UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

JASON A. RICHER, Plaintiff	:	
v.	:	C.A. No. 15-162-JJM-PAS
JASON PARMELEE as the Finance Director of THE TOWN OF NORTH SMITHFIELD, et al. Defendants	:	

PLAINTIFF'S SECOND MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to F.R.Civ.P. 56, Plaintiff 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 reconsideration of the Court's prior ruling that his Fourth Amendment claims are barred by the statute of limitations. Plaintiff also 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 upon the accompanying Statement of Undisputed Facts and his Memorandum in support of this motion.

JASON RICHER
By his attorneys,

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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. 15-162-JJM-PAS
JASON PARMELEE as the Finance Director of THE TOWN OF NORTH SMITHFIELD, et al. Defendants	: :	

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

Plaintiff moves for reconsideration of the Court's prior ruling that his Fourth Amendment claims are barred by the statute of limitations. Plaintiff also 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 depends, in part, on whether Defendants were ever investigating a possible crime. Because it appears Defendants themselves do not agree on this point, Plaintiff will analyze both possibilities.[1]

[1] Plaintiff notes that the legal arguments presented here, with the exception of Part I, are substantially similar to those also presented by Plaintiff in Caniglia v. Strom, C.A. No. 15-525, 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 Jason Richer has no history of criminal conduct or domestic violence of any kind. (SUF 3). Before September 28, 2008, Plaintiff has never attempted suicide or threatened suicide. (SUF 4). Mr. Richer legally owns three firearms: a Remington 1100 shotgun which he obtained in 1979, a .22 caliber bolt action rifle obtained in 1982, and a Thompson Center .50 caliber black powder muzzleloader obtained in 1993. (SUF 5). He has never misused those firearms. (SUF 3).

Defendants are the Town of North Smithfield, Rhode Island, the Chief of its Police Department, Steven Reynolds, and several members of the North Smithfield Police Department ("NSPD"): Officer Tim Lafferty, Officer Stephen Riccitelli, Officer Greg Landry, Officer Russell Amato, and Officer Mark Bergeron.[2]

On September 28, 2008, Mr. Richer was married to his now ex-wife Tracy Richer ("Tracy"). (SUF 1). She wanted a divorce which was a frequent source of arguments between the

[2]Reynolds, Lafferty, Riccitelli, Landry, Amato, and Bergeron, collectively are the "Individual Defendants." Officer Amato has retired from the NSPD. The ranks of the police officers other than Chief Reynolds have changed since 2008. For the sake of consistency, Plaintiff may refer to them as "Officer." This designation indicates no disrespect to their present or former ranks.

Plaintiff also named Officer Glenn Lamoureux as a defendant in the belief that he was one of the officers involved. However, during discovery, Plaintiff learned that the 24-officer NSPD also had two officers who last name is Lamoreaux, including Michael, who was an officer in training with Officer Amato at the relevant time. Michael Lamoreaux is no longer with the NSPD and has no recollection of the subject events. Officer Glenn Lamoureux had no involvement in the subject events. Accordingly, Plaintiff stipulates to dismissal of his claims against Officer Glenn Lamoureux.

Richers. (SUF 30). On September 28, 2008, the Richers had an argument during which Jason put pills in his mouth because he was tired of Tracy threatening to commit suicide when he would not consent to a divorce and he wanted to "turn the tables" on her. (SUF 33). Tracy called 911 in the belief that he had put "a handful" of pills in his mouth in a genuine attempt to harm himself. (SUF 35). However, Jason had put into his mouth only his regular doses of his prescription medications and then he spit them out into a trash can. (SUF 34, 38, 39). Officers Riccitelli, Landry, and Bergeron responded to the Richer household as did the North Smithfield Rescue, including Lieutenant David Mowry. (SUF 39, 42).

By the time the police arrived, Jason had explained to Tracy that he had only put into his mouth his regular doses of his regularly prescribed medications. (SUF 36). Jason explained what had happened to both the North Smithfield police and rescue officers. (SUF 37). Tracy heard Jason explain to the police. (SUF 40). The North Smithfield rescue confirmed that Jason had only put four pills into his mouth and then spit them into the trash can. (SUF 39). Nonetheless, the NSPD insisted that Jason go to Landmark Medical Center for a psychological evaluation and they seized his three firearms for "safekeeping" without obtaining his consent or a court order or warrant for either action. (SUF 60, 62, 63).

