DISTRICT COURT OF APPEAL, FIRST DISTRICT

DCA CASE NO.: 1D14-4614
L.T. CASE No. : 2014-CA-000104

FLORIDA CARRY, INC.,
Plaintiffs,

v.

UNIVERSITY OF FLORIDA,
BERNIE MACHEN.
Defendants.
_____/

Appeal from the Circuit Court,
Eighth Judicial Circuit in and for
Alachua County, Florida
Hon. Toby S. Monaco, Presiding

APPELLANT'S INITIAL BRIEF

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STATEMENT OF THE CASE

This case was filed on 10 January 2014 in the Circuit Court, Eight Judicial Circuit in and for Alachua County. (Vol. 1, Pg. 1). An Amended Complaint was filed on 21 February 2014. (Vol. 1, Pg. 53).

At issue in this case is whether, at the time the case was filed, the University of Florida (hereinafter "UF") had complied with this Court's ruling in the case of *Florida Carry, Inc. v. University of North Florida*, 133 So. 3d 966 (Fla. 1st DCA 2013)(hereinafter "the UNF decision"), regarding the lawful possession of firearms in vehicles on campus.

Also at issue was a determination of whether a person residing in housing owned by the Defendant university had a right to possess arms in their residence for purposes of self-defense. This determination involved the proper interpretation of Sec. 760.115, Fla. Stat., and the interplay between that statute and Sec. 790.25, Fla. Stat. It also required the Court to interpret the Florida Constitutional right to keep arms in ones home.

A secondary issue was the liability of the University President, Bernie Machen, pursuant to Sec 790.33(3), Fla. Stat.

The case was heard by Judge Monaco in Alachua County Circuit Court on the Defendants' Motion for Summary Judgment and Defendant Machen's Motion

to Dismiss Defendant Bernie Machen. (Vol. 1, Pg. 107 and 138).

The trial court granted the Defendant's Motion for Summary Judgment on Amended Complaint against all defendants. (Vol. 1, Pg. 158). The trial court found that as related to the "Motor Vehicle Claim" University of Florida Regulation 2.001 had been "expeditiously footnoted" following this Courts ruling in the UNF decision to "make clear that it would not be used to disallow securely encased firearms in vehicles on campus." (Vol. 1, Pg. 160). The trial court found that the relevant issue was whether the University sought to enact or enforce regulations impinging on the legislative preemption of firearms regulation. (Vol. 1, Pg. 60). The trial court found that there was no actual case or controversy, and that prior to suit being filed, "no such unlawful enactment or enforcement was imminent". (Vol. 1, Pg. 160).

On the "Housing Claim" the trial court also found the Defendants were entitled to summary judgment. (Vol. 1, Pg. 162). The Defendants conceded that a residence hall is a home for purposes of constitutional analysis in this case. (Vol. 2, Pg. 229). The court found that the provision of Sec. 790.25(3)(n), Fla. Stat., providing for the right to possess a firearm at one's home did not supercede the statutory prohibition on firearms on university property. (Vol. 1, Pg. 161). The court reasoned that Sec. 790.115, Fla. Stat., controlled because the Legislature had

made no specific exemption in Sec. 790.25, Fla. Stat., for university housing has it had for vehicles. (Vol. 1, Pg. 161). From this the court concluded that the Legislature did not intend to make an exception for residence halls. (Vol. 1, Pg. 161). The court did not address any other type of university owned housing.

The trial court partially granted and partially denied the Defendant's Motion to Dismiss Mr. Machen. (Vol. 1, Pg. 159). The trial Court found that the issue of a civil fine was not properly pled against Defendant Machen, and therefore any liability for a civil fine was not ripe for determination. (Vol. 1, Pg. 159). As to the request for damages against Defendant Machen, the court found that Defendant Machen was immune from damages on the basis of sovereign immunity under Sec. 768.28, Fla. Stat. (Vol. 1, Pg. 159).

Plaintiff filed a timely motion for rehearing and reconsideration asking the trial court to address Count III of the Amended Complaint regarding the right to possess arms at home under the Florida Constitution, and based on decisions of the U.S. Supreme Court analyzing the Second Amendment Right to keep arms. (Vol. 1, Pg. 164-187). The court denied the motion for rehearing, clarifying that its ruling on the housing claim resolved the constitutional issues raised in Count III as well. (Vol. 1, Pg. 191).

Plaintiff filed a timely Notice of Appeal of both orders. (Vol. 2, Pg. 201).

STATEMENT OF FACTS

After this Court's ruling in the UNF case, Plaintiff issued several press statements notifying all public universities that it expected immediate compliance with Sec. 790.33, Fla. Stat., regarding the preemption of any university rules or regulations that impinged on the Legislatures exclusive preemption of the field of firearms regulations. (Vol. 1, Pg. 154). After the beginning of the new school year Florida Carry began receiving complaints from its members and reviewing promulgated polices based on those complaints. (Vol.1, Pg. 155, Para. 5). Based on member complaints as well as its audits, Plaintiff discovered that the University of Florida was continuing to promulgate illegal rules and regulations in violation of Sec. 790.33, Fla. Stat. (Vol. 1, Pg. 155).

Theses promulgations included UF Regulation 2.001 "Possession and Use of Firearms"; an "Official University Policy" titled "Weapons on Campus"; UF Regulation 4.041 "Student Honor Code and Student Code: Scope of Violations"; and a "Work Place Violence Policy." (Vol. 1, Pg. 74-106). At the time suit was filed, each of these promulgated policies were published on the UF website, and were available through its website's internal search engine.[1] (Vol. 1, Pg. 155-156).

