218 A.3d 543
Supreme Court of Rhode Island.

Dana GALLOP
v.
ADULT CORRECTIONAL INSTITUTIONS et al.

No. 2018-246-Appeal. (PC 10-6627)
|
November 14, 2019

Attorneys and Law Firms

Ronald J. Resmini, Esq., Adam J. Resmini, Esq., For Plaintiff.

Michael W. Field, Department of Attorney General, For Defendants.

Present: Suttell, C.J., Goldberg, Flaherty, Robinson, and Indeglia, JJ.

OPINION

Justice Goldberg, for the Court.

This case came before the Supreme Court on October 2, 2019, on appeal by the plaintiff, Dana Gallop (plaintiff or Gallop), from a Superior Court judgment in favor of the defendants, the Adult Correctional Institutions, the State of Rhode Island, Ian Rosado (Rosado), and Matthew Galligan (Galligan), following the entry of an order, after remand by this Court, that denied the plaintiff's motion to file a second amended complaint. Before this Court, the plaintiff argues that

the trial court erred in (1) failing to address the plaintiff's argument that G.L. 1956 § 13-6-1 violates the Supremacy Clause of the United States Constitution, and in failing to allow the plaintiff's longstanding state law tort claims to proceed; and (2) denying the plaintiff's motion to file a second amended complaint. We directed the parties to appear and show cause why the issues raised in this appeal should not be summarily decided. After considering the parties' written and oral submissions and reviewing the record, we conclude that cause has not been shown and that this case may be decided without further briefing or argument. For the reasons set forth herein, we affirm the judgment of the Superior Court.

Facts and Travel

This case arises out of an incident that allegedly took place on or about April 26, 2010, while plaintiff was held in pretrial detention at the ACI while awaiting trial on numerous counts stemming from a fatal shooting in Providence in 2008. The plaintiff alleged that he was attacked by Rosado, a fellow inmate, and that he suffered lacerations and permanent facial scarring as a result. The plaintiff also alleged that the attack was made possible because, the day before the attack took place, Rosado told Galligan, a correctional officer, that he intended to carry out the attack. According to plaintiff, Galligan then informed various "John

Doe" defendants of Rosado's planned attack.[1] Finally, plaintiff alleged that Galligan had abandoned his post for eighteen minutes on April 26, 2010, to afford Rosado the opportunity to carry out the assault.

On May 12, 2010, plaintiff was convicted after a jury trial of first-degree murder, felony assault, using a firearm when committing a crime of violence, carrying a pistol without a license, and possession of arms by a person convicted of a crime of violence or who is a fugitive from justice. He was also declared a habitual offender. The trial justice sentenced plaintiff to two mandatory consecutive life sentences, plus an additional twenty-year sentence to be served consecutively to the second life sentence, and two ten-year sentences to run concurrently with the first life sentence. The plaintiff was also sentenced, as a habitual offender, to an additional twenty-five years, to be served after the sentences on the underlying conviction, without the possibility of parole. The plaintiff appealed, and this Court affirmed the judgment of conviction on May 2, 2014. *State v. Gallop*, 89 A.3d 795, 806 (R.I. 2014) (*Gallop I*).

On November 10, 2010, plaintiff filed a civil complaint in the present case, naming the ACI, the state, and various John Does as defendants, alleging negligence for failing to properly protect him. As part of that

[1] These so-called "John Does" have never been identified and are not part of this action. *See Ensey v. Culhane*, 727 A.2d 687, 690 (R.I. 1999) (noting that John Doe defendants must be named and served with process within a reasonable time or may not be considered parties to the case).

initial complaint, plaintiff also alleged several additional common law tort claims, including intentional infliction of emotional distress, negligent infliction of emotional distress, conspiracy and joint enterprise resulting in assault and battery, implied breach of warranty, failure to maintain "protective responsibilities[,]" and a violation of plaintiff's civil rights.

On April 11, 2013, with the statute of limitations looming, plaintiff filed an amended complaint, adding Rosado and Galligan as named defendants, with additional allegations concerning the circumstances under which the alleged incident took place. Significantly, plaintiff alleged the same tort claims that he alleged in his original complaint and did not add any federal or state constitutional claims.

The day before the trial's scheduled start date, the trial justice, *sua sponte*, raised the issue of § 13-6-1, the civil death statute, based on the fact that plaintiff was serving consecutive sentences of life imprisonment. The defendants immediately moved to dismiss the case in accordance with § 13-6-1, arguing that plaintiff was deemed to be civilly dead and that, therefore, the Superior Court lacked jurisdiction over plaintiff's claims.

The plaintiff objected to the motion to dismiss and sought leave to file a second amended complaint. The proposed second amended complaint added a claim alleging violations by defendants under various statutory and constitutional provisions, including 42 U.S.C. § 1983; the Eighth and Fourteenth Amendments to the United States Constitution; article 1, sections 2, 6, and

8 of the Rhode Island constitution, and G.L. 1956 §§ 42-112-1 and 42-112-2 of the Rhode Island Civil Rights Act. Counts two through six of the proposed second amended complaint recited the same tort allegations as in the original and first amended complaints, but more clearly assigned responsibility for each tort to specific actors.

Following a hearing on July 28, 2016, the trial justice granted defendants' motion to dismiss based on the civil death statute, but she did not address plaintiff's motion for leave to file a second amended complaint. The plaintiff appealed, arguing before this Court that § 13-6-1 did not require dismissal of his complaint and that the trial justice erred in failing to address his motion to file a second amended complaint. *Gallop v. Adult Correctional Institutions*, 182 A.3d 1137, 1141-45 (R.I. 2018) (*Gallop II*).

With respect to the civil death statute, this Court declared in *Gallop II* that the Superior Court had no authority to entertain plaintiff's action because plaintiff's civil rights were extinguished by operation of law once his criminal conviction was affirmed. *Gallop II*, 182 A.3d at 1141. We held that "[t]he statute unambiguously declares that a person such as plaintiff, who is serving a life sentence, is deemed civilly dead and thus does not possess most commonly recognized civil rights." *Id.* We decided that the trial justice "prudently and accurately dismissed the case[,]" and we declined to read an exception into the statute for claims alleging

a violation of a prisoner's civil rights. *Id.* at 1141, 1143.[2] We also reiterated the commonly-understood principle that "[r]epeal is the province of the Legislature." *Id.* at 1141.

Significantly, there was no timely constitutional challenge to the civil death statute, for negligence claims, raised in the Superior Court or this Court; instead, plaintiff's argument was confined to the federal civil rights actions. *Gallop II*, 182 A.3d at 1144. As a result, we concluded that the complaint had been properly dismissed. *Id.* at 1143. However, we decided that the "trial justice should have addressed the plaintiff's second amended complaint before granting the defendants' motion to dismiss." *Id.* at 1144. We noted that "[t]his Court cannot review the trial justice's decision granting or denying a motion to amend for abuse of discretion if the trial justice has not exercised that discretion." *Id.* at 1145. Accordingly, we held that plaintiff was "entitled, at the very least, to a reasoned decision on his motion for leave to file an amended complaint." *Id.* We vacated the judgment of the Superior Court and remanded the case with directions to hear and decide plaintiff's motion to file a second

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[2] In arriving at this decision, however, we clarified that the Superior Court was incorrect when it dismissed the case for lack of subject-matter jurisdiction. *Gallop v. Adult Correctional Institutions*, 182 A.3d 1137, 1142 (R.I. 2018). Rather than being dismissed for lack of subject-matter jurisdiction, the case should have been dismissed because it would have been "an *excess* of jurisdiction for the Superior Court to consider plaintiff's claims when the Legislature has declared [the] plaintiff to be civilly dead." *Id.* at 1143 (emphasis added).

amended complaint. *Id.* We took no position on the merits of plaintiff's motion to file a second amended complaint, but we affirmed the dismissal of the first amended complaint. *Id.*

On remand in the Superior Court, plaintiff presented his arguments in reverse order: He first asserted that, because § 13-6-1 is unconstitutional under federal law, his claims should go forward. Alternatively, plaintiff argued that, even if his federal civil rights claims were disallowed, the tort claims should nonetheless proceed because the civil death statute is unconstitutional. As to his motion to file a second amended complaint, plaintiff argued that there would be no extreme prejudice to defendants if the motion was granted, because the proposed second amended complaint merely clarified the tort claims raised in the first amended complaint. The plaintiff also argued in support of a liberal approach to allowing motions to amend. Specifically, plaintiff argued that the amendment should be allowed because the addition of the civil rights claim would not significantly change the content or nature of the complaint and would not require any further discovery.

The defendants correctly pointed out that plaintiff's various federal and constitutional claims were raised for the first time in the proposed second amended complaint and were not properly before the trial justice. Although defendants acknowledged that Rule 15(a) of the Superior Court Rules of Civil Procedure provides that leave to amend a pleading should be freely given when justice so requires, they argued that

a proposed amendment that results in undue prejudice or is unduly delayed or filed after the movant has had sufficient opportunity to state a claim should give rise to the denial of the motion to amend. Although mere delay is an insufficient ground for denial of a motion to amend a pleading, defendants argued that the delay in the present case was unduly excessive and would result in prejudice. The defendants submitted that plaintiff had sufficient opportunity to raise the new claims in the six years the case was pending, but he had failed to do so and only sought to change the nature of the case from negligence to civil rights and constitutional violations when faced with dismissal on the eve of trial. The defendants also argued that plaintiff had failed to satisfy his burden of showing some valid reason for his neglect and delay in moving to amend the complaint.

The trial justice ultimately denied plaintiff's motion to amend based on "the proximity to the trial, additional significant discovery, and other pleadings needed in lateness of filing the motion[.]" The trial justice determined that "[t]he delay of filing the second amended complaint would result in extreme prejudice to the defendant" because it was filed on the eve of trial, discovery had closed, trial strategy was developed, and witnesses were prepared. Finally, the trial justice determined that plaintiff "failed to establish a reasonable explanation for [his] delay in moving to amend the complaint." Before this Court, plaintiff argues that the trial justice erred in failing to address plaintiff's argument that § 13-6-1 violates the Supremacy Clause, in failing to allow plaintiff's longstanding

tort claims to proceed, and in denying plaintiff's motion to file a second amended complaint.

Standard of Review

This Court has consistently held that "the decision to grant or deny a motion to amend a complaint is within the sound discretion of the hearing justice[.]" *Barrette v. Yakavonis*, 966 A.2d 1231, 1236 (R.I. 2009). Therefore, we afford "great deference to the trial justice's ruling on a motion to amend." *Catucci v. Pacheco*, 866 A.2d 509, 513 (R.I. 2005) (quoting *Normandin v. Levine*, 621 A.2d 713, 715 (R.I. 1993)). This Court "will not disturb [the] ruling unless the hearing justice committed an abuse of discretion." *Barrette*, 966 A.2d at 1236.

Analysis

On appeal, plaintiff contends that his state law claims must be allowed to proceed because § 13-6-1 is unconstitutional under federal law and United States Supreme Court precedent. The plaintiff also argues that the trial justice erred in addressing his motion for leave to file a second amended complaint before she addressed the issue of the constitutionality of § 13-6-1. He argues that the civil death statute should have been invalidated first, then his motion to amend should have been granted as to some or all of his state law claims in counts two through six. The plaintiff is mistaken and overlooks the fact that there was *no complaint pending* before the Superior Court, and, unless

the motion to file a second amended complaint was granted, there was nothing for the trial justice to pass upon.

Motion to Amend

We first address whether the trial justice properly denied plaintiff's motion to amend. After careful review of the record, we are satisfied that the trial justice did not abuse her discretion, and properly denied the motion to amend.

The standard of review to be applied in evaluating the decision to grant or deny a motion to amend a complaint is well settled, and the focus is whether there was an abuse of discretion by the trial justice. Rule 15(a) provides, in pertinent part, that:

> "A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served * * *. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires."

After a pleading has been amended once as a matter of course, "leave to amend a pleading lies within the sound discretion of a trial justice," and Rule 15(a) "liberally permits amendment absent a showing of extreme prejudice." *Weybosset Hill Investments, LLC v. Rossi*, 857 A.2d 231, 236 (R.I. 2004) (quoting *Granoff Realty II, Limited Partnership v. Rossi*, 823 A.2d 296, 298 (R.I. 2003)). A lower court "need not grant leave to

amend a pleading when doing so would unduly prejudice the nonmoving party[,]" and "the question of prejudice to the party opposing the amendment is central to the investigation into whether an amendment should be granted." *Id.* (brackets omitted) (quoting *Faerber v. Cavanagh*, 568 A.2d 326, 329 (R.I. 1990)). This Court has recognized that "the risk of substantial prejudice generally increases with the passage of time." *RICO Corporation v. Town of Exeter*, 836 A.2d 212, 218 (R.I. 2003).

Factors that indicate substantial prejudice if a party were allowed to amend its claim include, but are not limited to, undue delay in seeking to amend the complaint without any reasonable explanation being given, or when the amendment would require a significant amount of new discovery. *Faerber*, 568 A.2d at 330 ("An addition of a new claim close to trial when discovery is essentially complete and trial strategy already planned invariably delays the resolution of a case, and delay itself may be considered prejudicial especially where excessive delay has already occurred.") (deletion omitted) (quoting *Andrews v. Bechtel Power Corporation*, 780 F.2d 124, 129 (1st Cir. 1985)). Both of these factors are present in the case at bar.

Again, it is well settled that this Court's review of a trial justice's decision to grant or deny a motion to amend a complaint is deferential, and we "will not disturb [the] ruling unless the hearing justice committed an abuse of discretion." *Barrette*, 966 A.2d at 1236. However, the courts are not vested with limitless discretion. *Hogan v. McAndrew*, 131 A.3d 717, 722 (R.I.

2016) (noting that the abuse of discretion standard "does not suggest that this Court merely endorses the findings made by the lower court").

Rather, "[a]buse occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed, but the court makes a serious mistake in weighing them." *Hogan*, 131 A.3d at 722 (quoting *Independent Oil and Chemical Workers of Quincy, Inc. v. Procter & Gamble Manufacturing Co.*, 864 F.2d 927, 929 (1st Cir. 1988)). In evaluating whether the trial justice abused her discretion, we carefully review the record to determine that all material factors have been properly acknowledged and weighed, that improper factors were not relied on, and, generally, that the record demonstrates the trial justice set forth some grounds that support her decision.

Our review of the record satisfies us that there was no abuse of discretion by the trial justice. The record reflects that she properly weighed all relevant factors without allocating weight to any improper factor, such as the constitutionality of the statute that was not before her, as discussed *infra*. There were more-than-adequate grounds to support her decision. The trial justice looked to our well-settled caselaw as the ruling standard for motions for leave to file an amended complaint, and properly applied the facts from the record to arrive at her decision.

Simply put, the trial justice concluded that plaintiff's undue delay in seeking the amendment would

create substantial prejudice to defendants. Discovery had closed at least eight months earlier, and the inclusion of the new claims would necessitate additional discovery because the statutory claims were different and more complex than the longstanding common law tort claims. Having observed that "the case would really have to start from square one[,]" the trial justice denied the motion "based upon the proximity to the trial, additional significant discovery, and other pleadings needed in lateness of filing the motion[.]" We discern no error.

The record establishes that there were ample grounds supporting the trial justice's decision. We agree that plaintiff's undue delay in bringing his new claims would create substantial prejudice for defendants, and that no reasonable explanation for the delay was ever provided by plaintiff. In *Gallop II*, we noted that the Superior Court failed to rule on plaintiff's motion for leave to amend his complaint for the second time, and held that "[w]e are of the opinion that the plaintiff is entitled, at the very least, to a reasoned decision on his motion for leave to file an amended complaint." *Gallop II*, 182 A.3d at 1145. We have before us a well reasoned decision, and we are satisfied that the motion to amend was properly denied.

