UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

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| EDWARD A. CANIGLIA,<br>Plaintiff | :<br>: | |
| v. | : | C.A. No. 15-525 |
| ROBERT F. STROM as the Finance Director of THE CITY OF CRANSTON, et al.<br>Defendants | :<br>: | |

**PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

Pursuant to F.R.Civ.P. 56, moves for partial summary judgment. Plaintiff alleges that Defendants unlawfully seized his firearms and required him to have a psychological evaluation because he made a supposedly suicidal statement and action. Plaintiff moves for partial summary judgment on Count III (Violation of Plaintiff's Rights Under the Fourth Amendment and Art. 1, Sec. 6 of the Rhode Island Constitution), Count IV (Violation of Plaintiff's Due Process), Count VI (Violation of the Rhode Island Mental Health Law), Count VII (Trover and Conversion), as well as on several of Defendants' various "affirmative defenses," including "absolute and qualified immunity" (First Affirmative Defense), and "statutory and common law immunity" (Second Affirmative Defense. In addition, Defendants have asserted the "Community Caretaking Function" as a defense to Plaintiff's claims in answers to interrogatories and at deposition. To the extent Defendants intend this "Function" as an additional defense, Plaintiff moves for summary judgment on it, as well.

Plaintiff relies on the accompanying Statement of Undisputed Facts and his Memorandum in support of this Motion.

**EDWARD CANIGLIA**
By his attorneys,

*/s/ Thomas W. Lyons*
Thomas W. Lyons #2946
Rhiannon S. Huffman #8642
RHODE ISLAND AFFILIATE,
AMERICAN CIVIL LIBERTIES UNION
Strauss, Factor, Laing & Lyons
One Davol Square, Suite 305
Providence, RI 02903
(401) 456-0700
tlyons@straussfactor.com

## CERTIFICATION

I hereby certify that on December 17, 2018, a copy of the foregoing was filed and served electronically on all registered CM/ECF users through the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF system.

/s/ Thomas W. Lyons

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| v. | : | C.A. No. 15-525 |
| ROBERT F. STROM as the Finance Director of<br>THE CITY OF CRANSTON, et al.<br>Defendants | :<br>: | |

**PLAINTIFF'S MEMORANDUM IN SUPPORT OF HIS MOTION FOR PARTIAL SUMMARY JUDGMENT**

Plaintiff alleges that Defendants unlawfully seized his firearms and required him to have a psychological evaluation because he made a supposedly suicidal statement and action. Plaintiff moves for partial summary judgment on Count III (Violation of Plaintiff's Rights Under the Fourth Amendment and Art. 1, Sec. 6 of the Rhode Island Constitution), Count IV (Violation of Plaintiff's Due Process), Count VI (Violation of the Rhode Island Mental Health Law), Count VII (Trover and Conversion), as well as on several of Defendants' various "affirmative defenses," including "absolute and qualified immunity" (First Affirmative Defense), and "statutory and common law immunity" (Second Affirmative Defense. In addition, Defendants have asserted the "Community Caretaking Function" as a defense to Plaintiff's claims in answers to interrogatories and at deposition. To the extent Defendants intend this "Function" as an additional defense, Plaintiff moves for summary judgment on it, as well. The case law and relevant statutes indicate that the legal analysis may depend, in part, on whether Defendants were ever investigating a possible crime. Plaintiff will argue Defendants' actions were unjustified regardless of whether there was a criminal investigation.[1]

[1] Plaintiff notes that the legal arguments presented here are substantially similar to many of those also presented by Plaintiff in Richer v. Parmelee, C.A. No. 15-162, in a similar motion.

## UNDISPUTED FACTS

Plaintiff incorporates by reference his Statement of Undisputed Facts. He will cite to the facts set forth by reference to the numbered paragraphs in the Statement, e.g. (SUF 1). Plaintiff will include here a summary of those Undisputed Facts.

Plaintiff Edward Caniglia ("Ed") is 68 years old. (SUF 1). He has been married to Kim Caniglia ("Kim") since 1993. (SUF 1). They live in Cranston, Rhode Island. (SUF at Exhibit T). They have never been in divorce proceedings. (SUF 1). Ed has never had any kind of criminal charges or restraining orders against him. (SUF 46). He has no history of violence or threatening violence to himself or others. (Id.). He has never misused firearms. (Id.).

Defendants include Col. Michael Winquist, the chief of the City of Cranston Police Department ("CPD"); Capt. Russell Henry, who made the decision to seize Ed Caniglia's firearms; Sgt. Brendan Barth, who was the senior CPD officer on scene at the Caniglias' home; Officers John Mastrati, Wayne Russell, and Austin Smith, who were also on scene; and Major Robert Quirk, who was involved in the decision whether to return Mr. Caniglia's firearms.

The CPD has promulgated General Orders ("GO") to comply with accreditation requirements of the Commission on Accreditation of Law Enforcement Agencies ("CALEA"). (SUF 12-14). The GOs constitute a manual that is the "complete catalog" of the CPD's policies and procedures. (Id.). The manual is "the bible" for the CPD. (Id.). There is a GO respecting "Public Mental Health" which states, in part, "officers are not in a position to diagnose mental illness but must be alert to common symptoms." (SUF 25, 28). CPD officers received training on mental health issues in 2008, 2011 and 2013, including "risk factors" for suicide. (SUF 34-38).

On the evening of August 20, 2015, Ed and Kim had an argument. (SUF 58). During the argument, Ed retrieved a handgun he keeps under the mattress of their bed, put it on the dining

room table, and said "just shoot me now and get it over with." (Id.). Kim and Ed agree that the handgun was not loaded although Kim did not know it at that moment. (SUF 59). Ed subsequently left the house and went for a drive. (SUF 60). Kim took the handgun and put it back under the bed and hid the gun's magazine. (Id.). When Ed returned, the Caniglias argued some more. (SUF 61).

Kim left and went to stay at the Econo Lodge Motel on Reservoir Avenue. (Id.). The next morning, Kim ate breakfast at the "Scramblers" Restaurant on Reservoir Avenue. (SUF 62). She tried to call Ed but he did not answer because he was in the bathroom. (Id.). Kim became concerned that Ed may have committed suicide. (SUF 63). She called the CPD because she wanted a police officer to accompany her to the house to check on Ed. (64, 142).

The CPD dispatched four police officers in four squad cars in response to Kim's call. (SUF 64). She told the officers she wanted an officer to accompany her to the house to check on Ed. (Id.). Officer Mastrati called Ed on his cell phone, spoke with him, and told Kim that Ed was "fine." (SUF 65-67). The officers told Kim to follow them to the Caniglia's home but to remain in her car. (SUF 67).

Officers Mastrati, Russell, Smith, and Sgt. Barth spoke with Ed on the back porch of the house. (SUF 69). The officers variously describe Ed as "cooperative," "not abrasive," "normal," "nice," "very polite," and "welcoming." (SUF 70, 79, 80). He did not seem suicidal. (SUF 80). Ed denied being suicidal (SUF 71-72), but Officer Mastrati did not believe him. (SUF 73-74). Officer Mastrati based his belief on Ed's statement and actions of the prior night. (SUF 75-76).

Capt. Henry made the decision to seize Ed's firearms based on the recommendation of the officers at the scene. (SUF 87). He does not remember any basis for the recommendation other than what is set forth in the in the Incident Report. (Id.). Capt. Henry understands that

nothing Ed said to the CPD officers indicated he was suicidal. (SUF 96). Officer Mastrati said the only risk factor for suicide present on August 21, 2015 was Ed's action the prior night in bringing out the (unloaded) handgun and saying "just shoot me now" to Kim. (SUF 75-79).

However, Mr. Caniglia was neither at acute nor imminent risk of suicide on August 20 and 21, 2015. (SUF 136). His actions and statements on the evening of August 20, 2015 did not constitute suicidal communication, nor did they communicate any suicidal intent. (Id.). Further, at no time and especially on the morning of August 21, 2015 did Mr. Caniglia express or communicate in words or actions anything that could be construed as indicating he was at imminent risk of suicide. (Id.). No independent evaluation of Mr. Caniglia's risk for suicide was made based on both his current mental status and associated risk factors as the Cranston Police Department officers were trained to observe. (Id.). A sole reliance on Mr. Caniglia's statement and action on the night before to document any level of concern for imminent risk was inappropriate and a breach of the standards to which these officers were trained. (Id.). Officers of the Cranston Police Department did not apply or rely upon appropriate criteria or reasonable and standard police procedures in determining Mr. Caniglia's was in imminent risk of suicide or in determining that his firearms needed to be confiscated on August 21, 2015. (Id.).[2]

Defendants told Ed they were going to seize his firearms. (SUF 83). Ed objected to the seizure of his firearms. (SUF 84). Defendants told Ed that they would not seize his firearms if he went to Kent Hospital for a psychological evaluation. (SUF 85). Ed agreed only to avoid having his firearms seized. (Id.). After he left in the Cranston Rescue, Defendants told Kim that Ed had agreed to have his firearms seized. (SUF 113). They told Kim that after Ed was checked

[2] Defendants have disclosed no expert witnesses. Thus, they have no expert testimony to refute the opinions of Mr. Caniglia's expert psychologist, Dr. Lanny Berman.

out at the hospital, she could come to the CPD station and retrieve the firearms. (Id.). However, despite repeated efforts by Kim, Ed, and Ed's lawyer, Defendants refused to return Ed's firearms unless he got a court order. (SUF 122-135). Defendants returned Ed's firearms after he filed this suit but before any order entered. (SUF 134).

Defendants justify their actions based on the purported consent of Kim Caniglia or the "community caretaking function" ("CCF"). (SUF 3-5, 20, 50-51, 54, 88-91). However, Defendants cannot identify any legal authority, or written policy, or specific training respecting the CCF that authorizes their actions. (SUF 6-7, 9-10, 17-20, 39-40, 56, 88, 94). Similarly, Defendants cannot identify any specific set of factors that constitute the factors to be considered in making such decisions. (SUF 31-33, 42-44). Rather, Defendants acknowledge that CPD officers make ad hoc decisions based on their individual experiences. (SUF 32-33, 99). Defendants' justification boils down to the fact that that Mr. Caniglia had made an supposedly suicidal statement and action the prior night even though he denied being suicidal when Defendants spoke to him. (SUF 69-76). Defendants' unwritten policy of seizing firearms for safekeeping and requiring allegedly suicidal people to have psychological evaluations is an ongoing practice. (SUF 144-46).

## PROCEDURAL BACKGROUND

Plaintiff filed suit on December 11, 2015. The original complaint named as defendants the City of Cranston, its finance director, and Col. Winquist in his official capacity as the Chief of the Cranston Police Department. The complaints alleged violation of the Rhode Island Firearms Act (Count I), Plaintiff's right to keep arms (Count II), violation of Plaintiff's due process (Count III), and violation of Plaintiff's right to equal protection (Count IV).

