Filing # 16944238 Electronically Filed 08/11/2014 02:08:57 PM

IN THE CIRCUIT COURT OF THE EIGHTH JUDICIAL CIRCUIT
IN AND FOR ALACHUA COUNTY, FLORIDA

FLORIDA CARRY, INC.,
a Florida non-profit corporation,

Plaintiff,
vs.

CASE NO.: 2014-CA-000104
DIVISION: J

UNIVERSITY OF FLORIDA,
a state university; and
BERNIE MACHEN, an individual,

Defendants.
_____/

MOTION FOR RECONSIDERATION

COMES NOW, the Plaintiff, Florida Carry, Inc., by and through its undersigned counsel and respectfully files with this Court Plaintiff's Motion for Reconsideration, and in support thereof would state:

FACTS

1. This is an action for damages and/or statutory fines, declaratory judgment, and injunctive relief in Alachua County, Florida.
2. The original Complaint was filed in Alachua County, Florida on January 10, 2014. This was subsequently amended on February 21, 2014.
3. Defendant Bernie Machen ("Machen") filed a Motion to Dismiss the First Amended Complaint on April 2, 2014 alleging this court's lack of jurisdiction over the person and Plaintiff's failure to state a cause of action.
4. Also on April 2, 2014, Defendants University of Florida ("UF") and Machen filed a Motion for Summary Judgment on Amended Complaint.
5. A Case Management Conference was held on July 24, 2014 with all parties present via counsel where the above reference motions were heard.
6. On July 30, 2014, the court issued its ruling partially granting and partially

denying Defendant's Motion to Dismiss; granting Summary Judgment of dismissal on the motor vehicle claims; and granting Summary Judgment in favor of Defendants on the housing claims.

7. The Plaintiff respectfully asserts that these decisions granting Summary Judgment were in error and, therefore, files this Motion for Reconsideration.

STANDARD OF REVIEW

Rather than constituting a motion for rehearing under Fla. R. Civ. Pro. 1.530, a motion directed to a nonfinal order is termed a "Motion for Reconsideration" based upon the trial court's inherent authority to reconsider and alter or retract orders prior to the entry of final judgment. *See Bettez v. City of Miami*, 510 So. 2d 1242, 1242-43 (So. 3d DCA 1987).

As the Florida Supreme Court articulated in *Hall v. Talcott*, 191 So. 2d 40, 46-47 (Fla. 1966):

> The granting or denial of rehearing is a matter within the sound discretion of the trial court, but it is never an arbitrary decision. **As indicated above, when the motion is filed by one against whom a summary judgment has been entered, the discretion not to grant is narrowed and every disposition should be indulged in favor of granting the motion. Only after it has been conclusively shown that the party moved against cannot offer proof to support his position on the genuine and material issues in the case should his right to trial be foreclosed.**

Emphasis added and citations omitted.

ARGUMENT

Summary judgment of dismissal on Plaintiff's "Motor Vehicle" claims due to absence of a present "case or controversy" invoking the court's jurisdiction.

The court relied on § 790.33(3)(a) in finding:

> 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 imminent.

While this follows the language of § 790.33(3)(a), it fails to address the third prong of "polic[ies] promulgated" as found in § 790.33(3)(f). Promulgation is a wholly different activity from either enactment or enforcement. To promulgate is "[t]o declare or announce publicly; to proclaim." Black's Law Dictionary 986 (7th Abridged ed. 2000). Per Webster's Third New International Dictionary, "promulgate" is "to make known by open declaration; to announce officially." Webster's Third New Int'l Dictionary 1816 (1986). *See State v. Watso*, 788 So. 2d 1026, 1028 (Fla. 2nd DCA 2001).

Plaintiff's pleadings, exhibits, and arguments are rife with concrete examples of UF's promulgation of policies which run afoul of legislative field preemption of firearms and ammunition and the *Florida Carry/UNF* decision upon which the court relies. In fact, one need look no further than page 1 of UF Regulation 2.001. Without addressing the third prong of legislatively preempted behavior, the court cannot find the absence of material issues sufficient to dismiss Plaintiff's claims based on a lack of an actual case or controversy.

Additionally, the court found that the offending UF Regulation 2.001 had "been expeditiously footnoted to make clear that it would not be used to disallow securely encased firearms in vehicles on campus." Plaintiff maintains that UF Regulation 2.001 is patently unclear to a layperson as to UF's policies regarding firearms in motor vehicles. After three full pages of regulations (which, incidentally, have not been changed since the *Florida Carry/UNF* decision) explicitly stating that the possession of firearms is prohibited outside of the strict circumstances in the regulation and violation results in immediate suspension, the "Intent" footnote which was promulgated at the time of filing of this instant action read:

> As University regulations and their implementation are subject to applicable law, the University will comply with Florida law governing firearms that are securely encased or otherwise not readily accessible for immediate use in vehicles by individuals 18 years and older, as decided by the First District Court of Appeal on December 10, 2013.