Chief Reynolds takes the position that Defendants could have been investigating a crime. (SUF 18). Other Defendants state there was no crime and no criminal investigation. (SUF 66). Officer Lafferty was involved in Mr. Richer's efforts to get back his firearms. (SUF 104). Defendants' custom and practice was to require persons whose firearms had been seized to obtain a court order mandating the return of the firearms. Despite Mr. Richer's repeated efforts to obtain his firearms, Defendants did not return them until he filed this lawsuit. (SUF 106, 108). Then, they returned them without a court order. (SUF 108).

Defendants justify their actions based on the purported consent of Tracy Richer or "exigent circumstances" or the "community caretaking function" ("CCF") and the "totality of the circumstances." (SUF 67). However, Defendants cannot identify any legal authority, or written policy, or formal training respecting the CCF that authorizes their actions. (SUF 16, 19, 20, 21, 68, 70-72, 79-80, 84, 96). Similarly, Defendants cannot identify any specific set of factors that constitute the "totality of circumstances" to be considered in making such decisions. (SUF 78, 79). Rather, Defendants acknowledge that NSPD officers make ad hoc decisions based on their individual experiences. (SUF 85). Defendants' justification boils down to the fact that they were told by the police dispatcher that Mr. Richer had made an allegedly suicidal statement and that they did not want to be held liable if they failed to take such steps. (SUF 93, 106). Defendants' unwritten policy of seizing firearms for safekeeping and requiring allegedly suicidal people to have psychological evaluations is an ongoing practice. (SUF 109, 110).

Mr. Richer was neither at acute nor imminent risk of suicide on September 28, 2008. (SUF 97). The NSPD officers were inadequately trained to reasonably screen for Mr. Richer's risk of suicide on September 28, 2008. (Id.). The NSPD officers were inadequately trained and/or failed to follow basic policies in place to interview and assess Mr. Richer on that night. (Id.). The NSPD officers made no independent evaluation of Mr. Richer's mental health and risk for suicide, relying solely on secondary reports of what he did and said. (Id.). The NSPD officers lacked any reasonable criteria by which they could evaluate either Mr. Richer's risk for suicide, mental status or degree of psychiatric crisis necessitating a recommendation for further evaluation at a hospital emergency department. (Id.). The NSPD officers did not apply or rely upon appropriate criteria or reasonable and standard police procedures in determining that Mr. Richer's firearms needed to be confiscated on September 28, 2008. (Id.).

PROCEDURAL BACKGROUND

Plaintiff filed suit on April 23, 2015. The original and the first amended complaints named as defendants the Town of North Smithfield, its finance director, and Steven Reynolds in his official capacity as the Chief of the North Smithfield Police Department. The complaint alleged violations 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 filed his first motion for partial summary judgment before the parties had commenced discovery. Plaintiff 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). It held that the Town violated Mr. Richer'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. 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.

In a footnote respecting the Fourth Amendment claims the Court made the following comments:

> Even if this claim were timely, Mr. Richer would not be entitled to summary judgment for two reasons. First, there exists a genuine issue of material fact about whether his then-wife consented to the seizure of the guns. ECF No. 32 at 11, n. 1. Second, the police's actions were likely a valid exercise of their community caretaking functions. *See Matalon v. Hynnes*, 806 F.3d 627, 633-36 (1st Cir. 2015) (discussing the community caretaking functions doctrine).

Id. at 343, n. 13. Plaintiff files this motion, in part, to address these comments.[3]

On April 14, 2017, after the Court lifted the stay on discovery, Plaintiff served a Third Amended Verified Complaint that added a claim against Chief Reynolds in his individual capacity and added as defendants the following North Smithfield police officers in their official and individual capacities: Tim Lafferty, Stephen Riccitelli, Russell Amato, Glenn "Lamoreaux," Mark Bergeron, and Gregory Landry. In addition, the Third 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 over 1300 pages of documents, answered interrogatories and conducted depositions of Plaintiff, his ex-wife Tracy Richer, each of the individual defendants, former NSPD officer Michael Lamoureaux, and a lieutenant of the North Smithfield Fire Department, David Mowry, who responded to Richers' home and transported Plaintiff to Landmark Medical Center for a psychological evaluation. In addition, the parties conducted expert discovery. Specifically, Plaintiff produced the report of Dr. Lanny Berman, a psychologist who is an expert in suicidology. Dr. Berman opines that Mr. Richer was neither an acute nor an imminent risk of suicide on September 28, 2008 when Defendants seized his firearms and required him to undergo a psychological evaluation at Landmark Medical Center.

[3] First, Plaintiff contends that his former wife could not legally consent to the seizure of his firearms, as a matter of law and undisputed fact. Second, Plaintiff contends that the community caretaking function does not authorize the seizure of his firearms from his home for non-criminal purposes.

