MEMORANDUM

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To: Charles H. Huckelberry, Pima County Administrator

From: Andrew Flagg, Chief Civil Deputy County Attorney
Clayton Kramer, Deputy County Attorney

Clayton Kramer

Date: December 10, 2019

Subject: Gun Shows at the Pima County Fairgrounds

Issues

You have asked three questions about gun shows occurring at the Pima County Fairgrounds:

1. Can the County require background checks on all gun sales held at the Fairgrounds?

2. If the answer to question 1 is no, what legislative change would be necessary to allow the County to require federal universal background checks on gun sales at the Fairgrounds?

3. Does Pima County face any potential liability by allowing gun shows to continue at the Pima County Fairgrounds given that the specific uses of the grounds are determined by the Southwestern Fair Commission and the County is precluded from regulating gun shows by state legislation?

Brief Answers

1. No. This is expressly prohibited by state law, and the County has no authority to override that law.

2. An amendment deleting or modifying portions of A.R.S. § 13-3108 would free the County to require background checks to be conducted on all sales on any property owned by the County, including the Fairgrounds.

3. Any risk of liability is very remote. Because the County does not owe a duty to an individual injured by a firearm sold at a gun show, a claim sounding in negligence would fail. Moreover, the County is barred from taking steps to limit the transfer of firearms, posing a substantial barrier for a plaintiff to establish a breach of any existing duty. Further, the County is far-removed from the transfer of firearms, likely precluding a plaintiff from establishing causation for any injuries resulting from a firearm sold at a gun show. Finally, qualified immunity and the management agreement for the fairgrounds provide additional limitations on County liability.

Background

Pima County owns the Fairgrounds, and they are managed by the Southwestern Fair Commission, Inc., under a management agreement. Under that management agreement, it is the Southwestern Fair Commission, not the County, that permits individual uses of the Fairgrounds, including gun shows.

On December 3, 2019, the Board of Supervisors was provided materials by a community member suggesting gun shows at the Pima County Fairgrounds pose "an important liability risk." In those materials, the community member contends allowing the "Crossroads of the West" gun show to continue at the fairgrounds "can be considered gross negligence." The community member's primary concern appears to be liability associated with "the gun show loophole," which allows for the private sale of firearms without a background check. As a result of those transfers, the community member argues "[t]he gun show has created a black market of guns being diverted into criminal activities in Pima County." The community member further questions the background of the owners and organizers of the "Crossroads of the West." Significantly, the community member does not allege those individuals lack the required legal qualifications to organize the event or have committed misconduct in their role organizing the event.

Analysis

1. The County cannot require background checks for gun sales at the Fairgrounds.

As we have previously advised, A.R.S. § 13-3108, the firearms-preemption statute, severely restricts the ability of a local government like the County to legislate in the area of firearms. Relevant here, the statute:

- Prohibits "any ordinance [or] rule . . . relating to the . . . sale, transfer, purchase, [or] acquisition . . . . of firearms or ammunition," unless authorized by subsection (G) of the statute, § 13-3108(A);
- Prohibits the County from "requir[ing] . . . any identifying information of a person who . . . purchases . . . a firearm" ("[e]xcept in the course of a law enforcement investigation"), § 13-3108(C)(2);

- Allows limited "regulation of commercial land and structures," but expressly says that permission does not allow the County to "regulate the sale or transfer of firearms on property it owns, leases, operates or controls in a manner that is different or inconsistent with state law," § 13-3108(G)(3)(a); and
- Applies whether or not the County is acting in a governmental or proprietary capacity, § 13-3108(M).

Both because identification is required to complete a background check, and because background checks are not required for private sales under state law, the statute clearly prohibits the County from requiring background checks on sales at the Fairgrounds.

2. Amendments to § 13-3108 would allow the County to require background checks on gun sales at the Fairgrounds.

Federal law does not prohibit state and local governments from requiring background checks on private sales. So the sole impediment to the County's ability to do so is state law. If § 13-3108 were amended in two respects, the prohibition would be removed. First, an exception could be added to § 13-3108(C)(2) allowing political subdivisions to require identification in connection with a background check through the National Instant Criminal Background Check System. Second, § 13-3108(G)(3)(a) could be deleted. Our office would be happy to assist with drafting a proposed amendment if so directed.

