

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
VOLUSIA COUNTY, FLORIDA

A.B., and individual and,
FLORIDA CARRY, INC.,
a Florida non-profit corporation,

CASE NO.: 2013-31317-CICI

Plaintiffs,

vs.

CITY OF DAYTONA BEACH, Florida;
DERRICK L. HENRY, and individual, and,
MICHAEL CHITWOOD, and individual.

Defendants.

DEFENDANT CITY OF DAYTONA BEACH'S
ANSWER AND COUNTERCLAIM FOR DECLARATORY JUDGMENT

Defendant CITY OF DAYTONA BEACH ("CITY") files its Answer and Counterclaim
for Declaratory Judgment and states:

1. Admitted for jurisdictional purposes only.
2. Admitted for jurisdictional purposes only.
3. Denied that A.B.'s identity for purposes of this suit is entitled to privacy
protections.
4. Without knowledge.
5. Without knowledge.
6. Without knowledge.
7. Admitted.
8. Admitted that MAYOR HENRY is the elected mayor of The City of Daytona
Beach. Remainder denied.

9. Admitted that CHIEF CHITWOOD is the appointed agency head of the Daytona Beach Police Department. Remainder denied.

10. Admitted to the extent the allegation references express language in § 790.33 Fla. Stat. Remainder denied.

11. Admitted except that the alleged events occurred on the late evening and early morning of 22/23 December 2012.

12. Admitted that on 12/23/12, Daytona Beach Police Officers seized from A.B.'s home multiple firearms, weapons, and other personal property. Remainder denied.

13. Without knowledge.

14. Without knowledge.

15. Admitted that A.B. was taken into custody and transported to a mental health facility for evaluation pursuant to Florida's Baker Act and that the seizure of the firearms, weapons, and other personal property was concurrent with A.B.'s transport. Remainder denied.

16. Admitted that A.B. was informed by one or more CITY employees that the firearms and other items would be returned in accordance with § 790.17, Fla. Stat., and that the CITY would consider affidavits from others, including mental health professionals before return of the property to A.B. Remainder denied.

17. Admitted.

18. Admitted that state law does not expressly require a Court order as a condition of return of firearms seized after the person in possession is taken into custody and transported for an involuntary mental health evaluation. Remainder denied.

19. Without knowledge.

20. Without knowledge.

21. Admitted.

22. Denied.

23. Denied.

24. Denied.

25. Admitted to the extent the allegation references express language in § 790.33, Fla.

Stat. Remainder denied.

26. Admitted to the extent the allegation references express language in § 790.33, Fla.

Stat. Remainder denied.

27. Admitted to the extent the allegation references express language in § 790.33, Fla.

Stat. Remainder denied.

28. Denied.

29. Without knowledge.

COUNT 1 – REPLEVIN – A.B. ONLY

CITY re-alleges its answers to paragraphs 1 through 29 of the Complaint.

30. Without knowledge.

31. Denied.

32. Admitted.

33. Admitted that CITY employees advised A.B. that the weapons could not be returned without a Court order. Remainder denied.

34. Admitted.

35. Denied.

COUNT 2 – VIOLATION OF § 790.33, FLA. STAT.

CITY re-alleges its answers to paragraphs 1 through 29 of the Complaint.

36. Denied.

37. Denied.

38. Admitted that MAYOR HENRY is the elected mayor of the City of Daytona Beach. Remainder denied.

39. Admitted that CHIEF CHITWOOD is the appointed agency head of the Daytona Beach Police Department. Remainder denied.

40. Denied.

41. Denied.

42. Denied.

43. Denied.

44. Denied.

45. Denied.

46. Denied.

47. Without knowledge as to the specific statutory reference to Florida law.

48. Denied.

49. Denied that § 790.33, Fla. Stat. provides for a statutory fine and actual damages under the alleged facts.

50. Denied.

51. Denied.

52. Denied.

53. Denied.

54. Denied that § 790.33, Fla. Stat., provides for the issuance of an injunction under the alleged facts.

55. Without knowledge.

56. Denied.

57. Denied.

AFFIRMATIVE DEFENSES

1. CITY affirmatively alleges that valid consent was given to Daytona Beach Police Officers for the alleged seizure of property and there was no violation of A.B.'s rights under State or Federal law.

