IN THE FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

Case No. 1D14-4614
L.T. Case No. 2014-CA-000104

FLORIDA CARRY, INC.
Plaintiff/Appellant,

v.

UNIVERSITY OF FLORIDA, BERNIE MACHEN,
Defendants/Appellees.

ANSWER BRIEF OF APPELLEES

On Appeal from the Eighth Judicial Circuit
In and for Alachua County, Florida

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STATEMENT OF THE CASE AND FACTS

The University makes the following exceptions and additions to the Statements of the Case and Facts presented by Florida Carry.

Florida Carry states that, "The court reasoned that Sec. 790.115, Fla. Stat., controlled because the Legislature had made no exemption in Sec. 790.25, Fla. Stat., for university housing has (sic) it had for vehicles." [Pl. Brief, p. 7] The trial court actually stated that, "There is no exception in § *790.115(2)* for a residence hall like there is for a vehicle." [R. 161] (emphasis added).

Florida Carry states that the trial court concluded that the Legislature did not intend to make an exception for "residence halls" and that the trial court "did not address any other type of University owned housing." [Pl. Brief, p. 7] While the trial court did refer to "residence halls," the order granting summary judgment dealt with university housing broadly, and the context in which the term "residence halls" was used indicates that the court was using it as an example, not as a limitation. The court begins its order granting summary judgment by summarizing Florida Carry's contention "that Defendants seek to unlawfully prohibit possession of firearms *in housing located on University property* (the Housing Claim)." (emphasis added) [R. 158] In its adjudication, the Court states:

> Summary judgment is hereby entered in favor of Defendants with respect to Plaintiff's "Housing Claims." Defendants are not violating Florida law by recognizing the legislature's

> prohibition against firearms *in housing located on University property* pursuant to § 790.115(2)(a).

(emphasis added) [R. 162] Thus, it is clear that the summary judgment encompassed all "housing located on University property," and was not limited to "residence halls" or "University owned housing."

In support of its Motion for Summary Judgment, the University introduced an affidavit of its Vice President and General Counsel, Jamie Lewis Keith. Ms. Keith testified that on the day this Court issued its decision in *Florida Carry, Inc. v. University of North Florida*, 133 So. 3d 966 (Fla. 1st DCA 2013) ("the UNF decision"), she took immediate steps to alert the President, Chief of Police, Senior Vice President with responsibility for the Police, and Vice President for Student Affairs, and on the very next day she took additional steps to ensure that the University complied with the UNF decision. Among her steps the next day, she met with the University's Chief of Police, Senior Vice President, and Vice President, and her office communicated with the Dean of Students Office and the Vice President for Student Affairs to ensure that the University's police department and offices responsible for administering the University's student conduct policies and processes understood this Court's decision and would comply with Florida law as interpreted by this Court. She testified that at a presidential cabinet meeting seven days after the decision, she advised the University cabinet of vice presidents

about Florida law on firearms as interpreted by this Court, and that the University's president emphasized to the cabinet that the University would comply with the law as so interpreted. She further testified that soon after the UNF decision, the University's Legal Office and Information Technology Office began a thorough review of the University's regulations, publications and practices to be sure that they were in compliance with Florida law on firearms in vehicles as interpreted by this Court.

Specifically, Ms. Keith also testified that promptly after the UNF decision, the University removed a policy referencing firearms in vehicles from the Police Department policies, published its policy that it would comply with Section 790.25(5) as interpreted by this Court, and made a change to the Human Resource Services Department's workplace violence policy to ensure that it complied.

The Keith affidavit was uncontroverted.

SUMMARY OF ARGUMENT

The Florida Legislature has struck a balance between preserving the right to bear arms for self-defense and protecting the safety and peace of mind of Florida citizens. In service of the latter interest, Florida law has long designated certain sensitive areas, including school and university campuses, as largely gun-free zones. In 1992, the Legislature enacted Section 790.115, a comprehensive

prohibition of firearms on the property and at events of any school, including postsecondary schools.