3. Any liability risk to the County under current law is very remote for several reasons.[1]

A. Negligence

In order to establish a claim for negligence, a plaintiff must establish an existing duty owed by the defendant, a breach of that duty, a causal connection between the defendant's conduct and the resulting injury, and actual damages. *See Gipson v. Kasey*, 214 Ariz. 141, ¶ 9 (2007). Under the circumstances here, a prospective plaintiff would face substantial barriers to establish duty, breach, and causation.

i. Duty

Whether a duty exists is a matter of law for the court to decide. *Id.* ¶ 9. "Duties of care may arise from special relationships based on contract, family relations, or conduct undertaken by the defendant." *Id.* ¶ 18. In *Bloxham v. Glock, Inc.*, the court addressed the liability of a handgun manufacturer and gun-show operators for a shooting by a third party involving a weapon sold at a gun show. 203 Ariz. 271, ¶ 1 (App. 2002). There, the plaintiffs argued the gun-show operators were negligent because they "had failed 'to impose distribution requirements'" and "had failed to adequately screen gun sellers and buyers and regulate sales at their gun shows." *Id.* ¶ 3. The court ultimately concluded that neither the manufacturer nor the gun-show operator owed a duty "to

[1]This memorandum limits its analysis to potential liability associated with an individual purchasing a firearm at a gun show and causing a subsequent injury. It does not analyze the potential liability associated with an injury that occurs on the premises of the fairgrounds. Under circumstances where an injury occurred on County-owned property, the analysis below—particularly as it relates to duty—would differ.

control all sales at gun shows by third parties to third parties," and, as a result, were not liable to the plaintiffs. *Id.* ¶¶ 1, 10.

In reaching its conclusion, the court noted that the plaintiffs had not alleged the defendants themselves participated in any unlawful conduct and that "other courts faced with similar issues have almost uniformly refused to impose any duty on businesses related to the legal use and distribution of firearms owed to those harmed by the misuse of those firearms." *Id.* ¶¶ 10, 12. The court also considered a theory based on premises liability, and concluded the theory did not apply because the shooting victims were not tenants or guests of the gun-show operators, were not injured on the gun-show operators' property, and no relationship existed between them and the gun-show operators. *Id.* ¶ 13.

Under the circumstances raised here, the County would be even further removed than the gun-show operator in *Bloxham*. Given that the gun-show operator in *Bloxham* owed no duty to the plaintiffs, it is difficult to imagine a circumstance where the County would owe a duty to an individual harmed by a firearm sold at a gun show. Moreover, none of the "categorical relationships" that can give rise to a duty—such as landowner-invitee or tavern owner-patron—appear to apply between the County and a third party injured by a firearm sold at a gun show. *Gipson*, 214 Ariz. 141, ¶ 19; *see also Ontiveros v. Borak*, 136 Ariz. 500, 508-509 (1983). Thus, a negligence claim against the County would very likely stumble at the outset, for lack of a duty.

ii. Breach

Even were a plaintiff to somehow establish a duty of care, the plaintiff would also have to show that duty was breached. The determination of whether a party has breached its duty of care is a fact-intensive inquiry, and is generally reserved for the jury. *See Gipson*, 214 Ariz. 141, ¶ 9. But the issue can be decided by the court without a trial "if no reasonable juror could conclude that the standard of care was breached." *Gipson*, 214 Ariz. at 143 n.1. Under the posed hypothetical, it is unclear precisely what duty the County would owe a third party injured by a firearm purchased at a gun show. Presumably, however, a plaintiff would argue the County had a general duty of care to ensure a gun show was conducted in a reasonably safe manner. As a result of the statutory limitations imposed on the County by our legislature, breach would be difficult to establish under this theory.

As noted above, A.R.S. § 13-3108 severely limits local ability to regulate firearms. It generally provides that the regulation of firearms is a power reserved only to the state, and it provides for a civil penalty of up to fifty thousand dollars against any political subdivision that knowingly and wilfully violates the statute. A.R.S. § 13-3108(I). Neither good faith nor consultation with counsel is a defense to a violation of the statute. A.R.S. § 13-3108(H). The statute does provide an exception that allows a political subdivision to regulate commercial land and structures, but that exception explicitly states:

> Notwithstanding any other law, this paragraph does not . . . [a]uthorize a political subdivision to regulate the sale or transfer of firearms on property it owns, leases, operates or controls in a manner that is different than or inconsistent with state law. For purposes of

> this subdivision, a use permit or other contract that provides for the use of property owned, leased, operated or controlled by a political subdivision shall not be considered a sale, conveyance or disposition of property.

A.R.S. § 13-3108(G)(3)(a).

In *McMann v. City of Tucson*, the court considered a city ordinance "requiring instant background checks for prospective gun purchasers during gun shows held at the Tucson Convention Center (TCC)." 202 Ariz. 468, ¶ 1 (App. 2002). There, the plaintiffs sought to enjoin the city from enforcing the ordinance, arguing a prior version § 13-3108 preempted it. *Id.* ¶ 1. The *McMann* court ultimately upheld the ordinance, concluding the ordinance was a matter of local concern related to the city's control of its own property—the lease of the TCC. *Id.* ¶¶ 7, 9-12, 18. The following year, the legislature amended § 13-3108 to include the language in subsection (G)(3)(a), quoted above, foreclosing a political subdivision from requiring background checks like those in *McMann*. 2003 Ariz. Sess. Laws, Ch. 162, § 1.