The Plaintiff's Federal and Constitutional Law Arguments

Next, we address plaintiff's efforts to advance arguments that Rhode Island's civil death statute is

unconstitutional on various grounds. In doing so, we do not reach the merits. Rather, we set forth the reasons that this issue is barred by this Court's so-called "raise-or-waive" rule and procedural law.

The raise-or-waive rule is a fundamental rule in this state that is "staunchly adhered to" by this Court. *Cusick v. Cusick*, 210 A.3d 1199, 1203 (R.I. 2019) (quoting *Rohena v. City of Providence*, 154 A.3d 935, 938 (R.I. 2017)). "[I]t is well settled that a litigant cannot raise an objection or advance a new theory on appeal if it was not raised before the trial court." *Id.* (quoting *Rohena*, 154 A.3d at 938).

However, "[w]e have recognized that an exception to the raise-or-waive rule arises when basic constitutional rights are involved[.]" *Cusick*, 210 A.3d at 1204 (quoting *In re Miguel A.*, 990 A.2d 1216, 1223 (R.I. 2010)). For the exception to apply, "the alleged error must be more than harmless, and the exception must implicate an issue of constitutional dimension derived from a novel rule of law that could not reasonably have been known to counsel at the time of trial." *Id.* (quoting *In re Miguel A.*, 990 A.2d at 1223); *see State v. Burke*, 522 A.2d 725, 731 (R.I. 1987) (providing that the exception may apply, for example, "when an intervening decision of this [C]ourt or of the Supreme Court of the United States establishes a novel constitutional doctrine" during the course of a trial).

Here, plaintiff seeks to challenge § 13-6-1 on federal and state constitutional grounds. However, that opportunity has passed, and the only issue before this

Court is whether the trial justice abused her discretion when she denied plaintiff's motion for leave to file a second amended complaint.

The sequence of events in the present case is apparent from the record before us. Neither plaintiff nor defendants raised the issue of Rhode Island's civil death statute and the impact it might have on the case prior to trial. The trial justice raised the issue *sua sponte*, and she appropriately continued the matter to afford the parties an adequate opportunity to research, brief, and argue the statute's applicability. The defendants moved to dismiss, and plaintiff opposed that motion and moved to file a second amended complaint.

Before this Court in *Gallop II*, plaintiff argued that the civil death statute is invalid under the Supremacy Clause "to the extent it impairs a plaintiff's capacity to sue under 42 [U.S.C. §] 1983 and other civil statutes" – statutes that he failed to name. However, there were no federal civil rights claims before the trial justice when she dismissed the complaint, and none before this Court in *Gallop II*.

The raise-or-waive rule controls this issue, and the narrow exception for a novel rule of law that could not reasonably have been known to counsel at the time of trial is not applicable. Rhode Island's civil death statute has been on the books since it was enacted in 1909. The plaintiff's opportunity to argue that, under the Supremacy Clause, the federal civil rights claims are not barred by the state civil death statute would arise only

if those claims were allowed in a second amended complaint. They were not.

Because the only issue before this Court is whether the trial justice abused her discretion when she denied plaintiff's motion for leave to file a second amended complaint, we reject this assignment of error. The plaintiff's opportunity to challenge the civil death statute's constitutionality before this Court was confined to federal civil rights claims. Those claims were not before the trial court and are not before us.

Conclusion

For the reasons articulated in this opinion, we affirm the judgment of the Superior Court. The papers in this case may be remanded to the Superior Court.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, Sc.		**SUPERIOR COURT**
DANA GALLOP	)	
	)	
VS.	)	
STATE OF RHODE ISLAND DEPARTMENT OF CORRECTIONS; IAN ROSADO; MATTHEW GALLIGAN	)	**NO: PC-2010-6627**

HEARD BEFORE THE HONORABLE MS. JUSTICE SARAH TAFT-CARTER

JULY 23, 2018

APPEARANCES:

RONALD RESMINI, ESQUIRE
FOR THE PLAINTIFF

MICHAEL FIELD, ESQUIRE
FOR THE DEFENDANT

ANDREA IACOBELLIS, CSR

CERTIFICATION

I, Andrea Iacobellis, CSR, hereby certify that the succeeding pages, 1 through 22 inclusive, are a true and accurate transcript of my stenographic notes.

_____

ANDREA IACOBELLIS, CSR
Court Reporter

[3] **Monday, July 23, 2018**

(Morning session)

THE CLERK: Civil matter **PC-2010-6627, Dana Gallop v. Adult Correctional Institution.** Come forward, please.

MR. RESMINI: Good morning, your Honor.

THE COURT: Good morning.

THE CLERK: Could you please state your name for the record.

MR. RESMINI: Ronald Resmini for the plaintiff.

MR. FIELD: Michael Field for the State, defendants, your Honor.

THE COURT: Is your client here?

MR. RESMINI: No, your Honor.

THE COURT: Alright. This is down for a motion to amend, on remand from the supreme court.

MR. RESMINI: Yes.

THE COURT: Do you want to argue the case?

MR. RESMINI: Yes, your Honor, I want to argue. As the Court is aware, this case has a very interesting history to it. At one point back the case was reached for trial, the Court recognized that this case conflicted with the civil death statute and the matter

was arguably dismissed. It went to the Supreme Court, and the Supreme Court, generally speaking, upheld your Honor on many of [4] her rulings; with the exception of the fact of what we're here today. It's on place for motions to amend. What I will do now succinctly is just address certain saline points that were brought out by the state in their memorandum. Of interest, which hasn't really been elaborated but been referenced to, is the comment in an interrogatory that was provided by my client that said he wasn't sure whether or not his civil rights were violated. I think it's very important for the Court to realize that certainly my client is not the one to define whether or not his civil rights have been violated, even myself as the attorney for the subject plaintiff is really not the final definition as to whether or not one's rights have been violated; that would be up to the court, that would be up to the jury, depending on what the situation happens to exist at the time of the hearing and the trial.

So I don't believe there's any significant defect of having that comment being considered to be a negative. What it certainly does suggest is that there is a question as to whether or not his civil rights were violated.

Now, let's transfer ourselves to the main issue under Rule 52 on the liberal interpretation of amending the complaint. The history in Rhode Island, in fact [5] every jurisdiction, in fact even in the United States Supreme Court rulings is there's a very liberal review as to allowing the motions to amend. I recall many years ago in a case that I took to the Rhode Island Supreme

Court called Tacito vs. Mello, where the very succinct and brief allegation that didn't include venue, the Supreme Court indicated it wasn't necessary to do so because the ruling in the review in our own book of civil procedures, when it shows the form complaint, has a very, very lax interpretation as to what happens to be the complaint.

Of significance in the case, it was definitely addressed in the Supreme Court, it appears, is whether or not plaintiff in his first complaint when he referenced his, I think it was violation of civil rights. Unfortunately, that terminology, even though it should be connoted to a 1983 violation, has not been agreed to by the Supreme Court. It appears that you need to mention Section 1983, just mentioning an individual's violation of civil rights does not seem to be sufficient.

So, moving on from that. Now we talk to the, we address the latitude and the flexibility and the discretionary powers of this Court in allowing a motion to amend. Counsel for the State has cited three cases. I believe it's **Faerber**, **Harodite** and **Carter**. In each of [6] those cases the State seems to want to say that that case; or those cases, prevent the amendment in a case such as this because of undue delay, and also in changing the significant content of the nature of the complaint. I am hard pressed to understand and realize what additional discovery, witnesses or whatever would be necessary in treating this matter as a violation of one's civil rights. The principal parties in this case have been deposed ad nauseam. It's my clients, it's the individual who, you know, slashed my client's

throat. It's the guard at the ACI who left his post, and there is nothing else really to be done in this case. In actuality, this case could be tried on, you know, on a civil rights case just as easily as a negligence case. So, as much is attempting to be made about saying there's a huge distinction but it's a distinction that I say clearly is without a difference, that the case that they refer to, on one of those three cases, had to do with employment discrimination, an entirely different, you know, situation then what we have here. To claim employment discrimination you need to bring in all different types of witnesses that changes the contents of the allegation in the first case. We do not have that situation here confronted before this Court.

So I say to this Court, to serve the ends of justice [7] for not only, you know, the definition of justice, as we've all learned it to be. I think it was Black's Law dictionary said that it's a practical science having to do with the affairs of life and instituted with the intentions to serve justice. The only way that justice would be served in this case is for Mr. Gallop to have his day in court and let the chips fall where they may, because there's been transgressions on his protection of safety, that regardless of our definition of what an individual is we all, we're all made up of the same contents, and we're all considered to have the individual rights of protection, regardless of what our past would bring forward.

So I would ask the Court in its discretion to implement Rule 52 and allow this case to go forward for trial. Thank you.

MR. FIELD: Good morning, your Honor. Much of the questions or much of the issues that are put forth by the plaintiff have already been answered by the Rhode Island Supreme Court. They've been answered in Gallop. The point that Mr. Resmini just made about; there's no additional discovery to be made in this case, it's essentially the same case that has been brought forth for the last six years, last eight years now. It was also answered by the Supreme Court.

[8] The Court noted in Gallop that the practice of changing the entire nature of the case from a negligence claim to a civil rights action after trial was scheduled to begin has been condemned by this Court, and that's precisely the issue that's being put forth by the plaintiff now.

This case has been a negligence claim since 2010, when it was filed. This court noted it two years ago, when this matter was originally before the court. The Supreme Court noted it in it's opinion several months ago at various points, and perhaps most importantly, the Court repeated this Court's statements and this Court's observations that this was always a negligence claim. This was never a 1983 claim. And your Honor's last sentence is it's too late to amend, which the Court noted, which the Supreme Court noted that your Honor's Observation was "correctly noted."

Your Honor previously in 2016 did everything but come to the final conclusion and the final sentence. Your Honor's prior observations made clear, as did the Supreme Court, that the case law did not allow for, or

in the court's exercise of discretion, allow for amendment. The Court has, the Rhode Island Supreme Court has upheld amendments with less time. In particularly, Harodite, where there was only four years from the time the [9] original complaint was filed until the time of amendment. There was four years. The court upheld that. So not only does the case law not allow it, not only is the burden on the plaintiff to show that they – to show and to allow for amendment. The court noted, the Rhode Island Supreme Court noted in **Faerber**, they cited a 1st circuit case, that when a considerable period of time has passed between the filing of the complaint and the motion to amend, the Court's have placed the burden upon the movant to show some valid reason for his neglect and delay. The plaintiff has not shown any showing to satisfy that burden whatsoever. So the case law clearly favors the State on this point.

And in addition to the case law, and I don't think this point should be overlooked at all. The evidence here doesn't provide for or require amendment. This is a situation where the plaintiff is coming forth with a federal claim. There's not been any evidence that's been discovered that there's a federal violation of any of the plaintiff's rights. Mr. Resmini already noted interrogatory 12, where the plaintiff has said that he's not sure if his civil rights have been violated. Regardless of whatever gloss the plaintiff puts on that, there is no evidence that the plaintiff came forward in that interrogatory, that was answered with legal [10] counsel's assistance, that showed any evidence of a civil rights violation.

The proposed second amended complaint, which is what we're here before, actually goes against the plaintiff's whole theory. Paragraph 13 says on April 26, 2010, which is the day of incident, defendant Galligan advised defendant John Doe, that defendant Rosado was going to assault the plaintiff, and the complaint makes clear that the John Doe that the plaintiff is referring to are. correctional officers. The allegation in the second amended complaint that Matthew Galligan, the correctional officer, advised other correctional officers, is clearly inconsistent with some sort of a deliberate indifference or constitutional violation type of theory. And even in the memo that's before the Court, the plaintiff's memo, the second paragraph on Page 1, notes that the basic premise of this action is that prison guards are charged with the duty under state and federal law to reasonably protect inmates incarcerated at the ACI from injuries or assaults by other inmates. The plaintiff is still trying to plead a negligence case. Clearly they're trying to show and trying to demonstrate a federal claim by trying to put a federal claim in a negligence pay. And amendment in this case with a federal claim is no more appropriate than the amendment, and the facts no more [11] demonstrated, that an amendment would be for a breach of contract action. So for those reasons we ask that the court deny the motion.

THE COURT: Thank you. Before this court for decision is the plaintiff's motion to file a second amended complaint, and the defendant's objection. Jurisdiction is pursuant to Superior Court Rule 15. Facts

are as follows: On or about April 26, 2010, the Plaintiff, Dana Gallop, was attacked by a fellow inmate at the ACI. As a result, the plaintiff sustained lacerations and it is alleged permanent scaring to his face. The plaintiff alleges that on the day before the attack, Mr. Rosado told Officer Matthew Galligan, a correctional officer at the ACI, that Rosado intended on attacking the plaintiff. The plaintiff alleges that Officer Galligan abandoned his post for 18 minutes, allowing such attack.

The reason for which plaintiff was being held at the ACI was for his conviction on first degree murder, felony assault, use of a firearm when committing a crime of violence, carrying a pistol without a license and possession of a firearm by a person convicted of a crime of violence who is a fugitive from justice. These convictions, he was convicted of these and he was sentenced to two consecutive life sentences, plus an [12] additional 20 years to be served consecutively; two, 10 year, sentences and as a habitual offender 25 years to serve.

The plaintiff timely appealed his conviction to the Rhode Island Supreme Court, where it was affirmed on May 2nd, 2014 in **State v. Gallop 89, A.3d, 795**. The Plaintiff filed this complaint in the Rhode Island Superior Court on November 10, 2010, alleging two counts of negligence against the defendant at the ACI, State of Rhode Island and various John Does. The civil case cover sheet accompanying the plaintiff's complaint listed the nature of the proceeding as a personal injury.

On April 12, 2013, the plaintiff filed an amended complaint adding defendants, Ian Rosado and Matthew Galligan, as well as two additional counts for personal injury sustained by a person in connection with the attack. Discovery commenced and was completed on or before the pretrial order date of November 20, 2015.

On November 20, 2015, a control conference was held, as a result a pretrial order was filed ordering the parties to list all complex legal issues and a pretrial memorandum that was to be filed before the Court.

On May 10, 2016, the plaintiff filed his pretrial memorandum, which did not list or mention any claims involving violations of federal constitutional law, state [13] constitutional law or plaintiff's civil rights, based on any federal or state statute.

The plaintiff's memorandum identified claims sounding in negligence only, that's listed on the pretrial memorandum, plaintiff's – at Page 2. A trial date was set for June 23, 2016. At the pretrial conference held prior to the trial, the jurisdictional issue of the civil death statute, Rhode Island General Law 361, was raised by the trial judge.

The parties were given an opportunity to brief and argue the issue. That same day the defendant filed a motion to dismiss, based on the civil death statute. The plaintiff objected.

On July 12, 2016, the plaintiff filed a motion to file a second amended complaint alleging claims pursuant

to 42 U.S.C. Section 1983 and 1988, 8th and 14th amendments to the United States Constitution, and a violation of Rhode Island Constitution and civil rights and Rhode Island common law. The Court held a hearing on July 28th and granted the defendant's motion to dismiss, based on the civil death statute. The plaintiff timely appealed on August 2nd, 2016, that was the date of the appeal.

On May 21, 2018, the Rhode Island Supreme Court issued its opinion affirming in part, reversing in part [14] and vacating in part the judgment of the superior court. The Court found that the issue in this case is not – the court listed several issues in this case, but remanded it on the issue with respect to the motion to amend. Superior Court rules of civil procedure, Rule 15, applies in these type of motions and that rule should be it should liberally allow amendment acts of showing of extreme prejudice **Weybosset Hills LLC v. Rossi, 857 A.2d 231 at 236**. **Westburger v. Pepper 583 A.2d 77**. The decision to grant or deny a motion to amend is confined to some discretion of the trial judge. Our Supreme Court has stated that the true spirit of. the rules is fighting words and these should be freely granted when justice requires **Richard v. John Hancock 113 R.I. 528**.

However, a trial judge may deny the motion to amend because of undue delay, prejudice, bad faith, futility of the amendment or some other compelling reasons **Medeiros v. Cornwall, 911 A.2d 251**.