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 affidavits, 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. Richer 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:

- The Court should reconsider its prior decision that Plaintiff's Fourth Amendment claims are barred by the statute of limitations for two reasons. First, Defendants' unwritten policy of requiring people who have made allegedly suicidal statement to have a psychological evaluation and to seize their firearms without court orders is an ongoing practice. Mr. Richer seeks declaratory and injunctive relief barring this practice. Second, Mr. Richer submits that Defendants' failure to return his firearms constituted a continuing violation of his constitutional rights which tolled the statute of limitations.
- Defendants' actions in requiring Mr. Richer to go for a psychological evaluation and seizing his firearms without a court because they believe he made a made a suicidal statement violates the Fourth Amendment and Article 1, Section 6 of the Rhode Island Constitution, the Due Process Clause of the Fourteenth Amendment and Article 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. Richer's firearms, their actions constitute conversion.
- Tracy Richer cannot consent to the seizure of Jason Richer's property, i.e., his firearms, Jason Richer did not consent either to a seizure or to a psychological evaluation, and there were no exigent circumstances.
- 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 Isalnd law limits the application of the 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. Richer'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. THE COURT SHOULD RECONSIDER ITS DECISION THAT PLAINTIFFS' FOURTH AMENDMENT CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS

The Court should reconsider its 2016 finding that Mr. Richer's Fourth Amendment claims were barred by the statute of limitations, Richer v. Parmelee, 189 F.Supp.3d 334, 343 (D.R.I. 2016), because they constitute part of a continuing violation of Mr. Richer's civil rights. Those allegations are contained in Count III of Mr. Richer's Complaints. Although the Court said in its 2016 Decision that the claims were time-barred, it noted that "[b]ecause the Town has not cross-filed on Counts I, II, and III…those issues also await trial or other pre-trial motions." Id. at 344, n. 15. To date, the Town has not filed a motion nor has any order entered respecting Count III.

Accordingly, the 2016 Decision respecting Count III is, at most, an interlocutory decree that the Court is free to reconsider as justice requires. F.R.Civ.P. 54(b)[4]; Powell v. Castaneda, 247 F.R.D. 179, 182 (D.D.C. 2007) (granting plaintiff's motion for reconsideration of

[4] "[A]ny order or other decision, however designated, that adjudicates fewer than all the claims…may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities."

defendant's motion to dismiss). The Court can reconsider its prior decision based on evidence not available at the time of the original decision. See, Nightlife Partners, Ltd. v. City of Beverly Hills, 304 F.Supp.2d 1208, 1213 (C.D.Cal. 2004), citing Knox v. Southwest Airlines, 124 F.3d 1103, 1105-06 (9th Cir. 1997). Here, the parties had not commenced discovery when the Court issued its 2016 Decision. The parties have conducted extensive lay and expert discovery since then and there is significant new evidence. In particular, the parties questioned all the parties and other witnesses about facts related to Defendants' seizure of Mr. Richer's firearms and their decision to send him to Landmark Medical Center for a psychological evaluation on September 28, 2008. Accordingly, there is no prejudice to Defendants in reconsidering the 2016 Decision.

This Court has previously recognized that the "continuing violation" doctrine applies in Title VII and Title IX cases. Doe v. Brown University, C.A. No. 17-191-JJM-LDA, 2018 WL 4062620 at *6 (D.R.I. Aug. 27, 2018) ("Doe"); Perez v. Town of North Providence, 256 F.Supp.3d 139, 150 (D.R.I. 2017) ("Perez"). Other federal courts have applied the continuing violation doctrine to civil and constitutional claims other than under Title VII or Title IX. See, Havens Realty Corp. v. Coleman, 455 U.S. 363, 380-81 (1982) (Brennan, J.) (defendants' pattern, practice and policy of housing discrimination constitutes a continuing violation not barred by the statute of limitations); Smith v. Shorstein, 217 Fed.Appx. 877, 881 (11th Cir. 2007) (per curiam) (prisoner alleged continuing violation of his due process and equal protection rights by prison officials who failed to release him after his sentence expired); Hendrick v. Caldwell, 232 F.Supp.3d 868, 881 (W.D.Va. 2017) (city attorney's practice of prosecuting homeless individuals as habitual drunkards violated the Eighth Amendment and constituted a continuing violation); Taylor v. Town of Freetown, 479 F.Supp. 227, 235 (D.Mass. 2007) (plaintiff alleged a continuing violation of his First Amendment rights through a "pattern of petty harassment");

see also, Parents for Quality Education With Integration, Inc. v. State of Indiana, 977 F.2d 1207, 1210 (7th Cir. 1992) (State's failure to remedy state-imposed segregation constitutes a continuing violation of the Fourteenth Amendment that subjects it to equitable remedies despite the Eleventh Amendment); Lauren v. City of Los Angeles, 797 F.Supp.2d 1005, 1019 (C.D.Cal. 2011) (City's practice of disposing of homeless people's personal property violated the Fourth and Fourteenth Amendments and constituted a continuing policy).

