16-3118

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOHN BORG, ALISON BORG, AND JOHN BORG, P.P.A. ROBIN BORG

Plaintiffs-Appellants,

v.

TOWN OF WESTPORT, DALE E. CALL, CHIEF OF POLICE, JOHN ROCKE, DETECTIVE, GEORGE TAYLOR, DETECTIVE, ANTHONY PREZIOSO, DETECTIVE JOHN LOCHIOMA, OFFICER AND DANIEL PAZ, OFFICER

Defendants - Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

COMBINED BRIEF FOR THE APPELLANTS AND JOINT APPENDIX

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II. Whether the District Court erred in dismissing Plaintiffs' state law claims for intentional infliction of emotional distress, negligent infliction of emotional distress, and negligence, which were predicated on the Fourth Amendment violation for the illegal search.

III. Whether the Defendants are entitled to governmental immunity based on the pleadings, where the imminent harm exception applies.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

On September 17, 2015, Plaintiffs filed this action in the United States District Court for the District of Connecticut seeking damages pursuant to 42 U.S.C. § 1983 for an illegal search conducted by the Defendants, police officers with the Town of Westport, and for the related state law claims of negligence, and intentional and negligent infliction of emotional distress. Plaintiffs also sue the Town of Westport for their failure to properly screen, discipline, transfer, counsel and/or otherwise control police officers engaged in the law of search and seizure, pursuant to 42 U.S.C. § 1983 and *Monell v. Department of Social Services*, 436 U.S. 658 (1978), and for indemnification pursuant to CONN. GEN. STAT. §§ 52-557 (for claims of negligence) and 7-465 (for civil rights violations).

Plaintiffs filed a timely appeal from the District Court's (*Thompson, J.*) granting the Defendants' motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) and entering judgment in favor of the Defendants. The district court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1367(a), (supplemental jurisdiction over state law claims). This Court has jurisdiction pursuant to 28 U.S.C. § 1291 (appellate jurisdiction over final judgments).

STATEMENT OF THE CASE

I. NATURE OF THE CASE

This is a civil rights action brought by the plaintiffs, John Borg, Alison Borg, and John Borg, p.p.a. on behalf of his minor child, Robin Borg, pursuant to 42 U.S.C. § 1983, against the Town of Westport, Chief of Police Dale E. Call, Westport Police Department Detectives John Rocke, George Taylor, Anthony Prezioso, and Officers John Lochioma and Daniel Paz, for an illegal search of the Plaintiffs' residence. The Amended Complaint alleges that from January 30, 2015 to at least April 20, 3015, the Defendants conducted around-the-clock covert video surveillance of the Plaintiffs' home in an attempt to obtain evidence of criminal activity. Additionally, John and Alison Borg are licensed psychotherapists, who regularly treat patient in their home office. The area surveilled included the curtilage and areas inside the Plaintiffs' residence, and was conducted without a warrant.

Plaintiffs seek damages against the individual defendant officers for an illegal search in violation of the Fourth Amendment, pursuant to 42 U.S.C. § 1983, and for the related state law claims of negligence, intentional and negligent infliction of emotional distress, and recklessness. Plaintiffs also sue the Town of Westport for their failure to properly screen, discipline, transfer, counsel and/or otherwise control police officers engaged in the law of search and seizure, pursuant to 42 U.S.C. § 1983 and *Monell v. Department of Social Services*, 436 U.S. 658 (1978), and for indemnification pursuant to CONN. GEN. STAT. §§ 52-557 (for claims of negligence) and 7-465 (for civil rights violations).

II. PROCEDURAL HISTORY

Plaintiffs filed the instant § 1983 action on September 17, 2015 in the United States District Court for the District of Connecticut. On December 18, 2015, the Defendants filed a motion to dismiss the action pursuant to Fed.R.Civ.P. 12(b)(6) [*Motion to Dismiss,* Doc. No. 10] without oral argument, contending that their continuous video surveillance of the Plaintiffs' residence did not constitute a "search" within the meaning of the Fourth Amendment. On August 18, 2016, the district court (*Thompson, J.*) granted the motion in its entirety. The Court concluded that the use of the video cameras did not render the defendants' surveillance a "search" for purposes of the Fourth Amendment. The other counts were predicated on the Plaintiffs' claim for an illegal search, accordingly, were also dismissed. Plaintiff filed a timely notice of appeal on September 8, 2016. The District Court entered the judgment dismissing the action on September 18, 2016.

III. JUDGE WHO RENDERED DECISION

The Honorable Alvin Thompson.

IV. DISPOSITION BELOW

The district court (*Thomspon, J.*) granted the Defendants' *Motion to Dismiss* pursuant to Fed.R.Civ.P. 12(b)(6) on all counts on August 18, 2016. Final judgment dismissing the action entered on September 18, 2016. Plaintiff's filed a timely notice of appeal on September 8, 2016.

V. RELEVANT FACTS

The Amended Complaint alleges the following:

The Plaintiffs in this action are the Borg family, husband and wife John and Alison Borg, and their minor child, Robin Borg. The family resides in Westport, Connecticut. *Amended Complaint*, ¶¶ 5-7, p.11. On or about January 30, 2015, Westport Police Officers John Rocke and Anthony Prezioso met with one of the Borg's neighbors, and received their permission to install the video surveillance equipment to covertly videotape the Plaintiffs' home. The areas under surveillance included the interior of the Plaintiffs' home as well as the curtilage. *Id.* at ¶¶ 15-16, p.p. 12-13. On February 12, 2015, Rocke and Detective George Taylor went to a second neighbor's residence to install video cameras to surveil the Plaintiff's home. The areas surveilled included the interior of the Plaintiffs' home as well as the curtilage. *Id.* at ¶ 17, p. 13. On March 26, 2015, Westport Police Officer John Lachioma downloaded the surveillance video footage, which was preserved as evidence to be used against the Plaintiffs. *Id.* at ¶ 18, p. 13.

From January 30, 2015 until April 20, 2015, the Detective John Rocke, Detective George Taylor, Detective Anthony P. Prezioso, Officer John Lachioma, Officer Daniel Paz conducted covert video surveillance of the Plaintiffs' residence in an effort to detect alleged criminal activity. *Id.* at ¶¶ 15-17, 18-20, p.p. 12-13. John and Alison Borg are both psychologists, who regularly see patients in their home office. The covert video surveillance captured details of John and Alison Borg's professional life and those of the patients who visited, all of whom reasonably expected to enjoy the confidentiality of the therapist- patient relationship. The police did not obtain a warrant prior to

conducting the surveillance, or at any time thereafter. Id. at ¶¶ 20-22, p.p. 13-14.

SUMMARY OF THE ARGUMENT

For a nearly twelve week period that lasted from January 30, 2015 until April 20, 2015, the defendants, police officers from the Town of Westport, Connecticut, conducted covert video surveillance of the Plaintiffs' residence, using video cameras that were positioned to view into their house, as well as the curtilage area. *Amended Complaint*, ¶¶ 15-20, p. 12-13. At issue in this action is whether the government can conduct such covert electronic surveillance without judicial approval and oversight without violating the Fourth Amendment. Federal courts have widely acknowledged the impact that technology has on the Fourth Amendment; most recently in the recent Supreme Court decision *United States v. Jones*, 132 S.Ct. 945 (2012). As argued *infra*, under any reasonable application of the test set forth in *Katz v. United States*, 389 U.S. 347 (1967), the Borg family had a reasonable expectation of privacy to not have their home continuously observed and covertly recorded, and this covert surveillance constituted a Fourth Amendment search. Accordingly, the District Court erred in dismissing the Plaintiffs' § 1983 claim for failure to state a claim pursuant to Fed.R.Civ.P. 12(b)(6); the District Court similarly erred in dismissing the Plaintiffs' related stated law claims, which were predicated on the illegality of the search.

ARGUMENT

I. Whether the District Court erred in granting the Defendants' Fed.R.Civ.P. 12(b)(6) *Motion to Dismiss* the Plaintiffs' § 1983 claim for the Fourth Amendment violation on the pleadings, where i) Plaintiffs had alleged continuous covert video surveillance of the curtilage area and areas inside their residence; (ii) where such continuous covert surveillance invades a reasonable expectation of privacy, and is therefore a "search" within the meaning of the Fourth Amendment and *Katz v. United States*, 389 U.S. 347 (1967) (*Harlan, J. concurring*); (iii) at least one other District Court has held that covert video surveillance is indeed a search within the meaning of the Fourth Amendment (*see e.g., Shafer v. City of Boulder*, 896 F.Supp.2d 915 (D. Nev. 2012); and (iv) where the District Court failed to analyze claim in a manner most favorable to sustaining its legal sufficiency.

A. Standard of Review

The Court reviews a District Court's decision on a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) *de novo*, accepting all factual allegations as true and drawing all reasonable inferences in the plaintiff's favor. *Hogan v. Fischer*, 738 F.3d 509 (2nd Cir. 2013).

B. Fed.R.Civ.P. 12(b)(6) Legal Standard on Motion to Dismiss

A motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Fed.R.Civ.P. 12(b)(6) is designed "merely to assess the legal feasibility of a complaint, not to assay the weight of evidence which might be offered in support thereof." *Ryder Energy Distrib. Corp. v. Merrill Lynch Commodities, Inc.*, 748 F.2d 774, 779 (2d Cir. 1984) (*quoting Geisler v. Petrocelli*, 616 F.2d 636, 639 (2d Cir. 1980)). In ruling on a motion to dismiss for failure to allege a cause of action pursuant to Fed.R.Civ.P. 12(b)(6), this court must "accept[] as true the complaint's factual allegations and draw[] all inferences in the plaintiff's favor." *Karedes v. Ackerley Group, Inc.*, 423 F.3d 107, 113 (2d Cir. 2005). A complaint should not be dismissed on the pleadings unless it "appears beyond doubt that

the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Sheppard v. Beerman*, 18 F.3d 147, 150 (2d Cir. 1994) (emphasis added). "This standard is applied with particular strictness when the plaintiff complains of a civil rights violation." *Irish Lesbian & Gay Org. v. Guiliani*, 143 F.3d 638, 644 (2d Cir. 1998) (*citing Branum v. Clark*, 927 F.2d 698, 705 (2d Cir. 1991)) (emphasis added).