The prohibition of firearms on school property includes university housing. Section 790.25 does not create an exception from the prohibition for university housing despite the supersede language in Section 790.25(4) for three reasons: (1) Section 790.25 expressly exempts Section 790.115 from its provisions;[1] (2) When enacting Section 790.115, the Legislature evidenced an awareness of Section 790.25 and expressly exempted only the motor vehicle provision of Section 790.25(5) from the broad prohibitions of Section 790.115. Section 790.115 does not exempt the provision of Section 790.25 relating to possession of guns in the home; (3) Section 790.25 is limited by its terms to the amendment of sections 790.053 and 790.06, which relate to the open carrying and concealed carrying of firearms.

The interpretation urged by Florida Carry should also be rejected because it would result in illogical consequences and indicate an irrational legislative intent.

The Florida and federal constitutions do not guaranty a right to possess a firearm in university housing. In *District of Columbia v. Heller,* 554 U.S. 570

[1] Section 790.25(2)(b)1 provides that, "The protections of this section do not apply to the following: A person . . . using weapons or firearms in violation of ss. 790.07-790.115 . . . ."

(2008), the Court pointedly noted that nothing in the opinion should be taken to cast doubt on laws prohibiting possession of firearms on school grounds. Moreover, Florida's constitutional provision on possession of firearms, as consistently interpreted by the courts, makes clear that the legislature possesses authority to regulate the manner of bearing arms in order to balance protection of certain other important societal interests.

The lower court correctly determined that there was no case or controversy that justified relief on Florida Carry's motor vehicle claim. The undisputed evidence established that, after this Court's UNF decision, the University had not attempted to enact or enforce a regulation that would violate Florida law as interpreted by this Court in *Florida Carry v. University of North Florida*, 133 So. 3d 966 (Fla. 1st DCA 2013) ("UNF decision"). Moreover, the University promptly added a policy of compliance to its firearms policy stating that the University would comply with Florida law respecting firearms in vehicles as interpreted in the UNF decision, acted expeditiously to ensure that appropriate administrative personnel were aware of the opinion and would comply with it, commenced a thorough review of its publications and website and made revisions accordingly.

The claims against University President Machen were properly stricken because Dr. Machen was entitled to immunity from both liability and suit. The

immunity provision of Section 768.28 bars "any action for any injury or damage suffered as a result of any act, or omission of action" against a state officer or employee. Furthermore, Florida Carry did not allege in its pleading or introduce any evidence that Dr. Machen engaged in any conduct that met the specific criteria for liability set forth in Section 768.28 or 790.33.

ARGUMENT

The standard of review as to all issues is *de novo*.

I
FLORIDA LAW PROHIBITS UNIVERSITIES FROM ALLOWING FIREARMS IN UNIVERSITY HOUSING.

Contrary to the thrust of Florida Carry's argument, the Legislature has not established a one-sided policy in which protection of the right to bear arms is made paramount to the exclusion of all other considerations. Thus, in its recent decision in *Florida Carry, Inc. v. University of North Florida*, *supra*, this Court states:

> In regulating the manner of bearing arms, the legislature has attempted to balance this fundamental right with the safety of Florida citizens.

Id., 133 So. 3d at 976. The statement accurately describes the Legislature's long-standing effort to strike a reasonable balance. In the statutory provisions cited by Florida Carry, the Legislature has indeed acted to recognize and protect the right to bear arms. But it has also acted to protect the safety and preserve the peace of

mind of Florida citizens in connection with the manner and place of possession of firearms.

The Legislature has prohibited persons from openly carrying a firearm in Florida unless expressly permitted by law. § 790.053, Fla. Stat. Florida law prohibits persons from carrying concealed firearms or other weapons unless such persons have been duly licensed to carry a concealed weapon or otherwise authorized to do so by law. § 790.06, Fla. Stat. The Legislature has also designated certain areas as firearms-free zones. Even persons licensed to carry a concealed firearm are not authorized to carry a firearm in 15 categories of places where the Legislature has deemed it contrary to the public interest to allow firearms, including, among others, courthouses, law enforcement offices, detention facilities, polling places, passenger terminals, bars, designated school and college settings, and legislative and local government meetings. § 790.06(12)(a), Fla. Stat.

