

The State of New Hampshire

ROCKINGHAM COUNTY

SUPERIOR COURT

RYAN HARDY & MATTHEW O'CONNOR

v.

NEW HAMPSHIRE DEPARTMENT OF SAFETY & CHESTER ARMS, LLC

Docket No. 218-2018-CV-828

ORDER

Plaintiffs Ryan Hardy and Matthew O'Connor brought this action against Defendants Chester Arms, LLC ("Chester Arms") and the New Hampshire Department of Safety ("NHDOS"), asserting claims for negligent entrustment and negligence per se. See Doc. 1 (Compl.). Defendants now move for summary judgment. See Docs. 42 (Chester Arms' Mot. Summ. J.) and 61 (NHDOS' Mot. Summ. J.). For the following reasons, the Court **GRANTS** Defendants' motions for summary judgment.

BACKGROUND

Chester Arms is a Federal Firearms Licensee ("FFL") with a retail location in Derry, New Hampshire. See Doc. 59 (Consol. State. Material Facts – Chester Arms) ¶ 1. On March 19, 2016, Ian MacPherson sought to purchase a gun from Chester Arms. Id. ¶ 8. Mr. MacPherson eventually decided to purchase a Smith & Wesson, Model SD40VE, .40 caliber semi-automatic pistol (the "Pistol"). Id. ¶ 12. He also attempted to purchase a fifty-round box of Magtech, .40 caliber target ammunition. Id. ¶ 14. In order to proceed with the sale, a Chester Arms employee asked Mr. MacPherson to provide a form of identification and to complete Bureau of Alcohol Tobacco and Firearms ("ATF") Form 4473. Id. ¶ 15. An ATF Form 4473 requires potential firearms buyers from FFL

dealers to provide the purchaser's name, date of birth, address, and other identifying information. Doc. 82 (Consol. State. Material Facts – NHDOS) ¶¶ 3, 5. Mr.

MacPherson initially provided a previous address on the ATF Form 4473, along with his identification card. Doc. 59 ¶¶ 15–16. After noticing the form had the wrong address, the employee shredded the first form and required Mr. MacPherson to fill out another form with his current address. Id. ¶¶ 16, 18. Mr. MacPherson complied and filled out a second form. Id. ¶ 17.

After Mr. MacPherson completed the new form, the employee contacted NHDOS's Permits and Licensing Unit, known as the Gun Line, to complete the required background check. Id. ¶¶ 5, 19. "Pursuant to state law, the Gun Line is partial point of contact in . . . New Hampshire for the federal National Instant Criminal Background Check System ("NICS")." Doc. 82 ¶ 8. "NICS is a national system that checks available records to determine if prospective firearm transferees are disqualified from receipt of firearms." Id. ¶ 9. In New Hampshire, all potential firearms transferees seeking to purchase a handgun from an FFL are required to undergo an NICS background check. Id. ¶ 11. Based on federal law, the Gun Line may approve, deny, or delay a firearm transfer. Id. ¶ 13.

In this case, the Gun Line did not provide an immediate response to Chester Arms' inquiry. Doc. 59 ¶ 20. After nearly a half an hour, the Gun Line informed the Chester Arms employee that the sale was given a "delay" status. Id. ¶ 68. The employee asked the Gun Line for the reason for the delay, but the Gun Line informed her that it could not provide her such information. Id. ¶ 69. The employee informed Mr. MacPherson the transaction was delayed, which meant that it would take several more

days to process. Doc. 59 ¶ 72. Indeed, once the transaction is put on a “delay” status, an FFL is required to wait until after three business days before it may proceed with the transaction. Doc. 82 ¶ 23. The employee offered to take Mr. MacPherson’s phone number to call him if the sale could be completed. Doc. 59 ¶ 72. Mr. MacPherson asked for a receipt, took a Chester Arms business card, and provided his phone number before leaving the store. Id. ¶ 73.