C. Extended covert video surveillance constitutes a "search" within the meaning of the Fourth Amendment and *Katz v. United States*, 389 U.S. 347 (1967) .

1. *Katz* Test for Fourth Amendment "search."

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. The touchstone of Fourth Amendment analysis to determine whether a search occurs is whether a person has a "'constitutionally protected reasonable expectation of privacy.'" *California v. Ciraolo*, 476 U.S. 207, 211 (1986) (*quoting Katz v. United States*, 389 U.S. 347, 360 (*Harlan, J., concurring*)). "The inquiry has two-parts: first, whether the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable?" *Ciraolo*, 476 U.S. at 211; *United States v. Hayes*, 551 F.3d 138, 143 (2nd Cir. 2008); *United States v. Thomas*, 757 F.2d 1359, 1366 (2d Cir.1985). The home is afforded a "heightened privacy interest." *Thomas*, 757 F.2d at 1366. The test of whether the expectation of privacy is legitimate is "not whether the individual chooses to conceal assertedly private activity, [r]ather, the correct inquiry is whether the government's intrusion infringes upon the personal and societal values

protected by the Fourth Amendment." *Oliver v. United States*, 466 U.S. 170, 182 (1984). "Although there is no 'talisman' that determines whether society will find a person's expectation of privacy reasonable, a court may consider (1) the nature of the search, (2) where the search takes place, (3) the person's use of the place, (4) our societal understanding that certain places deserve more protections than others, and (5) the severity of the search. *Trujillo v. City of Ontario*, 428 F. Supp.2d 1094 (C.D.Cal. 2006), *citing O'Connor v. Ortega*, 480 U.S. 709, 715 (1987).[1]

2. *Katz and covert electronic surveillance*

"Privacy" is defined as "the quality or state of being apart from company or observation," and "freedom from unauthorized intrusion." *Merriam-Webster Dictionary* (Merriam-Webster.com. 2016, *available at* <www.merriam-webster.com> (Nov. 1, 2016)). Federal courts have long-recognized that continuous covert video surveillance is an egregious governmental intrusion into personal privacy, as such surveillance "raises the specter of an Orwellian State." *United States v. Cuevas-Sanchez*, 821 F.2d 248, 251 (5th Cir. 1987).

As early as 1987, *Cuevas-Sanchez* recognized the impact of covert electronic surveillance on Fourth Amendment. In *Cuevas-Sanchez*, the government conducted video surveillance of the defendant's backyard, which was visible to a casual observer and from the street. Relying on the *California v. Ciraolo*, 476 U.S. 207 (1986) holding

[1] The court in *Trujillo* apparently attempted to employ the seven factors identified by the American Bar Association as relevant to the Fourth Amendment analysis of technologically assisted surveillance. *See generally,* Christopher Slobogin, *Technologically Assisted Physical Surveillance: The American Bar Associations Tentative Draft Standards*, HARVARD JOURNAL OF LAW & TECHNOLOGY, Vol. 10, No. 3 (Summer 1997).

that the "Fourth Amendment simply does not require the police traveling in the public airways at [1,000 feet] to obtain a warrant in order to observe what is visible to the naked eye," the government argued that no search had occurred. The court rejected the argument as "sophistry." Applying Katz, the *Cuevas-Sanchez* court found that the government had invaded the defendant's reasonable expectation of privacy in not being videotaped. *Id.* at 251:

> Close inspection, however, discloses the sophistry underlying the government's argument. ... The second part focuses on "whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment." *Oliver v. United States*, 466 U.S. 170, 182-83 (1984). To measure the government's intrusion we must consider the expectations of society. *Ciraolo* teaches us that a fly-over by a plane at 1,000 feet does not intrude upon the daily existence of most people; we must now determine whether a camera monitoring all of a person's backyard activities does. This type of surveillance provokes an immediate negative visceral reaction: indiscriminate video surveillance raises the spectre of the Orwellian state. Here, unlike in *Ciraolo*, the government's intrusion is not minimal. It is not a one-time overhead flight or a glance over the fence by a passer-by. Here the government placed a video camera that allowed them to record all activity in *Cuevas's* backyard. It does not follow that *Ciraolo* authorizes any type of surveillance whatever just because one type of minimally-intrusive aerial observation is possible.
>
> *Cuevas-Sanchez*, 821 F.2d at 251.

The court concluded, "*Cuevas's* expectation to be free from this type of video surveillance in his backyard is one that society is willing to recognize as reasonable." *Id.* The Fourth Amendment right to be "secure" in one's home implicates that feeling safety, stability, and freedom from fear or anxiety. Consequently, "[h]idden video surveillance is one of the most intrusive investigative mechanisms available to law

enforcement," largely because it infringes on that right. *United States v. Nerber*, 222 F.3d 597, 603 (9th Cir.2000). "The sweeping, indiscriminate manner in which video surveillance can intrude upon us, regardless of where we are, dictates that its use be approved only in limited circumstances." *Id.; see also United States v. Koyomejian*, 970 F.2d 536, 551 (9th Cir.1992) (*Kozinski, J.*, *concurring*); *United States v. Taketa*, 923 F.2d 665, 677 (9th Cir. 1991) (finding that warrantless video surveillance of an office violated the Fourth Amendment rights of those who were recorded, including a person recorded in an office that was not his); *United States v. Falls*, 34 F.3d 674, 680 (8th Cir. 1994) ("It is clear that silent video surveillance results . . . in a very serious, some say Orwellian, invasion of privacy"); *United States v. Mesa-Rincon*, 911 F.2d 1433, 1443 (10th Cir. 1990) ("Because of the invasive nature of video surveillance, the government's showing of necessity must be very high to justify its use"); *United States v. Houston*, 965 F.Supp.2d 855 (E.D.Tenn. 2013) (finding warrantless use of pole camera to continuously observe unobstructed curtilage on Defendant's property for period of ten weeks violated Fourth Amendment). Outside of a strip search or a body cavity search, a covert video search is the most intrusive method of investigation a government employer could select." *Richards v. County of Los Angeles*, 775 F.Supp.2d 1176 (C.D. Cal. 2011).

3. *United States v. Jones*, 132 S.Ct. 945, 956 (2012) underscores the conclusion that covert electronic surveillance is intrinsically more invasive than casual visual observation, and therefore constitutes a Fourth Amendment search.

Covert electronic surveillance is quintessentially a more intrusive violation of an individual's sense of privacy. Indeed, it would be difficult to reconcile the freedoms of

association, speech, and press, guaranteed by the United States Constitution with a government that can conduct unrestricted electronic surveillance without any kind of judicial oversight. “I would also consider the appropriateness of entrusting to the Executive, in the absence of any oversight from a coordinate branch, a tool so amenable to misuse, especially in light of the Fourth Amendment's goal to curb arbitrary exercises of police power to and prevent ‘a too permeating police surveillance.’" *United States v. Jones*, 132 S.Ct. 945, 956 (2012) (*Sotomayor, J., concurring*), *quoting United States v. Di Re,* 332 U.S. 581, 595 (1948).

Covert electronic surveillance can reveal intimate details that mere visual observation by human observation cannot. As Justice Sotomayor commented (in the context of GPS monitoring),

> Awareness that the Government may be watching chills associational and expressive freedoms. And the Government's unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse. The net result is that GPS monitoring-by making available at a relatively low cost such a substantial quantum of intimate information about any person whom the Government, in its unfettered discretion, chooses to track-may ‘alter the relationship between citizen and government in a way that is inimical to democratic society."
>
> *Jones* at 955 (*Sotomayor, J. concurring*), *citing United States v. Cuevas-Perez*, 640 F.3d 272, 285 (7th Cir. 2011) (*Flaum, J., concurring*).

Electronic surveillance “generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations. The Government can store such records and efficiently mine them for information years into the future. And because

GPS monitoring is cheap in comparison to conventional surveillance techniques and, by design, proceeds surreptitiously, it evades the ordinary checks that constrain abusive law enforcement practices: 'limited police resources and community hostility.'" *Id.* at 955-56. These privacy concerns are amplified when it comes to video surveillance of a person's home, and when the surveillance is continuous, because it reveals intimate details that short term surveillance cannot. "Prolonged surveillance reveals types of information not revealed by short-term surveillance, such as what a person does repeatedly, what he does not do, and what he does ensemble." *United States v. Maynard*, 615 F.3d 544, 562 (D.C. Cir. 2010), *aff'd sub nom. United States v. Jones*, 132 S. Ct. 945 (2012).

D. The Borg Family had an expectation of privacy in not being covertly videotaped over a three month period, and society is prepared to recognize the legitimacy of that expectation.

This Court recognizes *Katz v. United States*, 389 U.S. 347 (1967) as the proper framework for evaluating the acceptable use of electronic surveillance in the context of the Fourth Amendment. To establish that a Fourth Amendment search occurred, the Borg family was required to allege facts showing that the Westport Police's intrusion "infringed on the personal and societal values protected by the Fourth Amendment." *Oliver*, 466 U.S. at 182 . The Borg family has done so. For a nearly twelve week period that lasted from January 30, 2015 until April 20, 2015, Westport police officers conducted covert video surveillance of the their residence, using cameras that were positioned to peer into almost every room of the house, as well as the curtilage area. *Amended Complaint*, ¶¶ 15-20, p.p. 12-13 . Under any reasonable application of *Katz*,

the nearly 12 weeks of covert video surveillance of the Plaintiffs home invaded a reasonable expectation of the family's privacy. Consequently, by applying the liberal pleading standards set forth in *Sheppard*, and the particular strictness standard set forth in *Irish Lesbian & Gay Org. v. Guiliani*, it is clear that the Plaintiffs sufficiently stated a cause of action feasible claim for an illegal search.

1. *Shafer v. City of Boulder*, 896 F.Supp.2d 915 (D. Nev. 2012)

Indeed, *Shafer v. City of Boulder*, 896 F.Supp.2d 915 (D. Nev. 2012) should foreclose the argument whether the continuous video surveillance alleged in the Amended Complaint constitutes a search. *Shafer* involved similar facts. In *Shafer,* the court found a Fourth Amendment violation when the government provided a private citizen with video equipment that the citizen installed to allow the police to look into his neighbor's backyard. *Id.* at 928. The court found the surveillance, which lasted for nearly two months, intruded upon the neighbor's expectation of privacy in part because of the "intensity of the surveillance." *Id.* at 932. Indeed, the *Shafer* plaintiffs successfully prosecuted their § 1983 action against the City of Boulder for such extended warrantless covert video surveillance.

