STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: February 11, 2015)

DANIEL WILLIAMS,	:	
Plaintiff,	:	
	:	
v.	:	**C.A. No. PC 12-3664**
	:	
LEAH STODDARD f/k/a LEAH WILLIAMS,	:	
PAUL M. MARTELLINI, in his capacity as	:	
Acting Chief of Police of the North Providence	:	
Police Department, NORTH PROVIDENCE	:	
POLICE DEPARTMENT, and THOMAS	:	
MASSARO, in his capacity as the Finance	:	
Director of the Town of North Providence,	:	
Defendants.	:	

DECISION

GIBNEY, P.J. This matter came before the Court for a jury-waived trial on June 2 through June 6, 2014. The Plaintiff, Daniel Williams (Williams), filed suit against Defendants Leah Stoddard (Stoddard), his ex-wife, and the North Providence Police Department (the NPPD), his employer, for invasion of privacy and violations of the Federal Wiretap Act (FWA), the Rhode Island Wiretap Act (RIWA), the Stored Communications Act (SCA) and Rhode Island's computer crime and trespass laws. Williams also named as Defendants Acting Chief of the NPPD Paul Martellini (Martellini) and North Providence Finance Director Thomas Massaro (Massaro) (collectively, with Stoddard, the Defendants). At the close of all evidence, Defendants moved pursuant to Super. R. Civ. P. 52(c) (Rule 52(c)) for judgment against Williams, who objected to the motion. Jurisdiction is pursuant to G.L. 1956 § 8-2-13.

I

Standard of Review

A non-jury trial is governed by Super. R. Civ. P. 52(a), which provides that "[i]n all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon." In a bench trial, therefore, "[t]he trial justice sits as a trier of fact as well as of law." Hood v. Hawkins, 478 A.2d 181, 184 (R.I. 1984). "The task of determining the credibility of witnesses is peculiarly the function of the trial justice when sitting without a jury." Walton v. Baird, 433 A.2d 963, 964 (R.I. 1981).

Although the trial justice is required to make specific findings of fact and conclusions of law, "brief findings will suffice as long as they address and resolve the controlling factual and legal issues." White v. LeClerc, 468 A.2d 289, 290 (R.I. 1983); see also Super. R. Civ. P. 52(a). As such, a trial justice sitting as a finder of fact "need not 'categorically accept or reject each piece of evidence'" or "resolve every disputed factual contention that may arise during a trial." Notarantonio v. Notarantonio, 941 A.2d 138, 147 (R.I. 2008) (quoting Narragansett Elec. Co. v. Carbone, 898 A.2d 87, 102 (R.I. 2006)). The trial justice's findings, however, must be supported by "competent evidence." Tim Hennigan Co. v. Anthony A. Nunes, Inc., 437 A.2d 1355, 1357 (R.I. 1981).

II

Findings of Fact

Having reviewed the evidence presented by all parties, the Court makes the following findings of fact. Williams is employed as a police officer by the NPPD. On June 6, 2009, Williams married Stoddard. Within the first year of their marriage, Stoddard began to suspect Williams of infidelity. In order to confirm her suspicions, Stoddard purchased a surveillance

software program in March 2010 and installed it on the laptop computer that both she and Williams used at home. The surveillance software included a "keylogger" function that recorded all keystrokes entered into the computer's keyboard, a screenshot function that captured images of what the computer screen was displaying every five minutes, and a function that logged every website visited on the computer's web browser. The surveillance software stored this data on the computer's hard drive in a file to which Stoddard had access.

For approximately one month, Stoddard recorded Williams' computer activities without his knowledge. During that time, Stoddard, using the keylogger data from the surveillance software, obtained Williams' log-in credentials for his email account, various social media accounts—including his Facebook and MySpace webpages—and various online dating services—including his Ashley Madison[1] and Cougar Life[2] profiles. Prior to using the keylogger program, Stoddard was not privy to Williams' log-in credentials because Williams never shared them with her. Stoddard used these log-in credentials to access Williams' accounts and then read, printed out, or emailed to herself various emails and instant message conversations that Williams had exchanged with various other women. Among the email correspondence that Stoddard discovered was a message containing a photograph of Williams' genitalia, which Williams had sent to a person he met online, and messages containing partially nude photos of a woman. Stoddard also captured screenshots of Williams' online activity, which depicted, among other activity, pornography and an instant message conversation between Williams and another woman. Williams discovered the surveillance software on the couple's computer on April 12, 2010, at which time he deactivated it and confronted Stoddard. The couple then separated, and

[1]Ashley Madison is an online dating service and social networking service marketed to people who are already in a relationship with the slogan, "Life is short. Have an affair."
[2] Cougar Life is a dating website for women who want to date younger men.

Stoddard soon filed for divorce.[3]

On April 16, 2010, several days after Williams discovered the surveillance software on the laptop, Stoddard contacted Lieutenant Kristian Calise (Calise) of the NPPD's Internal Affairs Department (Internal Affairs) and told him that she had information that Williams had engaged in improper activities while on duty. Stoddard told Calise that she could support her accusation with data that she had collected from the computer on which she had installed the surveillance software. Calise and Stoddard met in person later that evening while he was on duty at a Shaw's Supermarket in North Providence. When Stoddard expressed some hesitancy about turning over the surveillance data, Calise informed her that although she was under no obligation to give him the data, he might not be able to take disciplinary action against Williams without it. Calise and Stoddard then arranged to meet again at Panera Bread in Seekonk, Massachusetts on April 20, 2010. Stoddard's mother and Captain Brendon Furtado (Furtado) of the NPPD were also present at this meeting at which Stoddard gave Calise and Furtado a folder containing printed copies of several emails that Williams had sent to other women. Stoddard also brought her laptop to the April 20, 2010 meeting and allowed Calise or Furtado to copy all of the data that she had captured with the surveillance software, including records of online activity and communications in which Williams engaged while he was using the computer at home.

After receiving the surveillance data from Stoddard, Calise decided to investigate whether Williams was again engaging in behavior for which he had previously been disciplined. In March of 2007, Williams had been suspended from duty for fifty days after a woman whom he had encountered while on duty complained to the NPPD that Williams had contacted her via Facebook to make sexual advances. Williams had learned this woman's name by running her

[3] The couple's divorce settlement was finalized on November 19, 2010.

license plate number through the Rhode Island Law Enforcement Telecommunications System (RILETS), the database that the NPPD officers use to look up information on motorists by their license plate numbers. Thus, when Stoddard approached Calise with her concerns that some of Williams' online activities might have occurred while he was on duty, Calise promptly commenced an investigation to determine whether Williams had again been using RILETS to find out the names of women he encountered while on duty and to later contact them via Facebook.[4] In furtherance of his investigation, Calise accessed the publically-available version of Williams' Facebook webpage, for which Calise did not need Williams' log-in credentials to access, and obtained a list of Williams' Facebook "friends."[5] On April 21, 2010, Calise requested from Captain Paul Ricci of the NPPD information on license plate numbers that Williams had run through RILETS. Calise then cross-referenced Williams' list of Facebook friends with women whose license plate numbers Williams had looked up in RILETS while on duty. Finding that Williams had contacted on Facebook several women whose names he had obtained by running their license plate numbers through RILETS, as well as a domestic violence victim whom Williams met when responding to her call for help after her boyfriend physically attacked her, Calise contacted and interviewed the women. These women corroborated that

[4] Calise gave conflicting testimony at trial regarding whether or not, at the time he began his investigation, the NPPD was already engaged in an informal investigation or inquiry into Williams' improper use of RILETS. At times, Calise seemed to indicate that the NPPD had initiated an informal investigation into Williams' use of RILETS prior to Calise's initiating his Internal Affairs investigation. At other times, however, Calise was unsure of when such an informal investigation had started or if there had been such an investigation at all. Because none of the other evidence in this case, including the deposition testimony of Captain Paul Ricci and Lieutenant Richard Varan, corroborates Calise's testimony that the NPPD had initiated an informal investigation into Williams' use of RILETS prior to Calise's initiating his Internal Affairs investigation, this Court does not credit Calise's testimony on this issue.

[5] Two individuals may become "friends" on Facebook by mutually agreeing to be Facebook friends. Doing so allows two Facebook users to view information on each other's Facebook webpages that is not publically available, follow each other's postings to Facebook, post on each other's webpages, and exchange messages with each other over the Facebook website.

Williams had first met them while he was carrying out his duties as a police officer and had then contacted them via Facebook or other social media websites. At least one woman believed that Williams contacted her for the purpose of initiating a sexual relationship.

After amassing evidence that he believed was sufficient to terminate Williams' job with the NPPD, Calise initiated disciplinary proceedings and formally examined Williams at the NPPD Professional Standards Unit on November 1, 2010. During this examination, Williams acknowledged contacting, via Facebook or over the telephone, several people whose names he learned through his position as a police officer. Williams further admitted that he contacted these people, mostly women, for "social" reasons and not for law enforcement purposes. In addition, Williams admitted to taking a photograph of his genitalia while on duty in his police cruiser and emailing it to a person he had met online. Williams also admitted to opening emails that contained photographs of a partially nude woman while he was on duty.

On March 28, 2012, Internal Affairs filed a complaint against Williams pursuant to the Law Enforcement Officers' Bill of Rights (LEOBOR), G.L. 1956 §§ 42-28.6-1 through 42-28.6-17. The complaint alleged that Williams had engaged in conduct unbecoming a police officer and had conducted personal business while on duty. The complaint also included charges of incompetence, violation of the NPPD rules of behavior, and insubordination. In accordance with § 42-28.6-4(a), Internal Affairs notified Williams that he was entitled to a "LEOBOR hearing" at which he would be given the opportunity to respond to the allegations of misconduct before Internal Affairs reached a final decision on whether to terminate his employment. On March 29, 2012, the NPPD suspended Williams from duty with full pay and benefits, and Williams exercised his right to a LEOBOR hearing. The NPPD attempted to submit into evidence at the LEOBOR hearing much, if not all, of the surveillance data that Stoddard had collected, including

screenshots of pornographic websites that Williams had visited while off duty. Williams objected to the use of the surveillance data and filed the instant lawsuit seeking to permanently enjoin the NPPD from using Stoddard's surveillance data, as well as any information that Internal Affairs derived with the aid of that data, at his LEOBOR hearing. The hearing has, therefore, been held in abeyance during the pendency of this lawsuit.

As grounds for the instant legal action, Williams alleges that Stoddard violated the FWA, 18 U.S.C. § 2511, the Stored Communications Act (SCA), 18 U.S.C. § 2701, and the RIWA, G.L. 1956 § 12-5.1-13, by recording and accessing his online communications without his permission. Furthermore, Williams alleges that Stoddard violated the Rhode Island Computer Crimes Law, G.L. 1956 §§ 11-52-3 and 11-52-4.1, and G.L. 1956 § 9-1-28.1, which codifies a right to privacy and creates a cause of action for violating an individual's right to privacy. Williams also seeks to hold Stoddard civilly liable, pursuant to § 9-1-2, for her alleged criminal conduct in violating the Wire Fraud Act, 18 U.S.C. § 1343, the Identity Theft Act, 18 U.S.C. § 1028A, and the fraud provision of the Rhode Island Computer Crimes Law, § 11-52-2. Additionally, Stoddard has asserted a counterclaim of abuse of process against Williams.[6]

Williams further alleges that the NPPD, Martellini, and Massaro (the North Providence Defendants) violated the FWA and RIWA (collectively, the Wiretap Acts) by seeking to use Stoddard's surveillance data against him in his LEOBOR hearing. Accordingly, Williams seeks to enjoin the NPPD from using any of the surveillance evidence obtained by Stoddard and the evidence derived therefrom at his LEOBOR hearing. In addition, Williams requests the Court

[6] Because Stoddard presented no evidence at trial in support of her abuse of process claim, she failed to satisfy her burden of proof. Thus, this Court finds for Williams on Stoddard's counterclaim. See Clyne v. Doyle, 740 A.2d 781, 782 (R.I. 1999) (upholding trial court's finding in favor of the defendant because the "plaintiff had failed to meet his burden of proving all elements of . . . abuse of process").

issue a declaration stating that all evidence obtained by the NPPD is inadmissible at the LEOBOR hearing. Lastly, Williams seeks attorneys' fees, costs, punitive damages, statutory damages, and compensatory damages from both Stoddard and the North Providence Defendants.

III

Analysis

A

Stoddard's Affirmative Defense of Waiver

As a threshold matter, this Court addresses the validity of Stoddard's affirmative defense that Williams waived his right to bring this suit against her in their divorce settlement agreement. In particular, Stoddard asserts that because Williams agreed in their divorce settlement to release her from any and all claims he had against her, he waived his right to sue her in any action subsequent to their divorce for any claim that had arisen prior to his signing their divorce settlement. Williams, however, maintains that the divorce agreement bars both him and Stoddard only from bringing subsequent lawsuits that relate to each other's property interests and that the agreement does not preclude him from bringing the instant lawsuit against Stoddard.

The divorce agreement contains two separate provisions with release language. First, section 5 is a mutual release of all claims to the property of the former spouse, as well as the right to support, maintenance, and alimony. Second, section 14, entitled "Full Disclosure," provides:

> "Each of the parties hereto represents that each has made a full disclosure one to the other of all assets owned by him or her . . . at the time of the negotiation of this agreement. Each expressly releases the other of and from any and all claims of every nature which either have [sic] had, now has, or hereafter may have, for or by reason of anything whatsoever, from the beginning of the world to the day or date of these presents."

In Ritter v. Mantissa Inv. Corp., 864 A.2d 601, 607-08 (R.I. 2005), our Supreme Court held that a divorce settlement agreement containing remarkably similar release language was ambiguous on the question of whether it barred the ex-wife's subsequent lawsuit against the ex-husband for a matter not dealt with in the divorce settlement. Noting that "a release provision [can] be ambiguous despite broad language consistent with a general release," the Supreme Court reasoned that the settlement agreement in question could reasonably be read in two ways. Id. at 608. On the one hand, the narrow language of section 5, which, by its terms, only applied to property and spousal support, could be interpreted "to cabin the parameters of the release [in section 14] to only the rights and obligations flowing from the divorce despite the broad language of section 14." Id. On the other hand, the broader release language of section 14 could be read to extend to matters outside the scope of the divorce settlement. Id.

The Supreme Court's reasoning and conclusion in Ritter is directly on point in the case at bar, as the facts and the release language in the divorce decrees are nearly identical. Moreover, the language of section 14 in the Stoddard-Williams divorce agreement, standing alone, is ambiguous on its face. The paragraph begins with a sentence relating to the parties' assets, but that sentence is then followed by another sentence purporting to control "any and all" of the parties' claims against each other "of every nature . . . from the beginning of the world." Just as the Supreme Court found in Ritter that section 5's narrow focus on property rights could "cabin" the broad release language of section 14, so too can the narrow focus of the first sentence of section 14 be read to limit the dominion of the rest of the section. Id.; see also Aetna Cas. & Sur. Co. v. Farr, 594 A.2d 379, 381 (R.I. 1991) (holding that even though a release used broad language to limit the plaintiff's ability to sue the defendant, the release's specific reference to only a certain kind of claim rendered the agreement ambiguous). Consequently, this Court finds

that the parties' divorce settlement agreement is ambiguous on the question of whether the release language bars Williams from bringing the instant suit against Stoddard.

In resolving the issues raised by this ambiguity, this Court applies general principles of contract law. See Esposito v. Esposito, 38 A.3d 1, 5 (R.I. 2012) (noting that "[i]t is well settled that a property settlement agreement that has been 'incorporated by reference, but not merged into the final divorce decree, retain[s] the characteristics of a contract'") (quoting Zaino v. Zaino, 818 A.2d 630, 637 (R.I. 2003)). Ordinarily, "when ambiguity exists [in a contract], extrinsic evidence may be introduced to ascertain the executing parties' intent." Farr, 594 A.2d at 381. Accordingly, this Court heard extrinsic evidence during trial in the form of testimony from both Williams and Stoddard as to what they understood the release language of section 14 to mean when they entered the agreement. Williams testified that when he signed the agreement, he believed the agreement precluded the parties only from bringing subsequent lawsuits pertaining to each other's property interests. Stoddard testified that she believed that it pertained to all suits of any kind. From this testimony, the Court can only conclude that the parties had a misunderstanding as to the meaning of section 14 when they entered into the divorce agreement. See II Farnsworth on Contracts, § 9.2 at 589 (2004) (explaining that a misunderstanding in contract law is "a situation in which two parties attach different meanings to their language").

This misunderstanding has two consequences. First, because the extrinsic evidence presented at trial failed to clarify the agreement's ambiguity, this Court is unable to decipher the meaning of the release provision of section 14. As a result, the Court cannot enforce this provision of the agreement. See 1 Corbin on Contracts, § 4.1 at 525 (1993) (explaining that "[a] court cannot enforce a contract unless it can determine what it is. It is not enough that the parties think that they have made a contract. They must have expressed their intentions in a manner that

is capable of being understood"). Second, Stoddard and Williams cannot be said to have actually agreed to be bound by the provisions of section 14 because they did not mutually assent to its terms. See State v. Rice, 727 A.2d 1229, 1232 (R.I. 1999) (explaining that "[a]n agreement[,] in order to have any semblance of validity[,] must at least objectively manifest the mutual assent of the parties to be bound by a contractual relationship"); see also Restatement (Second) Contracts § 20 (1981) (providing that "[t]here is no manifestation of mutual assent to an exchange if the parties attach materially different meanings to their manifestations and . . . neither party knows or has reason to know the meaning attached by the other").