In light of the language and history of § 13-3108, there appears to be little action the County could lawfully take to regulate gun shows at the fairgrounds. Therefore, in the context of a breach analysis, it would be problematic for a plaintiff to establish a breach of any duty of care. If the County is precluded from taking an action to make gun shows safer, it would be difficult to establish that action is required by the applicable duty of care.

iii. Causation

Like breach, the element of causation is a factual issue generally decided by a jury, *see Gipson*, 214 Ariz. 141, ¶ 9, but it also can be decided by the court without a trial if no reasonable juror would find causation, *Gipson*, 214 Ariz. at 143 n.1. Determining causation involves two separate considerations: whether the defendant was a "cause-in-fact" of the injury, and whether the defendant was a proximate cause of the injury. *See Ontiveros*, 136 Ariz. 205-06; *Fedie v. Travelodge Int'l, Inc.*, 162 Ariz. 263, 266 (App. 1989). Cause-in-fact exists if the defendant's "conduct contributed to the result and if that result would not have occurred 'but for' [the] defendant's conduct." *Ontiveros*, 136 Ariz. at 205. Even if a defendant's actions were a "but for" cause of the plaintiff's injuries, a defendant is not liable if a superseding cause of independent origin brings about an injury. *See id.* at 205-06. A superseding cause exists when "an intervening act of another was unforeseeable by a reasonable person in the position of the original actor *and* when, looking backward, after the event, the intervening act appears extraordinary." *Id.* at 206; *see also Fedie*, 162 Ariz. at 266 ("[A] crime is a superseding cause of harm unless the defendant should have foreseen the crime.").

Even assuming a plaintiff established duty and breach, a plaintiff would face difficulty in establishing causation under the hypothetical presented here. The actions of the County as the owner of the fairgrounds would be far-removed from any eventual harm caused by a firearm purchased at a gun show. Indeed, there would be several intervening actors between an injury and the County: the individual who committed a tortious act with a purchased firearm, the individual vendor who sold the firearm, the gun-show operator who coordinated the event, and the Southwest

Fair Commission that determines the uses of the fairgrounds. In light of the number of intervening actor involved, as well as the intervening commission of a crime, it would be difficult to establish proximate causation between the County's conduct and a resulting injury.

B. Additional Limitations on Liability

In Arizona, government entities and employees are generally subject to tort liability for their negligence. *Greenwood v. State*, 217 Ariz. 438, ¶ 14 (App. 2008). The Actions Against Public Entities or Public Employees Act provides an exception to the general rule, however. *Id.* Under A.R.S. § 12-820.02(A)(8):

> Unless a public employee acting within the scope of the public employee's employment intended to cause injury or was grossly negligent, neither a public entity nor a public employee is liable for . . . [t]he failure to prevent the sale or transfer of a handgun to a person whose receipt or possession of the handgun is unlawful under any federal law or any law of this state.

To our knowledge, our courts have not yet interpreted the scope of § 12-820.02(A)(8), but they have provided guidance on the issue of gross negligence under other provisions of the qualified-immunity statute. In *Noriega v. Town of Miami*, the court acknowledged that the definition of gross negligence is inexact, but clarified that it is something more than negligence, closer to recklessness, and "usually involves a conscious disregard of a risk." 243 Ariz. 320, ¶ 36 (App. 2017) (quoting *Weatherford ex rel. Michael L. v. State*, 206 Ariz. 529, n.4 (2003)).

Based on *Noriega*, to overcome qualified immunity a prospective plaintiff would have to show the County consciously disregarded a risk by allowing a gun show on County property. It thus follows that a plaintiff would also have to show that gun shows pose an inherent risk, and that the County approaches recklessness by allowing them. It seems highly unlikely a plaintiff would be able to meet this burden: gun shows themselves are lawful, and our legislature has limited the County's ability to regulate them. Because it is unlikely a court would agree the County acted with gross negligence, qualified immunity should shield the County from liability.

An important limitation to this immunity exists, however, as the language of the statute only applies to the unlawful transfer of handguns instead of a broader term, like firearms. *Cf.* A.R.S. §§ 13-105 ("'Firearm' means any loaded or unloaded handgun, pistol, revolver, rifle, shotgun or other weapon that will or is designed to or may readily be converted to expel a projectile by the action of expanding gases, except that it does not include a firearm in permanently inoperable condition."), 44-7851 (similar). Strictly construing the statutory language, the County arguably would not be entitled to immunity for the unlawful transfer of another type of weapon—such as a rifle.

In the event the County does face liability, the Southwestern Fair Commission is required to indemnify the County for liability arising from the use of the fairground under the current management agreement. *See Management Agreement for the Pima County Fairgrounds*, § 17. The commission is further required to carry commercial general liability insurance in an amount

not less than five million dollars. *See id.* at § 18.1.1. We have confirmed with the Risk Manager that the commission is in compliance with the insurance requirements. These safeguards provide an additional buffer from County liability.

Conclusion

State law prohibits the County from requiring background checks on gun sales at the Fairgrounds. This prohibition could be lifted by amending the state firearms-preemption statute. The County is unlikely to face any liability by allowing gun shows to continue at the Pima County Fairgrounds. In the event that it does, its liability should be limited by qualified immunity and indemnification.