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[1]Some or all of these policies were likely still in print in hard copy, but Plaintiffs claims do not rely on any pre-printed documents which the Defendants could obviously not un-publish. Plaintiff's claims rely solely on the fact that at the

The Policies

The first policy, Regulation 2.001, stated that "[t]he possession of firearms on the University campus or any land or property occupied by the University of Florida is prohibited." (Vol. 1, Pg. 75-77). As noted by the trial court, an "Intent" provision was promptly appended to the end of the regulation after this Court's ruling in the UNF case. (Vol. 1, Pg. 160). The footnote stated in its entirety:

> Intent: 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 old and older, as decided by the First District Court of Appeal on December 10, 2013.

Nothing in the footnote indicated any case name or case number, or other citation. (Vol. 1, Pg. 77).

The second policy, the "Official University Policy" claimed that "the University of Florida is a 'school' as defined in Sec. 790.115 Florida Statutes" and that firearms, weapons, and numerous other items defined in Chapter 790 Florida Statutes could not be possessed on campus "or other property owned, occupied or controlled by the University of Florida (including when stored in vehicles)." (Vol. 1, Pg. 79). The policy went on to claim that "The University of Florida confirms

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time suit was filed each of these policies and regulations was easily obtainable and viewable on UF's own website.

its waiver of the exception provided in Section 790.115(2)(a)3, Florida Statute." A footnote at the end of this sentence again made the same claim within the document. The policy further stated the reason for the policy was to implement UF Regulation 2.001. (Vol. 1, Pg. 79).

The third policy, UF Regulation 4.041 "Student Honor Code and Student Code: Scope of Violations" included as a violation of the Student Conduct Code:

> Possession, use, sale, or distribution of any firearm, ammunition, weapon or similar device not explicitly permitted under University of Florida Regulation 2.001. Prohibited devices include, but are not limited to, stun guns, pellet guns, BB guns, paintball guns, slingshots, archery equipment, any dangerous chemical or biological agent, or any object or material, including but not limited to knives, capable of causing, and used by the offending person to cause, or to threaten physical harm.

UF Regulation 4.041(4)(f), Firearms or Other Weapons Violations. (Vol. 1, Pg. 89).

The fourth and final policy, the "Workplace Violence Policy" stated that a warning sign and unacceptable behavior to address as a "Level Two" sign was "[c]arries a weapon" and claimed that Florida Law and University Policy prohibited firearms on "state property." (Vol. 1, Pg. 98-99).

The Discussion

On January 7, 2014, after learning that these preempted polices were continuing to be promulgated the Executive Director of Florida Carry, Sean Caranna, attempted to contact Defendant Machen, President of the University of Florida. (Vol. 1, Pg. 155). Mr. Caranna received a call in response from Jamie Lewis Keith, general counsel for the university. (Vol. 1, Pg. 155). Mr. Caranna explained Plaintiff's concerns to Ms. Keith. Specifically, he explained that the university was still violating Sec. 790.33, Fla. Stat., in several ways, including but not limited to:

> (1) the footnote to Reg. 2.001 was insufficient to notify students of what conduct was prohibited and that the footnote did not accurately reflect state law regarding the possession of firearms in vehicles;
>
> (2) the University had failed to issue any notice to students that it was taking any action to repeal or modify the rules and regulations that had previously been promulgated to students in violation of Sec. 790.33;
>
> (3) The university had conflicting policies on its website, some of which still claimed the university was entitled to waive the right of persons to possess firearms on campus;

(Vol. 1, Pg. 155-156).

Ms. Keith dismissed all of Mr. Caranna's concerns and assured him that the university police understood the law and had already taken all necessary steps to comply with this Court's ruling in the UNF case. (Vol. 1, Pg. 156-157). At no time during the conversation or during the next three days, or after the filing of suit did Ms. Keith or any representative of UF request additional time to comply with the law, or to make any edits or adjustments to the rules and regulations being promulgated by Defendants on the University's website. (Vol. 1, Pg. 156).

SUMMARY OF ARGUMENT

UF's rules, regulations and policies in violation of preemption, should never have been published on its website in the first place. Since 1987, before the internet came into common use for things like publishing university rules, the Legislature has reserved to itself the right to regulate the possession and use of firearms in the state of Florida. Since 2011, the Legislature has told all state entities, and the people that run them, that continued impingement on the Legislature's preemption would result in liability. Since April 15, 2013, every public university in the state of Florida has been aware that this Court was drafting an opinion to declare clearly whether a university was a school district. Since December 13, 2013, every public college in Florida has known that it has no authority to regulate the use or possession of firearms and that they are not a new

fourth, "eduslative" branch of government.

The University of Florida had more than adequate time to comply with this Court's ruling in UNF. UF also had the ability to request additional time to track down any policies in violation of the law and amend them. If it did not have time, it at least had time to communicate to its students and other members of the UF community that it was aware changes needed to be made, and was in the process of making such changes but would require additional time to make the necessary changes. Any claim that it was merely a matter of time is belied by Ms. Keith's statements to Florida Carry, Inc., and her dismissive attitude that no further changes to UF policies were necessary.

UF continued all the way until suit was filed to violate the rights of students and the ruling of this Court. UF attempted to read the this Court's decision in UNF for much less than it could possibly be read for, and ignored the plain language of 790.25(5), the law which this Court upheld as valid on university campuses over the objection of universities statewide. UF continued to promulgate preempted regulations and policies to violate the rights of the numerous people who drive on its campus each day, and only at the point of seeking summary judgment did it claim for the first time that it was merely a matter of insufficient time.