In general, when the parties to a contract have not mutually assented to all material terms of a contract, the entire contract is deemed invalid and unenforceable. See O'Donnell v. O'Donnell, 79 A.3d 815, 820 (R.I. 2013) (explaining that "in order to form an enforceable agreement, '[e]ach party must have and manifest an objective intent to be bound by the agreement'") (quoting Opella v. Opella, 896 A.2d 714, 720 (R.I. 2006)); see also Bonnco Petrol, Inc. v. Epstein, 115 N.J. 599, 612 (1989) (holding that "[a]s a general rule a contract is not to be partially rescinded"). Fortunately, however, in the case at bar, such a fate need not befall the parties' entire divorce settlement because the agreement contains a severability clause. See Bonnco Petrol, Inc., 115 N.J. at 612 (explaining that "a severable transaction may be partially rescinded"). In section 33 of the parties' divorce settlement, entitled "Partial Invalidity," Stoddard and Williams agreed that "[i]f any provision of this agreement is held to be invalid or unenforceable, all other provisions shall nevertheless continue in full force and effect." Because its meaning is clear and undisputed, this Court will enforce the parties' severability clause. See Sturbridge Home Builders, Inc. v. Downing Seaport, Inc., 890 A.2d 58, 66 n.5 (R.I. 2005) (explaining that "unambiguous terms in signed contracts will be enforced as written unless

enforcement is barred by a supervening principle of law or equity"). Thus, this Court finds only that the release provision of section 14 is unenforceable. As a result, the parties' divorce settlement agreement does not bar Williams' claims against Stoddard in the instant lawsuit.

B

Claims Against Stoddard

1

Wiretap Acts

Williams alleges that Stoddard violated the Wiretap Acts in several ways. First, Williams alleges that Stoddard violated the interception provisions of the Wiretap Acts by recording the log-in credentials that he used to access various websites. Williams further maintains that Stoddard's recording of screenshots of Williams' online activity—capturing images of Williams' emails, Facebook messages, and instant message conversations while Williams was typing these communications—violated the Wiretap Acts' prohibition on intercepting electronic communications. Next, Williams alleges that Stoddard violated the use provision of the FWA by using the information she gained from the keylogger program to access Williams' email and social media accounts. Lastly, Williams claims that Stoddard violated the disclosure provision of the FWA when she gave her surveillance data to Calise.

a

The FWA

The FWA establishes criminal and civil penalties for intentionally intercepting electronic communications and for disclosing or using electronic communications that were intercepted in violation of the law. See 18 U.S.C. §§ 2511, 2520. The federal courts are largely in agreement that the FWA's reference to "electronic communications" extends to email messages as well as

"information . . . conveyed from a private website to users," such as Facebook. United States v. Councilman, 418 F.3d 67, 79 (1st Cir. 2005); United States v. Steiger, 318 F.3d 1039, 1047 (11th Cir. 2003); accord United States v. Szymuszkiewicz, 622 F.3d 701, 705 (7th Cir. 2010) (finding that email messages are electronic communications under the Wiretap Act); accord Konop v. Hawaiian Airlines, Inc., 302 F.3d 868, 876 (9th Cir. 2002) (concluding that a "website fits the [FWA's] definition of 'electronic communication'").

There is much disagreement, however, as to what constitutes an "interception" of an electronic communication. The FWA defines "intercept[ion]" as "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device." 18 U.S.C. § 2510(4). Despite the complete absence of either the word "contemporaneous" or "simultaneous" from the statute, most federal circuit courts which have considered the question have interpreted this definition as requiring that an interception must occur contemporaneously with the transmission of the electronic communication. See United States v. Barrington, 648 F.3d 1178, 1202 (11th Cir. 2011) (holding that "to violate the Wiretap Act, an interception of electronic communications must occur contemporaneously with their transmission"); see also Steiger, 318 F.3d at 1047-48 (adopting the contemporaneity rule and citing cases); Konop, 302 F.3d at 876-79 (explaining history of contemporaneity rule and citing cases). This line of reasoning can be traced back to a 1976 case from the Fifth Circuit Court of Appeals, which held that, in the context of a tape-recorded telephone conversation, the FWA's prohibition of unauthorized interceptions applies only "in the contemporaneous acquisition of the communication" while it is being transmitted over telephone wires. United States v. Turk, 526 F.2d 654, 658 (5th Cir. 1976); see also Michael D. Roundy, The Wiretap Act—Reconcilable Differences: A Framework for Determining the "Interception" of Electronic

Communications Following United States v. Councilman's Rejection of the Storage/Transit Dichotomy, 28 W. New Eng. L. Rev. 403, 418 (2006) (noting that Turk was the wellspring of the contemporaneity test "for determining when an electronic communication has been intercepted in violation of the . . . Wiretap Act").

Championing the contemporaneity rule, the Defendants argue that Stoddard's use of the keylogger program did not violate the FWA because it did not intercept any of Williams' emails or instant message communications while they were being transmitted. Defendants base their argument on two federal district court cases that held that keystroke recorders do not violate the FWA: Rene v. G.F. Fishers, Inc., 817 F. Supp. 2d 1090 (S.D. Ind. 2011) and United States v. Ropp, 347 F. Supp. 2d 831 (2004).

Some judges and many commentators, however, have rejected or questioned the contemporaneity rule on the grounds that it is unworkable in the face of the speed and complexity at which electronic communications are transmitted. See, e.g., Konop, 302 F.3d at 891 (Reinhardt, J. dissenting) (arguing that a reading of the FWA that "would prohibit the interception of electronic communications, both stored and en route," is "consistent with the nature of the technology at issue, leaves no unexplained statutory gaps, and renders none of the myriad provisions of either the Wiretap Act or the Stored Communications Act superfluous"); Councilman, 418 F.3d at 73 (noting that "[t]he statute contains no explicit indication that Congress intended to exclude communications in transient storage from the definition of 'electronic communication,' and, hence, from the scope of the Wiretap Act"); Potter v. Havlicek, No. 3:06-CV-211, 2007 WL 539534, at *6 (S.D. Ohio Feb. 14, 2007) (noting that "[c]ontemporaneousness was an element originally introduced to 18 U.S.C. 2511 when the law applied only to wire and oral communications," not to electronic communications); Roundy,

supra, at 426 (advocating against the contemporaneity rule because "[t]he technological nature of e-mail and other forms of electronic communication renders the actual [contemporaneous] interception of such a communication virtually impossible," thereby "caus[ing] much of the . . . [Federal] Wiretap Act to be effectively inoperative with respect to electronic communications").

As the U.S. Supreme Court has not ruled on this issue, there is no controlling rule dictating whether an interception of an electronic communication under the FWA must occur contemporaneously with transmission. Nonetheless, this Court takes note of the high court's recent admonition against extending the reasoning of old case law to modern technology when that old case law was decided at a time when the modern technology at issue was "nearly inconceivable." Riley v. California, 134 S. Ct. 2473, 2484, 2491 (2014) (finding that Fourth Amendment search and seizure precedents developed in the 1960s and 1970s were largely inapplicable to search and seizure of "Internet-connected devices" and "data stored on remote servers"). When the Turk case was decided in 1976, a nascent form of email had just been invented, and the internet consisted of only a few dozen computers connected through an experimental U.S. Department of Defense program. Aaron Schwabach, Internet and the Law: Technology, Society, and Compromises 155 (2d ed. 2014). The internet as we know it today—together with email, social networking, and online dating—did not exist in any form.

Therefore, this Court declines to apply the reasoning of the Turk decision to the instant case and, accordingly, declines to foist a wholesale contemporaneity requirement onto the FWA's definition of "intercept[ion]" in the case of electronic communications. As an initial matter, the basis of the Turk court's formation of the contemporaneity rule was its reluctance to criminalize listening to a recording of a telephone conversation by someone who had no involvement in making the recording. Turk, 526 F.2d at 657-58 (eschewing an interpretation of

the law that "would mean that innumerable 'interceptions,' and thus violations of the Act, could follow from a single recording"). Such reasoning has no applicability in a case where, as in the case at bar, the person accused of violating the FWA was the person who surreptitiously accessed and read the plaintiff's electronic communications.

Moreover, the Turk case dealt with the interception of a telephone call, a technology that is not closely analogous to emails or other online, electronic communications. Unlike the landline telephone conversation at issue in Turk—a communication transmitted only once between the caller and the recipient at the time the call was placed—emails, instant message conversations, and other electronic communications submitted over websites are transmitted multiple times both in transit between the sender and the recipient and every time the recipient accesses the communication from the website (such as by accessing an already-read email from a webmail server). As the First Circuit Court of Appeals explained in Councilman,

> "[a]fter a user composes a[n] [email] message . . . a program called a mail transfer agent . . . formats that message and sends it to another program that 'packetizes' it and sends the packets out to the Internet. Computers on the network then pass the packets from one to another; each computer along the route stores the packets in memory, retrieves the addresses of their final destinations, and then determines where to send them next. At various points the packets are reassembled to form the original e-mail message, copied, and then repacketized for the next leg of the journey. . . . While the journey from sender to recipient may seem rather involved, it usually takes just a few seconds, with each intermediate step taking well under a second." 418 F.3d at 69-70.

Thus, emails, as well as other electronic communications sent over the internet, are transmitted multiple times at a staggering speed, making them impossible to intercept in the same way that a telephone call may be intercepted. Consequently, it makes no sense to apply the reasoning from Turk to cases involving electronic communications.

The wisdom of not applying the contemporaneity rule to electronic communications is

evident in the absurd results that occur when the rule is so applied. For example, in the Rene case, relied on by Defendants, the court found that use of keylogger software to capture another person's log-in credentials to private email and bank accounts did not violate the FWA. 817 F. Supp. 2d at 1094. Additionally, the court in Ropp, also relied on by Defendants, found that use of a keylogger program to record the content of another's email messages did not violate the FWA. 347 F. Supp. 2d at 837-38. Both courts based their conclusions on the fact that the keystrokes recorded by the keylogger programs were not immediately transmitted over the internet as they were being typed. Id. Instead, the computer user would have to take an additional step (e.g. clicking "send" or hitting the "enter" key) to transmit the characters recorded by the keylogger, thereby breaking the contemporaneity between interception and transmission. However, this distinction between typing a password into a webmail server's website and transmitting it to that webmail server is so temporally superficial that it takes much of the force out of the FWA's prohibition on intercepting electronic communications. See Steiger, 318 F.3d at 1050 (acknowledging that under a narrow reading of the FWA, "very few seizures of electronic communications from computers will constitute 'interceptions' because of the fleeting amount of time, lasting only seconds or milliseconds, in which such communications are in transit"); but see TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001) (holding that "[i]t is a cardinal principle of statutory construction" that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant").

Nearly every electronic communication that the average person engages in on a daily basis—such as accessing bank account information, sending emails, and having instant message conversations—starts out with keystrokes transmitted from the keyboard to the computer, which then send the information through the internet to a different computer someplace else. Yet,

intercepting these electronic communications while they are in transit and before they are stored on a server is so difficult that most unauthorized surveillance of electronic communications is much more likely to be carried out with the use of keyloggers. See Steiger, 318 F.3d at 1050 (explaining that under the contemporaneity rule, electronic communications surveillance "'is virtually impossible'") (quoting Jarrod J. White, E–Mail @Work.com: Employer Monitoring of Employee E–Mail, 48 Ala. L. Rev. 1079, 1083 (1997)). Therefore, a rule that protects electronic communications from unauthorized interception but does not protect the keystrokes necessary to create those electronic communications provides almost no meaningful protection at all and is, therefore, contrary to the evident purpose of the FWA. See Konop, 302 F.3d at 875 (noting that "[t]he legislative history of the [FWA] suggests that Congress wanted to protect electronic communications that are configured to be private, such as email").

Thus, this Court finds the reasoning espoused in the dissenting opinion in Konop to be persuasive and holds that keylogger programs that capture typed information, which is intended to be and is transmitted over the internet immediately after it is typed, do constitute an interception of electronic communications in violation of the FWA. 302 F.3d at 891 (Reinhardt, J. dissenting). In such an instance, it is the typed information, such as an email password, sent from a website user to the website that constitutes the intercepted electronic communication. See 18 U.S.C. § 2510(12) (defining "electronic communication" as "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce"). This interpretation is consistent with the plain language of the statute, which defines "intercept[ion]" as merely the "acquisition of the contents of any . . . electronic . . . communication through the use of any electronic, mechanical, or other device." 18 U.S.C.

§ 2510(4). Accordingly, when Stoddard used the keylogger program to record the passwords to Williams' private online accounts and his emails, she intercepted his electronic communications in violation of the FWA, 18 U.S.C. § 2511(1)(a).

Moreover, Stoddard violated the FWA's prohibition on interception of electronic communications by capturing screenshots of Williams' instant message conversations. These screenshots recorded Williams' online instant message conversations with his Facebook friends in real time, while the conversations were occurring. Thus, the screenshots would qualify as prohibited interceptions even under an interpretation of the FWA that requires interceptions of electronic communications to be contemporaneous with transmission. Cf. Shefts v. Petrakis, No. 10-CV-1104, 2012 WL 4049484, at *9 (C.D. Ill. Sept. 13, 2012) (finding that software that caused images of the plaintiff's email communications to be captured as they were being written and sent or received "contemporaneously captured Plaintiff's electronic communications within the meaning of the [FWA]"); see also Potter, 2007 WL 539534, at *6 (holding that "incoming emails subjected to the screen shot software" satisfy the FWA's definition of an interception of an electronic communication).

Furthermore, Stoddard violated the FWA's prohibition on using unlawfully intercepted electronic communications when she used Williams' log-in credentials to access his emails and other online communications. See 18 U.S.C. § 2511(1)(d). Finally, she violated the FWA's disclosure provision by disseminating copies of Williams' electronic communications to Calise. See 18 U.S.C. § 2511(1)(c); see also Noel v. Hall, 568 F.3d 743, 751 (9th Cir. 2009) (holding that 18 U.S.C. § 2511(1)(c) "protects against the dissemination of private communications that have been unlawfully intercepted").

b

The RIWA

Because Williams' claims against the North Providence Defendants are predicated, in part, on Williams' contention that Stoddard violated the RIWA, the North Providence Defendants argue that the civil suit provision of the RIWA does not apply to Stoddard. They base this argument on the fact that § 12-5.1-13 provides a civil remedy for "[a]ny person whose wire, electronic, or oral communication is intercepted, disclosed, or used in violation of this chapter." Sec. 12-5.1-13(a) (emphasis added). Because the statute outlines the legal avenues by which law enforcement officials and prosecutors—and no one else—may legally obtain wire, electronic, and oral communications, the North Providence Defendants argue that only law enforcement officials and prosecutors may violate the statute. Therefore, they argue, the RIWA does not provide a civil remedy against parties who are not law enforcement officials or prosecutors and, thus, does not give Williams a cause of action against Stoddard, who is neither a law enforcement official nor a prosecutor.

The North Providence Defendants' reading of the RIWA, however, is so limited as to lead to an absurd result. See Matter of Falstaff Brewing Corp. re: Narragansett Brewery Fire, 637 A.2d 1047, 1050 (R.I. 1994) (holding that "[a] statute may not . . . be construed in a way that would result in 'absurdities or would defeat the underlying purpose of the enactment'") (quoting Brennan v. Kirby, 529 A.2d 633, 637 (R.I. 1987)). The North Providence Defendants correctly point out that the RIWA provides a legal mechanism for only law enforcement officers and prosecutors to surreptitiously obtain wire, oral, and electronic communications. See §§ 12-5.1-2, 12-5.1-10. This does not mean, however, that only law enforcement officers and prosecutors may violate the RIWA. The North Providence Defendants' interpretation of the law would allow everyone for whom the legislature did not provide a legal means of obtaining such

communications to obtain them in any way at all. Such an interpretation "would result in 'absurdities [and] would defeat the underlying purpose of the enactment,'" which is to restrict the class of persons who can lawfully intercept wire, oral, and electronic communications to law enforcement officials and prosecutors. Matter of Falstaff Brewing Corp., 637 A.2d at 1050 (quoting Brennan, 529 A.2d at 637); see also §§ 12-5.1-2, 12-5.1-10. Thus, any person who is not a law enforcement official or a prosecutor who obtains such communications necessarily obtains them in violation of the law, and a victim of such unauthorized surveillance has a cause of action under § 12-5.1-13.

In addition, the North Providence Defendants' interpretation of the RIWA is contrary to the statute's plain language, which creates "a civil cause of action against any *person* who intercepts, discloses, or uses . . . communications [in violation of the law]." Sec. 12-5.1-13 (emphasis added). Thus, where a "person" intercepts an electronic communication in nonconformance with § 12-5.1-1, et seq., a cause of action may lie. The statute broadly defines "person" as "any individual, partnership, association, joint stock company, trust, or corporation, *whether or not any of the foregoing is an officer, agent, or employee of the United States, a state, or a political subdivision of a state*." Sec. 12-5.1-1(11) (emphasis added). Thus, by the statute's plain terms, Stoddard, an "individual," comes under the ambit of the civil remedy provisions of § 12-5.1-13.

c

The RIWA Applied to Stoddard's Actions

As noted above, the RIWA provides a civil remedy for "[a]ny person whose wire, electronic, or oral communication is intercepted, disclosed, or used in violation of this chapter." Sec. 12-5.1-13(a). This statute is, in large part, parallel to the FWA. See Pulawski v. Blais, 506

A.2d 76, 77, n.1 (R.I. 1986). In particular, both the federal and the state law provide a civil cause of action against a person who discloses or uses unlawfully intercepted communications. See § 12-5.1-13(a); 18 U.S.C. § 2511(1)(c)-(d). In addition, the RIWA defines "intercept" in exactly the same way as the federal statute. Compare § 12-5.1-1(8) with 18 U.S.C. § 2510(4). However, this Court is unaware of any Rhode Island Supreme Court ruling that has adopted the federal courts' contemporaneity rule with respect to interception of electronic communications. On the contrary, our Supreme Court "has indicated that Rhode Island's wiretapping statute would be interpreted more strictly than its federal counterpart in 'the interest of giving the full measure of protection to an individual's privacy.'" State v. O'Brien, 774 A.2d 89, 100 (R.I. 2001) (quoting State v. Maloof, 114 R.I. 380, 390, 333 A.2d 676, 681 (1975)); see also Maloof, 114 R.I. at 390, 333 A.2d at 681 (holding that "[i]n the interest of giving the full measure of protection to an individual's privacy, particularly as it relates to electronic eavesdropping, we shall insist upon a closer adherence to the Rhode Island statute than may be expected by those who interpret the federal legislation").

