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No. 66062-4

WASHINGTON COURT OF APPEALS, DIVISION 1

DAVID FEIS,

Appellant/Plaintiff,

v.

KING COUNTY SHERIFF'S DEPARTMENT a
division of King County, Deputies CHRISTINA BARTLETT,
ERIC FRANKLIN, ABAGAIL STEEL AND KYLE
McCUTCHEON and DOES 1-5 inclusive,

Respondent/Defendant

APPELLANT'S BRIEF

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DIVISION 1

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I. INTRODUCTION

It is still unlawful in this country for the police to enter someone's home without a warrant, without consent, without any exigent circumstances, nor any emergency. But on March 31, 2007, David Feis sat on his front porch in handcuffs, watching helplessly as the police entered his home, walked up to his bedroom, opened the door, turned over his mattress, threw his wife's jewelry and clothes on the ground, came back outside with his gun cases, took his guns out, threw the cases back inside the front door, and drove away.

When the deputies on the scene that day were sued for violating David Feis' Fourth Amendment rights, they claimed they just wanted to protect his stepson, Joshua Petersen (hereinafter "Joshua"), who had told the police that his stepfather had slapped him while they were arguing outside of the house. David Feis was arrested on suspicion of fourth degree assault.

So in order to protect Joshua from David (a school bus driver with no criminal record), and because, according to Sergeant Abigail Steele, "it was very likely that David would soon post bail, return home, and possibly be even angrier with Joshua," the deputies took it upon themselves to enter David's home, search his bedroom, and take his guns.

We ask this court to consider the implications of the deputies' actions that day. If the police are allowed to enter someone's home without a warrant, without any exigent circumstances or an emergency, in order to take away weapons they hypothesize without supporting facts will be used against alleged domestic violence victims, what is next? Why would the police leave the kitchen knives, extension cords and baseball bats? Could not these items just as readily be used against an alleged victim after a suspect posted bail and returned home, possibly even angrier? After all, David had never used or threatened to use his guns against Joshua.

The logical extension of labeling this intrusion lawful is that the search warrant requirement for entry of the home of an arrested person would cease to exist. There probably is not a single American who does not have some object in his home that can be used as a weapon. Following the logic of the trial court the police have the right to enter and remove all objects they believe are weapons which theoretically could be used to harm someone and justify it under the community caretaking function.

David Feis, plaintiff in the trial court and appellant here (hereinafter "Feis"), appeals from the trial court's summary judgment orders dismissing all of his claims against defendant-respondents

(hereinafter “the deputies”), the King County Sheriff’s Department, Sergeant Abigail Steele (hereinafter “Sergeant Steele”), Deputy Eric Franklin (hereinafter “Deputy Franklin”), and Deputy Kyle McCutchen (hereinafter “Deputy McCutchen”).

Feis's appeal is limited to his claim that in entering and searching his residence and vehicle in order to confiscate his gun collection without probable cause, without a warrant and without his consent, the deputies violated his Fourth Amendment right to be free from such unlawful entries and searches and violated his right to privacy. The parties conceded that no material facts were in dispute and that the Court could decide this issue as a matter of law.

The trial court found that the “community caretaking function” of law enforcement provided the deputies with a defense under state law, and even if the community care taking function did not provide a defense under federal law, the law was not clearly established that the community care taking function did not apply, so the deputies had qualified immunity under federal law. All of Feis’s claims were dismissed. The law is contrary to the trial court's position.

Nearly two decades ago, the Ninth Circuit made clear that “the fact that a police officer is performing a community caretaking function...

cannot itself justify a warrantless search of a private residence.” United States v. Erickson, 991 F.2d 529, 531 (9th Cir. 1993).

Federal district courts in Washington have routinely rejected “community caretaking” as an exception to the warrant requirement unless there is evidence of:

- (a) A medical emergency presently occurring inside the home (see Goldsmith v. Snohomish County, 558 F.Supp.2d 1140 (W.D. Wash. 2008), warrantless entry permitted for a medical emergency); or
- (b) An immediate threat to the health or safety of someone presently inside the home (see State v. Gocken, 71 Wn.App. 267, 857 P.2d 1074 (1993), warrantless entry to allow for emergency medical aid).

The Goldsmith and Gocken courts examined the “community caretaking” function of law enforcement to explain how on balance, an imminent threat to the health or safety of someone inside a home outweighed the occupant’s Fourth Amendment right to be free from warrantless entry.