With respect to the parties delaying the right to amend, their delay is insufficient as a reason to deny an amendment. The hearing judge must find that such delay creates substantial prejudice to the opposing party, **Paradise Industries, Inc. 224 A.3rd at 529**.

Therefore, when deciding whether to allow an amendment, the trial judge must inquire as to the degree [15] of prejudice, if any, the opposing party would suffer should the Court permit an amendment **Faerber v. Cavanaugh, 568 A.2d 326 at 329**. Moreover, the burden rests on the party opposing the motion to show it would incur substantial prejudice if the motion to amend was granted, **Wachsberger, 583 A.2d at 78** quoting **Babbs v. John Hancock Mutual Life, 507 A.2d, 1347**.

In this case, the plaintiff argued that its motion should be granted because grounds for the denial based on undue delay are insufficient and have not caused extreme prejudice to the defendant. The plaintiff asserts that there is no new cause of action requiring significant work or preparation because the alleged new theory of liability was specifically plead in Count 2 of the plaintiff's amended complaint filed on April 12, 2013. The defendant argues that the plaintiff is precluded from asserting causes of action, and under the theories of recovery in the second amended complaint in accordance with relevant statutes of limitations, the defendant asserts that the plaintiff's motion to – the motion is a product of undue delay and the allowance of which would cause extreme prejudice to the defendant. The defendant notes that the additional claim

alleged in the second amended complaint against Officer Galligan in his individual and official capacity will require the [16] reopening of significant discovery but that a new discovery would be frustrated by the memories of the parties, the relevant witnesses, due to the six year gap that's occurred.

In addition, the defendant argues that the plaintiffs have alleged no reasonable explanation to justify the six year delay. Here, the plaintiffs first argue that in the memo that there is no cause of action asserted because the theory was plead in Count 2 of the. April 2nd, 2013 amended complaint where the plaintiff used the word "violation of civil rights". While the. Court recognizes that the plaintiff did assert these words into the complaint, the plaintiff failed to proceed on any theory on this action upon the theory that the civil rights were violated. The plaintiff failed to conduct any discovery on that theory, and today, the plaintiff argues that the answer "not sure what civil rights have been violated" is not conclusive of the ultimate issue.

While the Court recognizes the role of the fact-finder, the facts remain that the plaintiff did not move forward with the claim during the pretrial procedure, and it's the Court's experience that most answers to interrogatories would have listed facts upon which the plaintiff relies in alleging a violation of the [17] civil rights, if they were proceeding on it.

The plaintiffs failed to brief this; any civil right issue in the pretrial memorandum. The plaintiff did nothing to alert the defendants or the Court that this

case involved a violation of the civil rights and that would be a topic at trial. Well, it could be argued that the civil rights violation was plead but certainly was not pursued as a cause of action. The Court finds instructive the case of **Pullar v. Cappelli, 148 A.3rd 551, (RI 216)**. In that case our Supreme Court held that the defense of lack of personal jurisdiction may be forfeited or abandoned through unwarranted delay or subsequent conduct in defending the case, even where it was pled in the complaint or answer.

In Pullar, the defendant filed an answer averring lack of jurisdiction, lack of personal jurisdiction. The case proceeded to over a period of three years with the parties engaged in discovery, court index arbitration, and the case had been set for trial before the defendant finally filed a motion for summary judgment, based on the theory of lack of personal jurisdiction. The court found that the delay produced a "unfair hardship on the plaintiffs, it subject them to a disadvantage of attempting to assemble proof, the effectiveness of which may well be severely deluded by the passage of time" and [18] see the Pullar case, quoting **Vozeh v. Good Samaritian, F.R.D. 143**.

Additionally, the courts found that even though the defendant asserted the jurisdictional affect in the answer, the defense was not presented – the defense was not preserved for perpetuity. That's **Pullar**, quoting **Yeldell v. Tutt**. The Court noted that the defense may be lost by failure to assert seasonably by formally submission in cause or submission through conduct.

While the Court recognizes that Rule 8 requires a short and plain statement of the claims showing that the pleading is entitled to relief, the case rings similar. This case rings similar to the **Pullar** case. Here, the case was the subject of discovery and the plaintiff failed to answer the same with an eye towards the civil rights claim, to the extent that the plaintiff failed to proceed in this matter, the claim is waived and forfeited.

With respect to extreme prejudice and undue delay, in **Wachsberger**, W-a-c-h-s-b-e-r-g-e-r, at **583 A.2d at 79**. The Rhode Island Supreme Court held that in order to deny a motion to amend on the basis of delay "the trial justice must first find that such delay creates substantial prejudice to the opposing party." As to such a finding, the denial cannot be upheld, at the same time [19] it should also be born in mind that we have explicitly observed that the risk of substantial prejudice generally increases with the passage of time. **Harodite case, 24 A.3d. 514, RICO CORP v. Town of Exeter, 836 A.2d, 212**. In **Faerber, 568 A.2d at 329**, the Supreme Court examined what constitutes undue delay. In it's analysis the Court adopted the holding in **Carter v. Supermarket General Corporation, 684 F.2d 187 at 192**, noting that when a considerable period of time has passed between the filing of a complaint and motion to amend, courts have placed the burden upon the movant to show that some valid reason for neglect and delay exists, quoting **Carter at 192**.

Here, the motion was filed. The motion to amend was filed on the eve of trial, after the trial judge raised the issue of the civil death statute. The court was assigned. The trial was assigned to a date certain of June 23, 2016. Discovery had closed at least eight months prior to the filing of the motion. Trial strategies had been planned and witnesses had been prepped. Any continuance, based upon the addition of the constitutional challenge, would necessitate the reopening of discovery. These claims are vastly different and more complex.

In addition, the plaintiff seeks punitive damages in the new complaint. The defendant's excessive delay would [20] also result in witnesses who may not remain responsive to the state inquiries would also exist.

The defendant knows that the witnesses in the criminal action were incarcerated at the time of the alleged assault, and in many instances former inmates are transients. Seeking them out now would require great efforts at the defendant's expense.

Additionally, these witnesses who are available now are at a distinct disadvantage if the case is continued because the event occurred more than eight years ago. The loss of memory over time of the events will cause an extreme prejudice to the defendant as the **Harodite** case at **218**.

Here a delay in the trial will result in the defense conducting new significant work in preparation of substantial claims, as well as the punitive damage claim now alleged by the plaintiff. This would clearly result

in extreme prejudice. See **Granoff v. Rossi, 823 A.2d 296, 298** and **Vincent v. Musone 572 A.2d, 280**.

The plaintiff is changing the entire nature of the case from a negligence claim to a civil rights action, while also adding a claim for punitive damages after the trial was scheduled to begin. This would result in the reopening of discovery and the commencement of legal research on all issues; including the formation of [21] defense and defense strategy, adding additional claims based on the constitutional violation. The Rhode Island Civil Rights Act and punitive damages at this juncture clearly shifts the focus of this case, would require additional significant discovery and dispositive pleadings to be filed and heard and would require the defendant to re-strategize in order to prepare the defendant in theory. That's the **Harodite** case at **532**. No discovery pertaining to these newly raised claims the. plaintiff now seeks to press has been conducted over this time frame. In addition, the plaintiff failed to list either federal and state constitutional claims or the civil rights claim under the "complex legal issues" section in the pretrial memorandum. Punitive damages were not listed there also. Notably, the plaintiff waited years to clarify the counts, which he now seeks to add into the second amended complaint of which he had significant opportunity to do so before discovery closed and the trial commenced.

Moreover, if the plaintiff were allowed to amend the amended complaint to add these new claims, the case would really have to start from square one. Officer Galligan may consider whether the suit would be

removed to a federal court, that's one issue one of the defendants would have to consider at **28 U.S.C. Section 1441**.

[22] Moreover, the plaintiff has not given the court a reasonable explanation for his delay in seeking to amend the complaint. The filing of this motion can be for no other purpose than to survive the defendant's motion to dismiss, and that's in the Supreme Court opinion at 10.

Therefore, based upon the proximity to the trial, additional significant discovery, and other pleadings needed in lateness of filing the motion, the plaintiff's motion to file a second amended complaint is denied.

The delay of filing the second amended complaint would result in extreme prejudice to the defendant. The plaintiff's motion was filed on the eve of trial, after the closure of discovery, after trial strategy had been planned and after witnesses had been prepped.

Moreover, the plaintiffs failed to establish a reasonable explanation for its delay in moving to amend the complaint. For these reasons, the Court denies the motion to amend the second amended complaint. Thank you.

A-D-J-O-U-R-N-E-D

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182 A.3d 1137
Supreme Court of Rhode Island.

Dana GALLOP
v.
ADULT CORRECTIONAL INSTITUTIONS et al.

No. 2016-278-Appeal.
|
(PC 10-6627)
|
May 8, 2018

Attorneys and Law Firms

For Plaintiff: Ronald J. Resmini, Esq., Providence

For Defendants: Ariele Yaffee, Special Assistant Attorney General, Michael Field, Assistant Attorney General, Providence

Present: Suttell, C.J., Goldberg, Flaherty, Robinson, and Indeglia, JJ.

OPINION

Justice Goldberg, for the Court.

This case came before the Supreme Court on February 14, 2018, on appeal by the plaintiff, Dana Gallop (plaintiff or Gallop), from an order entered in the Superior Court granting the State defendants'

(defendants or the State) motion to dismiss based on G.L. 1956 § 13-6-1, Rhode Island's civil death statute.[1]

Before this Court, plaintiff argues that: (1) the trial court erred in ruling that the civil death statute required dismissal of the complaint; (2) the trial court erred because the civil death statute in Rhode Island, to the extent that it impairs a person's capacity to sue under 42 U.S.C. § 1983, is invalid under the Supremacy Clause of the United States Constitution; (3) any state law that precludes access to state remedies available to litigate claims for alleged violations of any federal rights under color of law is invalidated by § 1983; and (4) the trial court erred in ruling that this case was not a civil rights action and in failing to address plaintiff's motion for leave to file a second amended complaint. For the reasons set forth herein, we affirm in part and reverse in part, and vacate the judgment of the Superior Court.

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[1] General Laws 1956 § 13-6-1, also known as the civil death statute, provides:

> "Every person imprisoned in the adult correctional institutions for life shall, with respect to all rights of property, to the bond of matrimony and to all civil rights and relations of any nature whatsoever, be deemed to be dead in all respects, as if his or her natural death had taken place at the time of conviction. However, the bond of matrimony shall not be dissolved, nor shall the rights to property or other rights of the husband or wife of the imprisoned person be terminated or impaired, except on the entry of a lawfully obtained decree for divorce."

Facts and Travel

The plaintiff has alleged that, on or about April 26, 2010, while he was being held as a pretrial detainee at the Adult Correctional Institutions (ACI), he was attacked by a fellow inmate, Ian Rosado (Rosado). As a result of this attack, plaintiff suffered lacerations and permanent scarring on his face. In his complaint, plaintiff alleges that Rosado, on the day before the attack, told defendant Matthew Galligan (Galligan), a correctional officer at the ACI, that he was going to attack plaintiff. The plaintiff has also alleged that Galligan informed various John Doe defendants of Rosado's planned attack, and that Galligan abandoned his post for eighteen minutes on April 26, 2010, in order to provide Rosado with an opportunity to assault plaintiff.[2]

On May 12, 2010, plaintiff was convicted of the following crimes, for which he was being detained: first-degree murder, felony assault, using a firearm when committing a crime of violence, carrying a pistol without a license, and possession of arms by a person convicted of a crime of violence or who is a fugitive from justice. He was subsequently declared a habitual offender. The trial justice sentenced plaintiff to two consecutive life sentences, plus an additional twenty-year

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[2] These John Doe defendants are not before the Court. Having failed to identify them during discovery, plaintiff is precluded from proceeding against them. *See Ensey v. Culhane*, 727 A.2d 687, 690 (R.I. 1999) ("The complaint does refer to a number of unnamed state police officers who are characterized as John Does. Nevertheless, unless these John Doe defendants are named and served with process within a reasonable time after their identities become known, they may not be considered parties to the case.").

sentence to be served consecutively to the second life sentence, two ten-year sentences to run concurrently with the first life sentence, and, as a habitual offender, to an additional twenty-five-year sentence, to be served after the other sentences and to be served without the possibility of parole. Thereafter, on November 10, 2010, plaintiff filed an initial civil complaint alleging negligence on the part of defendants for the April 26, 2010 attack. The plaintiff then filed an amended complaint on April 12, 2013. The plaintiff timely appealed his conviction, and this Court affirmed the conviction. *State v. Gallop*, 89 A.3d 795 (R.I. 2014). Final judgment of conviction entered on May 2, 2014. The civil action proceeded in the ordinary course.

The day before trial was scheduled to commence, the trial justice *sua sponte* raised the issue of the civil death statute, in light of plaintiff's sentences of life imprisonment. The defendants immediately responded with a motion to dismiss the case in accordance with § 13-6-1, arguing that plaintiff was deemed civilly dead and that, therefore, his civil rights and property rights effectively were terminated. On July 12, 2016, plaintiff filed a motion for leave to file a second amended complaint, which proposed to add a claim for violations of plaintiff's constitutional rights under color of law. The defendants objected, arguing that it would cause undue delay, futility, and prejudice to defendants. The plaintiff also objected to defendants' motion to dismiss the case based on § 13-6-1, arguing that: (1) the civil death statute was not applicable to this case; (2) the civil death statute in Rhode Island is invalid under the

Supremacy Clause to the extent that it impairs plaintiff's capacity to sue under § 1983; and (3) § 1983 invalidates any state law that precludes access to state remedies.

On July 28, 2016, the trial justice granted defendants' motion to dismiss based on the civil death statute, declaring that the Superior Court had "no jurisdiction to hear this case. Therefore, the complaint is dismissed." The trial justice did not address plaintiff's motion for leave to file a second amended complaint. The plaintiff timely appealed. Before this Court, plaintiff argues that § 13-6-1 does not require dismissal of his complaint, and that the trial justice erred in failing to address his motion to file a second amended complaint.

Standard of Review

A motion to dismiss under Rule 12(b)(1) of the Superior Court Rules of Civil Procedure "questions a court's authority to adjudicate a particular controversy before it." *Boyer v. Bedrosian*, 57 A.3d 259, 270 (R.I. 2012). This Court reviews a trial justice's decision on a Rule 12(b)(1) motion *de novo*. *Id.* In this instance, the Court "is not limited to the face of the pleadings. A court may consider any evidence it deems necessary to settle the jurisdictional question." *Id.*

This Court consistently has held "that the decision to grant or to deny a motion to amend a complaint is confided to the sound discretion of the hearing justice." *Harodite Industries, Inc. v. Warren Electric Corporation*,

24 A.3d 514, 529 (R.I. 2011). "[W]e afford 'great deference to the trial justice's ruling on a motion to amend.'" *Id.* (quoting *Catucci v. Pacheco*, 866 A.2d 509, 513 (R.I. 2005)). This Court "shall not disturb that decision unless it constitutes an abuse of discretion." *Normandin v. Levine*, 621 A.2d 713, 715 (R.I. 1993).

Analysis

The Civil Death Statute

The loss of civil status as a form of punishment is a principle that dates back to ancient societies. Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. Pa. L. Rev. 1789, 1795 (2012). The ancient Greeks were among the first to divest criminals of their civil rights, "including the right to appear in court, vote, make speeches, attend assemblies, and serve in the army." *Bogosian v. Vaccaro*, 422 A.2d 1253, 1255 n.1 (R.I. 1980). The rationale behind the enactment of civil death legislation was originally based on the principle that a person convicted of a crime was dead in the eyes of the law. *See* Chin, 160 U. Pa. L. Rev. at 1795. Rhode Island adopted its civil death statute in 1909. *See* G.L. 1909, ch. 354, § 59. By 1939, eighteen states still had civil death statutes in effect. Chin, 160 U. Pa. L. Rev. at 1796; *see also Civil Death Statutes-Medieval Fiction in a Modern World*, 50 Harv. L. Rev. 968, 968 n.1 (1937). While statutes imposing collateral consequences for convicted persons have almost all but vanished, New York, the Virgin Islands, and Rhode Island still retain civil death

statutes for persons sentenced to life imprisonment. Chin, 160 U. Pa. L. Rev. at 1798; *See* § 13-6-1; N.Y. Civ. Rights Law § 79-a(1); V.I. Code Ann. tit. 14, § 92. Repeal is the province of the Legislature.

