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 REPLY BRIEF

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REPLY

1. No matter how reasonable or constitutional their rules and regulations, the Defendants have violated Sec. 790.33, Fla. Stat.

Defendants argue throughout their Answer for their interpretation of statutes as a basis for administrative rules and regulations that the Defendants have promulgated in regard to possession of firearms in homes and vehicles. See, *State v. Watso*, 788 So. 2d 1026 (Fla. 2d DCA 2001)(holding that the term promulgate, as used in Chapter 790, is defined as "to declare or announce publicly; to proclaim."). They further argue that their conduct is either restricted or required by law, and are "reasonable restrictions" on the right to bear arms. Defendants fail to grasp the concept of express, field preemption, and argue that because their policies are consistent with their own interpretation of state law that their rules, policies and regulations do not violate preemption.

Even if this Court finds that every policy at issue here mirrors state law in its intent or verbiage, the very publishing of such regulation by the Defendants is in violation of Sec 790.33. The Defendants have no authority to concurrently regulate with the state in a case of express, field preemption. *Barragan v. Miami*, 545 So. 2d 252, 254 (Fla. 1989); see also, Sec. 166.021(3)(b) and (c), Fla. Stat.; and *Florida Carry, Inc. v. University of North Florida*, 133 So. 3d 966, 972 (Fla.

1st DCA 2013) *en banc*(holding that the regulation of arms is preempted by Art. I, Sec.8, Fla. Const., exclusively to the Legislature. Similarly, the fact that Defendants' promulgated regulations provide for administrative penalties[1] is in itself a violation of preemption under Sec. 790.33, Fla. Stat.

Defendants claim this issue was not raised below despite Paragraph 35 of the Amended Complaint which states: "There is no basis for any rule or regulation regarding firearms by UF, no matter how well intentioned or reasonable where the legislature has expressly preempted such rules and regulations." (Vol. 1, Pg. 59).

2. Florida law and decisions of the U.S. Supreme Court both recognize the special nature of one's home for the possession of firearms.

As stated by the United States Supreme Court, the enumeration of a fundamental right necessarily takes certain policy choices off the table. *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008)(*Heller*) and *McDonald v. Chicago*, 561 U.S. 742, 790 (2010). This includes the unsupported assertion of Defendants that their rules provide any safety or peace of mind. Answer Brief at Pg 3. In fact, Plaintiff can easily make the opposite claim that for Plaintiff's members, the denial of this fundamental right makes Plaintiff's members less safe. It is the burden of the entity restricting the exercise of the right, not the citizen's, to bring forth

[1]E.g.: Academic discipline, suspension, or expulsion

evidence of at least a close fit between the regulation and the public safety it claims is the goal.[2] *Moore v. Madigan,* 702 F.3d 933 (7th Cir. 2012) and *Heller v. District of Columbia*, 670 F.3d 1244, 1258 (D.C. Cir. 2011)(*Heller II*)(remanding to lower court to require evidence that the regulations at issue met intermediate scrutiny).

The Fourth Amendment does not protect against all searches, only unreasonable searches. See generally, *Tracey v. State*, 152 So. 3d 504 (Fla. 2014). For purposes of Fourth Amendment analysis there is no distinction between a private home and a person's university owned or managed residence. *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). Both are entitled to the protection of the Fourth Amendment's reasonableness test.

Here, there is no reasonableness test. The right to bear arms is not subject to a mere reasonableness test, any more than the right to free speech can be abrogated by mere reasonableness test. See, *District of Columbia v. Heller*, 554 U.S. 570 (2008)(drawing parallels between First and Second Amendment

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[2]Because this is a case involving a ban on firearms in the home, strict not intermediate scrutiny should be used by this Court.

protections). Since the Supreme Court's ruling in *Heller*, no Court has held that the right to bear arms can be regulated based on a mere reasonableness test.[3] The right to bear arms cannot be infringed.[4] While some regulation may be **presumptively** lawful, no evidence has been presented that the Defendants' restrictions on firearms possession in one's home meets the type of presumptively lawful, longstanding regulation, described in *Heller* and *McDonald*.

The *Heller* and *McDonald* Courts could not have been more clear. There is a right to keep and bear arms that is most acute within the home. *Heller* at 628. The university administration argues that because it is the lessor of the home it can prohibit the possession of firearms, and that the Legislature has prohibited firearms from these homes. This claim is even made in regard to off campus housing, which is indistinguishable from neighboring apartment complexes, and single family homes. Defendants' argument fails for two reasons.