A reasonable officer would not have entered Feis’s home, without a warrant, to take his guns unless there was some indication that someone inside the home was in imminent danger. Feis is entitled to judgment as a matter of law for the unlawful entry, search and seizure of his property because the deputies have offered no legally recognizable defense.

II. ASSIGNMENTS OF ERROR

Assignments of Error

The trial court erred in denying Feis's motion for summary judgment as a matter of law on his 42 U.S.C. §1983 claim of illegal entry, search and seizure under the Fourth Amendment and invasion of privacy under state law, and in granting the deputies' motion for summary judgment on those claims.

Issues Pertaining to Assignments of Error

Whether the deputies' warrantless entry into Feis's home, search, and seizure of Feis's property subsequent to his arrest violated the Fourth Amendment.

- a. If a warrant was required to enter Feis's home to seize his property, whether the "community caretaking doctrine" provided an exception.
- b. If the entry, search and seizure were unlawful under the Fourth Amendment, whether the "emergency exception" applied.
- c. If the entry, search and seizure was unlawful and no exception to the warrant requirement applies, whether the deputies are entitled to qualified immunity.
- d. If summary judgment in favor of Feis at the trial court was appropriate, whether Feis is entitled to an award of attorneys' fees.

III. STATEMENT OF THE CASE

A. Background Facts

On Saturday, March 31, 2007, David Feis, his wife Hope and his stepson Edward Petersen went to Shay's restaurant in Shoreline, Washington for breakfast. CP 250. While they were there, Joshua Petersen, Feis's estranged stepson, arrived and asked if he could join them. Id. The family agreed, and Joshua sat down at their table. Id. They talked and had a nice breakfast together. Id.

After breakfast, Edward asked his parents if he could go to the Marshall's department store directly across the street from Shay's. Id. Joshua stated that he would go with Edward. Id. Feis, his wife, Edward and Joshua agreed that they would all meet back at Feis's house. Id.

Later, Edward and Joshua arrived at the house; Edward carrying a bag with his purchases from Marshalls. Id. Edward went into the house while Joshua remained outside, where his mother and Feis had just pulled up in Feis's car. Id. Before they exited the vehicle, Joshua asked his mother if he could have \$100.00. Id. Hope replied, "No. I do not have \$100.00 to give you. I can give you \$10.00." CP 254. Upon hearing this, Joshua became irate and started cursing at his mother. CP 250. He called her a "fucking bitch" and kicked the car door on the passenger side where

she was seated. Id. Joshua yelled, "You never give me a dime" and "You all hate me!" Id. Joshua then started to walk toward the house. Id.

Joshua did not live in Feis's residence. Id. Because of Joshua's disrespectful attitude, Feis jumped out of the car and said, "No. You are not coming in the house." Id. Unbeknownst to Feis, he had left the car in gear, so as he exited the car it started to roll forward. Id. Realizing this, Hope reached over and engaged the emergency brake. CP 255.

As Feis and Joshua feuded, Edward came outside and put himself between Joshua and Feis. CP 250-51. Joshua yelled "You fat bastard! I am going to have you arrested!" CP 251. Feis never struck Joshua. Id. As he stormed off, Joshua hit the windows of Feis's truck. Id. Hope Feis immediately called 9-1-1 and told the operator what had happened. Id.

A few minutes later a police car arrived, followed by a second police car. Id. Sergeant Steele and Deputy Franklin exited their vehicles. Id. Feis explained separately to each deputy what had happened; that he did not hit Joshua, nor did he attempt to hit Joshua with his car. Id. As the deputies were arriving on the scene, Hope Feis passed out and dropped to the ground. CP 251. Feis asked Sergeant Steele to call for an aid car to check on his wife. Id. Shortly thereafter, Deputy McCutchen arrived, along with the aid car. CP 251.

Deputy McCutchen went across the street to the church parking lot where he found Joshua. CP 100. Joshua claimed Feis had attempted to run him over with his car, and had slapped him in the face. Id. Deputy McCutchen looked, but could not see any marks on Joshua's face. CP 239. Deputy McCutchen spoke with Hope Feis who was seated in the back of the aid car. Id. Deputy McCutchen reported Joshua and Hope's statements to Sergeant Steele. Id.