Accordingly, this Court declines to extend the contemporaneity rule to the RIWA and, applying the same reasoning as under this Court's interpretation of the federal statute, finds that Stoddard violated the state law when she intercepted Williams' emails, instant messages, and private website log-in credentials. See O'Brien, 774 A.2d at 99 (explaining that "[h]owever much we may look for guidance to cases interpreting federal wiretapping law, we are not bound to follow either federal or even our own decisions interpreting the *federal* wiretapping statute when we interpret Rhode Island's wiretapping statute, especially when we disagree with the reasoning or analysis used in such cases") (emphasis in original). Likewise, applying the same reasoning employed to find that Stoddard violated the use and disclosure provisions of the

federal law, this Court finds that Stoddard also used and disclosed Williams' electronic communications in violation of the RIWA. See § 12-5.1-13(a).

2

The SCA

Williams claims that Stoddard violated the SCA when she accessed his email and social media accounts without his permission. The SCA provides a cause of action against anyone who "intentionally accesses without authorization a facility through which an electronic communication service is provided . . . and thereby obtains . . . authorized access to a wire or electronic communication while it is in electronic storage." 18 U.S.C. §§ 2701(a)(1), 2707(a).

The SCA incorporates the definitions set forth in the FWA, which defines "electronic communication service" as "any service which provides to users thereof the ability to send or receive wire or electronic communications." 18 U.S.C. § 2510(15); 18 U.S.C. § 2711(1). The term "electronic storage" is defined as "any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof" and "any storage of such communication by an electronic communication service for purposes of backup protection of such communication." 18 U.S.C. § 2510(17). Although the statute does not define "facility," a number of federal courts have interpreted the term to include "facilities that are operated by electronic communication service providers and used to store and maintain electronic storage," such as "a phone company, internet service provider, or electronic bulletin board system" that stores electronic information. Garcia v. City of Laredo, Tex., 702 F.3d 788, 792 (5th Cir. 2012) (quoting Freedom Banc Mortg. Servs., Inc. v. O'Harra, No. 2:11–CV–01073, 2012 WL 3862209, at *9 (S.D. Ohio Sept. 5, 2012)); Steiger, 318 F.3d at 1049. In contrast, the term does not include personal "'computers that *enable* the use of an electronic communication service.'"

Garcia, 702 F.3d at 792 (quoting Freedom Banc Mortg. Servs., Inc., 2012 WL 3862209, at *9) (emphasis in original). Thus, the servers on which password-protected websites—such as Facebook and Williams' AOL email account—store electronic communications fall within the statute's definition of "facility." Putting all of these definitions together, it is clear that "e-mail stored on an electronic communication service provider's systems after it has been delivered, as opposed to e-mail stored on a personal computer, is a stored communication subject to the [SCA]." Pure Power Boot Camp v. Warrior Fitness Boot Camp, 587 F. Supp. 2d 548, 555 (S.D.N.Y. 2008) (finding that the defendant's use of the plaintiff's log-in credentials to access the plaintiff's emails that were stored online in "Microsoft's Hotmail system" constituted obtaining electronic communications in violation of the SCA); see also Theofel v. Farey-Jones, 359 F.3d 1066, 1075-76 (9th Cir. 2004) (finding that email messages are protected from unauthorized disclosure by the SCA both before and after they are received by the intended recipient).

At trial, Stoddard unequivocally admitted to engaging in activities that clearly violate the SCA. Specifically, she testified that she used the keylogger program to obtain Williams' email and other private website passwords and then used those passwords to access Williams' password-protected accounts without his authorization. Moreover, Stoddard admitted that the primary reason that she installed the keylogger software was to learn Williams' log-in credentials and use them to access his accounts without his knowledge or consent. Consequently, Stoddard "intentionally accesse[d] without authorization a facility through which an electronic communication service is provided . . . and thereby obtain[ed] . . . authorized access to a[n] . . . electronic communication while it [was] in electronic storage." 18 U.S.C. § 2701(a); see also Miller v. Meyers, 766 F. Supp. 2d 919, 923 (W.D. Ark. 2011) (finding civil liability under the

SCA under substantially similar circumstances); see also Cardinal Health 414, Inc. v. Adams, 582 F. Supp. 2d 967, 976 (M.D. Tenn. 2008) (holding that "where the facts indisputably present a case of an individual logging onto another's e-mail account without permission and reviewing the material therein, a summary judgment finding of [a SCA] violation is appropriate"). Stoddard thereby violated the SCA.

3

The Rhode Island Computer Crimes Law

Williams alleges that Stoddard intentionally accessed and copied his computer data without authorization, in violation of the Rhode Island Computer Crimes Law, §§ 11-52-3 and 11-52-4.1.

The Rhode Island Computer Crimes Law prohibits the intentional, unauthorized access to a computer network or any data contained therein as well as the unauthorized use of a computer network for the purpose of making "an unauthorized copy, in any form, including, but not limited to, any printed or electronic form of computer data." Secs. 11-52-3 and 11-52-4.1(a). The statute defines "computer network" as "a set of related, remotely connected devices and any communications facilities including more than one computer with the capability to transmit data among them through the communications facilities." Sec. 11-52-1(4). The internet itself "is a network of interconnected computers" over which data is transmitted by being "forwarded from one computer to another until [it] reach[es] [its] destination." Councilman, 418 F.3d at 69. The Rhode Island Computer Crimes Law defines "computer data" as "any representation of information, knowledge, facts, concepts, or instructions which . . . has been prepared and . . . has been processed in a computer or computer network." Sec. 11-52-1(3). Email and other electronic communications transmitted over the internet, therefore, qualify as "computer data"

because such communications convey "information, knowledge, facts, concepts, or instructions" over computer networks as they travel through the internet. Id.

Thus, by gaining access to Williams' email and social media accounts without his authorization, Stoddard accessed a computer network and data thereon in violation of § 11-52-3. By making copies of Williams' communications from these accounts, which she then shared with Calise, Stoddard violated § 11-52-4.1's prohibition on making unauthorized copies of computer data.

4

Invasion of Privacy

Williams brings two claims against Stoddard under § 9-1-28.1, which codifies a right to privacy and creates a cause of action for violating an individual's privacy rights. Specifically, Williams argues that Stoddard's unauthorized access to his online accounts and electronic communications constituted an intrusion upon seclusion, and that Stoddard gave unreasonable publicity to his private life by sharing his online activity and communications with Calise, in violation of § 9–1–28.1(a)(1) and (3). He therefore seeks damages pursuant to § 9-1-28.1(b).

In order to establish a violation of a right to privacy under § 9–1–28.1(a)(1), which protects the individual's right "to be secure from unreasonable intrusion upon one's physical solitude or seclusion," Williams must show that Stoddard engaged in "an invasion of something that is entitled to be private or would be expected to be private," and that the invasion would have been "offensive or objectionable to a reasonable man." Following the trend adopted by the majority of courts and the Second Restatement of Torts, our Supreme Court has interpreted our privacy law's protection of "physical solitude or seclusion" broadly, such that the statute's scope is not limited to intrusions that occur in a geographic place. Washburn v. Rite Aid Corp., 695

A.2d 495, 500 (R.I. 1997) (interpreting the scope of § 9–1–28.1(a)(1) to extend to unauthorized disclosure of an individual's confidential prescription drug records); see also Restatement (Second) Torts § 652B (1977) (explaining that the tort of intrusion upon seclusion encompasses a "physical intrusion into a place in which the plaintiff has secluded himself," as well as "some other form of investigation or examination into [the victim's] private concerns, as by opening his private and personal mail"); Lisnoff v. Stein, 925 F. Supp. 2d 233, 240 (D.R.I. 2013) (finding that a patient's disclosures to her doctor during private therapy sessions qualified as "private seclusion" under § 9–1–28.1(a)(1)).

To state a cause of action under § 9–1–28.1(a)(3), which provides the right "to be secure from unreasonable publicity given to one's private life," Williams must show "(1) 'publication' (2) of a 'private fact' (3) '. . . which would be offensive or objectionable to a reasonable man of ordinary sensibilities.'" Pontbriand v. Sundlun, 699 A.2d 856, 864 (R.I. 1997) (quoting § 9–1–28.1(a)(3)(A)(i)–(ii), (b)). "The term 'publication,' . . . does not require that the information be disseminated in a newspaper but merely that it be repeated to a third party." Id. A fact is private under this statute if Williams "actually expected [it] to remain private" and if "society would recognize this expectation of privacy as reasonable and be willing to respect it." Id. at 865. Whether a private fact "would be offensive or objectionable to a reasonable man of ordinary sensibilities" depends on whether the disclosure is "of the sort that could be expected to inflict harm on the person whose private affairs are made points of public discussion." Id. "This issue, of course, involves a factual determination of what would be offensive or objectionable in the context of this case." Id.

Recognizing that both sections (a)(1) and (a)(3) of § 9-1-28.1 require a reasonable expectation of privacy, Stoddard argues that Williams' invasion of privacy claims must fail on

the grounds that he had no such expectation of privacy in the computer on which Stoddard recorded his online activity. As support for this argument, Stoddard asserts that she, not Williams, owned the computer and that Williams knew that Stoddard also had access to it. This argument, however, is immaterial because Williams does not claim to have a privacy interest in the computer. Rather, Williams claims a right to privacy in his electronic communications and online activity. The computer was merely a portal through which Williams accessed his personal electronic communications and online data. Cf. Riley v. California, 134 S. Ct. 2473, 2493, 189 L. Ed. 2d 430 (2014) (likening cell phones to computers and finding that individuals have a Fourth Amendment privacy right to their internet-based data accessed therefrom). Consequently, the ownership of the computer is of no import in determining whether Stoddard violated the Rhode Island privacy statute.[7, 8]

[7] Seemingly, Stoddard also sought to apply this same lack of expectation of privacy argument to the rest of Williams' claims under the Wiretap Acts, the SCA, and the Rhode Island Computer Crimes Law. By the same logic under which such a defense does not absolve Stoddard of liability under the Rhode Island invasion of privacy law, such a defense has no effect on Stoddard's liability under these other statutes which protect against unauthorized interception, use, disclosure, and access of electronic communications and data, regardless of from whose computer the communications were accessed. See 18 U.S.C. § 2511; 18 U.S.C. § 2701; § 12-5.1-13; § 11-52-3. These statutes are aimed at protecting electronic communications—not computers—from unauthorized interception and dissemination, and therefore, they contain no exceptions for intercepting, using, disclosing, or accessing another person's electronic communications or data if it is captured from one's own computer. See id.; cf. Glazner v. Glazner, 347 F.3d 1212, 1215 (11th Cir. 2003) (noting that "an overwhelming majority of the federal circuit and district courts, as well as state courts, addressing the issue have refused to imply an exception to [FWA] liability for interspousal wiretapping").

[8] This case is easily distinguished from the Rhode Island Supreme Court's recent holding that, for Fourth Amendment purposes, a person has no reasonable expectation of privacy in his or her text messages—which bear relevant similarity to emails—that are stored in a cell phone belonging to, or possessed by, another person. State v. Patino, 93 A.3d 40, 57 (R.I. 2014). In that case, the Supreme Court held that when a sender transmits a text message to a recipient, "the sender relinquishes control over what becomes of that message on the recipient's phone." Id. at 55. Here, Stoddard was not the recipient of any of the emails or other electronic communications at issue, and therefore, Williams had a reasonable expectation that those communications would remain private from her.

Courts have widely recognized that individuals have an objectively reasonable expectation of privacy in their password-protected electronic communications and other online activity. See, e.g. United States v. Hamilton, 701 F.3d 404, 408 (4th Cir. 2012) (noting that "people have a reasonable expectation of privacy in their emails because emails today, in common experience, are confidential") (internal quotations omitted); United States v. Lucas, 640 F.3d 168, 178 (6th Cir. 2011) (recognizing that "individuals have a reasonable expectation of privacy in the content of emails stored, sent, or received through a commercial internet service provider"); R.S. ex rel. S.S. v. Minnewaska Area Sch. Dist. No. 2149, 894 F. Supp. 2d 1128, 1142 (D. Minn. 2012) (holding that the plaintiff had "a reasonable expectation of privacy to her private Facebook information and messages," which were password-protected and in her exclusive possession). Indeed, the primary purpose of requiring passwords to access certain websites, such as email accounts, is to maintain the privacy of the accountholder and to prevent other people from accessing and manipulating the data and communications available on those websites. Similarly, individuals have an objectively reasonable expectation of privacy in internet-based sexual activity, including web-based electronic communications of a sexual nature as well as visits to pornographic webpages. See Lawrence v. Texas, 539 U.S. 558, 567 (2003) (noting that "sexual behavior" is "the most private human conduct"). As such, Williams' expectation of privacy from Stoddard in his website passwords, password-protected electronic communications, and internet-based sexual activity was objectively reasonable.

Moreover, the evidence before the Court demonstrates that Williams "actually expected" his online activity "to remain private" from Stoddard. Pontbriand, 699 A.2d at 865. In particular, Williams and Stoddard's trial testimony revealed that Williams used password-protected websites to communicate over the internet, never voluntarily shared his passwords with

Stoddard, and engaged in much of the online activity at issue in this case when Stoddard was not present, all in an effort to prevent her from discovering his online activity.

Given Williams' actual and reasonable expectation of privacy in his electronic communications and online activity, this information constitutes "something that is entitled to be private or would be expected to be private" under § 9-1-28.1(a)(1), as well as "private fact[s]" under § 9-1-28.1(a)(3). See id. at 865 (explaining that a fact is private under § 9-1-28.1(a)(3) if it was "actually expected . . . to remain private" and if "society would recognize this expectation of privacy as reasonable and be willing to respect it"). By disclosing the details of Williams' online activity and electronic communications to Calise, Stoddard publicized the information. See id. at 864 (explaining that "[t]he term 'publication,' . . . does not require that the information be disseminated in a newspaper but merely that it be repeated to a third party"). Stoddard therefore gave "unreasonable publicity . . . to [Williams'] private life" and violated his "right to be secure from unreasonable intrusion upon [his] physical solitude or seclusion." Secs. 9-1-28.1(a)(1), (3).

5

Civil Liability for Criminal Conduct

Williams also brings a claim against Stoddard pursuant to § 9-1-2, which allows victims of crimes to bring civil suits to recover damages caused by the defendant's criminal conduct. In bringing this claim, Williams alleges that Stoddard violated the criminal provisions of the Wire Fraud Act, the Identity Theft Act, and the fraud provision of the Rhode Island Computer Crimes Law by impermissibly obtaining his email and social media account log-in credentials and accessing those accounts with the intent of depriving him of his privacy and employment.

The Identity Theft Act establishes a criminal penalty for unlawfully and knowingly transferring, possessing, or using a means of identification of another person during and in

relation to one or more predicate felonies enumerated in the statute. 18 U.S.C. § 1028A. Williams alleges that Stoddard's violation of the Wire Fraud Act serves as the predicate offense underpinning her violation of the Identity Theft Act. The Wire Fraud Act provides that

> "[w]hoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both." 18 U.S.C. § 1343.

Thus, "the essential elements of a . . . wire fraud violation are (1) a scheme to defraud, (2) money or property as the object of the scheme, and (3) use of . . . wires to further the scheme." United States v. Dinome, 86 F.3d 277, 283 (2d Cir. 1996) (internal quotations omitted). Moreover, the statute carries with it a mens rea of "knowing and willing participation in a scheme or artifice to defraud with the specific intent to defraud." United States v. Czubinski, 106 F.3d 1069, 1073 (1st Cir. 1997).

Relying primarily on the First Circuit's statement in Czubinski that "confidential information *may* constitute intangible 'property' and that its unauthorized dissemination or other use may deprive the owner of its property rights," Williams argues that his private online communications qualify as "property" under the statute. Id. at 1074 (emphasis added). Williams' reading of Czubinski, however, stretches that court's reasoning too far. The court clearly indicated that only information with some monetary value, such as "'[c]onfidential business information,'" would constitute property under the Wire Fraud Act. Id. at 1074-75 (quoting Carpenter v. United States, 484 U.S. 19, 26 (1987)); see also Town of Castle Rock, Colo. v. Gonzales, 545 U.S. 748, 766 (2005) (holding that in order to qualify as a property interest under the Due Process Clause, the interest must "have some ascertainable monetary

value") (internal citation omitted). None of the information that Stoddard collected from Williams' online activity relates to a business venture or has any inherent monetary value. Therefore, Stoddard did not violate the Wire Fraud Act with respect to her actions to obtain Williams' log-in credentials because the log-in credentials do not constitute a property interest of which Stoddard could have acted to defraud Williams.

Moreover, Williams has failed to show that Stoddard acted with the intent necessary to violate the Wire Fraud Act. Stoddard testified at trial that her intention in accessing Williams' email and social media accounts was only to confirm her suspicions that he was being unfaithful to her. Williams presented no evidence disproving this testimony. This Court, therefore, finds credible Stoddard's uncontroverted testimony that she had no intention of using Williams' online activity to deprive him of his employment until after she had accessed it and came to believe that Williams had engaged in unprofessional conduct on the job. Consequently, Stoddard did not have the "specific intent to defraud" that is required for a violation of the Wire Fraud Act. Czubinski, 106 F.3d at 1073; see also 18 U.S.C. § 1343. Because Stoddard did not violate the Wire Fraud Act, she did not violate the Identity Theft Act, which requires a predicate felony.

The fraud provision of the Rhode Island Computer Crimes Law is substantively similar to the federal Wire Fraud Act in that it criminalizes

> "directly or indirectly access[ing] . . . any computer, computer system, or computer network for the purpose of: (1) devising or executing any scheme or artifice to defraud; (2) obtaining money, property, or services by means of false or fraudulent pretenses, representations, or promises; or (3) damaging, destroying, altering, deleting, or removing any program or data contained in it in connection with any scheme or artifice to defraud . . . ." Sec. 11-52-2.

Williams argues that Stoddard violated § 11-52-2 in the same way that he asserts she violated the Wire Fraud Act, i.e. by depriving him of his confidential information. As noted above, however,

the information that Stoddard collected from Williams' online activity is not "property," as required under the statute. See § 11-52-2. Additionally, a violation of § 11-52-2 requires that the perpetrator have acted with the "purpose of . . . obtaining . . . property," and, as explained above, this Court finds that Stoddard acted with no such purpose when she accessed Williams' electronic communications and online activity. Consequently, Stoddard did not violate the Rhode Island Computer Crimes Law. Because she also did not violate the Wire Fraud Act or the Identity Theft Act, Williams is not entitled to recover from Stoddard pursuant to § 9-1-2.