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[3]Contrary to the argument of Defendants at page 15 of their Answer Brief, the *Heller* Court (or the *McDonald* Court) never stated that the right to bear arms could be subject to "reasonable restrictions." The term never appears in either decision.

[4]This is not to say that there cannot be restrictions on the right, but the U.S. Supreme Court and the lower courts have been consistent that a reasonableness, or interest balancing test is not appropriate in the context of the right to bear arms in the home. See generally*, District of Columbia v. Heller*, 554 U.S. 570 (2008); *Moore v. Madigan,* 702 F.3d 933 (7th Cir. 2012).

First, under preemption, the university is not allowed to have any regulation regarding firearms. It is only allowed to enforce and comply with state law. Sec. 790.33, Fla. Stat. Second, if state law is interpreted to prohibit firearms in these residences, then it is in clear violation of the Supreme Court holding in *Heller*. *Heller* at 636.

Finally, the Defendants continue to ignore in their argument the express construction that the Legislature has given to Sec. 790.25, Fla. Stat. This Court is required to liberally construe the provisions of 790.25 "in favor of the constitutional right to keep and bear arms for lawful purposes." Sec. 790.25(4) and *Ashley v. State*, 619 So. 2d 294, 296 (Fla. 1993)(reversing the 4th DCA for failing to give the required liberal construction to Sec. 790.25, Fla. Stat.).

3. Off campus and single family housing is not a school.

Defendants fall back on the idea that the premises at issue here are a school, and therefore a "sensitive" place. They are not. They are residential homes that happen to be owned or managed by the Board of Trustees. They are not a part of the educational premises of the school, and do not come within the Supreme Court's list of sensitive places.

The University claims that it is precluded from allowing firearms in a student's residence due to the provisions of Sec. 790.115, Fla. Stat. However,

their own policies allow for the possession of firearms in residences at the agricultural research centers, which are also owned by the university. (Vol. 1, Pg. 76). While the storage regulations regarding these homes is also at issue, there is no contention by the University that it is prohibited by law from allowing firearms at these locations.

4. Defendants mislead the Court regarding the 2006 amendment to Sec. 790.25, and misconstrue the terms used in the exemption.

A. The 2006 Amendment of Sec. 790.25, was unrelated to Sec. 790.115.

Defendant argues that 790.25 was amended in 2006 to specifically include Sec. 790.115 as not subject to the provisions of Sec. 790.25, thereby exempting Sec. 790.115 from the supremacy clause of Sec. 790.25. Prior to 2006, Sec. 790.25 stated that "[t]he protections of this section do not apply to the following: . . . a person **using** weapons or firearms in violation of ss. 790.07-790.12." (Emphasis added). This was amended to the current language by Chpt. 2006-103, Laws of Fla. The act dealt with the repeal of other statutes that prohibited firearms in national forests. It had nothing to do with possession of firearms on school grounds and merely amended the cross reference in Sec. 790.25 to the previous statute in the number sequence. To suggest the 2006 amendment to Sec. 790.25 had anything to do with Sec. 790.115, is disingenuous at best.

B. The terms use and possess are not synonymous as used in Chapter 790.

Throughout Chapter 790, the Legislature uses the words "use", "possess", and "discharge." These words are not used interchangeably. As made clear by this Court in the *UNF* case, the Legislature is presumed to have used the words it did by intention, not accident. *Florida Carry, Inc. v. University of North Florida*, 133 So. 3d 966, 971 (Fla. 1st DCA 2013) *en banc*. Sec. 790.25 does say that by its terms, it does not authorize carrying a concealed weapon in violation of Sec. 790.01 and Sec. 790.02, but does not include Sec. 790.115 in this exception. Sec. 790.25(2)(a).

The Defendants point to Sec.790.25(2)(b) and argue that the protections of Sec. 790.25 do not apply to a person "**using**" firearms in violation of Sec 790.115. Defendants argue this means that the Legislature had no intention of extending the right to possess firearms in one's home to university owned off-campus housing. Defendants ignore this Court's ruling in *UNF*. Just as the defendants in *UNF* claimed that school district meant all schools, Defendants here try to conflate the terms "use" and "possess" to mean the same thing even though they are two distinct terms used very differently throughout Chapter 790.

For example, Sec. 790.115 generally prohibits possession of firearms. Sec.

790.07, Fla. Stat., prohibits both carrying and use of firearms in the commission of a crime. This is in direct contrast to Sec. 790.151, Fla. Stat., which prohibits use, but not possession of a firearm by a person who is intoxicated. Any argument that the terms "possess" and "use" are synonymous in this context, would be contrary to the distinctive use of those terms throughout the remainder of Chapter 790.

