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.
_____/

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, FLORIDA CARRY, INC. (hereinafter referred to as "Plaintiff"), by and through undersigned counsel opposes Defendants' Motion for Summary Judgment, and in support thereof states:

SUMMARY JUDGMENT IS INAPPROPRIATE WHEN MATERIAL FACTUAL DISPUTES EXIST

Legal Standard for Summary Judgment

The requirements for filing a motion for summary judgment and the standard for considering the motion are set forth by Rule 1.510(c), Fla.R.Civ.P:

> The motion shall state with particularity the grounds upon which it is based and the substantial matters of law to be argued and shall specifically identify any affidavits, answers to interrogatories, admissions, depositions, and other materials as would be admissible in evidence ("summary judgment evidence") on which the movant relies. The movant shall serve the motion at least 20 days before the time fixed for the hearing, and shall also serve at that time copies of any summary judgment evidence on which the movant relies that has not already been filed with the court. The adverse party shall identify, by notice mailed to the movant's attorney at least 5 days prior to the day of the hearing, or delivered no later than 5:00 p.m. 2 business days prior to the day of the hearing, any summary judgment evidence on which the adverse party relies. To the extent such summary judgment evidence has not already been filed with the court, the adverse party shall serve copies

> on the movant by mailing them at least 5 days prior to the day of the hearing or by delivering them to the movant's attorney no later than 5:00 p.m. 2 business days prior to the day of hearing. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, admissions, affidavits, and other materials as would be admissible in evidence on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Summary judgment is only proper when there are no genuine issues of material fact and when the moving party is entitled to judgment as a matter of law. Fla. R. Civ. P. 1.510(c); *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000).

BACKGROUND

1. Plaintiff filed an Amended Complaint on February 21, 2014.

2. The Exhibits filed with the Amended Complaint include published and promulgated regulations and policies by Defendants which are in contravention of Fla. Stat. §790.

3. On April 2, 2014, Defendants filed their Motion for Summary Final Judgment ("MSJ").

4. To date, neither defendant has filed an Answer, Affirmative Defenses, or any responsive pleading.

MEMORANDUM OF LAW

Distinguishing Defendants' Reliance on *Rinzler*

5. In Defendants' MSJ, they rely heavily on *Rinzler v. Carson*, 262 So. 2d 661 (Fla. 1972) to support their position that the Defendants' policies regarding the possession of firearms in University housing complies with Florida law.

6. However, *Rinzler* is factually distinguishable in that the firearm in question was one regulated by the National Firearms Act ("NFA") and arguably illegal under Fla. Stat. §790.221 stating it is "unlawful for any person to own or to have in his care, custody, possession or control any short-barreled rifle, short-barreled shotgun, or machine gun which is, or may readily be made, operable." *Id*. at 663. The trial court ruled in favor of the appellee based on this narrow and specific prohibition in the statute.

7. The Florida Supreme Court however reversed the lower court on the grounds that the firearm at issue was licensed by the National Firearms Act and the statute excluded gun so registered.

8. The Defendants quote a portion of a paragraph from page 666 of *Rinzler* which seems to support their prohibitions, but they conveniently stop quoting at the point where the remainder of the paragraph damages their position. Picking up where the Defendants leave off, the Court continues in its immediately following sentence, "It seems to us to be significant that the type of firearms, the possession of which is outlawed by Section 790.221, Florida Statutes, F.S.A., is that weapon which is too dangerous to be kept in a settled community by individuals, and one which, in times of peace, finds its use by a criminal."

9. The Court clarifies in that same paragraph, "[N]ot such weapons which by common opinion and usage by law-abiding people are proper and legitimate to be kept upon private premises for the protection of person and property." *Id.* at 666.