2. CITY affirmatively alleges that exigent circumstances existed for the alleged seizure of property by Daytona Beach Police Officers and there was no violation of A.B.'s rights under State or Federal law.

3. CITY affirmatively alleges that Plaintiffs have failed to mitigate their damages as required by applicable law.

4. CITY affirmatively alleges that it may be legally prohibited from transferring possession of the weapons to A.B. pursuant to § 790.17, Fla. Stat.

5. CITY affirmatively alleges that it may be legally prohibited from transferring possession of the weapons to A.B. pursuant to § 790.25, Fla. Stat.

6. CITY affirmatively alleges that the actions taken by CITY employees did not violate § 790.33, Fla. Stat.

7. CITY affirmatively alleges that its ordinances, regulations, measures, directives, rules, enactments, orders, and policies are consistent with the requirements of § 790.33, Fla. Stat.

CITY'S COUNTERCLAIM FOR DECLARATORY JUDGMENT AS TO PLAINTIFF/COUNTER-DEFENDANT A.B.

Defendant/Counter-Plaintiff CITY files this request for declaratory relief and states:

1. This is an action for declaratory relief pursuant to the provisions of Chapter 86, Fla. Stat.

2. Defendant/Counter-Plaintiff CITY is a Florida municipal corporation located in Volusia County, Florida.

3. Plaintiff/Counter-Defendant A.B. is a natural person.

4. CITY is uncertain as to its legal authority under §§ 790.17 and 790.25, Fla. Stat., to transfer firearms, as identified in Exhibit 1 to this Counterclaim, currently in the possession of the CITY to A.B.; and as to A.B.'s rights and legal authority to possess said firearms. There presently exists a bona fide controversy between the parties and CITY is in reasonable doubt as to its rights or authority.

5. On or about the late night and early morning of December 22-23, 2012, A.B., a combat veteran, sought assistance from National Veterans Crisis Line, a veteran's assistance hotline. The hotline requested that the Daytona Beach Police Department respond to A.B.'s residence and make contact with A.B.

6. On December 23, 2013, at approximately 1:47 a.m., Daytona Beach Police Officers were dispatched to A.B.'s residence. The Volusia County dispatch operator informed Daytona Beach Police Officers as follows:

- a) A.B. was a suicidal person.
- b) A.B. was on a call with a crisis center.
- c) A.B. had a loaded gun.
- d) A.B. threatened to kill himself if law enforcement was called.
- e) A.B. was extremely intoxicated.
- f) A.B. has a history of Post Traumatic Stress Disorder.

g) A.B. had a history of traumatic brain injury.

7. Upon the officers' arrival, they remained outside the residence. After a short time, the crises center worker persuaded A.B. to go outside the residence. Daytona Beach Police Officers then took A.B. into custody under Florida's Baker Act.

8. When he was taken into custody, A.B. appeared to be under the influence of alcohol.

9. A.B. informed Daytona Beach Police Officers that there were multiple firearms inside the residence both hidden and lying on the bed.

10. Daytona Beach Police Officers entered A.B.'s residence and secured weapons, firearms, and ammunition in plain view for life safety purposes and for the protection of A.B.'s property. All the items seized were tagged and placed into evidence for safe keeping.

11. Subsequent to A.B.'s release under Florida's Baker Act, A.B. requested that the CITY return his property. One or more City employees informed A.B. that the firearms and other items would be returned in accordance with § 790.17, Fla. Stat., and that the CITY would consider affidavits concerning A.B.'s mental soundness from persons, including mental health professionals, before return of the weapons.

12. A.B. submitted two affidavits to the CITY concerning his mental status. One affidavit, signed by Licensed Mental Health Counselor Russell Holloway dated 3/14/13, references a "report" as to A.B. which "indicates alcohol abuse, history of PTSD and histrionic personality disorder." The affidavit however also states the "report indicates that [A.B.] did not meet requirement for involuntary treatment." The other affidavit from an apparent relative of A.B. attested to A.B.'s lack of mental illness.