In 1992, the Legislature enacted a more specific and comprehensive prohibition of firearms on the property and at events of any school, including postsecondary schools. The statute provides in pertinent part:

> 790.115 Possessing or discharging weapons or firearms at a school-sponsored event or on school property prohibited; penalties; exceptions. –
>
> *****

(2)(a) a person shall not possess any firearm, electric weapon or device, destructive device, or other weapon as defined in s. 790.001(13), including a razor blade or box cutter, except as authorized in support of school-sanctioned activities, at a school-sponsored event or on the property of any school, school bus, or school bus stop; however, a person may carry a firearm:

1. In a case to a firearms program, class or function which has been approved in advance by the principal or chief administrative officer of the school as a program or class to which firearms could be carried;

2. In a case to a career center having a firearms training range; or

3. In a vehicle pursuant to s. 790.25(5); except that school districts may adopt written and published policies that wave the exception in this subparagraph for purposes of student and campus parking privileges.

For purposes of this section, "school" means any preschool, elementary school, middle school, junior high school, secondary school, career center, or postsecondary school, whether public or nonpublic.

***

(3) This section does not apply to any law enforcement officer as defined in s. 943.10(1), (2), (3), (4), (6), (7), (8), (9), or (14).

§ 790.115, Fla. Stat. Notwithstanding the foregoing provisions, Florida Carry argues that the University is mandated by Florida law to permit students and other persons to possess firearms in dormitories and other housing located on University property. Florida Carry argues that this is required by Section 790.25(3)(n), which authorizes possession of a firearm at home or place of business.

Florida Carry argues that the prohibition of firearms on University property, including university housing, set forth in 790.115 conflicts with Section 790.25(3)(n), which authorizes possession of firearms in a person's home. Florida Carry contends that 790.25 should prevail because subsection (4) of that statute states "this act shall supersede any law, ordinance, or regulation in conflict herewith." Florida Carry's argument was rejected by the trial court and should be rejected by this Court as well for several reasons.

The Court is duty-bound to reconcile the two sections if there is any reasonable basis for doing so. *Knowles v. Beverly Enterprises-Florida, Inc.,* 898 So. 2d 1 (Fla. 2004). In this case, the sections are actually not in conflict. Most significantly, Section 790.25 expressly exempts Section 790.115 from its authorization for possession of firearms. Section 790.25 lists uses of firearms that are authorized and uses that are not authorized. Among the list of uses that are not authorized are those in violation of Section 790.115:

> USES NOT AUTHORIZED.–
> (b) The protections of this section do not apply to the following: . . . .
> a person using weapons or firearms in violation of ss. 790.07-***790.115***.
> . . .

§ 790.25(2)(b)1, Fla. Stat. (emphasis added). The specific reference to Section 790.115 was amended into Section 790.25 in 2006 by Chapter 2006-103, Laws of Florida, and has remained ever since. That alone should end the discussion.

However, there is additional reason to conclude that Section 790.115 was not preempted by Section 790.25.

The Legislature included in Section 790.115 an exception for possession of firearms in motor vehicles, expressly referencing the motor vehicle provision in 790.25(5). *See* § 790.115(2)(a)3, Fla. Stat. The inclusion of the exception indicates that the Legislature did not consider the supersede language in 790.25(4) to apply to after-enacted laws such as 790.115. If the supersede language were applicable, the express exception in Section 790.115 for motor vehicles under 790.25(5) would have been unnecessary. Thus, Sections 790.25 and 790.115 are completely compatible. Section 790.25 expressly exempts from its authorization to possess firearms the prohibition of firearms on university and other school property set forth in Section 790.115. Section 790.115 exempts the motor vehicle authorization in Section 790.25, but does not exempt the home provision.

