



No. 49A02-1501-CT-00042

IN THE
INDIANA COURT OF APPEALS

KS&E SPORTS AND EDWARD J. ELLIS,

Appellants,

v.

DWAYNE H. RUNNELS,

Appellee.

On Interlocutory Appeal
From the Marion County Superior Court
Trial Court Cause No. 49D11-13-12-CT-044030 (Hanley, J.)

BRIEF OF *AMICI CURIAE* LAW ENFORCEMENT
AND MUNICIPAL ORGANIZATIONS

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TABLE OF CONTENTS

INTERESTS OF *AMICI CURIAE*..... 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. NO RATIONAL LEGISLATURE WOULD INCENT STRAW SALES AND MAKE HARM TO ITS LAW ENFORCEMENT AGENTS *MORE* LIKELY. 6

 A. Illegal Straw Sales Are A Major Source Of Crime Guns In Indiana And The United States..... 6

 B. Crime Guns From Straw Sales Increase The Risk Of Violence Against Law Enforcement. 8

 C. There Is No Indication That Indiana Has Anointed Itself The Armory Of The Midwest..... 11

II. ANY LIMITED IMMUNITY AFFORDED BY IND. CODE § 34-12-3-3(2) DOES NOT PRECLUDE CIVIL LIABILITY FOR CONSPIRACY OR PUBLIC NUISANCE..... 14

 A. Since There Is No Such Thing As A “Third Party” Under Indiana Conspiracy Law, The “Immunity” Provision Does Not Apply..... 15

 B. There Is No “Third Party” To Blame For KS&E’s Status As An Unlawful Public Nuisance..... 17

CONCLUSION..... 19

CERTIFICATE OF COMPLIANCE WITH APP. R. 43 and 44 20

CERTIFICATE OF SERVICE..... 21

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Abramski v. U.S.</i> , 134 S. Ct. 2259 (2014)	7, 11
<i>Bacompt Sys., Inc. v. Peck</i> , 2007 WL 854020 (S.D. Ind. 2007)	16
<i>Boyle v. Anderson Fire Fighters Ass'n Local 1262, AFL-CIO</i> , 497 N.E.2d 1073 (Ind. Ct. App. 1986)	15
<i>City of Gary ex rel. King v. Smith & Wesson Corp.</i> , 801 N.E.2d 1222 (Ind. 2003)	18
<i>Comm'r, Dep't of Enuvtl. Mgmt. v. RLG, Inc.</i> , 755 N.E.2d 556 (Ind. 2001)	12
<i>Hankerson v. State</i> , 621 S.E.2d 772 (Ga. Ct. App. 2005)	16
<i>Indep. Trust Corp. v. Stewart Info. Services Corp.</i> , 2011 WL 529390 (N.D. Ill. 2011)	16
<i>Irvine v. Rare Feline Breeding Ctr., Inc.</i> , 685 N.E.2d 120 (Ind.Ct. App. 1997)	17
<i>Lemongello v. Will Company, Inc.</i> , 2004 WL 5203040 (W.Va. Cir. Ct. 2004)	9
<i>Lemongello v. Will Jewelry and Loan</i> , 2004 WL 1453520 (W.Va. Cir. Ct. 2004)	9
<i>S. Bend Cmty. Sch. Corp. v. Widawski</i> , 622 N.E.2d 160 (Ind. 1993)	17
<i>Watkins v. Penn</i> , 2007 WL 2265060 (S.D. Ind. 2007)	17
<i>Williams v. Beemiller, Inc.</i> , 952 N.Y.S.2d 333 (N.Y. App. Div. 2012)	10
<i>Willis v. State of Ind.</i> , 806 N.E.2d 817 (Ind. Ct. App. 2004)	12

STATUTES

18 U.S.C. § 922(a) 11

18 U.S.C. § 922(b) 11

18 U.S.C. § 922(t)..... 11

18 U.S.C. § 924(a) 11

Ind. Code § 32-30-6-6..... 17

Ind. Code § 34-12-3-1 18

Ind. Code § 34-12-3-3(2)..... 3, 14, 15, 17

Ind. Code § 35-47-2.5-16 11

STUDIES

Brady Center to Prevent Gun Violence, *Smoking Guns: Exposing the Gun Industry's Complicity in the Illegal Gun Market* (2003) 7

City of Chicago, Office of the Mayor, *Tracing Guns: The Impact of Illegal Guns on Violence in Chicago* (May 24, 2014)..... 14