Sergeant Steele observed Feis's car parked on the front lawn. CP 85. She observed rutted tire tracks under the wheels which she believed were caused by David accelerating his car toward Joshua. Id. She then observed Joshua's face, which she believed had "a very slight redness, consistent with a slap." Id. Based on her observations and Deputy McCutchen's report, Sergeant Steele arrested Feis for assault. CP 85. Feis asked "Why? I never touched anybody." CP 251. Deputies Franklin and McCutchen then handcuffed Feis and sat him in a chair on the front porch. CP 251.

Feis watched as Deputy McCutchen open the driver's door to his blue Mercury Grand Marquis. Id. Deputy McCutchen entered the car and appeared to be rummaging through the car looking under the seat. Id. He opened the glove compartment, removed its contents and threw them on the ground. Id. He checked under the visors, ashtrays and dashboard. Id.

He opened one of the rear doors and checked both of the back seat pockets and under the seats. Id.

After Deputy McCutchen finished searching Feis's vehicle he walked up to the front door and went directly into Feis's house. Id. Deputy McCutcheon saw Edward Petersen sitting on the couch and asked him, "Where are the guns?" CP 259. Edward stood up and asked, "What?" Id. Deputy McCutcheon did not answer; instead, he walked down the hallway leading to Feis's bedroom, opened the door and went inside. Id.

Edward followed him in and watched Deputy McCutchen go through Hope's jewelry box, picking up her jewelry and tossing it aside; some of it landing on the floor. Id. Edward told him he should not be in there; that he should leave. CP 259-60. Deputy McCutchen told Edward to be quiet or he would arrest him. CP 260. Deputy McCutchen went over to Feis and Hope's bed, lifted the mattress, and found two guns underneath. Id. He went to the closet, pulled out Hope's clothes and shoes and knocked items off the top shelf onto the floor. Id.

Next, Deputy McCutchen walked back into the living room and searched through the hallway closet next to the front door. Id. He pulled out coats, throwing them onto the floor, and found another gun. Id. He turned to Edward and told him if he had to come back inside for another

gun he would have Edward arrested. Id. He had been in Feis's home for approximately eight minutes. CP 252.

Deputy McCutchen then walked outside with Feis's gun cases, emptied out their contents, returned the gun cases to the house and drove away. Id.; CP 260.

At no point did any of the deputies ask Feis or his wife if they could enter their home or remove any of Feis's guns. CP 218; CP 243-44. Sergeant Steele reported that Joshua said "he wanted [them] to remove David's firearms now." CP 86. But Joshua did not live in Feis's house and had no authority to make such a demand. CP 249-50; CP 254.

Feis was taken to jail where he spent more than three days until he was able to post bail on April 2, 2007. CP 127; CP 129. He was under the threat of prosecution and jail until the charges against him were ultimately dismissed on September 12, 2007. CP 127; CP 154. After the charges were dismissed his guns were returned to him. CP 154.

B. Procedure

On December 31, 2008, Feis filed a civil claim in King County Superior Court for damages resulting from the deputies' unlawful conduct. CP 3. On July 2, 2010, the deputies filed a motion to dismiss all claims. CP 161. On July 19, 2010, Feis filed an opposition to the deputies' motion to dismiss all claims and filed a counter-motion for partial

summary judgment. CP 188. After oral argument on July 30, 2010, the deputies' motion to dismiss all claims except the 42 U.S.C. § 1983 claim for unlawful entry, search and seizure in violation of the Fourth Amendment was granted. CP 267. The Court allowed the parties additional time to brief the issue of unlawful Search and Seizure under Federal law. CP 269. The Court reviewed the parties' supplemental briefs on the issue of unlawful Search and Seizure under Federal law and on August 20, 2010, heard oral argument on the issue. CP 287. On September 17, 2010, the Court granted the deputies' motion to dismiss Feis's unlawful Search and Seizure claim under Federal law. Feis timely filed this appeal.

IV. ARGUMENT

STANDARD OF REVIEW

A grant of summary judgment is reviewed de novo. Botosan v. Paul McNally Realty, 216 F.3d 827, 830 (9th Cir. 2000); Weiner v. San Diego County, 210 F.3d 1025, 1028 (9th Cir. 2000).