Given *Shafer's* ruling, it was an error for the District Court in the instant action to dismiss the Plaintiffs' § 1983 claim. A complaint should not be dismissed on the pleadings unless it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Sheppard v. Beerman*, 18 F.3d at 150. *Shafer* alone establishes the viability of Plaintiffs' § 1983 cause of action for the Fourth Amendment violation.

2. ***United States v. Vargas*, United States District Court, Eastern District of Washington, Docket No. CR-13-6025-EFS (E.D. Wash. Dec. 15, 2014)**

The Eastern District of Washington engaged in a *Katz* analysis of the police conduct involving similar facts to the instant matter in *United States v. Vargas*, United States District Court, Eastern District of Washington, Docket No. CR-13-6025-EFS (E.D. Wash. Dec. 15, 2014) (*Order Granting Defendant's Motion to Suppress at 1-2, 12-13, ECF No. 106* (*available at <https://www.pacer.gov.>*). In *Vargas*, law enforcement officers had surveilled the defendant's rural eastern Washington home with a pole camera which continuously recorded activity in the front yard of the defendant's property for more than six weeks. Applying *Katz's* "reasonable-expectation-of-privacy approach," the court, in granting the motion to suppress, reasoned:

> *Accordingly, the Court's analysis focuses on whether Mr. Vargas had a reasonable expectation of privacy to not have his front yard continuously observed and recorded for six weeks by a camera with zooming and panning capabilities hidden on a telephone pole over a hundred yards away, and whether his subjective expectation of privacy is objectively reasonable. The Court finds the answer to both of these questions is clear: society expects that law enforcement's continuous and covert video observation and recording of an individual's front yard must be judicially approved, and Mr. Vargas' conduct during the six weeks that his front yard was covertly observed and recorded indicates that he expected not to have his front yard covertly observed and recorded on a continuous basis by law enforcement. Covert video surveillance is fundamentally different that naked eye observation, because of its covert nature, and its capture of intimate details of a home.*
>
> *Id*.

Though not cited for its precedential value, the analysis employed by the District Court in *Vargas* demonstrates a proper *Katz* analysis to an analogous fact pattern. Under any reasonable application of *Katz*, the nearly 12 weeks of covert video surveillance of the Plaintiffs home invaded a reasonable expectation of their privacy. The continuous nature of the surveillance revealed intimate details of the Borg's home, family, and professional life (as well as the privacy of the patients they saw in their home). The fact that the surveillance was done is secret, deprived them of the opportunity to shield their activities from view, establishes that a search occurred for purposes of the Fourth Amendment.

E. The District Court's ruling was based on the false equivalency between a simple "visual observation" and continuous covert video surveillance. [2]

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[2] The District Court further employed the analysis of whether the technology was in general public use. Respectfully, Plaintiffs contend that this issue is irrelevant to the Fourth Amendment inquiry at issue. As the *Vargas* court described in its ruling:

"Because the invasive and continuous manner in which the video camera was used for six weeks to surreptitiously record Mr. Vargas' front yard clearly violates Mr. Vargas' Fourth Amendment right to be free from unreasonable search, whether the video camera is or is not "in general public use" is immaterial to the Court's Fourth Amendment analysis. *Cf. Kyllo v. United States*, 533 U.S. 27, 34 (2001)(obtaining information regarding conduct inside a home through the use of technology that is not in general public use is a search); *Dow Chem. Co. v. United States*, 476 U.S. 227, 238 (1986) (recognizing that "surveillance of private property by using highly sophisticated surveillance equipment not generally available to the public, such as satellite technology, might be constitutionally proscribed absent a warrant"). Further, given the continued advancement of technology and reduction of cost in "old technology," the "in general public use" doctrine may lose viability: but this is a question for a different day. Colin Shaff, *Is the Court Allergic to Katz? Problems Posed by New Methods of Electronic Surveillance to the "Reasonable-Expectation-of-Privacy" Test*, 23 S. CAL. INTERDISC. L.J. 409, 448 (Winter 2014)." *United States v. Vargas,* * 27-28.

In granting the motion to dismiss, the District Court reasoned that no search had occurred, because what occurred was simply a "visual observation," i.e., the Borg family "knowingly exposed to the public" what would have been visible to passers-by. *Ruling on Motion to Dismiss*, p.29.

> In general, "visual observation is no 'search' at all" for purposes of the Fourth Amendment. Id. at 32 (*citing Dow Chemical Co. v. United States*, 476 U.S. 227, 234– 235 (1986)). "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Florida v. Riley*, 488 U.S. 445, 449 (1989) (*quoting California v. Ciraolo*, 476 U.S. 207, 213 (1986)). Accordingly, "what a person knowingly exposes to the public through an open door or window does not receive Fourth Amendment protection." *United States v. Davis*, 326 F.3d 361, 365 (2d Cir. 2003). "Generally, the police are free to observe whatever may be seen from a place where they are entitled to be." *United States v. Fields*, 113 F.3d 313, 321 (2d Cir. 1997) (*citing Riley*, 488 U.S. at 449).
>
> *Id.* at 29-30.

The District Court's ruling ignores the impact that technology has on the Fourth Amendment and the Orwellian rule– ("so reminiscent of the 'telescreens' by which 'Big Brother' in George Orwell's 1984 maintained visual surveillance of the entire population of 'Oceania,' the miserable country depicted in that anti-utopian novel--that it can in no circumstances be authorized", *United States v. Torres*, 751 F.2d 875, 877 (Cir. 1984)) – it creates. The fact that a police officer or public citizen can glimpse through window when passing by a private residence does not give rise to unlimited authority to set up warrantless, round-the-clock video recording of that residence and through that window. The thought of a government that is allowed to engage in such conduct is antithetical to the Fourth Amendment and to our system of government. "It is clear that silent video

surveillance results ... in a very serious, some say *Orwellian*, invasion of privacy." *United States v. Falls*, 34 F.3d at 680.

That the District Court's reasoning is based on the false equivalence between a simple visual observation and the level of information obtainable through covert electronic surveillance. This false equivalence is clearly revealed in the seminal cases the District Court cites in support, the companion cases of *California v. Ciraolo*, 476 U.S. 207 (1986) and *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986). The "plain view" aerial observations in *Ciraolo* and *Dow Chemical* are fundamentally different the covert electronic surveillance at issue in this action. It does not logically follow that because the Court held in *California v. Ciraolo*, 476 U.S. 207 (1986) that police did not violate a reasonable expectation of privacy when they engaged in a warrantless aerial observation of marijuana plants growing on curtilage of a home using only the naked eye from a height of 1,000 feet, "that it also authorizes any type of surveillance whatever just because one type of minimally-intrusive aerial observation is possible." *Cuevas-Sanchez, 821 F.2d at 251.*

Similarly, in *Dow Chemical*, the Supreme Court determined aerial surveillance of an indutrial location, that included “the open areas of an industrial plant complex with numerous plant structures spread over an area of 2,000 acres are not analogous to the ‘curtilage’ of a dwelling for purposes of aerial surveillance; such an industrial complex is more comparable to an open field and as such it is open to the view and observation of persons in aircraft lawfully in the public airspace immediately above or sufficiently near the area for the reach of cameras.” *Id.* at 240. The Court went on to comment,“**this is not an area immediately adjacent to a private home where privacy expectations are most**

heightened," thus acknowledging that the analysis would be different when the search involved a private home. *Id.* at 237, n.3 (emphasis added).

Thus, both *Dow Chemical* and *Ciraolo* acknowledge, and confirm in *United States v. Jones*, 132 S.Ct. 945 (2012), that the Fourth Amendment analysis changes when the surveillance is done electronically and covertly, and when the home is the target of the government's investigation. Although a person may expose small details of their public movements and may have no reasonable expectation of privacy in those movements, aggregating those movements through technologies that can reveal much more than discrete pieces of information raises different Fourth Amendment concerns. "Technology advances that make 'available at a relatively low cost such a substantial quantum of intimate information about any person" to the Government "may alter the relationship between citizen and government in a way that is inimical to democratic society." *Jones*, 132 S. Ct. at 956 (*Sotomayor, J., concurring*).

F. Conclusion

In the instant matter, the Plaintiffs have alleged that a Fourth Amendment search occurred, due to i) the continuous nature of the surveillance, ii) that fact that the surveillance revealed intimate details of the Borg's home and family as well as professional life, and iii) the fact that the surveillance was done covertly, thereby depriving them of the opportunity to shield their activities from view. *Amended Complaint, ¶¶ 15-20,* p.p. 12-13. Consequently, the Plaintiffs have alleged a viable cause of action for a warrantless search in violation of the Fourth Amendment.

Accordingly, the Court should reverse the District Court's ruling that there was no constitutional violation on the Fourth Amendment claim.[3]

II. Whether the District Court erred in dismissing Plaintiffs' state law claims for intentional infliction of emotional distress, negligent infliction of emotional distress, and which were predicated on the Fourth Amendment violation for the illegal search.

A. Standard of Review

The Court reviews a District Court's decision on a motion to dismiss or for judgment on the pleadings pursuant to Fed.R.Civ.P. 12(b)(6) *de novo*, accepting all factual allegations as true and drawing all reasonable inferences in the plaintiff's favor. *Hogan v. Fischer*, 738 F.3d 509 (2nd Cir. 2013).

B. Plaintiffs have alleged a legally feasible claim for intentional infliction of emotional distress.

1. Elements of intentional infliction of emotional distress claims.

To allege a claim for intentional infliction of emotional distress, plaintiffs are required to plead four elements: (1) that the actor intended to inflict emotional distress or that he knew or should have known that emotional distress was the likely result of his conduct; (2) that the conduct was extreme and outrageous; (3) that the defendant's conduct was the cause of the plaintiff's distress; and (4) that the emotional distress sustained by the plaintiff was severe. *Appleton v. Board of Education*, 254 Conn. 205, 210 (2000).