Dep't of Justice, *Gun Shows: Brady Checks and Crime Gun Traces* (1999) 12

Dep't of Justice, *The Bureau of Alcohol, Tobacco, Firearms and Explosives' Investigative Operations at Gun Shows* (June 2007) 9

Dep't of the Treasury, Bureau of Alcohol, Tobacco, & Firearms, *Crime Gun Trace Reports (2000) Albuquerque (2002)* 7

Dep't of the Treasury, Bureau of Alcohol, Tobacco, & Firearms, *Following the Gun: Enforcing Federal Laws Against Firearms Traffickers* (2000) 6

JOURNALS AND LAW REVIEWS

Kraft, *Firearms Trafficking 101 or Where Do Crime Guns Come From?*, 50 Project Safe Neighborhoods 6, (Jan. 2002)..... 10

Polston, *Civil Liability for High Risk Gun Sales: An Approach to Combat Gun Trafficking*, 19 SETON HALL LEGIS. J. 821 (1995) 12

Siebel, <i>City Lawsuits Against the Gun Industry: A Roadmap for Reforming Another Deadly Industry</i> , 18 ST. LOUIS. PUB. L. REV. 247, (1999).....	8
Sorenson & Vittes, <i>Buying a Handgun for Someone Else: Firearm Dealer Willingness to Sell</i> , 9 INJ. PREVENTION 147, (2003).....	8
Webster & Vernick, <i>Reducing Gun Violence in America: Informing Policy with Evidence and Analysis</i> , (J. HOPKINS U. PRESS 2013)	12
Webster, et al., <i>Effects of State-Level Firearm Seller Accountability Policies on Firearm Trafficking</i> , 86 J. OF URBAN HEALTH 525, (2009)	13
Weil & Knox, <i>Effects of Limiting Handgun Purchases on Interstate Transfer of Firearms</i> , J. AM. MED. ASSOC., (1996).....	13
Wintemute, <i>Firearm Retailers' Willingness to Participate in an Illegal Gun Purchase</i> , 87 J. OF URBAN HEALTH 865, (2010)	8
NEWS REPORTS	
<i>3 Killed, 33 Wounded in Weekend Gun Violence</i> , CHI. TRIB., June 22, 2015	13
<i>Agenda for Change '95</i> , ATLANTA J. AND CONST., Jan. 12, 1995.	13
<i>Rochester Woman Who Acted as Straw Buyer of Guns, etc.</i> , N.Y. DAILY NEWS, Dec. 28, 2012	10
Schulman et al., <i>Gun By Gun: Five Years of Damage Done by Weapons Bought from Ohio Gun Dealers</i> , BUFFALO NEWS, June 12, 2005.....	10
Thompson, <i>Guns Used to Kill Police Officers: Where They Come From and How They Get in the Hands of Criminals</i> , WASH. POST, Nov. 21, 2010.....	9, 13
OTHER AUTHORITIES	
15A C.J.S. Conspiracy § 19 (2015)	16

INTERESTS OF *AMICI CURIAE*

Amicus Major City Chiefs Association (“MCCA”) is a professional association comprised of police chiefs and sheriffs representing more than seventy of the largest cities in the United States, Canada, and the United Kingdom. It serves 91.4 million people (70 US – 11.5 Canada – 9.9 UK) with a sworn workforce of 241,257 (162,425 US, 21,939 Canada, 56,893 UK) officers and non-sworn personnel. MCCA is well represented in the Midwest, representing police chiefs from the cities of Chicago, Cincinnati, Cleveland, Columbus, Indianapolis, Louisville, Kansas City, St. Louis and Milwaukee.

Amicus International Brotherhood of Police Officers (“IBPO”) is one of the largest police unions in the country, representing a significant number of members across the nation. Though the IBPO fully supports and defends the Second Amendment right to keep and bear arms, it strongly supports reasonable federal and state gun laws that protect the public and law enforcement officers from persons who cannot be trusted to possess firearms.

Amicus City of Gary, Indiana is particularly impacted by gun violence. As a result, the City has filed a suit against gun manufacturers and gun dealers accused of encouraging the illegal sale of handguns in Gary, Indiana. The City therefore has a unique perspective on the Indiana immunity provision’s potential to increase the risks of gun deaths and injuries. It joins in the view that straw sales by rogue dealers are a scourge on local communities and the men and women sworn to protect them, that Indiana has not in some way immunized dealers from civil liability when they engage in illegal straw sales. It strongly believes that businesses

should be held accountable for supplying guns they know will reach criminals and others who legally cannot buy them.

Amicus Larry McKinley is the Chief of Police for the City of Gary Indiana, which employs nearly 200 law enforcement officers.