There is still another reason why the two sections are not in conflict. Section 790.25(3), which lists "lawful uses" of firearms, is an amendatory provision. By its express language, it amends only Section 790.053, which prohibits the open carrying of weapons, and Section 790.06, which provides for licensing of concealed weapons:

> (3) LAWFUL USES.—*The provisions of ss. 790.053 and 790.06* do not apply in the following instances, and, *despite such sections*, it is

> lawful for the following persons to own, possess, and lawfully use firearms and other weapons, ammunition, and supplies for lawful purposes:
>
> * * * * *
>
> (n) A person possessing arms at his or her home or place of business;

§ 790.25(3)(n), Fla. Stat. (emphasis added). The provision makes no mention of Section 790.115. In response, Florida Carry argues that it is understandable that the provision did not reference Section 790.115 because it did not exist at the time Section 790.25(3) was enacted. This argument fails to explain away the 2006 amendment to Section 790.25(2)(b)1 that expressly added Section 790.115 to the exemption from Section 790.25's authorization to carry guns under defined circumstances.

Multiple fundamental canons of statutory construction, which are particularly strong considering their cumulative impact, further support the conclusion that 790.115(2) prevails (as does Section 790.25(2)(b)1) over Section 790.25(3)(n) and (4).

Where statutes enacted at different times conflict, the latter enactment is presumed to have amended the former to the extent of the conflict. *Viering v. Florida Comm'n on Human Relations,* 128 S. 3d 967 (1st DCA 2013). Section 790.25 was initially enacted in 1965, at which time it contained the provision

authorizing possession of a weapon at one's home or business. *See* s. 1, Ch. 65-410, Laws of Florida. Section 790.115 was enacted twenty-seven years later in 1992 and, as the after-enacted law, is presumed to amend any earlier provision with which it conflicts. (Similarly, 790.25(b)(2)1 was enacted in 2006, also long after the initial enactment of 790.25.) [2]

The canon *expressio unius est exclusio alterius* holds that the expression of one thing in a statute, particularly an exception, is presumed to exclude all others. *Dobbs v. Sea Isle Hotel,* 56 So. 2d 341 (Fla. 1952). Section 790.115 contains specific exceptions, none of which encompasses housing on university or other school property. The application of the canon in this case is particularly appropriate considering that the Legislature included in Section 790.115 a limited number of exceptions from that section's broad prohibition of firearms on university and other school property and at school events. Those exceptions included the provision for possession of firearms in motor vehicles under appropriate conditions, but did not include a housing exception.

Basic rules of statutory construction also require that a statute be construed with the presumption that the Legislature did not intend irrational consequences,

[2] The argument that Section 790.25 trumps even later-enacted laws that conflict with it is untenable in light of the principle that a legislature cannot bind the hands of a future legislature by prohibiting amendments to statutory law. *See Neu v. Miami Herald Pub. Co.,* 462 So. 2d 821 (1985).

and to avoid a result that is illogical or would render the statute ineffective. *State v. Presidential Women's Center,* 937 So. 2d 114 (Fla. 2006); *State Farm Auto Ins. Co. v. O'Kelley,* 349 So. 2d 717 (Fla. 1st DCA 1977). Florida Carry's position leads to just such a result. Section 790.25(3)(n) authorizes a person to possess firearms not only at a person's home, but also at his or her "place of business." The term "place of business" in Section 790.25(3)(n) has been held to include the place where a person is employed even if the person has no proprietary interest in the business. *Brook v. State,* 999 So.2d 1093 (Fla. 5th DCA 2009); *State v. Commons,* 592 So. 2d 317 (Fla. 3d DCA 1992). There is no rational way to parse the provision so that the reference to "home" is subject to the supersede language of 790.25(4) but the reference to "place of business" is not. The consequence of Florida Carry's argument would be that anyone employed to work on school property, including instructors and administrative, clerical and maintenance personnel, would be authorized to carry a firearm anywhere on school property, and this would apply to elementary and high schools as well as postsecondary schools. Section 790.115 reflects a legislative intent to prohibit guns on university and other school property and their events with only a few designated exceptions. The construction that Florida Carry proposes would undermine that purpose and render the prohibition of gun possession on school property ineffective.