At issue in this case is not whether the Superior Court has subject-matter jurisdiction over this claim, but whether the Court has authority to hear the merits of plaintiff's case in light of § 13-6-1. We answer this question in the negative. The civil death statute plainly states:

> "Every person imprisoned in the adult correctional institutions for life shall, with respect to all rights of property, to the bond of matrimony *and to all civil rights* and relations of any nature whatsoever, *be deemed to be dead in all respects*, as if his or her natural death had taken place at the time of conviction." Section 13-6-1 (emphasis added).

This Court reviews questions of statutory interpretation *de novo*. *See State v. Hazard*, 68 A.3d 479, 485 (R.I. 2013). "In matters of statutory interpretation our ultimate goal is to give effect to the purpose of the act as intended by the Legislature." *Id.* (quoting *Alessi v. Bowen Court Condominium*, 44 A.3d 736, 740 (R.I. 2012)). In cases such as this, "when the language of a statute is clear and unambiguous, this Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings." *Id.* (quoting *Alessi*, 44 A.3d at 740).

We are of the opinion that § 13-6-1 is clear and unambiguous on its face and should be construed according to its plain and ordinary meaning, as intended by the Legislature. *See Hazard*, 68 A.3d at 485. The statute unambiguously declares that a person such as plaintiff, who is serving a life sentence, is deemed civilly dead and thus does not possess most commonly recognized civil rights. Section 13-6-1. The Legislature has enumerated certain exceptions to § 13-6-1—"[h]owever, the bond of matrimony shall not be dissolved"—but there is no exception for claims impacting a prisoner's civil rights. We decline to read such an exception into the statute. Our interpretation of § 13-6-1 leads to the necessary and logical conclusion that the Superior Court had no authority to hear this case, because plaintiff's civil rights were extinguished by operation of law once his conviction became final when it was affirmed on May 2, 2014.

The plaintiff points to *Vaccaro*, and argues that his claim is not barred by § 13-6-1 because his conviction was not final until three-and-a-half years after he filed his initial complaint in this case. *See Vaccaro*, 422 A.2d at 1254. The plaintiff's reliance on *Vaccaro* is misplaced. *See id.* In *Vaccaro*, this Court held only that "the civil-death proviso found in [§] 13-6-1 cannot be triggered until such time as there has been a final judgment of conviction." *Id.* Similar to the defendant in *Vaccaro*, the chronology of this case does not benefit plaintiff. *See id.* Once plaintiff's conviction became final on May 2, 2014, the proviso in § 13-6-1 was triggered, thus rendering his case incapable of adjudication at

the hearing held on July 28, 2016—over two years from the time plaintiff was deemed civilly dead. We also distinguish this case from *Vaccaro* based on the fact that it was Vaccaro, a defendant in a civil case, who sought to invoke immunity from a judgment ordering him to pay a real estate commission to the plaintiff, rather than a plaintiff seeking to assert a legal right. *Id.* at 1253-54. This Court specifically differentiated between the two scenarios, stating that "[§] 13-6-1 was intended to be a limitation on the assertion of any rights by a prisoner serving a life sentence rather than a shield that would insulate him or her from civil liability." *Id.* at 1254.

Subject-Matter Jurisdiction

Although the trial justice in this case raised the issue of the civil death statute *sua sponte*, on the eve of trial, which led to the dismissal of the case—a practice this Court generally frowns upon—she appropriately notified the parties and afforded them ample opportunity to brief the issue; and, in light of the conclusive effect of § 13-6-1 on this case, she was constrained to do so. However, the trial justice and both parties incorrectly identified the issue in this case as lack of subject-matter jurisdiction. The Superior Court has exclusive original jurisdiction over actions at law in which the amount in controversy is at least $10,000. *See* G.L. 1956 § 8-2-14. Clearly, "subject-matter jurisdiction is an indispensable requisite in any judicial proceeding." *Long v. Dell, Inc.*, 984 A.2d 1074, 1079 (R.I. 2009) (quoting *Newman v. Valleywood Associates, Inc.*, 874 A.2d

1286, 1288 (R.I. 2005)). "Subject-matter jurisdiction is the very essence of the court's power to hear and decide a case"; it has been defined as "jurisdiction over the nature of the case and the type of relief sought; the extent to which a court can rule on the conduct of persons or the status of things." *Id.* (quoting Black's Law Dictionary 931 (9th ed. 2009)). While the Superior Court had exclusive original subject-matter jurisdiction to hear the case at bar, whether the court has the authority to do so in light of the statutorily mandated disability is the crux of the issue.

This Court has drawn a distinction between subject-matter jurisdiction and the authority of the court to proceed. *See Chase v. Bouchard*, 671 A.2d 794, 795-96 (R.I. 1996); *Hartt v. Hartt*, 121 R.I. 220, 226, 397 A.2d 518, 521 (1979). In *Hartt*, this Court held that the Family Court acquired subject-matter jurisdiction over the matter in that case by statute, G.L. 1956 § 15-11-15, and thus any error assigned to that court was by an excess of jurisdiction and not by acting without subject-matter jurisdiction. *Hartt*, 121 R.I. at 225-26, 397 A.2d at 521, 522. This Court distinguished between subject-matter jurisdiction, acting in excess of jurisdiction, and mere error:

> "These distinctions have often proved difficult to draw. The meaning of the term 'excess of jurisdiction' has been especially elusive. An order in excess of jurisdiction in the context of collateral attack has been defined as one which the court has not the power under any circumstances to make or render. * * * Such

> excess of authority or power is said to be more akin to a want of jurisdiction over the subject matter * * * than to mere error. * * * As a practical matter, however, once a court has jurisdiction over the subject matter and person, it is virtually impossible to distinguish acts in excess of jurisdiction from mere error." *Hartt*, 121 R.I. at 226-27, 397 A.2d at 522.

This Court went on to provide illustrative examples of acting in excess of jurisdiction rather than acting without subject-matter jurisdiction:

> "Thus, if a probate court, invested only with the authority over wills and the settlement of estates of deceased persons, should proceed to try parties for public offen[s]es, jurisdiction over the subject of offen[s]es (would be) entirely wanting in the court * * *. But if on the other hand a judge of a criminal court, invested with general criminal jurisdiction over offen[s]es committed within a certain district, should hold a particular act to be a public offen[s]e, which is not by law made an offen[s]e, and proceed to the arrest and trial of a party charged with such act, * * * those acts would be in excess of his jurisdiction * * * (and) these are particulars for his judicial consideration, whenever his general jurisdiction over the subject-matter is invoked." *Id.* at 228-29, 397 A.2d at 522-23.

Similarly, in *Chase*, this Court upheld its holding in *Hartt* distinguishing "between the absence of [subject-matter] jurisdiction in the fundamental sense and the commission of an error for which a court might be

corrected on appeal, such as an evidentiary ruling or the failure to give effect to a condition precedent or to a defense properly raised by a party to a litigation." *Chase*, 671 A.2d at 796. Ultimately in *Chase*, this Court declared void its previous caselaw holding that the failure to comply with a condition precedent deprived the Superior Court of subject-matter jurisdiction, and instead held that:

> "The Superior Court of Rhode Island is a trial court of general jurisdiction. It is granted subject-matter jurisdiction over all cases unless that jurisdiction has been conferred by statute upon another tribunal * * * [and] the failure to file an account *did not and could not deprive the Superior Court of jurisdiction* to consider * * * the case on its merits." *Id.* (emphasis added).

In the case at bar, the Legislature has unambiguously mandated that persons serving a life sentence are prohibited from asserting civil actions. Section 13-6-1. The plaintiff does not fall under any exception to § 13-6-1, as prescribed by the Legislature; thus he is without recourse. Under our holdings in *Hartt* and *Chase*, it is clear that the Superior Court is vested with subject-matter jurisdiction, in the fundamental sense, over plaintiff's claims; however, it would have been error and an excess of jurisdiction for the Superior Court to consider plaintiff's claims when the Legislature has declared plaintiff to be civilly dead. We cannot imagine a case in which the Superior Court is divested completely of its statutorily-granted subject-matter

jurisdiction. We do, however, hold that, in cases such as this, it would be error for the Superior Court to proceed. We conclude that the trial justice prudently and accurately dismissed the case.

The Second Amended Complaint

On appeal, plaintiff argues that the trial justice erred in failing to address his motion to file a second amended complaint. This Court agrees. On July 12, 2016, after the trial justice raised the issue of the civil death statute *sua sponte*, plaintiff moved for leave to file a second amended complaint and provided a copy to the trial justice. Without addressing plaintiff's motion, the trial justice granted defendants' motion to dismiss the case on the basis of § 13-6-1. The plaintiff's proposed second amended complaint specifically named Galligan in his individual and official capacities and raised, for the first time, claims under 42 U.S.C. §§ 1983 and 1988; the Eighth and Fourteenth Amendments to the United States Constitution; the Rhode Island Constitution; and the Rhode Island Civil Rights Act.

The plaintiff attempted to add a § 1983 claim because, he contends, that statute precluded the Superior Court from dismissing his complaint based on his interpretation that § 1983 "invalidates any state law which stands in the way of any person filing suit to vindicate violation of federal protected rights" "under color of law[.]" The plaintiff has failed to produce any authority that holds that a state court is bound to hear

a § 1983 action where this Court has deemed the party to be civilly dead. Rather, plaintiff simply argues that the phrase "or other proper proceeding for redress" set forth in § 1983[3] must include "not only violations of civil rights under color of law, but also *related* tortious acts associated with the violation of constitutional rights—and that any state law which prevents anyone from filing suit is invalid under the broad language of § 1983." (Emphasis in original.) The plaintiff's generic assertions are unaccompanied by jurisdictional support, which will be necessary on remand.

Under this Court's procedural law, plaintiff is prohibited from adding new claims and new parties six years after his injury and after the statute of limitations has run. *See DeSantis v. Prelle*, 891 A.2d 873, 878 (R.I. 2006) (holding that the plaintiff was barred from bringing a claim against a new party after the three-year statute of limitations had run). The practice of changing the entire nature of a case from a negligence claim to a civil rights action after the trial was scheduled to begin has been condemned by this Court. *See*

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[3] The plaintiff points to 42 U.S.C. § 1983, which provides, in relevant part:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, *or other proper proceeding for redress* * * * ." (Emphasis added.)

Faerber v. Cavanagh, 568 A.2d 326, 330 (R.I. 1990) ("An addition of a new claim close to trial when discovery is essentially complete and trial strategy already planned invariably delays the resolution of a case, and delay itself may be considered prejudicial * * * especially where excessive delay has already occurred." (quoting *Andrews v. Bechtel Power Corporation*, 780 F.2d 124, 139 (1st Cir. 1985))). The trial justice correctly noted in her decision dismissing the case:

> "There was no 1983 claim pled or filed. This case was ready trial. It was ready trial on a negligence suit. The plaintiff did not plead any civil rights action. And I understand that we have very liberal pleading in our state. However, the fact is this case was a go for trial. It was a go on a negligence claim. And it was not a go on a civil rights claim. It's too late."

Nevertheless, we conclude that the trial justice should have addressed the plaintiff's second amended complaint before granting the defendants' motion to dismiss. Although we consistently have held "that the decision to grant or to deny a motion to amend a complaint is confided to the sound discretion of the hearing justice[,]" the trial justice is nonetheless required to rule on the motion. *Harodite Industries, Inc.*, 24 A.3d at 529. This Court cannot review the trial justice's decision granting or denying a motion to amend for abuse of discretion if the trial justice has not exercised that discretion. *See id.*; *see also Normandin*, 621 A.2d at 715. We are of the opinion that the plaintiff is entitled,

at the very least, to a reasoned decision on his motion for leave to file an amended complaint.

Conclusion

Accordingly, we vacate the judgment of the Superior Court and remand this case to the Superior Court with directions to hear and decide the plaintiff's motion to amend his complaint—upon the merits of which we take no position. The papers may be remanded to the Superior Court.

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS

PROVIDENCE, SC.		SUPERIOR COURT
DAWN GALLOP	)	
	)	
VS.	)	CASE NO: PC/2010-6627
	)	
ADULT CORRECTIONAL INSTITUTE, et al	)	

HEARD BEFORE THE
HONORABLE JUSTICE SARAH TAFT-CARTER

ON THURSDAY, JULY 28, 2016

MOTION TO DISMISS

APPEARANCES:

RONALD J. RESMINI, ESQUIRE
.....FOR THE PLAINTIFF

KELLY MCELROY, ESQUIRE and
MICHAEL RESNICK, ESQUIRE
OFFICE OF THE ATTORNEY GENERAL
.....FOR THE DEFENDANTS

IAN ROSADO, PRO SE

MARY M. GUGLIETTI, RPR
CERTIFIED COURT REPORTER

CERTIFICATION

I, Mary M. Guglietti, hereby certify that the succeeding pages, 1 through 12, inclusive, are a true and accurate transcript of my stenographic notes.

/s/ Mary M. Guglietti
MARY M. GUGLIETTI, RPR
Certified Court Reporter

[1] **THURSDAY, JULY 28, 2016**

MORNING SESSION

THE COURT: Call this case, please.

THE CLERK: All right. Your Honor, the matter before the Court is PC/2010-6627, Dana Gallop v. The Adult Correctional Institute.

Would the plaintiff please rise. Please state your name and date of birth for the record, sir.

MR. GALLOP: Dana Gallop, October 22nd, 1984.

THE CLERK: Thank you. And would the plaintiff's attorney please state your name.

MR. RESMINI: Ronald Resmini.

THE CLERK: Thank you. And would the defendant please rise and state your name, sir, and date of birth.

MR. ROSADO: Ian Rosado, 4-6-91.

THE CLERK: Thank you. And the State's attorney.

MS. MCELROY: Good morning, Your Honor. Kelly McElroy for the state defendants.

MR. RESNICK: Your Honor, Michael Resnick for the same.

THE COURT: Thank you. Mr. Rosado, you represent yourself, correct?

MR. ROSADO: Yes.

THE COURT: Thank you. You may be seated, sir.

Before the Court are two motions. One is the state [2] defendants' motion to dismiss for lack of subject matter jurisdiction. The second is the plaintiff's motion to amend the complaint. I have received and reviewed the motions and the objections.

Mr. Resmini, is there anything you would like to place on the record?

MR. RESMINI: Yes, if I may, Your Honor. May I please? I mentioned to counsel a moment ago that – two revelations I've had in the last 12 hours. One was at one o'clock in the morning, it had to do with a review of that statute, civil death statute, 13 whatever it is.

THE COURT: 13-6-1.

MR. RESMINI: 6-1. And in taking a close look at that, it mentions that the individual surrenders his civil rights, then it goes into the exceptions, into certain domestic categories, and it talks about property rights. But what it doesn't mention at all is any type of assaulting to the person. So with that curiosity, you know, begging me, I then took a look at I think it's Section 1983, the Civil Rights Act, which we tend in our memorandum to go back to to try to draw some life into the case, and in that particular Civil Rights Act they talk about injuries to the person.

So my thought was that I think really when that statute came into play, and is very seldom put in [3] application, they never – they never intended to give up one's cannon law rights that he would. have, I say, continued throughout his existence, whether he's serving a life sentence without parole, no matter what the case may be. And, you know, there's an old analogy that we say that no legislative words are ever to – ever produced or placed on our books for posterity if it produces an absurd result, and there's no question at all that the conclusion of the statute, if taken without my explanation of it, produces an absurd result. That's number one.