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[3] Based on its determination that no search had occurred, the District Court also dismissed the Plaintiffs' claims for the § 1983 *Monell* violation (Second Count), negligence (Fifth Count), indemnification pursuant to Conn. Gen. Stat. § 52-557n (Sixth Count, indemnification for negligence claims), and indemnification pursuant to Conn. Gen. Stat. § 7-465 (indemnification for civil rights violations), because there was no the underlying constitutional violation. *Ruling on Motion to Dismiss,* p.p.33-35,50-53. To the extent that Plaintiffs' claim for the illegal search survives, the Court should similarly vacate the dismissal of the Plaintiffs' claims predicated on the constitutional violation.

2. The Amended Complaint alleges a legally feasible claim for intentional infliction of emotional distress.

Other state courts have recognized claims for infliction of emotional distress and invasion of privacy for conduct similar to the allegations in the amended complaint, for illegal videotaping. *Amended Complaint,* ¶¶ 1-30, p. 17. *See e.g.*, *Hernandez v. Hillsides, Inc.*, 47 Cal.4th 272, 97 Cal.Rptr.3d 274, 211 P.3d 1063, 1078 (2009) (holding hidden video camera in plaintiffs' office established invasion of privacy); *Johnson v. Allen*, 613 S.E.2d 657, 661 (Ga.Ct.App. 2005) (recognizing claim for invasion of privacy and intentional infliction of emotional distress for use of video surveillance equipment in women's restroom); *Koeppel v. Speirs*, 808 N.W.2d 177 (Iowa 2011) (holding video surveillance constituted tort of invasion of privacy); *Dana v. Oak Park Marina, Inc.*, 230 A.D.2d 204, 660 N.Y.S.2d 906 (Supreme Court of New York, Appellate Division, April 7, 1997); *Kohler v. City of Wapakoneta*, 381 F.Supp.2d 692, 704 (N.D.Ohio 2005) (noting installation of hidden listening device or camera sufficient to establish intrusion, regardless of whether devices were actually used). Consequently, the Plaintiffs have alleged a viable cause of action for infliction of emotional distress, and the Court should deny the motion to dismiss the Count pursuant to Fed.R.Civ.P. 12(b)(6).

C. Plaintiffs have alleged a cause of action for negligent infliction of emotional distress.

1. Elements of Negligent Infliction of Emotional Distress

For a plaintiff to state a claim for negligent infliction of emotional distress, she must allege the following: (1) the defendant's conduct created an unreasonable risk of causing the plaintiff emotional distress; (2) the plaintiff's distress was foreseeable; (3) the emotional distress was severe enough that it might result in illness or bodily harm;

and (4) the defendant's conduct was the cause of the plaintiff's distress. *Carrol v. Allstate Ins. Co.*, 262 Conn. 433, 444 (2003).

2. The District Court misstates the law and holding in *Abdella v. O'Toole*, 343 F.Supp. 2d 129 (D.Conn. 2004).

The District Court relied on *Abdella v. O'Toole*, 343 F.Supp. 2d 129 (D.Conn. 2004), for the broadest proposition that a police search, even an illegal one, can never be the predicate for a claim of negligent infliction of emotional distress. However, *Abdella's* ruling was made in the context of a summary judgment proceeding, where the factual record was fully developed. This Court granted summary judgment in favor of the defendants on the negligent infliction of emotional distress claim for an illegal search based on the facts that were significantly different than the instant matter: the "officers behaved in a polite fashion and did not threaten or abuse the residents," and where there was "no evidence that any member of the [family] suffering any mental or emotional distress." *Abdella* involved an illegal search in which the police which was done in "in a fairly typical, though legally unjustified, fashion."

Abdella is inapposite because it is factually distinguishable. For the same reasons why illegal covert video surveillance establishes the factual predicate for intentional infliction of emotional distress, the allegations in the Amended Complaint also establishes the element of creating an unreasonable risk of causing emotional distress. *Amended Complaint, Fourth Count,* ¶¶ 1-30, p. 18. "Being watched can destroy a person's peace of mind, increase her self-consciousness and uneasiness to a debilitating degree, and can inhibit her daily activities." Daniel J. Solove,

CONCEPTUALIZING PRIVACY, 90 CAL. L. REV. 1087, 1130–31 (2002). Plaintiffs have therefore sufficiently alleged a claim for negligent infliction of emotional distress.

III. Whether the Defendants are entitled to governmental immunity based on the pleadings, where i) the imminent harm exception applies, and ii) there is a triable set of facts whether the government's conduct was wilful, wanton, or malicious.

A. Standard of Review

The Court reviews a District Court's decision on a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) *de novo*, accepting all factual allegations as true and drawing all reasonable inferences in the plaintiff's favor. *Hogan v. Fischer*, 738 F.3d 509 (2nd Cir. 2013).

B. Elements of Governmental Immunity Claim

Connecticut recognizes governmental immunity for municipal employees "for governmental acts involving the exercise of judgment or discretion." *Elliott v. City of Waterbury*, 245 Conn. 385, 411 (1998). This immunity applies to discretionary acts, as opposed to "ministerial acts which [are] to be performed in a prescribed manner without the exercise of judgment or discretion." *Id.* However, municipal employees do not receive immunity should the imminent harm exception apply. An officer "may be found to have subjected an identifiable person to imminent harm and therefore is not protected from suit by the doctrine of governmental immunity." *Odom v. Matteo*, 772 F.Supp.2d 377, 395 (D. Conn. 2011). To show that the imminent harm exception applies, the plaintiff must demonstrate 1) an "imminent harm" ("imminent" means "about to occur or impending" and "ready to take place, near at hand"); 2) an identifiable victim; and 3) a public official to whom it is apparent that his or her conduct

is likely to subject that victim to that harm. *Purzycki v. Fairfield*, 244 Conn. 101, 116 (1998). The imminent harm exception applies when the danger was significant and foreseeable and limited in duration and geographical scope. *Purzycki*, 244 Conn. at 108.

The Defendants are not entitled to governmental immunity because the imminent harm exception applies. The Amended Complaint alleges that the officers directed the search of the residence, and did so without a warrant, subjecting the Plaintiffs to an invasion of a constitutionally protected privacy interest. *Amended Complaint, ¶¶ 15-20. p.p. 12-13.* The danger was limited in duration– the search was continuous over a twelve week period, and limited in geographical scope to the Borg's residence, thereby meeting the imminent requirement. Equally apparent was that their conduct subjected the Borg's to harm, as alleged in the Complaint. Consequently, the defendants are not entitled to discretionary act immunity based on the pleadings.

VI. CONCLUSION

For the aforementioned reasons, the Plaintiffs-Appellants request the following relief: that the Court reverse the District Court's granting of the motion to dismiss and entry of judgment in favor of the defendants, and to remand the action to the District Court for further proceedings.

THE PLAINTIFFS-APPELLANTS,

By: */s/ A. Paul Spinella, Esq.*

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because: this brief contains 7240 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared using Corel WordPerfect X3 in 12 point Arial font.

DATED: November 2, 2016

By: */s/ A. Paul Spinella*

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CERTIFICATION OF SERVICE

The undersigned hereby certifies that on November 4, 2016, the Combined Brief of the Appellant and Joint Appendix were filed on the Court's electronic filing system, sent by and by First Class mail, to the Clerk of the Court. Service was made on the following counsel and pro se parties of record via the Court's electronic filing system and via first class mail:

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16-3118

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOHN BORG, ALISON BORG, AND JOHN BORG, P.P.A. ROBIN BORG

Plaintiffs-Appellants,

v.

TOWN OF WESTPORT, DALE E. CALL, CHIEF OF POLICE, JOHN ROCKE, DETECTIVE, GEORGE TAYLOR, DETECTIVE, ANTHONY PREZIOSO, DETECTIVE JOHN LOCHIOMA, OFFICER AND DANIEL PAZ, OFFICER

Defendants - Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

JOINT APPENDIX

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JOINT APPENDIX
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APPEAL,CLOSED,EFILE

U.S. District Court
United States District Court for the District of Connecticut (New Haven)
CIVIL DOCKET FOR CASE #: 3:15-cv-01380-AWT

Borg v. Westport et al
Assigned to: Judge Alvin W. Thompson
Cause: 42:1983 Civil Rights Act

Date Filed: 09/17/2015
Date Terminated: 09/15/2016
Jury Demand: Plaintiff
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: Federal Question

Plaintiff

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Date Filed	#	Docket Text
09/17/2015		Judge Alvin W. Thompson added. (Walker, J.) (Entered: 09/18/2015)
09/18/2015	1	NOTICE OF REMOVAL by George Taylor, Town of Westport, Anthony P. Prezioso, Daniel Paz, John Lachioma, Dale E. Call, John Rocke from Judicial District of Stamford-Norwalk, filed by George Taylor, Town of Westport, Anthony P. Prezioso, Daniel Paz, John Lachioma, Dale E. Call, John Rocke. (Filing Fee: $400; Receipt No. 0205-3735240) (Attachments: # 1 State Court Complaint)(Walker, J.) Modified on 9/18/2015 to add receipt number (Walker, J.). (Entered: 09/18/2015)
09/18/2015	2	NOTICE of Appearance by Jonathan Zellner on behalf of Dale E. Call, John Lachioma, Daniel Paz, Anthony P. Prezioso, John Rocke, George Taylor, Town of Westport (Zellner, Jonathan) (Entered: 09/18/2015)
09/18/2015	3	NOTICE by Dale E. Call, John Lachioma, Daniel Paz, Anthony P. Prezioso, John Rocke, George Taylor, Town of Westport *of Pending Motions* (Cannavino, John) (Entered: 09/18/2015)
09/18/2015	4	NOTICE by Dale E. Call, John Lachioma, Daniel Paz, Anthony P. Prezioso, John Rocke, George Taylor, Town of Westport *Defendants' Statement Re: Standing Order on Removed Cases* (Cannavino, John) (Entered: 09/18/2015)
09/18/2015	5	Order on Pretrial Deadlines: Motions to Dismiss due on 12/18/2015. Amended Pleadings due by 11/17/2015 Discovery due by 3/19/2016 Dispositive Motions due by 4/18/2016. Signed by Clerk on 9/18/2015.(Anastasio, F.) (Entered: 09/18/2015)