In Doe, plaintiff alleged discrimination during two different investigations of claimed sexual assault. Defendant argued that plaintiff's claims respecting the first investigation were barred by the statute of limitations. This Court said:

> At first blush, Brown's two investigations into John appear to be discrete, separable events with independent beginnings and ends. That said, the Court believes the facts as pleaded, tell the tale of a singular ongoing and evolving interaction between John and Brown, motivated by discriminatory animus, which gives rise to certain of his claims…The Court cannot ignore the direct link between the pre-limitations conduct and the allegations that fall within the three-year anchor period. Any such distinction would be artificial and ignore why what happened happened.

2018 WL 4062620 at *6. The Court held that the continuing violation doctrine applied to three of the five counts of plaintiff's complaint but not the counts setting forth "discrete claims" that applied only to the first investigation. Id. at *7.

In Perez, plaintiff alleged that defendants engaged in a lengthy series of sexual discrimination and harassment against other women and herself which created a hostile environment at the North Providence police department. The Town moved to dismiss plaintiff's claims respecting events that had occurred more than three years before she filed suit. The Court said:

> [T]he Court can best classify the time-barred acts as a series of harassing comments motivated by gender. Specifically, women—Lt. Perez and others—were subjected to salacious comments from male supervisors and were criticized

> if they did not fit a gender mold…In each instance, superiors criticized women for their appearance or for not living up to a docile, sexual image of a woman.

256 F.Supp.3d at 150. The Court declined "the Town's invitation to excise the continuing violation doctrine." Id.

Moreover, there are two different facets to the continuing violation doctrine: the "series-of-related-acts" standard and the "systematic policy of discrimination" standard. Beasley v. Alabama State University, 966 F.Supp. 1117, 1129 (M.D.Ala. 1997). The series-of-related-events standard applies when defendant directs more than one related civil rights violation at the same plaintiff. In Beasley, plaintiff alleged that defendant violated Title IX by discriminating against female athletes like herself with respect to awarding athletic scholarships and with respect to the financial support, including medical coverage, provided to female athletes who competed for the university. Defendant argued that plaintiff's claim respecting the failure to offer her a scholarship was time-barred because it occurred more than three years before her suit. The court found the claims were "closely interwoven" because the failure to provide prompt medical coverage affected plaintiff 's ability to remain eligible and she could have received a scholarship any time during her college career. Id. at 1129-30. Accordingly, the court held that the failure to award a scholarship was and the lack of support for female student athletes were a series of related acts. Id. at 1130.

The Beasley court also considered whether there was a systematic policy of discrimination. The court said plaintiff was alleging "a pervasive policy…to disfavor and direct insufficient attention, funds and resources to women's sports." Id. "Beasley alleges that any deprivation of opportunity she suffered resulted from a continuing, offensive practice or policy of the university, its 'standard operating procedure.'" Id. The court held this was sufficient to meet the systematic-policy-of-discrimination standard. Id.

Here, the evidence shows that Defendants have an ongoing, unwritten policy and practice of requiring persons who have allegedly made suicidal statements to have psychological evaluations and to seize those persons' firearms "for safekeeping." (SUF 19, 20, 72, 91-94). Then, they refused to return those persons' firearms unless they obtain a court order requiring the return of the firearms. (SUF 100). Defendants engage in this practice because they wish to avoid liability if any such persons subsequently cause harm, especially with the firearms. (SUF 93, 106). Defendants made Mr. Richer go for a psychological evaluation because he supposedly made a suicidal comment and they also seized his firearms. (SUF 60, 62, 63, 87). For years, they refused to return his firearms without a court order. (SUF 106). The Court has found the practice of requiring a court order to be unconstitutional. It specifically rejected the justification that this practice protected the Town from liability. 189 F.Supp.3d at 341. That practice was part and parcel of Defendants' practice of seizing firearms and requiring psychological evaluations to avoid liability. Thus, Defendants' conduct constitutes both a series of related acts and a systematic violation of civil rights. Hence, Mr. Richer's claims respecting the initial seizure and the required psychological evaluation are part of a continuing violation and are not barred the statute of limitations. Accordingly, the Court should reconsider its prior decision.

II. DEFENDANTS VIOLATED PLAINTIFF'S CONSTITUTIONAL AND STATUTORY RIGHTS

Defendants violated Mr. Richer'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. Richer 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 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)).