13. After consideration of the affidavits, A.B. was informed by one or more CITY employees that the return of the weapons and firearms would require a court order.

14. Section 790.17, Fla. Stat., provides, “[a] person who ... transfers, or gives to any person of unsound mind an electric weapon or device or any dangerous weapon, other than an ordinary pocketknife, commits a misdemeanor of the first degree”.

15. Section 790.25, Fla. Stat., provides that use of firearms is not authorized by “[a] person ... who is a habitual or chronic alcoholic ...”.

16. Based on the facts known to the CITY on 12/23/12, that A.B. was suicidal, extremely intoxicated, had a history of traumatic brain injury and Post Traumatic Stress Disorder; and based on the Counselor’s affidavit indicating that A.B. suffered from alcohol abuse, a history of Post Traumatic Stress Disorder, and personality disorder, the CITY has reasonable grounds to believe that transfer of weapons and firearms to A.B. could violate §§ 790.17 or 790.25, Fla. Stat., or both, and is uncertain as to its obligations in this instance.

17. The CITY is uncertain as to whether transfer of the subject weapons and firearms to A.B. would constitute negligent entrustment. Florida case law recognizes that the owner or possessor of a firearm may be liable under the theory of negligent entrustment when possession of a firearm is transferred to another and the original possessor knew or should have known that the other person is likely to use it in a manner involving an unreasonable risk of harm. *Foster v. Author*, 519 So.2d 1092 (1st DCA 1988); *Williams v. Bumpass*, 568 So.2d 979 (5th DCA 1990).

18. The CITY is aware of a citizen’s rights under state and federal laws and constitutions to possess firearms and is uncertain how to resolve its obligations under these various laws given the facts and circumstances of this case.

19. Due to the important interests at stake herein and pursuant to § 86.111, Fla. Stat., the CITY requests that the Court advance this action on its calendar and conduct a speedy hearing to resolve this matter.

WHEREFORE, the CITY requests that this Court enter a Declaratory Judgment determining the CITY's legal authority to transfer weapons and firearms in the possession of the CITY to A.B., and as to A.B.'s rights and legal authority to possess said weapons and firearms.

CERTIFICATE OF SERVICE: I HEREBY CERTIFY that a true copy of the foregoing has been provided this 10th day of June, 2013, via E-MAIL SERVICE to: Eric J. Friday, Esq., familylaw@fletcherandphillips.com and efriday@fletcherandphillips.com.

/s/ Robert F. Jagger

Robert F. Jagger, Esq.