In fact, the Gun Line delayed the transfer to conduct further research regarding Mr. MacPherson’s misdemeanor crimes of domestic violence in order to determine whether they met the requisite victim relationship to disqualify him from purchasing a firearm. Doc. 82 ¶¶ 19–21. On March 23, 2016, the Gun Line sent a fax to the Merrimack Police Department (the “MPD”) requesting information related to three simple assault arrests and a disorderly conduct arrest found during its search. Doc. 82 ¶ 24. The MPD responded by faxing police reports concerning the criminal charges. Id. ¶ 25. The reports showed that none of Mr. MacPherson’s “NICS hits” disqualified him from taking possession of the firearm because they did not meet a victim relationship requirement prescribed by federal law. Id. ¶ 26.

Also on March 23, 2016, the Gun Line sent a fax to Merrimack District Court asking for docket information concerning the criminal charges. Id. ¶ 27. The next day, Detective Scott Park of the MPD sent the Gun Line a fax stating:

Merrimack Police have been made aware that [Mr. MacPherson] has attempted to purchase a firearm at a retail outlet in Chester. Merrimack Police have had many dealings with [Mr.] MacPherson to including having been made aware through family members that he has been diagnosed with schizophrenia. [Mr.] MacPherson has displayed on many occasions delusional behavior which should serve as significant concern should he obtain a firearm.

Id. ¶ 30. However, the Gun Line was unable to obtain supporting documentation regarding Mr. MacPherson’s mental health diagnosis. Id. ¶ 61. On March 29, 2016, the Gun Line received case summaries from the Merrimack District Court concerning the criminal charges. Id. ¶ 32. The case summaries showed Mr. MacPherson had been found or pled guilty to all the charges which produced NICS hits and that he had once been evaluated for competence to stand trial but was allowed to enter a plea after that evaluation. Id. ¶¶ 32–38.

While the delay was still in place but after the required three business days, on April 1, 2016, Mr. MacPherson returned to Chester Arms. Doc. 59 ¶ 80. Chester Arms’ owner required Mr. MacPherson to complete another ATF Form 4473 due to an incorrect date on the previous form. Id. ¶¶ 84, 86. Thereafter, Chester Arms transferred the firearm to Mr. MacPherson. Id. ¶ 86. Over a month later, on May 13, 2016, Mr. MacPherson used the firearm to shoot Plaintiffs, who are both Manchester police officers. Id. ¶ 91. After the shooting, ATF agents obtained Mr. MacPherson’s ATF Form 4473 from Chester Arms. Id. ¶ 93. The Gun Line continued the delay status on Mr. MacPherson’s transaction until the day he was indicted for the shooting, at which point the Gun Line changed the status to denied. Id. ¶ 97. Neither Chester Arms nor any Chester Arms employee was ever charged, indicted, or convicted of any state or federal crimes related to the transfer of the firearm to Mr. MacPherson. Id. ¶ 89.

LEGAL STANDARD

Summary judgment shall be granted where “there is no genuine issue as to any material fact” and “the moving party is entitled to judgment as a matter of law.” RSA 491:8-a, III. “A fact is material if it affects the outcome of the litigation under the

applicable substantive law.” Lynn v. Wentworth by the Sea Master Ass’n, 169 N.H. 77, 87 (2016). In deciding the motion, the Court assesses “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits filed” by the parties. RSA 491:8-a, III. The Court must consider the evidence, and all reasonable inferences therefrom, in the light most favorable to the non-moving party. See Stewart v. Bader, 154 N.H. 75, 85 (2006). The movant bears the burden of proving that no genuine issue of material fact exists, and that it is entitled to judgment as a matter of law. See id. at 86; see also RSA 491:8-a, III.

ANALYSIS

Defendants now move for summary judgment. See Docs. 42, 61. Chester Arms argues, among other things, that it is immune from civil liability lawsuits in accordance with RSA 508:21. Doc. 42 ¶ 3. Similarly, NHDOS contends, among other things, that it is immune from Plaintiffs’ claims pursuant to RSA 541:B-19, I(b). Doc. 61 ¶¶ 1–2. Plaintiffs object. See Docs. 52, 69.