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09/18/2015	6	ELECTRONIC FILING ORDER - PLEASE ENSURE COMPLIANCE WITH COURTESY COPY REQUIREMENTS IN THIS ORDER Signed by Judge Alvin W. Thompson on 9/18/2015.(Anastasio, F.) (Entered: 09/18/2015)
09/18/2015	7	STANDING PROTECTIVE ORDER Signed by Judge Alvin W. Thompson on 9/18/2015.(Anastasio, F.) (Entered: 09/18/2015)
09/18/2015	8	NOTICE TO COUNSEL: Counsel initiating or removing this action is responsible for serving all parties with attached documents and copies of 4 Notice (Other) filed by John Lachioma, John Rocke, George Taylor, Anthony P. Prezioso, Dale E. Call, Town of Westport, Daniel Paz, 1 Notice of Removal, filed by John Lachioma, John Rocke, George Taylor, Anthony P. Prezioso, Dale E. Call, Town of Westport, Daniel Paz, 7 Protective Order, 3 Notice (Other) filed by John Lachioma, John Rocke, George Taylor, Anthony P. Prezioso, Dale E. Call, Town of Westport, Daniel Paz, 2 Notice of Appearance filed by John Lachioma, John Rocke, George Taylor, Anthony P. Prezioso, Dale E. Call, Town of Westport, Daniel Paz, 6 Electronic Filing Order, 5 Order on Pretrial Deadlines Signed by Clerk on 9/18/2015. (Attachments: # 1 Removal Standing Order)(Anastasio, F.) (Entered: 09/18/2015)
09/22/2015	9	NOTICE of Appearance by A. Paul Spinella on behalf of Alison Borg, John Borg(ppa Robin Borg), John Borg (Spinella, A.) (Entered: 09/22/2015)
12/18/2015	10	MOTION to Dismiss by Dale E. Call, John Lachioma, Daniel Paz, Anthony P. Prezioso, John Rocke, George Taylor, Town of Westport.Responses due by 1/8/2016 (Attachments: # 1 Memorandum in Support of Motion To Dismiss, # 2 Appendix of Cases)(Zellner, Jonathan) (Entered: 12/18/2015)
12/23/2015	11	MOTION for Extension of Time to File Response/Reply as to 10 MOTION to Dismiss until February 16, 2016 by Alison Borg, John Borg(ppa Robin Borg), John Borg. (Spinella, A.) (Entered: 12/23/2015)
01/08/2016	12	ORDER: Motion for Enlargement of Time (Doc. No. 11) is hereby GRANTED to February 16, 2016. It is so ordered. Signed by Judge Alvin W. Thompson on 1/8/2016. (Calle, K) (Entered: 01/08/2016)
01/08/2016		Set/Reset Deadlines as to 10 MOTION to Dismiss . Responses due by 2/16/2016. (Ferguson, L.) (Entered: 01/11/2016)
01/12/2016	13	REPORT of Rule 26(f) Planning Meeting. (Zellner, Jonathan) (Entered: 01/12/2016)
01/15/2016	14	NOTICE OF E-FILED CALENDAR: THIS IS THE ONLY NOTICE COUNSEL WILL RECEIVE. Telephonic Status Conference set for 1/19/2016 at 10:00 AM before Judge Alvin W. Thompson. Counsel for the plaintiff shall initiate the call to chambers at 860-240-3224 with opposing counsel on the line. (Calle, K) (Entered: 01/15/2016)
01/19/2016	15	Minute Entry for proceedings held before Judge Alvin W. Thompson: TelephonicStatus Conference held on 1/19/2016. Case status and 26(f) report discussed. Counsel will discuss the potential for an early settlement conference and whether the plaintiff intends to file an amended complaint. (Duration: 15 minutes)(Court Reporter C. Thompson) (Calle, K) (Entered: 01/19/2016)
01/19/2016	16	ORDER: The Report of Parties' Rule 26(f) Planning Meeting (Doc. No. 13) is hereby APPROVED. All discovery shall be completed by March 15, 2017. Dispositive motions shall be filed by April 15, 2017. All other dates requested in this report are also approved. A trial memorandum order will be issued once the dispositive motions deadline has passed. REMINDER: please refer to the electronic filing order in civil cases re: the requirements for submission of chambers copies. It is so ordered. Signed by Judge Alvin W. Thompson on 1/19/2016. (Calle, K) (Entered: 01/19/2016)

01/19/2016	17	ORDER RE JOINT STATUS REPORT. Signed by Judge Alvin W. Thompson on 1/19/2016. Calle, K) (Entered: 01/19/2016)
01/19/2016		Set Deadlines: Joint Status Report due by 8/16/2016. Discovery due by 3/15/2017. Dispositive Motions due by 4/15/2017. (Ferguson, L.) (Entered: 01/22/2016)
02/03/2016	18	MOTION to Amend/Correct by Alison Borg, John Borg(ppa Robin Borg), John Borg.Responses due by 2/24/2016 (Attachments: # 1 Exhibit Amended Complaint) (Spinella, A.) (Entered: 02/03/2016)
02/04/2016	19	OBJECTION re 18 MOTION to Amend/Correct filed by Dale E. Call, John Lachioma, Daniel Paz, Anthony P. Prezioso, John Rocke, George Taylor, Town of Westport. (Zellner, Jonathan) (Entered: 02/04/2016)
02/05/2016	20	MOTION for Extension of Time to File Response/Reply as to 10 MOTION to Dismiss until March 17, 2016 by Alison Borg, John Borg(ppa Robin Borg), John Borg. (Spinella, A.) (Entered: 02/05/2016)
02/10/2016	21	ORDER: Motion for Extension of Time to File Response/Reply to Motion to Dismiss until March 17, 2016 (Doc. No. 20) is hereby GRANTED. It is so ordered. Signed by Judge Alvin W. Thompson on 2/10/16. (Ferguson, L.) (Entered: 02/11/2016)
03/10/2016	22	OBJECTION re 10 MOTION to Dismiss filed by Alison Borg, John Borg(ppa Robin Borg), John Borg. (Attachments: # 1 Memorandum in Support, # 2 Exhibit A)(Spinella, A.) (Entered: 03/10/2016)
03/23/2016	23	REPLY to Response to 10 MOTION to Dismiss filed by Dale E. Call, John Lachioma, Daniel Paz, Anthony P. Prezioso, John Rocke, George Taylor, Town of Westport. (Attachments: # 1 Appendix of Cases)(Zellner, Jonathan) (Entered: 03/23/2016)
04/28/2016	24	NOTICE of Appearance by Peter C. White on behalf of Alison Borg, John Borg(ppa Robin Borg), John Borg (White, Peter) (Entered: 04/28/2016)
05/12/2016	25	ORDER: Motion to Amend (Doc. No. 18) is hereby GRANTED. During a telephonic status conference on 1/19/2016, potential deficiencies in the original complaint were discussed, and the plaintiffs stated that they would consider whether they would like to file an Amended Complaint to address those deficiencies before the court considered the pending Motion to Dismiss. The plaintiffs have since filed this Motion to Amend Complaint. Although the defendants object to the proposed Amended Complaint on the grounds that it does not remedy the deficiencies discussed during the 1/19/2016 status conference, they have expressed that they will stand by their original motion to dismiss (Doc. No. 10), as they consider the arguments expressed therein to be equally applicable to the proposed Amended Complaint. The plaintiff shall file the Amended Complaint forthwith. It is so ordered. Signed by Judge Alvin W. Thompson on 5/12/2016. (Calle, K) (Entered: 05/12/2016)
05/13/2016	26	AMENDED COMPLAINT against All Plaintiffs, filed by John Borg(ppa Robin Borg), Alison Borg, John Borg.(Spinella, A.) (Entered: 05/13/2016)
08/16/2016	27	STATUS REPORT by Dale E. Call, John Lachioma, Daniel Paz, Anthony P. Prezioso, John Rocke, George Taylor, Town of Westport. (Zellner, Jonathan) (Entered: 08/16/2016)
08/18/2016	28	ORDER: Status Report (Doc. No. 27) is hereby APPROVED. It is so ordered. Signed by Judge Alvin W. Thompson on 8/18/2016. (Calle, K) (Entered: 08/18/2016)
08/18/2016	29	ORDER: For the reasons set forth in the ruling attached, the Motion to Dismiss (Doc. No. 10) is hereby GRANTED. The Clerk shall close this case. It is so ordered. Signed by Judge Alvin W. Thompson on 8/18/2016. (Calle, K) (Entered: 08/18/2016)

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09/08/2016	30	NOTICE OF APPEAL as to 29 Order on Motion to Dismiss by Alison Borg, John Borg(ppa Robin Borg), John Borg. Filing fee $ 505, receipt number 0205-4128390. (Spinella, A.) (Entered: 09/08/2016)
09/15/2016	31	JUDGMENT entered DISMISSING the case. For Appeal Forms please go to the following website: http://www.ctd.uscourts.gov/forms/all-forms/appeals_forms Signed by Clerk on 9/15/16.(Ferguson, L.) (Entered: 09/15/2016)
09/15/2016		JUDICIAL PROCEEDINGS SURVEY: The following link to the confidential survey requires you to log into CM/ECF for SECURITY purposes. Once in CM/ECF you will be prompted for the case number. Although you are receiving this survey through CM/ECF, it is hosted on an independent website called SurveyMonkey. Once in SurveyMonkey, the survey is located in a secure account. The survey is not docketed and it is not sent directly to the judge. To ensure anonymity, completed surveys are held up to 90 days before they are sent to the judge for review. We hope you will take this opportunity to participate, please click on this link: https://ecf.ctd.uscourts.gov/cgi-bin/Dispatch.pl?survey (Ferguson, L.) (Entered: 09/15/2016)
09/22/2016	32	Index to Record on Appeal by Alison Borg, John Borg(ppa Robin Borg), John Borg re 30 Notice of Appeal. For docket entries without a hyperlink, contact the court to arrange for the document(s) to be made available to you. (White, Peter) (Entered: 09/22/2016)
09/22/2016	33	Index to Record on Appeal by Alison Borg, John Borg(ppa Robin Borg), John Borg re 32 Index to Record on Appeal, 30 Notice of Appeal, 18 MOTION to Amend/Correct , 26 Amended Complaint, 1 Notice of Removal, 29 Order on Motion to Dismiss, 23 Reply to Response to Motion, 31 Judgment, 22 Objection, 25 Order on Motion to Amend/Correct,,, 10 MOTION to Dismiss . For docket entries without a hyperlink, contact the court to arrange for the document(s) to be made available to you. (Enderlin, M.) (Entered: 09/23/2016)