10. The next paragraph reads, "We hold that the Legislation may prohibit the possession of weapons which are ordinarily used for criminal and improper purposes and *which are not among those which are legitimate weapons of defense and protection and protected by Section 8 of the Florida Declaration of Rights.*" (Emphasis added.) *Id.*

11. For *Rinzler* to be remotely applicable to the instant case, Defendant must be considering the UF policy to be akin to the municipal ordinance discussed in *Rinzler*. To assume otherwise would be to render *Rinzler* so far afield that its inclusion in Defendant's MSJ would be absurd. Furthermore the Court in *Rinzler* found that the local ordinance failed due to its conflict with state law.

12. In support of the similarity between UF policies and rules, ordinances, regulations, and the like, the court held in *Florida Carry, Inc., v. University of North Florida*, that universities qualify as part of "state government." Regulations such as the ones in this instant case, "qualif[y] as an administrative rule adopted by 'local or state government' which the legislature has expressly preempted." 133 So. 3d 966, 973 (Fla. 1st DCA 2013).

13. The types of regulations are "inferior in stature and subordinate to the laws of the state." *Rinzler* at 668. If any doubt exists as to the attempted exercise of power that may conflict with a state statute, the doubt is to be resolved in favor of the state statute." *Id.*

14. To prohibit something which is allowed by the general laws of the state, there must be an express legislative grant to authorize such prohibition. *Id.*

15. *Rinzler* could not be more clear as when the Court stated (referencing firearms and Fla. Stat. §790.25(1)), "[T]he lawful use in defense of life, home, and property and for other lawful purposes is not to be prohibited." *Id.*

Defendants' Claim that University Policies Have Been Updated Online

16. A change of policy does not render the case resolved. This Court may still rule on the legality of the policy to insure that it is not reenacted, and to determine whether the change was caused by the Plaintiff's filing to make Plaintiff the prevailing party. *Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656 (1993).

17. Defendants' claims on page 5 of their Motion that Plaintiff has not accessed the updated policies is patently false.

18. Any change in policy after the filing of the original Complaint is irrelevant as an amended complaint relates back to the date of the original complaint. *Brooks v. Interlachen Lakes Estates, Inc*., 332 So. 2d 681 (Fla. 1st DCA 1976).

19. University Regulation 2.001, "Possession and Use of Firearms," was accessed online April 9, 2014, well *after* Defendants filed their MSJ, at http://regulations.ufl.edu/wp-content/uploads/2012/09/2001.pdf. There have been no changes made since the filing of the original Complaint in this matter other than a slight modification to the previously insufficient footnote.

20. On its face, the published history of University Regulation 2.001 shows that it has last been amended on March 16, 2010, although Plaintiff will concede that it has been amended since then.

21. The most recent "Notice of Change in Proposed Regulation" available online in reference to University Regulation 2.001 is undated but appears to be referencing the March 16, 2010 amendment.

22. The Division of Student Affairs, Dean of Students Office, "Policies Pertaining Primarily to Individuals," accessed online April 9, 2014 at https://www.dso.ufl.edu/home/about/student-handbook/individual-policy, appears to still prohibit possession of firearms anywhere on campus and states:

> FIREARMS-POSSESSION AND USE. The possession of firearms and weapons on the University campus is prohibited except as provided for by state statute and applicable university policy. The term "firearm" is defined for the purpose of this policy to include, but is not limited to, rifles, shotguns, handguns, pellet guns, BB guns, and pistols. Weapons include, but are not limited to, knives, bows and arrows and martial arts equipment. For the convenience of persons residing on the University of

Florida campus, weapons may be registered and stored for safekeeping at the University Police Department.

23. UF Rule 6C-7.048, relating to faculty discipline, suspension, and termination, was accessed online on April 9, 2014. It lists the following as just causes for termination: Paragraph 1(c) – Willful violation of a rule or regulation of the University; Paragraph 1(e) – Conduct, professional or personal, involving moral turpitude; Paragraph 1(j) – Threatening or abusive language or conduct; and Paragraph 1(p) – Possession of unauthorized weapons and/or firearms on university property. The rule history shows that this was last amended on July 19, 2005. All four of these provisions could be interpreted to provide for termination of a faculty member for lawfully possessing a firearm on campus.