Number two. This I picked up 25 minutes ago, and I shared both of these with counsel, that when I reviewed Lawyers *Weekly* this morning before I came over here, there was a case in there just recently decided by Judge Gibney, coincidentally called Dana Corporation versus whomever, and in there Judge Gibney addressed the factual scenario that is – or allowed her

to come to a conclusion that the defense was forfeited. She used the term forfeiture. And the facts in that case were such as that when this case commenced, the defense firm filed defenses for jurisdictional issues, but they waited two and a half years to file their motion to dismiss. So she indicated that the – to attack subject matter personal jurisdiction was lost under a theory of forfeiture. She [4] also researched in her opinion before she came to that conclusion the Federal Court citations to see if there was any – any cases that she could, you know, put her hands on to draw some reference to. According to my circumspect review of those comments made from that opinion, it appeared that there wasn't any that she could draw her conclusions on except her own analysis and experience as a judicial officer before this court practicing as she did many years before she became a judicial representative from the State of Rhode Island.

So having read both of those and come to those kind of observations, which I didn't really get into in my briefs, we, both of our – he and I and Kelly McElroy I think have done I think a yeoman's job in attempting to address all potential issues that could, you know, involve all the parties in this case. And I think that's the only elements that I would offer outside my – my written memorandums for the Court to consider in making its decision.

THE COURT: Thank you. Just a couple of points before I hear from the defense. This case was assigned – you recall this case was assigned to me for a trial. We had a trial date certain that was to have started

I believe approximately a month, ago. As typically happens, we had. a chambers conference to determine witness order, [5] talk about when jury instructions are due and the like. Now, during that chambers conference, it was the court who raised the issue of 13-6-1, life prisoners deemed civilly dead, and I felt it was so significant I raised it sua sponte. And the matter was continued until today so the attorneys could be afforded the opportunity to research, brief and discuss on the record the impact of the civil death statute on this case.

In addition, the pro se or self-represented litigant, Mr. Rosado, was also given the opportunity – I believe the clerk gave him a copy of the case or a motion that was filed, and he too had the opportunity and time to look into this issue.

So the suggestion that the defense needs to file a motion to amend their answer to include the jurisdictional issue I don't really think applies here since the Court is the one that raised this issue and afforded the attorneys and the self-representing litigant to further brief and discuss the issue.

I'll hear from the State.

MR. RESNICK: Thank you, Your Honor. I'll just address the two points that Mr. Resmini just raised.

As far as the language of the statute, it's incredibly broad. Mr. Resmini seemed to isolate the term "civil rights," but that statute says to all civil rights [6] and

relations of any nature whatsoever, so I think it's much broader than that. And as to the case which was just mentioned by Mr. Resmini, I have not had a chance to review it in its entirety, but personal jurisdiction is something that can be waived. It can be forfeited. It's incredibly different than the subject matter jurisdiction as just noted by the Court.

There is one other issue that I did not brief that I would like to bring to the Court's attention, I had told Mr. Resmini about it, and it's more aimed at the motion to amend.

In the motion to amend and also in the motion to dismiss, there's the concept that somehow this statute would be preempted by a Section 1983 cause of action. There is no controlling law from the First Circuit. The Fourth Circuit has entertained it, but there's nothing from our high court, there's nothing from the First Circuit on that issue.

But it's actually a very complex issue, because if this case was brought in Federal Court, the Federal Rules of Civil Procedure would apply. And Federal Rule of Civil Procedure 17, which I have a copy for the Court if you wish to see it, 17(b)(1) talks about the capacity. An individual who is not – who is not acting in a representative capacity is determined by the law of the [7] individual's domicile.

So 13-6-1 not only creates the subject matter jurisdiction argument that we're making, but it goes to the capacity of these individuals, this class of individuals, to bring a suit. And even federal law says that capacity

is a state law issue, so we don't even need to go to the Erie doctrine because it's actually stated right in the Federal Rules of Civil Procedure.

As to our motion to dismiss, Your Honor, I have nothing to add, but I'd certainly open myself up to any questions as to distinguishing *Boyajian* from this case, why the reference to Section 1983 in hopes of defeating our motion to dismiss is inappropriate.

And as to plaintiff's motion to amend, I would simply open myself up to questions regarding undue delay, the extreme prejudice to the State, and also our futility argument based on statute of limitations and some other grounds, and I'm ready to answer any questions.

THE COURT: Thank you. Ms. McElroy.

MS. MCELROY: I have nothing to add, Your Honor. Thank you.

THE COURT: Mr. Rosado, would you like to address the Court?

MR. ROSADO: NO.

THE COURT: Thank you. The plaintiff in this case, [8] as I stated earlier, argues that the defendant should file a motion for leave to amend. I gave my thoughts on that, but I will cite a case in support of my statements. *Bruce Brayman Builders v. Lamphere*, 109 A.3d 395; *Ryan v. DeMello*, 354 A.2d 734; *State v. Kenney*, 523 A.2d 853.

The plaintiff also relies on *Bogosian v. Vaccaro*, which is found at 422 A.2d 1253, that's a Rhode Island 1980 case, in arguing that this complaint ought not to be dismissed.

The Court finds factual distinction between this case and the *Bogosian* case. First, Mr. Vaccaro, in *Bogosian v. Vaccaro*, was the defendant, and it was the defendant who attempted to utilize the 13-6-1 statute that's at issue here as a shield from liability. He attempted to nullify an agreement that he made with the plaintiff based on the statute. In that case the Supreme Court said no, he could not use 13-6-1 to nullify the agreement. That's just a very basic rendition of what the Supreme Court said. It was a real estate commission case. In ruling, the Court said the commission was earned when the plaintiff produced a ready, willing and able buyer and this happened before the conviction was final, and the Court talked about the finality of conviction as it relates to 13-6-1. That case is factually distinct.

[9] Here, the plaintiff is seeking to proceed with a claim after the imposition of the final judgment of conviction. He seeks to proceed with his trial and seeks judgment against the defendants. 13-6-1 is clear and unambiguous. A person serving life in prison shall, with respect to all rights of property and all civil rights, be deemed dead as if his or her natural life had been taken at the time of the conviction.

This Court has no jurisdiction to hear this case. Therefore, the complaint is dismissed.

The plaintiff also argues that the statute is invalid under the Supremacy Clause because it impairs the plaintiff's right to sue under 42 U.S.C. 1983 and that the 1983 statute invalidates any state law that precludes access to state remedies to file suit to litigate claims. The plaintiff raises these issues based on what I perceive as a generic assertion in his complaint that the action violates his civil rights.

I've read the complaint. I've read the pretrial memos. There was no claim, specific claim. There was no 1983 claim pled or filed. This case was ready trial. It was ready trial on a negligence suit. The plaintiff did not plead any civil rights action. And I understand that we have very liberal pleading in our state. However, the fact is this case was a go for trial. It was a go on a [10] negligence claim. And it was not a go on a civil rights claim. It's too late. It was not until after, after the eve of trial that the civil rights statutes were even mentioned. They were not before the Court and they are not now before the Court.

I will not weigh in at this point on whether or not this statute is unconstitutional or anything like that. I'm weighing in on the facts of the case that's presented in front of me. I have no jurisdiction. The motion to dismiss is granted.

As the motion to dismiss is granted, there is no need for me at this point to discuss the motion to amend. Counsel please prepare the appropriate order.

MR. RESMINI: Your Honor, may I be allowed to make a short comment, is it permissible under the circumstances?

THE COURT: You can make a comment, but I'm not changing my mind.

MR. RESMINI: I understand. Just for the record, because you know it's going to go up to the Supreme Court.

THE COURT: Yes.

MR. RESMINI: As the Court notes – and I'm sure the Court has spent sufficient time to come to its conclusion based on your reviewing of the entire materials that you've had before you, but we take the position that the [11] complaint that was originally filed, then called – the second one was called amended complaint, in Paragraph 2 when we used the terminology that they violated his civil rights, we feel that the specificity does not have to be elaborated in order to incorporate, you know, the golden words of 1983. The case that T would substantiate for that on pleadings is *Placido v. Mello*, which adopted the – which had adopted an earlier case, a domestic case, called *Mateer v. Mateer.*

And also if you look at the form pleadings in the Rules of Civil Procedure, which hasn't been changed since Lang before anyone here was born, that – it indicates they're very, very, very, very vague pleading requirements. So for those reasons, we feel we satisfied the rule. And of course, throughout the course of the trial, depending how the evidence was going, we certainly

would have been prepared to do jury instructions that would incorporate with more specificity the civil rights violation.

And since it's going up to the Supreme Court, would just like to add this, which is more encompassing rather than partially legalistic, that the review of the entire file in my experience with this case, we would press, if the case gets returned back for a trial on its merits, that we don't hold, realistically speaking, this [12] gentleman to my right to be the grave man of the deed. We will argue, and I think successfully, that the so-called green light was given to attack this gentleman, that this gentleman to my right –

THE COURT: You're arguing facts that aren't before the Court.

MR. RESMINI: I know. I just want to – I wanted to have that as a little caveat to go up to the Supreme Court.

THE COURT: You can brief that.

MR. RESMINI: All right. I'll let it rest at that.

THE COURT: Thank you.

MR. RESMINI: You're welcome.

THE COURT: And I do stand a bit corrected. It was an amended complaint and it was Paragraph 2, but at the pretrial memo, I'm going to cite to Paragraph IV, complex legal issues, it's all in terms of duty and negligence and respondeat superior. There's nothing,

nothing, nothing that indicates that this is a civil rights action. Your objection is noted for the record.

Counsel please prepare the appropriate order.

MR. RESNICK: Thank you, Your Honor.

THE COURT: Don't forget to send a copy of the order to Mr. Rosario. Thank you.

(ADJOURNED)

STATE OF RHODE ISLAND SUPREME COURT

DANA GALLOP,
Appellant

v.

ADULT CORRECTIONAL INSTITUTIONS; IAN ROSADO, ALIAS; MATTHEW GALLIGAN, STATE OF RHODE ISLAND; And VARIOUS JOHN DOES
Appellees

SUPREME COURT NO. SU-2018-0246-A (Prov. Superior Court No. PC-2010-6627)

APPELLANT'S RULE 12A STATEMENT

NOW COMES the Appellant, Dana Gallop (hereinafter "Plaintiff" or by name), and submits this Rule 12A Statement, alleging that the Superior Court below erred 1) in failing to address Plaintiff's argument that RIGL 13-6-1 violates the federal Supremacy Clause, and in failing to allow Plaintiff's longstanding state law tort claims to proceed; and 2) in denying Plaintiff's Second Motion to Amend his Complaint in its entirety.

Background Facts and Travel:

The history of this case is familiar to this Court. *Gallop v. Adult Corr. Institutions*, 182 A.3d 1137 (R.I. 2018). On or about April 26, 2010, Dana Gallop was a pretrial detainee housed at the Adult Correctional Institute, in Module E, at the Intake Center in Cranston, Rhode Island. At this time, he sustained severe and

permanent injuries, after being attacked by inmate and defendant Ian Rosado, allegedly with the knowledge and acquiescence of Defendant Correctional Officer Matthew Galligan.

Plaintiff filed an initial complaint on November 10, 2010. An amended complaint was allowed on April 12, 2013 – prior to the three years expiring to amend a complaint to add new claims. On June 22, 2016, the day before the trial was scheduled to start, the Superior Court, in chambers, *sua sponte* raised the issue of the Civil Death Statute § 13-6-1. Defendant's counsel then filed a motion to dismiss and supporting memorandum based on the civil death statute.

On July 12, 2016, Plaintiff filed a Motion for Leave to file a Second Amended Complaint, and annexed a proposed Second Amended Complaint – adding specificity to his claims, which were necessitated in part by Defendant's 11th hour motion to dismiss based on the civil death statute, as Plaintiff's civil rights claim alone defeats the civil death statute.

Defendant's filed an objection to Plaintiff's Motion for Leave to File the Second Amended Complaint on the grounds of undue delay, prejudice and futility. Defendant's argued the civil rights claims were outside the statute of limitations, by failing to acknowledge that the "civil rights" violation was specified in Count II of the timely filed complaint in 2013.

On July 22, 2016, Plaintiff filed his objection to Defendant's Motion to Dismiss based on the Civil Death Statute. Plaintiff argued that: (1) the Civil Death

statute was not applicable under Bogosian v. Vaccaro, 422 A.2d 1253 (RI. 1980), as Plaintiff's conviction was not final until 4 years after the injury; (2) the Civil Death Statute in Rhode Island is invalid under the Supremacy Clause to the extent it impairs plaintiff s capacity to sue under 42 USC § 1983 ***and other civil statutes***; and (3) 42 USC 1983 invalidates any State law that precludes access to State remedies available to file suit to litigate claims directly associated with violation of any federal right under color of law.

On July 26, 2016, Plaintiff filed a Reply to Defendant's Objection to the Motion for Leave to file the Second Amended Complaint. Plaintiff argued that the Defendant's objections based on prejudice and undue delay were insufficient as a matter of law, that the amendment was not futile as the Civil Rights claim had been filed in 2013 before the statute of limitations had expired; and that the Civil Death Statute did not apply.

On July 28, 2016, after hearing arguments, the trial court granted Defendant's Motion to Dismiss based on the Civil Death Statute, and held that there was no need to address the Motion for Leave to File the Second Amended Complaint. The trial court ruled that on the eve of trial the case was a negligence claim, and not a civil rights claim. The trial court did not rule on the issue of RIGL 13-6-1 being unconstitutional under the Supremacy Clause. An Order entered. Mr. Gallop appealed to this Court, raising 4 direct issues:

A. The Trial Court erred in Ruling that the Civil Death Statute Required Dismissal of the Complaint

B. The Trial Court erred as the Civil Death Statute in RI is Invalid under the Supremacy Clause to the Extent it Impairs A Plaintiff's Capacity to Sue under 42 USC 1983 ***and other Civil Statutes***

C. 42 USC 1983 Invalidates any state law that precludes access to state remedies available to file suit to litigate claims directly associated with violations of any federal rights under color of law

D. The Trial Court erred in ruling the case was not a civil rights case and in not addressing the Motion for Leave to file the Second Amended Complaint

(Exhibit ___ annexed). This Court reached Issues A, C, and D, but ambiguously addressed Point B's "***and other Civil Statutes***" (specifically 13-6-1) as being unconstitutional under the federal Supremacy Clause. In the *Gallop* opinion, "and other Civil Statutes" of Point B was omitted from the opinion listing the issues presented:

> Before this Court, plaintiff argues that: (1) the trial court erred in ruling that the civil death statute required dismissal of the complaint; (2) the trial court erred because the civil death statute in Rhode Island, to the extent that it impairs a person's capacity to sue under 42 U.S.C. § 1983 [***omitted is "and other Civil***

> ***Statutes"***], is invalid under the Supremacy Clause of the United States Constitution; (3) any state law that precludes access to state remedies available to litigate claims for alleged violations of any federal rights under color of law is invalidated by § 1983; and (4) the trial court erred in ruling that this case was not a civil rights action and in failing to address plaintiff's motion for leave to file a second amended complaint.

Gallop v. Adult Corr. Institutions, 182 A.3d 1137, 1139 (R.I. 2018). This *Gallop* opinion is ambiguous as to the Supremacy Clause argument as to "other Civil Statutes" – specifically 13-6- 1, and it appears from the *Gallop* opinion that this Court left the door opened for this issue to be ~~wanted this~~ addressed on remand with the 1983 issue, which it was argued concurrently with. This Court stated that the Superior Court was justified in dismissing the Complaint under 13-6-1 as a matter of *state* law, and then directed the plaintiff to provide authority on remand for the argument that state tort claims must be allowed under *1983/federal* laws:

> The plaintiff attempted to add a § 1983 claim because, he contends, that statute precluded the Superior Court from dismissing his complaint based on his interpretation that § 1983 "invalidates any state law which stands in the way of any person filing suit to vindicate violation of federal protected rights" "under color of law[.]" *The plaintiff has failed to produce any authority that holds that a state court is bound to hear a § 1983 action where this Court has deemed the party to be civilly dead* Rather,

> plaintiff simply argues that the phrase "or other proper proceeding for redress" set forth in § 1983 must include "not only violations of civil rights under color of law, but also related tortious acts associated with the violation of constitutional rights – and that any state law which prevents anyone from filing suit is invalid under the broad language of § 1983." (Emphasis in original.) *The plaintiff's generic assertions are unaccompanied by jurisdictional support, which will be necessary on remand.*

Gallop v. Adult Corr. Institutions, 182 A.3d 1137, 1144 (R.I. 2018). On May 8, 2018, this Court vacated the judgment of the Superior Court, and also ordered the Superior Court to address Plaintiff's Motion for Leave to File a Second Amended Complaint.