Here, Chief Reynolds testified that anytime the NSPD responds to a report of a domestic disturbance there is a possibility of a criminal investigation. (SUF 18). Further, Defendants were told that Mr. Richer had made suicidal comments and possibly had attempted suicide by putting pills into his mouth. (SUF 87). 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 Richers' home.

It is undisputed that Defendants seized Plaintiff's firearms without a search warrant. (SUF 60). Defendants' actions constituted a seach for Jason's firearms and a seizure of both those firearms and of Jason 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 may have had consent to enter Plaintiff's home, they did not have his consent to search for his guns, open his storage area, 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).[5] 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.

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

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

standard than the mere possibility that someone might get injured." Id., citing United States v. Curzi, 867 F.2d 36, 42 (1st Cir. 1989).[6]

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 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:

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

> 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.

According to Tracy Richer, Jason was not in the vicinity of the firearms when Defendants seized them. (SUF 62). Rather, at their insistence, he had gone to the hospital to be examined. (Id.). The firearms were kept in a private storage area in a detached garage. (SUF 7-11, 61).

The storage area was behind a door in a wall which door was kept shut. (SUF 8). Five police officers had come to Plaintiff's home. (SUF 42 and Exhibit O). None of them went with Plaintiff to the hospital. Certainly, one or two of them could have watched the storage area while another attempted to get a warrant or other court order. They made no such effort. Defendants' warrantless seizure of Plaintiff's firearms violated the United States and Rhode Island Constitutions.

The 911 report that Defendants received does not, by itself, justify seizing Mr. Richer or his firearms. This Court, in the context of its due process analysis in its 2016 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. Richer and his wife were arguing about whether he would agree to the divorce she wanted. (SUF 33). She threatened to commit suicide if he would not do so. (Id.). Tired of hearing these threats and to "turn the tables" on her, Jason put his regular doses of his regular medication in his mouth. (Id.). Tracy Richer made a 911 call in the mistaken belief that Jason had ingested a "handful" of pills. (SUF 35). However, by the time the police had arrived, Tracy understood that Jason had only put his regular dose in his mouth and that he had not attempted suicide. (SUF 34, 36). Jason explained this to the NSPD officers and to the rescue personnel. (SUF 37-39). Tracy heard Jason explain this to the police. (SUF 40). The rescue report states: "pt took 4 pills then spit them out". (SUF 39). Jason did not show his firearms to the NSPD officers. The NSPD officers did not ask Jason while he was in the home whether they could see his guns. Rather, according to Tracy, they waited until they had removed him from the house and then they asked her whether he had any guns in the house. (SUF 62). They knew that Tracy wanted a divorce from Jason and that the Richers had just had a big fight over that. (SUF 42 and Exhibit O). Tracy agreed to let the police take Jason's guns. (SUF 62). However, Defendants

and Tracy had to search for Jason's guns because she did not know "exactly" where Jason kept them. (SUF 61). In fact, they were in Jason's private storage area, behind a closed door, in a detached garage. (SUF 7-11). The police seized the guns based on the 911 report which they knew to be erroneous and based on their desire to avoid liability. (SUF 93).

Thus, this case is very different from Coolidge v. New Hampshire. There was no crime and no criminal investigation. Defendants did not ask Jason to see his guns nor did he voluntarily display them. Rather, they asked Tracy about his guns after the Richers had had a big fight and after they sent Jason away in the rescue. Defendants did so pursuant an unwritten policy of seizing firearms. Tracy was not trying to clear Jason of suspicion of a crime. To the contrary, she was still angry with him. Tracy and the police had to search for Jason's guns because she did not know where he kept them. (SUF 61). They found the guns in a closed storage area that only Jason used. Thus, Defendants did "rummag[e] around [Jason's] effects" and they did intend to "dispossess[ ] him of…his property." Id. at 488. Nothing in Coolidge v. New Hampshire authorizes the NSPD to seize Jason's firearms solely because there was an incorrect 911 call that he had attempted suicide or because Defendants wanted to avoid liability.

Similarly, Defendants seized Jason when they required him to go to Landmark Medical Center for a psychological evaluation as a condition of getting back 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.[7]

Accordingly, Defendants had to have probable cause to believe Mr. Richer 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, Jason has no history of making threats against others or against himself. (SUF 3). Tracy agrees he has never made any suicidal comments before September 28, 2008. (SUF 4). Jason has no history of violent or abusive behavior. (SUF

[7] 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).