Amici MCCA and IBPO, as part of their advocacy mandates, seek to impact policy that affects the safety of law enforcement officers and the citizens they are sworn to protect. As a municipality and its Chief of Police, the City of Gary, Indiana, and Chief McKinley experience the daily impact of such policies. This case falls squarely within each *amici's* interest and expertise. Illegal straw sales contribute to criminality and violence against law enforcement all across our nation, and especially in major cities and surrounding urban areas (with both Chicago and Gary being significant examples). The interpretation of law urged by the appellant firearm dealer, if credited, has the potential to greatly affect whether illegal straw sales will proliferate, to the detriment of the citizens of Indiana, its law enforcement officers, Indiana's neighboring states, and their law enforcement officers. Accordingly, the interests of *amici* in this case are profound.

In the pages that follow, *amici* first explain just how dangerous and misguided the appellants' contentions are. Thereafter, *amici* show that, even if their contentions were credited, the judgment below should be affirmed, and the case permitted to proceed. That is because no matter how far they are stretched, even those misguided arguments do not encompass all of Officer Runnels' claims.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici are united in the view that straw sales by rogue dealers are a scourge on local communities and the men and women sworn to protect them. In addition to the general criminality illegal gun sales (like straw sales) foment, the impact of such sales falls disproportionately on law enforcement. Fortunately, the federal government, supplemented by the laws in most states (including Indiana), makes straw sales illegal. The question presented here is whether Indiana, deliberately or not, has immunized dealers from civil liability when they engage in such sales.

The answer, of course, is no.

We agree with the positions put forth by our fellow officer, Dwayne Runnels, who is the apparent victim of a straw sale engaged in between the Defendants (KS&E Sports and Edward Ellis), the man who shot Officer Runnels, and the man who served as their go-between. Specifically, the canons of statutory construction preclude the reading urged by KS&E, that is, that the limited protection under Ind. Code § 34-12-3-3(2) for (i) *lawful* sales and (ii) harm caused by *third party purchasers* also protects against claims of harm arising out of *unlawful sales* made by *sellers*. That reading is inconsistent with the text and structure of the Act.

A simple example illuminates why the reading urged is either wrong or, if technically correct, unenforceable, because it would be absurd. Suppose the man who shot Officer Runnels and the middleman who procured his weapon entered KS&E and asked a salesperson for a good gun to use to in a shoot-out. Suppose they asked for “armor-piercing” bullets. Suppose they admitted that the one was purchasing on the other’s behalf, and that when they get out into the parking lot

they would complete the straw sale. Suppose they said they planned to shoot Officer Runnels. Suppose they then paid and went on their way.

According to KS&E, the Indiana Legislature has not only failed to provide for civil liability to the victims of this sort of act, it has immunized it. Better yet, in doing so the Legislature has not just failed to protect its citizens and its law enforcement officers, it has incited such sales by protecting the profits they engender. That cannot be right, as Officer Runnels has shown.

In addition to supporting Officer Runnels, we write to provide further information the Court may find helpful.

First, we explain, from the perspective of those on the front lines, why KS&E's reading of the law is untenable. No rational legislature would incent straw sales and make harm to its law enforcement agents *more* likely. Yet that is the upshot of this appeal. Decades of studies have shown that illegal straw sales are a major source of crime guns in Indiana and the United States. The common thread binding years of sting operations is that in every one of them, many dealers abide by the law, while many others do not. The notion that Indiana treats both types the same is just wrong.

Second, we show that crime guns from straw sales increase the risk of violence against law enforcement. When firearm retailers facilitate straw purchases, more guns flow into the hands of violent criminals. More criminals with guns give rise to more violent crime, and more violent crime causes more violence against law enforcement. As one might expect, this logical point is borne out

statistically and anecdotally. There is no world in which this result reflects the *intent* of the Indiana Legislature.

Third, we explain that Indiana law rationally seeks to inhibit, not foster, straw sales. The federal government already regulates gun dealers and makes straw sales illegal. Indiana law goes even further. This is inconsistent with any notion that Indiana has anointed itself the armory of the Midwest. But that is what KS&E's reading of the law would make it. It is well-established that the states with lax dealer regulation are magnets for criminals, and incubators of crime. Such crime is then dispersed back to neighboring states that *do* try to prevent illegal gun sales.