I. Chester Arms’ Motion for Summary Judgment

In support of its Motion for Summary Judgment, Chester Arms advances two arguments: (1) RSA 508:21 grants it immunity from civil lawsuits so long as it has not been convicted of a felony in relation to the firearms transfer at issue; and (2) the Protection of Lawful Commerce in Arms Act (“PLCAA”) also prohibits Plaintiffs’ lawsuit. See Doc. 42 ¶¶ 3–4. In response, Plaintiffs contend: (1) Chester Arms waived its defense under RSA 508:21; (2) RSA 508:21 does not apply as this case is not a “qualified civil liability action”; (3) if RSA 508:21 does bar Plaintiffs’ claims, the statute is unconstitutional; and (4) the PLCAA does not prohibit Plaintiffs’ lawsuit. See Doc. 52.

Whether RSA 508:21 precludes Plaintiffs' claims is a question of statutory interpretation. "Statutory interpretation is a question of law" McCarthy v. Manchester Police Dep't, 168 N.H. 202, 207 (2015). The Court "first look[s] to the language of the statute itself, and, if possible, construe[s] that language according to its plain and ordinary meaning." Id. The Court "interpret[s] legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include." Id. In doing so, the Court "construe[s] all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result." Id. "Moreover, [the Court] do[es] not consider words and phrases in isolation, but rather within the context of the statute as a whole." Id. "This enables [the Court] to better discern the legislature's intent and to interpret statutory language in light of the policy or purpose sought to be advanced by the statutory scheme." Id.

RSA 508:21 provides that "a qualified civil liability action shall not be brought in any state court." A "'qualified civil liability action' means a civil action . . . brought by any person against a . . . seller . . . of a qualified product, for damages resulting from the criminal or unlawful use of a qualified product by the person or a third party." RSA 508:21(I)(d). However, a qualified civil liability action "shall not include an action brought against a . . . seller . . . convicted of a felony under state or federal law, by a party directly harmed by the felonious conduct." Id. A "'[q]ualified 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." RSA 508:21(I)(c).

In light of the foregoing, RSA 508:21 only confers immunity if three conditions are met. First, Chester Arms must have acted as a “seller” of a “qualified product.” See id. Second, the civil action must seek to recover for damages resulting from the criminal use of that “qualified product” by a third party. See id. Finally, the “seller” must not have been convicted of felonious conduct in connection with the events underlying the civil action. See id. If all three conditions are met, RSA 508:21 entitles the seller to immunity from suit.

In this case, Chester Arms sold a qualified product—the Pistol—and thus meets the first condition. See Doc. 59 ¶¶ 1, 12. In addition, Plaintiffs claim damages arising from the criminal use of the Pistol by a third party, and thus the second condition is also satisfied. See Doc. 1 ¶ 70 (“Chester Arms, LLC proximately caused harm to Officer Hardy . . . to include the physical injuries to Officer Hardy and all injuries naturally flowing from” the transfer of the Pistol to Mr. MacPherson). Further, neither Chester Arms nor any Chester Arms employee has been convicted of felonious conduct in relation to the transfer of the Pistol to Mr. MacPherson, and thus the third condition is also satisfied. See Doc. 59 ¶ 89. For these reasons, Chester Arms is entitled to immunity under the plain language of RSA 508:21.

Notwithstanding the foregoing, Plaintiffs argue Chester Arms: (1) waived its immunity because it was not pled or preserved in the answer and brief statement of defenses; and (2) RSA 508:21 is unconstitutional on its face and as applied to this case. The Court will address each argument in turn.

First, Plaintiffs argue Chester Arms waived “any defense that would be available to it under [RSA 508:21.]” Doc. 53 at 24. However, Plaintiffs mischaracterize RSA

508:21 as an affirmative defense. Indeed, as stated above, RSA 508:21 specifically provides that “[a] qualified civil liability action shall not be brought in any court.” (emphasis added). As such, if an action is found to be a qualified civil liability action under RSA 508:21, the Court lacks authority to adjudicate it. Unlike an affirmative defense, “[a] party may challenge subject matter jurisdiction at any time during the proceeding . . . and may not waive subject matter jurisdiction.” In re D.O., 173 N.H. 48, 51 (2020). The Court therefore cannot conclude that Chester Arms waived its right to immunity under RSA 508:21.