The appellate court's review is governed by the same standard used by the trial court under Federal Rule of Civil Procedure 56(c). Adcock v. Chrysler Corp., 166 F.3d 1290, 1292 (9th Cir.), cert. denied, 528 U.S. 816, 145 L. Ed. 2d 48, 120 S. Ct. 55 (1999). The court must determine, viewing the evidence in the light most favorable to the nonmoving party, whether

there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. Lopez v. Smith, 203 F.3d 1122, 1131 (9th Cir. 2000) (en banc).

Defendants Are Liable as a Matter of Law For Their Warrantless Entry, Search and Seizure in Violation of Feis's Fourth Amendment Rights.

It is undisputed and readily admitted that Deputy McCutchen entered Feis's residence, searched his home including his private bedroom, retrieved numerous firearms and removed them from his house. CP 102. Deputy McCutchen also admits that he likely searched Feis's vehicle. CP 102. This is confirmed by the testimony of Edward Peterson. CP 259-260. It is also undisputed that the deputies did not possess a warrant to search Feis's residence, nor did they possess a warrant to search of Feis's vehicle parked on his property.

In the trial court, the deputies sought to justify the search by claiming that the search of both the car and the home was lawful because it was done for benevolent reasons and therefore falls under the community caretaking function exception to the warrant requirement. The deputies further argue that even if the entry and search of Feis's residence violated the Fourth Amendment, they are entitled to qualified immunity because it was not clearly established in the Ninth Circuit that the community caretaking function did not apply to homes.

Both of these arguments are unavailing because they are based on a misunderstanding of the law. Under federal law, there are only two exceptions to the warrant requirement for entering a private residence when authorized consent has not been obtained. There must either be exigent circumstances or an emergency requiring immediate action to protect the health and safety of an occupant whose safety could be compromised if the officers had to wait for a warrant. While it is true that the emergency doctrine is a function of community caretaking, the community caretaking function of law enforcement is not a legally recognized exception to the warrant requirement.

The deputies also are not entitled to qualified immunity because the law regarding a warrantless entry into a private residence was firmly established at the time of the deputy's entry. Law enforcement may enter to assist persons who are seriously injured or threatened with such injury and to prevent the imminent destruction of evidence. The exigencies of such situations "make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." See Mincey v. Arizona, 437 U.S. 385, 393 - 94 (1978); and Brigham City v. Stuart, 547 U.S. 398, 403 (2006).

It is a "basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively

unreasonable." Groh v. Ramirez, 540 U.S. 551, 559, 124 S. Ct. 1284, 157 L. Ed. 2d 1068 (2004) (quoting Payton v. New York, 445 U.S. 573, 586, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980)). This law has been established for decades. The deputies have presented no evidence to show that a reasonable police officer could believe they could enter someone's home without an emergency and without their consent to remove firearms that were not part of a criminal investigation.

a. The Deputies' Reliance on the Community Caretaking Exception to the Warrant Requirement is Unavailing.

The fact that a police officer is performing a community caretaking function cannot itself justify a warrantless search of a private residence. In determining whether a search is reasonable within the meaning of the Fourth Amendment, the governmental interest motivating the search must be balanced against the intrusion on the individual's Fourth Amendment interests. Maryland v. Buie, 494 U.S. 325, 331, 108 L. Ed. 2d 276, 110 S. Ct. 1093 (1990). "Under this test, a search of the house or office is generally not reasonable without a warrant issued on probable cause." Id.

The Supreme Court set forth the 'community caretaking' doctrine for searches in Cady v. Dombrowski, 413 U.S. 433 (1973). In Dombrowski, the police searched a motorist's car after he had been arrested because they had reason to believe he had a gun in the car and according to standard police procedure, they wanted to protect the public

from a weapon's possibly falling into untrained or perhaps malicious hands. Id. at 443. The Supreme Court ruled that the search of the car was legal as it was the result of the officers' community caretaking function, "totally divorced from the detection, investigation, or acquisition of evidence relating to violation of a criminal statute." Id. at 441. However, the Court took great pains to point out the constitutional distinction between *vehicles*, where frequent non-criminal contact with police occurs, and *homes*, where the expectation of privacy is much greater. Id.