The U.S. Supreme Court has been more than clear that laws which prohibit the best means to exercise the right of self-defense in the home, are prohibited under the Constitution of the United States. Florida's Constitution cannot be interpreted to mean any less. It is a basic premise of statutory construction that statutes should be read in pari materia, in a way that allows the courts to uphold the constitutionality of statutes rather than declare them unconstitutional. The only way this Court can comply with that premise is to interpret 790.25 consistent with its plain terms that it supercedes conflicting statutes, including Sec. 790.115, and allows persons residing on university property to possess lawful, commonly used firearms for self-defense in the home.

Any argument that Defendant Machen is entitled to sovereign immunity is without merit. Sovereign immunity is a common law doctrine protecting the state and its employees for actions taken in their official capacity. It is a doctrine which the Legislature can waive on behalf of the state, its sub-entities, its employees and is has done so, twice. The first is in actions in tort pursuant to Sec. 776.28, Fla. Stat., and the second is in actions against agency heads who refuse to accept limits on their power grabs, and who cannot seem to grasp the simple concept that they and their agencies have no authority to regulate firearms.

ARGUMENT

There are three main issues in this case that will be addressed in order. First, is the "Housing Claim", second, is the "Motor Vehicle Claim" and third, is the "Immunity From Suit," or whether an individual agency head can be held liable for damages for violating Sec. 790.33, Fla. Stat., Field of regulation of firearms and ammunition preempted.

I. Can a state university prohibit, within a home leased to an adult student, possession of lawful arms that are in common use for lawful purposes, simply because that home is owned by the university?

Standard of Review

"A trial court's ruling on summary judgment is subject to de novo review." *Acosta, Inc. v. Nat'l Union Fire Ins. Co.*, 39 So. 3d 565 (Fla. 1st DCA 2010). Rulings of the trial court on matters of law are also subject to de novo review. *Id.*

Argument

The University of Florida, and its president, Defendant Machen, have chosen to interpret the provisions of Sec. 790.115, Fla. Stat., to prohibit possession of firearms on any property owned by the university, including property that has been leased to a tenant. This interpretation is either contrary to the laws as passed by the Legislature, or if correctly interpreted by the Defendants, violates Art. I, Sec. 8, of the Florida Constitution.

Art. I, Sec. 8, Fla. Const. is interpreted similarly to the Second Amendment to the Constitution of the United States. See, *Rinzler v. Carson*, 262 So. 2d 661, 666-667 (Fla. 1972)(holding that the term "keep" was added to "bring the protection in line with the phraseology used in the Second Amendment to the Constitution of the United States"). Any interpretation however must give at least protection equal to that provided by the federal constitution, if not more rights. *Jardines v. State*, 73 So. 3d 34, 59 (Fla. 2011)(noting that Florida Courts are not prohibited from recognizing a higher standard of protection for constitutional rights).

A. *Heller* and *McDonald* are unequivocal that prohibitions on lawful possession of arms in common use for defense of one's home cannot survive any level of scrutiny.

The decisions of the U.S. Supreme Court in *Heller* and *McDonald* have forever made clear that the Second Amendment protects a pre-existing, fundamental right, and that enshrinement of a right "necessarily takes certain policy choices off the table." *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008) and *McDonald v. Chicago*, 561 U.S. 742, 790 (2010). There can be no doubt after *McDonald*, that whatever else it means, the Second Amendment does not allow a state, or its subdivisions, to prohibit a law abiding person from possessing a functional firearm in their home for purposes of self-defense.

McDonald at 791. Even those courts that have tried to limit the holdings of *Heller* and *McDonald* to their narrowest, have been compelled to accept this holding. See generally, *Kachalsky v. County of Westchester*, 701 F.3d 81(2nd. Cir 2012)(allowing good cause requirement for license only for carrying outside the home); *Drake v. Filko*, 724 F.3d 426 (3rd. Cir. 2013)(recognizing that *McDonald* allowed for in home possession of firearms but questioning the limits of the right outside the home); but see, *Moore v. Madigan*, 702 F.3d 933, 941 (7th Cir. 2012)(questioning the validity of the *Kachalsky* court's reasoning)

After an exhaustive historical analysis of the Second Amendment, the *Heller* Court concluded that:

> under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home the most preferred firearm in the nation to 'keep' and use for protection of one's home and family, would fail constitutional muster. [internal cites and quotes omitted]

Heller, 554 U.S. 570, 628-629 (U.S. 2008). Just as in *Heller*, the Defendants here have sought to prohibit the possession of any arm in a home leased by a student, if that home is owned by the University. This rule applies without distinction to traditional dormitories, single family housing, apartments where each student has

their own living space, and to rural agricultural stations.[2]

B. The Court must reconcile the conflict between Sec. 790.25, Fla. Stat., which by is terms has supremacy over conflicting statutes, and Sec. 790.115, Fla. Stat.

Sec. 790.25, Fla. Stat., provides that despite other statutes it is lawful for a person to possess a concealed or openly carried firearm at one's home. Sec. 790.115, provides that it is generally not lawful to possess a firearm on the property of any school, and defines school to include "post-secondary school."[3] It is important to note that Sec. 790.25 by its terms supercedes any law in conflict with its terms. Sec. 790.25(4), Fla. Stat.

During the argument on Defendants' Motion for Summary Judgment, Defendants admitted the clear precedent that a residence hall room is a home for purposes of constitutional analysis. (Vol. 1, Pg. 229). With that admission the question remains, how can the Court reconcile the provisions of Sec. 790.25 and 790.115, without declaring either statute unconstitutional?

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[2]The Defendants do make one distinction in regards to rural agricultural research stations. Similarly to the unconstitutional city ordinance in Heller, Defendants require those living at the agricultural stations to keep their firearms in an inoperable condition where they are useless for self-defense. (Vol. 1, Pg. 76).