Next, Plaintiffs argue that RSA 508:21 is unconstitutional. “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). “In other words, [the Court] will not hold a statute to be unconstitutional unless a clear and substantial conflict exists between it and the constitution.” Id. “As such, a statute will not be construed to be unconstitutional when it is susceptible to a construction rendering it constitutional.” Id. “When doubts exist as to the constitutionality of a statute, those doubts must be resolved in favor of its constitutionality.” Id.

“A party may challenge the constitutionality of a statute by asserting a facial challenge, an as-applied challenge, or both.” Id. (quotation omitted). “A facial challenge is a head-on attack of a legislative judgment, an assertion that the challenged statute violates the Constitution in all or virtually all, of its applications.” Id. “To prevail on a facial challenge to a statute, the challenger must establish that no set of circumstances exists under which the Act would be valid.” Id. “An as-applied challenge, on the other

hand, concedes that the statute may be constitutional in many of its applications, but contends that it is not so under the particular circumstances of the case.” Id.

In this case, Plaintiffs assert both a facial challenge and an as-applied challenge to RSA 508:21. See Doc. 53 at 33 (“RSA 508:21 is Unconstitutional if Read to Bar Plaintiffs’ Claim”), 33–34 (“Thus, RSA 508:21 violates the due process aspect of the New Hampshire Constitution . . . by depriving victims of negligent misconduct by firearms industry actors like Chester Arms of any remedy without providing any rational substitute.”). The Court begins by addressing Plaintiffs’ as-applied challenge “because, if the statute[] [is] constitutional as applied to . . . [P]laintiff[s], then, by necessity, both of [their] challenges must fail.” Huckins, 166 N.H. at 180.

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.” Huckins v. McSweeney, 166 N.H. 176, 180 (2014). “The right to a remedy is not a fundamental right, but is relative and does not prohibit all impairments of the right of access.” Id. This article “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.” Id. at 181.

Accordingly, the Court “addresse[s] alleged violations of a litigant’s right to a remedy and to equal protection by engaging in a single analysis.” Id.

Here, Plaintiffs first contend that RSA 508:21 violates Part I, Article 14 because “[i]t precludes [them] from any right to recovery against Chester Arms unless or until Chester Arms has been convicted of a felony . . . at which point it would almost certainly be judgment proof.” Doc. 53 at 33. However, similar arguments were “squarely rejected” in Huckins. 166 N.H. at 180–81. In that case, the plaintiff argued that although he could maintain a personal injury action against a third-party responsible for his injuries, that would be “a hollow recovery” and thus the immunities provided by RSA 507-B:2 and RSA 507-B:5 deprived him of his right to remedy. Id. However, the supreme court explained that “RSA 507-B:2 and RSA 507-B:5 d[id] not infringe upon the plaintiff’s statutory or common law rights to bring a direct claim against the alleged tortfeasor” Id. at 181. Thus, the court held that “the plaintiff ha[d] not been deprived of his right to a remedy under the New Hampshire Constitution.” Id. Here, like the plaintiff in Huckins, Plaintiffs have legal recourse to recover damages from the party allegedly responsible for their injury: Mr. MacPherson. Accordingly, they have not been deprived of their right to a remedy under the New Hampshire Constitution. See id.

Next, Plaintiffs contend that RSA 508:21 violates equal protection because “identically situated plaintiffs are treated totally differently based on the identity of the instrument that cause their harm.” See Doc. 53 at 34. Specifically, Plaintiffs argue that “[u]nder RSA 508:21(d), had the shooter, 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 no limitation on their right of recovery.” Id.

(emphasis in original). Even accepting arguendo Plaintiffs' equivalence between such instrumentalities, RSA 508:21 remains constitutional.

