FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-2819

STATE OF FLORIDA, GOVERNOR RON DESANTIS, ATTORNEY GENERAL ASHLEY MOODY, and FDLE COMMISSIONER RICHARD L. SWEARINGEN,

Appellants,

v.

CITY OF WESTON, FLORIDA; DAN DALEY, in his official capacity as Commissioner of the City of Coral Springs, Florida; BROWARD COUNTY; et al.,

Appellees.

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MAILED: July 7, 2021
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On appeal from the Circuit Court for Leon County.
Charles W. Dodson, Judge.

April 9, 2021

KELSEY, J.

The trial court invalidated Florida's statutory penalties against local governments, local officials, and agency heads for violating the Florida Legislature's total preemption of firearm and ammunition regulation. We find the challenged statutes valid and enforceable, and we reverse.

I. Governing Statutes.

A. Preemption.

The Florida Legislature expressly preempted the whole field of firearm and ammunition regulation in 1987, enacting section 790.33, Florida Statutes. It provides in pertinent part as follows:

> PREEMPTION.—Except as expressly provided by the State Constitution or general law, the Legislature hereby declares that it is occupying the whole field of regulation of firearms and ammunition, including the purchase, sale, transfer, taxation, manufacture, ownership, possession, storage, and transportation thereof, to the exclusion of all existing and future county, city, town, or municipal ordinances or any administrative regulations or rules adopted by local or state government relating thereto. Any such existing ordinances, rules, or regulations are hereby declared null and void.

§ 790.33(1), Fla. Stat. (2019). The Legislature's express intent in enacting this preemption statute was to maintain uniform firearms laws throughout Florida; to nullify and void all ordinances and regulations not enacted at the state or federal level; "to prohibit the enactment of any future ordinances or regulations relating to firearms, ammunition, or components thereof unless specifically authorized by this section or general law"; and to require local jurisdictions to enforce state laws in this field. § 790.33(2), Fla. Stat.

B. Violations of Preemption Statute.

In 2011, the Legislature amended section 790.33 to redress violations of the preemption statute. The 2011 amendments apply to the enactment or enforcement of any "local ordinance or administrative rule or regulation impinging upon" the Legislature's exclusive occupation of the entire field of firearms and ammunition. § 790.33(3)(a), Fla. Stat. The statute requires courts to invalidate and permanently enjoin the operation of any ordinance, regulation, or rule adopted in violation of state preemption. § 790.33(3)(b), Fla. Stat.

This appeal is about statutory penalties enacted in 2011, which can be imposed against governmental entities and individual officials. The statute eliminates defenses of good faith and advice of counsel for violating the total preemption of the field. *Id.* The statute also imposes 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," if a court determines the violation was "knowing and willful." § 790.33(3)(c), Fla. Stat. Public funds may not be used to defend or reimburse such individuals for civil fines or costs of defense, unless another law provides to the contrary. § 790.33(3)(d), Fla. Stat. The law provides that individuals acting in an official capacity for an entity that enacts or enforces a preempted ordinance, rule, or regulation, can be terminated from employment or contract, or the Governor can remove them from office. § 790.33(3)(e), Fla. Stat.

The statute authorizes adversely affected people and organizations to sue local governments, agencies, and other entities for violating this law. § 790.33(3)(f), Fla. Stat. Such lawsuits can seek actual damages in addition to declaratory and injunctive relief. *Id.* Prevailing plaintiffs in such lawsuits can recover up to $100,000 in actual damages, plus costs and reasonable attorney's fees that can include contingency multipliers, plus interest accruing from date of filing the lawsuit. *Id.*

Florida statutes also prohibit governmental entities from maintaining any "list, record, or registry of legally owned firearms or law-abiding firearm owners," unless an enumerated exception applies. § 790.335(1)(a)(2)-(3), Fla. Stat. This law also prohibits state agencies, local governments, special districts, other political subdivisions, and the officers, agents, and employees of those entities, from knowingly and willfully keeping or causing such lists to be kept. § 790.335(2), Fla. Stat. Violating these provisions is a third-degree felony, and the governmental entity or designee causing such a list, record, or registry to be compiled may be fined up to $5 million. § 790.335(4)(a), (c), Fla. Stat.