Florida Bar No. 718262

OFFICE OF THE CITY ATTORNEY

THE CITY OF DAYTONA BEACH

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/s/ Marie Hartman

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Attorney for: Defendant

Volusia County Sheriff's Office

EXHIBIT 1



VOLUSIA COUNTY SHERIFF'S OFFICE REPORTING SYSTEM

DBPD EVIDENCE REPORT

SORTED BY CASE NUMBER AND TAG NUMBER AND LOCATION

CASE NUMBER: 120023342
TAG NUMBER: ALL
NEXT ACTIVITY: ALL
NEXT ACTIVITY DATE: ALL
INVOLVEMENT: ALL
INVOLVEMENT DATE: ALL

BUILDING: ALL
ROOM: ALL
SHELF: ALL
BIN: ALL
ACTIVITY: ALL
ACTIVITY DATE: ALL

DEPT ID: ALL
EVD RCP: ALL

DISPOSITION: ALL
DISPOSITION DATE: ALL

INVOLVEMENT	CASE #	TAG #	ITM #	ITEM DESCRIPTION	BLD	ROOM	SHELF	BIN	DID	LAST SIG ACTIVITY	DISPO
BAK - 12/23/12	120023342	120043592	16	(9) ARROWS [REDACTED]	01	1059	01C		D45283	INT - 12/26/12	
BAK - 12/23/12	120023342	120043592	21	HOYT XT2000 CAMO BOW [REDACTED]	01	1059	01C		D45283	INT - 12/26/12	
BAK - 12/23/12	120023342	120043592	22	BARNETT CROSSBOW [REDACTED]	01	1059	01C		D45283	INT - 12/26/12	
BAK - 12/23/12	120023342	120043592	1	KELTEC PF-9 9MM HANDGUN [REDACTED]	01	1068F	03F		D45283	INT - 12/24/12	
BAK - 12/23/12	120023342	120043592	2	SIG SAUER,MOSQUITO 22CAL [REDACTED]	01	1068F	03F		D45283	INT - 12/24/12	
BAK - 12/23/12	120023342	120043592	3	COBRA HANDGUN W/ MAG [REDACTED]	01	1068F	03F		D45283	INT - 12/24/12	
BAK - 12/23/12	120023342	120043592	4	COLT .45CAL HANDGUN [REDACTED]	01	1068F	03F		D45283	INT - 12/24/12	
BAK - 12/23/12	120023342	120043592	5	HERITAGE ROUGH RIDER 22CAL HANDGUN: [REDACTED]	01	1068F	03F		D45283	INT - 12/24/12	
BAK - 12/23/12	120023342	120043592	6	SPRINGFIELD SA-XD 9MM HANDGUN: [REDACTED]	01	1068F	03F		D45283	INT - 12/24/12	
BAK - 12/23/12	120023342	120043592	7	SMITH & WESSON 380 HANDGUN: [REDACTED]	01	1068F	03F		D45283	INT - 12/24/12	
BAK - 12/23/12	120023342	120043592	23	COLT .45 REVOLVER (NO BARREL) [REDACTED]	01	1068F	03F		D57563	INT - 03/26/13	
BAK - 12/23/12	120023342	120043592	8	MOSSBERG 12 GAUGE SHOTGUN(SN TR12059458) [REDACTED]	01	1068F	04F		D45283	INT - 12/24/12	
BAK - 12/23/12	120023342	120043592	9	SAVAGE ARMS 22CAL RIFLE (SN 1254769) [REDACTED]	01	1068F	04F		D45283	INT - 12/24/12	
BAK - 12/23/12	120023342	120043592	10	GOLDEN STATE ARMS RIFLE 7MM (SN 1916) [REDACTED]	01	1068F	04F		D45283	INT - 12/24/12	
BAK - 12/23/12	120023342	120043592	11	RUGER M/10/22 22 CAL RIFLE(SN 359-50348) [REDACTED]	01	1068F	04F		D45283	INT - 12/24/12	
BAK - 12/23/12	120023342	120043592	12	WEATHERBY RIFLE 308 [REDACTED]	01	1068F	04F		D45283	INT - 12/24/12	
BAK - 12/23/12	120023342	120043592	13	MARBLES GLADSTONE .22 RIFLE(SN CC756319) [REDACTED]	01	1068F	04F		D45283	INT - 12/24/12	
BAK - 12/23/12	120023342	120043592	14	BUSHMASTER 223CAL RIFLE [REDACTED]	01	1068F	04F		D45283	INT - 12/24/12	
BAK - 12/23/12	120023342	120043592	15	WINCHESTER 270 RIFLE (SN G1880636) [REDACTED]	01	1068F	04F		D45283	INT - 12/24/12	
BAK - 12/23/12	120023342	120043592	17	VEST WITH MEDICAL KIT [REDACTED]	01	1072	A19	01PP	D45283	INT - 12/26/12	
BAK - 12/23/12	120023342	120043592	18	1175 VARIOUS ROUNDS/GREEN BIN [REDACTED]	01	1072	A19	01PP	D45283	INT - 12/26/12	
BAK - 12/23/12	120023342	120043592	19	(12) MAGAZINES/HOLSTER/CYLINDER [REDACTED]	01	1072	A19	01PP	D45283	INT - 12/26/12	
BAK - 12/23/12	120023342	120043592	20	KELTEC BOX/BOX OF BOOBIE TRAPS [REDACTED]	01	1072	A19	01PP	D45283	INT - 12/26/12	

TOTAL ITEMS: 23