On remand, the Superior Court directed the parties to file briefing on these issues. Plaintiff raised the issue that under *federal* law, 13-6-1 was unconstitutional under the Supremacy Clause, and that the negligence and other state law tort claims survive; and that the Court should allow the Motion for Leave to File a Second Amended Complaint, at a minimum, to the extent of the negligence and other state law claims set forth in Counts 2-6. The State defendant's objected, stating that the Superior Court should reach the merits of the Motion for Leave to file the Second Amended Complaint before reaching Plaintiff's argument that the federal Supremacy Clause prohibits the application of RIGL 13-6-1. On July 28, 2018, the Superior Court proceeded as requested by the State defendants

and denied the Motion for Leave to File the Second Amended Complaint in its entirety, without addressing the Supremacy Clause issue. The Superior Court did acknowledge that Plaintiff had pled a "violation of civil rights" in the amended complaint filed in 2013 prior to the expiration of the statute of limitations, but held that Plaintiff waived the 1983 claim by not pursuing it.

ARGUMENT

I. UNDER FEDERAL LAW AND US SUPREME COURT PRECEDENT GALLOP'S STATE LAW TORT CLAIMS MUST BE ALLOWED TO PROCEED AS RIGL 13-6-1 IS UNCONSTITUTIONAL

Prisoners have a fundamental right to access the courts, established in a series of important cases, including *Ex parte Hull*, 312 U.S. 546 (1941), *Johnson v. Avery*, 383 U.S. 483 (1969), and *Bounds v. Smith*, 430 U.S. 817 (1977); See also *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974)(prisoners "retain right of access to the courts"). This right allows prisoners to file civil claims. The right is so fundamental that it requires a prison to fund a way for prisoners to have meaningful access to the courts. *Bounds v. Smith*, 430 U.S. at 825, 828.

The preemption doctrine arises from the United States Constitution's Supremacy Clause, Art. VI, cl. 2, which provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

If the provisions of a state law are "inconsistent with an act of Congress, they are void, as far as that inconsistency extends." *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 31 (1824). The federal Supremacy Clause overrides state constitutional and statutory provisions contrary to federal constitutional and statutory law. *Bailey v. Laurie*, 118 R.I. 184, 189, 373 A.2d 482, 485 (1977).

Rhode Island is the only court in the continental United States which allows its civil death statute to foreclose a prisoner serving a life sentence from pursuing a civil claim in court. In this respect, every other State's civil death statute has been either struck down as unconstitutional or the respective legislative body has repealed it.

Applying *federal* constitutional law, court after court squarely faced with a civil death statute precluding an inmate from accessing the courts has struck it down as violative of the First Amendment, Due Process Clause, and for Equal Protection Clause of the U.S. Constitution. See e.g., *Holman v. Hilton*, 712 F.2d 854 (3rd Cir. 1983) (finding New Jersey's civil death statute unconstitutional as due process violation when it

barred inmate serving life sentence from accessing the courts); *Thompson v. Bond*, 421 F. Supp. 878, 885-886 (W.D. Mo. 1976) ("Mo. Rev. Stat. § 222.010 (1969), insofar as it purports to suspend the civil rights or declare the civil death of adults sentenced to imprisonment in an institution within the Missouri Department of Corrections for a term of years or for a term of life, is unconstitutional, null and void, in violation of the First and Fourteenth Amendments to the Constitution of the United States, and enforcement thereof shall be, and is hereby, enjoined"); *Delorme v. Pierce Freightlines Co.*, 353 F. Supp. 258 (D.Or. 1973) ("We decide this [civil death statute] case on the basis of the Equal Protection Clause alone, although we believe there is much merit in Delorme's other arguments. There is no dispute that the goals of preventing pointless litigation and rehabilitating prisoners are constitutionally permissible. But if ORS 137.240 is to withstand the test of the Equal Protection Clause, defendants must also show that these goals are rationally related to the action taken by the State, which suspends the right of an imprisoned felon to litigate his legal claims. Reed v. Reed, 404 U.S. 71, 92 S. Ct. 251, 30 L. Ed. 2d 225 (1971). Defendants have not made such a showing. We find that the means used here to accomplish the State's purposes are impermissibly broad"); *McCuiston v. Wanicka*, 483 So. 2d 489, 491 (Fla 2nd DCA 1986) (Florida civil death statute unconstitutional in that it violated both the state and federal constitutions as it foreclosed assaulted prisoner from pursuing civil action in court); *Chesapeake Utilities Corp. v. Hopkins*, 340 A.2d 154 (Del. 1975) (Delaware Constitution overcomes the

common law doctrine of "civil death"); *Davis v. Pullium*, 484 P.2d 1306 (Okla. 1971) ("civil death" statute no defense to a personal injury action, due to Oklahoma Constitution holding that state's courts open to "every person").[1]

In *Gallop*, this Court opined that New York and Rhode Island are the only two states in the US that have civil death statutes, but New York's civil death statute was struck down in part as unconstitutional 45 years ago on federal grounds because it precluded a prisoner serving a life sentence from accessing the courts. *Bilello v. A.J. Eckert Co.*, 42 A.D.2d 243, 346 N.Y.S.2d 2 (1973).[2] The New York legislature subsequently amended its "civil death" statute 58 days after the Bilello court issued its opinion on July 12, 1973, and permanently removed its provisions banning life

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[1] The Oklahoma Constitution relied upon in *Davis* and Article I, Section 5 of the Rhode Island Constitution use the same "every person" language. RIGL 13-6-1 violates the RI Constitution, as Section 5 of Article I provides:

> "Entitlement to remedies for injuries and wrongs – Right to justice. – Every person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which may be received in one's person, property, or character. Every person ought to obtain right and justice freely, and without purchase, completely and without denial; promptly and without delay; conformably to the laws."

[2] See *United States v. Nesbeth*, 188 F. Supp. 3d 179, 181 (E.D.N.Y. 2016)(commentators express that the continuation of civil death, "[e]ven watered down and euphemistically denominated 'civil disabilities,' . . . functioned after the Civil War to perpetuate the social exclusion and political disenfranchisement of African-Americans.")

prisoners from accessing the courts. N.Y. Civ. Rights Law §§ 79 and 79-a; L 1973, ch. 687, eff. Sept 9, 1973.

The federal Supremacy Clause overrides all state constitutional and statutory provisions contrary to federal constitutional and statutory law. See e.g., *Haywood v. Drown*, 556 U.S. 729, 737, 129 S. Ct. 2108, 173 L. Ed. 2d 920 (2009) (New York law that stripped state courts of jurisdiction over § 1983 actions against correctional officers violated the Supremacy Clause, because the state law was "contrary to Congress' judgment that all persons who violate federal rights while acting under color of state law shall be held liable for damages.")

II. THE SUPERIOR COURT ERRED IN ADDRESSING THE MOTION FOR LEAVE TO AMEND THE COMPLAINT *FIRST*, INSTEAD OF FIRST ADDRESSING THE CIVIL DEATH STATUTE BEING INVALID UNDER FEDERAL LAW; THE CIVIL DEATH STATUTE SHOULD HAVE BEEN STRUCK DOWN AS INVALID AND THE MOTION TO AMEND SHOULD HAVE BEEN GRANTED IN PART AS TO THE SOME OR ALL OF THE STATE LAW TORT COUNTS, 2-6

This Court "has consistently held that trial justices should liberally allow amendments to the pleadings." *Serra v. Ford Motor Credit Co.*, 463 A.2d 142, 150 (Rd.1983). This rule promotes the goal of resolving disputes on their merits, rather than through blind adherence to procedural technicalities. *Inleasing Corp. v.*

Jessup, 475 A.2d 989 (R.I. 1984). The granting or denial of a motion to amend is within the discretion of the trial justice, and the Court will not disturb such a ruling absent a clear showing that such discretion was abused. *Id.* The burden rests on the party opposing the motion to show it would incur substantial prejudice if the motion were granted. *Wachsberger v. Pepper*, 583 A.2d 77 (R.I. 1990). This Court has consistently permitted amendments to pleadings "absent a showing of extreme prejudice." *Mikaelian v. Drug Abuse Unit*, 501 A.2d 721, 722 (R.I. 1985). A trial justice's discretion in granting a motion to amend "is inherently constrained by the plain language of Rule 15(a) and our cases interpreting the same; the proverbial scales are tipped at the outset in favor of permitting the amendment." *Harodite Indus., Inc. v. Warren Elec. Corp.*, 24 A.3d 514, 531 (R.I. 2011).

Defendants argued that the instant case is one of extreme prejudice, based completely of the addition of and pursuit of the 1983 claim set forth in Count 1.[3] With the 1983 count set aside, the state law tort counts list as 2-6 should have been allowed to go forward in part or as a whole, as they are primarily the same claims from the beginning, so there is no prejudice at all. For example, in *Inleasing*, *supra*, this Court concluded that the trial justice abused his discretion by

[3] In fact, the Court has upheld a trial court's granting of motions to amend one day before trial was scheduled to commence, see *Mikaelian v. Drug Abuse Unit*, 501 A.2d 721, 722-23 (R.I. 1985), and even after trial had begun. See *Bourbon"s, Inc. v. ECIN Industries, Inc.*, 704 A.2d 747, 751-52 (R.I. 1997).

not allowing the defendant to amend his answer even though the motion to amend was made after a thirty-day trial notice had been issued and more than three years after the initial answer was filed. *Id.* The *Inleasing* Court cited *Howey v. United States*, 481 F.2d 1187, 1190 (9th Cir.1973)(court found no reason to deny an amendment by the plaintiff even though it was offered on the second day of trial and five years after the action was commenced); *see also Ricard v. John Hancock Mutual Life Insurance Co.*, 113 RI. 528, 539, 324 A.2d 671, 677 (1974) (trial justice abused discretion by denying motion to amend for only reason that "the case had gone on too long on the basis of the [original] pleadings"); *Wilkinson v. Vesey*, 110 R.I. 606, 295 A.2d 676 (1972) (allowing amendment after completion of trial); *Local 850, Intl Assoc. of Firefighters v. Pakey*, 107 R.I. 125, 265 A.2d 730 (1970) (permitting amendment after trial judge granted motion to dismiss).

Alternatively, due to RIGL 13-6-1 being unconstitutional, at a minimum, Plaintiff's First Amended Complaint from 2013 should have remained valid.

CONCLUSION

WHEREFORE, Appellant prays that this Honorable Court reverse the ruling of the Superior Court and (1) find RIGL 13-6-1 invalid under Supremacy Clause; (2) hold that the Superior Court erred in not ruling on this issue first; and (3) find that the Superior Court erred in not allowing the Motion for Leave to File the Second Amended Complaint's state law tort Counts 26 in part

or as a whole, or alternatively, find that the 2013 Amended Complaint's State law tort counts survived due to the RIGL 13-6-1 being invalid under the Supremacy Clause.

Respectfully submitted,
Appellant Dana Gallop,
By his Attorneys,

/s/ Ronald J. Resmini

/s/ Ronald J. Resmini

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[Certificate Of Service Omitted]

STATE OF RHODE ISLAND SUPERIOR COURT
PROVIDENCE, SC.

DANA GALLOP

v. **C.A. NO. PC10-6627**

STATE OF RHODE ISLAND,
Department of Corrections;
IAN ROSADO, ALIAS;
MATTHEW GALLIGAN,
JOHN DOES,
Defendants

PLAINTIFF'S BRIEFING OF ISSUES UPON REMAND FROM RI SUPREME COURT

Plaintiff Dana Gallop submits this briefing on the issues to be resolved upon remand of this case from the Rhode Island Supreme Court.

Background Facts and Travel:

On or about April 26, 2010, Dana Gallop was a pretrial detainee housed at the Adult Correctional Institute, in Module E, at the Intake Center in Cranston, Rhode Island. At this time, he sustained severe and permanent injuries, after being attacked by inmate Ian Rosado.

The basic premise of this action is that prison guards are charged with the duty under State and Federal law to reasonably protect inmates incarcerated at the ACI from injuries or assaults by other inmates.

Plaintiff filed an initial complaint on November 10, 2010. An amended complaint was allowed on April 12, 2013 – prior to the three years expiring to amend a complaint to add new claims. Count II of amended complaint filed in 2013 adds that plaintiff's claims are based on violations of his "civil rights."

On June 22, 2016, the day before the trial was scheduled to start, this Court, in chambers, sua sponte raised the issue of the Civil Death Statute § 13-6-1. Defendant's counsel then filed a motion to dismiss and supporting memorandum based on the civil death statute. On July 12, 2016, Plaintiff filed a Motion for Leave to file a Second Amended Complaint, and annexed a proposed Second Amended Complaint – adding specificity to his claims, which were necessitated in part by Defendant's 11th hour motion to dismiss based on the civil death statute, as Plaintiff's civil rights claim alone defeats the civil death statute.

Defendant's filed an objection to Plaintiff's Motion for Leave to File the Second Amended Complaint on the grounds of undue delay, prejudice and futility. Defendant's argued the civil rights claims were outside the statute of limitations, by failing to acknowledge that the "civil rights" violation was specified in Count II of the timely filed complaint in 2013.

On July 22, 2016, Plaintiff filed his objection to Defendant's Motion to Dismiss based on the Civil Death Statute. Plaintiff argued that: (1) the Civil Death statute was not applicable under Bogosian v. Vaccaro, 422 A.2d 1253 (R.I. 1980), as Plaintiff's conviction was not

final until 4 years after the injury; (2) the Civil Death Statute in Rhode Island is invalid under the Supremacy Clause to the extent it impairs plaintiff's capacity to sue under 42 USC § 1983 ***and other civil statutes***; and (3) 42 USC 1983 invalidates any State law that precludes access to State remedies available to file suit to litigate claims directly associated with violation of any federal right under color of law.

On July 26, 2016, Plaintiff filed a Reply to Defendant's Objection to the Motion for Leave to file the Second Amended Complaint. Plaintiff argued that the Defendant's objections based on prejudice and undue delay were insufficient as a matter of law, that the amendment was not futile as the Civil Rights claim had been filed in 2013 before the statute of limitations had expired; and that the Civil Death Statute did not apply.

On July 28, 2016, after hearing arguments, the trial court granted Defendant's Motion to Dismiss based on the Civil Death Statute, and held that there was no need to address the Motion for Leave to File the Second Amended Complaint. The Trial Court ruled that on the eve of trial the case was a negligence claim, and not a civil rights claim. The trial court did not rule on the issue of the Civil Death Statute being unconstitutional. An Order entered.