In anticipation of the foregoing argument, Florida Carry advances an argument that thoroughly undermines its main argument on the housing issue. Florida Carry states that Section 790.25(3)(n) would not require a school to permit its employees to possess firearms anywhere on campus because another provision of Chapter 790, Section 790.33(4)(c), "specifically provides for universities, as well as any other state actor, to regulate possession of firearms by employees in the course of their employment." [Pl. Brf., p. 23] The University does not disagree with the argument. However, the problem for Florida Carry is that the argument implicitly concedes that the supersede language in Section 790.25(4) does not apply to after-enacted exceptions such as Section 790.33(4)(c), which was enacted in 2011, many years after Section 790.25. *See* Chapter 2011-109, Laws of Florida. If the supersede language does not apply to 790.33, it logically does not apply to 790.115 either.

Florida Carry argues that the Court should not resort to canons of statutory construction when the plain language of the statute is clear, in which case such language is all a court should consider. The argument fails to advance Florida Carry's case because the plain language of the statute undermines Florida Carry's premise. The plain language of Section 790.115(2)(a) states that, except as expressly authorized, "a person shall not possess any firearm . . . at a school-

sponsored event or on the property of any school," including a post-secondary school. And Section 790.25(2)(b)1 plainly exempts from that statute's authorization to carry firearms in a home, "a person using weapons or firearms in violation of ss. 790.07-790.115. . . ." In this case, the plain language and the canons of statutory construction lead to the same conclusion: Florida law prohibits possession of firearms on university property except as specifically authorized by Section 790.115, which does not authorize firearms in housing on University or other school property.

II
NEITHER THE FEDERAL NOR FLORIDA CONSTITUTION ESTABLISHES A RIGHT TO POSSESS FIREARMS IN UNIVERISTY HOUSING.

In *District of Colombia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that the Second Amendment to the United States Constitution guarantees individuals the right to possess weapons for self-defense subject to reasonable restrictions. Florida Carry selectively quotes *Heller* for the proposition that an individual has the right to keep firearms in the home for self-protection, but fails to quote a key statement in the opinion of the Supreme Court that has direct application to the case at bar:

> Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on long-standing prohibitions on the

> possession of firearms by felons and the mentally ill, or *laws forbidding the carrying of firearms in sensitive places such as schools* and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

Heller, 554 U.S. at 626-627 (emphasis added).[3] Thus, Petitioner's argument that the right to bear arms provision of the Florida Constitution should be interpreted similarly to the Second Amendment to the United States Constitution necessarily leads to the conclusion that the Florida Constitution allows the prohibition of firearms on school property. Moreover, the language of the Florida constitutional provision makes clear its recognition of the state legislature's reasonable regulatory authority. Article I, Section 8 provides:

> The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, *except that the manner of bearing arms may be regulated by law*.

Art. I, § 8(a), Fla. Const. (emphasis added). Florida courts have consistently held that the italicized portion of Article I, Section 8 authorizes the Legislature to enact reasonable restrictions on the possessions of firearms. *Rinzler v. Carson*, 262 So. 2d 661 (Fla. 1972); *Davis v. State*, 147 So. 2d 893 (Fla. 1962); *Robarge v. State*,

[3] It is noteworthy that the Supreme Court's recognition that states have the power to prohibit firearms in sensitive places such as schools reflected the unanimous opinion of the justices. While the statement was in the opinion of the majority, the four dissenting justices would have allowed even broader restriction on the possession of guns by individuals. *Heller*, 554 U.S. 636-723.

432 So. 2d 669 (Fla. 5th DCA 1983). Florida Carry cited *Rinzler* for the proposition that the Florida constitutional provision on the right to bear arms should be interpreted as is the Federal Constitution. However, as with *Heller,* Florida Carry chose to ignore a statement in the opinion that bears directly on the issue now before this Court. The Florida Supreme Court, after citing a number of cases in which firearms regulations were upheld, concluded:

> In each of the four cited cases there is inherent in the holding of this Court the proposition that the right to keep and bear arms is not an absolute right, but is one that is subject to the right of the people through their legislature to enact valid police regulations to promote the health, morals, safety, and general welfare of the people.

Rinzler, 252 So. 2nd at 666. Whatever may be the ultimate determination of the outer limits of a state's constitutional power to regulate possession of guns, one thing is now abundantly clear. The Florida Legislature has the power to limit or prohibit possession of guns on school property and at school events.