Fourth, we discuss why KS&E's contention that it cannot be held accountable for the unlawful acts of "third parties" is misguided and irrelevant. As noted, this reading of the law, on its own terms, is mistaken. But more than that, as pled, a number of Officer Runnels' claims are not vulnerable to even KS&E's mistaken vision of the law. That view requires that there be some "third party" to shift blame to, because KS&E's interpretation immunizes, at most, damages caused by *others*. Perhaps most notably, the Conspiracy claim (Count VI) cannot be defended this way because under settled Indiana law the acts of all members of the conspiracy are the acts of *each* of them. That is, there is no such thing as a "third party" to a conspiracy. Similarly, there is no "third party" for KS&E to blame when it comes to Runnels' Public Nuisance claim (Count VII) – KS&E *is* the nuisance. Accordingly, even under KS&E's interpretation, immunity for the acts of "third parties" does not apply.

* * *

Amici note that we are in an age when interactions between law enforcement officers and citizens often make headline news. Now is the *last* time to reward gun dealers who spurn the law and increase the likelihood that such interactions turn deadly. Accordingly, we urge the Court to affirm the Court below and permit Officer Runnels to obtain compensation for injuries suffered in the line of duty, presuming his allegations are true (which we do).

ARGUMENT

I. NO RATIONAL LEGISLATURE WOULD INCENT STRAW SALES AND MAKE HARM TO ITS LAW ENFORCEMENT AGENTS *MORE LIKELY*.

The thrust of KS&E's claim is that the Indiana Legislature deliberately eliminated civil liability for firearm dealers, including those engaged in unlawful straw sales, when a victim is harmed most directly by a "third party." Accepting this conclusion requires accepting the implicit premise that the Legislature deemed such sales insufficiently serious to warrant civil liability. Worse, KS&E's argument contains the implicit premise that the Legislature has taken an action that would increase the likelihood of injury to state and municipal law enforcement officers in its borders (and, we shall see, outside them too). It is law enforcement that feels the direct and brunt impact of lax straw sale regulation, as this case shows in spades.

These premises are baseless and should be rejected.

A. Illegal Straw Sales Are A Major Source Of Crime Guns In Indiana And The United States.

Straw purchases are a primary source of "crime guns," or firearms used in crimes. See Dep't of the Treasury, Bureau of Alcohol, Tobacco, & Firearms (ATF),

Following the Gun: Enforcing Federal Laws Against Firearms Traffickers (2000), at 18. Nine of ten crime guns were transferred from the original purchaser to the criminal. Dep't of the Treasury, Bureau of Alcohol, Tobacco, & Firearms (ATF), *Crime Gun Trace Reports (2000) Albuquerque* (2002), at 8. In some cases a straw purchaser is a friend or a relative. *Id.* at 2 and A6. In others, he or she is a gang member or other criminal not yet in the background check system. *Id.* These purchases are illegal in all cases, and are a major factor in criminality generally, and harm to law enforcement specifically.¹

We acknowledge that there are many law abiding gun dealers in Indiana and the nation. That said, a significant number are brazenly unlawful. The anecdotal and statistical evidence is revealing.

In a set of sting operations considered in one study, officers posing as purchasers explained to dealers that they were felons and, therefore, required an accomplice to complete the paperwork. See Brady Center to Prevent Gun Violence, *Smoking Guns: Exposing the Gun Industry's Complicity in the Illegal Gun Market* 6-7 (2003). Nonetheless, firearms dealers repeatedly and willingly supplied these purchasers with guns. *Id.* One dealer even told the straw purchasers that the straw sales were "highly illegal," only to proceed to close out the sale. *Id.* at 7.

¹ A straw sale occurs whenever one person buys a firearm on "someone else's behalf while falsely claiming that it is for himself." See *Abramski v. United States*, 134 S. Ct. 2259, 2263 (2014).

In another study, seventy percent of dealers approached indicated that they were “willing to sell a handgun to the caller regardless of the stated end user of the gun.” Sorenson & Vittes, *Buying a Handgun for Someone Else: Firearm Dealer Willingness to Sell*, 9 INJ. PREVENTION 147, 148 (2003). More than half were willing to participate in a straw sale when told that “my girl/boyfriend needs me to buy him/her a handgun.” *Id.* When twenty retailers were told that “My girl/boyfriend needs me to buy her/him a handgun because s/he isn’t allowed to,” four agreed to assist in the commission of a felony. *Id.* at 149-50.

In one more study, many dealers were caught coaching the prospective straw purchaser on ways to skirt the law and make the sale appear legitimate. Wintemute, *Firearm Retailers’ Willingness to Participate in an Illegal Gun Purchase*, 87 J. OF URBAN HEALTH 865, 868 (2010). In these scenarios, dealers initially explain to a caller that the proposed transaction was illegal, but if the prospective purchaser came into their store they would “ignore the caller’s intent” to complete a sale and act as if she did not previously reveal her plan. *Id.*

According to KS&E’s argument, if these dealers were licensed in Indiana, they would have no need to worry about civil liability arising from these sales.

