**Smith Research Memo**

**To:** Client

**From:** Charles Isaacs

**Re:** Mary Smith’s impending loss of companionship, and suppression of evidence actions

**I. Issues:**

**A.**  Does Mary Smith have a cause of action under 42 U.S.C. § 1983 for the loss of companionship from Bess Smith in her last months, and in the future; is she considered family for the legal means of recovery?

**B.**  Was the use of a GPS device to track Mary Smith’s car for several weeks a search under the 4th Amendment so that she can have the evidence suppressed?

**II. Brief Answers:**

**A.** Probably yes. A state actor who actively causes a person to be deprived of a protected liberty interest may be liable for resulting harm. Ronald Lowe, acting in his position at a state run health facility, will likely be seen as falling under § 1983 allowing for suit of the State of Euphoria. Mary’s background with Bess, both the nature of their familial relationship, and the level of dependency between the two, will likely allow Mary to recover for loss of companionship from a pseudo-parent such as Bess.

**B.** Probably yes. A search occurs any time a person’s reasonable privacy interest is violated by police, however the use of GPS tracking devices are not, per se, considered a search. The continuous, often unrelated, tracking and recording of data by the Bliss police using the GPS device violated both Bliss police policy, and federal standards for the unreasonable use of a device without procurement of a warrant. Although a car has no expectation of privacy, it can be assumed that much of the data taken by the device granted a private, personal view into Mary’s life beyond the investigation.

**III. Facts:**

From a young age, Mary lived her mother Jennifer, and her aunt (Jennifer’s sister) Bess in Euphoria. For a number of years the three of them lived together as an extended family, with Mary depending on both women for financial, upkeep, and parental support. Mary eventually grew up and became an attorney, but continued living with the two women in Bliss through the time when she and Jennifer decided to move Bess to Happy Acres care facility due to her Alzheimer’s disease. While Bess underwent treatment at Happy Acres, Jennifer and Mary continued to visit frequently. During these visits Mary met Ronald, one of the nurses employed by the state-run facility.

Ronald and Mary began seeing each other socially, and continued to do so for several months. Over the course of this time Ronald, on several occasions, had asked Mary to run errands for him. Some of these errands included dropping off unmarked packages in exchange for unmarked envelopes. This activity continued until Mary began to grow suspicious of Ronald’s dealings, and broke off the relationship. During this period of errand running, the Bliss police had begun to launch an investigation into Ronald’s suspected ties to drug trafficking in Bliss. The investigation revealed that Ronald appeared to be stealing prescription drugs from Happy Acres, and selling them privately. After placing him under surveillance and scrutinizing his cell phone activity, the police began to suspect that Mary may also be involved in the illegal activity. To investigate further, the police attached a GPS transmitter to Mary’s car while it was parked, and used it to track her locations in real time. Using the device, they recorded her frequent trips to suspected drug-related locations, construing that she may be making deliveries and pick-up’s as accomplice to Ronald.

Due to his break-up with Mary, Ronald stopped giving Bess the treatment she needed to keep her Alzheimer’s under control. As a result, Bess began to deteriorate rapidly; losing memory function, and suffering emotionally. She was no longer able to recognize her own family members, and her condition deeply affected both Mary and Jennifer. After several months in this state, Bess passed away from unrelated causes. During the time she was off of her medication, Bess was unable to function cogently, or interact with Mary in a meaningful way.

**IV. Discussion**

**A.** Under the Fourteenth Amendment the state is required to give due process under the law, however the Fourteenth Amendment itself does not create a cause of action which may garner relief. Monell v. Dep’t of Soc. Serv. of New York, 436 U.S. 658, 669 (1978). Under a § 1983 civil suit a cause of action is claimed against an agent of the state who, acting under the color of state law, actively deprives a citizen of a civil right. 42 U.S.C. § 1983 (2006); Monell, 436 U.S. at 658. An actor is under the color of state law when conducting duties in the employ, or on behalf of a state agency, or under the protection of state statute. City of Oklahoma City v. Tuttle, 471 U.S. 808, 809 (1985). Liberty interests may be claimed as civil rights, which cannot be withheld or interrupted by any action without Due Process of the law. Maine v. Thiboutot, 448 U.S. 1, 6 (1980).What liberties are protected varies, and can be limited or modified by state interests. McCurdy v. Dodd, 352 F.3d 820, 826 (3d Cir. 2003).

