.

The Delaware legislature's enactment of Section 1448A was within its discretion to enact laws that affect some groups of citizens differently than others. *McGowan v. Maryland*, 366 U.S. at 425. There are a great many other statutory restrictions on causes of action and damage claims, which treat injured persons differently and pass constitutional muster, including worker's compensation laws, statutes of limitations, statutes of repose and damages caps. Merely showing differential treatment falls considerably short of demonstrating a violation of the Equal Protection Clause.

CONCLUSION

For the foregoing reasons, Cabela's respectfully requests that the trial court's judgment, as explained in its well-reasoned memorandum opinion, be affirmed.

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