“The equal protection guarantee is essentially a direction that all persons similarly situated should be treated alike.” Lennartz v. Oak Point Assocs., P.A., 167 N.H. 459, 462 (2015) (quotation omitted). “A classification cannot be arbitrary, but must reasonably promote some proper object of public welfare or interest.” Id. In considering an equal protection challenge under [the] State Constitution, [the Court] must first determine the standard of review by examining the purpose and scope of the State-created classification and the individual rights affected.” Id. “Because the right to recover for one’s injuries implicates an important substantive right, intermediate scrutiny applies” Id. at 462–63 (internal citations omitted). “Intermediate scrutiny . . . requires that the challenged legislation be substantially related to an important governmental objective.” Id. at 463 (quotation omitted).

Here, RSA 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.” See N.H. Const. pt. 1, art. 2-a; see also District of Columbia v. Heller, 544 U.S. 570, 630 (2008). RSA 508:21 is substantially related to that purpose because it seeks to protect firearms sellers and manufacturers from insolvency due to litigation arising out of the criminality of others. See Doc. 45 Ex 19 (“This bill will protect firearm manufacturers and dealers from suit over the criminal use of the manufacturer[’s] non-defective product.”). Because RSA 508:21 is substantially related to an important governmental objective, the statute does not violate the principles of equal protection under the State Constitution.

In accordance with above, and in light of the Court’s obligation to construe RSA 508:21 so that it complies with the State Constitution, see Huckins, 166 N.H. at 182, the Court concludes that RSA 508:21 is constitutional as applied to the Plaintiffs’ claim. In addition, because RSA 508:21 is constitutional as applied to Plaintiffs, it necessarily is also facially constitutional. See Id. at 183; see also United States v. Tooley, 468 Fed. Appx. 357, 359 (4th Cir. 2012) (per curiam) (“To prevail on a facial challenge, [plaintiff] must establish that no set of circumstances exist under which the [statute] would be valid. By finding the statute valid as applied to this plaintiff, the facial challenge fails as well.” (quotation and brackets omitted)).

In sum, RSA 508:21 applies to bar Plaintiffs’ action against Chester Arms.¹ Thus, Chester Arms’ motion for summary judgment is **GRANTED**.

II. NHDOS Motion for Summary Judgment

Plaintiffs have also asserted two claims against NHDOS: (1) negligent entrustment; and (2) negligence per se. See Doc. 1. NHDOS now moves for summary judgment on both claims, arguing, in part, that it is entitled to sovereign immunity pursuant to RSA 541-B:19, I(b) because the Gun Line employees acted with due care when investigating Mr. MacPherson’s application. See Doc. 62.

“In New Hampshire, the State is immune from suit in its courts without its consent.” Lorenz v. N.H. Admin. Office of the Courts, 152 N.H. 632, 634 (2006).

“Sovereign immunity rested on a common law basis until the enactment in 1978 of RSA Chapter 99-D, which adopted sovereign immunity ‘as the law of the state,’ except where

¹ Having determined that Plaintiffs’ claims are barred by RSA 508:21, the Court need not reach Chester Arms’ alternative argument that the claims are barred by the PLCAA. See Canty v. Hopkins, 146 N.H. 151, 156 (2001) (holding that the Court need not consider party’s remaining arguments where one or more was dispositive of the case).

a statute might provide an exception.” Id. (quoting Tilton v. Dougherty, 126 N.H. 294, 298 (1985)). One such exception is for: “[a]ny 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 rule of a state agency.” RSA 541-B:19, I(b). “The test of due care is what reasonable prudence would require under similar circumstances.” Caliri v. State Dep’t of Transp., 136 N.H. 606, 610 (1993). However, “[f]or immunity purposes, the failure to act ‘reasonably’ must connote more than mere negligent actions.” Farrelly v. City of Concord, 168 N.H. 430, 445 (2015). “If it did not, immunity would serve no purpose because if an official were not negligent, he would not be liable at all and there would be no need for immunity.” Id. “For the added protection of official immunity to serve any purpose, . . . [i]t implies that the official acted with a higher level of culpability, *i.e.*, recklessly or wantonly.” Id.