On July 3, 2015, Plaintiff Jason Richer filed his first motion for partial summary judgment in Richer v. Parmelee, C.A. 15-162. Richer moved for summary judgment on liability on all his claims. On June 1, 2016, the Court rendered its decision on that motion. Richer v. Parmelee, 189 F.Supp.3d 334 (D.R.I. 2016) ("Richer"). It held that the Town of North Smithfield violated Mr. Caniglia's due process rights by not providing a post-seizure process to obtain his firearms other than filing a lawsuit and obtaining a court order. Id. at 342. It held that the Town did not violate Mr. Richer's Second Amendment rights because he could obtain other firearms. Id. at 343. The Court held that Mr. Richer's Fourth Amendment Claims were barred by the applicable statute of limitations. Id.[3] Finally, it held Mr. Richer's claim under the Rhode Island Firearms Act was moot because the Town had returned his firearms. Id. at 344.

On April 6, 2017, after the Court lifted the stay on discovery in both Richer and Caniglia, Plaintiff served an Amended Verified Complaint that added a claim against Col. Winquist in his individual capacity and added as defendants the other Cranston police officers in their official and individual capacities. In addition, the Amended Verified Complaint added claims for violation of Plaintiff's rights under the Rhode Island Mental Health Law (Count VI) and trover and conversion (Count VII). The Complaint sought damages as well as injunctive and declaratory relief.

Since then, the parties have produced thousands of pages of documents, answered interrogatories, and conducted depositions of Plaintiff, his wife Kim, each of the individual defendants, and a lieutenant of the Cranston Fire Department, Lieutenant Richard Greene, who responded to Caniglias' home and transported Plaintiff to Kent Hospital for a psychological evaluation. In addition, the parties conducted expert discovery. Specifically, Plaintiff produced

[3] This is not an issue in this case.

the report of Dr. Lanny Berman, a psychologist who is an expert in suicidology. Dr. Berman opines, *inter alia*, that Mr. Caniglia was neither an acute nor an imminent risk of suicide on August 20 and 21, 2015 when Defendants seized his firearms and required him to undergo a psychological evaluation at Kent Hospital.

## STANDARDS OF REVIEW

There are two relevant standards of review: (1) the standard for summary judgment, which includes (2) the standard to review of the constitutionality of a government restriction on Plaintiff's constitutional rights.

As this Court has said in URI Cogeneration Partners, L.P. v Board of Governors for Higher Education, 915 F.Supp. 1267 (D.R.I. 1996):

> The standard for ruling on a Rule 56(d) motion is identical to that deployed when considering a summary judgment motion under Rule 56(c). [citations omitted]. Rule 56(c) dictates that summary judgment shall be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the ffidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

Id. at 1279.

Here, the legal analysis includes the appropriate constitutional standard of review of Defendants' apparently unwritten policy of seizing a person's firearms from his home for "safekeeping" if he has made allegedly suicidal comments and requiring him to have a psychological evaluation. The level of Fourth Amendment scrutiny applied depends on the nature of the police-citizen encounter. Brawell v. McCamman, 256 F.Supp.3d 719, 733 (W.D.Mich. 2017) ("An investigatory Terry stop requires reasonable suspicion that criminal activity is afoot; a Terry frisk requires reasonable suspicion that the suspect stopped is armed and dangerous; and an arrest requires probable cause that a crime has occurred."); Tisdale v. Gravitt, 51 F.Supp.3d 1378, 1379 (N.D.Ga. 2014). Mr. Caniglia submits that Defendants' actions in

seizing his firearms for "safekeeping" and requiring him to have a psychological evaluation requires that they show they had probable cause to think he was at imminent or acute risk of harming himself with his firearms.

## SUMMARY OF THE ARGUMENT

Plaintiff will argue the following:

- Defendants' actions in requiring Mr. Caniglia to go for a psychological evaluation and seizing his firearms because they believed he made a suicidal statement violate the Fourth Amendment and Article 1, Section 6 of the Rhode Island Constitution. Kim Caniglia cannot consent to the seizure of Edward Caniglia's property, i.e., his firearms, Edward Caniglia did not consent either to a seizure or to a psychological evaluation, and there were no exigent circumstances.
- Defendants' actions in requiring Mr. Caniglia to go for a psychological evaluation and seizing his firearms without a court order because they believed he made a suicidal statement violates the Due Process Clause of the Fourteenth Amendment and Acticle 1, Section 2 of the Rhode Island Constitution, as well as the Rhode Island Mental Health Act. Accordingly, because Defendants did not have legal justification to seize Mr. Caniglia's firearms, their actions constitute conversion.
- Neither Ed nor Kim Caniglia voluntarily consented to the seizure of Ed's firearms. Kim Caniglia cannot consent to the seizure of Edward Caniglia's property, i.e., his firearms. Mr. Caniglia did not voluntarily consent to a psychological evaluation.
- The "community caretaking function" does not justify Defendants' actions because neither the United States nor the Rhode Island Supreme Courts have authorized the use of

the community caretaking function to seize a person and his property from his home for non-criminal purposes and other Rhode Island law limits the application of that function.

- Defendants have no other absolute or qualified immunity for their actions because absolute immunity only applies to actions "intimately associated" with the judicial process and qualified immunity does not apply where Mr. Caniglia's rights were clearly established and Defendants violated them.
- Defendants have no other statutory or common law immunity because Rhode Island has abolished Defendants' sovereign immunity and the "public duty doctrine" does not apply to intentional torts.

## ARGUMENT

### I. DEFENDANTS VIOLATED PLAINTIFF'S CONSTITUTIONAL AND STATUTORY RIGHTS

Defendants violated Mr. Caniglia's constitutional and statutory rights including his rights against unreasonable searches and seizures under the Fourth Amendment and Article 1, Section 6 of the Rhode Island Constitution, his rights under to due process under the Fourteenth Amendment and Article 1, Section 2 of the Rhode Island Constitution, as well as his rights under the Rhode Island Mental Health Act, R.I.Gen.L. § 40.1-5-1, et seq. Because Defendants' seizures had no legal justifications, they constitute conversion.

#### A. DEFENDANTS' ACTIONS IN REQUIRING PLAINTIFF TO HAVE A PSYCHOLOGICAL EVALUATION AND SEIZING HIS FIREARMS VIOLATED THE FOURTH AMENDMENT AND ARTICLE 1, SECTION 6 OF THE RHODE ISLAND CONSTITUTION

Defendants' requirement that Mr. Caniglia have a psychological evaluation and their seizure of his firearms violated his rights under federal and state law, including the Fourth

Amendment and Article 1, Section 6 of the Rhode Island Constitution. The words of both constitutional provisions are almost identical. The Fourth Amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated and no Warrant shall issue, but upon probably cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const., amend. IV. Art. 1, Sec. 6 of the Rhode Island Constitution states:

> The right of the people to be secure in their persons, papers and possessions, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue, but on complaint in writing, upon probable cause, supported by oath or affirmation, and describing as nearly as may be, the place to be searched and the persons or things to be seized.

R.I. Const., art. 1, § 6.

The protection against unreasonable searches and seizures is not limited to criminal investigation. "[I]t would be anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.'" McCabe v. Life-Line Ambulance Service, Inc., 77 F.3d 540, 544 (1st Cir. 1996), quoting O'Connor v. Ortega, 480 U.S. 709, 715 (1987) (quoting New Jersey v. T.L.O., 469 U.S. 325, 335 (1985)). "Included among the civil proceedings in which the Fourth Amendment applies are involuntary commitment proceedings for dangerous persons suffering from mental illness." Id.; see also Bilida v. McCleod, 211 F.3d 166, 171 (1st Cir. 2000) ("In general this [Fourth Amendment] warrant requirement applies to civil as well as criminal searches.").

The Rhode Island provision provides Rhode Island citizens a "double barreled source of protection which safeguards their privacy from unauthorized and unwarranted intrusions…" State v. von Bulow, 475 A.2d 995, 1019 (R.I. 1984), quoting State v. Sitko, 460 A.2d 1, 2 (R.I. 1983). "This dual safeguard flows directly from the United States Supreme Court's explicit

acknowledgement of the 'right of state courts, as final interpreters of state law, 'to impose higher standards on searches and seizures than [those] required by the Federal Constitution,' even if the state constitution provision is similar to the Fourth Amendment." Id., quoting State v. Benoit, 417 A.2d 895, 899 (1980) (quoting Cooper v. California, 386 U.S. 58, 62 (1967)).

Defendants claim that Mr. Caniglia had made a purportedly suicidal comment and action by taking out his unloaded handgun, putting in front of his wife and telling her to "just shoot me now." (SUF 58). Suicide is a common law felony in Rhode Island. Clift v. Narraganset Television L.P., 688 A.2d 805, 808 (R.I. 1988). Accordingly, there was at least the prospect of a criminal investigation when Defendants went to the Caniglias' home.

It is undisputed that Defendants seized Plaintiff's firearms without a search warrant. Defendants' actions constituted a search for Ed's firearms and a seizure of both those firearms and of Ed himself. A "search occurs when an expectation of privacy that society considers reasonable is infringed." United States v. Jacobson, 466 U.S. 109, 112 (1984). Americans have an expectation of privacy that has "roots in the common law" and is where "the minimal expectation of privacy exists." Kyllo v. United States, 533 U.S. 27, 34 (2001). "Searches conducted outside of the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment." Katz v. United States, 389 U.S. 347, 357 (1967). "Indiscriminate monitoring of property that has been withdrawn from public view would present far too serious a threat to privacy interests in the home to escape entirely some sort of Fourth Amendment oversight." United States v. Karo, 468 U.S. 705, 716 (1984).

Defendants have the burden of establishing that a warrantless search or seizure was reasonable, including the effectiveness of a third party's consent or the exigency of the circumstances. Illinois v. Rodriguez, 497 U.S. 177, 181 (1980); State v. Linde, 876 A.2d 1115,

1125 (R.I. 2005); State v. Clark, 265 Wis.2d 557, 568, 666 N.W.2d 112, 116 (2003) ("[C]ompliance with an internal policy department policy does not, in and of itself, guarantee the reasonableness of a search or seizure.").

While Defendants had Kim Caniglia's consent to go to Plaintiff's home, they did not have Ed Caniglia's consent to search for his guns, and seize his guns while he was going to the hospital to be examined. "Absent consent or exigent circumstances, police officers must obtain a warrant before entering a private dwelling to effect an arrest or search for evidence." State v. Gonsalves, 553 A.2d 1073, 1075 (R.I. 1999), citing, Payton v. New York, 445 U.S. 573 (1980). The requirement of a search warrant derives from the Fourth Amendment of the United States Constitution and Art. 1, Sec. 6 of the Rhode Island Constitution. Vinagro v. Reitsma, 260 F.Supp.2d, 425, 430 (D.R.I. 2003) ("Vinagro"); Bilida v. McCleod, 41 F.Supp.2d 142, 148 (D.R.I. 1999) (Lagueux, J.) ("Bilida"); Pimental v. Department of Transportation, 561 A.2d 1348, 1351-52 (R.I. 1989), quoting, State v. Benoit, 417 A.2d 895, 901 (R.I. 1980) (Art. 1, Sec. 6 "reflect[s] the intention of the framers to declare all warrantless searches and seizures unreasonable."). "Only if circumstances render procurement of a warrant impractible, and society demands swift action, does article 1, section 6 allow the 'temporary limited infringement of an individual's right of privacy.'" Pimental, 561 A.2d at 1352, quoting, Benoit, 417 A.2d at 901. The Supreme Court has also held that under the "emergency" doctrine, a search occurring after the emergency has been resolved could not be justified by the emergency. Mincey v. Arizona, 437 U.S. 385, 395 (1978).