C

Remedies Against Stoddard

Williams asks this Court to award actual damages[9], statutory damages, punitive damages, and costs and attorneys' fees for Stoddard's statutory violations. Here, this Court has found that Stoddard violated the FWA, the RIWA, the SCA, the R.I. Computer Crimes Law, and the R.I. invasion of privacy statute. Accordingly, each of these provisions authorizes the Court to award damages. See 18 U.S.C. § 2520(b)(3); § 12-5.1-13(a)(1)-(3); 18 U.S.C. § 2707(b)(3); § 11-52-6(a); § 9-1-28.1(b). However, to determine whether the legislature intended for the award of damages to be mandatory or discretionary, the Court looks to the language of the respective statutes.

a

[9] "Compensatory damages and actual damages mean the same thing; that is, that the damages shall be the result of the injury alleged and proved, and that the amount awarded shall be precisely commensurate with the injury suffered, neither more nor less, whether the injury be to the person or estate of the complaining party." Birdsall v. Coolidge, 93 U.S. 64, 64 (1876); see 22 Am. Jur. 2d Damages § 25.

Statutory Interpretation

It is axiomatic that "'[w]hen the language of a statute is clear and unambiguous, [this Court] must enforce the statute as written by giving the words of the statute their plain and ordinary meaning.'" Park v. Rizzo Ford, Inc., 893 A.2d 216, 221 (R.I. 2006) (quoting Gem Plumbing & Heating Co. v. Rossi, 867 A.2d 796, 811 (R.I. 2005)). The rationale behind this canon of statutory interpretation is that "[t]he plain meaning of the statute is the best indication of the General Assembly's intent." Park, 893 A.2d at 221. Furthermore, in construing the language of the FWA, the RIWA, and the R.I. invasion of privacy statute, this Court must determine whether the legislature's use of the terms 'may' and 'shall' were intended to grant the Court discretion in awarding damages and attorneys' fees.

Our Supreme Court has found that the "ordinary meaning of the word 'may' is permissive and not compulsive; yet whether it should be given the latter meaning and construed as 'shall' in a given case depends on the intent of the legislature as ascertained from the language, the nature, and the object of the statute." Carlson v. McLyman, 77 R.I. 177, 180, 74 A.2d 853, 855 (1950) (citing Nolan v. Representative Council of Newport, 73 R.I. 498, 57 A.2d 730). On the other hand, "[t]he word 'shall' usually connotes the imperative and contemplates the imposition of a duty, unless the particular context and plan require a contrary meaning." Carpenter v. Smith, 79 R.I. 326, 334-35, 89 A.2d 168, 172-73 (1952); see also City of Providence v. Estate of Tarro, 973 A.2d 597, 605 (R.I. 2009) (quoting Conrad v. State of R.I.-Med. Ctr.-Gen. Hosp., 592 A.2d 858, 860 (R.I. 1991)) (finding that our Supreme Court "[has] long held that the use of the word 'shall' denotes 'something mandatory or the imposition of a duty'"). In Conrad, for example, our Supreme Court held a statute—providing that the workers' compensation court 'shall' award interest to employees on compensation payments—created a

mandatory requirement that interest be paid. See Conrad, 592 A.2d at 860 (finding that the "word 'shall' usually connotes the imperative and contemplates the imposition of a duty"); Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 27, (1998) (holding that the term "'shall,' . . . normally creates an obligation impervious to judicial discretion"); see also Whitsett v. Wamack, 69 S.W. 24, 25 (1902) (holding that a statute which provided that the judge shall allow a reasonable fee to the attorney bringing the suit did not vest the court with discretion except as to the amount of the fees to be given); Natural Res. Def. Council, Inc. v. Berklund, 458 F. Supp. 925 (D.D.C. 1978) (holding that the Coal Mining Act, which provides that a permittee 'shall be entitled' to a lease if he makes a showing that the land contains coal in commercial quantities, does not vest the secretary with discretion to reject leases when coal has been found in commercial quantities).

Therefore, this Court agrees that the term 'may' is permissive and not compulsive, while the term 'shall' usually connotes the imperative and contemplates the imposition of a duty, unless the particular context of the statute requires a contrary meaning. See Carlson, 77 R.I. at 180, 74 A.2d at 855; Estate of Tarro, 973 A.2d at 605. Accordingly, this Court will generally interpret the use of the term 'may' as providing the Court with discretion to award damages, while conversely, the use of the term 'shall' will be construed so as to mandate the award of damages.

b

FWA

Section 2520(a) of the FWA "authorizes the court to grant 'such relief as *may* be appropriate' to a plaintiff establishing a violation of the Act, and § 2520(b) specifies that appropriate relief includes equitable or declaratory relief, damages as described in subsection (c),

punitive damages, costs, and attorney's fees." Nalley v. Nalley, 53 F.3d 649, 650-51 (4th Cir. 1995) (citing 18 U.S.C. § 2520(a)) (emphasis added). Although courts have grappled with whether 18 U.S.C. § 2520 mandates the award of damages, all Circuits Courts that have addressed the issue have found that the award is indeed discretionary. See Nalley, 53 F.3d at 651-52 (holding district court has discretion under 18 U.S.C. § 2520 to decline to award damages); DIRECTV, Inc. v. Brown, 371 F.3d 814, 818 (11th Cir. 2004) (holding that "it is clear that Congress intended the award of larger damages under subsection (c)(2) to be within the discretion of the trial court"); Dorris v. Absher, 179 F.3d 420, 429 (6th Cir. 1999) (finding that the "plain language of the statute compels the conclusion that the district courts have the discretion to decline the imposition of damages"); Reynolds v. Spears, 93 F.3d 428, 435 (8th Cir. 1996) (same); DIRECTV, Inc. v. Barczewski, 604 F.3d 1004 (7th Cir. 2010) (overruling Rodgers v. Wood, 910 F.2d 444 (7th Cir. 1990), and holding that district court had discretion not to award damages).

The Circuit Courts thus concluded that 18 U.S.C. § 2520(c)(2) provides courts with discretion to award damages based upon 1) the contrast between the mandatory verb form in 18 U.S.C. § 2520(c)(1) and the permissive form in 18 U.S.C. § 2520(c)(2); and 2) by comparing the language of the present FWA to the language of the FWA prior to its amendment in 1986. Nalley, 53 F.3d at 651-52. First, 18 U.S.C. § 2520(c)(1)—which provides for the computation of damages for the interception of certain satellite and radio transmissions—uses the mandatory verb form and provides that the "court *shall* assess damages" for any violation. 18 U.S.C. § 2520(c)(1) (emphasis added). In contrast, 18 U.S.C. § 2520(c)(2)—which addresses damages for all other actions—uses the permissive verb form, which provides what "the court *may* assess as damages . . . ." for a violation. 18 U.S.C. § 2520(c)(2) (emphasis added). Thus, the Circuit

Courts have found that in order to give the "contrasting language meaning, [they] must read § 2520(c)(2) to embody a congressional intent to grant courts the discretion to decline to award damages in all but the particular circumstances covered by § 2520(c)(1), where Congress clearly did not manifest an intent to confer such discretion." Nalley, 53 F.3d at 651.

Second, courts have compared the language of the present version of 18 U.S.C. § 2520(c)(2) to the language of the FWA prior to its amendment in 1986. Prior to amendment, the statute provided that:

> "Any person whose [electronic] communication is intercepted, disclosed, or used in violation of this chapter *shall . . . be entitled to recover from [the violator] . . . actual damages but not less than liquidated damages* computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher . . . ." P.L. 90–351, Title III, § 802, 82 Stat. 223 (June 19, 1968); 18 U.S.C. § 2520 (1970) (emphasis added).

However, in 1986, Congress increased the statutory damage amount to $10,000, mandated reduced penalties for certain private satellite video and radio communication interceptions, and changed the mandatory language in the former 18 U.S.C. § 2520 to the permissive language found in the present 18 U.S.C. § 2520(c)(2):

> "In any other action under this section [other than actions based on certain satellite or radio interceptions], the court *may assess* as damages whichever is the greater of—
> "(A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or
> "(B) statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000." 18 U.S.C. § 2520(c)(2) (emphasis added).

Accordingly, the Circuit Courts which have considered the issue have found that the change in the relevant provision from 'shall' to 'may' indicates a clear legislative intent to confer upon the district courts the discretion to decline to award damages in applying 18 U.S.C. § 2520(c)(2). See Nalley, 53 F.3d at 652 ("When the wording of an amended statute differs in substance from

the wording of the statute prior to amendment, we can only conclude that Congress intended the amended statute to have a different meaning."); Dorris, 179 F.3d at 429 ("We find that the plain language of the statute compels the conclusion that the district courts have the discretion to decline the imposition of damages. Congress expressly changed the verb from a mandatory form to a permissive one."). Accordingly, this Court shall construe the term 'may'—in 18 U.S.C. § 2520(c)(2)—to be permissive and thus vest this Court with discretion to award damages under 18 U.S.C. § 2520(c)(2). See Nalley, 53 F.3d at 651; Barczewski, 604 F.3d at 1009-10.

c

RIWA

The Rhode Island legislature modeled the Rhode Island Wiretap Statute after its federal counterpart; which the state statute closely parallels. Pulawski, 506 A.2d at 77 n.1; State v. Ahmadjian, 438 A.2d 1070, 1080 n.4 (R.I. 1981). Furthermore, the First Circuit has found that "Rhode Island law dictates that courts interpret the state wiretap act by analogy to interpretations of the federal wiretap act . . . ." Walden v. City of Providence, R.I., 596 F.3d 38, 59 (1st Cir. 2010).

Unlike its federal counterpart, § 12-5.1-13 was not amended so as to change the mandatory language to the permissive. Thus, § 12-5.1-13 provides, in relevant part:

> "(a) Any person whose wire, electronic, or oral communication is intercepted, disclosed, or used in violation of this chapter shall have a civil cause of action against any person who intercepts, discloses, or uses the communications, and *shall* be entitled to recover from that person:
> "(1) Actual damages, but not less than liquidated damages, computed at the rate of one hundred dollars ($100) per day for each day of violation, or one thousand dollars ($1,000), whichever is higher;
> "(2) Punitive damages; and
> "(3) Reasonable attorneys' fees and other litigation disbursements reasonably incurred." Sec. 12-5.1-13(a)(1)-(3) (emphasis added).

This Court gives the statutory language its plain and ordinary meaning. See Walden, 596 F.3d at 59 (holding that unambiguous language is given its "plain and ordinary meaning"); Nalley, 53 F.3d at 652 (finding that the plain meaning of the amended statute should be considered conclusive). Therefore, this Court interprets the term 'shall' as mandatory with respect to the award of damages under the RIWA, unless a clear indication to the contrary can be found in the statute. See Carpenter, 79 R.I. at 334-35, 89 A.2d at 172-73 (holding that the word 'shall' usually connotes the imperative and contemplates the imposition of a duty, unless the particular context and plan require a contrary meaning); Black's Law Dictionary (9th ed. 2009) (defining shall: "has a duty to; more broadly, is required to").

To construe the General Assembly's intent, this Court first looks to the FWA, after which the RIWA was modeled. See Walden, 596 F.3d at 59 (holding that Rhode Island law dictates that courts interpret the RIWA by analogy to interpretations of the FWA). As discussed above, the Federal Legislature amended 18 U.S.C. § 2520 so as to replace the term 'shall' with 'may,' thereby making the imposition of damages discretionary. However, such an amendment also implies that prior to the change in the statutory language, the term 'shall' was to be construed as mandatory. Here, the RIWA—which was enacted and modeled after the original language of the FWA—still contains the term 'shall.' Thus, based upon the original language of the FWA and the plain meaning of the term 'shall,' this Court finds that the General Assembly intended to mandate the imposition of damages. See Estate of Tarro, 973 A.2d at 605 (quoting Conrad, 592 A.2d at 860); see also Sierra Club v. Train, 557 F.2d 485, 489 (5th Cir. 1977) ("Use of the word 'shall' generally indicates a mandatory intent unless a convincing argument to the contrary is made.") (citing C. Sands, Sutherland's Statutory Construction § 25.04 (4th ed. 1973)); Whitsett, 69 S.W. at 25. Accordingly, because Stoddard unlawfully intercepted and disclosed Williams'

electronic communications—in violation of the RIWA—the RIWA mandates that this Court award Williams' actual damages, punitive damages, and reasonable attorneys' fees.

d

The SCA

i

Knowing or Intentional State of Mind

The SCA creates a civil cause of action, allowing any person who is the victim of a violation of the SCA to seek damages from the violator. See 18 U.S.C. § 2707(a). Specifically, 18 U.S.C. § 2707(a) provides that "any . . . person aggrieved by any violation of this chapter in which the conduct constituting the violation is engaged in *with a knowing or intentional state of mind* may, in a civil action, recover from the person or entity . . . which engaged in that violation such relief as may be appropriate." 18 U.S.C. § 2707(a) (emphasis added). Accordingly, such relief includes "(1) such preliminary and other equitable or declaratory relief as may be appropriate; (2) damages under subsection (c); and (3) a reasonable attorney's fee and other litigation costs reasonably incurred." 18 U.S.C. § 2707(b)(1)-(3).

Section 2707(a) of the United States Code directs that a civil litigant must establish that the defendant acted "with a knowing or intentional state of mind." 18 U.S.C. § 2707(a). However, neither of the terms 'knowing' nor 'intentional' is defined in the Electronic Communications Privacy Act (ECPA). See Clifford S. Fishman & Anne T. McKenna, Wiretapping & Eavesdropping: Surveillance in the Internet Age § 2:120 (3d ed. 2012). With respect to the meaning of the term 'knowingly,' "it need not be shown that that defendant knew that the interception was unlawful; mistake of law is not a defense." Id.; see United States v. Wuliger, 981 F.2d 1497, 1507 (6th Cir. 1992) ("[T]he unlawfulness of interspousal wiretapping

has been a settled point of law in this Circuit since our decision in [United States v. Jones, 542 F.2d 661 (6th Cir. 1976)].”). Instead,

> “more is required than merely the intentional disclosure of such information which, it later turns out, was obtained from an unlawfully intercepted communication. It must also be shown: (a) that the defendant knew that the information came from an intercepted communication; and (b) that defendant knew sufficient facts concerning the circumstances of the interception such that the defendant could, with presumed knowledge of the law, determine that the interception was prohibited . . . .” McKenna et al., supra, at § 2:120.

Furthermore, the Senate Judiciary Committee report on the ECPA contains the following discussion of the meaning of ‘intentionally’:

> “As used in the [ECPA], the term ‘intentional is narrower than the dictionary definition of ‘intentional.’ ‘Intentional’ means more than that one voluntarily engaged in conduct or caused a result. Such conduct or the causing of the result must have been the person’s conscious objective.” Id. at § 2:116 (citing Senate Rpt. No. 99-541 at 23 to 24, reprinted in 1986 U.S. Code, Cong & Admin News, 3555, 3577-78).

In Freedman v. America Online, Inc., for example, the court found that America Online’s actions were ‘knowing or intentional’ for purposes of 18 U.S.C. § 2707 because they were not accidental. Freedman v. Am. Online, Inc., 325 F. Supp. 2d 638, 645 (E.D. Va. 2004) (holding that “while the statute does not define ‘intentional’ conduct, legislative history interpreting . . . the ECPA offer significant guidance . . . and make clear [a Defendant] acts intentionally provided its acts are not inadvertent”); see Kristen J. Matthews, Proskauer on Privacy: A Guide to Privacy and Data Security Law in the Information Age § 6:3:2(A)(2) (2014). Stoddard intentionally accessed—without authorization—Williams’ stored electronic communications and therefore violated 18 U.S.C. § 2701(a) of the SCA. Regarding Stoddard’s state of mind, it is clear that she “knowingly and intentionally” violated the SCA when she installed the keylogger

program for the express purpose of capturing Williams' log-in credentials in order to access his personal email and social media accounts. 18 U.S.C. § 2707(a).

ii

Actual Damages Not Required in Order to Recover Statutory Damages

The SCA's statutory damages section provides that:

> "The court may assess as damages in a civil action under this section the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation, but in no case shall a person entitled to recover receive less than the sum of $1,000." 18 U.S.C. § 2707(c).

Thus, "§ 2707(c) directs that a successful plaintiff must be awarded damages of at least $1,000; the court may assess damages as the sum of the plaintiff's actual damages plus any profits made by the violator; and the provision also authorizes awarding of punitive damages." McKenna et al., supra, at § 7:39.

However, the federal courts are in disagreement as to whether a person who has not adequately proven actual damages is entitled to statutory damages under 18 U.S.C. § 2707(c). Compare Van Alstyne v. Elec. Scriptorium, Ltd., 560 F.3d 199, 208 (4th Cir. 2009) (holding that the trial court erred in allowing the jury to award the plaintiff "statutory damages without requiring her to prove that she sustained actual damages") with Shefts v. Petrakis, 931 F. Supp. 2d 916, 919 (C.D. Ill. 2013) (holding that "[i]f liability under the [SCA] is found, . . . the fact that Plaintiff does not seek actual damages does not preclude his recovery of statutory damages") and Pure Power Boot Camp, Inc. v. Warrior Fitness Boot Camp, LLC, 759 F. Supp. 2d 417, 428 (S.D.N.Y. 2010) (holding that a litigant was entitled to statutory damages under the SCA even though it had not shown actual damages).

In Van Alstyne, the Fourth Circuit found that statutory damages under the SCA are only

recoverable where a plaintiff has also suffered actual damages.

> "The Van Alstyne court relied on Doe v. Chao, 540 U.S. 614 (2004), where the Supreme Court held that statutory damages under the Privacy Act, 5 U.S.C. § 552, et seq., are not recoverable absent actual damages. The Van Alstyne court reasoned that the relevant provisions of the SCA and the Privacy Act were essentially identical and, accordingly, that a straightforward textual analysis of the SCA mandated the same result as that reached by the Supreme Court in Doe." Pure Power Boot Camp, Inc. 759 F. Supp. 2d at 427.