III
THE TRIAL COURT CORRECTLY DETERMINED THAT THERE IS NO CASE OR CONTROVERSY JUSTIFYING ADJUDICATION OF FLORIDA CARRY'S MOTOR VEHICLE CLAIM.

In order to establish jurisdiction, a party seeking declaratory or injunctive relief must make an adequate showing "that there is a bona fide dispute with an actual present need for judicial intervention." *Florida Homebuilders Ass'n, Inc. v.*

City of Tallahassee, 15 So. 2nd 612, 613 (2009); see also *Martina v. Scanlan*, 582 So. 2d 1167 (Fla. 1991). Despite Florida Carry's dogged attempt to fashion a controversy on the motor vehicle issue, none existed at the time of the hearing below and none exists now.

In the UNF decision, this Court held that a state university cannot exempt itself from Section 790.25(5), which authorizes possession of a firearm within a motor vehicle on school property pursuant to that Section's provisions. At the hearing below, counsel for the University informed the court that the University agreed that Florida law, as interpreted by this Court in the UNF decision, entitles people to possess firearms in their vehicles on school property. [R. 255] The University's conduct in response to the UNF decision bore out counsel's statement. Promptly after the UNF decision, the University added a policy of compliance to its firearms policies stating that the University would comply with Florida law relating to firearms in motor vehicles as that law was interpreted in the UNF decision. The footnote states:

> Intent/application: As university regulations and their implementation are subject to applicable law, the University will comply with Florida law governing firearms in vehicles under Section 790.25(5), Florida Statutes, including firearms that are securely encased or otherwise not readily accessible for immediate use in vehicles by individuals 18

> years old and older, as decided by the First District Court of Appeal on December 10, 2013 (Case No. 1D12-2174).[4]

[R. 120]

Florida Carry asserted below that the University was failing to heed this Court's decision and was continuing to prohibit possession of firearms in motor vehicles located on campus after the decision was rendered. The trial court found that Florida Carry's claim that the University was ignoring the law as construed by this Court was factually unsupported and that no controversy existed sufficient to justify the remedies sought by Florida Carry:

> The clear and factually undisputed record in this case establishes that the University of Florida's Regulation 2.0001 (Exhibit A to Plaintiff's First Amended Complaint) regarding firearms has been expeditiously footnoted to make clear that it would not be used to disallow securely encased firearms in vehicles on campus. This was done in rapid compliance with the opinion in *Florida Carry, Inc. v. University of North Florida*, 133 So. 3rd 966 (Fla. 1st DCA 2013)(hereinafter referred as *Florida Carry/UNF*). The modification of the subject regulation and other steps taken to conform University policy to Florida law were initiated before this suit was filed, and Plaintiff was well aware of them. The record is clear that the Defendants are not attempting to enact or enforce any regulation that would violate Florida law as interpreted by the *Florida Carry/UNF* decision.

[R. 160] The trial court's finding is amply supported by the uncontroverted evidence in the record.

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[4] The footnote was clarified by adding the words "application" and "including" and the case number cited above were added shortly after the initial publication.

In support of its motion for summary judgment, the University introduced the affidavit of Vice President and General Counsel Jamie Lewis Keith who testified that immediately after this Court's UNF decision, the University acted expeditiously to ensure that the University was in compliance with the law as construed by this Court. Ms. Keith testified that on the day this Court issued its UNF decision, she took immediate steps to alert the President, Chief of Police, Senior Vice President with responsibility for the Police, and Vice President for Student Affairs, and on the very next day she took additional steps to ensure that the University complied with the UNF decision. Among her steps the next day, she met with the University's Chief of Police, Senior Vice President, and Vice President, and her office communicated with the Dean of Students Office and the Vice President for Student Affairs to ensure that the University's police department and offices responsible for administering the University's student conduct policies and processes understood this Court's decision and would comply with Florida law as interpreted by this Court. She testified that at a presidential cabinet meeting seven days after the decision, she advised the University cabinet of vice presidents about Florida law on firearms as interpreted by this Court, and that the University's president emphasized to the cabinet that the University would comply with the law as so interpreted. She further testified that soon after the UNF decision, the