Both our federal and state courts have not hesitated to find warrantless seizures improper where government officials could not justify the failure to obtain a proper warrant. Vinagro, supra; Bilida, supra; State v. Terzian, 162 A.3d 1230, 1243-44 (R.I. 2017) ("Terzian"); State v.

Jeremiah, 696 A.2d 1220, 1225 (R.I. 1997); State v. Jennings, 461 A.2d 361, 366-67 (R.I. 1983); State v. Jenison, 442 A.2d 866, 873-74 (R.I. 1982). For example, in Vinagro v. Reitsma, 260 F.Supp.2d 425, 430 (D.R.I. 2003), Judge Lagueux held that plaintiff stated a claim for violation of his Fourth Amendment rights where he alleged that employees of the Rhode Island Department of Environmental Management "without warrant and in the absence of any exigent circumstances…entered onto the curtilage of of his residential property and seized material…".

Plaintiff notes that Chapter 5 of Title 12 of the Rhode Island General Laws addresses Rhode Island's statutory requirements for search warrants. In sum, Chapter 5 requires that law enforcement officials like Defendants: (1) apply to a judge of the Supreme, Superior, District or Family Courts for a search warrant, R.I.Gen.Law § 12-5-1; (2) demonstrate specific grounds for the issuance of the search warrant, including the need to search for stolen property, concealed property in violation of law, property intended to be used to violate the law, property which is evidence used in the commission of a crime, samples of bodily tissue or fluids that may identify a criminal, or samples of blood or breath that may yield evidence of alcohol or a controlled substance. R.I.Gen.Law § 12-5-2; (3) provide a complaint in writing and under oath to support the application, R.I.Gen. Law § 12-5-3(a); and, (4) return the warrant within 14 days to the court that issued it, R.I.Gen. Law § 12-5-3(b).[4] Notably, Defendants did not apply to a judge or a magistrate for a search warrant, did not demonstrate specific statutory grounds for a search warrant (none of which include "safekeeping" of firearms), did not provide a complaint in writing and under oath to support the request for the search warrant, and, obviously, did not obtain a search warrant before seizing Plaintiff's firearms.

[4] Superior Court Rule of Criminal Procedure 41 sets forth similar standards.

The Rhode Island Supreme Court has held that this statute strictly and constitutionally limits police power to seize property by a search warrant. See State v. Gomes, 881 A.2d 97, 105 (R.I. 2005); State v. Dearmas, 841 A.2d 659, 665 (R.I. 2004); State v. DiStefano, 764 A.2d 1156, 1169 (R.I. 2000). In DeStefano and Gomes, the Supreme Court held that evidence of blood tests from a non-consenting person subject to a search warrant was not permitted under § 12-5-2, as it was then drafted. In both cases, the court held the evidence must be excluded. In Gomes, the court held that DNA test results from blood obtained by search warrant must also be excluded. The court indicated in Dearmas that the General Assembly determines the scope of a permissible search warrant. 841 A.2d at 665. Here, Defendants' seizure of Plaintiff's firearms completely fails to comply with Rhode Island law.

Moreover, there were no exigent circumstances here justifying a warrantless seizure of Plaintiff's firearms. Terzian, 162 A.3d at 1240-41. While "[t]he need to protect or preserve life or avoid serious injury" constitutes an exigent circumstance, no such circumstances were present here. Bilida v. McCleod, 41 F.Supp.2d at 149; State v. Jennings, 461 A.2d at 367. In Bilida, Judge Lagueux held there were no exigent circumstances that justified DEM's warrantless seizure of a pet raccoon from plaintiff's backyard. "[I]mminent danger requires a higher standard than the mere possibility that someone might get injured." Id., citing United States v. Curzi, 867 F.2d 36, 42 (1st Cir. 1989).[5]

In Terzian, the Superior Court had held there were exigent circumstances that justified the seizure of defendant's firearm without a warrant because there was a three-year old child "running around the house." The Supreme Court said that exigent circumstances to excuse the

[5] Judge Lagueux did find that the "plain view" doctrine justified the seizure. Id. at 150. Here, Mr. Caniglia's firearms were not in plain view (nor were they evidence of a crime).

requirement of a warrant exist only when "there is such a compelling necessity for immediate action as will not brook the delay of obtaining a warrant." 162 A.3d at 1241 (R.I. 2016), citing State v. Gonzalez, 136 A.3d 1131, 1151 (R.I. 2016) (quoting United States v. Adams, 621 F.2d 41, 44 (1st Cir. 1980). "[T]he police [must] have an objective reasonable belief that a crisis can be avoided only by swift and immediate action." Id., citing State v. Gonzalez, 136 A.3d at 1151 (quoting State v. Gonsalves, 553 A.2d 1073, 1075 (R.I. 1989).

> This Court remains ever "mindful of the admonition of the United States Supreme Court to the effect that '[w]hen an officer undertakes to act as his own magistrate he ought to be in a position to justify it by pointing to some real immediate consequences if he postponed action to get a warrant.'" (emphasis original).

Id. at 1241, citing State v. Gonzalez, id., (quoting Welsh v. Wisconsin, 466 U.S. 740, 751 (1984).

The Court said it had previously set forth specific examples of exigent circumstances that would justify the failure to get a warrant, including providing emergency assistance to an occupant of the house, engaging in "hot pursuit" of fleeing suspect, entering a burning building to put out a fire and to investigate its cause, and preventing the imminent destruction of evidence. Id. at 1241, quoting Gonzalez, 136 A.3d at 1164 (quoting Missouri v. McNeely, 569 U.S. 141, 148-49 (2013). The Terzian Court said there was no evidence of any emergency nor did any police officer testify to any facts showing a reasonable belief of any emergency:

> The record clearly establishes that, at the time of the warrantless entry, defendant—the lone suspect—was in custody in the back seat of a police cruiser. No suspect was attempting to flee the scene; there was no threat of an imminent destruction of evidence; there was no need to provide emergency assistance to anyone in the home; and there were no other suspects, intruders, or victims on the premises…A passing observation that there may have been a child "running around the house" will not support a warrantless search based on an emergency***Nor are we persuaded that the presence of a firearm gives rise to an exigent circumstance sufficient to circumvent the warrant requirement. The fact that there may have been a firearm somewhere in the residence does not, by itself, rise to the level of exigency necessary to surpass the warrant requirement. (emphasis added).

Id. at 1242-43. The Court said that the warrantless entry of defendant's house and seizure of his firearm was "in clear violation of his Fourth Amendment rights." Id. at 1243.

In Jennings, there had been a possible homicide in the vicinity of defendant's apartment. A police officer originally entered the apartment because defendant's landlord's son saw defendant's door was open and the apartment looked like it had been ransacked. The officer checked the apartment and determined there were no intruders present. He left the apartment and met his supervisor downstairs. The two of them then conducted a "full scale, intensive search" of the apartment during which they seized a gun, ammunition and a bullet cartridge. The Rhode Island Supreme Court said the initial search was valid, but:

> There is nothing in the record, however, to justify any further intrusion by the authorities without first securing a search warrant. There is no indication that there was any continuing danger to anyone or that the destruction or removal of evidence was imminent. The exigency justifying Alberico's initial entry and security sweep had ended, and the apartment had been secured. The police had ample time to obtain a warrant.

461 A.2d at 367.

Ed was not in the vicinity of the firearms when Defendants seized them. (SUF 85, 113). Rather, at their insistence, he had gone to the hospital to be examined. (Id.). They told Ed that they would not seize his firearms if he had the psychological evaluation. (Id.). Four police officers had come to Plaintiff's home. (SUF 68). None of them went with Plaintiff to the hospital. Certainly, one or two of them could have watched the handguns while another attempted to get a warrant or other court order authorizing the seizure. They made no such effort. Defendants' warrantless seizure of Plaintiff's firearms violated the United States and Rhode Island Constitutions.

Kim Caniglia's call to the CPD does not, by itself, justify seizing Mr. Caniglia or his firearms. This Court, in the context of its due process analysis in its Richer Decision, wrote:

> When the Town's police officers are summoned by a member of the household to diffuse a domestic dispute involving alleged suicidality, the Town has a critical interest in empowering its police officers to remove objects "dangerous in themselves, including lethal firearms from the premises."

189 F.Supp.3d at 340, citing Coolidge v. New Hampshire, 403 U.S. 443, 470 (1971). However, nothing on page 470 of Coolidge v. New Hampshire nor in the rest of that decision supports that proposition of law.

In Coolidge, police in Manchester, New Hampshire were investigating Coolidge for the murder of a 14-year old girl. They went to his house to question him in his wife's presence and asked him if he owned any guns. He showed them three guns. He subsequently went to a police station to take a lie-detector test. While he was out of the house, other police went there to speak to his wife. They asked her whether Coolidge had any guns. She showed them four guns and some clothing. Coolidge's wife volunteered that the police could take the items in the belief that neither she nor he had anything to hide and that providing the items would help her husband. Coolidge unsuccessfully moved to suppress the evidence and was convicted of murder.

With respect to the guns and clothing, the Supreme Court said:

> [I]t cannot be said that the police should have obtained a warrant for the guns and clothing before they set out to visit Mrs. Coolidge since they had no intention of rummaging around Coolidge's effects or of dispossessing him of any of his property. Nor can it be said that they should have obtained Coolidge's permission for a seizure they did not intend to make.

Id. at 488. The Court continued "To hold that the conduct of the police here was a search and seizure would be to hold, in effect, that a criminal suspect has constitutional protection against the adverse consequences of a spontaneous, good-faith effort by his wife to clear him of suspicion." Id. at 489-90. The Court concluded that the police did not need a warrant as Mrs. Coolidge had seen her husband show his guns to the police and she thought by offering them she was helping to clear him of suspicion. Id. at 489-91.

Here, Mr. Caniglia and his wife were arguing when Ed made his dramatic gesture (SUF 58-61). The next day, Ed explained this to the CPD officers and to the rescue personnel. (SUF 69-72, 106). The CPD officers said Ed was not suicidal when they spoke with him. (SUF 70, 81). They based their decision solely on Ed's statement and action of the previous night. (SUF 76, 96). The rescue report states, in part: "pt stated he was not looking to harm himself, this happened last night…Pt calm, did not deny altercation, psych eval". (SUF 103). In contrast to Coolidge, Ed did not show his firearms to the CPD officers. The CPD officers did not ask Ed while he was in the home whether they could see his guns. Rather, according to Kim, they waited until they had removed him from the house and then they told her Ed had agreed to the seizure of the firearms. (SUF 113). The police seized the guns based on Ed's supposedly suicidal statement and action of the previous evening night even though they admit Ed was not suicidal when they spoke with him the next morning. (SUF 80-81).