2-4). Rather, Tracy mistakenly believed that he had attempted to overdose on pills, when, in fact, he had only put into his mouth his regular dose of his regularly-prescribed medication. (SUF 33-36). She called "911" to report Jason had taken an overdose. However, Tracy understood by the time the police arrived that Jason had only put his usual dose into his mouth. (SUF 36). Jason explained the situation both to the North Smithfield Rescue and the NSPD. (SUF 37-39). Tracy heard him do so. (SUF 40). Tracy does not recall whether she told the NSPD that it was just Jason's regular dose but says she would not have withheld that information. (SUF 36). The incident report inexplicably fails to include anything that Jason said to the NSPD. (SUF 42-44). However, the DV/SA report states that Jason was "calm" and the NSPD officers confirmed that Jason was calm. (SUF 56-57). Jason only "agreed" to go to Landmark because the officers said they would return his firearms if he was "checked out." (SUF 63).

The NSPD General Orders state that NSPD officers are not qualified to diagnose a person's psychiatric condition. (SUF 22). GO 320.09 lists symptoms that NSPD officers should consider. (Id.). The NSPD considered one factor, that Jason had supposedly made one suicidal remark, i.e., that he was taking pills and was going to go to bed and not get up. (SUF 87). However, they learned when they got to the house that Jason had not attempted suicide. (SUF 36-42). The only other factor the NSPD officers considered, which is not in any GO, was that they wanted to avoid liability. (SUF 93). They took Jason into custody and required him to go to Landmark Medical Center for a psychological evaluation. (SUF 63). Jason was released from Landmark within minutes of seeing a doctor. (SUF 65). Dr. Berman has said that Jason was not a threat and that Defendants failed to apply any reasonable criteria by which they could evaluate Jason's risk of suicide. (SUF 97). No doctor has said the Jason was ever a threat to himself or to others. (SUF 2).

Under these facts, Defendants' did not have probable cause to require Jason to have a psychological evaluation. The single fact upon which they based their decision was the report that Jason had put pills into his mouth and said he was going to bed and not getting up. (SUF 52, 87). However, this report was shown to be inaccurate when the NSPD arrived at the Richer household. (SUF 36). Tracy knew it was inaccurate. (Id.). She remembers Jason telling the NSPD that he was not suicidal. (SUF 40). Jason showed both the NSPD and the Rescue that he had spit the pills into the trash. (SUF 37-38). The Rescue report reflects that the Rescue personnel saw the pills in the trash. (SUF 39). No doctor has ever said Jason was suicidal. Three doctors—the one at Landmark, Dr. Murphy, and Dr. Berman—have said he was not. (SUF 65, 97). In short, Defendants' actions were not based on the actual facts, but only on a desire to avoid personal liability. This is not probable cause. Accordingly, Defendants' violated Jason'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 Jason's firearms by stating they had Tracy's consent to do so. However, under the NSPD's own General Order ("GO"), Tracy cannot consent to the seizure of Jason's firearms. GO 100.20(VII)(A)(1) states: "Officers may conduct a search of a person or property when the consent of the person who rights will be affected by the search has been obtained." Thus, while Tracy can consent to a search of the house she co-owned with Jason, she cannot consent to the seizure of his firearms because that seizure affects his rights, not hers. Further, Defendants acknowledge that Jason did not consent. (SUF 60). Moreover, the circumstances were not "exigent," GO 100.02 (VII)(F), considering that the NSPD had taken Jason into custody and, according to Tracy's version of events, was on his way to Landmark Medical Center.

Setting aside the NSPD GO, there was no consent under the applicable case law. Tracy could not consent to the seizure of Jason'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, 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 therefor could consent to a search was not reasonably based on facts. Id.

Further, 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 on 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.

Here, Defendants knew the firearms belonged to Jason. The Incident Report so states. (SUF 60, Exhibit O). They did not ask Jason for permission to search for and seize his firearms. (SUF 60). Rather, according to Tracy, they asked her about firearms after they had required Jason to go to Landmark Medical Center for a psychological evaluation. (SUF 62). Moreover, they knew that Jason and Tracy were arguing over whether Jason would agree to a divorce with Tracy. (SUF 42). This was Defendants' second visit to the Richer household in nine days on this issue. (SUF 30-32). Further, Jason's firearms were not stored in the house. (SUF 7-11). Rather, Jason kept them in a gun case in a closed storage area behind a wall on the second floor

of a detached garage. (Id.). Only Jason used the guns and that storage area. (Id.). Tracy did not know exactly where the firearms were stored in the garage. (SUF 61). Defendants and she had to search for them. (Id.). Accordingly, Defendants could not reasonably believe that Tracy had actual authority to agree to the seizure of Jason's firearms.