University's Legal Office and Information Technology Office began a thorough review of the University's regulations, publications and practices to be sure that they were in compliance with Florida law on firearms in vehicles as interpreted by this Court. Specifically, Ms. Keith testified that promptly after the UNF decision, the University removed a policy referencing firearms in vehicles from the Police Department policies, published its policy of compliance with Section 790.25(5) as interpreted by this Court in the UNF decision, and made a change to the Human Resource Services Department's workplace violence policy. [R. 119-121]

In response, Florida Carry filed the affidavit of its executive director, Sean Caranna. The trial court found that the Caranna affidavit was hearsay and not admissible for purposes of summary judgment. [R. 252-255]. The University submits that the trial court was correct in excluding the affidavit on the ground of hearsay and that it should be disregarded by the Court as well. In any case, the affidavit failed to controvert the material provisions of the Keith affidavit as illustrated below.

The Keith affidavit was filed on January 31, 2014, and stated that, beginning on the date of the UNF decision and continuing promptly after it, the University had already taken extensive steps to ensure that all appropriate personnel complied with the law as interpreted by this Court, and was engaged in a conscientious effort

to ensure that any previously existing statements on its website or in its publications were modified accordingly. [R. 119-121] The Caranna affidavit was dated July 15, 2014, five months after the Keith affidavit, but neither the Caranna affidavit nor any other evidence produced by Florida Carry indicated that, as of the date of the Caranna affidavit, the University was failing to comply with the UNF decision. Instead, the carefully worded affidavit stated that "*immediately prior to filing the complaint in this action*," Mr. Caranna checked the University's website and found no changes had been made to the University's policies. [R. 156-157] (emphasis added). The complaint had been filed on January 10, 2014, two weeks prior to the Keith affidavit and barely a month after the UNF decision.

As with the Caranna affidavit, Florida Carry's pleadings failed to allege facts to show that the University was disregarding this Court's decision. Florida Carry filed an amended complaint on February 21, 2014, three weeks after the Keith affidavit. Like the Caranna affidavit, the amended complaint did not state that the University was continuing to enforce its old policy prohibiting guns in motor vehicles as of the time of the amended complaint, or even as of the time of the Keith affidavit. Instead, the amended complaint stated:

> *As of the filing of the original Complaint* in this action, all of the policies detailed herein were still being promulgated by UF, and were available by searching the UF website using UF's own search bar, and

> were not cached copies of old pages, however UF has slightly amended its footnote since the filing of the original complaint.

[R. 58, ¶ 26] (emphasis added). It is not simply a matter of Florida Carry failing to controvert the University's evidence. Either Florida Carry did not bother to re-check the University's websites and publications prior to filing its Amended Complaint and Caranna affidavit or, having re-checked, was unable to testify that the University had failed to make appropriate changes, because the University had already done so. Perhaps most significantly, Florida Carry, faced with a motion for summary judgment, failed to produce any evidence that, after the UNF decision, the University had attempted or threatened to adopt or enforce any regulation or policy against anyone that would be inconsistent with the UNF decision.

The trial court identified an additional reason why there was no evidence of a University violation. In its order dismissing the motor vehicle claim for lack of a case or controversy, the trial court stated:

> Importantly, § 790.33(3)(a) prohibits the enactment and enforcement of regulations which impinge on the legislature's preemption of the field of firearm regulation. Existing local ordinances or agency regulations which tread on this preempted field are declared null and void. § 790.33(1). The relevant issue is whether the University seeks to enact or enforce a regulation concerning firearms in vehicles which impinges upon the legislative domain, and on this material issue there is no genuine dispute that, prior to suit being filed, no such unlawful enactment or enforcement was eminent. Quite the opposite was true.

> Thus, consistent with Defendant's position, there was no actual case or controversy in need of adjudication as to this point when suit was filed seeking declaratory and injunctive relief.

[R. 160] (emphasis by court). Nothing cited in Florida Carry's brief to this Court justifies reversal of the trial court in this regard.[5]

IV
THE TRIAL COURT PROPERLY STRUCK CLAIMS FOR MONETARY RELIEF AGAINST UNIVERSITY OF FLORIDA PRESIDENT BERNIE MACHEN.