Thus, this case is very different from Coolidge v. New Hampshire. There was no crime and no criminal investigation. Defendants did not ask Ed to see his guns nor did he voluntarily display them. Rather, they asked Kim about his guns after the Caniglias had had a big fight and after they sent Ed away in the rescue. Defendants did so pursuant an unwritten policy of seizing firearms. Kim was not trying to clear Ed of suspicion of a crime. To the contrary, she was told Ed had agreed to the seizure of the guns. (SUF 113). They found the guns under the mattress and in a box behind Ed's workbench in the garage. (SUF 117). Thus, Defendants did "rummag[e] around [Ed's] effects" and they did intend to "dispossess[ ] him of…his property." Id. at 488. Nothing in Coolidge v. New Hampshire authorizes the CPD to seize Ed's firearms solely because there was an incorrect concern that he may have attempted suicide or that he made a dramatic statement with an unloaded handgun.

Similarly, Defendants seized Ed when they required him to go to Kent Hospital for a psychological evaluation as a condition of not seizing his guns. A seizure occurs when "there is termination of freedom of movement through means intentionally applied." Brower v. County of Inyo, 489 U.S. 593, 597 (1998). "The security of one's privacy against arbitrary intrusion by the police—which is at the heart of the Fourth Amendment—is basic to a free society." Wolf v. Colorado, 338 U.S. 25-27-28 (1999). The Fourth Amendment imposes a warrant requirement "so that an objective mind might weigh the need to invade privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose jobs is the detection of crime and the arrest of criminals." McDonald v. United States, 335 U.S. 451, 455-56 (1948).

It is clear that taking a person into custody because of concerns that the person's mental health creates a likelihood of serious harm is a seizure protected by the Fourth Amendment. Ahern v. O'Donnell, 109 F.3d 809, 817 (1st Cir. 1997) (per curiam); see also, Cantrell v. City of Murphy, 666 F.3d 911, 923 & n. 8 (5th Cir. 2012); Roberts v. Speilman, 643 F.3d 899, 905 (11th Cir. 2011); Bailey v. Kennedy, 349 F.3d 731, 739 (4th Cir. 2003); Mondavy v. Ouellette, 118 f.3d 1099, 1102 (6th Cir. 1997); Pino v. Higgs, 75 F.3d 1461, 1467-68 (10th Cir. 1996); Sherman v. Four City Counselling Center, 987 F.2d 397, 401 (7th Cir. 1993); Glass v. Mayas, 984 F.2d 55, 58 (2nd Cir. 1993); Maag v. Wessler, 960 F.2d 773, 775-76 (9th Cir. 1991) (per curiam). In Ahern, the First Circuit addressed the circumstances upon which a police officer could seize a person and cause him to be admitted involuntarily to a mental hospital. The court said that "[i]t is well-settled that the Fourth Amendment's protections against unreasonable searches and seizures apply to the involuntary hospitalization of persons for psychiatric reasons." 109 F.3d at

815. Further, when a police officer, not an independent expert, makes the decision to seize the person for psychiatric reasons he must have probable cause. Id. at 817.

Accordingly, the Ahern court considered whether the officer had probable cause. In that case, the plaintiff Ahern was a police officer with the University of Massachusetts-Boston ("UMB"). Ahern had left threatening messages on the answering machine of an ex-girlfriend named Deborah Cate. He had previously stopped at her workplace uninvited with unwanted gifts trying to get her to resume their relationship. He obtained her new boyfriend's address and threatened to tell the new boyfriend's wife and Cate's husband. Ahern would call Cate to tell her he had been following her all day or that he was watching her apartment from a phone booth across the street. Ahern made anonymous sexually explicit phone calls to Cate and threatening calls to her new boyfriend. Cate eventually reported these events to the Boston Police Department ("BPD"). A Boston police officer investigated and listened to tapes of the messages and phone calls. The BPD officer had Ahern's superior listen to some of the tapes and the superior agreed the caller was Ahern.

The superior described the situation to a psychologist who consulted with the UMB security department. The psychologist advised that Ahern might be homicidal or suicidal and should be evaluated by a mental health professional to determine whether he posed a danger to himself or others. The psychologist arranged for Ahern to be seen at a hospital. The BPD and UMB police officers seized Ahern at work and took him to the hospital. Ahern was admitted to the hospital involuntarily and remained there for 12 days. He subsequently sued numerous defendants. The district court granted defendants' summary judgment motions. The First Circuits found that these undisputed facts constituted probable cause for the officers' actions.

By comparison, the Fourth Circuit considered a more analogous case in Bailey v. Kennedy, 349 F.3d 731 (4th Cir. 2003). In that case, plaintiff Michael Bailey was riding his bike while intoxicated and fell down near his neighbor's house. His neighbor called "911." The 911 operator relayed a report to the local police department that "Mike Bailey advised a neighbor that he is going home to commit suicide. He is intoxicated and has been depressed." A detective went to Bailey's house and found him sitting at his dining table eating lunch. There were no weapons or any other preparations for suicide in the vicinity. Bailey denied any thoughts of suicide and also declined the detective's request to search the house. Bailey said the detective should ask Bailey's father who owned the house. The detective left the house and went out to the porch. Another police officer arrived and said "we're going to have to do something." The two police officers forced their way into the house and seized Bailey, who resisted. They struck him and handcuffed him. The officers then took Bailey to the hospital where they told the doctors that Bailey had attacked them and that Bailey's father had petitioned to have Bailey involuntarily committed. One of the officers then called a magistrate and obtained a commitment order without disclosing that Bailey was already in custody. Bailey and his parents sued alleging, inter alia, violation of his Fourth Amendment right by seizing him without probable cause. The district court granted defendants summary judgment on that claim.

On appeal, the Fourth Circuit analyzed whether the police had probable cause:

> [T]he police officers had no evidence to support the assertion in the 911 report that Michael [Bailey] was suicidal. Michael was not visibly distraught or crying. Instead, he was eating lunch. There were no weapons or other suicide preparations evident, and Michael denied the suicide reports, told the officers they needed to leave and said he was going to call his lawyer. Moreover, after talking with Michael for approximately five minutes, [Officer] Whitley voluntarily left the house. Of course, citizen complaints are entitled to some credence… Nonetheless…the 911 report viewed together with the events after the police officers arrived, was insufficient to establish probable cause to detain Michael for an emergency mental evaluation.

349 F.3d at 740-41.[6]

Accordingly, Defendants had to have probable cause to believe Mr. Caniglia posed an imminent threat of harm to himself or to others before they could require him to have a psychological evaluation at a hospital. Here, Ed has no history of making threats against others or against himself. (SUF 46). Ed has no history of violent or abusive behavior. (Id.). Rather, he made one dramatic gesture with an unloaded gun during an argument with his wife. (SUF 58). Kim mistakenly believed that he might have committed suicide when, in fact, he was only in the bathroom. (SUF 62). She called the CPD to request an escort to the house to check on Ed. (SUF 63, 142). Defendants called Ed on his cellphone after they spoke with Kim in the "Scramblers" parking lot. (SUF 66). They said Ed was fine. (SUF 67). Then, they spoke with Ed at the house. (SUF 68). Ed was "normal" and not "suicidal." (SUF 70, 80-81). Ed explained the situation to the Defendants. (SUF 71-72). Nonetheless, the Defendants said they were going to seize his firearms to which Ed objected. (SUF 83-84). Ed only "agreed" to go to Kent Hospital because the officers said they would not seize his firearms if he was "checked out." (SUF 85). Then, they told Kim that Ed had agreed to the seizure of the firearms. (SUF 113).

The CPD General Orders state that CPD officers are not qualified to diagnose a person's psychiatric condition. (SUF 28). GO 320.70 lists symptoms that CPD officers should consider. (Id.). The CPD officers had received training on risk factors for suicide. (SUF 34-38). The CPD considered only one symptom factor, that Ed had supposedly made one suicidal remark the

[6] Other courts have similarly said that a 911 call by itself does not constitute probable cause to arrest or search. Thompson v. Louisiana, 469 U.S. 17, 22 (1984) ("Petitioner's call for help can hardly be seen as an invitation to the general public that would have converted her home into the sort of public place for which no warrant to search would be necessary."); Kerman v. City of New York, 261 F.3d 229, 235-36 (2nd Cir. 2001).

previous night, i.e., presenting Kim with his (unloaded) handgun and telling her to "shoot me now." (SUF 71-76). However, they learned when they got to the house that Ed denied being suicidal. (SUF 70-72, 80). They acknowledge he was not suicidal when they spoke with him. (SUF 70, 80-81). They took Ed into custody and required him to go to Kent Hospital for a psychological evaluation. (SUF 85, 103-05). Ed was released from Kent Hospital after he spoke with a social worker. (SUF 121). Dr. Berman has said that Ed was not a threat and that Defendants failed to apply any reasonable criteria by which they could evaluate Ed's risk of suicide. (SUF 136). No doctor has said the Ed was ever a threat to himself or to others. Under these facts, Defendants' did not have probable cause to require Ed to have a psychological evaluation. Accordingly, Defendants' violated Ed's rights under the Fourth Amendment and Article 1, Section 6 of the Rhode Island Constitution to be free from unreasonable seizures.

Defendants justify the seizure of Ed's firearms by stating they had Kim's consent to do so. However, under the CPD's own General Order ("GO"), Kim cannot consent to the seizure of Ed's firearms. GO 100.10(VII)(j) sets forth "exceptions to the search warrant requirement," including:

i. Consent to search the property <u>by the person whose rights will be affected</u> by the search.

   1. Must be voluntary and either written or verbal.
   2. A signed "Consent to Search" form is preferred

(emphasis added) (SUF 15 and Exhibit E). Moreover, the CPD's GO 320.80, respecting "Civil Procedure," states that in "keep the peace" situations, "the officer must terminate the process if there is any resistance." (SUF 17). Clearly, Ed resisted their intention to seize his firearms. (SUF 83-85). While Kim can consent to a search of the house she co-owned with Ed, she cannot

consent to the seizure of his firearms because that seizure affects his rights, not hers. Moreover, she was misled into giving her "consent" because Defendants told her that Ed had agreed to the seizure. (SUF 113). (But, Ed did not consent. (SUF 83-85)). Thus, the CPD's own procedures demonstrate that they did not have consent here. Moreover, the circumstances were not "exigent," GO 100.10(VII)(j)(4)(b) (SUF 15),[7] considering that the CPD had taken Ed into custody and he was on his way to Kent Hospital. (SUF 113).

Setting aside the CPD GOs, there was no consent under the applicable case law for several reasons. First, the First Circuit has made clear that a purported "consent" obtained through "coercive tactics" or "fraud, deceit, trickery or misrepresentation" is not a genuine consent. United State v. Vasquez, 724 F.3d 15, 18-19 (1st Cir. 2013); Sanchez v. Perieira-Castillo, 590 F.3d 31, 46 (1st Cir. 2009); United States v. VanVliet, 542 F.3d 259, 264-65 (1st Cir. 2008), citing Moran v. Burbine, 475 U.S. 412, 421 (1986). Here, Defendants told Ed that if he went to the hospital they would not seize his firearms. Then, they told Kim that Ed had agreed to the seizure of his firearms. There were both coercive tactics and misrepresentations.

Second, under Rhode Island case law, Kim could not consent to the seizure of Ed's firearms. Terzian, 16 A.3d at 1240. In Terzian, the police conducted a warrantless search of defendant's house for a firearm based on a report that defendant may have shot at a person. Defendant was in custody in the back of a police cruiser at the time of the search. The police purportedly relied on the consent of defendant's girlfriend whom they mistakenly believed lived in defendant's house. The Rhode Island Supreme Court said: "A third party's consent to [an entry or] is valid if that person has either the 'actual authority' or the 'apparent authority' to consent to [entry and] a search of that property." 162 A.3d at 1239, citing State v. Barkmeyer,

[7] "Searches conducted under exigent circumstances are limited to emergency situations."