II. Declaratory Judgment Claims.

Appellees include thirty municipalities, three counties, and more than seventy elected representatives of those entities. As Appellees describe their goals, they wanted to enact local firearm-safety measures that they believed were not preempted.[1] These included mandating reports of failed background checks, mandating documentation of compliance with mandatory waiting periods and criminal history background checks, prohibiting sales of large-capacity detachable magazines, and restricting firearm possession at government-owned-or-operated facilities and locations.

Without actually enacting any of their desired restrictions and regulations, Appellees filed suit, seeking declaratory judgments invalidating the penalty statutes. The trial court ultimately granted summary judgment for Appellees on some claims. The judgment invalidated sections 790.33(3)(f) and 790.335(4)(c) as violating government function immunity. The court also held that the penalty provisions applicable to individual actors—subsections 790.33(3)(c), (d), and (e)—are unconstitutional because they violate these individuals' legislative immunity.

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[1] Lest we overlook the fundamentally important broader context in which the present issues arise, we observe that, implicitly, Appellees sought to test the boundaries of the Second Amendment to the United States Constitution, which provides as follows: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, *shall not be infringed*." Amend. II, U.S. Const. (emphasis added); *see also* Art. I, § 8, Fla. Const. (echoing the federal right to keep and bear arms). As the United States Supreme Court has held, the Second Amendment gives individuals the right to keep and bear arms. *D.C. v. Heller*, 554 U.S. 570, 635–36 (2008). By way of the Fourteenth Amendment, the Second Amendment applies to the States and to their political subdivisions. *See McDonald v. City of Chic., Ill.*, 561 U.S. 742, 750 (2010) (rejecting municipalities' arguments against applying the Second Amendment to states and their subdivisions).

III. Analysis.

Our standard of review is de novo, both because the order on appeal granted summary judgment, and because the appeal presents legal questions of statutory interpretation and validity. *See Major League Baseball v. Morsani*, 790 So. 2d 1071, 1074 (Fla. 2001) ("The standard of review governing a trial court's ruling on a motion for summary judgment posing a pure question of law is de novo."); *BellSouth Telecomms., Inc. v. Meeks*, 863 So. 2d 287, 289 (Fla. 2003) ("Statutory interpretation is a question of law subject to *de novo* review.").

We hold that the statutory penalty provisions disputed on appeal are valid and enforceable. Government function immunity does not shield entities that act contrary to or more restrictively than state law in the completely preempted field of firearm and ammunition regulation. Likewise, legislative immunity does not shield individuals who knowingly and willfully act contrary to or beyond the limits of state law.

A. Government Function Immunity.

This analysis applies to two challenged statutes that affect governmental entities. The first is section 790.33(3)(f), which authorizes lawsuits against entities that violate preemption, and authorizes awards of damages, attorney's fees, and costs to prevailing plaintiffs. The second is section 790.335(4)(c), which authorizes a fine of up to $5 million for knowingly maintaining a list, record, or registry of firearms or their owners.

Appellees argue that entities adopting firearm or ammunition regulations stricter than the Legislature's are properly exercising their rights to discretion in governance, and that immunity derived from the separation of powers doctrine shields the exercise of that discretion.[2] The trial court accepted this reasoning, but we reject it.

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[2] Appellees and their amici also argue that the challenged statutes are unnecessary or unwise, but we reject all such arguments. Those are factors for the Legislature alone to evaluate and resolve. *See Hamilton v. State*, 366 So. 2d 8, 10 (Fla. 1978)

The trial court's reasoning overlooks the State's superior authority in this context, derived from both constitution and statute. The Florida Constitution confers exclusively upon the Florida Legislature the power to abrogate common law and restrict local government power. The Florida Legislature can abolish counties by general law. *See* Art. VIII, § 1, Fla. Const. Municipalities exist only by virtue of general law. *See* Ch. 165, Fla. Stat. Local governments are subject to legislative regulation including the Legislature's superior right to abolish and change the subordinate entities themselves. *See* Art. VIII, §§ 1(a), 2(a), Fla. Const.