Recent appellate courts that have addressed the "community caretaking" doctrine have also rejected its application to warrantless searches of homes. In Ray v. Township of Warren, supra officers concerned about the well-being of a young girl made a warrantless entry into her father's home to check on her. Ray v. Township of Warren, 626 F.3d 170, 172 (3rd Cir. 2010). Police were aware of past domestic violence disputes between the father and the girl's mother. Id. The police attempted to justify their Fourth Amendment violation by arguing they were performing a "community caretaking function." Id. at 174 The court of appeals rejected this argument, stating:

"We agree with the conclusion of the Seventh, Ninth, and Tenth Circuits on this issue, and interpret the Supreme Court's decision in Cady as being expressly based on the distinction between automobiles and homes for Fourth Amendment purposes. The community caretaking doctrine cannot be used to justify warrantless searches of a home...

[I]n the context of a search of a home, it does not override the warrant requirement or the carefully crafted and well-recognized exceptions to that requirement.”

Id. at 177. The court ultimately ruled that the officers were entitled to qualified immunity for their actions, but importantly, based their decision to grant qualified immunity on the fact that the question of whether the “community caretaking doctrine” could justify a warrantless search into a home was unanswered *in their circuit*. *Id.* at 177.

The Ninth Circuit *has* addressed the ‘community caretaking’ doctrine in the context of warrantless searches of homes. In United States v. Erickson, 991 F.2d 529, 530 (9th Cir. 1993), a Tacoma police officer who was investigating a possible burglary pulled back a black plastic bag that was covering a basement window and observed marijuana plants growing inside. The government sought to justify the warrantless search by arguing that the officer was performing one of his ‘community caretaking’ functions when he pulled back the plastic sheet and looked inside. *Id.* at 531. The government further asserted that such a caretaking search was undertaken to protect the residents, rather than to build a criminal case against them. As such, they argued, the search was permissible without a warrant or probable cause, as long as the officer acted reasonably under the circumstances. *Id.* at 532.

Here, the deputies similarly argue that the warrant requirement should not apply because the deputies were not trying to make a criminal case against Feis. “But the Court has long rejected such a cramped view of the Fourth Amendment. The right to be free from unreasonable searches and seizures does not extend only to those who are suspected of criminal behavior.” *Id.* at 531, and see Camara v. Municipal Court, 387 U.S. 523, 530, 87 S. Ct. 1727, 1731, 18 L.Ed.2d 639 (1980). This misguided understanding of the function and purpose of the Fourth Amendment illustrates why the right to privacy is so jealously guarded by the courts.

The right to be free from unreasonable searches and seizures does not extend only to those who are suspected of criminal behavior. *Id.* On the contrary, “even the most law-abiding citizen has a very tangible interest in limiting the circumstances under which the sanctity of his home may be broken by official authority.” *Id.* at 530-31.

The warrantless search of a private residence strikes at the heart of the Fourth Amendment's protections. “The right of officers to thrust themselves into a home is . . . a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance.” Johnson v. United States, 333 U.S. 10, 14 (1948).

The community caretaking function of law enforcement does not permit a police officer, without a search warrant and in the absence of

exigent circumstances or an emergency, to enter a private home to search for and remove property. "[I]t is precisely this kind of judgmental assessment of the reasonableness and scope of a proposed search that the Fourth Amendment requires be made by a neutral and objective magistrate, not a police officer." Erickson, 991 F.2d 529, 532 (citing Mincey v. Arizona, 437 U.S. 385, 395 (1978)).

b. Without an Imminent Threat to Health or Safety Inside the Home the Emergency Exception to the Warrant Requirement Does Not Apply.

The Fourth Amendment requires that searches of the home be reasonable. See Illinois v. Rodriguez, 497 U.S. 177, 185-86 (1990). This reasonableness requirement generally requires police to obtain a warrant based upon a judicial determination of probable cause prior to entering a home. See Payton, 445 U.S. 573, 585-86. Warrantless searches of the home are *per se* unreasonable, unless they fall within a few specifically established and well-delineated exceptions. *Id.*; Mincey, 437 U.S. 385, 390. There are two general exceptions to the warrant requirement for warrantless home searches: exigent circumstances and emergency. These exceptions are narrowly applied and their boundaries rigorously guarded to prevent any expansion that would unduly interfere with the sanctity of the home. Hopkins v. Bonvicino, 573 F.3d 752, 763 (9th Cir. 2009). Both of those exceptions require some amount of urgency.

The Ninth Circuit defined "exigent circumstances" as those which:

"would cause a reasonable person to believe that entry . . . was necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts."