[3]Plaintiff does not contest that Defendant University of Florida is a post-secondary school as defined in Sec. 790.115.

1. Sec. 790.25, Fla. Stat., has consistently been upheld to protect the right of law abiding Floridians to keep arms in their home for the purpose of self-defense, without reference to the nature of the home.

Then a statute is clear and unambiguous the plain language controls. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99 (2003). Sec. 790.25 allows a person to possess a firearm at their home. Sec. 790.25(3)(n), Fla. Stat. No distinction is made as to who owns the home, who it is leased to, or where the property is located. By its plain language Sec. 790.25 allows any adult to possess a lawfully owned firearm in what the Defendants have already conceded is a home and states that it supercedes any conflicting statute. The courts of this state have extended the definition of home for purposes of this statutes to include any place, such as a motel, where a person resides overnight. *Cokin v. State*, 453 So. 2d 189 (Fla. 3d DCA 1984).

Defendants claim that Plaintiff is inserting a conflict where none exists. (Vol. 2, Pg. 229 and 231). Defendants' argument is two fold. First, Sec. 790.25 was enacted several years prior to Sec. 790.115, and as the more recent statute Sec. 790.115 should control. Second, Sec. 790.25 does not specifically exclude operation of Sec. 790.115 as it does Sec. 790.053, Fla. Stat., (open carry of weapons) and Sec. 790.06, Fla. Stat., (concealed carry of weapons or firearms).

The first argument answers the second, because Sec. 790.115 did not exist at the time Sec. 790.25 was enacted of course it did not reference a non-existent statute.

Defendants claim that because Sec. 790.115 is the later enacted statute it should control despite the supremacy clause of Sec. 790.25.

Ordinarily given this language and the contrary positions and interpretation of the parties the Court would be required to resort to canons of statutory construction to determine the intent of the Legislature. In this case however, the Legislature has made specific findings, declarations of policy, as well as determinations of construction and conflict avoidance.

> (1) DECLARATION OF POLICY.—The Legislature finds as a matter of public policy and fact that it is necessary to promote firearms safety and to curb and prevent the use of firearms and other weapons in crime and by incompetent persons without prohibiting the lawful use in defense of life, home, and property, and the use by United States or state military organizations, and as otherwise now authorized by law, including the right to use and own firearms for target practice and marksmanship on target practice ranges or other lawful places, and lawful hunting and other lawful purposes.
> . . .
> (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.

Sec. 790.25, Fla. Stat. The plain language of the statute, which is all this Court

should consider, provides that in cases of conflict with other laws Sec. 790.25 is the controlling law, and that its terms should be liberally construed to carry out its provisions. See *Curry-Pennamon v. State*, 2015 Fla. App. LEXIS 21 (Fla. 1st DCA 2015) citing *Florida Carry, Inc. v. University of North Florida*, 133 So. 3d 966 (Fla. 1st DCA 2013)(noting the statutory requirement of liberal construction in favor of the right to bear arms). Unfortunately the Court below failed to comply with the plain language of the statute, and at the invitation of Defendants, interpreted the statute as narrowly as possible, in direct contradiction to the Legislature's express instructions.

2. If Sec. 790.115, applies to all property owned by a university to include student housing, then Sec. 790.115 is in conflict with the holdings of Heller and McDonald and must be declared unconstitutional.

While the primary focus of Defendants and the Court below was students, it is not just students' rights that are imperiled by Sec. 790.115. Numerous persons who are not students live in university housing, specifically spouses of students. These persons who are not in any way subject to the academic rules of the university, who live with their spouse in university housing, must commute to and from work without the ability to exercise their rights as well as being defenseless in their home.

These individuals cannot be forced to give up their most fundamental constitutional rights as a condition of either obtaining an education or residing with their spouse who is attending the state university. *Lieberman v. Marshall*, 236 So.2d 120, 123 (Fla. 1970).

3. Under the doctrine of constitutional avoidance, the Court should interpret Sec. 790.115 in a manner that allows it to be upheld constitutionally rather than in a manner that requires it to be declared unconstitutional.

A court should seek to avoid an interpretation of a statute that results in the statute being declared unconstitutional. *Durring v. Reynolds, Smith & Hills*, 471 So. 2d 603, 606 (Fla. 1st DCA 1985). Based on the U.S. Supreme Court's holdings in *Heller* and *McDonald* any ban on possession of firearms in a student's home, regardless of whether the university owns the property, is unconstitutional. This leaves this Court with a simple choice: interpret Secs. 790.115 and 790.25 in a way that gives effect to both statutes, without running afoul of student's constitutional rights to keep arms; or find that to the extent 790.115 prohibits arms in university housing, it is unconstitutional.

4. There is nothing absurd or irrational about finding Sec. 790.25 supercedes Sec. 790.115.

Defendants assert that Plaintiff's reading of Sec. 790.25 would have irrational consequences because it would allow teachers and other employees to

carry firearms on campus. (Vol. 2, Pg. 230). This is true but only to an extent. As a matter of criminal law, Defendants are correct. A proper reading of Sec. 790.25, is that employees are permitted to carry at their place of employment and cannot be prosecuted. See, *State v. Little*, 104 So. 3d 1263 (Fla. 4th DCA 2013) and *Brook v. State*, 999 So. 2d 1093 (Fla. 5th DCA 2009).

Defendants are incorrect that such a ruling would necessarily allow employees to possess firearms on campus without any sanction. Defendants confuse the distinction between criminal penalties and regulation of their employees. Sec. 790.33(4)©), Fla. Stat., specifically provides for universities, as well as any other state actor, to regulate possession of firearms by employees in the course of their employment. *Pelt v. Department of Transp.*, 664 So. 2d 320 (Fla. 1st DCA 1995).