However, "as recognized by the majority of federal courts to have examined this issue subsequent to the Doe decision, the Privacy Act and the SCA are different statutes, with different purposes, and they penalize different behavior." Id.; see, e.g., Freedman v. Town of Fairfield, 2006 WL 2684347, at *3 (D. Conn. Sept. 19, 2006) ("Doe is dubious authority for the proposition that Section 2707(c) does not mean what it provides, recovery of 'minimum statutory damages of $1,000.'"); In re Hawaiian Airlines, Inc., 355 B.R. 225, 230 (D. Haw. 2006) ("Notwithstanding the similar language found in the two statutes, the overall structure of the [SCA] and its legislative history differ from the Privacy Act such that the holding in [Doe] is not directly applicable to the [SCA]."). In fact, "[w]hen provided with the opportunity to confirm that the language in Section 2707(c) of the SCA, that is identical to that of the Privacy Act, also prohibits the recovery of statutory damages in the absence of actual damages, the Supreme Court majority [in Doe] chose instead to reject the history of the Stored Communications Act as not relevant, distinguishing the SCA as a 'completely separate statute [ ] passed well after the Privacy Act.'" Pure Power Boot Camp, Inc., 759 F. Supp. 2d at 427 (quoting Doe, 540 U.S. at 626).

In the wake of the Van Alstyne decision, "numerous district courts concluded that the Supreme Court's decision in Doe was not persuasive to an analysis of the SCA because the

structures of the Privacy Act and the SCA were not similar enough for the former to be directly applicable to the latter." Vista Mktg., LLC v. Burkett, 2014 WL 3887729, at *5 (M.D. Fla. Aug. 7, 2014); see Shefts, 931 F. Supp. 2d at 916–19 (disagreeing with the Fourth Circuit's analysis in Van Alstyne and listing numerous district court cases that concluded, contrary to Van Alstyne, that the SCA did not require actual damages in order to recover statutory damages); see also Maremont v. Susan Fredman Design Grp., Ltd., 2014 WL 812401, at *6–7 (N.D. Ill. Mar. 3, 2014) (agreeing with "those courts that have held that a plaintiff need not prove actual damages in order to be entitled to statutory damages for an SCA violation" and listing those decisions). Rather, the courts have concluded that basic rules of statutory construction and the legislative history support the position that the SCA does not require actual damages as a precursor to recovery. See Shefts, 931 F. Supp. 2d at 918-19; Pure Power Boot Camp, Inc. 759 F. Supp. 2d at 428; In re Hawaiian Airlines, Inc., 355 B.R. at 231.

More specifically, the Shefts court found that "a plain reading of the statute seems to indicate that § 2707(c) provides a means of calculating damages allowing the court to assess the sum of actual damages and any profits, but in the absence of those variables, a person entitled to recovery can at least recover the statutory minimum." Shefts, 931 F. Supp. 2d at 918. The court further noted that "[f]rom a practical standpoint, this viewpoint bears logic as actual damages may often be very difficult to prove in SCA cases, when, for example, the SCA violation is an unauthorized access of email which results in no financial harm to the plaintiff." Id.

Regarding the legislative history of the SCA, the Shefts court found that the language of the House Report accompanying the SCA provided support for the position that actual damages were not necessary in order to collect statutory damages. The House Report "explain[ed] that 'damages *include* actual damages, any lost profits but in no case less than $1,000,'" and thus the

court found "the decision to use the word 'include' implie[d] that recovery is not strictly limited to actual damages but rather encompasses a broader scope." Shefts, 931 F. Supp. 2d at 918 (citing H.R. REP. NO. 99–647, at 74 (1986)) (emphasis added). Conversely, "[t]he court in Van Alstyne refused to consider the legislative history in its analysis because it found the statutory language 'plain and unambiguous.'" Id. at 919 (quoting Van Alstyne, 560 F.3d at 207). However, this Court finds the Shefts court's analysis persuasive, "particularly because the Doe Court relied on legislative history in reaching its own determination on the Privacy Act." Id.

Accordingly, the majority of district courts to address the issue have found that "Defendants need not allege actual damages when a plain reading of the statute, and the legislative history associated with the statute, make it clear that Congress intended that damages under Section 2707(c) be at least $1,000 per violation." Pure Power Boot Camp Inc., 759 F. Supp. 2d at 427; see Shefts, 931 F. Supp. 2d at 918; In re Hawaiian Airlines, Inc., 355 B.R. at 230; Cedar Hill Assocs., Inc. v. Paget, 2005 WL 3430562, at *3 (N.D. Ill. Dec. 9, 2005). Accordingly, this Court finds that the SCA does not require actual damages as a precursor to the recovery of statutory damages. See Shefts, 931 F. Supp. 2d at 918-19.

e

The Rhode Island Computer Crimes Law

Section 11-52-6(a) of the Rhode Island Computer Crimes Act provides:

> "[a]ny person injured as a result of a violation of this chapter may bring a civil action against the violator for compensatory damages, punitive damages, court costs, and any other relief that the court deems appropriate, including reasonable attorneys' fees." Sec. 11-52-6(a).

As the Rhode Island Federal District Court noted, § 11-52-6 "is a relatively new area of the law, and no cases on this statute have been decided by the Rhode Island Supreme Court." Wilson v.

Moreau, 440 F. Supp. 2d 81, 116 (D.R.I. 2006), aff'd, 492 F.3d 50 (1st Cir. 2007). Accordingly, this Court's analysis starts with the language of the statute. See Dorris, 179 F.3d at 429 (citing Appleton v. First Nat'l Bank of Ohio, 62 F.3d 791, 801 (6th Cir. 1995)) ("In all cases of statutory construction, the starting point is the language employed by Congress."). Here, the statute authorizes courts to award damages that it "deems appropriate[,]" but neither §§ 11-52-1 nor 11-52-6 explicitly states whether courts have discretion to award damages and attorneys' fees. Sec. 11-52-6(a). However, our Supreme Court has had the opportunity to comment upon the meaning of similar statutory language within the context of discovery violations and zoning appeals.

Rule 16 of the Rhode Island Rules of Criminal Procedure (Rule 16) provides that if a party fails to comply with the rules of discovery, the court may:

> "order such party to provide the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material which or testimony of a witness whose identity or statement were not disclosed, or it may enter such other order as it *deems appropriate*." Super. R. Crim. P. 16(i) (emphasis added).

In construing the meaning of Rule 16, our Supreme Court has found that the trial judge is "clearly free within the bounds of sound discretion to impose any sanction he or she deems appropriate in light of the attendant circumstances." State v. Musumeci, 717 A.2d 56, 72 (R.I. 1998) (Goldberg J., concurring in part and dissenting in part); see State v. Quintal, 479 A.2d 117, 119 (R.I. 1984); State v. Silva, 118 R.I. 408, 411, 374 A.2d 106, 108 (1977); see also State v. Darcy, 442 A.2d 900, 902 (R.I. 1982) ("[t]he phrase 'such other order as it deems appropriate' makes the declaration of a mistrial an appropriate sanction"); State v. Cohen, 73 N.H. 543, 63 A. 928, 930 (1906) ("'Deem' does not signify an arbitrary exercise of will, but a deliberate exercise of the judgment. 'To deem' is to think, judge, hold as an opinion, decide, or believe on consideration, adjudge.").

Similarly, in De Stefanis v. Zoning Bd. of Review of N. Providence, the Court was asked to construe the meaning of a zoning regulation which allowed the zoning board, to "permit in any district any use or building *deemed* by the said board to be in harmony with the character of the neighborhood . . . ." De Stefanis v. Zoning Bd. of Review of N. Providence, 84 R.I. 343, 346, 124 A.2d 544, 545 (1956) (emphasis added). The Court held that "[t]he word 'deemed' as used therein should be construed as connoting deliberate action based on evidence and standards." Id. Additionally, it found the term 'deem' to "mean '[t]o decide [and] to judge[.]'" Id. Returning to the language of § 11-52-6(a), a plain reading provides this Court with discretion to 'judge' or 'decide' whether to award "compensatory damages, punitive damages, court costs, and any other relief that the court deems appropriate, including reasonable attorneys' fees." Sec. 11-52-6(a). Thus, it is within the Court's discretion to award damages and attorneys' fees under the Rhode Island Computer Crimes Law.

f

Invasion of Privacy

Section 9-1-28.1(b) provides that:

> "Every person who subjects or causes to be subjected any citizen of this state . . . to a deprivation and/or violation of his or her right to privacy shall be liable to the party injured in an action at law, suit in equity, or any other appropriate proceedings for redress in either the superior court or district court of this state. The court having jurisdiction of an action brought pursuant to this section *may* award reasonable attorneys' fees and court costs to the prevailing party." Sec. 9-1-28.1(b) (emphasis added).

Like the remedial provision of the FWA, § 9-1-28.1(b) provides that a court "*may* award reasonable attorneys' fees and court costs . . . ." Sec. 9-1-28.1(b) (emphasis added). As with damages under the FWA, the term 'may' implies that the General Assembly intended to provide

the court with discretion to award damages and attorneys' fees.[10] Similarly, a plain reading of the instant statute affords this Court discretion to award attorneys' fees to the prevailing party.[11] Having found that Stoddard violated § 9–1–28.1(a)(1) and (3), this Court is permitted to award reasonable attorneys' fees and court costs to Williams under 9-1-28.1(b).

2

Damages

a

Actual Damages

i

Burden of Proof

Williams asks this Court to award him actual damages for Stoddard's statutory violations. "It is axiomatic that the burden of proving damages is on the party claiming them." 24 Leggett St. Ltd. P'ship v. Beacon Indus., Inc., 239 Conn. 284, 308 (1996); see also Pete v. City of Lake Charles, 434 So. 2d 617, 619 (La. Ct. App. 1983) (holding that "it is axiomatic that the burden of proof is upon the plaintiff to establish damages by a preponderance of evidence"). "Although mathematical exactitude is not required, [an award of] damages must be based on reasonable and probable estimates." White v. LeClerc, 444 A.2d 847, 850 (R.I. 1982). Accordingly, the party claiming damages must prove those damages "by evidence which furnishes the [factfinder] with sufficient data to enable [it] to calculate the amount with reasonable certainty." Olagbegi v.

[10] The "ordinary meaning of the word 'may' is permissive and not compulsive; yet whether it should be given the latter meaning and construed as 'shall' in a given case depends on the intent of the legislature as ascertained from the language, the nature, and the object of the statute." Carlson, 77 R.I. at 182, 74 A.2d at 855 (citing Nolan, 73 R.I. at 498, 57 A.2d at 730).

[11] In interpreting a statute, the court will "first attempt to see whether or not the statute in question has a plain meaning and therefore is unambiguous; in that situation, [the court will] simply apply that plain meaning to the case at hand." Chambers v. Ormiston, 935 A.2d 956, 960 (R.I. 2007).

Hutto, 320 Ga. App. 436, 439-40 (2013) (holding that "[p]roof of damages cannot be left to speculation, conjecture and guesswork"); see also Rush v. Leader Indus., Inc., 176 Ill. App. 3d 803, 806 (1988) (noting that "it is axiomatic that . . . damages are not recoverable without some evidence as to amount"). Thus, a compensatory damages award "must be consistent with the evidence," and "'no claim for damages should be allowed to stand where such claim is not supported by the required degree of proof, or is speculative, or imaginary, or is clearly attributable to other causes.'" Oliveira v. Jacobson, 846 A.2d 822, 827 (R.I. 2004); Perrotti v. Gonicberg, 877 A.2d 631, 636 (R.I. 2005) (quoting Andrews v. Penna Charcoal Co., 55 R.I. 215, 222, 179 A. 696, 700 (1935)).

ii

Evidence Submitted

In the case at bar, Williams submitted no evidence of any actual damages. On the contrary, all the evidence submitted at trial suggests that Williams has suffered little or no monetary or reputational damage as a result of Stoddard's actions. Although Williams has been suspended from duty with the NPPD for over two years, he has been suspended with full pay and benefits. Williams testified at trial that had he not been suspended from duty, he might have had the opportunity to earn more than his base yearly compensation because he might have had the opportunity to earn overtime pay in addition to his regular pay. However, Williams did not provide any evidence demonstrating how much overtime pay he would likely have received had he not been suspended from duty. In addition, Williams testified that he has been working as both a substitute teacher and as a high school baseball coach, jobs he took on after being suspended and for which he has received compensation in addition to his NPPD salary. Moreover, Williams testified that he has remarried since his divorce from Stoddard. This

testimony, combined with the fact that he is gainfully employed and works with schoolchildren, suggests that Williams' reputation suffered little, if at all, as a result of Stoddard's actions. Williams' claims for actual or compensatory damages are therefore "not supported by the required degree of proof." Perrotti, 877 A.2d at 636.

iii

Damages Under the FWA

The Sixth Circuit has described steps a court is to take when awarding damages to a prevailing plaintiff:

> "(1) determine the amount of plaintiff's actual damages and profits derived by the violator, if any; (2) ascertain the number of days that the statute was violated, and multiply by $100; and (3) tentatively award the greater of the two amounts, unless each is less than $10,000, in which case $10,000 is to be the presumed award." James G. Carr & Patricia L. Bellia, The Law of Electronic Surveillance § 8:33 (2014) (citing Dorris, 179 F.3d at 420).

However, "courts have discretion to award no damages or damages in an amount less than the amount available under the statute." Dorris, 179 F.3d at 420; see Brown, 371 F.3d at 818; Nalley, 53 F.3d at 651-52. Here, this Court has found that Williams has not suffered any actual damages and Stoddard did not derive any profits by the violation thereof. Furthermore, this Court notes that although Stoddard violated the FWA, she did so in order to discover whether her husband was being unfaithful. Thus, awarding Williams compensatory damages—where no such damages have been shown—would not comport with the overall goal of compensatory damages. See Cady v. IMC Mortg. Co., 862 A.2d 202, 210 (R.I. 2004) (finding that the corporate defendants violated the federal wiretapping statute, but awarding no damages); 22 Am. Jur. 2d Damages § 3 ("Compensatory damages are awarded to compensate an injured party for his or her injury."). Accordingly, this Court declines to award damages under 18 U.S.C.

§ 2520(c)(2).

iv

Damages Under the RIWA

As discussed above, the General Assembly's inclusion of the term 'shall' in the RIWA indicates that this Court does not have discretion with respect to the award of actual damages where it has found a violation of the RIWA. Thus, this Court must award to Williams actual damages, "computed at the rate of one hundred dollars ($100) per day for each day of violation, or one thousand dollars ($1,000), whichever is higher." Sec. 12-5.1-13(a)(1). Stoddard admitted to "print[ing] out a whole bunch of [Williams'] e-mails on March 23, 2010" . . . as well as "a whole bunch of e-mails and other evidence and other activity . . . on April 1st and at least on April 10th . . . ." Tr. at 78:11-78:15, June 3, 2014. Additionally, Stoddard emailed some of the surveillance data to herself on March 26, 2010. Id. at 29:5-30:19. Although Stoddard admitted that the surveillance software continued to run until Williams discovered it in mid to late April, Williams did not establish that Stoddard accessed the information apart from the previously specified instances. Id. at 78:11-78:20. Here, the Court is mandated to award Williams the sum of $1000.[12]

v

Damages Under the SCA

Having found that Stoddard "knowingly and intentionally" violated 18 U.S.C. § 2701(a) of the SCA, this Court now turns to 18 U.S.C. § 2707(c) in order to determine Williams'

[12] If the Court were to multiply the four proven violations by the $100 a day penalty, it would arrive at a damage award of $400. However, § 12-5.1-13(a)(1) provides that the Court must award damages of either "one hundred dollars ($100) per day for each day of violation, or one thousand dollars ($1000), *whichever is higher*." Sec. § 12-5.1-13(a)(1) (emphasis added). Here, the $1000 penalty is higher.

damages. Section 2707(c) of the United States Code provides, in relevant part:

> "[t]he court may assess as damages in a civil action under this section the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation, *but in no case shall a person entitled to recover receive less than the sum of $1,000*." 18 U.S.C. 2707(c) (emphasis added).

As discussed above, this Court has found that Williams has not demonstrated that he suffered any actual damages. Furthermore, there is no evidence that Stoddard derived any profits from the violation. However, "[a] plain reading of the statute seems to indicate that § 2707(c) provides a means of calculating damages allowing the court to assess the sum of actual damages and any profits, but in the absence of those variables, a person entitled to recovery can at least recover the statutory minimum." Shefts, 931 F. Supp. 2d at 918; see McKenna et al., supra, at § 7:39 ("[Section] 2707(c) directs that a successful plaintiff must be awarded damages of *at least* $1,000[.]") (emphasis added). With respect to the calculation of statutory damages, federal courts are conflicted as to whether the minimum statutory award of $1000 may be multiplied by the number of violations. Compare In re Hawaiian Airlines, Inc., 355 B.R. at 231 (holding the minimum statutory award may be multiplied by the number of violations, but it might be appropriate to aggregate intrusions that functionally constitute a single visit), with Vista Mktg., LLC, 2014 WL 3887729, at *6 (holding that the use of the term 'may' provides the court with discretion as to whether to award damages, but declining to do so).