Taken together, Florida's Constitution and statutes limit counties' and municipalities' powers of self-government by requiring consistency with legislatively-enacted general and special laws. *See* Art. VIII, §§ 1(f)-(g), 2(b), Fla. Const.; *see also Weaver v. Heidtman*, 245 So. 2d 295, 296 (Fla. 1st DCA 1971) (holding local governments are subject to "legislative prerogatives in the conduct of their affairs"); *McNayr v. Kelly*, 184 So. 2d 428, 430 n.6 (Fla. 1966) (acknowledging that the Florida Legislature has the authority to "do away with immunity altogether" as it applied to local government officials). As the trial court correctly noted and Appellees do not dispute, the Florida Legislature likewise is authorized to enact general laws preempting all regulation in an area of the law. *See* § 125.01(1), Fla. Stat. (limiting counties' authority to that "not inconsistent with general or special law"); *Metro. Dade Cnty. v. Chase Fed. Hous. Corp.*, 737 So. 2d 494, 504 (Fla. 1999) ("[W]henever 'any doubt exists as to the extent of a power attempted to be exercised which may affect the operation of a state statute, the doubt is to be resolved against the ordinance and in favor of the statute.'") (quoting *Rinzler v. Carson*, 262 So. 2d 661, 668 (Fla. 1972)). As this case illustrates, the Legislature

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("The Legislature has a great deal of discretion in determining what measures are necessary for the public's protection, and this Court will not, and may not, substitute its judgment for that of the Legislature insofar as the wisdom or policy of the act is concerned.").

has exercised its preemption authority with respect to firearms and ammunition. *See* § 790.33, Fla. Stat.

The trial court erred in elevating the separation of powers doctrine over the state's superior legislative authority validly exercised in this case. Separation of powers is a foundational characteristic of state government, but it operates between and among the branches of state government: "The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." Art. II, § 3, Fla. Const. The doctrine also gives rise to concepts of sovereign immunity. "Florida's sovereign immunity provision stems in part from separation of powers concerns." *Dep't of Educ. v. Roe*, 679 So. 2d 756, 759 n.1 (Fla. 1996). In relevant application here, however, the separation of powers doctrine means only that no judge or jury can impose "traditional tort liability" on a local government for planning-level activity. *See Com. Carrier Corp. v. Indian River Cnty.*, 371 So. 2d 1010, 1020–21 (Fla. 1979). This boundary exists to keep courts from becoming entangled in "fundamental questions of policy and planning." *Kaisner v. Kolb*, 543 So. 2d 732, 737 (Fla. 1989).

The separation of powers doctrine does not defeat validly enacted general law, and does not enable state subdivisions or agencies or their officials to violate state preemption with impunity. The Florida Legislature is authorized to enact general law waiving sovereign immunity. Art. X, § 13, Fla. Const. The Legislature has exercised that authority through general law encompassing state agencies and subdivisions. *See* § 768.28, Fla. Stat. The Legislature likewise is authorized to abrogate common law, and is authorized to enact preemption laws that limit local government authority—and has done so validly in the present context. The State's subdivisions and agencies have no authority to violate state preemption. *See Fla. Power Corp. v. Seminole Cnty.*, 579 So. 2d 105, 107 (Fla. 1991) ("While the authority given to cities and counties in Florida is broad, both the constitution and statutes recognize that cities and counties have no authority to act in areas that the legislature has preempted."); *Trianon Park Condo. Ass'n, Inc. v. City of Hialeah*, 468 So. 2d 912, 919 (Fla. 1985) (noting that a lawsuit over a statutory violation does not implicate

separation of powers concerns). The trial court's reasoning and ruling are inconsistent with these authorities.

The trial court also failed to acknowledge that the actions penalized in the challenged statutes are, by definition, violations of statutes. The separation of powers doctrine protects only lawful and authorized planning-level activity. No immunity can attach to violation of state preemption statutes. *See Fla. Power Corp*., 579 So. 2d at 107; *Trianon Park*, 468 So. 2d at 918; *see also Jibory v. City of Jacksonville*, 920 So. 2d 666, 667 (Fla. 1st DCA 2005) (explaining that discretionary function immunity cannot apply to an unlawful act) (citing *Lester v. City of Tavares*, 603 So. 2d 18, 19 (Fla. 5th DCA 1992)). The Florida Legislature is authorized to prescribe penalties for violations of state preemption, and the judicial branch can (and must) enforce them. The trial court erred in holding to the contrary.