This result is only irrational due to the Defendants' hoplophobia. Despite Defendants' claims of absurdity or irrationality, some Legislatures have in fact determined that firearms should be allowed to be carried on college campuses.[4]

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[4]http://www.ncsl.org/research/education/guns-on-campus-overview.aspx. "7 states now have provisions allowing the carrying of concealed weapons on public postsecondary campuses. These states are Colorado, Idaho, Kansas, Mississippi, Oregon, Utah, and Wisconsin. In March 2014, Idaho's legislature passed a bill premitting concealed weapons on campus and making it the 7th state to permit guns on campus."

In Florida, schools are not the only place where one cannot normally possess or carry a weapon unless they are at their place of business. Others include, bars, courthouse, jails, police stations, seaports, airport passenger terminals, and other examples listed in Sec. 790.06(12), where firearms are not generally allowed with a concealed weapons firearms license, but can be possessed by employees under Sec. 790.25, Fla. Stat.

C. Under the current law students who pay for their home are given less constitutional protections than persons who receive subsidized housing at taxpayer expense.

At lease one court has had an opportunity to consider the government as a landlord argument, as well as public safety and police powers arguments in regards to publicly owned housing for low income families. In that case, residents obtaining free or reduced housing based on their economic circumstances challenged rules that prohibited possession of firearms in their government owned homes and later in common areas. The Court found, and the Defendant conceded by amending its rules, that a prohibition on arms in the home was invalid after *McDonald*. *Doe v. Wilmington Hous. Auth.*, 88 A.3d 654 (Del. 2014).

There is no basis for the Court to find that students and their families who pay substantial rents for their university owned homes have any less rights than those who receive subsidized housing from government entities.

The very status of these units as homes belies the characterization by the Defendants that these homes are University property. While they may be owned by the University, they are actually private property held under a lease by the student. Just as the private property within 1,000 feet of a school is not subject to the provisions of Sec. 790.115, a student's private residence should not be subject to the general prohibition on firearms as the residence ceases to be school property when it is leased. Any contrary analysis would completely overturn a wealth of jurisprudence in the Fourth Amendment context. See, *Beauchamp v. State*, 742 So. 2d 431 (Fla. 2nd DCA 1999)(finding that Fourth Amendment protections applied in the context of a search of a dormitory room at a state university).

II. Do the promulgated policy changes made by Defendants prior to the filing of suit adequately comply with this Court's ruling in the case of Florida Carry, Inc. v. University of North Florida?

Standard of Review

"A trial court's ruling on summary judgment is subject to de novo review." *Acosta, Inc. v. Nat'l Union Fire Ins. Co.*, 39 So. 3d 565 (Fla. 1st DCA 2010). Rulings of the trial court on matters of law are also subject to de novo review. *Id.* To the extent that the court below found that a particular change was made on or before a particular date, this Court should determine whether the trial court abused its discretion and whether its findings are supported by competent substantial

evidence, but in doing so must draw every possible, reasonable inference in favor of the party against whom the summary judgment was sought. *Speedway SuperAmerica, LLC v. Dupont*, 933 So. 2d 75 (Fla. 5th DCA 2006).

Argument

A. The trial court erred in entering a summary judgment because there were material issues of disputed fact.

Before addressing the substance of the argument on this issue, it must first be considered whether summary judgment was proper on the motor vehicle claim and whether the court below erred in entering summary judgment or in its determination of the facts on which summary judgment was predicated.

In order for summary judgment to be granted there must be no genuine issue of material dispute. *Acosta, Inc. v. Nat'l Union Fire Ins. Co.*, 39 So. 3d 565, 573 (Fla. 1st DCA 2010). The party seeking summary judgement must be entitled to judgment as a matter of law based on the undisputed facts. *Id.* If there is any claim of disputed material fact all reasonable inferences must be drawn in favor of the non-moving party. *Id.*

Neither of the factors were met in this case, and the trial court failed to draw the required reasonable inferences in favor of Plaintiff. The trial court found that Regulation 2.001 was expeditiously footnoted to comply with this Court's decision in *Florida Carry, Inc. v. University of North Florida*, 133 So. 3d 966

(Fla. 1st DCA 2013) (hereinafter "the UNF decision"). The Court also found that the modification of Regulation 2.001 and "other steps" were taken to conform university policy to Florida law. The trial court did not specify what those steps were indicating a lack of competent substantial evidence to support its finding. The trial court found that the unspecified steps were taken before suit was filed and that Plaintiff was well aware of these unidentified steps.

According to the trial court the only disputed fact in regards to the motor vehicle claim was "the extent to which all references to the previous version of Regulation 2.001 have been corrected in various documents or on-line publications."[5] According to the trial court any question as to whether the Defendants were timely in making the changes to Regulation 2.001 and the other unspecified modifications was not material to the question of whether Defendants had violated Sec. 790.33. The trial court reached its conclusion based on the affidavit of Ms. Keith, general counsel for UF.

The court ignored the affidavit of Sean Caranna, and the conflicting allegations between Mr. Caranna's account of the conversation between himself

[5]As noted *supra* Plaintiff has not taken issue with any previously issued documents, only the continued on-line promulgation of the prohibited regulations and policies and the failure to notify students that prior policies were promulgated in error at the start of the school year.

and Ms. Keith, and relied solely on Ms. Keith's claims, and ignored disputed issues raised in the Plaintiff's response to the Defendants' motion for summary judgment.