B. Crime Guns From Straw Sales Increase The Risk Of Violence Against Law Enforcement.

When firearm retailers facilitate straw purchases, more crime guns flow into the hands of violent criminals. Straw purchasing accounts for “almost 50% of the firearms trafficked into crime.” Siebel, *City Lawsuits Against the Gun Industry: A Roadmap for Reforming Another Deadly Industry*, 18 ST. LOUIS. PUB. L. REV. 247,

272 (1999). ATF investigations uncovered “widespread” straw purchasing from firearms dealers where guns were diverted to “convicted felons and local and international gangs.” Dep’t of Justice, *The Bureau of Alcohol, Tobacco, Firearms and Explosives’ Investigative Operations at Gun Shows* v-vi (June 2007). More criminals with guns give rise to more violent crime, and more violent crime causes more violence against law enforcement.

Felons prohibited from owning handguns kill more police officers than any other demographic. Thompson, *Guns Used to Kill Police Officers: Where They Come From and How They Get in the Hands of Criminals*, WASH. POST, Nov. 21, 2010, at 2. The guns they use, more often than not, begin at a legal source and are often purchased by a straw purchaser. *Id.* Indeed, firearms purchased from legal sources, like firearm dealers, kill more police officers than any category of firearms. *Id.*

Examples are myriad. In one case, a three-time felon enlisted a cab driver to travel to West Virginia and purchase 12 guns with over \$4,000 in cash, with the intent to sell them onto the black market in New Jersey. *Lemongello v. Will Company, Inc.*, 2004 WL 5203040 at *2 (W.Va. Cir. Ct. 2004). Shortly thereafter, these firearms were used in the near fatal shooting of two police officers in New Jersey. *See Lemongello*, 2004 WL 5203040 at *2.²

² The Court granted summary judgment in favor of the gun manufacturer. The action against the *seller* resulted in a large settlement. *Lemongello v. Will Jewelry and Loan*, 2004 WL 1453520 at *3 (W.Va. Cir. Ct. 2004) (settlement of \$1,000,000).

In another case, a convicted felon purchased an automatic weapon via a straw sale in Alabama, which he used to kill a Washington, D.C. police officer and two FBI agents. Kraft, *Firearms Trafficking 101 or Where Do Crime Guns Come From?*, 50 Project Safe Neighborhoods 6, 6-7 (Jan. 2002). More recently, a woman was implicated for supplying weapons to her neighbor, who had a prior conviction for killing his grandmother. He then used those weapons to ambush firefighters lured to a fire he set himself, killing two and wounding three others. *Rochester Woman Who Acted as Straw Buyer of Guns, etc.*, N.Y. DAILY NEWS, Dec. 28, 2012.

Some straw sales involve so many guns that they result in injuries to many officers, working different jobs in different jurisdictions. One Ohio dealer sold over a hundred handguns to straw purchasers working with a gun trafficker. *Williams v. Beemiller, Inc.*, 952 N.Y.S.2d 333, 336 (N.Y. App. Div. 2012). The trafficker then sold the guns in New York, precipitating a violent crime-wave against law enforcement. *Id.* One gunman fired at four officers with one trafficked gun. See Schulman et al., *Gun By Gun: Five Years of Damage Done by Weapons Bought from Ohio Gun Dealers*, BUFFALO NEWS, June 12, 2005 A8. Guns from the same series of straw sales were used against different officers searching a crack house. *Id.* Another officer was threatened with yet another gun from the same sales during a routine traffic stop. *Id.*

And yet, according to KS&E, if this Ohio dealer were an Indiana dealer, it would not face the prospect of civil liability for its actions.

C. There Is No Indication That Indiana Has Anointed Itself The Armory Of The Midwest.

As one might expect, state and federal law focuses on inhibiting straw sales, not fostering them. At the federal level, the Gun Control Act prohibits the straw sale of a firearm from any licensed firearm dealer. 18 U.S.C. § 922(a)(6); 18 U.S.C. § 924(a)(1)(A). Licensed dealers must verify the purchaser's identity and collect his name, age, and place of residence. See 18 U.S.C. §§ 922(b)(5), 922(t)(1)(C). Before a sale, a purchaser must formally declare him or herself the actual buyer of the firearm. See ATF Form 4473. Before the sale is completed, the seller must run a background check and ensure that the purchaser is not prohibited from owning a firearm. 18 U.S.C. § 922(t)(1)(A)-(B). If the purchaser "knowingly . . . make[s] any false or fictitious oral or written statement," he is guilty of participating in an illegal straw sale. See ATF Form 4473 at 2. Even if the person on whose behalf the straw purchaser is buying – e.g., the guy waiting in the parking lot – is legally entitled to purchase a firearm, the straw sale is still a felony. See *Abramski*, 134 S. at 2275.