949 A.2d 984, 999-1000 (R.I. 2008) (quoting United States v. Kimoana, 383 F.3d 1215, 1221 (10th Cir. 2004). "[T]he linchpin of apparent authority is evidence that the police officer entered and/or searched the premises under the reasonable, but mistaken, belief that the person consenting to such entry and/or search had the actual authority to do so." Id. at 1240, quoting Illinois v. Rodriguez, 497 U.S. 177, 186 (1990). The Court held that the police officers' assumption that the girlfriend lived in the house and therefore could consent to a search was not reasonably based on facts. Id.

Here, Defendants knew the firearms belonged to Ed. (SUF 110, 116). The Incident Report so states. (SUF Exhibit T). Ed objected to the seizure of his firearms. (SUF 84). Rather, after Defendants had required Ed to go to Kent Hospital for a psychological evaluation, they told Kim that Ed had consented to the seizure. (SUF 113). Defendants did not obtain a written consent for the search or the seizure. (SUF 111).

Third, consent to enter part of the dwelling does not necessarily extend to all parts of the dwelling and into all containers within the dwelling. United States v. Gamache, 792 F.3d 194, 198 (1st Cir. 2015) ("[C]onsent to enter a home does not, by itself, give law enforcement officers carte blanche to rummage throughout the premises and perform a general search. After all, a warrantless search may not exceed the scope of the consent obtained."); Linde, id. A third party cannot consent to a seizure of a person's property unless that third-party has mutual use of that property by virtue of joint access or control of it for most purposes. United States v. Gonzalez, 7609 F.3d 13, 18 n.1 (1st Cir. 2010). A third party cannot consent to the seizure of property from a locked container reserved for the owner's sole personal use and over which the owner had not relinquished sole control. United States v. Welch, 4 F.3d 761, 764 (9th Cir. 1993), citing United

States v. Karo, 468 U.S. 705, 725-27 (O'Connor, J., concurring); Linde, 876 A.2d at 1127; see also, United States v. Troxel, 547 F.Supp.2d 1190, 1199-2000 (D.Kan. 2008).

The Rhode Island Supreme Court has held that even when one domiciliary consents to search of a residence, the consent "does not serve to forfeit the expectation of privacy in containers within that property." State v. Linde, 876 A.2d 1115, 1126 (R.I. 2005), quoting United States v. Welch, 4 F.3d 761, 764 (1st Cir. 1993). It added:

> In Welch, the court held that although the defendant had relinquished her expectation of privacy in the car, this did not apply to her purse inside the car. [citation omitted]. The court said that "the government must show shared control with respect to the purse as well as with respect to the vehicle if it is to prevail on a mutual use and joint control theory." [citation omitted].

876 A.2d at 1126. The court distinguished the various cases by stating: "those in which the search was held to be unconstitutional…involved evidence seized from closed or locked containers or items reserved for the sole personal use of the defendants and over which they had not relinquished their sole control." Id. At 1127.

Ed's firearms were not in plain view. (SUF 117). Rather, Ed kept one under the mattress of the bed and the other in a box in the wall behind his work bench in the garage. (Id.). Accordingly, Kim could not consent to seize Ed's property in private locations in the house.

Consider a hypothetical scenario in which Kim called the CPD, told them Ed had firearms (or any other property) in their house, said she did not want firearms (or some other property) in their house, and asked the CPD to come take the firearms (or other property) when Ed was not home. If the CPD complied with that request without a court order permitting it, the CPD's actions would clearly be a violation of Ed's rights respecting the firearms. See, Georgia v Randolph, 547 U.S. 103, 113-14 (2006) ("[W]hen people living together disagree over the use of their common quarter, a resolution must come through voluntary accommodation, not by

appeals."). In Georgia v. Randolph, the Supreme Court held that the police could not rely on the consent of a tenant to search a house when the cotenant was present and objected. By the same token, police should not be able to rely on the consent of one tenant when the other tenant had been present but the police caused him to be removed without requesting his consent and, in fact, he objects. Similarly, having just intervened in a verbal domestic between Ed and Kim involving Ed's unloaded firearm, Defendants could not reasonably believe that Kim had authority to agree to the seizure of Ed's firearms. See also, Stoner v. California, 376 U.S. 483, 488 (1964) ("[T]he rights protected by the Fourth Amendment are not to be 'eroded…by unrealistic doctrines of apparent authority.'").

Finally, it is irrelevant whether Defendants had the best of intentions when they seized his firearms and required him to have a psychological evaluation based on their perception of the community caretaking function. It would be "anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." Camara v. Municipal Court of San Francisco, 387 U.S. 523, 530 (1967). Justice Brandeis has admonished: "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficient…The greatest dangers to liberty lurk in the insidious encroachment by men of zeal, well-meaning but without understanding." Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting). That admonition applies here. Even if Defendants sincerely thought they were preventing a possible suicide, they do not and should not have the authority to do so without judicial authorization based on sufficient evidence.

### A. DEFENDANTS VIOLATED PLAINTIFF'S RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT AND ART. 1, SEC. 2 OF THE RHODE ISLAND CONSTITUTION

By requiring Mr. Caniglia to have a psychological evaluation and seizing his firearms, without court orders, Defendants violated Mr. Caniglia's due process rights under the federal and Rhode Island Constitutions. It is axiomatic that the government may not deprive a person of his liberty and property rights without due process, including notice and an opportunity to be heard. U.S. Const., Fourteenth Amend., R.I. Const., Art. 1, § 2. This is particularly true when the deprivation is pursuant to a government policy or practice. See, Zinerman v. Burch, 494 U.S. 113, 138-39 (1990); Fuentes v. Shevin, 407 U.S. 67, 80-81 (1972); L.A. Realty v. Town Council of Town of Cumberland, 698 A.2d 202, 210 (R.I. 1997); Mills v. Howard, 109 R.I. 25, 27-29, 280 A.2d 101, 103-04 (1971). Here, it is undisputed that Defendants did not obtain a court order before seizing the firearms and requiring Mr. Caniglia to have a psychological evaluation and the seizure was pursuant to an unwritten policy.

By contrast, in Di Stefano v. U.S. Dept. of Treasury Office of Thrift Supervision, 787 F.Supp. 292 (D.R.I. 1992), the federal agency issued a cease-and-desist order to a federally-insured financial institution that put strict limits on the compensation of the institution's employees, including the plaintiff, and directed the plaintiff to return his bonus to the institution. Plaintiff filed suit to enjoin the order alleging a violation of his due process rights because there was no hearing before the order issued.

Judge Lagueux acknowledged that due process normally requires a hearing before the government can deprive a person of his property. Id. at 296, citing Fuentes v. Shevin, 407 U.S. 67, 80 (1972). He also cited a Ninth Circuit decision which permitted such seizures in limited circumstances. Spiegel v Ryan, 946 F.2d 1435, 1439 (9th Cir. 1991). Judge Lagueux reviewed

the federal statute under which the agency had acted, known by its acronym, FIRREA. 12 U.S. § 1818. He discerned a three-part test that would "justify the extraordinary measure of deprivation prior to a hearing": (1) the seizure must be necessary to secure an important government or public interest, (2) the person responsible for initiating the seizure must be a government official responsible for determining, under the standards of a narrowly-drawn statute, that seizure is necessary and justifiable in the particular instance, and (3) there must be a special need for prompt action. Id. at 298. Judge Lagueux found that maintaining the integrity of federally-insured financial institutions and the public fisc are important public interests. Further, FIRREA met the criteria for identifying a government official responsible for initiating the seizure pursuant to a narrowly-drawn statute. Finally, Congress had addressed the need for swift action before assets became unrecoverable and financial institutions insolvent. Id.

Here, the government does not have an important interest in requiring a private person to have a psychological evaluation and seizing his private property from his home even if he has made a suicidal comment in the privacy of his own home. See Payton v. New York, 445 U.S. 573, 589-90 (1980); Stanley v. Georgia, 394 U.S. 557, 565 (1969); Griswold v. Connecticut, 381 U.S. 479, 484 (1965); Association of Community Organizations for Reform Now v. Town of East Greenwich, 453 F.Supp.2d 394, 413 (D.R.I. 2006) (Torres, J.); but see Washington v. Glucksberg, 521 U.S. 702 (1997) (rejecting argument that there is a constitutional right to assisted suicide).

The undisputed evidence is that Ed Caniglia did not attempt suicide on August 20, 2015 (SUF 71-72, 136), and was not in acute or imminent risk of suicide on August 21, 2015 (SUF 136) (even assuming that preventing suicide in the home is an important government interest). Further, there was no "narrowly-drawn" statute that authorized the CPD to seize Mr. Caniglia's

firearms without a court order. To the contrary, as discussed *infra*, both the Rhode Island Firearms Act, R.I.Gen.L. § 11-47-1, et seq., and the Rhode Island Mental Health Act, R.I.Gen.L. § 40.1-5-1, et seq., indicated that Defendants did not have the authority to seize the firearms or require a psychological evaluation in these circumstances without a court order. Moreover, the CPD GO respecting "Mental Health" states that CPD officers are not qualified to diagnosis mental illness. (SUF 28). One of the training PowerPoint presentations on "Mental Health" references the Mental Health Act. (SUF 35). Finally, there was no special need for very prompt action to seize the firearms. Defendants had sent Mr. Caniglia to Kent Hospital for an evaluation. Defendants had time to seek a court order to seize the firearms.

Rhode Island requires that any seizures of property be pursuant to a court order obtained through due process. See, Shawmut Bank of Rhode Island v. Costello, 643 A.2d 194, 201 (R.I. 1994); Sells/Greene Bldg. Co. LLC v. Rossi, C.A. PB-2002-1019, 2003 WL 21018168 at *16 (R.I.Super. Apr. 23, 2003) (Silverstein, J.); Kottis v. Cerilli, C.A. PC-1980-0265, 1992 WL 813515 at **2-3 (R.I.Super. Feb. 21, 1992) (Gibney, J.). Defendants' invocation of the community caretaking function in these circumstances constitutes an attempt for an extraordinary expansion of the police powers in contravention of the Fourteenth Amendment and Article 1, Section 2 of the Rhode Island Constitution.

### B. DEFENDANTS' ACTIONS IN REQUIRING MR. CANIGLIA TO SUBMIT TO A PSYCHOLOGICAL EVALUATION VIOLATES THE RHODE ISLAND MENTAL HEALTH ACT

Defendants' requirement that Ed submit to a psychological evaluation violated the Rhode Island Mental Health Act, R.I.Gen.L. § 40.1-5-1, et seq. The Mental Health Act specifically prescribes the circumstances and procedures by which a person may be admitted or received at a hospital for mental health care and treatment. Section 40.1-5-5; In re Doe, 440 A.2d 712, 714

(R.I. 1982). In Doe, Justice Weisberger wrote: "The Rhode Island Mental Health Law was carefully crafted in order to guarantee that the liberty of an individual patient would be scrupulously protected and that this liberty would be impaired only in the event of findings of stringent necessity…" Id. at 714. He added: "The failure of public officials to apply promptly for required judicial authorization to commit or retain involuntary patients may give rise to civil liability in the even that such a patient should be wrongfully deprived of his liberty." Id. at 716.