To cite one example, Exhibit A to both the Complaint and Amended Complaint are identical. As set forth in Mr. Caranna's affidavit the policy attached as Exhibit A was identical on January 7th and January 10th, 2014, and no indication by Ms. Keith was made on January 7, that UF had any intention of modifying the footnote in any way. It is the Plaintiff's position, set forth in both is response to the motion for summary judgment and in Mr. Caranna's affidavit, that it was only after the filing of suit that changes were made to the footnote to track the statutory language ruled on by this Court in the UNF case. On this basis alone, summary judgment should have been denied, or the trial court should have considered whether the footnote version in existence at the time suit was filed was compliant with Sec. 790.33 and the UNF decision.

Furthermore, while not specified in the trial court's order the court failed to consider the three other polices that continued to be promulgated as much as three months after the filing of suit. Plaintiff's response to the motion for summary judgment set forth that each of these policies was still being promulgated on the date suit was filed and three months later, and Mr. Caranna's affidavit attested that

each was viewable online as an original, un-cached document on the date suit was filed.

The trial court's granting of summary judgment on the motor vehicle claim was in error because issues of disputed fact remained in regards to that claim, and the court failed to make the required inferences in favor of Plaintiff. The question of the Courts legal conclusions in regards to the timeliness and sufficiency of the modifications are addressed *infra.*

B. Adequate time was given by the Legislature and by the Plaintiff for Defendants to comply with Sec. 790.33, Fla. Stat.

Prior to filing suit in this case, the Plaintiff contacted Defendants in an attempt to avoid litigation. (Vol. 1, Pg. 59). Plaintiff informed Defendant that the footnote was insufficient given the remaining language. (Vol. 1, Pg. 155). Defendants once again refused to make any changes. (Vol. 1, Pg. 155 and 157).

The Court below found that the Defendants had attempted "rapid compliance" with this Court's decision in *UNF*, by adding a footnote within a one month time period. It is important to note however, that this action was only filed after Defendants made clear they had no intention of making further amendments or corrections and believed their policies were in full compliance. (Vol. 1, Pg. 155 and 157). Were this a case where Plaintiffs had refused additional time to comply or correct policies, the lower court's ruling might be correct. But where all the

time needed had been taken and Defendants refused to take any further action in any time frame, a claim that Defendant's did not have adequate time to amend their policies is disingenuous. In fact, not once in their motion for summary judgment did Defendant's claim they had not had adequate time to comply with the *UNF* ruling.

C. Defendants failed to take timely appropriate action to cease regulating the possession of firearms on campus.

This case was not a surprise or a "gotcha". The Defendants knew exactly what they were doing and were taking every step possible to avoid and delay compliance with this Court's decision in UNF. Mr. Machen's reputation and disdain for firearms preemption laws is well established.[6]

The law of this state since 1987 has been that the regulation of firearms is preempted by the Legislature.[7] Furthermore the Florida Constitution has since at least 1968 stated that the manner of bearing arms may be regulated by law, i.e. the Legislature, not by whatever agency wishes to make its own rules. See also, *University of North Florida*, at 972. Despite these laws and the Florida

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[6]While president of the University of Utah, Defendant Machen sued the Attorney General of Utah in an effort to avoid complying with Utah's firearms preemption law. *Univ. of Utah v. Shurtleff*, 144 P.3d 1109 (Utah 2006).

[7]Co-regulation is not allowed in cases of express field preemption. *Phantom of Brevard, Inc. v. Brevard County*, 3 So.3d 309 (Fla. 2008).

Constitution the University continued to regulate firearms.

In 2011, tired of non-compliant municipalities, counties and agencies, the Legislature created an enforcement mechanism to insure the Defendants and others would follow Florida law. The enforcement provisions were signed into law on June, 2 2011, but did not go into effect until October 1, 2011, 1 day less than four months later in order to give those entities that had previously been in violation time to come into compliance. Again, Defendants and others refused. In December 2013, this Court issued a 12-3 en banc decision making clear once again that the regulation of firearms was by law and by the Florida Constitution, reserved to the Legislature. *Florida Carry v. University of North Florida*, 133 So. 3d 966 (Fla. 1st DCA 2013) Defendants refused again to modify their rules and continued to promulgate the same rules they had previously. Their only concession to this Court's ruling was a footnote, in only one of at least 3 locations where university rules regarding firearms were published to students. Furthermore, no change was made to the University's Workplace violence policy.

This footnote stated that it was the University's "intent" to comply with Sec. 790.33 regarding "securely encased" firearms, citing the date of this Courts decision and this Court's name. No other information was provided such as a case cite or case name.

Any claim that the Defendants were unsure of the law or merely made a misstatement in their polices, or missed a few policies has one simple answer, that is why co-regulation is not allowed in cases of express field preemption. See, *Phantom of Brevard, Inc. v. Brevard County*, 3 So.3d 309 (Fla. 2008). Even if Defendant's had enacted their own policies that tracked perfectly with state law, they are still in violation of Sec. 790.33. The Legislature was very clear in 1987 and was more clear in 2011, no state agency is allowed to be in the business of regulating, or co-regulating consistent with state law, the possession and use of firearms.

Finally, if Defendants' polices tracked state law precisely, the additional penalties under school administrative rules would violate preemption. (Vol. 1, Pg. 89, "Disciplinary action may be imposed for violations of the Student Honor Code or Student Code of Conduct . . ."). By the terms of Sec. 790.33, Fla. Stat, the punishments provided for in Chapter 790, are the only punishment that may be imposed by the state or any sub-entity for possession of firearms on campus.

D. Sec. 790.33, Fla. Stat., is not concerned with an agency's intentions, but with its actions.

Nothing in Sec. 790.33 references a state agency's intent. Sec. 790.33 requires and demands compliance through remedies that some local officials have complained are "draconian." Lee, Demorris, Tampa Bay Times, August 18, 2011,

Local gun rules coming off the books. The demands of 790.33 are clear: quit trying to regulate firearms, quit enacting new rules, regulations, and policies, and quit promulgating the ones you have enacted.