This Court notes that although Stoddard violated the SCA, she did so only to confirm her suspicions that her husband was being unfaithful and then turned over her findings to the NPPD "out of pure concern [her] ex-husband was speaking to girls that were seventeen years old." Tr. at 183:6-183:8, June 2, 2014. Accordingly, this Court finds that Williams' violations, although distinct in time, can be more appropriately classified as a single ongoing intrusion that

functionally constitutes a single visit. In re Hawaiian Airlines, Inc., 355 B.R. at 232 ("The court is not holding that every technical intrusion into a stored communication necessarily merits a separate damage award."); see also Tomasello v. Rubin, 167 F.3d 612, 618 (D.C. Cir. 1999) (holding that even though "the $1000 figure [in the Privacy Act] seems to refer to each time the agency 'acted,'" it is proper to aggregate "several more-or-less contemporaneous transmissions of the same record into one 'act'"). Therefore, this Court awards Williams the statutory minimum of $1000. See 18 U.S.C. § 2707(c).

vi

Damages Under the Rhode Island Computer Crimes Law

Here, this Court has found that Stoddard unlawfully accessed a computer network—in violation of § 11-52-3—when she gained access to Williams' private email and social media accounts. Furthermore, by making copies of Williams' communications from these accounts, which she then shared with Calise, Stoddard violated § 11-52-4.1's prohibition on making unauthorized copies of computer data. Thus, Williams may recover "compensatory damages, punitive damages, court costs, and any other relief that the court deems appropriate, including reasonable attorneys' fees." Sec. 11-52-6(a); see Ret. Bd. of Emps.' Ret. Sys. of State v. DiPrete, 845 A.2d 270, 279 (R.I. 2004). However, this Court has found that § 11-52-6 of the R.I. Computer Crime Law provides the Court with discretion to award damages. Accordingly, since Williams has not shown that he suffered any actual damages, this Court declines to award compensatory damages.

b

Punitive Damages

Williams also requests that the Court assess punitive damages against Stoddard pursuant

to the Wiretap Acts, the SCA, and the Rhode Island Computer Crimes Law. See 18 U.S.C. § 2707, 18 U.S.C. § 2520, §§ 11-52-6 and 12-5.1-13. Punitive damages "are considered an extraordinary sanction and are regarded with disfavor." Soares v. Ann & Hope of R.I., Inc., 637 A.2d 339, 351 (R.I. 1994). Our Supreme Court has held that "punitive damages may be assessed 'upon evidence of such willfulness, recklessness or wickedness, on the part of the party at fault, as amounted to criminality, which for the good of society and warning to the individual, ought to be punished.'" Sherman v. McDermott, 114 R.I. 107, 109, 329 A.2d 195, 196 (1974) (quoting Adams v. Lorraine Mfg. Co., 29 R.I. 333, 338, 71 A. 180, 182 (1908)). In general, our Supreme Court has "held that [it will] allow punitive damages only when the defendant has acted maliciously or in bad faith." Peckham v. Hirschfeld, 570 A.2d 663, 669 (R.I. 1990). "[T]he party seeking punitive damages has the burden of producing" evidence sufficient to establish that such damages are warranted. Palmisano v. Toth, 624 A.2d 314, 318 (R.I. 1993).

In determining whether Stoddard acted with the "willfulness, recklessness or wickedness" necessary "to support an award of punitive damages," the Court considers her trial testimony. Id.; Sherman, 114 R.I. at 109, 329 A.2d at 196. Stoddard testified consistently that she installed the surveillance software for the sole purpose of determining whether Williams was being unfaithful. Stoddard also testified that she decided to bring her surveillance data to the NPPD only after she surmised that Williams had engaged in questionable online activities while on duty. Therefore, Stoddard's behavior, although ultimately tortious, was not undertaken "maliciously or in bad faith." Peckham, 570 A.2d at 669; but cf. Fenwick v. Oberman, 847 A.2d 852, 855 (R.I. 2004) (finding that a police officer who "arrested the plaintiff and beat him with a club on the head and legs while two other police officers held the plaintiff down" engaged in conduct that was "sufficiently malicious, wanton and willful to support an award of punitive

damages"). Thus, the Court finds that Williams has not satisfied his burden of proof to support his claim for punitive damages against Stoddard. See Palmisano, 624 A.2d at 318.

Nevertheless, this Court has found that Stoddard violated the RIWA which statutorily mandates the award of punitive damages. Thus, this Court awards Williams nominal damages of one dollar ($1). See Carey v. Piphus, 435 U.S. 247, 266–67, 98 S.Ct. 1042, 1053–54, 55 L.Ed.2d 252 (1978) (holding if plaintiffs were entitled to nominal damages for the mere violation, the damages should not exceed one dollar); Kyle v. Patterson, 196 F.3d 695, 697 (7th Cir. 1999) ("[N]ominal damages, of which $1 is the norm, are an appropriate means of vindicating rights whose deprivation has not caused actual, provable injury."); Miller v. Baldwin Cnty., 2013 WL 1499566, at *6 (S.D. Ala. Mar. 15, 2013) ("Nominal damages are just what its name reflects an award of a nominal amount after the court has determined that there was a violation."); see also Hughes v. Lott, 350 F.3d 1157, 1162 (11th Cir. 2003)("[n]ominal damages are appropriate if a plaintiff establishes a violation of a fundamental constitutional right, even if he cannot prove actual injury sufficient to entitle him to compensatory damages").

3

Attorneys' Fees

The FWA, the SCA, the RIWA, the Rhode Island Computer Crimes Law, and the Rhode Island invasion of privacy statute all authorize this Court to award attorneys' fees in the instant case. See 18 U.S.C. § 2520(b)(3); 18 U.S.C. § 2707(b)(3); § 12-5.1-13; § 11-52-6(a); § 9-1-28.1(b). "The award of attorneys' fees, when statutorily or contractually authorized, is a matter confided to the sound discretion of the presiding judicial officer." Mullowney v. Masopust, 943 A.2d 1029, 1034-35 (R.I. 2008); accord Bitgood v. Allstate Ins. Co., 481 A.2d 1001, 1008 (R.I. 1984) (ruling that "the question of an award of attorney's fees is within the parameters of judicial

discretion"); see also Rossello-Gonzalez v. Acevedo-Vila, 483 F.3d 1, 6 (1st Cir. 2007) (explaining that "a [trial] court is best placed to evaluate attorneys' fees requests [because] the district judge who presided over the case has 'intimate knowledge of the nuances of the underlying case' which 'uniquely positions him' to determine whether a prevailing [party] is entitled to a fee award") (quoting Gay Officers Action League v. Puerto Rico, 247 F.3d 288, 292 (1st Cir. 2001)). Pursuant to both § 9–22–5 and Super. R. Civ. P. 54(d), this Court also has discretion to award costs to the prevailing party. See State v. Lead Indus. Ass'n, 69 A.3d 1304, 1309 (R.I. 2013).

As discussed above, the RIWA mandates the imposition of reasonable attorneys' fees under the provisions of § 12-5.1-13; however, the FWA, the SCA[13], the R.I. Computer Crimes Law and the R.I. invasion of privacy statute authorize the issuance of attorneys' fees, but at the court's discretion. See § 12-5.1-13; 18 U.S.C. § 2520(b)(3); 18 U.S.C. § 2707(b)(3); § 11-52-6(a); § 9-1-28.1(b). Accordingly, this Court finds that Williams is entitled to attorneys' fees under the RIWA, and furthermore, attorneys' fees—proportional to each claim—are appropriate under each of the FWA, the SCA, the R.I. Computer Crimes Law and the R.I. invasion of privacy statute. As such, this Court will consider the reasonableness of the fees requested upon further hearing before this Court.

[13] If a plaintiff cannot establish that he or she suffered actual damages under the SCA, courts are nevertheless permitted to award attorneys' fees. See Van Alstyne, 560 F.3d at 209 (holding that under the SCA, "proof of actual damages [are] not required before an award of either punitive damages or attorney's fees").

D

Claims Against the North Providence Defendants

1

Claims Properly Before the Court

Although his Complaint alleges only that the North Providence Defendants violated the Wiretap Acts, Williams argued in his pre- and post-trial memoranda that he is also entitled to recover from the North Providence Defendants pursuant to the Rhode Island invasion of privacy statute and the Rhode Island Computer Crimes Law. Williams further argued in his pre- and post-trial memoranda that the North Providence Defendants are liable pursuant to § 9-1-2 for their alleged criminal violations of the Rhode Island Computer Crimes Law, § 11-52-2, the Wire Fraud Act, 18 U.S.C. § 1343, and the Identity Theft Act, 18 U.S.C. § 1028A. Williams did not, however, move to amend his Complaint to formally allege these additional counts against the North Providence Defendants. At the outset of trial, the North Providence Defendants objected to the addition of new claims and requested the Court to limit its disposition of Williams' claims against them to only those raised in his Third Amended Complaint.

Rhode Island Superior Court Rule of Civil Procedure 15(b) (Rule 15(b)) provides, "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." If, however, a party does not expressly or impliedly consent to evidence being admitted, "the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the objecting party." Rule 15(b). Thus, a party need not amend its pleadings to raise a new issue if the opposing side has expressly or impliedly

consented to litigating that issue. Rule 15(b); see also Cofone v. Narragansett Racing Ass'n, 103 R.I. 345, 350, 237 A.2d 717, 720 (1968) (explaining that "issues tried by express or implied consent, even though not raised by the pleadings, should be treated in all respects as if they had been pleaded even in the absence of amendment"). In contrast, where, as in the case at bar, a party expressly objects to the litigation of issues not properly raised in a pleading, the Court may nonetheless allow the issue to be litigated upon a motion to amend. See Duquette v. Godbout, 416 A.2d 669, 672 (R.I. 1980) (noting that when the opposing party objects to evidence offered on an issue that was not raised in the pleadings, the proponent of such evidence should offer to amend the pleadings).

"[P]roposed amendments under Super. R. Civ. P. 15(b) are permitted with liberality . . . " Order of St. Benedict v. Gordon, 417 A.2d 881, 883 (R.I. 1980). However, in cases like the within, where there has been no motion to amend and where the opposing party has expressly objected to the litigation of issues not in the Complaint, the Court has no authority to amend the pleadings sua sponte. Duquette, 416 A.2d at 672 (vacating judgment where the trial justice, over the plaintiff's objection, allowed the defendant to present evidence of an affirmative defense that it had not pled and for which it had not moved to amend its answer); see also Wagner v. Daewoo Heavy Indus. Am. Corp., 314 F.3d 541, 542 (11th Cir. 2002) (holding that "[a trial] court is not required to grant a plaintiff leave to amend his complaint sua sponte when the plaintiff . . . never filed a motion to amend nor requested leave to amend"). On the contrary, if a party does not consent to litigate issues outside the pleadings, such party "is entitled to show extreme prejudice prior to an amendment of the pleadings." Id.; see also Rule 15(b). Thus, to summarily treat Williams' Complaint as having been amended to include additional counts against the North Providence Defendants would be to "deprive[] [them] of the protection provided by Rule 15(b)."

Duquette, 416 A.2d at 672.

Consequently, the Court will not consider claims pursuant to §§ 9-1-28.1, 11-52-3 or 11-52-4.1 as part of Williams' case against the North Providence Defendants. Williams' only remaining claims against the North Providence Defendants, therefore, are those that he pled in his latest Amended Complaint; namely, his claims that the North Providence Defendants violated the Wiretap Acts.

2

Whether a Municipality May Be Sued Under the Wiretap Acts

The North Providence Defendants argue that neither the RIWA nor the FWA allows Williams to bring suit against them. Specifically, the North Providence Defendants contend that in naming the NPPD, Martellini, and Massaro as Defendants, Williams has actually brought suit against the Town of North Providence as a municipal entity. As such, the North Providence Defendants argue that neither of the Wiretap Acts creates a civil cause of action against them because the statutes only allow for civil suits against "persons," the statutory definitions of which do not include municipalities.

a

A Suit Against a Government Official—in His or Her Official Capacity—Is a Suit Against the Official's Office

It is well established that "'a suit against a [government] official in his or her official capacity is not a suit against the official but rather is a suit against the official's office.'" Capital Props., Inc. v. State, 749 A.2d 1069, 1081 (R.I. 1999) (quoting Will v. Michigan, 491 U.S. 58, 71 (1989)). Thus, in contrast to lawsuits against government officials in their individual capacities, "[o]fficial-capacity suits . . . generally represent only another way of pleading an action against an entity of which an officer is an agent." Kentucky v. Graham, 473 U.S. 159, 165-66 (1985)

(internal citations and quotations omitted). Accordingly,

> "[a]s long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is not a suit against the official personally, for the real party in interest is the entity." Id. (emphasis in original).

In addition, "any suit against a municipal department . . . is a suit against the municipality itself." Peters v. Jim Walter Door Sales of Tampa, Inc., 525 A.2d 46, 47 (R.I. 1987); see also Wright v. Town of Zebulon, 202 N.C. App. 540 (2010) (holding that "[a] municipal police department is a component of the municipality," and therefore cannot be sued separately from the municipality).

Thus, in naming Martellini and Massaro as Defendants in their official capacities, Williams has brought suit against the Town of North Providence. See Capital Props., Inc., 749 A.2d at 1081; see also Graham, 473 U.S. at 165-66. Furthermore, Williams' claims against the NPPD also amount to a suit against the Town of North Providence because the NPPD is a municipal department that cannot be a party to a lawsuit independent of the municipality. See Peters, 525 A.2d at 47. Because Williams has not named as a defendant any government agent in his or her individual capacity, this Court must determine whether the RIWA or the FWA permits Williams' civil cause of action against a municipality.

b

FWA

Williams alleges that the North Providence Defendants violated two provisions of the FWA, both of which are contained in 18 U.S.C. § 2511(1). First, Williams claims that the North Providence Defendants induced Stoddard to covertly obtain Williams' electronic communications and then turn those communications over to Calise, thereby violating the FWA's prohibition on "procur[ing] any other person to intercept . . . any . . . electronic

communication." 18 U.S.C. § 2511(1)(a).[14] Next, Williams alleges that the North Providence Defendants violated the FWA's use and disclosure provisions by attempting to use and disclose the contents of Williams' electronic communications in his LEOBOR hearing despite knowing, or having reason to know, that Stoddard had obtained the communications in violation of the law. See 18 U.S.C. § 2511(1)(c), (d).

i

Statutory Interpretation

In order to determine whether Williams can bring suit against the Town of North Providence, this Court must construe the legislative intent of the FWA. Specifically, this Court must determine Congress' intent when it amended 18 U.S.C. § 2520 to include the term 'entity.' In Rhode Island, it is well established that "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." Liberty Mut. Ins. Co. v. Kaya, 947 A.2d 869, 872 (R.I. 2008) (quoting State v. LaRoche, 925 A.2d 885, 887 (R.I. 2007)). Hence, when "a statutory provision is unambiguous, there is no room for statutory construction and [the Court] must apply the statute as written." Ret. Bd. of Emps.' Ret. Sys. of State, 845 A.2d at 297 (quoting In re Denisewich, 643 A.2d 1194, 1197 (R.I. 1994)). "It is only when confronted with an unclear or ambiguous statutory provision that this Court will examine the statute in its entirety to discern

[14] In his pre-trial memorandum, but not in his Complaint, Williams also asserts that the North Providence Defendants violated § 11-35-21's prohibition on "procur[ing] any other person to intercept . . . any . . . electronic . . . communication." However, § 11-35-21 is a criminal statute and does not create a civil cause of action for such behavior. See Walden v. City of Providence, 495 F. Supp. 2d 245, 270 (D.R.I. 2007). Thus, § 9-1-2, Rhode Island's statute creating a civil cause of action for victims of crimes, would be the appropriate mechanism under which Williams could recover from the North Providence Defendants for their alleged violation of § 11-35-21. However, as explained above, Williams did not timely raise a claim against the North Providence Defendants under § 9-1-2. Consequently, the Court will not consider Williams' § 11-35-21 allegations against the North Providence Defendants.

the legislative intent and purpose behind the provision." Liberty Mutual Ins. Co., 947 A.2d at 872 (quoting LaRoche, 925 A.2d at 888).

Furthermore, it is well established that the interpretation of a statute is a question of law. See Palazzolo v. State ex rel. Tavares, 746 A.2d 707, 711 (R.I. 2000). Where the language of a statute "is clear on its face, then the plain meaning of the statute must be given effect and this Court should not look elsewhere to discern the legislative intent." Ret. Bd. of Emps.' Ret. Sys., 845 A.2d at 297 (internal quotations omitted). Accordingly, when "a statutory provision is unambiguous, there is no room for statutory construction and [this Court] must apply the statute as written." Id.; see also State v. Santos, 870 A.2d 1029, 1032 (R.I. 2005) ("The plain statutory language is the best indicator of legislative intent.").

Nonetheless, the Court's "interpretation of an ambiguous statute is grounded in policy considerations and [it] will not apply a statute in a manner that will defeat its underlying purpose." Castelli v. Carcieri, 961 A.2d 277, 282 (R.I. 2008). Furthermore, it has been stated "repeatedly that in construing a statute, [the court's] task is to establish and effectuate the intent of the Legislature by examining the language, nature, and object of the statute . . . . Furthermore, th[e] court will not adopt a construction that effects an absurd result." R.I. State Labor Relations Bd. v. Valley Falls Fire Dist., 505 A.2d 1170, 1171 (R.I. 1986).

ii

Definition of "Person" in 18 U.S.C. § 2510(6)

Section 2510(6) of the FWA defines "person" as "any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation." 18 U.S.C. § 2510(6). "[W]hen Congress originally enacted the [FWA], it specifically provided for the exclusion of governmental units." Amati v.

City of Woodstock, Ill., 829 F. Supp. 998, 1001 (N.D. Ill. 1993). The legislative history of the FWA notes:

> "[t]he definition [of 'person'] explicitly includes any officer or employee of the United States or any State or political subdivision of a State. *Only the governmental units themselves are excluded*. Otherwise the definition is intended to be comprehensive." S. Rep. No. 1097, 90th Cong., 2d Sess. (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2179 (emphasis added) (internal citations omitted).

Notably, the legislature has not changed or amended the definition of 'person' in 18 U.S.C. § 2510 since the FWA was published. See Seitz v. City of Elgin, 719 F.3d 654, 656 (7th Cir. 2013) ("The plain text of that definition—which has remained unchanged since passage of the original act in 1968—does not extend to government units."). Furthermore, the Senate Report accompanying the original bill indicated that the "definition [of person] [was] intended to be comprehensive." 1968 U.S.C.C.A.N. 2112, 2179. Thus, the definition of 'person'—as defined in 18 U.S.C. § 2510(6) of the FWA—does not include government units. Seitz, 719 F.3d at 656.

iii

18 U.S.C. § 2520 Recovery of Civil Damages Authorized

Section 2520(a) of the FWA states:

> "Except as provided in section 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the *person* or *entity*, other than the United States, which engaged in that violation such relief as may be appropriate." 18 U.S.C. § 2520(a) (emphasis added).

When initially published, 18 U.S.C. § 2520 did not include the term 'entity' or the phrase "other than the United States." 18 U.S.C. § 2520. However, in 1986, Congress amended § 2520 of the statute to include the term 'entity' as part of the Electronic Communications Privacy Act of

1986, P.L. No. 99–508, 100 Stat. 1848 (1986). In 2001, Congress further amended 18 U.S.C. § 2520 to include the phrase "other than the United States." See Garza v. Bexar Metro. Water Dist., 639 F. Supp. 2d 770, 774 (W.D. Tex. 2009) (holding that Congress "carved out an exception for the United States in response to the federal government's need to increase surveillance domestically and abroad to combat terrorism").