UF's perfunctory "Intent" insertion not only required the average reader to ignore the strict, prohibitive language of the body of the regulation in favor of a footnote, but also required a layperson to be familiar with an unnamed 1st DCA decision. While not penal, the Regulation is most assuredly punitive and against the spirit of the Court in *Gluesenkamp v. State*, "A penal statute must be written in language sufficiently definite, when measured by common understanding and practice, to apprise ordinary persons of common intelligence of what conduct will render them liable to be prosecuted for its violation." 391 So. 2d 192, 198 (Fla. 1980).

Subsequent to the filing of the Complaint, UF amended the promulgated "Intent" footnote to read:

> Intent/Application: As University regulations and their implementation are subject to applicable law, the University will comply with the Florida law governing firearms in 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 Appeals on December 10, 2013 in a case involving University of North Florida (case No. 1D12-2174).

This updated "Intent" footnote also misstates the law and promulgates a regulation that is inconsistent with § 790.25(5) by a contextual omission. What it fails to include is the remainder of the applicable section which reads, "Nothing herein contained prohibits the carrying of a legal firearm other than a handgun anywhere in a private conveyance when such firearm is being carried for lawful use."

Given the court's oversight of an element of § 790.33's preemption and prohibitions, the fact that UF's amending of the "Intent" footnote after filing would not render this matter moot (even if it were an appropriate change), and a questionable interpretation of the sufficiency of the footnotes added to UF Regulation 2.001 (and other exhibits), there can be no question that there exists an "actual case or controversy in need of adjudication" nullifying the basis for the entry of summary judgment in favor of the Defendants. Therefore, summary judgment granted in favor of the Defendants which dismissed the Plaintiff's motor vehicle claim is improper and should be reconsidered and denied accordingly.

Summary judgment entered in favor of Defendants on Plaintiff's claim that the possession of firearms in university housing violates Florida law.

The court considered the interplay between § 790.115 and § 790.25 finding that that the prohibition of firearms on university property in § 790.115 trumps § 790.25's provision allowing the possession of a firearm in one's home. Interestingly, the question was not whether university housing constituted a "home" as the Defendant conceded the point but rather which section had supremacy over the other. In ruling, the court accepted the Defendants' arguments that the legislature did not intend firearms to be allowed on university property, including housing. However, Defendants intentionally misrepresented the provisions of § 790.115 and essentially cut and pasted the section in order to support their position. Defendants relied heavily on § 790.115(2)(a) stating that a person shall not possess any firearm, *inter alia*, on the property of any school. When Plaintiff argued at hearing that blind adherence to this section would also mean that razor blades were not allowed in university housing rendering shaving impossible, Defendants argued that razor blades were only in violation if they were displayed in a rude or threatening manner. What may have escaped the court's attention is that this is an out-of-context blending of § 790.115(1) and § 790.115(2)(a) which results in a nonsensical, inaccurate, and absurd interpretation.

Despite the court's focus on the issue, there is no ambiguity on the interplay between § 790.115 and § 790.25. The answer is found in § 790.25(4) which states:

> **(4) Construction.—**This act shall be liberally construed to carry out the declaration of policy herein and in favor of the constitutional right to keep and bear arms for lawful purposes. This act is supplemental and additional to existing rights to bear arms now guaranteed by law and decisions of the courts of Florida, and nothing herein shall impair or diminish any of such rights. This act shall supersede any law, ordinance, or regulation in conflict herewith.

This is the current language of the statute through the latest regular legislative session. Despite any argument as to which section was enacted first, it is clear that the legislature has done nothing to restrict or diminish the supremacy of § 790.25 as it applies to any "law, ordinance, or regulation in conflict herewith." To find otherwise is to impart a supposed realization of what the legislature possibly meant to do.

Even if the court were to continue to hold that § 790.115 is superior to § 790.25, it is inarguable that § 790.115 is inferior to the United States Constitution as interpreted by *Heller* and *McDonald* holding that the banning of possession of a readily operable firearm in the home is a violation of the 2nd Amendment. Additionally, understanding the right to keep arms for lawful self-defense is most acute in the home, to claim that the legislature intended for § 790.115 to govern under the facts of this case, would be to accept that the legislature intended the section to supersede Section 8 of the Florida Declaration of Rights – an absurd proposition.

Remembering that Defendants conceded that university housing does qualify as a student's home, opting to prohibit firearms within per § 790.115 over the plain language of § 790.25 allows for an unconstitutional result. This runs afoul of the Restrictive Construction Doctrine as described in *Industrial Fire & Cas. Ins. Co. v. Kwechin*, 447 So. 2d 1337, 1340 (Fla. 1983) which states, "When two constructions of a statute are possible, one of which is of questionable constitutionality, the statute must be construed so as to

avoid any violation of the constitution." Chapter 790, read as a whole, allows for a clearly constitutional interpretation; sadly, this is not the interpretation that the court found despite having "long been the policy of [the Supreme C]ourt in the interpretation of statutes where possible to make such an interpretation as would enable the court to hold [a] statute constitutional." *Rich v. Ryals*, 212 So. 2d 641, 643 (Fla. 1968).