B. Legislative Immunity.

This analysis applies to two statutes that affect individuals.[3] The first is section 790.33(3)(c), which imposes a fine of up to $5,000 against officials and agency heads under whose jurisdiction a knowing and willful violation of preemption occurred. The second is section 790.33(3)(d), which prohibits use of public funds to defend or reimburse anyone found to have knowingly and willfully violated preemption. Appellees argued below that entities adopting stricter firearm or ammunition regulations are exercising their rights to discretion in governance, and that immunity derived from the separation of powers doctrine and federal law shields the exercise of that discretion. We again reject this reasoning and reverse the trial court's ruling.

On this issue, Appellees advance a variation of separation of powers immunity. They argue that local-government officials partake of the same immunity afforded members of the Florida

[3] Appellants have not argued their challenge to the trial court's ruling on the third statute, section 790.33(3)(e), under which a knowing and willful violation of preemption is cause for "termination of employment or contract or removal from office by the Governor." We therefore do not address this statute.

Legislature, to be free from inquiry or consequence as to why they make discretionary decisions in the scope of governing. We find that Appellees overstate the immunity afforded to local and agency officials, which does not apply on the facts presented here.

As a threshold matter, we reject Appellees' attempt to expand beyond its context our decision in *Florida House of Representatives v. Expedia, Inc.*, 85 So. 3d 517 (Fla. 1st DCA 2012). In that case, this Court held that members of the Florida House have a privilege against being compelled to testify about how they gathered materials on an issue under legislative consideration. *Id.* at 525. Appellees over-broadly rely on *Expedia* to argue that a local-government-level legislative privilege precludes legal proceedings to subject local officials to statutory penalties. To the contrary, any privilege that may exist in this context would have its limits, and that limit is reached when local or agency officials violate the state's superior power of preemption. *See id.* ("The court will always have to make a preliminary inquiry to determine whether the information is within the scope of the privilege and whether the need for privacy is outweighed by a more important governmental interest."). Preemption was not at issue in *Expedia*, but it is the principal issue here, and the state's preemption authority eliminates Appellees' privilege defense.

Further, as the Florida Supreme Court held soon after *Expedia*, even state legislators' testimonial privilege in their exercise of official functions is limited. The privilege must yield where improper intent is a proper legal inquiry. *See League of Women Voters of Fla. v. Fla. House of Reps.*, 132 So. 3d 135, 148 (Fla. 2013) (allowing limited inquiry into intent in reapportionment challenge). In relevant part here, the statutory penalty provisions at issue expressly depend upon a finding of a knowing and willful violation, which goes directly to local officials' intent. Officials are not immune from having to prove lack of knowing and willful intent to violate state preemption.

Turning back to whether local government officials have legislative immunity in the first place, the Florida Supreme Court has stated—in language it described as a holding—that "our separation of powers provision was not intended to apply to local governmental entities and officials, such as those identified in

articles VIII and IX and controlled in part by legislative acts." *Locke v. Hawkes*, 595 So. 2d 32, 36 (Fla. 1992). Appellees nevertheless argue that they partake of state legislative immunity handed down to them when the Florida Legislature delegated part of its legislative authority to local governments.

This argument once again overlooks the determinative threshold factor: the particular attempt to invoke immunity here occurs in direct violation of state preemption. The Florida Legislature has the authority to abrogate legislative immunity. *McNayr*, 184 So. 2d at 430 & n.6. It has done so here, because state preemption in this field necessarily and directly deprives local governments and agencies, and their officials, of any authority or discretion to contravene, exceed, or evade the Florida Legislature's regulation of the entire field of firearms and ammunition. In this field, the Legislature has withdrawn all legislative authority from local governments and agencies to make policy decisions. *Cf. Fla. Power Corp.*, 579 So. 2d at 107 (recognizing that local governments have no authority to act in preempted areas). No immunity can exist for local or agency enactment of provisions in violation of state preemption and thus beyond the scope of state-delegated authority.