Consider a hypothetical scenario in which Tracy called the NSPD, told them Jason 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 NSPD to come take the firearms (or other property) when Jason was not home. If the NSPD complied with that request without a court order permitting it, the NSPD's actions would clearly be a violation of Jason'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 argument about whether Jason would agree to a divorce from Tracy, Defendants could not reasonably believe that Tracy had authority to agree to the seizure of Jason'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.

B. 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. Richer to have a psychological evaluation and seizing his firearms, without court orders, Defendants violated Mr. Richer'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. Richer to have a psychological evaluation.

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 Jason Richer did not attempt suicide (SUF 33-40) and was not in acute or imminent risk of suicide on September 28, 2008 (SUF 97) (even assuming that preventing suicide in the home is an important government interest). Further, there was no "narrowly-drawn" statute that authorized the NSPD to seize Mr. Richer'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 in these circumstances without a court order. Moreover, the NSPD GO respecting "Mental Health" states that NSPD officers are not qualified to diagnosis mental illness. (SUF 22). The GO further states that when "public safety is at issue," NSPD officers will follow the Mental Health Act. (SUF 24-25). Finally, there was no special need for very prompt action to seize the firearms. Defendants had sent Mr. Richer to Landmark Medical Center for an evaluation (and Landmark discharged him shortly after he talked to a doctor). 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 Fourth Amendment and Article 1, Section 6 of the Rhode Island Constitution.

C. DEFENDANTS' ACTIONS IN REQUIRING MR. RICHER TO SUBMIT TO A PSYCHOLOGICAL EVALUATION VIOLATES THE RHODE ISLAND MENTAL HEALTH ACT

Defendants' requirement that Jason 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 40-1.7(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 the Act when they required Mr. Richer to submit to a psychological evaluation at Landmark Medical Center without obtaining a court order.

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

Defendants' seizure and retention of Mr. Richer'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

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

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. Richer's firearms without his consent (SUF 60) and refused to return them despite his repeated efforts to get them back. Richer v. Parmelee, 189 F.Supp.3d 334 (D.R.I. 2016). As set forth above, it is immaterial whether Tracy Richer consented to the seizure; she had no authority to do so. Accordingly, Defendants converted Mr. Richer's firearms.

III. 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 that does not apply when constitutional law and statutes specifically apply to the circumstances 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

[9] Since the community caretaking function is a defense to Plaintiff's claims that Defendants violated his civil rights, Defendants have the burden of proving that 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 belong to the defendant asserting it.").

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 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, Chief Reynolds testified that any domestic disturbance call potentially involves a crime. (SUF 18). The "911" call said that Mr. Richer had attempted suicide. Suicide is a common law felony in Rhode Island. Clift v. Narraganset Television L.P., 688 A.2d 805, 808 (R.I. 1988). Five NSPD officers in four cruisers responded to the scene. (SUF 42, Exhibit O). The officers who responded completed a "Domestic Violence/Sexual Assault" form. (SUF 56, 57). 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 has 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

[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 16, 19, 20, 21, 68, 70-72, 79-80, 84, 96).

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 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 after Mr. Richer was in Defendants' custody and on his way to Landmark Medical Center. He was clearly no longer a danger, even if he ever had been.

In analogous situations, 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.

Here, Defendants' seized Jason's firearms from the garage which was detached from the house where the domestic dispute took place. (SUF 61). The firearms were in a closed storage area that only Jason used. (SUF 7-11). Defendants knew the firearms belonged to Jason and acknowledge they did not obtain his permission to seize them. (SUF 60). Tracy did not know exactly where Jason kept the firearms so she and Defendants had to search for them it the garage. (SUF 61). They found the firearms in the storage area behind a closed door.

Moreover, there was no significant evidence that Jason'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 3). Jason had never misused the firearms. (Id.). He owned them legally. (SUF 5). Jason had only put his prescribed doses of medications into his mouth, as he explained to the officers. (SUF 33-40). Jason simple act of putting those doses in his mouth was not a suicide attempt. (SUF 50). No one told the NSPD officers that Jason had

attempted suicide. (SUF 51). And, there was no imminent, acute risk of suicide. (SUF 97). Against this undisputed evidence, the police—who acknowledge they are not qualified to diagnose mental illness (SUF 22)—offer the justification that they were told Jason had made a suicidal comment and they wanted to avoid potential liability if they failed to act. (SUF 88-93).