The Mental Health Law provides for emergency certification by a physician of a person "whose continued unsupervised presence in the community would create an imminent likelihood of harm by reason of mental disability…" Section 40.1-5-7(a). Similarly, a person who resides with someone "alleged to be in need of care and treatment in a [mental health] facility" may file a petition in district court seeking "care and treatment" for a person "whose continued unsupervised presence in the community would create a likelihood of serious harm by reason of mental disability." Section 40.1-5-8(a). This section provides for a judicial process to obtain an involuntary mental health evaluation. It requires the court to find by "clear and convincing evidence that the subject of the hearing is in dire need of care and treatment in a facility, and is one whose continued unsupervised presence in the community would by reason of mental disability, create a likelihood of serious harm, and that all alternatives to certification have been investigated and deemed unsuitable …" Section 40.1-5-8(j). Then, and only then, can the court order the person into mental health treatment.

Defendants complied with none of the requirements of the Mental Health Act. Accordingly, they violated it when they required Mr. Caniglia to submit to a psychological evaluation at Kent Hospital without obtaining a court order.

### C. DEFENDANTS' SEIZURE OF PLAINTIFF'S PROPERTY WITHOUT JUSTIFICATION CONSTITUTES CONVERSION

Defendants' seizure and retention of Mr. Caniglia's property in these circumstances constitutes conversion.[8] To prove conversion, Plaintiff must show that he was in possession of personal property, that defendant took the property without Plaintiff's consent, and exercised dominion over it inconsistent with Plaintiff's right to possession. Narragansett Electric Co. v. Carbone, 898 A.2d 87, 97 (R.I. 2006).

Police officers can be liable for conversion when they seize or fail to return property that rightfully belongs in the possession of others. Denault v. Ahern, 857 F.3d 76, 86 (1st Cir. 2017) (Mass. law) (police officer's failure to return seized automobile after it was searched unsuccessfully for evidence constitutes conversion); Kelly v. LaForce, 288 F.3d 1, 12 (1st Cir. 2002) (Mass. law) (reversing summary judgment for policy officers on conversion claim where police officers assisted other defendants in "wrestling control of pub from appellants"); Boston Five Cents Sav. Bank v. Searles, 237 Mass. 489, 493, 190 N.E. 91, 92 (1921) (police officer liable for conversion where he failed to return stolen revolver to its rightful owner); Jean v. Cawley, 218 Mass. 271, 277-78, 105 N.E. 1009, 1012 (1914) (police officer liable for conversion where officer excluded plaintiff from plaintiff's building and exercised dominion over it); Hill v. Gold, 79 Misc.2d 1055, 362 N.Y.S.2d 328 (1974) (police clerk's sale of seized automobile that was not contraband or evidence constituted conversion).

Here, it is undisputed that Defendants seized Mr. Caniglia's firearms without his consent (SUF 83-84, 110-11) and refused to return them despite the Caniglis' repeated efforts to get them back. (SUF 122-131). As set forth above, it is immaterial whether Kim Caniglia consented to

[8] In Rhode Island, the statute of limitation for trover and conversion is 10 years. R.I.Gen.L. § 9-1-13(b).

the seizure; she had no authority to do so and her consent was obtained through misrepresentation. Accordingly, Defendants converted Mr. Caniglia's firearms.

## II. THE COMMUNITY CARETAKING FUNCTION DOES NOT JUSTIFY DEFENDANTS' ACTIONS

The "community caretaking function" that Defendants assert to justify their warrantless seizure of Plaintiff's firearms does not apply for several reasons. First, the community caretaking function does not apply when the police officers were initially engaged in a potential criminal investigation. Second, it does not apply to the non-criminal seizure of property, including firearms, from a person's home without some kind of court order. Third, the community caretaking function is a common law doctrine and its cope depends on state law respecting police authority; accordingly, it does not apply when Rhode Island constitutional law and statutes specifically exclude its application here.[9]

The First Circuit has held that the community caretaking function cannot apply when police officers were initially involved in a criminal investigation. Mataloon v. Hynnes, 806 F.3d 627, 634-35 (1st Cir. 2015) (Selya, J.). In Mataloon, in 2010, a manager of a restaurant reported to police that he had interrupted a robber removing money from the restaurant's safe. He chased the robber out of the restaurant. Boston police responded and began searching for the robber. A "victim" reportedly pointed out the plaintiff's house as where the robber had supposedly gone. An officer found the house unlocked and called into it without a response. She then called for a canine unit, conducted a search of the house, and found the owner who had been sleeping. The owner had words with the officer and was arrested. He was acquitted of criminal charges and

[9] Since the community caretaking function is a defense to Plaintiff's claims that Defendants violated his civil rights, Defendants have the burden to prove the defense is available to them. See, Farrey v. City of Pawtucket, 725 F.Supp.2d 286, 297 n. 8 (D.R.I. 2010) ("Qualified immunity is an affirmative defense and the burden belongs to the defendant asserting it.").

filed a § 1983 lawsuit. The police officers defended on the grounds that their actions were justified by their community caretaking function. The district court refused to instruct the jury on the function and the jury found the officers liable and awarded damages of $50,000. Defendants appealed.

Judge Selya noted initially that "[t]he case law involving community caretaking functions most often have involved actions by police officers with respect to motor vehicles." Id. at 634 citing Cady. The court assumed, without deciding, that the function could apply to warrantless residential searches. Nonetheless, Judge Selya said the function only applies, if at all, when the police officer's actions are "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.'" Id. at 634 quoting Cady, 413 U.S. at 441. Judge Selya wrote: "In the circumstances of this case—where the officer was indisputably engaged in an ongoing criminal investigation when the warrantless search occurred—the community caretaking exemption does not apply." Id. at 636. Further, the First Circuit affirmed the district court's refusal to instruct the jury on the community caretaking function. Id. at 637. The First Circuit affirmed the finding of liability. Id. at 640.

Here, Kim Caniglia's phone call to the CPD indicated she was concerned that Ed may have committed suicide. (SUF 63). Suicide is a common law felony in Rhode Island. Clift v. Narraganset Television L.P., 688 A.2d 805, 808 (R.I. 1988). Four CPD officers in four cruisers responded to Kim's call from the "Scramblers" parking lot and then they all went to the Caniglias' home to talk to Ed. (SUF 64, 68). Even though they ultimately concluded that there had been no crime, the situation was not "totally divorced from the detection, investigation, or acquisition of evidence relating to" a crime. Thus, the community caretaking function does not apply.

Further, neither the United States Supreme Court nor the Rhode Island Supreme Court have held that the community caretaking exception can justify the warrantless seizure of property from a person's home.[10] The United States Supreme Court has approved the exercise of the community caretaking function with respect to searches of automobiles. See, Colorado v. Bertine, 479 U.S. 367 (1987); South Dakota v. Opperman, 428 U.S. 364, (1976); Cady v. Dombrowski, 413 U.S. 433 (1973). In Opperman, the Court said it "has traditionally drawn a distinction between automobiles and homes or offices in relation to the Fourth Amendment." 428 U.S. at 367.

In Cady, defendant was a Chicago police officer who was involved in a one-car accident with a rental car in West Bend, Wisconsin. The local police investigated and found defendant to be intoxicated. He told them he was a Chicago police officer. The local police understood that Chicago police were required to have their service revolver on them at all times. Defendant did not have his revolver on him so the local police removed the damaged car to a private garage and searched it, attempting to locate and secure the revolver. Based on evidence found during that warrantless search of the rental car, the local police conducted further investigation that resulted in defendant being convicted of murder. He argued that the conviction should be overturned because the investigation began with a warrantless search of his car.

The Supreme Court discussed the nature and frequency of local police officers' contact with motor vehicles because of state regulation and the officers' law enforcement responsibilities:

> Local police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for

[10] Notably, no Defendant can personally identify a statute, regulation, GO, judicial decision or any formal training that states the community caretaking function authorizes their actions. (SUF 5-7, 10, 16, 20, 49-51, 56, 88-89, 94, 131).

> want of a better term may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.

Cady, 413 U.S. at 441. The Court distinguished such searches from those of a residence:

> [T]here is a constitutional difference between houses and cars…The constitutional difference between searches of and seizures from houses and similar structures and from vehicles stems both from the ambulatory character of the latter and from the fact that extensive, and often non-criminal contact with automobiles will bring local officials in "plain view" of evidence, fruits or instrumentalities of a crime or contraband. (emphasis added).

Id. at 441-42.

The Supreme Court then observed that the local police had exercised a form of custody over the rental car, that it was disabled, and that it "constituted a nuisance along the highway." Id. at 442-43. The defendant could not arrange to move it because he was intoxicated. The police moved the rental car for purposes of safety. Then, they searched it for the revolver, as a matter of standard procedure, to protect against the possibility of the revolver from falling into untrained or malicious hands. The Court reviewed its precedent respecting searches of vehicles and concluded:

> The Court's previous recognition of the distinction between motor vehicles and dwelling places lead us to conclude that the type of caretaking "search" conducted here of a vehicle that was neither in the custody nor on the premises of its owner, and that was placed where it was by virtue of lawful police action, was not unreasonable solely because a warrant had not been obtained.

Id. at 447-48. Thus, the Supreme Court has clearly distinguished between houses and cars with respect to the application of the community caretaking function. The Court has never approved the application of the function to a warrantless search of a home and the seizure of a property in that home.

Some courts have held that Cady does not apply inside a person's home or business. Ray v. Township of Warren, 626 F.3d 170, 177 (3d Cir. 2010); Lundstrom v. Romero, 616 F.3d

1108, 1125-1129 (10th Cir. 2010); United States v. Pichany, 687 F.2d 204, 207-09 (7th Cir. 1982) United States v. Gough, 412 F.3d 1232, 1238 (11th Cir. 2005); United States v. Erickson, 991 F.2d 529, 533 (9th Cir. 1993); Ramirez v. Fonseca, 331 F.Supp.3d 667, 679-80 (W.D.Tex. 2018) (under the law of the Fifth Circuit, the community caretaking function does not justify a warrantless entry into plaintiff's home). Other courts have held that the police's community caretaking function ends when the person they seek to protect is not in danger. Corrigan v. District of Columbia, 841 F.3d 1022, 1034-35 (D.C.Cir. 2016); Arden v. McIntosh, 622 Fed.Apx. 707, 710 (10th Cir. 2015) (police officers' seizure of firearms after "incoherent and unresponsive" homeowner was removed by ambulance was not protected by the community caretaking function and violated homeowner's Fourth Amendment rights); U.S. v. Tarburton, 610 F.Supp.2d 268, 277 (D.Del. 2009); U.S. v. Cruz-Roman, 312 F.Supp.2d 1355, 1364-65 (W.D.Wash. 2004); State v. Maddox, 54 P.3d 464, 468 (Id.App. 2002); State v. Othoudt, 482 N.W.2d 218, 233 (Minn. 1992); State v. Fisher, 2004 WL 440402 at *3 (Del.Super. Feb. 18, 2004). Here, Defendants seek to apply the community caretaking function to a search that occurred about 12 hours after Mr. Caniglia had made his allegedly suicidal statement and after he was in Defendants' custody and on his way to Kent Hospital. He was clearly no longer a danger, if he ever had been.