Appellees fare no better with their federal common law argument and citations to federal cases. Those do not apply here. *See NRP Holdings LLC v. City of Buffalo*, 916 F.3d 177, 190 n.10 (2d Cir. 2019) (explaining that the "federal common-law" legislative immunity recognized by the Supreme Court protects only against federal claims, may be abrogated by federal statute, and affords no protection from state-law actions for damages); *League of Women Voters*, 132 So. 3d at 152 (holding that "federal common law" on legislative privilege does not apply in state court).

Finally, we reject Appellees' argument that the constitutional origins of local governing bodies confers legislative immunity on local legislators. *See* Art. VIII, §§ 1–2, Fla. Const. (governing creation and powers of counties and municipalities). The constitutional text does not support this argument, and the argument fails in the face of state preemption.

III. Scope of Arguments.

Before we conclude, we note that both sides have failed to challenge on appeal some of the trial court's rulings adverse to them. The trial court rejected some of Appellees' arguments, holding that Appellees were not legally authorized to regulate firearm "components" and "accessories" such as rifle stocks and large-capacity magazines, to regulate firearms on local government property beyond "internal government operations," or to establish "gun-free zones." The trial court also rejected Appellees' arguments based on free-speech rights and void-for-vagueness principles. Appellees did not cross-appeal to challenge these adverse rulings.[4]

Likewise, the trial court ruled against Appellants on some issues that Appellants do not challenge here. Those include the trial court's holding that section 790.33(3)(e), authorizing the Governor to remove local officials for violating the statutes at issue, is an unconstitutional expansion of the Governor's constitutionally enumerated suspension powers. *See* Art. IV, § 7, Fla. Const. (authorizing the Governor to "suspend" certain state and local officials for enumerated grounds including malfeasance or misfeasance in office). Appellants do not challenge the trial court's ruling preserving certain of local governmental entities' rights as employers and property owners. Also unchallenged are the trial court's approval of regulations that in concept would require proof as to waiting periods and criminal history checks; create records of firearms "transactions" (although such records

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[4] As Appellants note, the trial court provided advisory rulings on hypothetical scenarios. This clearly exceeds the proper scope and function of a declaratory-judgment action. *See Apthorp v. Detzner*, 162 So. 3d 236, 240 (Fla. 1st DCA 2015) ("[I]t is well settled that, Florida courts will not render, in the form of a declaratory judgment, what amounts to an advisory opinion at the instance of parties who show merely the *possibility* of legal injury on the basis of a hypothetical state of facts which have not arisen and are only contingent, uncertain, [and] rest in the future.") (quoting *Santa Rosa Cnty. v. Admin. Comm'n, Div. of Admin. Hearings*, 661 So. 2d 1190, 1193 (Fla. 1995)).

cannot amount to a "list, record, or registry" of legally-owned firearms or owners, which remain prohibited under section 790.335(4)(c) and subject to a fine of up to $5 million); and require tagging firearms, controlling door access, and posting informational signs and notices at gun shows.

"[I]ssues not raised in the initial brief are considered waived or abandoned." *Rosier v. State*, 276 So. 3d 403, 406 (Fla. 1st DCA 2019) (en banc). Failure to cross-appeal also waives any challenge to adverse aspects of a lower tribunal's rulings. *Harrison v. Lee Auto Holdings, Inc.*, 295 So. 3d 857, 863 n.2 (Fla. 1st DCA 2020). The trial court's unchallenged rulings are res judicata, and we do not address them. *See Fla. Dep't of Transp. v. Juliano*, 801 So. 2d 101, 107 (Fla. 2001) ("[R]es judicata bars relitigation in a subsequent cause of action not only of claims raised, but also claims that could have been raised.").

IV. Conclusion.

We hold that neither discretionary-function nor legislative immunity shields local governments and officials from the challenged statutes. We hold that these statutes are valid and enforceable. We reverse the judgment on appeal as stated herein.

REVERSED.

RAY, C.J., and B.L. THOMAS, J., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

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