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09/26/2016 13:29:46			
PACER Login:	onelewisstreet:2806434:0	**Client Code:**	McAlmond
Description:	Docket Report	**Search Criteria:**	3:15-cv-01380-AWT
Billable Pages:	6	**Cost:**	0.60

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UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

JOHN BORG; ALISON BORG; JOHN BORG, PPA, ROBIN BORG Planitiffs, v. TOWN OF WESTPORT; DALE E. CALL, CHIEF OF POLICE; DETECTIVE JOHN ROCKE; DETECTIVE GEORGE TAYLOR; DETECTIVE ANTHONY P. PREZIOSO; OFFICER JOHN LACHIOMA; OFFICER DANIEL PAZ Defendants.	CIVIL ACTION NO. SEPTEMBER 17, 2015

PETITION FOR REMOVAL

NOW, come the Defendants, Town of Westport Dale E. Call, Chief of Police, Detective John Rocke, Detective George Taylor, Detective Anthony P. Prezioso, Officer John Lachioma, and Officer Daniel Paz, by and through their attorneys, Ryan Ryan Deluca LLP, and file this Notice of Removal pursuant to 28 U.S.C. § 1441 et seq. The Defendants submit that the United States District Court for the District of Connecticut has federal question jurisdiction over this civil action pursuant to and this matter may be removed to the District Court in accordance with the procedures provided at 28 U.S.C. § 1446. In further support of this Notice of Removal, the Defendants state as follows:

1. The Plaintiffs, John Borg, Alison Borg, and John Borg, PPA, Robin Borg, have prepared a Complaint to be filed in the Superior Court for the State of

Connecticut in the County of Fairfield, dated August 18, 2015. A true and correct copy of the Plaintiffs' Complaint is attached hereto as Exhibit A.

2. The Defendants were served with the Complaint on August 24, 2015.[1]

3. To date, the Complaint has not been filed in the Superior Court for the State of Connecticut.

4. The Plaintiffs purport to allege violations of 42 U.S.C. §§ 1983 and 1988 as against the Defendants as well as state law claims sounding in intentional infliction of emotional distress, negligent infliction of emotional distress, and negligence against the individual defendants and indemnification pursuant to Conn. Gen. Stat. §§ 52-557n and 7-465 against the Town of Westport.

5. According to 28 U.S.C. § 1331, "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

6. According to 28 U.S.C. § 1441(b), "[a]ny civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or law of the United States shall be removable without regard to the citizenship or residence of the parties."

7. The Defendants submit that this matter should be removed to the United States District Court for the District of Connecticut pursuant to 28 U.S.C. §§ 1331 and 1441(b), which permit removal of any civil action to the District Courts that have original jurisdiction.

[1] The Defendants do not have available to them the Return of Service, as the Complaint has not yet been filed in the Superior Court.

WHEREFORE, the Defendants hereby remove this civil action to the United States District Court for the District of Connecticut pursuant to 28 U.S.C. § 1441.

THE DEFENDANTS,
TOWN OF WESTPORT, DALE E. CALL, CHIEF OF POLICE, DETECTIVE JOHN ROCKE, DETECTIVE GEORGE TAYLOR, DETECTIVE ANTHONY P. PREZIOSO, OFFICER JOHN LACHIOMA, AND OFFICER DANIEL PAZ

By: /s/

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UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JOHN BORG;	:	**CIVIL ACTION NO.**
ALISON BORG	:	**3:15-cv-01380 (AWT)**
JOHN BORG, PPA, ROBIN BORG	:	
Plaintiffs	:	
	:	
v.	:	
	:	
TOWN OF WESTPORT;	:	
DALE E. CALL, CHIEF OF POLICE	:	
DETECTIVE JOHN ROCKE;	:	
DETECTIVE GEORGE TAYLOR	:	
DETECTIVE ANTHONY P. PREZIOSO;	:	
OFFICER JOHN LACHIOMA;	:	
OFFICER DANIEL PAZ	:	
Defendants	:	**MAY 13, 2016**

AMENDED COMPLAINT

Come now the Plaintiffs, John Borg, Alison Borg, and Robin Borg, and for their causes of action complain and allege as follows:

INTRODUCTION

1. This action arises under the Fourth, Fifth and Fourteenth Amendments to the United States Constitution; under federal law, 42 U.S.C. §§ 1983 and 1988; under the common law of the State of Connecticut for intentional and/or negligent infliction of emotional distress, civil conspiracy, and negligence.

JURISDICTION

2. Jurisdiction is proper pursuant to 28 U.S.C. §§1331, 1343(3) and (4), as

this action seeks redress for the violation of plaintiffs constitutional and civil rights.

3. This court has supplemental jurisdiction over Plaintiffs' state common law claims pursuant to 28 U.S.C. § 1367(a).

VENUE

4. Venue is proper in the United States District Court for the District of Connecticut pursuant to 28 U.S.C. § 1391(b) and (c).

PARTIES

5. The Plaintiff, JOHN BORG, is a citizen and resident of Westport, Connecticut.

6. The Plaintiff, ALISON BORG is a citizen and resident of Westport, Connecticut.

7. The Plaintiff, ROBIN BORG, is the minor child of Alison and John Borg, and is a citizen and resident of Westport.

8. The Defendant, DETECTIVE JOHN ROCKE, was at all times material to the allegations in this Complaint, acting in his capacity as a Police Officer employed by the Town of Westport, Connecticut and was acting under color of state law.

9. The Defendant, DETECTIVE GEORGE TAYLOR, was at all times material to the allegations in this Complaint, acting in his capacity as a Police Officer employed by the Town of Westport, Connecticut and was acting under color of state law.

10. The Defendant, DETECTIVE ANTHONY P. PREZIOSO, was at all times

material to the allegations in this Complaint, acting in his capacity as a Police Officer employed by the Town of Westport, Connecticut and was acting under color of state law.

11. The Defendant, OFFICER JOHN LACHIOMA, was at all times material to the allegations in this Complaint, acting in his capacity as a Police Officer employed by the Town of Westport, Connecticut and was acting under color of state law.

12. The Defendant, OFFICER DANIEL PAZ, was at all times material to the allegations in this Complaint, acting in his capacity as a Police Officer employed by the Town of Westport, Connecticut and was acting under color of state law.

13. The Defendant, the TOWN OF WESTPORT, Connecticut, is a municipality and a political subdivision of the State of Connecticut, for which the individual Defendants serve as police officers.

14. The Town of Westport has established or delegated to Defendant, Chief of Police DALE E. CALL, the responsibility for establishing and implementing policies, practices, procedures, and customs used by law enforcement officers employed by Town of Westport regarding searches of private residences.

FACTUAL ALLEGATIONS

15. On or about January 15, 2015 the Defendant police officers requested from one of the Plaintiffs' immediate neighbors that the Westport Police Department be allowed to install video cameras to conduct covert surveillance of the Plaintiffs' Westport

home, in an effort to obtain evidence of criminal activity.

16. On or about January 30, 2015 defendants ROCKE and PREZIOSO met with the neighbor, installed the video surveillance equipment, and covertly began filming Plaintiffs' home. The areas under surveillance included the interior of the Plaintiffs' home as well as the curtilage.

17. On February 12, 2015, Defendants ROCKE and TAYLOR went to a second neighbor's residence for the purpose of installing the surveillance cameras pointed at the Plaintiff's home, installed video cameras, and did begin said surveillance on the Plaintiffs' residence. The areas under surveillance also included the interior of the Plaintiffs' home as well as the curtilage.

18. On March 26, 2015, defendant officer LACHIOMA downloaded the surveillance video footage, and the footage was preserved as evidence to be used against the Plaintiffs.

19. On April 5, 2015, defendant PAZ reviewed the surveillance video footage, to determine whether the Plaintiffs had engaged in criminal activity.

20. Beginning on January 30, 2015, and lasting until at least April 20, 3015, the Defendants had conducted continuing, around-the-clock covert surveillance of the interior of the Plaintiffs' home and the curtilage area in an attempt to obtain evidence of criminal activity.

21. The Defendants' prolonged and pervasive video surveillance of the

Plaintiffs' residence recorded intimate details connected the Plaintiffs' home and family.

22. John and Alison Borg are both psychologists, and see patients from their home. The covert video surveillance further captured details of John and Alison Borg's working life and those of the patients who visited, all of whom reasonably expected to enjoy the confidentiality of the therapist- patient relationship.

23. The Plaintiffs had a reasonable expectation of privacy in interior of their home and in the curtilage area.

24. The defendants' continuing surveillance of the Plaintiffs' home over a period of nearly 12 weeks for the purpose of obtaining evidence of criminal activity, constituted a search within the meaning of the Fourth Amendment.

25. The Defendants' did not obtain a search warrant prior conducting the ongoing video surveillance and consequently violated the Fourth Amendment's prohibition against unreasonable searches.

26. Statutory notice of the Plaintiffs' claims and intention to bring this action was sent to the Town of Westport in accordance with § 7-101a and § 7-465 of the General Statutes.

FIRST COUNT: 42 U.S.C. § 1983.
Unreasonable Warrantless Search in Violation of the Fourth Amendment

1-26. Plaintiffs reallege and incorporate herein by reference the allegations set forth in paragraphs 1-26, above.

27. In committing the acts complained of herein, Defendants acted under color of state law to deprive Plaintiffs of certain constitutionally protected rights under the Fourth and Fourteenth Amendments to the Constitution of the United States including the right to be free from unreasonable searches.

28. John and Alison Borg have suffered and continue to suffer mental anguish, shock, fright, and embarrassment of having the government secretly videotaping the intimate details of their family life over a period of twelve weeks.

29. The minor Plaintiff, Robin Borg, has suffered and continues to suffer from a heightened level of anxiety, fear of police, feeling unsafe in own home, mental anguish, shock, fright, and embarrassment of having the government secretly videotaping the intimate details of her life over a period of twelve weeks.