If the community caretaking function can justify the seizure of Jason'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 medication 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 private property from a home 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 NSPD's community caretaking function ended once it was clear that Jason had not ingested an overdose of pills or otherwise attempted suicide. 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 NSPD officers who went to the Richers' home said there was no crime resulting from the Richers' verbal domestic dispute. (SUF 66). Rather, Defendants use the community caretaking function to justify the seizure of Mr. Richer'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 an erroneous report that Mr. Richer made a single suicidal

comment (SUF 52) and because Defendants wish to avoid liability (SUF 93). 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.

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. Richer'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. Further, Defendants' own GO required the return of Mr. Richer's firearms. (SUF 69). Similarly, the Mental Health Act required Defendants to obtain a court order before forcing Mr. Richer to have a psychological evaluation. Supra, pp. 35-36. 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 refute their invocation of the community caretaking function to justify their seizures of Jason and his firearms. The NSPD was once accredited by the Commission on Accreditation for Law Enforcement ("CALEA"). (SUF 13). The NSPD promulgated the GOs to obtain CALEA accreditation. (SUF 14). Those GOs represent Department policy based on the best practices of law enforcement agencies nationwide. (SUF 14). The CALEA accreditation lapsed. (SUF 13). The NSPD has been accredited by the Rhode Island Police Accreditation Commission since 2015 ("RIPAC").

(SUIF 14). When the NSPD became accredited by RIPAC, it changed the number of the GOs to refer to RIPAC standards. (SUF 15).[12]

RIPAC has no standard for determining when police may seize weapons for safekeeping. (SUF 16). The NSPD has no specific document that authorized the seizure of Mr. Richer's firearms. (SUF 19). The NSPD has no GO which sets forth the limits of its authority when it is acting outside the criminal process. (SUF 20). The NSPD GO respecting "Mental Illness" states that NSPD officers are not in a position to diagnose mental illness. (SUF 22). Moreover, it says that "when public safety is at issue, officers will follow Rhode Island General Law, Health General, Article §40.1-5-7, regarding involuntary emergency evaluation." (SUF 25). As set forth previously, that section requires a court order to compel a mental health evaluation. Defendants failed to comply with their own GO. Instead, the NSPD's practice of seizing firearms and requiring a person to have a psychological evaluation defends on an individual officer's personal experience and ad hoc decisions. (SUF 84-85). Defendants failed to comply with any "sound police procedures" and, accordingly, cannot invoke 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

[12] Since the Cranston Police Department is still accredited by CALEA, the Court can refer to the GOs cited in the Caniglia case for further evidence of the "best practices" of law enforcement agencies under those standards.

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.[13]

IV. 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, Chief Reynolds stated: "This affirmative defense was interposed by my attorney…It is my general understanding that the facts upon which all affirmative defenses are based are contained in the Incident Report attached to this response." (SUF Exhibit W at Response No. 15).

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 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 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

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

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. Richer'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. 13-37). Defendants' defense rests on whether the community caretaking function excuses their violation of those rights. Defendants themselves are unable to identify any decision, GO, or formal training that states the community caretaking function authorizes their actions. (SUF 16, 19, 20, 21, 68, 70-72, 79-80, 84, 96).

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. 16-17.

Moreover, Defendants cannot obtain qualified immunity for requiring Mr. Richer 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 probably cause to believe Jason 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 Richer house that the 911 call was erroneous. Tracy knew that Jason had not attempted suicide. (SUF 36). She knew that he had only put into his mouth his regular doses of his regular medication. (SUF 36). Tracy heard Jason explain this to the police. (SUF 39). She does not recall saying it herself but she would not have withheld the information. (SUF 36). Jason had spit out the pills into the trash can. (SUF 34). He showed the pills and his pill bottles to the rescue personnel. (SUF 38). They confirmed that the pills were his regular medications. (SUF 38). The NSPD General Orders state

that NSPD officers are not qualified to diagnose mental illness, but they list numerous symptoms of mental illness. (SUF 22). The only symptom that arguably applies is Jason's supposed suicidal statement that the Defendants knew to be unfounded. (SUF 36-40, 50). Three different doctors have determined that Jason was not suicidal, the doctor at Landmark Medical Center, Dr. Murphy, and, now, Dr. Berman. (SUF 64, 97). No doctor has said Jason was suicidal. (SUF 2). Thus, Defendants' actions are justified only by their desire to avoid liability. (SUF 93, 106). That desire alone does not provide qualified immunity.

V. 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, Chief Reynolds stated: "This affirmative defense was interposed 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." (SUF Exhibit W at Response No. 15). 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 negligent 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. Richer'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. Richer'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. Richer's rights to due process under the Fourteenth Amendment and Art. 1, Sec. 2 of the Rhode Island Constitution; and

- Mr. Richer'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. Richer's firearms by seizing them and refusing to return them.

JASON RICHER
By his attorneys,

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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