

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 REHEARING

COMES NOW, the Plaintiff, Florida Carry, Inc., by and through its undersigned counsel and respectfully files with this Court Plaintiff's Motion for Rehearing, 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 the decisions granting Defendant Machen's Motion to Dismiss was in error and, therefore, files this Motion for Rehearing.

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).

ARGUMENT

Sec. 768.28, Fla. Stat., immunity from suit does not apply to requests for damages brought pursuant to Sec. 790.33, Fla. Stat.

A finding that Sec. 768.28, Fla. Stat., precludes personal liability under Sec. 790.33 is directly contrary to the remedial purposes of Sec. 790.33, Fla. Stat. The 2011 amendments to Sec. 790.33 were passed in direct response to various entities including cities, counties, agencies, departments and governmental officials who were blatantly and with impunity acting in violation of state law. The Legislature sought to create an enforcement mechanism which would reign in the abuse of power by officials who wished to continue regulating firearms despite clear law to the contrary. In doing so the Legislature abrogated the doctrine of sovereign immunity as to officials acting outside the boundaries of their legislative discretion who had crossed over to acting outside of their statutory authority.

The Defendants' own argument regarding the later enactment of conflicting provisions are more appropriate to the issue of sovereign immunity than the tortured reading Defendants seek to apply as to the enactment of Sec. 790.115, Fla. Stat. after the enactment of Sec. 790.25, Fla. Stat. It must be presumed that the Legislature was aware of Sec. 768.28, Fla. Stat., when it enacted Sec. 790.33, Fla. Stat. Despite the presumed knowledge of Sec. 790.33 the Legislature stated:

(a) 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.

...

(f) A person or an organization whose membership is adversely affected by any ordinance, regulation, measure, directive, rule, enactment, order, or policy promulgated or caused to be enforced in violation of this section 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:

Sec. 790.33(3), Fla. Stat. The most recent amendments to Sec. 790.33 came about through HB 45 in 2011. A copy of the Staff Analysis is attached. It is clear from the language the Legislature used in Sec. 790.33 and from the Staff Analysis that the Legislature was seeking to stop illegal enactment, promulgation and enforcement by any entity, including the elected and appointed officials who were acting outside of their discretion by engaging in lawmaking within the preempted field of firearms regulation. The idea that an individual such as Machen can rely on Sec. 768.28 to escape liability for acting beyond his discretion and in violation of both the law and the remedial measures created by the Legislature eviscerates the intent and the plain language of Sec. 790.33.

Furthermore, Sec. 768.28 only protects the individual government official as long as they do not act “in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.” Acting outside of the clear limits set by the Legislature in Sec. 790.33, by knowingly and willfully violating Sec 790.33 as set forth in the Amended Complain, and beyond his discretion, is the very definition of bad faith. Additionally, Machen’s actions are in willful disregard of human rights and safety. Any question as to whether the possession of firearms in vehicles or the home is a good policy is already been answered by the Framers of Florida’s Constitution as well as by the Legislature which has enacted specific protections for firearms on both public and private property (Sec. 790.251, Fla. Stat.) and for firearms in the home and

business (Sec. 790.25, Fla. Stat.) and has stated:

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.

Sec. 790.25, Fla. Stat.

A request for the civil fine in the ad damnum caluse is unnecessary where the Legislature has required the court to assess a fine upon a finding of a knowing and willful violation.

In its order granting in part the dismissal of Machen, the Court focused on the lack of a request for assessment of the civil fine in the *ad damnum*. Sec. 790.33(c)(3), Fla. Stat. states “If the court determines that a violation was knowing and willful, the court *shall* assess a civil fine of up to \$5,000 against the elected or appointed local government official or officials or administrative agency head under whose jurisdiction the violation occurred.” This is not discretionary and it is not necessary that the Plaintiff ask for what the Court is required by statute to do upon a finding of a knowing and willful violation of the statute.

WHEREFORE, Plaintiff respectfully requests this Honorable Court enter an Order Vacating the partial granting of Defendant Machen’s Motion to Dismiss and require the Defendant Machen 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 12, 2014 to the following:

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