24. University Regulation 4.041, "Student Honor Code, Scope and Violations," was accessed online April 9, 2014, at http://regulations.ufl.edu/wp-content/uploads/2012/09/4041.pdf. The regulation history shows that it was last amended on December 10, 2010.

25. Paragraph (4)(f) of University Regulation 4.041 relates to "Firearms or Other Weapons Violations" being a violation of the Student Conduct Code. This is unchanged from the filing of the original Complaint in this matter.

26. The UF Human Resources website information on workplace violence, accessed on April 9, 2014, at http://hr.ufl.edu/manager-resources/policies-2/workplace-violence/, has been amended to state that "Level Two" behavior which should be reported immediately includes, "Violates state law by carrying a weapon or firearm on UF property or at UF events (see 790.115(2), Florida Statutes) – other than in the circumstances specified as permitted, including vehicles under 790.25(5), Florida Statutes."

27. However, the language of this update, when taken in conjunction with the other referenced University policies above is unclear at best.

28. The Division of Student Affairs, Dean of Students Office, Records Retention Policy, available online at https://www.dso.ufl.edu/sccr/record-reviews/record-retention-policy/, and accessed on April 9, 2014, states in Paragraph 5(f) that violating the firearms regulations of the University is sufficient to not grant a request to destroy a student's conduct record. This is included and in context with other inarguably major offenses.

Defendants' Claims that Residence Halls/Dorm Rooms Are School Property/"College or University Facility" Rather Than a Residence, Domicile, or "Home."

29. The University of Florida contract for housing and payment refers to monies paid as "rent." *Black's Law Dictionary* defines "rent" as, "Consideration paid, usually periodically, for the use or occupancy of property." Incumbent with the payment of rent and the occupancy of a property comes the right of quiet enjoyment. While a student is a renter, the space rented becomes the student's home with all the rights of a resident.

30. Information posted on UF's Housing website on April 25, 2013 refers to students' renter's insurance with encouragement and instruction on how to obtain such insurance. This information was accessed on April 10, 2014 at http://www.housing.ufl.edu/blog/2013/04/25/residence-halls-close-august-10-at-4-p-m-for-the-summer-terms/. For one to obtain a policy, there can be no question that they must be a resident with an insurable interest in the contents therein. This logically results in the conclusion when a person paying rent, for a specified period of time, keeping their belongings in a space, with the intent to live in that space, makes that space their dwelling or residence for the time that person resides there.

31. Fla. Stat. §83.43(2)(a) defines "Dwelling Unit" as, "A structure or part of a structure that is rented for use as a home, residence, or sleeping place by one person or two or more persons…"

32. Fla. Stat. §776.013 is entitled "Home protection; use of deadly force; presumption of fear of death or great bodily harm." Paragraph 5(a) defines "dwelling" as "a building… of any kind… whether temporary or permanent… which has a roof over it… and is designed to be occupied by people lodging therein at night." Paragraph 5(b) defines "residence" as "a dwelling in which a person resides either temporarily or permanently or is visiting as an invited guest." It is clear and unambiguous that university housing facilities fall under the category of "homes" allowing for armed defense and are therefore legislatively preempted from university regulation relating to the prohibition of firearms.

33. Fla. Stat. §812.135(1) defines "home-invasion robbery" as "any robbery that occurs when the offender enters a dwelling unit with the intent to commit a robbery, and does commit a robbery of the occupants therein." Surely the Defendants cannot argue that this would not be the appropriate charge upon the robbery of a dormitory room. However, they would thereby concede that the room was a "home," entitled to all the protections of the statutes and Florida Declaration of Rights.

34. Courts in Florida have recognized an expanded definition of "home" as it applies to Fla. Stat. §790. In *Cockin v. State*, 453 So. 2d 189, 191 (Fla. 3rd DCA 1984), the court held that a motel room is the "functional equivalent" of a person's home within the meaning of Fla. Stat. §790.