Once a protected right is shown, and can be stated to have been violated, a claim for damages is made. Memphis Cmty. Sch. Dist., 477 U.S. 299, 299 (1986). A decedent’s survivors may then have grounds to sue for a loss of society, consortium and companionship suffered due to the actions of the defendant. Bell v. City of Milwaukee, 746 F.2d 1205, 1244 (7th Cir. 1984). The love, care, counsel, advice and support of the decedent may be considered in terms of the benefits lost while the loved one was alive, and the expected benefit a survivor would have reasonably expected had the deceased continued to live. Vogler v. Blackmore, 352 F.3d 150, 154 (5th Cir. 2003). To recover, the plaintiff must first assert the constitutional right which was deprived, and the injury which followed. Dodd, 352 F.3d at 825. The defendant must then be shown to be an agent of the state, acting in that capacity. Russ v. Watts, 414 F.3d 783, 786 (7th Cir. 2005). Under the Due Process Clause, the plaintiff must also show the actions of the defendant were either deliberate, or as a result of the performance of state duties. Id. Some courts hold that recovery for this form of loss is intended for the benefit of couples, and only spouses may recover. Douglass v. Delta Air Lines, Inc., 897 F.2d 1336, 1339 (5th Cir. 1990). Others hold that the loss itself dictates the survivors who may recover damages, Pleasant v. Washington Sand and Gravel Co., 262 F.2d 471, 472 (D.C. Cir. 1958); courts have used this argument to enable or preclude family members from recovering for loss of companionship. Bell, 746 F.2d at 1244

This is an issue of first impression in the Fourteenth Circuit, and as such the court will likely look to the holdings of other circuits when ruling. The court will rule that a §1983 claim is appropriate given Ronald’s position at a state funded facility, and his intentional mistreatment of Bess in order to harm Mary. Tuttle, 471 U.S. at 813. The court will also likely look to established holdings furthering the idea of familial right to recovery, and how this right is substantiated through dependency, emotional attachment, and loss. Hallberg v. Brasher, 679 F.2d 751, 758 (8th Cir. 1982). The Fourteenth Circuit will likely agree that the denial of recovery due to a statutory technicality would not serve the interests of justice, and the rulings of other districts reflect that holding. Halverson, 495 F.2d at 820. Mary is a blood relative to Bess, and there is compelling evidence that she acted as a pseudo-parent to Bess. Vogler, 352 F.3d at 155. The court will likely take the totality of the familial relationship into account, and rule that Mary is eligible to make a claim for the loss of companionship. Bradley v. Sebelius, 621 F.3d 1330, 1333 (11th Cir. 2010).

In Monell, female employees of the Department of Social Services brought suit against New York City for forced maternity-leave employment practices. 436 U.S. at 658. Prior to this decision, it was common practice for municipal departments to require their female employees to take unpaid maternity leave, even when not medically necessary. Id. The court ruled that under §1983 the plaintiffs could bring a suit against the municipality directly, on behalf of their agents. Id. at 659. The court ruled that for the purposes of this type of claim of deprivation of a civil right, governmental bodies and their employees may be considered “persons”. Id. at 660. In Tuttle, the Court ruled that deliberate action, or action resultant from given policy were required to make a civil rights claim under §1983. 471 U.S. at 812. The widow of a man shot and killed by police brought a suit against the department, claiming that the action of the officer in question deprived her husband of his constitutionally protected rights. Id. The court held that, as the actions of the officer were an isolated incident of excessive force and not the result of the department’s training, the suit did not have any standing. Id. at 814. The Court held that the acts of the offending officer were not deliberately intended to deprive the decedent of a civil right, and so the plaintiff could not recover. Id. In Thiboutot, the Court held that §1983 created a cause of action for deprivations under the color of state law of any statutory right. 448 U.S. at 6. The plaintiff if this case was the father by marriage of eight children, but only the biological father of three. Id. at 4. The Maine Department of Human Services informed the plaintiff that he would only be able to receive government assistance for the three children he was the biological father of, although he was legally responsible financially for the care of all eight. Id. The Court held that Thiboutot’s civil rights had been violated under the Social Security Act, and therefore he had a cause of action for recovery. Id. at 7.