Defendants and the court also failed to notice (or address) § 790.115(3)(c) which, if held to apply to student housing, would convert an accepted constitutional right – possession of a firearm in one's home – to a third degree felony. Because university housing also encompasses many off-campus properties, this could result in disparate treatment of student/neighbors and their ability to defend themselves in their home by like methods merely by virtue of the entity that owns the property. The student renting from a UF owned property would be an as yet undetected felon while the student renting from a private entity would remain a law abiding citizen. In *Reinish v. Clark*, 765 So. 2d 197, 203 (Fla. 1st DCA 2000), the court held that a state may not treat those within its borders unequally solely on the basis of their different residences." The application was for out-of-state property owners so it is a logical extension that it would, of course, apply to those not across state borders but merely across yards or parking lots. Further, when speaking of the Equal Protection Clause, *Reinish* held that "it simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Id*. There is no relevant distinction between similarly situated students, one who lives in private housing and the other who lives in university housing when it is applied to a fundamental constitutional right. It is an impossible stretch to find one a felon and exposed to possible incarceration.

In this court's order granting the Defendants' summary judgment on the housing claim, it stated, "There is no exception in § 790.115(2) for a residence hall like there is for a vehicle." Indeed there is. The exceptions are the United States Constitution and the Florida Declaration of Rights. This is a line that UF may not cross. "[T]he State cannot condition the granting of a college education, even though a privilege, upon the renunciation of constitutional rights." *Lieberman v. Marshall*, 236 So. 2d 120, 123 (Fla. 1970).

Both the United States and the Florida Constitutions protect individuals from arbitrary and unreasonable interference with a person's right to life, liberty, and property. *State v. Robinson*, 873 So. 2d 1205, 1212 (Fla. 2004). Additionally, substantive due process bars certain actions regardless of the fairness of the procedures used to implement them. *Id*. It was held in *State v. Saiez*, 489 So. 2d 1125, 1128 (Fla. 1986) that an infringement must not be unreasonable, arbitrary, or capricious and must have a "reasonable and substantial relation" to a legitimate objective. Given that similarly situated students who have the mere difference of landlords can have their fundamental right to protection in the home be treated so harshly and drastically differently, is a glaring example of the arbitrariness and capriciousness of the UF regulations. Plus, it is further proof that such regulations, especially considering other firearm related regulations, do not have any relation to a legitimate University objective. To deny students the right to bear arms, especially in their home where the right is most acute, without due process of law violates the guarantees of Art. I Sec. 9 of the Florida Constitution.

There is not a way to hold that § 790.115 is supreme over § 790.25 and retain its constitutionality. Therefore, summary judgment granted in favor of the Defendants with respect to Plaintiff's housing claim is improper and should be reconsidered and denied accordingly.

The court's failure to address any issues specific to Count III of Plaintiff's First Amended Complaint results in an ambiguity as to the status of the instant case.

The court's order granting summary judgment in favor of the Defendants attempts to categorize all of the Plaintiff's counts in the First Amended Complaint that are not directly related to "motor vehicle claims" as the "housing claim" and attempts to dispose of them via the above supremacy ruling. However, Count III of the First Amended Complaint (Paragraphs 72 through 84) demand adjudication on constitutional issues that are not related to § 790. This claim was made specifically under § 86.011. If the court's intent was to include Count III under the umbrella of its summary judgment ruling, it was essentially applying a "no scrutiny" standard to a fundamental right enshrined in both Art I, Sec. 8 and Art. I, Sec. 2 of the Florida Constitution.

A "no scrutiny" standard of review cannot possibly rise to the heightened scrutiny demanded by the United States and Florida Supreme Courts when a fundamental right is implicated. Plaintiff contends that the only permissible standard for Count III is that of strict scrutiny and that Count III cannot be disposed of by the subject Order.

WHEREFORE, Plaintiff respectfully requests this Honorable Court enter an Order Vacating the Granting of Summary Judgment and require the Defendants to Answer the First Amended Complaint in its entirety as well as any other relief that this Court deems proper.

Respectfully submitted this 11th day of August, 2014.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via the e-filing portal on August 11, 2014 to the following:

Barry Richard, Esq.
Greenberg Traurig, P.A.
richardb@gtlaw.com

/s/ Lesley McKinney
By: _____
Lesley McKinney, Esq.
Florida Bar No.: 67976

MCKINNEY, WILKES, & MEE, PLLC
13400 Sutton Park Dr. S, Suite 1204
Jacksonville, FL 32224
904.620.9545 – Office
904.404.8321 – Fax
Email: lesley@mwmfl.com

/s/ Eric J. Friday
By: _____
Eric J. Friday, Esq.
Florida Bar No.: 797901

FLETCHER & PHILLIPS
541 E. Monroe, Suite 1
Jacksonville, FL 32202
904.353.7733 – Office
904.353.8255 – Fax
Email: efriday@fletcherandphillips.com

Attorneys for Plaintiff