Indiana law goes further, puncturing the notion that it prefers to be on the outer boundary of gun regulation. Indiana criminalizes the act of "providing a firearm to an individual who the person knows: (1) is ineligible to purchase . . . a firearm for any reason other than . . . age; or (2) intends to use the firearm to commit a crime." I.C. § 35-47-2.5-16. The penalty increases if the firearm that was transferred is later used to commit murder. *Id.* Indiana law applies to *all* transfers of firearms, even by unlicensed dealers or members of the public. Straw sales would

therefore be punishable even if they take place at gun shows, where background checks may not be required. See Dep't of the Treasury and Dep't of Justice, *Gun Shows: Brady Checks and Crime Gun Traces* 1 (1999).³

Just as Indiana has implemented gun violence prevention regulation beyond what the federal government has done, so too have other states. These regimes vary by type and degree. One consequence of this patchwork is that jurisdictions with weaker gun laws become importers of criminals into their borders, and exporters of crime guns outside of them. See Polston, *Civil Liability for High Risk Gun Sales: An Approach to Combat Gun Trafficking*, 19 SETON HALL LEGIS. J. 821, 829 (1995).

The statistics speak for themselves. A recent study indicated that nearly half of all crime guns that crossed state lines were supplied by just ten states. Mayors Against Illegal Guns, *Trace the Guns: The Link Between Gun Laws and Interstate Gun Trafficking* (Sept. 2010). Over thirty percent of the crime guns recovered in 2009 were first sold into commerce in another state by a federally licensed dealer. *Id.* The likelihood that an illegal straw sale will take place is six times greater in a state that does not regulate straw sales effectively versus a state that does. Webster & Vernick, *Reducing Gun Violence in America: Informing Policy with Evidence and Analysis* 112 (J. HOPKINS U. PRESS 2013).

³ It is common to provide for both criminal and civil liability over the same subject, in service of separate but complementary societal interests. See *Willis v. State of Ind.*, 806 N.E.2d 817, 823 (Ind. Ct. App. 2004) ("It is well settled that the Legislature may impose both a criminal and civil sanction in respect to the same act or omission."); *Comm'r, Dep't of Envtl. Mgmt. v. RLG, Inc.*, 755 N.E.2d 556, 561 (Ind. 2001).

Effective enforcement makes a difference inside, and outside, a state's borders. For example, Virginia had long been the major source of crime guns. Weil & Knox, *Effects of Limiting Handgun Purchases on Interstate Transfer of Firearms*, J. AM. MED. ASSOC. 1760-61 (1996). When it implemented a one-handgun-per-customer every thirty days policy, it fell from first to ninth among state sources of crime guns. *See Agenda for Change '95*, ATLANTA J. AND CONST., Jan. 12, 1995, at A10. Once again, when states decline to make themselves magnets for gun traffickers, law enforcement officers benefit directly. *See Thompson, supra* at 2 ("In general, states with looser gun laws had higher rates of fatal shootings of police officers, overall handgun killings, and sales of weapons that were used in crimes in other states") (citing 2008 study produced by Mayors Against Illegal Guns). The statistics are backed by the simplest logic; when fewer criminals with guns are on the streets, law enforcement officers face fewer life threatening encounters with violent criminals.

Statistics and logic also support the converse: states with weaker regimes attract more criminals and export more crime. Indeed, a criminal's proximity to states with weaker laws is a critical factor in his ability to obtain illegal straw sale guns. Webster, *et al.*, *Effects of State-Level Firearm Seller Accountability Policies on Firearm Trafficking*, 86 J. OF URBAN HEALTH 525, 528 (2009).

Indiana's proximity to Chicago means particular care is warranted here. In the first half of this year (2015), Chicago has had 203 homicides and 1,187 shootings. *3 Killed, 33 Wounded in Weekend Gun Violence*, CHI. TRIB., June 22, 2015. Almost sixty percent of the guns recovered in Chicago come from out of state. City of

Chicago, Office of the Mayor, *Tracing Guns: The Impact of Illegal Guns on Violence in Chicago* 4-5 (May 24, 2014). Indiana was the single largest source of crime guns flowing into Chicago from outside Illinois. *Id.* at 5-6. One dealer in Indiana was responsible for 515 crime guns recovered in a single year. *Id.* at 6-7.