UF claims, and the trial court found that the intention of Defendants as contained in their footnote to Regulation 2.001 was sufficient. Defendants' intent however, is only expressed in relation to securely encased firearms. Nothing in Sec. 790.25, Fla. Stat., requires all arms to be securely encased, only handguns. Long arms may be transported anywhere in the car. Despite any subjective intent, the objective conclusion is clear, Defendants intended to continue regulating firearms in any method possible that has not been clearly delineated by this Court. Any question regarding this intent was answered by Ms. Keith's dismissive attitude when Plaintiff attempted to bring other policies to her attention, and Defendant's failed to repeal these numerous other polices and continued to promulgate their own chosen rules, regulations and policies in violation of Florida law.

In addition to the preempted firearms regulations, the Defendants also continue to prohibit the possession of non-dart firing stun guns. (Vol. 1, Pg. 89. This is in clear violation of Sec. 790.06(12)(a)(13), Fla. Stat., once again showing that the Defendants are willing to ignore state law and instead institute their own

regulations, in violation the Legislature's specific preemption. Sec. 790.06(15).

E. Defendants' promulgated policies continue to impose restrictions preempted by Sec. 790.33, Fla. Stat., and attempt to continue regulating the possession of firearms in vehicles on campus.

The lower court makes the same mistake that Defendants have in claiming a lack of enactment or enforcement. Sec. 790.33 also prohibits the promulgation of prohibited policies regarding firearms. Sec. 790.33(3)(f), Fla. Stat. Defendants continued to promulgate their illegal rules on its website well beyond the date suit was filed.

Despite this suit being filed, a student who read these preempted polices that continued to be promulgated could not possible decipher what conduct was and was not allowed. For example, nothing in the "Official University Policy" or the "Student Code of Conduct" would indicate to a student that firearms are permitted to be stored in vehicles. (Vol. 1 Pg. 79 and 89). The student would then have to review Regulation 2.001 which again tells them that firearms are prohibited.[8] The conflicting policies and regulations almost require a law degree to decipher.

Of course avoiding such confusion is the very reason the Legislature gives

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[8]While the trial court used the term "footnote" calling the intent language a footnote is overly generous. Nothing in the body of Regulation 2.001 references or informs the reader that the intent language at the very bottom of the Regulation exists or modifies the terms of the Regulation.

in Sec. 790.33 for demanding uniform statewide firearms laws. Contrast the Legislatures intent with the actions of Defendants here. Defendants continued to promulgate illegal policies, were informed that an organization had an issue with the policies, and refused to cease promulgating illegal policies, other than to state that they had no intent to violate state law.

The fundamental problem with the Defendants' argument and the trial court's ruling in addition to the insufficiency and like of prompt action is a unwarranted focus on the statutes prohibition on enactment and enforcement. Both the court below and the Defendants ignore the prohibition on promulgation.

The term promulgation, as used in Chapter 790, is defined as "to declare or announce publicly; to proclaim." *State v. Watso*, 788 So. 2d 1026 (Fla. 2d DCA 2001). Regardless of the other ways in which the Defendants allegedly complied or attempted to comply, the mere promulgation of any rule or regulation regarding the possession and use of firearms has been clearly prohibited by Sec. 790.33, and subject to enforcement since October 1, 2011. With the possible exception of claiming the waiver in Sec. 790.115, Fla. Stat., as addressed by the UNF Court, any other co-regulation or other promulgation has long been prohibited, Defendants' pleas and claims notwithstanding.

Defendants' continued promulgation and attempts to co-regulate the

possession of firearms rather than just referencing state law should not be condoned by this Court.

III. Is Defendant Machen immune from liability for damages for violation of Sec. 790.33, Fla. Stat.?

Standard of Review

The review of an order granting a motion to dismiss is de novo and accepts the factual allegations of the complaint as true. *Scovell v. Delco Oil Co.*, 798 So. 2d 844, 846 (Fla. 5th DCA 2001).

Argument

The Court below found that Defendant Machen could not be held responsible for damages under Sec. 790.33, Fla. Stat., because of the provisions of Sec. 768.28, Fla. Stat. The Court cited no precedent in support of this finding and none was offered by the Defendant.

A. The Legislature has the power and authority to abrogate the doctrine of sovereign immunity in regards to heads of state agencies or departments.

No dispute or argument has been raised against the simple premise that it is within the province of the Legislature to waive sovereign immunity for itself, its subdivisions and its agents/ employees at its discretion. In two places within the laws of Florida the Legislature has done so. The first is in Sec. 768.28, Fla. Stat., which Defendant Machen relies on to claim he is immune from damages in this

case. The second is in Sec. 790.33.

Defendant and the trial court's reliance on Sec. 768.28(9)(a) to grant immunity from damages to Machen is misplaced. The relevant provision states:

> No officer, employee, or agent of the state or of 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 her or his 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.
>
> . . .The exclusive remedy for injury or damage suffered as a result of an act, event, or omission of an officer, employee, or agent of the state or any of its subdivisions or constitutional officers shall be by action against the governmental entity, or the head of such entity in her or his official capacity, or the constitutional officer of which the officer, employee, or agent is an employee, unless such act or omission was committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. . . .

Sec. 768.28(9)(a). The misplaced reliance on this subsection is made clear by both the title of the section "Waiver of sovereign immunity in tort actions; recovery limits; limitation on attorney fees; statute of limitations; exclusions; indemnification; risk management programs," and the very first subsection of the statute "In accordance with s. 13, Art. X of the State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act. . .". The first thing that should be apparent is that Sec. 768.28 is only applicable to actions in tort,

which this case is not. The second point of note is the Constitutional authority for Sec. 768.28, Fla. Stat.