30. As a direct and proximate result of the government's continuous covert video surveillance of their home over a period of nearly twelve weeks, the Plaintiffs have suffered general and special damages as alleged in this Complaint, and are entitled to relief under 42 U.S.C. § 1983.

SECOND COUNT: 42 U.S.C. § 1983– MONELL VIOLATION

1-30. Plaintiffs reallege and incorporate herein by reference the allegations set forth in paragraphs 1-30 of the First Count.

31. Upon information and belief, the Town of Westport, by and through its Police Department, regularly conducts warrantless, covert video surveillance of its

residents.

32. The Town of Westport, by and through the Chief of Police, Dale E. Call, is vested with the authority to make the policy for the Town of Westport on the use of covert video surveillance.

33. The Town of Westport, by and through the Chief of Police, Dale E. Call had knowledge of the practice of warrantless covert video surveillance, or had they diligently exercised its duties to instruct, supervise, control, and discipline the Westport Police Department on a continuing basis, should have had knowledge of the wrongs that had been committed, as heretofore alleged, were about to be committed.

34. The Defendant, DALE E. CALL, in his capacity as Chief of Police of the Westport Police Department, and the Defendant, the TOWN OF WESTPORT, implicitly or explicitly adopted and implemented careless and reckless policies, customs, or practices, that included allowing the Westport Police Department to conduct warrantless video surveillance of private homes and property, in such a way as to violate constitutionally protected rights.

35. The Town of Westport and Chief of Police Call had power to prevent the commission of these warrantless searches and could have done so by reasonable diligence, but intentionally, knowingly, or recklessly failed or refused to do so. The allegations in this paragraph are likely to have evidentiary support after reasonable opportunity for further investigation and or discovery.

36. The Defendant, DALE E. CALL, in his capacity as Chief of Police of the Westport Police Department, and the Defendant, the TOWN OF WESTPORT, failed to train the Westport Police Department in the law of search and seizure, which allowed the Westport Police Department to conduct warrantless video surveillance of private homes and property, in such a way as to violate constitutionally protected rights.

37. As a direct and proximate result of the acts and omissions by the Town of Westport, by and through its police department and Chief of Police Call, as set forth herein, the plaintiffs suffered general and special damages in connection with the deprivation of their constitutional rights guaranteed by the fourth and 14th amendments to the Constitution of United States, and protected by 42 U.S.C. § 1983.

THIRD COUNT: INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS
(against the defendant officers)

1-30. Plaintiffs reallege and incorporate herein by reference the allegations set forth in paragraphs 1-30 of the First Count.

32. The aforementioned actions by the defendant officers were intentional, willful and deliberate, and caused the Plaintiffs to suffer from severe emotional distress, which the defendant officers knew or should have known would have resulted from their actions.

32. Said conduct was extreme and outrageous.

33. The defendants' conduct was the sole cause of the Plaintiffs' distress.

34. The emotional distress sustained by the Plaintiffs was severe.

35. As a result of the defendants' actions, the plaintiff suffered damages, as set forth above.

FOURTH COUNT: NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS (against the defendant officers)

1-30. Plaintiffs reallege and incorporate herein by reference the allegations set forth in paragraphs 1-30 of the First Count.

31. The defendant officers were negligent in causing the Plaintiff to suffer emotional distress in that the defendants should have realized that their conduct involved an unreasonable risk of causing emotional distress, and that distress might result in illness or bodily harm, and did cause the plaintiff bodily harm.

32. As a result of the defendant's negligence, the plaintiffs suffered damages, as set forth above.

FIFTH COUNT: NEGLIGENCE (against the defendant officers)

1-30. Plaintiffs reallege and incorporate herein by reference the allegations set forth in paragraphs 1-30 of the First Count.

31. As a police officers for the Town of Westport, the defendant officers owed the Plaintiffs a duty of care.

32. The defendant officers breached that duty of care by the aforementioned search, which had no justification or excuse in law, and were instead illegal, improper

and unrelated to any activity in which law enforcement officers may rightfully engage in the course of protecting persons or property or ensuring civil order.

33. As a result of the defendants' actions, the plaintiff suffered damages, as set forth above.

SIXTH COUNT: TOWN OF WESTPORT'S DUTY TO INDEMNIFY PURSUANT TO GEN. STAT.§ 52-557n

1. The Plaintiffs incorporate by reference the allegations set forth in Fourth Count as though fully set forth herein.

2. The Plaintiffs incorporate by reference the allegations set forth in Fifth Count as though fully set forth herein.

3. Pursuant to Gen. Stat. § 52-557n, the Town of Westport is liable for the injuries and losses complained of caused by the negligent acts or omissions of any officer or agent thereof acting within the scope of his employment or official duties, as complained of herein.

SEVENTH COUNT: TOWN OF WESTPORT'S DUTY TO INDEMNIFY PURSUANT TO GEN. STAT. § 7- 465

1. The Plaintiff incorporates by reference the allegations set forth in First Count as though fully set forth herein.

2. The Town of Westport is legally liable to pay on behalf of defendants all sums which each becomes obligated to pay by reason of the imposed upon such employee by law for damages awarded for the physical damages to the person or

property of the Plaintiff as a result of the events complained of herein pursuant to Gen. Stat. § 7- 465.

THE PLAINTIFFS,

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CERTIFICATION

I HEREBY CERTIFY that on this date, a copy of foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

/s/ A. Paul Spinella, Esq
A. Paul Spinella, Federal Bar #: ct00078

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JOHN BORG; ALISON BORG; and JOHN BORG, PPA, ROBIN BORG,	:	
Plaintiffs,	:	Civil No. 3:15-cv-1380(AWT)
v.	:	
TOWN OF WESTPORT; DALE E. CALL, CHIEF OF POLICE; DETECTIVE JOHN ROCKE; DETECTIVE GEORGE TAYLOR; DETECTIVE ANTHONY P. PREZIOSO; OFFICER JOHN LACHIOMA; and OFFICER DANIEL PAZ,	:	
Defendants.	:	

RULING ON MOTION TO DISMISS

The Amended Complaint in this case contains seven counts: unreasonable warrantless search in violation of Fourth and Fourteenth Amendments of the United States Constitution (First Count); a Monell claim (Second Count); intentional infliction of emotional distress by the defendant officers (Third Count); negligent infliction of emotional distress by the defendant officers (Fourth Count); negligence by the defendant officers (Fifth Count); indemnification claim against the Town of Westport pursuant to Conn. Gen. Stat. § 52-557n (Sixth Count); and indemnification claim against the Town of Westport pursuant to Conn. Gen. Stat. § 7-465 (Seventh Count).

The defendants, Town of Westport ("Westport"), Dale E. Call, Chief of Police ("Chief Call"), Detective John Rocke ("Rocke"), Detective George Taylor ("Taylor"), Detective Anthony P. Prezioso ("Prezioso"), Officer John Lachioma; and Officer Daniel Paz move to dismiss the Amended Complaint[1] in its entirety pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. The motion is being granted.

I. FACTUAL ALLEGATIONS

"The complaint, which [the court] must accept as true for purposes of testing its sufficiency, alleges the following circumstances." Monsky v. Moraghan, 127 F.3d 243, 244 (2d Cir. 1997).

The plaintiffs allege that "[o]n or about January 15, 2015 the Defendant police officers requested from one of the Plaintiffs' immediate neighbors that the Westport Police Department be allowed to install video cameras to conduct surveillance of the Plaintiffs' Westport home, in an effort to

[1] The defendants filed their motion to dismiss the original complaint. The plaintiffs thereafter filed a Motion to Amend Complaint (Doc. No. 18), which the court granted. (See Doc. No. 25). The defendants objected to the plaintiff's motion, but nonetheless stated, "[T]he Defendants stand by and reiterate the arguments raised in their Motion to Dismiss the original Complaint (#10), as those arguments are equally applicable to the Proposed Amended Complaint." (Doc. No. 19). Accordingly, the court considers the defendants' Motion to Dismiss as directed to the Amended Complaint (Doc. No. 26).

obtain evidence of criminal activity." (Amended Complaint (Doc. No. 26) ("Am. Compl.") ¶ 15.) The plaintiffs allege that on or about January 30, 2015, Rocke and Prezioso installed the video surveillance equipment and began filming their home. "The areas under surveillance included the interior of the Plaintiffs' home as well as the curtilage." (Id. ¶ 16.) On February 12, 2015, Rocke and Taylor installed video cameras at a second neighbor's residence, again in order to surveil the plaintiffs' home. The plaintiffs allege that the "covert surveillance" took place "around-the-clock" from January 30, 2015 to at least April 20, 2015. (Id. ¶ 20.) The surveillance was conducted without a search warrant.

The plaintiffs allege that "[t]he Defendants' prolonged and pervasive video surveillance of the Plaintiffs' residence recorded intimate details connected [to] the Plaintiffs' home and family." (Id. ¶ 21.) The plaintiffs further allege that John and Alison Borg are both psychologists who see patients in their home and that the video surveillance "captured details of John and Alison Borg's working life and those of the patients who visited, all of whom reasonably expected to enjoy the confidentiality of the therapist-patient relationship." (Id. ¶ 22.)

In the First Count, the plaintiffs allege that the defendants acted under color of law to deprive them of their

Fourth and Fourteenth Amendment rights to be free from unreasonable searches. They allege that, as a "direct and proximate result" of the surveillance, they have suffered general and special damages and are entitled to relief under 42 U.S.C. § 1983. They further allege that "John and Alison Borg have suffered and continue to suffer mental anguish, shock, fright, and embarrassment of having the government secretly videotaping the intimate details of their family life over a period of twelve weeks" and that "[t]he minor Plaintiff, Robin Borg, has suffered and continues the suffer from a heightened level of anxiety, fear of police, feeling unsafe in her own home, mental anguish, shock, fright, and embarrassment of having the government secretly videotaping the intimate details of her life over a period of twelve weeks." (Id. I,[2] ¶¶ 28-29.)