* * *

These facts show that KS&E's burden on this motion is enormous. Indiana is neither the Wild West nor a rogue state with any intention to supervise a regulatory regime that, interpreted in KS&E's fashion, increases the likelihood of violence involving law enforcement. That leaves the question of whether, despite good intentions, Indiana passed a bad law that must be left to the Legislature to fix. As we explain below, reconvening the Legislature is unnecessary.

II. ANY LIMITED IMMUNITY AFFORDED BY IND. CODE § 34-12-3-3(2) DOES NOT PRECLUDE CIVIL LIABILITY FOR CONSPIRACY OR PUBLIC NUISANCE.

Officer Runnels' brief does the heavy lifting regarding the infirmity of KS&E's legal arguments, which *amici* support. In sum, even under KS&E's incorrect reading, gun sellers can be held liable for harm arising from their *own* unlawful acts. Officer Runnels is not seeking recompense from KS&E because of the unlawful acts "of third parties," but from KS&E's acts. That is the end of the story.

We write to emphasize that, were KS&E somehow correct in its reading, its motion should still be denied. No matter how broad the Court reads I.C. § 34-12-3-3(2), it could never encompass several of Runnels' claims.

A. Since There Is No Such Thing As A “Third Party” Under Indiana Conspiracy Law, The “Immunity” Provision Does Not Apply.

Assume that I.C. § 34-12-3-3(2) really does operate as KS&E argues, so that sellers engaged in straw sales of crime guns are immune from damages caused directly by third parties. In that scenario KS&E nevertheless cannot rely on I.C. § 34-12-3-3(2) to defend all of the counts in the Complaint, most notably Officer Runnels’ Civil Conspiracy claim. In a conspiracy claim, there is no “third party” for KS&E to offload blame on, and KS&E’s appeal depends *entirely* on the immunity allegedly afforded because of acts of “third parties.” See KS&E Br. at 1 (framing issue for review as whether Indiana law “immunizes firearm sellers against actions” arising from the “unlawful misuse of a firearm” by “a third party”).

The Complaint alleges in detail, *inter alia*, that KS&E, along with Tarus Blackman (the straw buyer) and Demetrious Martin (the gunman) agreed between themselves to commit unlawful acts. See KS&E Br. at 4-5. On this motion, these facts are taken as true. In addition, on this motion, KS&E has not argued that the allegations fail to state a conspiracy claim, and such an argument would not be well-founded. Under Indiana law, “a civil conspiracy is a combination of two or more persons who engage in concerted action to accomplish an unlawful purpose or to accomplish some lawful purpose by unlawful means.” *Boyle v. Anderson Fire Fighters Ass’n Local 1262, AFL-CIO*, 497 N.E.2d 1073, 1079 (Ind. Ct. App. 1986). The Complaint sets forth a textbook conspiracy claim.

Critically, civil conspiracy laws *do not distinguish* between links in the causal chain and do not separate principal actors from third-parties. The reality is quite

the opposite. “[E]ach participant in the conspiracy may be held responsible as a joint tortfeasor for damages caused by the wrongful . . . acts *regardless* of the degree of active participation.” *Id.* Moreover, “[a]ll those who aid and abet in the commission of an intentional tort are equally liable with the party directly committing it.” *Id.* There is no “third-party” in a civil conspiracy. 15A C.J.S. Conspiracy § 19 (2015) (“In a civil conspiracy, the acts of coconspirators are attributable to each other.”)

Courts repeatedly hold that protections often afforded “third parties” do not apply to co-conspirators, as the two are not the same. For example, the constitutional requirement of “minimum contacts” for personal jurisdiction applies to a third party, but not a co-conspirator, even when the co-conspirator has had *no* contacts with the forum. *See Bacompt Sys., Inc. v. Peck*, 2007 WL 854020, at *2 (S.D. Ind. 2007) (explaining “conspiracy theory of personal jurisdiction”). In the criminal law context, a defendant’s statements to a non-testifying “third party” are inadmissible, but statements made to “co-conspirators” are admissible. *Hankerson v. State*, 621 S.E.2d 772, 773 (Ga. Ct. App. 2005). One court recently chastised a litigant who, purporting to quote from case law, “twice substitute[d] *‘third party’* for [the case’s actual text] “nonboard-member *coconspirator*.” *Indep. Trust Corp. v. Stewart Info. Services Corp.*, 2011 WL 529390, at *4 (N.D. Ill. 2011).