Notwithstanding, Congress failed to articulate why it chose to amend 18 U.S.C. § 2520 to include the "person or entity" language. See 18 U.S.C. § 2520. Thus, "[t]he legislative history pertaining to the 1986 amendments to sections 2511 and 2520, while relatively detailed, is silent as to the reason behind the use of the term "entity." Amati, 829 F. Supp. at 1003 (citing 1986 U.S. Code Cong. and Adm. News, 3555–3606). Accordingly, courts have been left to decipher Congress' intent through the original legislative history and the rules of statutory construction.

Williams asserts that by amending 18 U.S.C. § 2520 to include the term 'entity,' Congress intended to bring municipalities, such as North Providence, within the scope of 18 U.S.C. § 2520. Williams reasons that since the term 'person' already includes commercial entities—such as corporations and partnerships—then the term 'entity' must reach government units. In other words, under Williams' argument, if the addition of the term 'entity' were designed to apply only to business entities, then it would be superfluous because the definition of 'person' already includes business entities.

Following this chain of reasoning, the majority of courts have concluded that the addition of the term 'entity' makes municipalities amenable to suit under 18 U.S.C. § 2520. See Seitz, 719 F.3d at 657 ("[W]e agree with plaintiffs that 'entity' as used in § 2520 includes government units . . . ."); Adams v. City of Battle Creek, 250 F.3d 980, 985 (6th Cir. 2001) ("The addition of the words 'entity' can only mean a governmental entity because prior to the 1986 amendments,

the definition of 'person' already included business entities. In order for the term not to be superfluous, the term 'entity' necessarily means governmental entities."); Garza, 639 F. Supp. 2d at 774 ("There would have been no reason for Congress to carve out an exception for the United States if governmental entities could not be sued under the statute."); Williams v. City of Tulsa, 393 F. Supp. 2d 1124, 1132–33 (N.D. Okla. 2005) ("Congress' subsequent amendment in 2001 to exclude the United States from entities that could be liable evidences a Congressional understanding that the 1986 amendment created governmental liability."); Conner v. Tate, 130 F. Supp. 2d 1370, 1374–75 (N.D. Ga. 2001); PBA Local No. 38 v. Woodbridge Police Dep't, 832 F. Supp. 808, 823 (D.N.J. 1993).

From the foregoing, it is clear to the Court that the 1986 Amendment to 18 U.S.C. § 2520 brought municipalities, such as North Providence, within the scope of 18 U.S.C. § 2520. See Seitz, 719 F.3d at 657. However, it is unclear whether 18 U.S.C. § 2520 confers substantive rights or only confers an action to enforce 18 U.S.C. § 2511. Id. at 657. More specifically, "section 2520 creates no substantive rights. Rather it simply provides a cause of action to vindicate rights identified in other portions of the FWA . . . ." Id. at 658. Thus, 18 U.S.C. § 2520 only confers an action to enforce 18 U.S.C. § 2511. Id. Accordingly, this Court must determine whether 18 U.S.C. § 2511(1) provides a cause of action against municipalities, such as North Providence.

iv

18 U.S.C. § 2511(1) Does Not Provide a Cause of Action Against Municipalities

Section 2511(1) of the FWA provides a cause of action against "any person." See 18 U.S.C. § 2511(1). As evidenced in the legislative history of the FWA, the definition of 'person' was to be comprehensive and specifically exclude municipalities. See U.S.C.C.A.N. 2112, 2179

(indicating that 18 U.S.C. § 2510(6)'s definition of 'person'—which specifically excluded municipalities—was to be comprehensive and apply to the entire statute). Furthermore, when Congress amended the statute in 1986 and 2001, it did not alter the definition of 'person' to include municipalities, nor did it add the term 'entity' to 18 U.S.C. § 2511(1) as it did in 18 U.S.C. § 2520. Based upon the rules of statutory construction, it must be presumed that Congress acted intentionally and purposefully when it chose not to alter the overall definition of 'person' or add the term 'entity' to 18 U.S.C. § 2511(1). See Russello v. United States, 464 U.S. 16, 23, 29 (1983) ("Where Congress includes particular language in one section of a statute, but omits it in another section of the same Act, it is generally presumed that Congress acted intentionally and purposefully in the disparate inclusion or exclusion."). It follows that by not providing for a cause of action against an 'entity,' "[m]unicipalities are immune from suit, not only because of the corroborating testimony in the legislative history, but simply because Congress has never amended the definition of 'person' in § 2510(6). That definition unequivocally excludes local governmental entities from its definition of person and continues to apply to the entire chapter." See Abbott v. Vill. of Winthrop Harbor, 205 F.3d 976, 980 (7th Cir. 2000).

Williams contends that the addition of the term 'entity' to 18 U.S.C. § 2520 should be construed so as to change the overall definition of 'person' to include municipalities. Williams further asserts that the inclusion of the term 'entity' in 18 U.S.C. § 2520 would be meaningless if 18 U.S.C. § 2511(1) did not provide a cause of action against municipalities. However, this assertion construes the legislature's intent too broadly. See Seitz, 719 F.3d at 658 (citing Abbott, 205 F.3d at 980) ("[E]ven though 'entity' includes government units, § 2520 provides no cause of action against a municipality for violations of § 2511(1) because nothing in the 1986

amendments altered the scope of the substantive violation by expanding it beyond 'persons' as defined in the FWA.").

The rules of statutory interpretation dictate that "absent a clearly expressed legislative intent to the contrary, the statutory language must be regarded as conclusive." Milwaukee Gun Club v. Schulz, 979 F.2d 1252, 1255 (7th Cir. 1992); see Liberty Mut. Ins. Co., 947 A.2d at 872. Here, the legislature did not clearly express the intent to change the definition of 'person' to include municipalities. See Amati, 829 F. Supp. at 1002 ("Even after the 1986 amendment, section 2510(6) remains unchanged. It still unequivocally excludes local governmental entities from its definition of person and continues to apply to the entire chapter."). In fact, "the legislative history pertaining to the 1986 amendments to sections 2511 and 2520, while relatively detailed, is silent as to the reason behind the use of the term 'entity.'" See 1986 U.S. Code Cong. and Adm. News, 3555–3606. Thus, the statutory definition of 'person' must be regarded as conclusive and should be applied to 18 U.S.C. § 2511(1) so as to specifically exclude suit against municipalities.

Moreover, there is a reasonable explanation as to why the legislature added the term 'entity' to 18 U.S.C. § 2520, but not 18 U.S.C. § 2511(1). The Amati court "reasoned that the term "entity" was added to § 2520 in order to 'maintain consistency with the alternative language contained in section 2511(3)(a).'"[15] Amati, 829 F. Supp. at 1003. As a result, the court found

[15] 18 U.S.C. § 2511(3)(a):

> "Except as provided in paragraph (b) of this subsection, a *person or entity* providing an electronic communication service to the public shall not intentionally divulge the contents of any communication (other than one to such *person or entity*, or an agent thereof) while in transmission on that service to any person or entity other than an addressee or intended recipient of such communication or an agent of such addressee or intended recipient." (emphasis added).

the addition of the term "entity" fell "short of a Congressional intent to amend the statute to include local governmental entities as potential defendants." Id.

It would appear that the First Circuit's holding in Walden v. City of Providence was rejected by the Seventh Circuit's decision in Seitz; however, upon closer inspection, Walden can be clearly distinguished. See Walden, 596 F.3d at 38. In Walden, the court was not asked to decide whether 18 U.S.C. § 2511(1) of the FWA provided a cause of action against municipalities; rather, the court was tasked with determining if the remedial section of the state Wiretap Act—which is analogous to 18 U.S.C. § 2520—allowed suit against municipalities. See id. at 38. Significantly, the remedial section of the RIWA—unlike its federal counterpart—was never amended to include the term "entity." Id. ("The Rhode Island statute instead permits suit only against a 'person' and does not include the term 'entity.'"). See §§ 11–35–21(a) and 12–5.1–13(a). Thus, the court quickly determined that the term 'person' was not meant to include municipalities based upon the legislative history which expressly excluded municipalities from the definition." Walden, 596 F.3d at 59 ("Further, the wiretap act's unique definition of the term 'person' shows the state legislature did not intend the act to provide for suit against municipalities.").

In its analysis, the Walden court was required to address the FWA by analogy, and reasoned that the inclusion of the term 'entity' was the "only *possible* basis for holding municipalities liable under the federal act." Id. at 60 (emphasis added). Accordingly, the court suggested that the term 'entity' may include municipalities for the purpose of 18 U.S.C. § 2520. Id. However, the court also stated that it was "clear that Congress did not intend to define the term 'person' to include municipalities in the federal statute." Id.

At this point the First Circuit ended its inquiry by concluding that government units may be entities under 18 U.S.C. § 2520 and, therefore, may be amenable to suit for all violations of the FWA. See id. However, as the Seitz court points out, previous courts—including Walden—did not consider whether 18 U.S.C. § 2520 created only substantive rights and "whether other parts of the FWA created substantive rights enforceable against an entity." Seitz, 719 F.3d at 659.

In summarizing the issue, the Seitz court held: "the 1986 amendment permits suit against governmental units through the addition of 'entity' to the statutory text. But it does so only for substantive provisions that identify an 'entity' as a potential violator of that provision. Any conclusion otherwise ignores at least some part of the statutory text." Id. at 660. Therefore, because 18 U.S.C. § 2511(1) does not identify an 'entity' as a potential violator of the FWA, plaintiffs cannot bring suit against a municipality or government entity.

v

The Town of North Providence is Not Amenable to Suit Under the FWA

In the case at bar, Williams cannot bring suit against the Town of North Providence under 18 U.S.C. § 2511(1)(a)-(d) because the provision only provides a cause of action against "any person" which does not include municipal entities such as North Providence. See 18 U.S.C. § 2511(1)(a)-(d). As a result, this Court finds for the North Providence Defendants as to Williams' claim pursuant to the FWA. The Court next must consider whether a municipality is subject to suit under the RIWA.

c

The RIWA

Although the RIWA generally mirrors the FWA, the remedial section of the RIWA was never amended to include the term "entity." Walden, 596 F.3d at 59. Thus, § 12-5.1-13 provides, in pertinent part:

> "Any person whose wire, electronic, or oral communication is intercepted, disclosed, or used in violation of this chapter shall have a civil cause of action against any *person* who intercepts, discloses, or uses the communications, and shall be entitled to recover from that person[.]" Sec. 12-5.1-13(a) (emphasis added).

In addressing the RIWA, the First Circuit held that the "City [of Providence] is not a proper defendant within the scope of the state wiretap act." Walden, 596 F.3d at 58. In reaching its decision, the First Circuit applied Rhode Island's rules of statutory construction, which required the court to "interpret the state wiretap act by analogy to interpretation of the federal wiretap act . . . ." Id. at 59. The court noted that the addition of the word 'entity' to the federal statute was the "only possible basis for holding municipalities liable under the federal act." Id. at 60. In contrast to the federal legislature, the Rhode Island General Assembly chose not to amend the statute to include the word 'entity.' See § 12-5.1-13. Thus, the court found the exclusion of the word 'entity' to be conclusive evidence of the General Assembly's intent not to include municipalities in the definition of 'person.' See Walden, 596 F.3d at 59; sec. 12-5.1-13.

Furthermore, the Walden court noted that the Rhode Island legislature purposefully chose not to use Rhode Island's general definition of 'person' which included political bodies such as the City of Providence. Compare G.L. 1956 § 43-3-6 (emphasis added) (Rhode Island general definition of 'person' provides that the "[t]he word 'person' extends to and includes co-partnerships and *bodies corporate and politic*."), with § 12.5.1-1(11) (The RIWA's definition of

'person' provides that "'[p]erson' means any individual, partnership, association, joint stock company, trust, or corporation, whether or not any of the foregoing is an officer, agent, or employee of the United States, a state, or a political subdivision of a state."). The court concluded that "had Rhode Island's legislature wished the act to cover municipalities, it could have ensured it did so specifically by including the phrase 'bodies corporate and politic,' or using the State's general definition of the word 'person.'" Walden, 596 F.3d at 59; see 2A Sutherland Statutory Construction § 46:6 at 263–66 (7th rev. ed. 2014) ("When the legislature uses a term or phrase in one statute or provision but excludes it from another, courts do not imply an intent to include the missing term in that statute or provision where the term or phrase is excluded.").

The Walden court found the Rhode Island legislature's choice not to amend § 12-5.1-13 to include the term 'entity,'—which was the "only possible basis for holding municipalities liable under the federal act"—evidenced an intent to exclude municipalities from liability. Walden, 596 F.3d at 60. In addition, the court found that the General Assembly's intent was further evidenced by the decision not to use the general definition of 'person.' Id. Consequently, this Court finds the North Providence Defendants are not amenable to suit pursuant to the RIWA.

E

Use of the Evidence Gathered by Stoddard, and the Evidence Collected in the Ensuing Investigation, at Williams' LEOBOR Hearing

Williams alleges that the NPPD should be preliminarily and permanently enjoined from using the unlawfully obtained evidence—and any evidence derived therefrom—at his LEOBOR hearing. Accordingly, Williams requests the Court issue a declaration stating that all evidence obtained by the NPPD is inadmissible at the LEOBOR hearing.

1

Evidence Obtained in Violation of the RIWA, the FWA, and the SCA

This Court has held that Stoddard violated numerous provisions of the FWA, the RIWA, and the SCA.[16] Stoddard violated 18 U.S.C. § 2511(1)(a) by using a keylogger program which recorded Williams' keystrokes, took periodic snapshots of his activity, and captured his passwords. Additionally, she violated 18 U.S.C. § 2511(1)(d) by using the unlawfully intercepted information—specifically Williams' passwords—to access his email and various social media accounts. Finally, Stoddard violated 18 U.S.C. § 2511(1)(c) when she "intentionally disclosed" the unlawfully obtained information to the NPPD. 18 U.S.C. § 2511(1)(c). Applying the same reasoning as under this Court's interpretation of the federal statute, this Court finds that Stoddard violated § 12-5.1-13 of the RIWA when she intercepted Williams' emails, instant messages, and private website log-in credentials. Sec. 12-5.1-13.

2

The FWA's Suppression Remedy, § 18 U.S.C. 2515, Does Not Extend to Electronic Communications

Williams argues that evidence obtained by Stoddard is not admissible at his LEOBOR hearing because both Stoddard and the North Providence Defendants violated the FWA. In support of his argument, Williams alleges that the North Providence Defendants violated the FWA by 'procuring' Stoddard to intercept and disclose the unlawful information in violation of 18 U.S.C. § 2511(1)(a). 18 U.S.C. 2511(1)(a). Furthermore, Williams contends that the North

[16] The SCA does not provide for a suppression remedy. Even if Stoddard and the NPPD did not comply with the SCA, the statute does not provide for a suppression remedy. See 18 U.S.C. § 2708; United States v. Smith, 155 F.3d 1051, 1056 (9th Cir. 1998) ("the Stored Communications Act does not provide an exclusion remedy. It allows for civil damages . . . and criminal punishment . . . but nothing more."); United States v. Ferguson, 508 F. Supp. 2d 7, 10 (D.D.C. 2007) (holding that the SCA does not provide for a suppression remedy).

Providence Defendants violated 18 U.S.C. § 2511(1)(c) and (d) by "intentionally disclos[ing] . . . electronic communication, knowing or having reason to know that the information was obtained through the interception of a . . . electronic communication in violation of this subsection." 18 U.S.C. § 2511(1)(c). Thus, Williams argues that pursuant to 18 U.S.C. § 2515, any evidence collected by Stoddard should be suppressed.

As noted above, 18 U.S.C. § 2511(1) only applies to 'any person'; thus, the plain language of the statute indicates that the section does not apply to municipalities such as North Providence. 18 U.S.C. § 2511(1). Furthermore, even if it were shown that the North Providence Defendants violated the FWA, "there is no provision for the suppression of intercepted electronic communications under the [A]ct." United States v. Jones, 364 F. Supp. 2d 1303, 1306 (D. Utah 2005). 18 U.S.C. 2515 states:

> "Whenever *any wire or oral communication* has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter." 18 U.S.C. § 2515 (emphasis added).

"By its terms, 18 U.S.C. § 2515 applies only to 'wire or oral communication[s],' and not to 'electronic communications.'" Steiger, 318 F.3d at 1050; see Jones, 364 F. Supp. 2d at 1308 ("The Wiretap Act does not provide a suppression remedy for electronic communications unlawfully acquired under the Act."); United States v. Bode, 2013 WL 4501303, at *13 (D. Md. Aug. 21, 2013) ("The Wiretap Act contains a suppression remedy, but it is expressly limited to 'wire or oral communication.'"). This conclusion is supported both by case law and basic rules of statutory interpretation. Steiger, 318 F.3d at 1051.

With respect to statutory interpretation, "[i]t is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another[.]" BFP v. Resolution Trust Corp., 511 U.S. 531, 536 (1994) (citing Chicago v. Envtl. Def. Fund, 511 U.S. 328, 338 (1994) (internal quotation marks omitted)). Here, the ECPA amended numerous sections of the FWA to include 'electronic communications'; however, "the ECPA did not amend § 2515." Steiger, 318 F.3d at 1050. Thus, this Court finds that 18 U.S.C. § 2515 does not provide Williams with a remedy to prevent the North Providence Defendants from introducing the evidence gathered by Stoddard at his LEOBOR hearing. See id. at 1051.

3

Suppression Under § 12-5.1-12 of the RIWA

Unlike the FWA, the RIWA specifically includes the term 'electronic communications' within § 12-5.1-12(a). Section 12-5.1-12(a) states:

> "(a) Any aggrieved person may move to suppress the contents of any intercepted wire, *electronic*, or oral communication or evidence derived from them on the grounds that:
> "(1) The communication was unlawfully intercepted;
> "(2) The order under which it was intercepted is insufficient on its face;
> "(3) The interception was not made in conformity with the order;
> "(4) Service was not made as provided in § 12-5.1-11; or
> "(5) The seal provided in 12-5.1-8(b) is not present and there is no satisfactory explanation for its absence." Sec. 12-5.1-12(a) (emphasis added).