The trial court struck claims for monetary relief against Dr. Machen, finding:

> There is no dispute that Machen fits within the category of state officers or employees who would possess the immunity set forth in § 768.28(9)(a), and his alleged liability is predicated upon acts within the scope of his employment. Thus, to the extent Plaintiff's suit seeks damages against Machen, he would have immunity from suit.

[R. 159] Florida Carry argues that Section 768.28 is limited to tort actions and therefore the trial court erred in finding Dr. Machen immune from suit for monetary damages.[6] While it is true that Section 768.28 deals primarily with the waiver of sovereign immunity in tort actions, the immunity from liability and suit granted to officers and employees extends beyond tort actions:

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[5] While not making it a point on appeal, Florida Carry asserts that simply the existence of a university regulation that touches on firearm possession would violate the preemption language of Section 790.25. This was not a point adjudicated by the trial court and is not properly before this Court.

[6] It is fairly arguable that an action against an individual for deprivation of a constitutional right is within the definition of a tort claim. However, for the reasons discussed below, it is not necessary for the Court to address this issue.

> No officer, employee, or agent of the state or any of its subdivisions shall be held personally liable in tort or named as a party defendant in *any action for any injury or damage suffered as a result of any act, event, or omission of action* . . . . in the scope of his or her employment or function, unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

§ 768.28(9)(a), Fla. Stat. (emphasis added).

Florida Carry argues that Section 790.33 independently waives immunity for actions against officers and employees for deprivation of gun rights. Even if the Court were to hold that Section 790.33 subjects an officer to liability despite the immunity provisions of Section 768.28, Dr. Machen would still be entitled to such immunity for two reasons.

First, as the trial court noted, the penalty provision set forth in Section 790.33(3)(a) expressly applies only to a person who violates the section "by enacting or causing to be enforced" a provision that impinges upon the legislature's occupation of the field. Nothing in Florida Carry's pleadings or any evidence introduced at the trial level alleged that the University, or Dr. Machen in particular, enacted or caused to be enforced anything in violation of Florida gun laws subsequent to this Court's UNF decision. Florida Carry argues that Section 790.33 prohibits not only enactment and enforcement, but "promulgation" of preempted, statutorily voided regulations, and that regulations continue to be

promulgated as long as they remain on the books. Section 790.33 never refers to "promulgation" in the penalty provision included in Subsection (3)(a). The term is used only in Subsection (3)(f), which sets forth the circumstances giving rise to standing to sue. It is reasonable to assume that the Legislature did not desire to subject schools to penalties solely because they had not cleaned up old provisions, so long as they were not attempting to enforce such provisions or enacting new ones. In any event, the plaintiff filed suit quickly after the UNF decision and the undisputed evidence established that the University acted conscientiously to give notice of its intention to fully comply and to make sure that its published policies conformed to the law.

There is a second reason that the trial court's decision regarding monetary penalties against Dr. Machen should be affirmed. Both Sections 768.28 and 790.33 require more than simple negligence or vicarious liability. Section 768.28 requires that the officer or employee have "acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property." § 768.28(9)(a), Fla. Stat. Section 788.33 provides that a violation and associated liability occurs "by enacting or causing to be enforced" a rule or regulation that violates legislative preemption, and requires that the violation have been "knowing and willful" for there to be any individual liability.

§ 790.33(3)(c), Fla. Stat. The Amended Complaint makes no allegation that Dr. Machen personally violated any Florida gun laws willfully or knowingly or in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. Florida Carry also failed to introduce any evidence that would support an inference that he did so. The allegations against Dr. Machen are in the nature of vicarious liability in his purported capacity as University president. *See* Amended Complaint, p. 1, ¶ 4, p. 9, ¶ 48.

CONCLUSION

The decision of the trial court should be affirmed in all respects.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by email or U.S. mail this 5th day of March, 2015 to the following:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing document is in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2). This document is submitted in Times New Roman 14-point font.

S/ **BARRY RICHARD**
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