In analogous situations, other courts have found that the community caretaking function did not justify the warrantless seizure of property. Thompson v. Village of Monroe, No. 12-cv-5020, 2015 WL 3798152 at *13 (N.D.Ill. June 17, 2015) (community caretaking function did not justify warrantless seizure of plaintiff's car from his garage); State v. Clark, 265 Wis.2d at 574, 666 N.W.2d at 119 (police department's policy of a "safekeeping tow" did not justify seizing unlocked car); State v. Christenson, 181 Or.App. 345, 352-53, 45 P.3d 511, 514-15 (2002)

(unlocked house with dogs running around and no response to calls did not justify police officers in entering house).

The application of the community caretaking function depends upon "state law or sound police procedure." Cady, 413 U.S. at 447. After all, within the limits of the Fourth Amendment, the community decides what caretaking authority its police may have. The Rhode Island Supreme Court has approved the application of the community caretaking function only with respect to police actions related to automobiles which result in criminal charges. See, State v. Rousell, 770 A.2d 858 (R.I. 2001), citing Cady v. Dombrowski, 413 U.S. 433, 441 (1973) ("Cady"); State v. Cook, 440 A.2d 137, 139 (R.I. 1982), citing Cady. In Rousell, a state trooper observed defendant's car drive at a high rate of speed in the breakdown lane and stop abruptly close behind the trooper's cruiser. He opened the defendant's passenger door to see if defendant was okay. The trooper detected an odor of alcohol and observed defendant's eyes were bloodshot and her speech was slurred. She was charged with operating a vehicle under the influence of alcohol. Defendant argued that the trooper's action in opening her car door without a warrant violated her federal and state constitutional rights. The Rhode Island Supreme Court said that given defendant's actions, the trooper had reasonable grounds to suspect something was amiss and to investigate for the safety of defendant and others on the highway pursuant to the community caretaking function. Id. at 861.

In Cook, an East Providence police officer was driving his cruiser to the Providence County Courthouse to retrieve another East Providence officer who had just testified. Defendant cut off the officer on South Main Street near the Courthouse and assaulted the officer. He was charged with striking a police officer in the performance of his duties. Defendant argued that because the officer was outside his jurisdiction he was not acting in the performance of his

duties. The Supreme Court held that because the officer was picking up a fellow officer who had just testified his actions fell within the scope of the community caretaking function. 440 A.2d at 139.

Other provisions of Rhode Island law indicate that the police cannot rely on the community caretaking function to justify their actions. Article 1, Section 22 of the Rhode Island Constitution states: "The right of the people to keep and bear arms shall not be infringed." The Rhode Island Supreme Court's most extensive analysis of this provision is in Mosby v. Devine, 851 A.2d 1031 (R.I. 2004). In that case, the Court considered the authority of the Attorney General to issue permits for concealed-carry of handguns. The Court interpreted the provision without regard to the "origins and proper interpretation of the Second Amendment." Id. at 1039. The Court specifically found that Section 22 established an individual right to keep and bear arms. Id. at 1040-41. It distinguished between the right "to keep" and the right "to bear" arms. Id. at 1041-42. The Court said that the right to bear arms is subject to reasonable regulation by the Legislature. Id. at 1044. The Court said the Firearms Act, R.I.Gen.L. §11-47-1, et seq., was such a reasonable regulation. The Court noted, however, that "one has an absolute right to keep firearms in one's house or business…" (emphasis added). Id. at 1043, n. 7.[11]

The Firearms Act states: "The control of firearms…regarding their ownership, possession…shall rest solely with the state, except as otherwise provided in this chapter."

[11] Similarly, the First Circuit recently confirmed that the possession of firearms in the home is a "core Second Amendment right." Gould v. Morgan, 907 F.3d 659, 671-72 (1st Cir. 2018). The Court said: "The home is where families reside, where people keep their most valuable possessions, and where they are the most vulnerable (especially while asleep at night)…Police may not be able to respond to calls for help quickly, so an individual within the four walls of his own house may need to provide for the protection of himself and his family in case of emergency. Lastly—but surely not least—the availability of firearms inside the home implicates the safety only of those who live or visit there, not the general public." Id.

R.I.Gen.L. § 11-47-1. Thus, Defendants cannot utilize the community caretaking function in a manner that is inconsistent with the Firearms Act. Moreover, as the Rhode Island Supreme Court has said, the Act "…is generally nonrestrictive as to the rights of persons generally to purchase, own, carry, transport or have in their possession or control most kinds of firearms…" State v. Storms, 112 R.I. 121, 125, 308 A.2d 463, 465 (1973).

To the extent Defendants argue Plaintiff's mental state justified their seizure of his guns, the General Assembly has set forth in the Firearms Act what mental conditions disqualify a person from possessing a firearm. "No person who is under guardianship or treatment or confinement by virtue of being a mental incompetent, or who has been adjudicated or is under treatment or confinement as a drug addict, shall purchase, own, carry, transport, or have in his or her possession or under his or her control any firearm." R.I.Gen.L. § 11-47-6. This restriction does not apply to Plaintiff, nor do the other statutory restrictions on which persons cannot possess a firearm. R.I.Gen.L. §§ 11-47-5 (felons and fugitives from justice), 11-47-7 (illegal aliens); R.I.G.L. § 11-47-7 (persons who are unnaturalized foreign born persons whose presence in the United States is illegal); and, R.I.G.L. § 11-47-33 (persons who are minors). Further, the Firearms Act provides: "Nothing in this section shall be construed to reduce or limit any existing right to purchase and own firearms and/or ammunition or to provide authority to any state or local agency to infringe upon the privacy of any family, home or business except by lawful warrant." R.I.G.L. § 11-47-60.1(a).

Chapter 5 of Title 12 of the Rhode Island General Laws addresses Rhode Island's statutory requirements for search warrants. The Rhode Island Supreme Court has held that this statute strictly and constitutionally limits police power to seize property by a search warrant. See State v. Gomes, 881 A.2d 97, 105 (R.I. 2005); State v. Dearmas, 841 A.2d 659, 665 (R.I. 2004);

State v. DiStefano, 764 A.2d 1156, 1169 (R.I. 2000). Here, Defendants' seizure of Plaintiff's firearms completely fails to comply with Chapter 5. The failure to comply with this chapter's requirements means the seizure of property is unlawful. Hence, Defendants' seizure of Plaintiff's firearms for "safekeeping" without a search warrant violated Rhode Island statutory law.

Moreover, Defendants had a statutory obligation to return Mr. Caniglia's property to him. R.I.Gen.L. § 12-5-7(c); State v. Rushlow, 72 A.3d 868, 869-70 (R.I. 2013), quoting, State v. Shore, 522 A.2d 1215, 1217 (R.I. 1987) ("[T]he seizure of property from an individual is prima facie evidence of that individual's entitlement to the property. Unless the government presents serious reasons to doubt the individual's entitlement, and produces evidence to substantiate its claim, the individual need not come forward with additional evidence of ownership." Accordingly, Defendants may not claim the protections of that chapter. Similarly, the Mental Health Act required Defendants to obtain a court order before forcing Mr. Caniglia to have a psychological evaluation. *Supra*, pp. 30-31. Accordingly, Rhode Island law bars the application of the community caretaking function in the manner Defendants urge.

With respect to "sound police procedure," Defendants' own GOs and training refute their invocation of the community caretaking function to justify their seizures of Ed and his firearms without a court order. Those GOs are in a manual that contains the "complete catalog" of the CPD's "issued general orders, policies, procedures, rules and regulations." (SUF 14). It is Defendants' "bible." (SUF 14). The GO addressing searches, GO 100.10, "Limits of Authority," does not authorize Defendants' actions. (SUF Exhibit E). The GO addressing "Civil Procedure, states "the officer must terminate the process if there's any resistance." (SUF Exhibit F). Clearly, Ed Caniglia resisted. (SUF 83-85). Further, Defendants' won GO required the

return of Mr. Caniglia's firearms. (SUF 69). The CPD's own training on mental health refers them to the Rhode Island Mental Health Law, which requires a court order in these circumstances. *Supra*, pp. 30-31. The is no GO that authorizes the seizure of property from a home for "safekeeping." Finally, every court decision about the community caretaking function of which the officers are aware involves automobiles. (SUF 40, 94). Defendants' decisions were not based on their GOs or their training but rather were ad hoc decisions based on individual experiences and "instinct." Hence, Defendants failed to comply with any "sound police procedure" and, accordingly, they cannot invoke the community caretaking function.

Here, Defendants' seized Ed's firearms from under the mattress of the Caniglia's bed and from a box behind his workbench in the garage. (SUF 117). Defendants knew the firearms belong to Ed and acknowledge they did not obtain his permission to seize them. (SUF 117-16). Kim did not know Ed had objected to seizure. To the contrary, Defendants told her Ed had agreed. (SUF 113).

Moreover, there was no significant evidence that Ed's continued possession of the firearms posed any significant risk of harm. He had no history of threatening harm to himself or others with the firearms (or otherwise). (SUF 46). Ed had never misused the firearms. (Id.). Simply as a dramatic gesture, Ed had placed an unloaded handgun on the dining room table and told Kim to "shoot me now." (SUF 58). This was not a suicide attempt. (SUF 136). And, there was no imminent, acute risk of suicide. (Id.). Against this undisputed evidence, the police—who acknowledge they are not qualified to diagnose mental illness (SUF 28, 93) —offer the justification that they were told Ed had made a suicidal comment and they "can't determine if someone is not suicidal." (SUF 74-76).

If the community caretaking function can justify the seizure of Ed's firearms in these circumstances, there is no limit the extent to which the function will justify seizures of private property. It could justify the seizure of a person's prescription opioid medications if the police felt it could lead to an overdose. It could justify the seizure of a senior citizen's automobile if a relative reports him driving erratically. It could justify the seizure of a woman's dog if a neighbor claims the dog lunged at her. However, neither the federal nor state constitutions generally authorize the police to seize property simply for the sake of avoiding possible harm and potential liability.

Thus, while the community caretaking function may authorize the police to enter a home for non-criminal purposes, it does not authorize them to seize property for a non-criminal purpose once they are there. Here, the CPD's community caretaking function ended once it was clear that Ed had not attempted suicide and was not suicidal. In these circumstances, the community caretaking function does not authorize the police to seize firearms or require a person to have a psychological evaluation.

The CPD officers who went to the Caniglias' home said there was no crime resulting from the Caniglias' verbal domestic dispute. (SUF 112). Rather, Defendants use the community caretaking function to justify siezing Mr. Caniglia's firearms and requiring him to have a psychological evaluation in the complete absence of an alleged crime or any domestic violence. They base these actions merely on Mr. Caniglia's single dramatic gesture the prior evening. (SUF 75-78). Rhode Island has never authorized the seizure of property from a home nor has it authorized a psychological evaluation pursuant to the community caretaking function.