Here, the fact that Demetrious Martin was the triggerman does not matter because for purposes of the conspiracy claim KS&E, Blackman, and Martin are one and the same – they are *all* Demetrious Martin. *See* 15A C.J.S. Conspiracy § 19

(2015) (Each conspiratorial action is “imputed to each coconspirator regardless of who actually performed the act.”); *Watkins v. Penn*, 2007 WL 2265060, at *3 (S.D. Ind. 2007). By selling the firearm to Martin and Blackman in an illicit straw sale, black letter law dictates that KS&E may as well have pulled the trigger.⁴

B. There Is No “Third Party” To Blame For KS&E’s Status As An Unlawful Public Nuisance.

Likewise, KS&E is not immune from Runnels’ public nuisance claim. As above, the facts supporting that claim are taken as true. As above, KS&E does not assert that Runnels has failed to *state* a nuisance claim. Once more, such an argument would be misguided. Nuisances are defined as “[w]hatever is (1) injurious to health; (2) indecent; (3) offensive to the senses; or (4) an obstruction to the free use of property; so as essentially to interfere with the comfortable enjoyment of life or property[.]” I.C. § 32-30-6-6. KS&E appears to be a public nuisance of the grossest sort. *See, e.g.*, Compl. ¶¶ 49-54 (observing that KS&E has been among the “worst of the worst” gun law violators and crime facilitators, selling more than twice the

⁴ There is no basis to contend that I.C. § 34-12-3-3(2) has vitiated the common law in this context. In Indiana, statutory enactments do not vitiate the common law absent explicit legislative intent. *S. Bend Cmty. Sch. Corp. v. Widawski*, 622 N.E.2d 160, 162 (Ind. 1993) (Indiana courts “presume that the legislature did not intend to make any change in the common law beyond those declared either in express terms or by unmistakable implication.”). Abrogation may be implied only where a statute covers “the entire subject treated and was clearly designed as a substitute for the common law,” or, “where the two laws are so repugnant that both in reason may not stand.” *Irvine v. Rare Feline Breeding Ctr., Inc.*, 685 N.E.2d 120, 123 (Ind.Ct.App. 1997). The provision here deals with a limited set of activities relating to third parties, is not “clearly designed as a substitute for common law,” and does not conflict with the common law in such a way that it cannot stand.

number of crime guns yearly than the average shop, selling 529 crime guns during a four year period, and ranking 34th in the nation in crime gun sales).

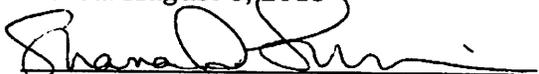
The nature of this claim precludes any immunity afforded by Section 3(2). Runnels alleges that KS&E, not a “third party,” is the nuisance. Section 3(1), which speaks to claims for “abatement of a nuisance relating to . . . the lawful . . . sale” of a gun, does not protect KS&E either. The Complaint alleges unlawful sales, and KS&E does not contend that this claim is not well-pled. In any event, the Indiana Supreme Court has held that nuisance claims are appropriately brought against scofflaw gun retailers. *City of Gary ex rel. King v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1231-35 (Ind. 2003) (allegations that defendants “willingly supply the demand for illegal purchase of handguns,” have “participated in straw purchases” and “ignored these unlawful transactions” over many years were sufficient to state “a public nuisance” claim).⁵

⁵ The passage of I.C. § 34-12-3-1 after *Gary* was filed, and its amendment, does not undercut *Gary*'s holding regarding public nuisance, because the statute does not reach nuisance claims based on unlawful conduct.

CONCLUSION

For all of these reasons, the decision of the court below should be affirmed.

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CERTIFICATE OF COMPLIANCE WITH APP. R. 43 AND 44

I, Stephen R. Chuk, hereby certify the following:

1. The Brief of *Amici Curiae* Law Enforcement and Municipal Organizations complies with APP. R. 43 and 44. According to the word count function in Microsoft Word 97-2003, I verify that this brief contains 4972 words, excluding the parts of the brief exempted by APP. R. 44(C).

2. The brief complies with the typeface requirements of APP. R. 43(D) because the text of this brief was prepared in a proportionally spaced typeface using Century Schoolbook 12 point font.



Stephen R. Chuk

CERTIFICATE OF SERVICE

I, Shana D. Levinson, hereby certify that, on August 3, 2015, I caused the Brief of *Amici Curiae* Law Enforcement and Municipal Organizations to be filed with the Clerk of the Court for the Indiana Court of Appeals through first class mail.

I further certify that I caused a true and correct copy of the foregoing brief to be served on the following by Federal Express, overnight delivery:

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