“Because immunity provides . . . immunity from suit, rather than a mere defense to liability, if at all possible, immunity claims are to be resolved before trial.” Conrad v. N.H. Dep’t of Safety, 167 N.H. 59, 70 (2014); see also Hunter v. Bryant, 502 U.S. 224, 228 (“Immunity ordinarily should be decided by the court long before trial.”). “Given that purpose of immunity is to operate as a bar to a lawsuit, it is effectively lost if a case is erroneously permitted to go to trial.” Id. (quotation omitted). As such, “[s]overeign immunity is a jurisdictional question[.]” Id. at 78.

Plaintiffs argue the Gun Line did not act with due care when completing its investigation into Mr. MacPherson. See Doc. 72 at 16–17. Specifically, Plaintiffs allege that the Gun Line failed to act with due care by not processing Mr. MacPherson’s background check in a timely manner, and with respect to its investigation into whether

Mr. MacPherson was diagnosed with schizophrenia. Id. NHDOS counters the Gun Line acted properly as it had no knowledge that Mr. MacPherson was ever involuntarily committed or adjudicated defective or otherwise disqualified from owning a firearm under 18 U.S.C. § 922(g)(8). Doc. 62 at 16–17.

Plaintiffs first contend the Gun Line did not act with due care based on the delay in beginning its investigation into Mr. MacPherson. The Gun Line is authorized to “become the point of contact for federal government purposes of the [NICS].” RSA 159-D:1. The Gun Line has assumed this role for the purchase of handguns. Doc. 82 ¶ 49. “In other words, if a person wishes to purchase a handgun from a[n FFL], the Gun Line conducts the background investigation.” Doc. 72 Ex. 1 ¶ 6. To complete such check, the Gun Line searches the NICS database to determine if a transferee is disqualified from purchasing a firearm. Doc 82 ¶ 50. The Gun Line also has access to other New Hampshire databases to search for potential disqualifiers. Id.

Here, the Gun Line received notice of Mr. MacPherson’s interest in buying a handgun on March 19, 2016. Doc. 70 Ex. 1 ¶ 22. During the instant search of Mr. MacPherson’s record, a Gun Line employee learned that Mr. MacPherson was listed as a disqualified person under the NICS Index for a misdemeanor crime of domestic violence. Id. ¶¶ 23, 24 (Mr. MacPherson had a criminal record that included three simple assault convictions and one disorderly conduct conviction—which could have been disqualifying as misdemeanor crimes of domestic violence). Knowing that misdemeanor crimes of domestic violence were at times false denials, the Gun Line employee delayed the transfer of the firearm in order to conduct further research. Id. ¶¶ 25–26.

On March 23, 2016, the Gun Line began researching Mr. MacPherson's application and made a request for police reports and related court case summaries regarding Mr. MacPherson's criminal record. Doc. 82 ¶ 24. After receiving responsive documents later that day, the Gun Line determined that none of Mr. MacPherson's prior convictions met the requirements to disqualify him from purchasing a firearm. Id. ¶ 26. Therefore, despite the delay in beginning its investigation, the Gun Line concluded its investigation into Mr. MacPherson's criminal history prior to the date the FFL would be allowed to sell Mr. MacPherson a weapon based on the delayed status. See id. ¶ 23 (stating Chester Arms could not transfer the firearm until after March 23, 2016 (emphasis added)). Accordingly, the Court finds the elements of RSA 541-B:19, I(b) met with regards to Gun Line's actions in beginning its search, and its search into Mr. MacPherson's criminal history.