Defendants attempt to bolster their interpretation by alleging that Plaintiffs have made inconsistent arguments between Secs. 790.25, 790.115, and 790.33. Defendants ignore the difference between civil and criminal statutes and the relevant penalties. Sec. 790.25 deals with rights Floridians have to use or possess firearms without fear of criminal prosecution by the State. This is very different from the civil remedies contained in Sec. 790.33, or to cite another example, Sec. 790.251, Fla. Stat., the "guns in parking lots" statute.

For example, Sec. 790.25 gives all UF employees a defense to criminal charges for possession a firearm at their place of business, even on a university campus, because of Sec. 790.25's supremacy clause. It does not however mean that as a matter of policy, UF cannot prohibit employees from having a firearm in their office because that is a matter of civil law and the employer/employee relationship. Such polices are specifically provided for in Sec. 790.33. It does not violate the supremacy provision of Sec. 790.25, a criminal statute, to allow an

employer as a civil matter to regulate the conduct of its employees on duty. See, *Pelt v. Department of Transp.*, 664 So. 2d 320 (Fla. 1st DCA 1995).

Contrary to Defendants' attempt to claim inconsistency in Plaintiff's argument, all it has done is show the weakness of its own position by trying to manufacture inconsistency where there is none.

5. A controversy still exists between the parties as to the timeliness and sufficiency of the Defendants' modification of their regulations.

Defendants argue that the regulations modified after the filing of the initial complaint, but before the filing of the amended complaint, have some relevance. This is a complete fabrication. It is well established that the filing of an amended complaint relates back in time of the filing of the original complaint as long as they are based on the same operative facts and circumstances. Rule 1.190, Fla. R. Civ. P., and *Brooks v. Interlachen Lakes Estates, Inc.*, 332 So. 2d 681(Fla. 1st DCA 1976). Defendants' argument that the regulations were subsequently modified after suit was filed is an attempt to avoid their knowing and willful violation of the Legislature's preemption despite being warned of their violation.

6. The Caranna Affidavit should have been considered.

Defendants argue that the Caranna Affidavit is hearsay. Rule 1.510, Fla. R. Civ. P., sets forth the requirements for affidavits in opposition to summary

judgment.

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

Fla. R. Civ. P. 1.510. The purpose of the rule is "to ensure that there is an admissible evidentiary basis for the case rather than mere supposition or belief." *Fla. Dep't of Fin. Servs. v. Associated Indus. Ins. Co.*, 868 So. 2d 600, 602 (Fla. 1st DCA 2004).

The trial court discussed in the hearing that the Caranna Affidavit was hearsay, but did not include such a finding in its order. Defendants argue the same in their brief. Neither the Defendants, nor the court below, identified why or upon what basis the affidavit was hearsay.

The material testimony contained within the affidavit set forth Caranna's personal knowledge regarding what policies were being promulgated on UF's website. The affidavit is based on his personal knowledge as to what was being promulgated by the Defendants at the time of filing this action. Caranna further detailed his conversation with UF's General Counsel, again based on his personal knowledge of statements of a party opponent speaking on behalf of Defendant UF.

Caranna had personal knowledge of all matters within his affidavit, and was

therefore competent to offer the same testimony if called at trial.

7. Sovereign immunity is inapplicable in this case and has been abrogated by the Legislature for those who violate the legislative and constitutional preemption of firearms regulation.

Defendants offer no contrary authority or precedent to repudiate Plaintiff's position that Sec. 790.33 abrogates the general sovereign immunity of Sec. 768.28 as to individuals who violate firearms preemption. Lacking any support or authority for their position, Defendants turn to arguing that Defendant Machen did not enact or enforce preempted regulations, and that he did not take any action that was willful or knowing.

A. Promulgation is just as prohibited by Sec. 790.33, as enactment and enforcement.

Defendant's argument that promulgation of illegal rules and regulations creates standing to bring an action where no cause of action exists is nonsensical. According to the Defendants' argument, the Legislature has created standing to sue for promulgation of illegal regulations but has not prohibited those regulations from being promulgated. Such interpretation is illogical and the very definition of an absurd result. No result could be more absurd than the Legislature wasting the judiciary's time by giving standing where no cause of action exists.