Art. X, Sec. 13 of the Florida Constitution provides, "Suits against the state.—Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating." This provision makes clear that the Constitutional authority allowing the Legislature to enact Sec. 768.28, is the very same authority that allows the Legislature to enact the penalty provisions of Sec. 790.33, and to waive sovereign immunity for its sub-entities and employees who choose to violate its preemption of firearms possession and ownership.

B. Sec. 790.33, Fla. Stat., by its plain terms, abrogates the doctrine of sovereign immunity within the range of misconduct it prohibits.

Contrary to the trial court's order, Sec. 790.33 does provide for an award of damages against state employees including agency heads acting in their official capacities. First, Sec. 790.33 provides:

> Any person, county, agency, municipality, district, or other entity that violates the Legislature's occupation of the whole field of regulation of firearms and ammunition, as declared in subsection (1), by enacting or causing to be enforced any local ordinance or administrative rule or regulation impinging upon such exclusive occupation of the field shall be liable as set forth herein.

Sec. 790.33(3)(a), Fla. Stat. Next, it states that:

> A person or an organization . . . may file suit against any county, agency, municipality, district, **or other entity** in any court of this state having jurisdiction over any defendant to the suit **for declaratory and injunctive relief and for actual damages, as limited herein, caused by the violation**. A court shall award the prevailing plaintiff in any such suit:
>
> 1. Reasonable attorney's fees and costs in accordance with the laws of this state, including a contingency fee multiplier, as authorized by law; and
> 2. The actual damages incurred, but not more than $100,000."

Sec. 790.33(3)(f), Fla. Stat.

The very fact that the Legislature chose to allow attorneys fees in excess of the maximum damage award contrary to Sec. 768.28, did not limit attorney's fees as provided in Sec. 768.28, and provided for a multiplier, shows the statute is a distinct and separate waiver of sovereign immunity than that provided by Sec. 768.28. Sec. 790.33 also provides for a lower amount of actual damages than allowed under Sec 768.28. The trial court recognized that Defendant Machen was not immune from an action for declaratory judgment either by organic law or Sec. 768.28. Sec. Only subsection (3)(f) makes any provision for declaratory or injunctive relief and provides for damages. Based on the court's ruling without any basis, subsection (3)(f) supposedly provides for all relief allowed under the statute but is not applicable to all defendants. Nothing in Sec. 790.33(3)(f) supports such a conclusion.

790.33 specifically provides in (3)(a) that a person can be held liable, and in (3)(f) that suit may be filed against listed subdivisions of the state, or "other entity" for declaratory and injunctive relief and damages. Simply stated Sec. 790.33 is a supplemental and additional waiver of sovereign immunity for violations of firearm preemption, having nothing whatsoever to do with the provisions of Sec. 768.28, and any reliance on the limitations in Sec. 768.28 by the trial court was in error.

C. The case cited by counsel for the Defendants does not stand for the proposition for which it was cited.

In the trial court, counsel for the Defendants cited the case of *Crocker v. Pleasant*, 778 So. 2d 978 (Fla. 2001), for the proposition that in that case the court found immunity under Sec. 768.28 from an action brought pursuant to 42 U.S.C. 1983. Actually this is not what the court said at all. The question before the court was what had the U.S. Supreme Court determined to be a deprivation of rights. The court determined that the U.S. Supreme Court had limited deprivations to deliberate decisions, not merely negligence in the performance of a duty. *Crocker* at 988.

The limitations of a Sec. 1983 claim do not exist in regards to a claim under Sec. 790.33. The Legislature here has actually made clear that it intends to hold officials responsible for their actions within the realm of conduct regulated by Sec.

790.33.

Defendants' own arguments in relation to the conflict between Sec. 790.25 and Sec. 790.115 contradict their argument here. While *supra* Defendants claim that the later enacted statute must control, even where a supremacy clause exists, here the Defendants seek to have Sec. 768.28, control over the later enacted Sec. 790.33. Additionally, Sec. 768.28 is a general liability statute, while Sec. 790.33 is a very limited and specific statue. As the Court well knows it is a canon of statutory construction that the specific controls over the general.

The Court should find that 768.28 is not applicable to cases brought under Sec. 790.33 and that Defendant Machen, can be held liable for damages under that statute.

CONCLUSION

The Court should find that as a matter of law the U.S. Supreme Court's decisions in *Heller* and *McDonald* are controlling and that the right to bear arms in one's home is not subject to any type of interest balancing and cannot survive any level of scrutiny. Consistent with basic principles of statutory construction the Court should find that Sec. 790.115 can only be declared constitutional if Sec. 790.25 allows for possession of firearms in university owned housing. Alternatively, the Court should find that the constitutional right to bear arms requires that Sec. 790.115 is unconstitutional to the extent it prohibits firearms in university housing.

Defendants had ample opportunity to cease promulgation of prohibited regulations and policies and failed to do so and should be held liable for their failure. The Defendants made clear prior to the filing of this case that they had no intention of ceasing promulgation.

The immunity from liability provided in Sec. 768.28 does not apply to Machen. Sec. 790.33, is a separate and distinct waiver of sovereign immunity.

The Court should reverse the lower court's decision and find that the Defendant's policies are preempted, and in violation of Sec. 790.33 and remand the case for further proceedings.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished this 26th day of January, 2015 by eService, to the following:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Rule 9.120, Fla. R. App. P. The brief is drafted in Times New Roman with a 14-point font.

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