In Dodd, the court ruled that a biological father’s liberty interest of companionship is not protected under the Constitution. 352 F.3d at 826. In this case the plaintiff’s independent adult son was shot and killed by police. Id. at 824. The father made the claim that his parental right to companionship from his son was a protected liberty interest. Id. The court used a strict scrutiny standard of review, holding that the interest in question was an unenumerated constitutional right; although recognized as significant and fundamental, the court refused to extend parental liberty interests beyond those pertaining to minor children. Id. at 827. In Russ, the court held that deliberate intent to deprive protection liberty interests was not required to recover under §1983. 414 F.3d at 786. This suit was brought after the plaintiff’s son was shot and killed by police. The court ruled that a constitutional right to recover for loss of companionship existed from an incidental action of the State. Id. The court held that the interest in recovery hinged on the quality of the familial relationship, and should not be precluded by procedural interests (e.g.: age, independence or intent of the acting party). 414 F.3d at 788. In Pleasant, the court held that a husband, but not a child, may recover for loss of companionship of his wife during a period where she was incapacitated. 262 F.2d at 472. In this case the court focused on the legal ground of marriage which created the husband’s cause of action for loss of companionship. Id. The child, not being in a legally bound relationship, would not have a similar right to recover for loss of companionship from his mother during her incapacitation. Id. at 473. In Vogler, the court held that both husband and child had comparable right to recovery for loss of companionship due to the death of the plaintiff’s wife and daughter. 352 F.3d at 154. In this case the decedents had perished in an auto accident, and suit was brought by her husband and children from the mother’s first marriage. 352 F.3d at 152. The court held that it was the nature of the relationship which created the right of recovery, and should not be precluded by the lack of a legal relationship on the part of the children. 352 F.3d at 155. In Bradley, the court held that a child had a recoverable right to recover for the loss of parental companionship. 621 F.3d at 1333. In this case the plaintiff’s father had been the victim of neglect and abuse while in a Florida nursing home. Id. at 1331. The court ruled that, as a property interest, surviving children (regardless of age) may recover for loss of companionship under the Florida Wrongful Death Act. Id. The court held that the companionship interest was the property of the person or persons who incurred the loss. The right of recovery is created by the loss, herein borne by the decedents’ loved ones. Id. at 1337.

Mary Smith will be able to successfully bring a suit against the State of Euphoria for deprivation of a civil right, and will be able to recover for the loss of her aunt’s companionship. As in Monell, Mary will be able to show that Ronald was acting under the color of Euphoria state law while conducting his duties at the facility. 436 U.S. at 658. Unlike Tuttle though, Mary can point to the deliberateness of Ronald’s actions in failing to treat Bess specifically to harm Mary out of his knowledge of their relationship. 471 U.S. at 812. However, given the court’s ruling in Russ, even if Ronald’s motives and intent are in question his actions and the resulting deprivation of Mary’s liberty interest in her aunt are not; intent is not required for a cause of action. 414 F.3d at 786. Mary will be able to show that his actions directly caused Bess to deteriorate, and deprived Mary of the companionship she could have reasonably expected in Bess’ remaining months; as in Thiboutot, the State’s actions will create Mary’s cause of action under §1983. 448 U.S. at 6.

Mary will also be able to show her right to recover. As in Vogler, the court will take into account the totality of Mary’s relationship with Bess. 352 F.3d at 155. Bess’ dependency on Mary as a pseudo-parent, and the emotional attachment shown in Mary’s frequent visits to the facility, show the familial interest between the two. Id. Beyond Mary’s blood relationship, the court will also acknowledge the reverse-parental right that Mary has over Bess; unlike in Dodd, Mary has been legally responsible for making decisions for Bess since she began to decline, and that right of decision making of a loved one is protected. 352 F.3d at 8267. However, unlike in Pleasant, Mary will be able to show that she also had a protected interest in the companionship she shared with Bess, and as in Bradley, will recover for its loss. 262 F.2d at 472; 621 F.3d at 1333. The court will quantify the value of the time they would have had, and award damages accordingly. However, unlike Russ, the awarding of damages for future companionship would be inappropriate due to Bess’ mental decline being unrelated to her death; the court will not allow Mary to recover for companionship that she factually could not receive. 414 F.3d at 789.

**B.** Under the Fourth Amendment are protected against unreasonable searches and seizures. Katz v. United States, 389 U.S. 347, 348 (1967). All warrantless searches are, presumed, unreasonable due to an existence outside the judicial process. Id. The courts have several exceptions which do not require warrants, such as situations where a person has no privacy interest, has consented, or there is prior statutory ruling that a search is not unreasonable. Johnson v. United States, 333 U.S. 10, 13 (1948). Evidence which does not qualify for an exception, and was gathered in a search without the use of a warrant may be inadmissible under the exclusionary rule; evidence gathered in a manner which is deemed to have violated the defendant’s constitutional rights may be inadmissible in a court of law. Mapp v. Ohio, 367 U.S. 643, 646 (1961). The exclusionary rule comes from the Fourth Amendment Due Process Clause, and applies to state law through the Fourteenth Amendment. Id. This type if action can be prompted by lack of a warrant, a warrant based on insufficient/false information, or violation of a person’s expected right to privacy through a search. United States v. Karo, 468 U.S. 705, 707 (1984). To state a claim, a person must show that the procedure used by police during an investigation violated the defendant’s protected rights. If the methods used are deemed to be in violation of the defendant’s constitutionally protected rights, the evidence may be suppressed by the courts. Illinois v. Gates, 462 U.S. 213, 220 (1983).