Section 12-5.1-12 defines an 'aggrieved person' as "an individual who was a party to any intercepted wire, electronic, or oral communication or against whom the interception was directed." Sec. 12-5.1-1. Clearly, Williams falls within the definition of an 'aggrieved person'

because Stoddard unlawfully intercepted his electronic communications in violation of the RIWA.

In interpreting § 12-5.1-12(a), this Court is guided by settled precepts of statutory construction. Statutes should be read to give effect to every word or phrase. State v. DeMagistris, 714 A.2d 567 (R.I. 1998). Thus, a plain reading of the statute indicates that a plaintiff can move to suppress communications which were unlawfully intercepted. See § 12-5.1-12(a). However, § 12-5.1-12(a) does not indicate whether the suppression remedy is applicable to administrative proceedings, such as a LEOBOR hearing.

In contrast to the RIWA, § 2515 of the FWA states that no evidence derived from unlawfully intercepted communications "may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, *agency, regulatory body*, legislative committee . . . if the disclosure of that information would be in violation of this chapter." 18 U.S.C. § 2515 (emphasis added); compare § 12-5.1-12(a)-(b) with 18 U.S.C. § 2515. While the language of 18 U.S.C. § 2515 of the FWA explicitly indicates that evidence obtained in violation of the FWA is not admissible before an agency or regulatory body, § 12-5.1-12 of the RIWA does not specify if an agency or regulatory board—such as a LEOBOR hearing committee—can receive evidence which violates the RIWA.

Section 12-5.1-12(b) states that a "motion under this section shall be made before the *trial* . . . . If the motion is granted, the contents of the intercepted wire, electronic, or oral communication, or evidence derived from them, shall be treated as having been obtained in violation of this chapter." Sec. 12-5.1-12(b). Notably, there is no language indicating that the suppression provision is to apply to administrative agencies. In construing the statute, this Court notes that "[i]t is well settled that 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." Accent Store Design, Inc. v. Marathon House, Inc., 674 A.2d 1223, 1226 (R.I. 1996). Furthermore, "it is axiomatic that 'this Court will not broaden statutory provisions by judicial interpretation unless such interpretation is necessary and appropriate in carrying out the clear intent or defining the terms of the statute.'" Santos, 870 A.2d at 1032 (quoting Simeone v. Charron, 762 A.2d 442, 448–49 (R.I. 2000)).

In an effort to ascertain the intent of the legislature, this Court looks to analogous statutes found in Connecticut, New York, and Pennsylvania. See 2B Sutherland Statutory Construction § 52:3 (7th ed.) ("Courts look to the phraseology and language of similar legislation not only in the interests of uniformity, but also to determine the general policy and objectives of a particular course of legislation."). In all of the aforementioned states, the respective legislatures used language which explicitly expanded the scope of the suppression remedy to agencies and regulatory bodies.[17] Alternatively, here, based upon the wording of the federal statute, as well as

[17] Connecticut's wiretap act states, in pertinent part,

> "Any aggrieved person in any trial, hearing or proceeding in or *before any court, department, officer, agency, regulatory body or other authority of the state of Connecticut*, or of a political subdivision thereof, may move to suppress the contents of any intercepted wire communication, or evidence derived therefrom, on the grounds that the communication was unlawfully intercepted under the provisions of this chapter." Conn. Gen. Stat. Ann. § 54-41m (emphasis added).

New York's wiretap act states, in pertinent part,

> "An aggrieved person who is a party in any civil trial, hearing or proceeding before any court, *or before any department, officer, agency, regulatory body, or other authority of the state*, or a political subdivision thereof, may move to suppress the contents of any overheard or recorded communication, conversation or discussion or evidence derived therefrom . . . ." N.Y. C.P.L.R. 4506 (McKinney) (emphasis added).

Pennsylvania's wiretap act states, in pertinent part,

other analogous state statutes, this Court finds that the General Assembly chose not to include agencies or administrative boards within the scope of § 12-5.1-12(a). See 2A Sutherland Statutory Construction § 47:38 (7th ed.) ("Courts supply words to a statute to give it effect, or to avoid repugnancy or inconsistency with legislative intent, where an omission results from inadvertence, mistake, accident, or clerical error, where an omission makes a statute absurd, meaningless, irrational, or unreasonable, where necessary to give effect to a legislative intent clearly indicated by the statute's context or other parts."). Furthermore, this Court will not provide a word or phrase "where an omission is not plainly indicated." Id.

The wording of the Massachusetts wiretap act is more analogous to that of the RIWA. The suppression clause of the Massachusetts act states: "[a]ny person who is a defendant in a criminal trial in a court of the commonwealth may move to suppress the contents of any intercepted wire or oral communication or evidence derived therefrom . . . ." Mass. Gen. Laws ch. 272 § 99. Like the Massachusetts statute, the Rhode Island statute seems to be applicable only to defendants in a criminal trial. As this Court finds that § 12-5.1-12(a) is not applicable to administrative hearings, which includes LEOBOR hearings, § 12-5.1-12(a) does not prohibit the North Providence Defendants from introducing Stoddard's evidence at the LEOBOR hearing.

4

Evidence Admissible at a LEOBOR Hearing

This Court must now decide whether the unlawful evidence is admissible at a LEOBOR hearing. Section 42-28.6-6(a) of the LEOBOR states:

> "Any aggrieved person *who is a party to any proceeding in any court, board or agency of this Commonwealth* may move to exclude the contents of any wire, electronic or oral communication, or evidence derived therefrom, on any of the following grounds . . . ." 18 Pa. Cons. Stat. Ann. § 5721.1.

> "(a) Evidence which possesses *probative value commonly accepted by reasonable and prudent persons in the conduct of their affairs shall be admissible* and shall be given probative effect. The hearing committee conducting the hearing shall give effect to the rules of privilege recognized by law, and may exclude incompetent, irrelevant, immaterial, and unduly repetitious evidence. All records and documents which any party desires to use shall be offered and made part of the record." Sec. 42-28.6-6 (emphasis added).

A LEOBOR hearing is not a trial, but rather an administrative proceeding, and thus need not comply with all of the rules of evidence and procedure applicable to a trial. City of Pawtucket v. Laprade, 94 A.3d 503, 513 (R.I. 2014) ("[T]he 1995 amendment [to LEOBOR] specified that, '[f]or purposes of this section, the hearing committee shall be deemed an administrative agency and its final decision shall be deemed a final order in a contested case within the meaning of sections 42–35–15 and 42–35–15.1.'").

Williams argues that the North Providence Defendants should be enjoined from using the evidence obtained by Stoddard at his LEOBOR hearing. However, the exclusionary rule—Sec. 9-9-25—applies only to "trials" and "actions in any court." Our Supreme Court has found that the exclusionary rule applies to liquor license revocation hearings, which are administrative in nature, but has yet to decide whether the exclusionary rule applies to all administrative hearings or LEOBOR hearings specifically. Bd. of License Comm'rs of Tiverton v. Pastore, 463 A.2d 161 (R.I. 1983).

The United States Supreme Court (Supreme Court) has visited the issue indirectly, but has not yet directly decided whether the Fourth Amendment exclusionary rule is applicable to administrative hearings. City of Omaha v. Savard-Henson, 615 N.W.2d 497, 503 (2000). The Supreme Court determined that the primary purpose of the exclusionary rule is to deter future conduct on the part of law enforcement officials. United States v. Calandra, 414 U.S. 338, 348

(1974). In explaining the purpose of the rule, the Supreme Court further held, "[a]s with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." Calandra, 414 U.S. at 348. However, with respect to the expansion of the rule, the Supreme Court found that "despite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons." Id. Additionally, it cautioned that "standing to invoke the exclusionary rule has been confined to situations where the Government seeks to use such evidence to incriminate the victim of the unlawful search." Id.

The Rhode Island Supreme Court has narrowly held that the exclusionary rule is applicable to liquor license revocation hearings. Pastore, 463 A.2d at 166. Pastore involved an illegal search and seizure resulting in the discovery of stolen property, evidence of which was admitted in a subsequent liquor license revocation hearing. Id. at 162. The respondent consequently lost his license. Id. In the criminal proceeding involving the stolen property, the Court ruled that the search of the bar was illegal, and therefore the respondent was exonerated. Id. On appeal of the liquor license revocation, the liquor control administrator then refused to admit the evidence obtained in the search and reinstated the respondent's license. The Pastore court found that "the exclusionary rule should apply" in such a liquor license revocation proceeding "based on an illegal search and seizure to uncover stolen goods." Pastore, 463 A.2d at 163, 165. The Court reasoned that such a proceeding "is in substance and effect a quasi-criminal proceeding since its object is to penalize for the commission of an offense against the law." Id. at 165 (internal citations omitted). Moreover, the Court further analogized the liquor revocation hearing to a forfeiture proceeding that could result in punishment greater than the criminal prosecution for the underlying conduct. The Court explained: "it would be anomalous

. . . to hold that in [a] criminal proceeding, illegally seized evidence is excludable, while in [a] forfeiture proceeding, requiring the determination that the criminal law has been violated, the same evidence would be admissible." Pastore, 463 A.2d at 163 (citing Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 701(1965)).

Based upon the Pastore decision, a colorable argument can be made that the exclusionary rule should be extended to a LEOBOR hearing. Unlike Pastore, here, the alleged underlying conduct is not criminal in nature. However, the Pastore Court noted that an administrative proceeding "could result in punishment greater than the criminal prosecution for the underlying conduct" with respect to the "magnitude of the consequences for the individual involved." Id. at 163. Thus, here, the admission of Stoddard's evidence at the LEOBOR hearing, like the admission of the illegal search evidence that led to a revocation of a license in Pastore, could have a consequence—termination of Williams' employment. However, the Court need not decide this issue because the evidence at bar was received as a result of a private search which does not implicate the Fourth Amendment.

Section 9-19-25 only excludes evidence "procured by, through, or in consequence of any illegal search and seizure . . . ." Sec. 9-19-25. Here, "the Fourth Amendment's protection against unreasonable searches and seizures applies only to government action and not 'to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government.'" United States v. Jacobsen, 466 U.S. 109, 113 (1984) (quoting Walter v. United States, 447 U.S. 649, 662 (1980) (Blackmun, J., dissenting)); see R.I. Const. art. I, § 6; U.S. Const. amend. IV. Stoddard was not acting at the direction of the NPPD, or as an agent thereof, when she sought to confirm her suspicions that her husband was being unfaithful. It was only after she realized that Williams may have been contacting other women—while either on duty or

with the use of police resources—that Stoddard contacted Calise. By the time Stoddard met with Calise, she had already ceased collecting evidence and therefore could not have been acting at the behest of the government. Accordingly, this Court finds that the evidence does not fall under § 9-19-25 because Stoddard was not acting as an agent of the NPPD and therefore conducted a private search. Thus, neither the Federal nor the State Constitution bars the NPPD from introducing Stoddard's evidence at the LEOBOR hearing.

At this point in the proceedings—prior to the LEOBOR hearing—it is not appropriate for this Court to decide whether the evidence collected by Stoddard possesses probative value. Sec. 42-35-15. Williams has not "exhausted all administrative remedies available to him" and has not been "aggrieved by a final order in a contested case." Id.; see R.I. Emp't Sec. Alliance, Local 401, S.E.I.U., AFL-CIO v. State, Dep't of Emp't & Training, 788 A.2d 465, 467 (R.I. 2002) (citing Burns v. Sundlun, 617 A.2d 114, 116 (R.I. 1992) (holding that "[i]t is well settled that a plaintiff aggrieved by a state agency's action first must exhaust administrative remedies before bringing a claim in court."); Rodrigues v. R.I. Dep't of Educ., 697 A.2d 1077, 1079 (R.I. 1997) (dismissing plaintiff's claim without prejudice because he failed to exhaust all administrative remedies). Furthermore, there is no indication that a review of the final agency order would not provide an adequate remedy. Id.; see Frazier v. Fairhaven Sch. Comm., 276 F.3d 52, 61 (1st Cir. 2002) (concluding that exhaustion of administrative remedies is advantageous even though the administrative process does not offer the specific form of relief sought by the plaintiff). Upon receipt of a final order by the LEOBOR committee, Williams may appeal any decision rendered to this Court in accordance with §§ 42-35-15 and 42-35-15.1. Sec. 42-28.6-12. Moreover, if Williams were to appeal the hearing committee's decision, review would be "limited . . . to an

examination of the record to determine whether some competent evidence exists to support the committee's findings." Laprade, 94 A.3d at 513.

5

The NPPD Investigation

Williams contends that but for Calise's receipt of Stoddard's unlawfully obtained information, the NPPD would not have begun an investigation and obtained additional evidence of his alleged misconduct. Moreover, Williams asserts that none of the information the NPPD obtained, and now intends to use against him, can be disconnected from Stoddard's unlawful conduct. In response, Defendants argue, under the inevitable discovery doctrine, they would have discovered the additional evidence even if Stoddard had not delivered the evidence to Calise.

With respect to the case at bar, Defendant's reliance on the inevitable discovery doctrine is misplaced because there is no evidence that the NPPD violated Williams' constitutional rights. State v. Barkmeyer, 949 A.2d 984, 998 (R.I. 2008) ("The question as to whether the inevitable-discovery exception is available arises after there has been a determination that the accused's constitutional rights have been violated."). The inevitable discovery doctrine applies to unlawful searches and seizures conducted by government agents. Id. Here, Stoddard undertook a private search and then later turned over the fruits of her search to Calise. This Court finds no indication that the NPPD encouraged or otherwise assisted Stoddard with her unlawful search and therefore determines that Stoddard's search was wholly private in nature. Jacobsen, 466 U.S. at 113. Furthermore, a private search does not implicate the Fourth Amendment because it is conducted by a private party; thus, the Defendants did not violate Williams' constitutional rights by accepting the evidence from Stoddard. United States v. D'Andrea, 648 F.3d 1, 7 (1st Cir. 2011)

([T]he initial private search did not implicate the Fourth Amendment because it was conducted by a private party.").

Additionally, this Court finds that there is sufficient evidence to conclude that the NPPD discovered evidence of Williams' alleged indiscretions independent of Stoddard's unlawfully obtained evidence. On April 21, 2010, after Stoddard approached Calise with her concerns that some of Williams' online activities might have occurred while he was on duty, Calise commenced an investigation to determine whether Williams had again been using RILETS to contact women he encountered while on duty. Accordingly, he cross-referenced Williams' public list of Facebook friends with women whose license plate numbers Williams had looked up in RILETS while on duty. Calise then contacted and interviewed the women which the cross-reference search produced. The NPPD did not use Stoddard's evidence in this phase of the investigation because, at this point in time, Williams' list of Facebook friends was public, and the NPPD found this information by simply searching his name.

In light of Williams' history of using RILETS to contact women for personal reasons, this Court finds that the NPPD would have investigated Stoddard's allegations—even without receiving Stoddard's unlawful electronic evidence—and ultimately convened a LEOBOR hearing. This Court finds that there is no constitutional basis to prohibit the introduction of Stoddard's evidence at the LEOBOR hearing because the information Stoddard provided the NPPD was a result of a private search. See D'Andrea, 648 F.3d at 7 (holding that a private search does not implicate the Fourth Amendment). The LEOBOR committee, in accordance with § 42-28.6-6, shall make a determination as to whether the evidence "possesses probative value commonly accepted by reasonable and prudent persons in the conduct of their affairs." Sec. 42-28.6-6. Accordingly, this Court finds that the evidence gathered pursuant to the

NPPD's investigation—including Stoddard's evidence, the NPPD's interviews with the women Williams contacted and Williams' subsequent admissions—does not violate Williams' constitutional rights and thus is admissible at the discretion of the LEOBOR committee.

IV

Conclusion

As to Williams' claims against Stoddard, the Court, having weighed all the evidence and considered the parties' arguments, finds for Williams as to Counts I, II, III, IV, V, VI, and VII of his Complaint and for Stoddard as to Count VIII. Accordingly, Stoddard's motion pursuant to Rule 52(c) for judgment against Williams is denied in part and granted in part. The Court further finds for Williams on Stoddard's counterclaim for abuse of process. As to Williams' claims against the North Providence Defendants, Counts IX and X, the Court finds for the North Providence Defendants on the grounds that they are not amenable to suit under Williams' cause of action. Accordingly, the North Providence Defendants' Rule 52(c) motion is granted. Furthermore, the North Providence Defendants are not prevented—under the RIWA, the FWA, or the Fourth Amendment—from introducing the evidence it gathered pursuant to its investigation and the evidence it received from Stoddard at Williams' LEOBOR hearing. Therefore, this Court finds for the North Providence Defendants as to Counts XI and XII.

By virtue of Williams having prevailed under both the RIWA and the SCA, he is entitled to actual and punitive damages. Accordingly, pursuant to § 12-5.1-13 of the RIWA, this Court awards Williams $1000 in actual damages and $1 in punitive damages. Furthermore, pursuant to 18 U.S.C. § 2707(c) of the SCA, this Court awards Williams actual damages of $1000. With respect to all other claims, this Court denies Williams' request for actual, statutory and punitive damages. Finally, this Court is mandated to award reasonable attorneys' fees pursuant to § 12-

5.1-13 of the RIWA. Accordingly, this Court finds that Williams is entitled to reasonable attorneys' fees under the RIWA, and furthermore, attorneys' fees—proportional to each claim—are appropriate under each of the FWA, the SCA, the R.I. Computer Crimes Law, and the R.I. invasion of privacy statute. As such, the Court will consider the reasonableness of the fees requested upon further hearing before this Court. Counsel shall prepare the appropriate judgment for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Daniel Williams v. Leah Stoddard, et al.**
CASE NO:	**PC 12-3664**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**February 11, 2015**
JUSTICE/MAGISTRATE:	**Gibney, P.J.**
ATTORNEYS:	
For Plaintiff:	**John R. Grasso, Esq.; Stephen J. Brouillard, Esq.**
For Defendant:	**John B. Harwood, Esq.; John A. Tarantino, Esq. Vincent F. Ragosta, Jr., Esq.; Carly Beauvais Iafrate, Esq.**