Id. (citing United States v. McConney, 728 F.2d 1195, 1199 (9th Cir. 1984) (en banc) (abrogated on other grounds)). There must be a "substantial risk [that] would arise if the police were to delay a search until a warrant could be obtained." United States v. Reid, 226 F.3d 1020, 1027-28 (9th Cir. 2000) (quoting United States v. Gooch, 6 F.3d 673, 679 (9th Cir. 1993)).

In our case, the deputies do not argue that there were exigent circumstances. Instead, they rely solely on the 'community caretaking' function of law enforcement to provide them with an exception to the warrant requirement. However, the Ninth Circuit made clear in Erickson that even when law enforcement are performing a community caretaking function, they still must show that they were confronted with an emergency situation that required immediate action making the application of a warrant unreasonable. Erickson, 991 F.2d 529, 533.

The emergency exception has three requirements: "(1) The police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life

or property. (2) The search must not be primarily motivated by intent to arrest and seize evidence. (3) There must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched." United States v. Martinez, 406 F.3d 1160, 1164 (9th Cir. 2005).

The "emergency aid exception does not depend on the officers' subjective intent or the seriousness of any crime they are investigating when the emergency arises. It requires only an objectively reasonable basis for believing that a person within the house is in need of immediate aid." Michigan v. Fisher, 130 S. Ct. 546, 548 (2009) (quotations and citations omitted).

Here, Defendants contend that it was objectively reasonable for them to believe that Joshua was in immediate danger. (see CP 87, where Sergeant Steele states: "It was very likely that [Feis] would soon post bail, return home, and possibly be even angrier with Joshua and Hope."). The deputies offer no facts to support this belief. At no point were any guns displayed, used, or their use threatened. The deputies have not produced any evidence suggesting Joshua was in immediate danger. In fact, the evidence shows Feis was in custody when they entered his home and searched his bedroom. CP 252. There simply was no imminent threat that required the deputies to bypass the warrant requirement.

In its ruling, the Superior Court cited a recent District Court case that examined the emergency doctrine. CP 307, citing Goldsmith v. Snohomish County, 558 F.Supp.2d 1140, 1152 (W.D. Wash. 2008). Although the court in Goldsmith discussed the ‘community caretaking’ function of law enforcement, the facts of our case are easily distinguishable. The court in Goldsmith found that an officer’s warrantless entry of a home was justified after paramedics had called the police to help them subdue a man who was in need of immediate medical assistance, but was being combative. Id. at 1152. In Goldsmith, the court found the police could enter a home without a warrant to prevent immediate injury to an occupant of the home. Id.

Goldsmith recognized that in the case of persons who are seriously injured or threatened with such injury, warrantless entry into a home to resolve the situation will not run afoul of the Fourth Amendment. Goldsmith. Id.; (citing Brigham City, Utah v. Stuart, 547 U.S. 398, 126 S.Ct. 1943, 1947, 164 L.Ed.2d 650 (2006) (entry into home to stop a fight not an illegal search); Mincey, 437 U.S. 385, 392). Here, there was no serious injury or threat of injury. There was no need for immediate assistance inside the home. The Superior Court’s reliance on Goldsmith was misguided.

The Superior Court also cited State v. Gocken, 71 Wn.App. 267, 857 P.2d 1074 (1993), to support their finding that a reasonable officer would not know whether a warrant was required under the facts of our case. CP 307. In Gocken, police entered a home without a warrant because they reasonably believed an elderly resident was in need of immediate assistance. Under the emergency doctrine, the court found they were justified in their warrantless entry in order to see if she required emergency medical aid. Id. at 278.

The situation the deputies faced in this case is easily distinguishable from Gocken: There was no immediate need to enter the home and the alleged aggressor had been detained and was outside the home when the police entered. Sergeant Steele stated that it was very likely Feis would soon post bail, come home angry, and be prepared to use his gun against his son and his wife. CP 87; CP 88. This is completely unsubstantiated, unreasonable, and nowhere near the degree or type of threat that courts describe as an emergency. There was simply no imminent threat that required the deputies to circumvent the warrant requirement before they entered Feis's home to remove his property.