Plaintiffs next contend the Gun Line did not act with due care when investigating Mr. MacPherson's mental health history. In accordance with 18 U.S.C. § 922(g)(4), it is unlawful for a person "who has been adjudicated as a mental defective or who has been committed to a mental institution" to possess a firearm. "[A]djudicated as a mental defective" means that "a court, board, commission, or other lawful authority" has determined that the individual, "as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease: (1) is a danger to himself or to others; or (2) lacks the mental capacity to contract or manage his own affairs." 27 C.F.R. 478.11. "[C]ommitted to a mental institution" means "[a] formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority," including involuntary commitment for "mental defectiveness," mental illness, or other reasons,

such as drug use. Id. However, “[t]he term does not include a person in a mental institution for observation or a voluntary admission” Id.

There is no dispute that the Gun Line is required to determine whether an individual is allowed to possess a firearm. However, under New Hampshire law “[n]o person, organization, department, or agency shall submit the name of any person to the [NICS] on the basis that the person has been adjudicated a ‘mental defective’ or has been committed to a mental institution, except pursuant to a court order issued following a hearing in which the person participated and was represented by an attorney.” RSA 126-AA:2.

In this case, Detective Park sent a fax to the Gun Line stating:

Merrimack Police have been made aware that [Mr. MacPherson] has attempted to purchase a firearm at a retail outlet in Chester. [MPD] ha[s] had many dealings with [Mr.] Mac[P]herson to include having been made aware through family members that he has been diagnosed with schizophrenia. [Mr.] MacPherson has displayed on many occasions delusional behavior which should serve as a significant concern should he obtain a firearm.

Doc. 62 at 39; but see Doc. 71 at 83 (Detective Park stating he did not know if Mr. MacPherson was ever committed for his mental health issues). Additionally, in one of the case summaries, the Gun Line learned that Mr. MacPherson was evaluated for competence but, after evaluation, was allowed to enter a plea. Id. at 42. Based on these reports, the Gun Line inquired further with the court if there was anything that had not been provided regarding Mr. MacPherson’s mental health history. Doc. 71 at 50. However, because the Gun Line was unable to access documentation stating Mr. MacPherson was either adjudicated a “mental defective” or committed to a mental

institution, the Gun Line continued to label Mr. MacPherson's transaction as delayed.
Id. at 55–56.

The Court finds the Gun Line acted with due care in attempting to determine if Mr. MacPherson met the criteria under 18 U.S.C. § 922(g)(4). Indeed, the Gun Line attempted to secure information regarding Mr. MacPherson's mental health history through inquiring with the court system after speaking with Detective Park. It is possible the Gun Line could have taken additional steps, such as contacting Mr. MacPherson directly or instituting an action under RSA 126-AA:2. However, the Court notes 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. Under these circumstances, the Court cannot conclude, and no reasonable jury could find, that the Gun Line's failure to pursue alternative paths constituted a lack of due care.

Further, to the extent Plaintiffs contend that Mr. MacPherson should have been denied access to a firearm based on mere allegations of his mental illness, the Court finds that such an action would have been inconsistent with federal regulation. See 18 U.S.C. § 922(g)(4) (requiring an adjudication as a "mental defective" or paperwork showing an individual has been committed to a mental institution in order to deny the individual access to a firearm). In addition, infringing on an individual's right to keep and bear arms based on an unsubstantiated report would not comport with the State Constitution. See N.H. Const. pt. I, art. 2-a ("All persons have the right to keep and bear arms in defense of themselves, their families, their property and the state.")

In light of the foregoing, the Court finds based upon the undisputed material facts before it that the Gun Line investigated Mr. MacPherson's application to purchase the Pistol with due care. Accordingly, the elements of RSA 541-B:19, I(b) have been satisfied, and that NHDOS is entitled to sovereign immunity. To the extent Plaintiffs contend that the Gun Line should have greater access to resources to investigate an applicant's fitness to own firearms, the Court finds such an inquiry to be a legislative and not a judicial question. See Cram v. School Bd., 82 N.H. 495, 496 (1927). Therefore, NHDOS's motion for summary judgment is **GRANTED**.

Conclusion

For the reasons outlined above, the Court **GRANTS** Defendants' motions for summary judgment.

Date: February 11, 2022



Hon. David W. Ruoff

Clerk's Notice of Decision
Document Sent to Parties
on 02/14/2022