Mr. Gallop appealed to the Rhode Island Supreme Court. He raised 4 direct issues:

A. The Trial Court erred in Ruling that the Civil Death Statute Required Dismissal of the Complaint

B. The Trial Court erred as the Civil Death Statute in RI is Invalid under the Supremacy Clause to the Extent it Impairs A Plaintiff's Capacity to Sue under 42 USC 1983 ***and other Civil Statutes***

C. 42 USC 1983 Invalidates any state law that precludes access to state remedies available to file suit to litigate claims directly associated with violations of any federal rights under color of law

D. The Trial Court erred in ruling the case was not a civil rights case and in not addressing the Motion for Leave to file the Second Amended Complaint

(Exhibit A annexed). The RI Supreme Court only reached the first issue and found that this Court was justified in dismissing the Complaint under *state* law, and then *vacated* the judgment of this Court and directed this Court to address the remaining issues – which are whether the Civil Death statute is invalidated by the Supremacy Clause and *Federal law*, and the failure of this court to address plaintiff's Second Amended Complaint. The *Gallop* Court explained:

The Second Amended Complaint

> On appeal, plaintiff argues that the trial justice erred in failing to address his motion to file a second amended complaint. This Court agrees. On July 12, 2016, after the trial justice

raised the issue of the civil death statute sua sponte, plaintiff moved for leave to file a second amended complaint and provided a copy to the trial justice. *Without addressing plaintiff's motion, the trial justice granted defendants' motion to dismiss the case on the basis of § 13-6-1.* The plaintiff's proposed second amended complaint specifically named Galligan in his individual and official *capacities* and raised, for the first time, claims under 42 U.S.C. §§ 1983 and 1988; the Eighth and Fourteenth Amendments to the United States Constitution; the Rhode Island Constitution; and the Rhode Island Civil Rights Act.

The plaintiff attempted to add a § 1983 claim because, he contends, that statute precluded the Superior Court from dismissing his complaint based on his interpretation that § 1983 "invalidates any state law which stands in the way of any person filing suit to vindicate violation of federal protected rights" "under color of law[.]" *The plaintiff has failed to produce any authority that holds that a state court is bound to hear a § 1983 action where this Court has deemed the party to be civilly dead.* Rather, plaintiff simply argues that the phrase "or other proper proceeding for redress" set forth in § 1983 must include "not only violations of civil rights under color of law, but also related tortious acts associated with the violation of constitutional rights—and that any state law which prevents anyone from filing suit is invalid under the broad language of § 1983." (Emphasis in original.) The plaintiff's generic assertions are unaccompanied by

> jurisdictional support, which will be necessary on remand.

Gallop v. Adult Corr. Institutions, No. 2016-278-APPEAL., 2018 WL 2107853, at *5 (R.I. May 8, 2018). Due to the prior judgment of this Court being "*vacated*" by the RI Supreme Court, the issue of whether RIGL 13-6-1 is unconstitutional under the Supremacy Clause and federal law is ripe for disposition, as it has yet to be addressed by this Court or the Supreme Court.

ARGUMENT

I. UNDER FEDERAL LAW AND US SUPREME COURT PRECEDENT GALLOP'S CLAIMS MUST BE ALLOWED TO PROCEED AS RIGL 13-6-1 IS UNCONSTITUTIONAL

The preemption doctrine arises from the Supremacy Clause, Art. VI, cl. 2, which provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

If the provisions of a state law are "inconsistent with an act of Congress, they are void, as far as that inconsistency extends." *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 31 (1824). Of course, the federal Supremacy Clause

overrides state constitutional and statutory provisions contrary to federal constitutional and statutory law. *Bailey v. Laurie*, 118 R.I. 184, 189, 373 A.2d 482, 485 (1977).

On July 12, 2016, Gallop filed his objection to the State's Motion to Dismiss under RIGL 13-6-1. Mr. Gallop's third argument was that:

> C. THE CIVIL DEATH STATUTE IN RHODE ISLAND IS INVALID UNDER THE SUPREMACY CLAUSE TO THE EXTENT IT IMPAIRS PLAINTIFF'S CAPACITY TO SUE UNDER 42 USC 1983 ***AND OTHER CIVIL STATUTES***

This was also the second issue raised on direct appeal. (Exhibit A)

On appeal, Gallop clearly raised the issue that the Supremacy Clause and federal law forbid the use of the "civil death" statute to foreclose Mr. Gallop's claims. The Rhode Island Supreme Court upheld the dismissal on *state law* grounds, but did not reach the Supremacy Clause and *federal law* issues directly raised by Gallop at the trial court level and on direct appeal – and the specific language on remand as well as the failure to address these issues in this Court or on appeal leaves open the question as to whether the Supremacy Clause and/or *federal law* forbids the application of "civil death" statutes to foreclose Mr. Gallop's claims. This question must be answered in the affirmative.

It should not surprise this Court that Rhode Island is the only court in the continental United States

which allows its civil death statute to foreclose a prisoner serving a life sentence from pursuing a civil claim in court. In this respect, every other State's civil death statute has been either struck down as unconstitutional under the Federal Constitution by state or federal courts or the respective legislative body has repealed it.

In *Gallop*, our Supreme Court opined that Mr. Gallop "*has failed to produce any authority that holds that a state court is bound to hear a § 1983 action where this Court has deemed the party to be civilly dead.*" First, it is well settled that any "state law rules or practices that may inhibit the prosecution of § 1983 actions in state courts are preempted by the Supremacy Clause of the United States Constitution." *L.A. Ray Realty v. Town Council of Town of Cumberland*, 698 A.2d 202, 221 (R.I. 1997). Second, the United States Supreme Court has explicitly established that prisoners have a fundamental right to access the courts in a series of important cases, including *Ex party Hull*, 312 U.S. 546 (1941), *Johnson v. Avery*, 383 U.S. 483 (1969), and *Bounds v. Smith*, 430 U.S. 817 (1977). This right allows prisoners to file civil claims.[1] The right is so

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[1] See also *Wolff v. McDonnell*, 418 U.S. 539, 555-56, 94 S. Ct. 2963, 2974 (1974):

> [A] prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country. Prisoners have been held to enjoy substantial religious freedom under the First and Fourteenth Amendments. *Cruz* v. *Beto*, 405 U.S. 319 (1972); *Cooper* v. *Pate*, 378 U.S. 546 (1964). ***They***

fundamental that it requires a prison to fund a way for prisoners to have meaningful access to the courts. *Bounds v. Smith*, 430 U.S. at 825, 828. In *Wolff v. McDonnell*, 418 U.S. 539, 94 S. Ct. 2963 (1974), the United States Supreme Court explained that:

> The right of access to the courts, upon which *Avery* was premised, is founded in the Due Process Clause and assures that ***no person*** will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights. *It is futile to contend that the Civil Rights Act of 1871 has less importance in our constitutional scheme than does the Great Writ.* The recognition by this Court that prisoners have certain constitutional rights which can be protected by civil rights actions would be diluted if inmates, often "totally or functionally illiterate," were unable to articulate their complaints to the courts. Although there may be additional burdens on the Complex, if inmates may seek help from other inmates, or from the inmate

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retain right of access to the courts, *Younger* v. *Gilmore*, 404 U.S. 15 (1971), aff'g *Gilmore* v. *Lynch*, 319 F.Supp. 105 (ND Cal. 1970); *Johnson* v. *Avery*, 393 U.S. 483 (1969); *Ex parte Hull*, 312 U.S. 546 (1941). Prisoners are protected under the Equal Protection Clause of the Fourteenth Amendment from invidious discrimination based on race. *Lee* v. *Washington*, 390 U.S. 333 (1968). Prisoners may also claim the protections of the Due Process Clause. They may not be deprived of life, liberty, or property without due process of law. *Haines* v. *Kerner*, 404 U.S. 519 (1972); *Wilwording* v. *Swenson*, 404 U.S. 249 (1971); *Screws* v. *United States*, 325 U.S. 91 (1945).

> adviser if he proves adequate, in both habeas and civil rights actions, this should not prove overwhelming.
>
> *Wolff v. McDonnell*, 418 U.S. at 579, 94 S. Ct. at 2986

Again, the federal Supremacy Clause overrides state constitutional and statutory provisions contrary to federal constitutional law. *Bailey v. Laurie*, 118 R.I. 184, 189, 373 A.2d 482, 485 (1977). See *Haywood v. Drown*, 556 U.S. 729, 737, 129 S. Ct. 2108, 173 L. Ed. 2d 920 (2009) (New York law that stripped state courts of jurisdiction over § 1983 actions against correctional officers violated the Supremacy Clause, because the state law was "contrary to Congress' judgment that all persons who violate federal rights while acting under color of state law shall be held liable for damages.") Clearly, RIGL 13-6-1 violates the Supremacy Clause to the extent that it bars a prisoner from pursuing valid civil claims in the courts.

II. COURT AFTER COURT HAS STRUCK DOWN "CIVIL DEATH" STATUTES LIKE RIGL 13-6-1 AS UNCONSTITUTIONAL, AS THEY PRECLUDE A LIFE PRISONER FROM ACCESSING THE COURTS

Applying federal constitutional law, it is a fact that court after court squarely faced with a civil death statute precluding an inmate from accessing the courts has struck down the statute as violative of the First Amendment, Due Process Clause, and/or Equal

Protection Clause of the U.S. Constitution. See e.g., *Holman v. Hilton*, 712 F.2d 854 (3rd Cir. 1983) (finding New Jersey's civil death statute unconstitutional as due process violation when it barred inmate serving life sentence from accessing the courts); *Thompson v. Bond*, 421 F. Supp. 878, 885-886 (W.D. Mo. 1976) ("Mo. Rev. Stat. § 222.010 (1969), insofar as it purports to suspend the civil rights or declare the civil death of adults sentenced to imprisonment in an institution within the Missouri Department of Corrections for a term of years or for a term of life, is unconstitutional, null and void, in violation of the First and Fourteenth Amendments to the Constitution of the United States, and enforcement thereof shall be, and is hereby, enjoined"); *Delorme v. Pierce Freightlines Co.*, 353 F. Supp. 258 (D.Or. 1973) ("We decide this [civil death statute] case on the basis of the Equal Protection Clause alone, although we believe there is much merit in Delorme's other arguments. There is no dispute that the goals of preventing pointless litigation and rehabilitating prisoners are constitutionally permissible. But if ORS 137.240 is to withstand the test of the Equal Protection Clause, defendants must also show that these goals are rationally related to the action taken by the State, which suspends the right of an imprisoned felon to litigate his legal claims. Reed v. Reed, 404 U.S. 71, 92 S. Ct. 251, 30 L. Ed. 2d 225 (1971), Defendants have not made such a showing. We find that the means used here to accomplish the State's purposes are impermissibly broad"); *McCuiston v. Wanicka*, 483 So. 2d 489, 491 (Fla 2nd DCA 1986) (Florida civil death statute unconstitutional in that it violated both the state and

federal constitutions as it foreclosed assaulted prisoner from pursuing civil action in court); *Chesapeake Utilities Corp. v. Hopkins*, 340 A.2d 154 (Del. 1975) (Delaware Constitution overcomes the common law doctrine of "civil death"); *Davis v. Pullium*, 484 P.2d 1306 (Okla. 1971) ("civil death" statute no defense to a personal injury action, due to Oklahoma Constitution holding that state's courts open to "every person").[2]

In *Gallop*, our Supreme Court acknowledged that New York and Rhode Island are the only two states in the US that have civil death statutes, but the Court failed to mention that New York's civil death statute was struck down as unconstitutional 45 years ago on federal grounds because it precluded a prisoner serving a life sentence from accessing the courts. *Bilello v. A.J. Eckert Co.*, 42 A.D.2d 243, 346 N.Y.S.2d 2 (1973).[3]

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[2] The Oklahoma Constitution relied upon in *Davis* and Article I, Section 5 of the Rhode Island Constitution use the same "every person" language. RIGL 13-6-1 violates the RI Constitution, which provides:

> "Entitlement to remedies for injuries and wrongs – Right to justice. – *Every person* within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which may be received in one's person, property, or character. *Every person* ought to obtain right and justice freely, and without purchase, completely and without denial; promptly and without delay; conformably to the laws."

[3] See *United States v. Nesbeth*, 188 F. Supp. 3d 179, 181 (E.D.N.Y. 2016) (commentators express that the continuation of civil death, "[e]ven watered down and euphemistically denominated 'civil disabilities,' . . . functioned after the Civil War to perpetuate the social exclusion and political disenfranchisement of African-Americans.")

The New York legislature subsequently amended its "civil death" statute 58 days after the *Bilello* court issued its opinion on July 12, 1973, and permanently removed its provisions banning life prisoners from accessing the courts. N.Y. Civ. Rights Law §§ 79 and 79-a; L 1973, ch. 687, eff. Sept 9, 1973. See also *Johnson v. Rockefeller*, 365 F. Supp. 377, 380 (S.D.N.Y. 1973).

In *Almond v. Kent*, 459 F.2d 200 (4th Cir. 1972), the court invalidated Virginia statutes (impairing access to filing a civil action under s. 1983) along with Rule 17(b) of the Federal Rules of Civil Procedure to the extent that they ran afoul of the clearly expressed intent of 1983. The court explained that it was the unanimous view of the courts that civil death statutes were invalid if they impaired pursuit of a claim under 42 USC 1983. See Almond, 459 F.2d at 203 ("We, therefore, conclude that for purposes of suits under § 1983, the language of § 1983, affording the right to sue to "any citizen of the United States . . . within the jurisdiction thereof," who has been deprived of any right, privilege or immunity, should prevail over the conflicting policy purportedly expressed in Rule 17(b) when applied in the light of the rationale of Virginia statutes").

The RI Civil Death statute is an unconstitutional statute and void as applied to this case. This is the last court in the 50 States comprising the United States to have a Civil Death statute barring an inmate from pursuing a civil action in our courts, and it is long overdue that this unconstitutional practice be extinguished.

III. DUE TO THE CIVIL DEATH STATUTE BEING UNCONSTITUTIONAL UNDER FEDERAL LAW AND VIOLATING THE SUPREMACY CLAUSE, THIS COURT SHOULD GRANT PLAINTIFF'S MOTION FOR LEAVE TO FILE HIS SECOND AMENDED COMPLAINT AND ALLOW HIM TO PROCEED AS TO COUNTS 2-6

This RI Supreme Court "has consistently held that trial justices should liberally allow amendments to the pleadings." *Serra v. Ford Motor Credit Co.*, 463 A.2d 142, 150 (R.I.1983). This rule promotes the goal of resolving disputes on their merits, rather than through blind adherence to procedural technicalities. *Inleasing Corp. v. Jessup*, 475 A.2d 989 (R.I. 1984). The granting or denial of a motion to amend is within the discretion of the trial justice, and the Court will not disturb such a ruling absent a clear showing that such discretion was abused. *Id.* The burden rests on the party opposing the motion to show it would incur substantial prejudice if the motion were granted. *Wachsberger v. Pepper*, 583 A.2d 77 (R.I. 1990). This Court has consistently permitted amendments to pleadings "absent a showing of extreme prejudice." *Mikaelian v. Drug Abuse Unit*, 501 A.2d 721, 722 (Rd. 1985). A trial justice's discretion in granting a motion to amend "is inherently constrained by the plain language of Rule 15(a) and our cases interpreting the same; the proverbial scales are tipped at the outset in favor of permitting the amendment." *Harodite Indus., Inc. v. Warren Elec. Corp.*, 24 A.3d 514, 531 (R.I. 2011).

Defendants may argue that the instant case is one of extreme prejudice, based mainly on grounds of delay. Yet the Court has stressed that "mere delay is not enough to deny [an] amendment," absent substantial prejudice to the opposing party. *Bourdon Inc. v. Ecin Industries Inc.*, 740 A.2d 747 (R.I. 1997).[4] For example, in *Inleasing, supra*, this Court concluded that the trial justice abused his discretion by not allowing the defendant to amend his answer even though the motion to amend was made after a thirty-day trial notice had been issued and more than three years after the initial answer was filed. *Id.*; *see also Ricard v. John Hancock Mutual Life Insurance Co.*, 113 R.I. 528, 539, 324 A.2d 671, 677 (1974) (trial justice abused discretion by denying motion to amend for only reason that "the case had gone on too long on the basis of the [original] pleadings"); *Wilkinson v. Vesey*, 110 R.I. 606, 295 A.2d 676 (1972) (allowing amendment after completion of *trial*); *Local 850, Int'l Assoc. of Firefighters v. Pakey*, 107 R.I. 125, 265 A.2d 730 (1970) (permitting amendment after trial judge granted motion to dismiss).