When considering the reasonableness of a search, a court must first establish if a search has actually occurred. Carroll v. United States, 267 U.S. 132, 150 (1925). The law states that a search occurs when an act violates an area in which a person has a reasonable expectation of privacy. Terry v. Ohio, 392 U.S. 1, 9 (1968). An expectation of privacy begins in the home, but can extend to other places if the court holds that those places warrant it. Katz, 389 U.S. at 351. Physical penetration of a protected area is not required for a search to have occurred. Id. Any form of intrusion can be construed as sufficient, and may be deemed unreasonable. Carroll, 267 U.S. at 151. The Fourth Amendment only protects specific places from certain types of government intrusion; the Constitution forbids only unreasonable searches. Katz, 389 U.S. at 352; Terry, 392 U.S. at 8. Cars are constantly under the view of the public (even while parked), and their contents and passengers should not expect a level of privacy comparable to that of the home. United States v. Knotts, 460 U.S. 276, 276 (1983). The police are not held to be acting invasively when a person is placed under surveillance while using her car. Id. The law has held even elaborate methods of tracking and inspecting, extending also to contents out of view, are not invasive enough to be considered a search and do not require a warrant. Kyllo v. United States, 533 U.S. 27, 28 (2001). The use of computers, cameras, and other modern methods has made this task simpler, but the court has held to the original idea that surveillance is generally not a search. Knotts, 460 U.S. at 276.

Courts have held to different standards regarding whether “GPS” tracking is considered a search, or simply a substitute for more traditional methods of investigation. Kyllo, 533 U.S. at 28 (Court ruled that the reasonableness of devices used in police investigation was contingent on the device existing to enhance traditional means); United States v. Garcia, 474 F.3d 994, 997 (7th Cir. 2007). If the use of a technology can be claimed as replacing what could be done through traditional means; e.g.: using a tracking device instead of following a suspect using patrols and cameras; then the court traditionally does not consider these uses invasive enough to be considered a search. Garcia, 474 F.3d at 996. In considering the amount of invasion, courts look at how intrusive the device is, the breadth of time it is used, and the type of information gathered. Id. at 997; United States v. Michael, 645 F.2d 252, 256 (5th Cir. 1981) (court ruled that beeper attached to van parked in public was not a search); United States v. Maynard, 615 F.3d 544, 552 (D.C. Cir. 2010) ; United States v. Bailey, 628 F.2d 938, 940 (6th Cir. 1980). Where the vehicle was parked while the unit was attached can lend itself greatly to the level of privacy the suspect should have expected. United States v. Pineda-Moreno, 591 F.3d 1212, 1215 (9th Cir. 2010) (court ruled that there was no expectation of privacy for a car parked in an open driveway). The type of information gathered can retroactively sustain or invalidate a warrantless use of GPS. Maynard, 615 F.3d at 552. This is an issue of first impression for Euphoria federal court, and the court will likely look to other federal decisions when deciding the case at bar. The court will likely consider the amount of time spent tracking Mary with the GPS, the recording of her whereabouts during both suspected criminal and innocent activities, with the fact that this sustained following (only within Euphoria) could have been accomplished through traditional surveillance methods. Maynard, 615 F.3d at 554. While the installation of the device will likely be deemed not to violate the Fourth Amendment, the intimate picture of Mary’s life created by the continuous monitoring will. Bailey, 628 F.2d at 942. The court will likely rule that this level of scrutiny using a device was indeed a search, and a violation of Mary’s legitimate expectation of privacy, and required a warrant or some sustainable level of probable cause. Michael, 645 F.2d at 256; Karo, 468 U.S. at 708.