The court in State v. Williams, 148 Wn.App. 678 (2009) recently addressed facts similar to our case. In Williams, police were called to a hotel room after a man claimed his nephew was "being violent" with him

and was preventing him from entering the room they shared. Id. at 680. After the nephew opened the door and allowed the officers to enter, they became suspicious when he gave them a name the officers suspected was fake. Id. at 681. As one officer asked him questions, another officer looked around the hotel room and noticed drug paraphernalia. Id. The nephew was charged with possession. Id. at 682.

The state sought to justify their warrantless entry, search and seizure “under the community caretaking/emergency aid exception.” Id. at 685. The court noted that “missing from the factual findings, conclusions of law, and testimony of the officers, however, is any indication that before entering, officers actually believed someone inside the hotel room might need medical assistance or be in danger.” Id. The state argued in response that “the officers could use the community caretaking function to... ensure [the uncle’s] safe re-entry into the room. Id. The court found their argument completely without merit. “The Washington cases applying the exception...contain some evidence to support that the officers believed they needed to enter a residence because of an ongoing risk to the health or safety of *someone inside* the residence.” (emphasis original) Id. at 686.

In this case as in Williams, there was no immediate health or safety risk to *anyone* inside Feis’s home. The entire incident in this case

occurred outside the home on the front lawn, and was motivated by Feis's desire to keep Joshua from entering his home. Even if the deputies reasonably believed Feis was a threat to Joshua, it was unreasonable for them to believe any threat was imminent. Feis was handcuffed and waiting to be transported to jail when the entry, search and seizure occurred. CP 252.

c. A Reasonable Officer Would Understand that a Warrantless Entry and Search of a Home Violates the Fourth Amendment; The Deputies are Not Entitled to Qualified Immunity.

The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Katz v. United States, 194 F.3d 962, 967 (9th Cir. 1999).

The availability of qualified immunity for individual defendants on summary judgment is tested under the rule of Anderson v. Creighton, 483 U.S. 635 (1987). Under Anderson, the Court must review whether in light of (1) the information possessed by the officer and (2) clearly established law; the officer could have reasonably believed his actions to be lawful. Qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established

statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

In assessing a claim of qualified immunity, the court generally follows the two-step sequence laid out in Saucier v. Katz, 533 U.S. 194 (2001). First, the court determines (1) whether the facts as alleged by the plaintiff show the defendant violated a constitutional right. Id. at 201. If so, the court then asks (2) whether the violated right was "clearly established" at the time of the alleged misconduct. Id. at 202.

If the defendants violated a clearly established constitutional right, they are not entitled to qualified immunity.

In Pearson v. Callahan, 555 U.S. 223, 129 S.Ct. 808, 821-22, 172 L.Ed.2d 565 (2009), the United States Supreme Court held the Saucier protocol is not mandatory in all cases and that district courts may exercise discretion in applying it.

In Schlegel v. BeBout, 831 F.2d 881, 887, 888 (9th Cir.1987), the Ninth Circuit held that "the existence of a reasonable belief that conduct was lawful in light of clearly established law is a jury question, not appropriate for summary disposition."

The determination of whether a reasonable officer could have believed his conduct was lawful is a determination of law that can be decided on summary judgment only if the material facts are undisputed.

Act Up!/Portland v. Bagley, 988 F.2d 868, 873 (9th Cir.1992). If, however, there is a material dispute as to the facts regarding the information in the deputies' possession at the time of entry, search and seizure, it becomes a question for the finder of fact. Id.

The constitutional right at issue in this case is the fundamental Fourth Amendment guarantee not to have one's home subjected to an "unreasonable" search; a right established long before 2007. See Silverman v. United States, 365 U.S. 505, 511 (1961). At the very core of the Fourth Amendment stands the right of a person to retreat into their own home and there be free from unreasonable governmental intrusion. The relevant question for qualified immunity purposes is not whether the "exact contours of the right" were absolutely defined, but instead whether there existed some ambiguity in the case law to render the deputies' conduct arguably reasonable. See Harlow v. Fitzgerald, 457 U.S. 800, 815, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982).

As noted above, the Third Circuit in Ray v. Township of Warren, supra addressed the application of the community caretaking/emergency doctrine to warrantless searches of the home. The Ray court granted qualified immunity for a warrantless search not because the "community caretaking doctrine" applied to a search of a home, but rather because the question of whether the "community caretaking doctrine" applied was

unanswered in their circuit. Ray v. Township of Warren, 626 F.3d 170, 177 (3rd Cir. 2010). Even more important is the fact that the officers were faced with a situation that required immediate attention: the well being of a child that they believed to be on the premises where a domestic dispute was ongoing. These officers in fact called a judge and apparently got approval for their entry into the home before entering. Id. at 172.