In this case, the Supreme Court ruled that the Civil Rights counts were not pleaded until after the three-year Statute of Limitations passed. *Gallop v. Adult Corr. Institutions*, No. 2016-278-APPEAL., 2018 WL 2107853, at *6. This is a point Gallop strongly

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[4] In fact, the Court has upheld a trial court's granting of motions to amend one day before trial was scheduled to commence, see *Mikaelian v. Drug Abuse Unit*, 501 A.2d 721, 722-23 (R.I. 1985), and even after trial had begun. See *Bourbon"s, Inc. v. ECIN Industries, Inc.*, 704 A.2d 747, 751-52 (R.I. 1997).

disagrees with. However, even with Count 1 of the Second Amended complaint set aside, the Second Amended Complaint clarifies the tort claims raised in the original Complaint and Amended Complaint. The pleading format and tort counts set forth in Counts 2-6 make the case much easier to navigate. The State of Rhode Island, Matthew Galligan, and Ian Rosado cannot complain that they are prejudiced as they were named as defendants in the First Amended Complaint filed prior to the three-year statute of limitations expiring.

The State has previously alleged that defendant correctional officer Galligan was sued in his official capacity, and as a result, damages are not available under section 1983. However, the amended complaint from 2013 in this case does not mention anything about defendant Galligan being sued in his *official* capacity. In their Appellee's Brief, the State admitted that "The First Amended Complaint added Officer Galligan as a defendant, but nowhere states in what capacity he is sued." Appellee's Brief, p. 21. The original amended complaint from 2013 is filed against Defendant Galligan in his *individual* capacity, as plaintiff's original amended complaint case is identical to the one filed in *Andrade v. Perry*, 863 A.2d 1272, 1278 (R.I. 2004) (clear that plaintiff *did not* sue defendant in his

official capacity, so suit was held to be in *individual* capacity).

Respectfully submitted,
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By His Attorney,

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[Certificate Of Service Omitted]

STATE OF RHODE ISLAND SUPERIOR COURT
PROVIDENCE, SC.

DANA GALLOP

v.

C.A. NO.
PC2010-6627

ADULT CORRECTIONAL INSTITUTIONS;
IAN ROSADO, ALIAS;
MATTHEW GALLIGAN,
STATE OF RHODE ISLAND;
And VARIOUS JOHN DOES
Defendants

PLAINTIFF'S OPPOSITION TO STATE'S MOTION TO DISMISS FOR LACK OF JURISDICTION PURSUANT TO GEN. LAWS 1956, & 13-6-1

NOW COMES the plaintiff, Dana Gallop, and hereby files this objection to the defendant's motion to dismiss under the Civil Death Statute, Gen. Laws 1956, § 13-6-1.

BACKGROUND FACTS

On or about April 26, 2010, Plaintiff, Dana Gallop, was a prisoner, detained in the Adult Correctional Institute ("ACI"), in Module E, at the Intake Center in Cranston, Rhode Island, where he sustained severe and permanent injuries, after being attacked by Defendant Ian Rosado. Plaintiff was awaiting sentencing. A life sentence of imprisonment was imposed on February 15, 2011. Plaintiff appealed his conviction and

sentencing to the Rhode Island Supreme Court. The conviction was upheld on May 2, 2014.

The basic premise of this action is that prison guards, such as the Defendants, are charged with the duty under Rhode Island law to reasonably protect inmates incarcerated at the ACI from injuries or damage caused by other inmates. On the day prior to Plaintiff being attacked on April 26, 2010, Defendant Matthew Galligan ("Galligan") was advised by Defendant Ian Rosado ("Rosado") that he was going to attack Plaintiff. Defendant Galligan knew and had reason to anticipate: (1) that Plaintiff was in danger; (2) that the aggressor, Defendant Rosado, might attack Plaintiff; and (3) that Defendant Rosado had dangerous propensities and/or was likely to be involved in a violent attack upon Plaintiff.

On information and belief, on April 26, 2010, Defendant Galligan advised Defendant John Does that Defendant Rosado was going to assault Plaintiff. On further information and belief, Defendant Galligan left his post in Module E for approximately 18 minutes, in order to provide Defendant Rosado with the opportunity to assault Plaintiff. Plaintiff was negligently left unattended due to the lack of guards posted in the area who were not fulfilling their responsibilities to provide appropriate protection and control of inmates and to prevent certain prisoner assaults and disturbances.

A complaint was filed in 2010, and an amended complaint was allowed on April 12, 2013. Count II of the amended complaint states that Plaintiff's claims

are based on violations of his civil rights. On June 22, 2016, Defendant's counsel filed a motion to dismiss based on the Civil Death Statute, Gen. Laws 1956, § 13-6-1. The issue has been briefed by the Plaintiff's counsel. Plaintiff has also filed a motion for leave to file a second amended complaint, and a copy of the proposed second amended complaint is attached to that motion, and the second amended complaint clarifies Plaintiff's claims.

ARGUMENT

A. DEFENDANTS MOTION TO DISMISS IS NOT AUTHORIZED AND MUST BE DENIED

The Defendants have filed a Motion to Dismiss at the 11th hour based on the Civil Death Statute. However, this is inappropriate. In order to raise this issue, Defendant's must file a Motion for Leave to Amend their Answer to the Complaint to assert this defense. In 2002, the Honorable Superior Court Justice Clifton reached the same conclusion:

> While analyzing cases regarding Rule 15, the Rhode Island Supreme Court has pointed out Rule 15's apparent conflict with Rule 8 and Rule 12 of the Rhode Island Civil Procedure. The court has stated that failure to raise an affirmative defense in a timely manner constitutes a waiver of that defense in order to protect the complaining party from unfair surprise at trial. *See World-Wide Computer Resources v. Arthur Kaufman Sales Co.*, 615

A.2d 122, 124 (R.I.1992). However, as previously ruled by another justice of the Superior Court, "[w]hile the general rule requires that affirmative defenses are waived when not plead in a party's answer, failure to raise a defense does not forever preclude a party from raising it;" and, "[t]he proper remedy for a party who fails to raise an affirmative defense is a motion for leave to amend under Rule 15." *Osborn v. State*, 1992 WL 813634, at 1 (R.I. Super 1992) (quoting 5 Wright, Federal Practice and Procedure 1278 (1982)). Therefore, in order to resolve the conflict between the rules, courts must "take into account such elements as the extent of prejudice, as well as the question of a defendant's knowledge of circumstances that should have alerted him or her to the existence of such a defense." *World-Wide Computer Resources, Inc.*, 615 A.2d at 124.

Cady v. IMC Mortgage Co., No. CIV.A. 98-5400, 2002 WL 220899, at *2 (R.I. Super. Jan. 31, 2002), aff'd in part, rev'd in part sub nom, Cady v. IMC Mortgage Co., 862 A.2d 202 (R.I. 2004)

B. THE CIVIL DEATH STATUTE IS NOT APPLICABLE UNDER *Bogosian v. Vaccaro*, 422 A.2d 1253 (R.I. 1980)

Plaintiff's conviction was not final until it was affirmed by the Rhode Island Supreme Court on May 2, 2014, which is over four (4) years after the events complained of; and some three and a half (3½) years after

the initial complaint was filed. The Defendant's motion to dismiss is easily dispensed with by applying stare decisis, as the Rhode Island Supreme Court has already denied the retroactive application of this antiquated law:

> Section 13-6-1 specifies that the mantle of civil death falls upon a person sentenced to life imprisonment "at the time of such conviction." However, in actuality, a determination that a person has been imprisoned for life cannot be made until a final judgment of conviction has been entered. Thus, we hold that the civil-death proviso found in s 13-6-1 cannot be triggered until such time as there has been a final judgment of conviction. In State v. Macarelli, 118 R.I. 693, 375 A.2d 944 (1977), we pointed out that a judgment of conviction is not final so long as the case is pending on appeal. It is clear from the chronology set forth earlier in this opinion regarding the time of the murder trial and the imposition of sentence that the brokerage agreement was executed approximately a year and a half before Michael's conviction became final. Consequently, the Vaccaro's gain no benefit from the provisions of s 13-6-1.
>
> *Bogosian v. Vaccaro*, 422 A.2d 1253, 1254 (R.I. 1980).

C. THE CIVIL DEATH STATUTE IN RHODE ISLAND IS INVALID UNDER THE SUPREMACY CLAUSE TO THE EXTENT IT IMPAIRS PLAINTIFF'S CAPACITY TO SUE UNDER 42 USC 1983 AND OTHER CIVIL STATUTES

The preemption doctrine arises from the supremacy clause of the Constitution. If the provisions of a state law are "inconsistent with an act of Congress, they are void, as far as that inconsistency extends." *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 31 (1824). Any "state law rules or practices that may inhibit the prosecution of § 1983 actions in state courts are preempted by the Supremacy Clause of the United States Constitution." *L.A. Ray Realty v. Town Council of Town of Cumberland*, 698 A.2d 202, 221 (R.I. 1997); **see also** *Bailey v. Laurie*, 118 R.I. 184, 189, 373 A.2d 482, 485 (1977) (supremacy clause overrides state constitutional provisions contrary to federal constitutional law). The Civil Death Statute in Rhode Island is such a law.

The Civil Death Statute in Rhode Island was enacted in 1909, at a time when some states were implementing archaic punitive laws. It provides as follows:

> **§ 13-6-1. Life prisoners deemed civilly dead**
>
> Every person imprisoned in the adult correctional institutions for life shall, with respect to all rights of property, to the bond of matrimony and to all civil rights and relations of any nature whatsoever, be deemed to be dead in all respects, as if his or her natural death

> had taken place at the time of conviction. However, the bond of matrimony shall not be dissolved, nor shall the rights to property or other rights of the husband or wife of the imprisoned person be terminated or impaired, except on the entry of a lawfully obtained decree for divorce.
>
> P.L. 1915, ch. 1261, § 1; P.L. 1956, ch. 3721, § 1.
>
> **Codifications:** G.L. 1909, ch. 354, § 59; G.L. 1923, ch. 407, § 59; G.L. 1938, ch. 624, § 1.

By the 1960's, nearly every state repealed these laws. Rhode Island is one of the only states with such a law remaining on its books. *Bogosian v. Vaccaro*, 422 A.2d 1253, 1255 n.2 (R.I. 1980) ("Today, Rhode Island is one of a very small number of states that still retain civil-death statutes.")

In his first amended complaint, Plaintiff complains in Count II that he has been deprived of his civil rights.[1] In the proposed second amended complaint, Plaintiff more specifically alleges the civil rights violations under 42 USC 1983, which provides:

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[1] In the instant case, plaintiff has alleged in Count II of the amended complaint that the defendants have violated his civil rights. See 42 USC 1983. *Felder v. Casey*, 487 U.S. 131 (1988). The federal constitution mandates that a prison guard has a duty to protect a prisoner from attack by another prisoner. *Farmer v. Brennan*, 511 U.S. 825 (1994). Under state law, prison officials likewise owe a duty of ordinary or reasonable care to safeguard prisoners in their custody or control from attack by other prisoners. *Saunders v. State*, 446 A.2d 748, 750 (R.I. 1982).

> *Every person who*, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, ***any citizen of the United States*** or other person within the jurisdiction thereof to the deprivation of *any rights*, privileges, or immunities secured by the Constitution and laws, *shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress* . . . (emphasis supplied)
>
> (R.S. § 1979; Pub. L. 96–170. § 1, Dec. 29, 1979, 93 Stat, 1284; Pub. L. 104–317, title III, § 309(c), Oct. 19, 1996, 110 Stat. 3853.)

In *Almond v. Kent*, 459 F.2d 200 (4th Cir. 1972), the court invalidated several Virginia statutes (impairing access to filing a civil action under s. 1983) along with Rule 17(b) of the Federal Rules of Civil Procedure to the extent that they ran afoul of the clearly expressed intent of 1983. The court explained that it was the unanimous view of the courts that civil death statutes were invalid if they impaired pursuit of a claim under 42 USC 1983 – such as the Rhode Island statute at issue:

> Other courts have held that statutes rendering prisoners civiliter mortuus cannot affect their capacity to maintain a suit under § 1983 despite Rule 17(b). McCollum v. Mayfield, 130 F. Supp. 112 (N.D.Cal.1955), aff'd. sub nom. Weller v. Dickerson, 314 F.2d 598 (9 Cir. 1963), cert. den., 375 U.S. 845, 84 S. Ct. 97, 11 L.Ed.2d 72 (1963); Beyer v. Werner, 299

> F. Supp. 967 (E.D.N.Y.1969); Siegel v. Ragen, 88 F. Supp. 996 (N.D.Ill.1949), aff'd., 180 F.2d 785 (7 Cir. 1950), cert. den., 339 U.S. 990, 70 S. Ct. 1015, 94 L. Ed. 1391 (1950), rehearing den., 340 U.S. 847, 71 S. Ct 12, 95 L. Ed. 621 (1950). The district court thought these cases distinguishable, since they concerned statutes making suit by a convict totally impossible; but in McCollum, we observe that the California statute allowed the Adult Authority discretion to restore a prisoner's rights which it had not done in that case. 130 F. Supp. at 115-116.

Almond v. Kent, 459 F.2d at 202 (emphasis supplied). See also *Almond*, 459 F.2d at 203 ("We, therefore, conclude that for purposes of suits under § 1983, the language of § 1983, affording the right to sue to "any citizen of the United States . . . within the jurisdiction thereof," who has been deprived of any right, privilege or immunity, should prevail over the conflicting policy purportedly expressed in Rule 17(b) when applied in the light of the rationale of Virginia statutes").

D. 42 USC 1983 INVALIDATES ANY STATE LAW THAT PRECLUDES ACCESS TO STATE REMEDIES AVAILABLE TO FILE SUIT TO LITIGATE CLAIMS DIRECTLY ASSOCIATED WITH VIOLATION OF ANY FEDERAL RIGHTS UNDER COLOR OF LAW

Plaintiff has made his case that 42 USC 1983 invalidates the Rhode Island Civil Death Statute. However, 42 USC 1983 appears to invalidate any state law

which stands in the way of any person filing suit to vindicate violations of federal protected rights, even when the suit filed asserts only claims directly associated with the violations of federal protected rights:

> *Every person who*, under color of any statute, ordinance, regulation, custom, or usage . . . subjects . . . any *citizen of the United States* to the deprivation of *any rights* . . . secured by the Constitution and laws, *shall be liable to the party injured in an action at law, suit in equity, or* ***other proper proceeding for redress*** . . .

The clause "*other proper proceeding for redness*" must have a meaning beyond "[a 1983] action at law, suit in equity," because these phrases are together in the 1983 statute.

A basic principle of statutory interpretation is that courts should "give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed." *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883). The modem variant is that statutes should be construed "so as to avoid rendering superfluous" any statutory language: "A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant. . . ." *Hibbs v. Winn*, 542 U.S. 88, 101 (2004); **see also** *Sprietsma v. Mercury Marine*, 537 U.S. 51, 63 (2003) (interpreting word "law" broadly could render

word "regulation" superfluous in preemption clause applicable to a state "law or regulation"); **and** *Bailey v. United States*, 516 U.S. 137, 146 (1995) ("We assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning.")

The clause "*other proper proceeding for redress*" obviously has a meaning beyond "an action at law, suit in equity." In order to avoid it being surplusage, it must mean that "*other*" state proceedings are available to remedy not only violations of civil rights under color of law, but also *related* tortious acts associated with the violation of constitutional rights – and that any state law which prevents anyone from filing suit is invalid under the broad language of 1983.

It should also be pointed out that if this case was filed in federal court under 42 U.S.C. § 1983, the court would have jurisdiction to adjudicate the state law claims presented because they arise out of "a common nucleus of operative fact." 28 U.S.C. § 1367. It would be an absurd result if the Civil Death Statute defense to 1983 related claims is precluded in federal courts, but allowed in Rhode Island courts.

CONCLUSION

Based on the foregoing reasons, the Defendant's Motion to Dismiss must be denied.

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