35. Further, the court spoke specifically on the subject of dormitories on campus in *Beauchamp v. State*, the court held that a dormitory room "is comparable to a motel room or a room in a boarding house." 742 So. 2d 431, 432 (Fla. 2nd DCA 1999). Since there is no

dispute that the protection and preemption provisions for Fla. Stat. §790 apply to motels and rented rooms, they must apply to campus housing.

Defendants Mistakenly Rely Upon §790.115 to Support Position that Firearms and Other Weapons are Not Permitted on *Any* Property of *Any* School

36. Defendants quote Fla. Stat. §790.115(2)(a) in its entirety to support the contention that the possession of firearms on school property is prohibited. However, Defendants fail to recognize that this statutory provision also prohibits the possession of razor blades on school property. So, if a student's campus housing is recognized under this provision, and Defendants wish to rely on this provision, it is a violation for a student to shave in campus housing. Defendants are not allowed to choose which clauses of a statutory provision are valid and which are not. The reasonable interpretation that encompasses all of the clauses is that campus housing is defined as a student's residence.

37. More importantly, Fla. Stat. §790.25(3)(n) specifically provides for the lawful possession of firearms and other weapons, ammunition, and supplies "at his or her home or place of business."

38. Should Defendants claim that §790.25 conflicts with §790.115, §790.25(4) contains a supremacy clause which makes its intent clear, "This act shall supersede any law, ordinance, or regulation in conflict herewith."

39. While Sec. 790.115, Fla. Stat., clearly defines a university as a school for purposes of the ban of possession of firearms, it does not say any property owned by the university is a prohibited place. It is less than clear that the ban extends to property not related to the education of students but rather to housing, especially when said property is not on the campus proper or is merely tangential to the educational environment.

40. A factual question exists as to whether the various types of housing units operated by the University of Florida constitute a school, as the Defendant has numerous hosing options ranging from traditional dorms, to family apartments, remotely located rural agricultural stations.

Defendants Attempt to Resort to Rules of Statutory Construction

41. On Page 9 of Defendants' MSJ, they attempt to argue various aspects of statutory construction. However, it is commonly known and accepted that these canons and rules are only applicable when the law is not clear. The first rule of statutory construction is that the plain meaning of the language controls and if clear and unambiguous, the court need not inquire further. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99 (2003).

42. This matter could not be clearer. Section 8 of the Florida Declaration of Rights states "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[.]" Further, in *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008), and incorporated to the states via *McDonald v. Chicago*, 130 S.Ct. 3020 (2010), the U.S. Supreme Court held "In sum, we hold that [a] ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purposes of immediate self-defense."

43. If Defendants wish to argue any perceived ambiguities in §790.115(2)(a), the legislature through statutes, and the courts through holdings, have long clarified the matter.

Defendants' Rules and Policies Provide for Discipline for Those Found on Campus Outside of Narrowly Prescribed Conditions

44. University Regulation 2.00(5) calls for immediate suspension upon violation of firearms policy. Also, the "Violations of Student Conduct Code" accessed online April 14,

2014 at https://www.dso.ufl.edu/sccr/process/student-conduct-honor-code/ and sanctions codified by Regulation 4.047 provide for suspension and expulsion for violations of the University's firearms policies. It is a step too far to demand that students wishing to attend the University of Florida surrender their recognized rights under both the Florida and United States Constitutions to protect themselves and their property via arms in their homes. "[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).

Disputed Issues of Material Fact

45. The very fact that there is a disputed issue of material fact as to if and when policies were modified and whether they were still being promulgated to students is alone sufficient to deny summary judgment until the parties have had an opportunity to engage in discovery and determine the exact dates of modification and promulgation of policies.

46. Additionally the factual distinctions between the various types of housing units precludes a blanket summary judgment prior to an opportunity for discovery into the various types of housing options where firearms are banned by the University.

WHEREFORE, Defendant prays that this Honorable Court deny Defendants' Motion for Summary Judgment and for such other and further relief as this Honorable Court deems necessary and just.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via email on July 30, 2014 to the following:

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