The 9th Circuit addressed the application of the “community caretaking doctrine” to a warrantless search of a home in Erickson, 991 F.2d 529. The Erickson court clearly and unambiguously held that “[t]he fact that a police officer is performing a community caretaking function, however, cannot by itself justify a warrantless search of a private residence.” Id. at 531. “The warrantless search of Erickson’s residence was not justified by any of the established exceptions to the warrant requirement, such as consent or exigent circumstances. Thus it was presumptively unreasonable.” (internal quotation marks omitted) Id. at 532 (quoting Payton, 445 U.S. 573, 586).

We believe that there is little dispute that Feis’s right to be free from warrantless searches and seizures was violated. The only real issue presented by this appeal is whether the violated right was “clearly established” at the time of the alleged misconduct. Saucier v. Katz, at 202.

Although not controlling in a 42 U.S.C. § 1983 action, we believe that even under well-established case law in Washington, the deputies were "on notice" that absent (1) some medical emergency inside the home (see State v. Gocken, where officers feared an elderly woman may be in need of emergency medical assistance), or (2) a substantial threat of imminent harm (see Goldsmith v. Snohomish County, warrantless entry upheld when police entered to subdue a man in need of medical assistance), a warrantless search of a residence without any other exigencies present is not only unreasonable, but unconstitutional (see United States v. Erickson).

d. Feis was Entitled to Summary Judgment at the Trial Court, Therefore He is Entitled to Attorneys' Fees.

Pursuant to Washington Rule of Appellate Procedure 18.1, appellant Feis requests attorneys fees. Since Feis has demonstrated via this appeal that he is the prevailing party in his 42 United States Code §1983 action for violation of his Fourth Amendment right, he is entitled to fees under 42 United States Code §1988.

Section 1988 applies in 42 U.S.C §1983 suits brought in state court by virtue of the supremacy clause. Ramirez v. County of Hudson, 169 N.J. Super. 455, 404 A.2d 1271, 1272 (1979), accord, Jacobsen v. Seattle, 98 Wn.2d 668, 676, 658 P.2d 653 (1983). The statute applies even if the state in which the action is brought does not have a statute authorizing

attorney's fees for similar types of actions. Bess v. Toia, 66 A.D.2d 844, 411 N.Y.S.2d 651, 653 (1978).

V. CONCLUSION

The 'community caretaking' emergency exception has been clearly and consistently applied in the Ninth Circuit since United States v. Erickson, 991 F.2d 529, 530 (9th Cir. 1993). Absent a medical emergency or an imminent threat to the health or safety of someone presently inside a residence, the police must obtain a warrant before entering someone's home.

The deputies do not offer any exigent circumstances in this case. A finding of exigent circumstances requires a "substantial risk [that] would arise if the police were to delay a search until a warrant could be obtained." United States v. Reid, 226 F.3d 1020, 1027-28 (9th Cir. 2000) (quoting United States v. Gooch, 6 F.3d 673, 679 (9th Cir. 1993)).

They cannot identify an emergency inside the home requiring them to enter without first obtaining a warrant. An emergency exception requires:

"(1) The police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property. (2) The search must not be primarily motivated by intent to arrest and seize evidence. (3) There must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched."

United States v. Martinez, 406 F.3d 1160, 1164 (9th Cir. 2005). There was simply no need for the deputies to rush into Feis's home. There was no immediate threat inside the home.

A reasonable officer understands the strict parameters and narrow exceptions that apply to entry and searches of people's homes. A reasonable officer would have clearly understood that in order to enter Feis's home to search and seize his guns, a search warrant was required. Feis is entitled to summary judgment as a matter of law.

DATED this 11 day of February, 2011.

Respectfully submitted,

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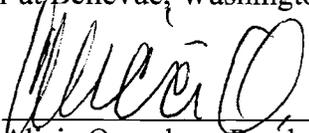
DECLARATION OF SERVICE

I certify under penalty of under the laws of the State of Washington that on this day I caused to be delivered via legal messenger a copy of the Appellant's Brief to counsel of record listed below and the original to the Court of Appeals, Division I to the following:

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