In Katz, the Court held that a search could occur, and violate constitutional standards, without any physical contact or penetration of the premises. 389 U.S. at 351. In this case the defendant was convicted of transmitting gambling information on the strength of evidence gathered using electronic listening devices attached to a phone booth. Id. at 348. The Court ruled that there was a reasonable expectation of privacy in the use of a phone booth, and so a non-judicially sanctioned eavesdropping was an unreasonable search within the fourth Amendment. Id. at 352. In Mapp, the Court held that the exclusionary rule applies to states under the Fourteenth Amendment. In this case the police conducted, what was later established as, an unreasonable search of the defendant’s home. 367 U.S. at 646. The Court ruled that the general presumption is that all searches require a warrant, unless given to specific exceptions. Id. at 649. The Court ultimately held that the exclusionary rule allowed the unconstitutionally gathered evidence to be suppressed in court, overturning the defendant’s conviction. 367 U.S. at 649. In Knotts, the Court held that monitoring a radio transmitter without a warrant is not a search. In this case the police had conspired with a chemical seller to place a radio transmitter into a container of chloroform being sold to a suspected manufacturer of drugs. 460 U.S. at 277. The police then followed the transmitter’s signal to the suspect’s cabin, where he was suspected of producing the illegal substances. Id, at 278. The defendant motioned to have the evidence suppressed based on the monitoring without a warrant, however the Court held that since the tracking signals were a natural replacement of visual surveillance, there was no expectation of privacy, and monitoring was not a search. Id. at 276.

In Garcia, the court held that the attachment of a GPS tracking device to an automobile, without a warrant, was not a search under the Fourth Amendment. 474 F.3d at 995. In this case, on the strength of an informer’s tip, police used a GPS tracker to survey the movements of suspected drug makers. Id. at 996. The court ruled that because the car was parked on a public street, and driven on public roads, the defendant had no reasonable expectation of privacy while using it. Id. at 997. The device itself is claimed to be non-invasive; it does not affect the use of the car, and has its own power source; it is a “de minimis” intrusion. Id. In Bailey, all unreasonable violations of an individual’s expectation of privacy are unconstitutional, regardless of being ruled “de minimis”. 628 F.2d at 943. In this case, a GPS tracker was placed in a barrel of chemicals for two months to evaluate the location of suspected PCP manufacturers. Id. at 940. The police stated that this use of technology merely enhances the natural, more traditional methods of surveillance. Id. at 942. The court ruled that once the canisters were taken into private dwellings, shielded from public scrutiny, there became a legitimate expectation of privacy on the part of the suspects. Id. at 944. It was held that the original use of the tracker was legitimate, but since the warrants used had no termination date the court will not support “open-ended” searches. Id. at 947. In Maynard, the court held that the warrantless use of a GPS tracking device can be legally considered a search. 615 F.3d at 553. The defendants in this case were being investigated for suspected connections to drug sales and distribution. Id. at 549. The two men were being tracked using a device for 28 straight days. Id. The court made a distinction between the limited information gathered from most tracking devices, and consistent twenty-four hour surveillance “dragnets” upon any citizen without the need for a warrant. Id. at 555. The court ruled that prolonged, excessive surveillance of all activities is invasive enough to be considered a search. Id. at 552.

Mary Smith will be able to have the GPS records the police obtained suppressed under the Fourth Amendment in the upcoming prosecution. The actions of the police will constitute a search, as in Katz, due to the violation of Mary’s reasonable expectation of privacy. 389 U.S. at 351. The warrantless attaching of a GPS to Mary’s car would not, on its own, be considered a search, but like in Bailey, the invasiveness of the police use of the device will turn it into one. 628 F.2d at 947. Unlike in Garcia, the police left the GPS on Mary’s car for an extended period of time, and recorded information about her whereabouts. 474 F.3d at 996. Mary does not have an expectation of privacy while driving, but under the Fourth Amendment she is entitled to be free of unreasonable searches. Id. The information collected by the police using the tracking device not only recorded her location during suspected illicit activities, but also innocent ones as well. As the court showed in Bailey, that level of invasiveness gives the police a more intimate picture of Mary’s life well in excess of the investigation. 628 F.2d at 947. As in Maynard, the unrestricted monitoring of Mary’s life twenty-four hours a day did constitute a violation of a reasonable privacy interest. Id. at 552. The mosaic of her activities created by the collected information would go far beyond that which would be available to alternative means of traditional surveillance, which sets it apart from short term GPS use. The court will use an argument similar to Knotts, on the basis that if this level of surveillance is only an alternative to more traditional means, the police should have gotten a warrant. 460 U.S. at 276. Given the constant, unspecified monitoring there was no pressing evidentiary concern as in Mapp, and there is no indication that the police thought otherwise. 367 U.S. at 646. It is the timeframe which made the tracking a search, and unreasonable; the acquisition of a warrant would have included a set timeframe, making the search legal and accomplishing the same task within the judicial system.