In 2017, the General Assembly passed a statute that states police may take a person into protective custody and transport that person to an emergency room of a hospital if the officer has

reason to believe that the person is in need of immediate care and treatment and the person's continued unsupervised presence in the community would create an imminent likelihood of serious harm if allowed to be at liberty. R.I.Gen.L. § 40.1-5-7.1(a)(1). In 2018, the General Assembly passed the "Red Flag Law," R.I.Gen.L. § 8-8.3-1, et seq., which permits the police to seek a court order to seize firearms upon a showing that "the respondent poses a significant danger of causing personal injury to self or others by having in their custody or control, purchasing, possessing, or receiving a firearm." Obviously, these Acts would have been unnecessary if the General Assembly thought that police already had the authority to seize people and their firearms in their homes based on the community caretaking function.[12]

## III. DEFENDANTS HAVE NO OTHER ABSOLUTE OR QUALIFIED IMMUNITY

Defendants do not have a defense based on absolute or qualified immunity. In response to Plaintiff's interrogatory requesting the factual basis of this defense, Defendants stated: "This affirmative defense was introduced by my attorney…It is my general understanding that the facts upon which all affirmative defenses are based are contained in the Incident Report (Exhibit A) attached to this response." (See Winquist Response to Interrogatory No. 17, SUF Exhibit EE).

Defendants have no absolute immunity. Police officers who procure an arrest warrant and make an arrest are not entitled to absolute immunity. Malloy v. Briggs, 475 U.S. 335, 340-41 (1986). The Supreme Court affords absolute immunity under §1983 only to functions "intimately associated with the judicial phase of the criminal process." Id. at 342, quoting Imbler v. Pachtman, 424 U.S. 409, 430 (1976) (rejecting application of absolute immunity for police

[12] Plaintiff's citation to these Acts does not constitute an endorsement of them. Both may have constitutional issues.

officers who served an improper body attachment); Beaudoin v. Levesque, 697 A.2d 1065, 1068 (R.I. 1997) (per curiam) (absolute immunity extends to judges and prosecutors). Here, Defendants are neither judges nor prosecutors. They did nothing that was "intimately associated" with the judicial process. To the contrary, it is undisputed that Defendants' actions were entirely independent of the judicial process. They made no attempt to obtain a court order to justify their actions. Accordingly, they are not entitled to absolute immunity.

Qualified immunity is an affirmative defense that the Defendants have the burden of establishing. See Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982), citing Gomez v. Toledo, 446 U.S. 635, 639–641(1980); see also, Burnham v. Ianni, 119 F.3d 668, 674 (8th Cir. 1997). Determining whether a public official is entitled to qualified immunity is a two-step inquiry: "(1) whether the facts alleged or shown by the plaintiff make out a violation of a constitutional right; and (2) if so, whether the right was 'clearly established' at the time of the defendant's alleged violation." Maldonado v. Fontanes, 568 F.3d 263, 269 (1st Cir. 2009).

Here, Mr. Caniglia's rights to be free from unreasonable searches and seizures and to due process were clearly established by constitutional provisions, statutes, case law, and even Defendants' own GOs. (*Supra*, pp. 9-31). Defendants' defense rests on whether the community caretaking function excuses their violation of those rights. Defendants themselves are unable to identify any court decision, GO, or formal training that states the community caretaking function authorizes their actions. (*Supra*, p. 35, n. 10).

The United States Supreme Court has clearly distinguished between automobiles and homes with respect to the application of the community caretaking function. Cady, 413 U.S. at 441-42. The First Circuit has expressly not decided "whether … the community caretaking function can be applied so as to render constitutional a warrantless and non-consensual police

entry into a home." McDonald v. Town of Eastham, 745 F.3d 8, 15 (1st Cir. 2014) (Selya, J.). In McDonald, the First Circuit held that police officers sued in a Section 1983 action were entitled to qualified immunity because the relevant legal question was not "resolved by clearly established law." Id. In the course of his analysis, Judge Selya recognized that the other circuit courts are split as to whether this function justifies the warrantless entry of a home. Id. at 13, citing, Ray v. Twp. Of Warren, 626 F.3d 170-175-76 (3rd Cir. 2010) (collecting cases and concluding that "[t]here is some confusion among the circuits as to whether the community caretaking exception…applies to warrantless searches of the home."). No Rhode Island decision has ever said the community caretaking function permits the police to seize a person and his property in his home for non-criminal purposes without a court order.

However, Plaintiff is not aware of any First Circuit or Rhode Island case holding that the community caretaking function justifies the warrantless seizure of firearms in a person's home in the absence of a criminal investigation. Stated differently, in all of the federal cases respecting warrantless searches in homes pursuant to the community caretaking function, the subsequent seizure of property in the home was based on evidence of crime revealed during the search. Thus, there is no local federal case justifying the non-criminal seizure of property from a home based only on the community caretaking function. Moreover, there are Rhode Island and federal cases invalidating the non-criminal seizure of property without a court order. *Supra*, pp. 12-16.

Moreover, Defendants cannot obtain qualified immunity for requiring Mr. Caniglia to have a psychological evaluation where they had no probable cause to do so. Alfano v. Richer, 847 F.3d 71, 77 (1st Cir. 2018) (Selya, J.). In that case, plaintiff had consumed 6-8 beers for a 4-6 hour period and intended to attend a concert at the Xfinity Center in Mansfield, Massachusetts. When he attempted to enter the Center he was intercepted by two security officers who took him

to a local police officer working at the concert and told the police officer that they thought he was incapacitated. The police officer performed a series of field sobriety tests and asked plaintiff to take a breathalyzer test. Plaintiff contended he passed two of the three field sobriety tests but he refused to take the breathalyzer test. The officer took plaintiff into protective custody, took him to the Mansfield police station where he was held for five hours and released, by which time the concert was over. Plaintiff sued the police officer alleging a violation of his Fourth Amendment rights. The district court granted the police officer's summary judgment motion based on qualified immunity.

On appeal, the First Circuit said the situation was analogous to when a police officer takes a person into protective custody because of concerns that his psychological condition creates a likelihood of serious harm. Id. at 77, citing Ahern v. O'Donnell, 109 F.3d at 817. Accordingly, the police officer had to have probable cause to believe that the plaintiff posed an imminent threat of likely harm to himself or others before he could take him into protective custody. Id. at 78-79. The First Circuit said the police officer may have had probable cause to believe plaintiff was intoxicated but there was an issue of fact as to whether plaintiff was incapacitated, i.e., apt to harm himself or others. Accordingly, because the law was clear that defendant was incapacitated before taking him into custody and there was an issue of fact whether plaintiff was incapacitated, defendant was not entitled to qualified immunity. Id. at 80.

Here, the law is well-established that Defendants had to have probable cause to believe Ed was an imminent threat to cause harm to himself or others before requiring him to have a psychological evaluation. However, they learned when they got to the Caniglia house that the Ed was "normal," and not suicidal. (SUF 70-72, 80). The CPD General Orders state that CPD officers are not qualified to diagnose mental illness, but they list numerous symptoms of mental

illness. (SUF 28). The CPD officers have received training on risk factors for suicide. (SUF 34-38). The only factor that arguably applies is Ed's supposed suicidal statement with an unloaded gun. (SUF 37). Dr. Berman has determined that Ed was not suicidal. (SUF 136). No doctor has said Ed was suicidal. (SUF 136). Thus, Defendants could not reasonably believe that they had probable cause to seize Mr. Caniglia and his firearms. Accordingly, they are not entitled to qualified immunity.

## IV. DEFENDANTS HAVE NO OTHER STATUTORY OR COMMON LAW IMMUNITY

Defendants do not have a defense based on "statutory and common law immunity." In response to an interrogatory, Defendants stated: "This affirmative defense was introduced by my attorney…It is my general understanding that the facts upon which it is based are contained in the Incident Report attached to this response." (See Winquist Response to Interrogatory No. 18, SUF Exhibit EE). As an initial matter, the State of Rhode Island has waived Defendants' sovereign immunity, if any. R.I.Gen.L. § 9-31-1(a). Moreover, the statutory limitation on damages under the Rhode Island Governmental Tort Liability Act, R.I.Gen.L. § 9-31-3, does not apply in Section 1983 cases if it would cause Plaintiff's remedy to be inadequate. L.A. Realty v. Town Council of Town of Cumberland, 698 A.2d 200, 213 (R.I. 1997) ("L.A. Realty").

Historically, the public duty doctrine in Rhode Island has only applied to negligence actions, not intentional torts. See Case v. Bogosian, C.A. KC-1992-0763, 1996 WL 936944 at * 8 n. 8 (R.I.Super. June 14, 1996) (Gibney, J.) ("Because Bogosian's claim against the town involves an intentional tort the [public duty] doctrine is inapplicable in this case.").

Admittedly, the Supreme Court did consider the application of the doctrine to an intentional tort in L.A. Realty. There, plaintiffs asserted a claim against the town for interference with prospective contractual relations by adopting and enforcing an invalid zoning ordinance

intended to prevent plaintiffs from developing their property. The Superior Court analyzed the application of the public duty doctrine. (The decision does not state whether plaintiffs argued that the doctrine did not apply to intentional torts). The Superior Court applied the doctrine because promulgating zoning ordinances was a governmental function. Nonetheless, the Superior Court said there was an exception for "egregious conduct" applied and found the defendants' conduct was egregious.

The Supreme Court said: "We are of the opinion that the town's adoption and enforcement of an invalid ordinance in order to interfere with plaintiffs' legitimate expectations regarding their property amounted to egregious misconduct, and consequently deprived the town of governmental immunity from tort claims." 698 A.2d at 208. The Court held that plaintiffs were entitled to damages in the full amount of their harm, as well as prejudgment interest and attorney's fees, under §§ 1983 and 1988(b), respectively.

Thus, it is immaterial whether the public duty doctrine does not apply to intentional torts, per se, or whether it does not apply because intentional torts fall within the exception for egregious acts. Either way, Defendants' intentional violations of Mr. Caniglia's constitutional and common law rights are not protected by the public duty doctrine.

## CONCLUSION

For these reasons, the Court should hold that Defendants violated:

- Mr. Caniglia's rights to be free from unreasonable searches and seizures under the Fourth Amendment and Art. 1, Sec. 6 of the Rhode Island Constitution;
- Mr. Caniglia's rights to due process under the Fourteenth Amendment and Art. 1, Sec. 2 of the Rhode Island Constitution; and

- Mr. Caniglia's rights under the Rhode Island Mental Health Act, R.I.Gen.L. § 40.1-5-1, et seq.

Further, the Court should strike Defendants' affirmative defenses respecting absolute and qualified immunity, statutory and common law immunity, and the community caretaking function.

Finally, the Court should hold that Defendants converted Mr. Caniglia's firearms by seizing them and refusing to return them.

**EDWARD CANIGLIA**
By his attorneys,

*/s/ Thomas W. Lyons*
Thomas W. Lyons #2946
Rhiannon S. Huffman #8642
RHODE ISLAND AFFILIATE,
AMERICAN CIVIL LIBERTIES UNION
Strauss, Factor, Laing & Lyons
One Davol Square, Suite 305
Providence, RI 02903
(401) 456-0700
tlyons@straussfactor.com

**CERTIFICATION**

I hereby certify that on December 17, 2018, a copy of the foregoing was filed and served electronically on all registered CM/ECF users through the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF system.

/s/ Thomas W. Lyons