> An analysis of the scope of a statute's pre-emption is guided by the comment that the purpose of Congress is the ultimate touch-stone in

> every pre-emption case. As a result, any understanding of the scope of a pre-emption statute must rest primarily on a fair understanding of congressional purpose. Congress' intent primarily is discerned from the language of the pre-emption statute and the statutory framework surrounding it. Also relevant is the structure and purpose of the statute as a whole, as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law.

Medtronic, Inc. v. Lohr, 518 U.S. 470, 474 (U.S. 1996).

The legislative intent behind Sec. 790.33 could not be more clear. It is a comprehensive plan to prevent local jurisdictions and agencies from creating or continuing illegal ordinances, rules and regulations. From 1987 until 2011, the Legislature trusted preempted entities to follow the law. When it became apparent in 2011 that its trust was misplaced, the Legislature took additional actions to penalize those that continued to violate the law.

The promulgation of illegal policies continues to mislead the public from knowing whether local and agency laws were legal, despite the clear legislative intent "of this section to provide uniform firearms laws in the state." Sec. 790.33, Fla. Stat. For that reason, promulgation was added to the prohibition and penalty provisions of Sec. 790.33 in 2011. Despite Defendants' argument, the prohibitions and penalties are not separate and discrete provisions. All are contained within subsection (3), "PROHIBITIONS; PENALTIES."

The legislative intent for uniform firearm laws, and to clearly inform citizens, can only be accomplished by prohibiting continued promulgations as well as enactment and enforcement. Anything less allows Defendants and others to continue to use half measures and misleading regulations to attempt to do by fiat what they are forbidden to do directly. This is a policy decision that the Legislature has already made and should not be disturbed by this Court.

B. The motion to dismiss and summary judgment was improperly granted as to Machen to the extent that it was based on a lack of knowing and willful violation.

For the purposes of the motion to dismiss, all well-pleaded allegations of the complaint were to be taken as true. The complaint states in specific detail that Machen authorized, or allowed the continued promulgation of, preempted regulations. (Vol. 1, Pg. 61, et. seq.). For purposes of summary judgement the allegations of the complaint are taken as true, absent some evidence that the allegations are false or are disputed by the moving party.

No evidence has been offered, and Defendants have not argued, that Machen was unaware of the provisions of Sec. 790.33 or that Machen was unaware of the rules and regulations being promulgated within his jurisdiction. In fact, Plaintiff attempted to contact Machen at the outset to achieve compliance with Sec. 790.33 without the necessity of litigation. (Vol. 1, Pg. 155). Defendants

Answer Brief is clear that it is not a lack of knowledge or intent, but a claim that Machen did not violate preemption at all.

Contrary to Defendants' attempt to paint Plaintiff's claims as an improper vicarious liability claim, 790.33 is clear in its provisions. No personal action is required by Machen. Nothing in Sec. 790.33 requires that the individual fined take any personal action, nor is there any mention of vicarious liability. The liability is based on the knowing and willful violation of the statute under his jurisdiction:

> "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."

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

Florida Carry was not required to offer any evidence of Machen's knowing and willful violation to avoid summary judgement. It was Machen's burden to demonstrate that the violation was not knowing and willful. Machen offered no such evidence. Machen only claimed that there was no violation of Sec. 790.33.

Defendant argues that Plaintiff did not use the magic words "knowing and willful" in the complaint, an argument not made below and therefore not properly before this Court. Plaintiff did however assert that "Machen continues to authorize and allow the promulgation. . ." (Vol. 1, Pg. 65, Para. 67). A

determination of knowing and willful is not necessary to constitute a violation of Sec. 790.33. If the lower court finds a violation it must determine if the violation was knowing and willful. The statue then mandates the assessment of the civil fine upon such finding.

CONCLUSION

This Court should find that the plain language and intent of Sec. 790.33 requires Defendants to cease promulgation of preempted rules, and that regardless of the consistency of the rules with state law, promulgation and concurrent regulation of firearms is not permitted. The Court should further find that Defendant's "footnote" was insufficient to comply with this Court's holding in the *UNF* case.

Additionally, the Court should hold that the Supreme Court's decisions in *Heller* and *McDonald* require that persons residing in housing owned or managed by the Board of trustees, a state actor, be allowed to possess operable firearms in the home for lawful self-defense. In order to meet this constitutional requirement and avoid declaring Sec. 790.115 unconstitutional, the Court should read it in pari materia with Sec. 790.25, to hold once again that the supremacy clause of Sec. 790.25 means exactly what it says, and that it recognizes the long existing right to keep and bear arms in ones home for lawful self defense.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished this 29th day of April, 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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