In the Second Count, the plaintiffs allege, upon information and belief, that "the Town of Westport, by and through its Police Department, regularly conducts warrantless, covert video surveillance of its residents" and that Westport, by and through Chief Call, "had knowledge of the practice of warrantless covert video surveillance, or had they diligently exercised its duties to instruct, supervise, control, and discipline the Westport Police Department on a continuing basis,

[2] Because the numbering of paragraphs is not continuous, the court uses roman numerals to denote from which count the court is citing.

should have had knowledge of the wrongs that had been committed . . . [or] were about to be committed." (Id. II, ¶¶ 31, 33.) Additionally, they allege that Chief Call and Westport "implicitly or explicitly adopted and implemented careless and reckless policies, customs, or practices" of conducting warrantless searches in violation of constitutional rights. (Id. II, ¶ 34.) They also allege that Chief Call and Westport "failed to train the Westport Police Department in the law of search and seizure" and that such failure allowed officers to conduct unconstitutional warrantless video surveillance of homes and property. (Id. II, ¶ 36.) The plaintiffs allege that Chief Call and Westport were in a position to prevent these alleged unconstitutional warrantless searches and "could have done so by reasonable diligence, but intentionally, knowingly, or recklessly failed or refused to do so." (Id. II, ¶ 35.) As a direct and proximate result, the plaintiffs allege that they have suffered damages.

In the Third Count, brought against the defendant officers, the plaintiffs allege that the "actions by the defendant officers were intentional, willful and deliberate, and caused the Plaintiffs to suffer from severe emotional distress, which the defendant officers knew or should have known would have resulted from their actions." (Id. III, ¶ 32.) They allege that the officers' conduct was "extreme and outrageous," that it was

the "sole cause of the Plaintiffs' distress," that their distress was "severe," and that they "suffered damages." (Id. III, ¶¶ 32-35.)

In the Fourth Count, brought against the defendant officers, the plaintiffs allege that "[t]he defendant officers were negligent in causing the Plaintiff to suffer emotional distress in that the defendants should have realized that their conduct involved an unreasonable risk of causing emotional distress, and that distress might result in illness or bodily harm, and did cause the plaintiff[s] bodily harm." (Id. IV, ¶ 31.) They allege that as a result of the defendants' negligence, they have suffered damages.

In the Fifth Count, brought against the defendant officers, the plaintiffs allege that "[a]s . . . police officers for the Town of Westport, the defendant officers owed the Plaintiffs a duty of care," that they breached this duty by conducting the warrantless search and that, as a result, the plaintiffs have suffered damages. (Id. V, ¶¶ 31-33.)

In the Sixth Count, the plaintiffs allege that "[p]ursuant to Gen. Stat. § 52-557n, the Town of Westport is liable for the injuries and losses complained of caused by the negligent acts or omissions of any officer or agent thereof acting within the scope of his employment or official duties[.]" (Id. VI, ¶ 3.)

In the Seventh Count, the plaintiffs allege that pursuant to Conn. Gen. Stat. § 7-465, Westport is liable to indemnify the officers for any damages awarded for physical damage to the plaintiffs or their property as a result of the defendant officers' video surveillance.

II. LEGAL STANDARD

When deciding a motion to dismiss under Fed. R. Civ. P. Rule 12(b)(6), the court must accept as true all factual allegations in the complaint and must draw inferences in a light most favorable to the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). Although a complaint "does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atlantic Corp. v. Twombly, 550 U.S. 550, 555 (2007) (citing Papasan v. Allain, 478 U.S. 265, 286 (1986)(on a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation")). "Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 557). "Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all allegations in the complaint are true (even if doubtful

in fact)." Id. (citations omitted). However, the plaintiff must plead "only enough facts to state a claim to relief that is plausible on its face." Id. at 1974. "The function of a motion to dismiss is 'merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof.'" Mytych v. May Dept. Store Co., 34 F. Supp. 2d 130, 131 (D. Conn. 1999) (quoting Ryder Energy Distrib. v. Merrill Lynch Commodities, Inc., 748 F.2d 774, 779 (2d Cir. 1984)). "The issue on a motion to dismiss is not whether the plaintiff will prevail, but whether the plaintiff is entitled to offer evidence to support his claims." United States v. Yale New Haven Hosp., 727 F. Supp. 784, 786 (D. Conn. 1990) (citing Scheuer, 416 U.S. at 232).

In its review of a motion to dismiss for failure to state a claim, the court may consider "only the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the pleadings and matters of which judicial notice may be taken." Samuels v. Air Transp. Local 504, 992 F.2d 12, 15 (2d Cir. 1993).

III. DISCUSSION

The defendants move to dismiss all counts pursuant to Federal Rule of Civil Procedure 12(b)(6) on the ground that the plaintiffs have failed to state a claim upon which relief can be granted.

A. Count One -- Violation of the Fourth Amendment

The plaintiffs allege that the defendants acted under color of state law to violate their Fourth and Fourteenth Amendment rights.

> The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." "At the very core" of the Fourth Amendment "stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."

Kyllo v. United States, 533 U.S. 27, 31 (2001) (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)).

The defendants argue that the plaintiffs have failed to allege that they conducted a "search" of the plaintiffs' home within the meaning of the Fourth Amendment. "[A] Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." Kyllo, 533 U.S. at 33 (citing Katz v. United States, 389 U.S. 347 (1967)). In general, "visual observation is no 'search' at all" for purposes of the Fourth Amendment. Id. at 32 (citing Dow Chemical Co. v. United States, 476 U.S. 227, 234-235 (1986)). "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." Florida v. Riley, 488 U.S. 445, 449 (1989) (quoting California v. Ciraolo, 476 U.S. 207, 213 (1986)). Accordingly, "what a person knowingly exposes to the

public through an open door or window does not receive Fourth Amendment protection." United States v. Davis, 326 F.3d 361, 365 (2d Cir. 2003). "Generally, the police are free to observe whatever may be seen from a place where they are entitled to be." United States v. Fields, 113 F.3d 313, 321 (2d Cir. 1997) (citing Riley, 488 U.S. at 449).

In this case, the plaintiffs do not allege that the defendant officers physically entered their property or home. In addition, the plaintiffs have not alleged that the defendant officers observed anything other than that which could be seen from a place where they were entitled to be, see Fields, 113 F.3d at 321, or that they observed anything other than what the plaintiffs voluntarily chose to expose to public view, see id. ("Although society generally respects a person's expectations of privacy in a dwelling, what a person chooses voluntarily to expose to public view thereby loses its Fourth Amendment protection." (citing Ciraolo, 476 U.S. at 213)).

Although the officers used video equipment to surveil the house, as opposed to naked-eye observation, the use of technology to conduct visual surveillance does not inherently raise constitutional concerns. See Dow Chemical Co., 476 U.S. at 238 ("the photographs here are not so revealing of intimate details as to raise constitutional concerns. Although they undoubtedly give . . . more detailed information than naked-eye

views, they remain limited to an outline of the facility's buildings and equipment. The mere fact that human vision is enhanced somewhat, at least to the degree here, does not give rise to constitutional problems."). In Kyllo, the Supreme Court considered "how much technological enhancement of ordinary perception from such a vantage point, if any, is too much" and "what limits there are upon this power of technology to shrink the realm of guaranteed privacy." Kyllo, 533 U.S. at 33-34. The Court concluded that "[w]here . . . the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant." Id. at 40. In Kyllo, the Court held that use of thermal-imaging technology constituted a search of a person's home because such technology was not in general public use at the time and the information obtained would previously have been unknowable without physical intrusion. In this case, the plaintiffs do not allege facts that support an inference that the police used a device that was not in general public use at the time or that the police explored any details of the home that would previously have been unknowable without physical intrusion. Thus, they have failed to allege facts sufficient to suggest that the defendants conducted a Fourth Amendment search of their home or property.

The plaintiffs argue that Shafer v. City of Boulder, 896 F. Supp. 2d 915 (D. Nev. 2012) "foreclose[s] any argument that the Plaintiff's § 1983 claim is not legally feasible and fails to state a cause of action." (Mem. of Law in Supp. of Opp. to the Mot. to Dismiss Pursuant to Fed.R.Civ.P. 12(b)(6) (Doc. No. 22-1) ("Opp.") at 5.) In Shafer, the court denied the defendants' motion for summary judgment where the government installed "four infrared, long-range, weatherproof, silent video surveillance cameras" that had been provided by the Department of Homeland Security and surveilled the plaintiff's backyard and bathroom window around the clock for 56 days. Shafer, 896 F. Supp. 2d at 924. The court concluded that the government had violated the plaintiff's reasonable subjective and objective expectations of privacy. In concluding that the surveillance violated the plaintiff's objective expectation of privacy, the court stated:

> Importantly, it was not only [the] omnipresence and lengthy duration of the surveillance that intruded upon Shafer's expectation of privacy in his home, but also the intensity of the surveillance. The DHS cameras provided to Fenyves were long-range, infrared, heavy-duty, waterproof, daytime/nighttime cameras, purchased as part of a $50,000 Department of Homeland Security grant to combat terrorism and similar criminal activity. The DHS cameras undoubtedly contained superior video-recording capabilities than a video camera purchased from a department store. As such, this case presents similar facts to cases where "the Government uses a device that is not in general public use[] to explore details of a home that would previously have been unknowable without physical intrusion." See Kyllo, 533 U.S. at 40[.]

Shafer, 896 F. Supp. 2d at 932. Here the facts alleged do not suggest that the surveillance was comparable in terms of "intensity" to the conduct in Shafer, and that fact distinguishes this case from Shafer along the lines discussed in Kyllo.

Accordingly, the court concludes that here the use of the video cameras did not render the defendants' surveillance a "search" for purposes of the Fourth Amendment, and the First Count is being dismissed.

B. Count Two -- Monell Violation

"A municipality or other local government may be liable under [42 U.S.C. § 1983] if the governmental body itself 'subjects' a person to a deprivation of rights or 'causes' a person 'to be subjected' to such deprivation." Connick v. Thompson, 563 U.S. 51, 60 (2011) (citing Monell v. New York City Dept. of Social Servs., 436 U.S. 658, 692 (1978)).

> Plaintiffs who seek to impose liability on local governments under § 1983 must prove that 'action pursuant to official municipal policy' caused their injury. Official municipal policy includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law.

Id. at 60-61 (citations omitted) (quoting Monell, 436 U.S. at 691).

The plaintiffs allege that Westport is liable under Monell on the grounds that Westport had the authority to make a policy

to conduct covert video surveillance; that Westport had "knowledge of the practice of warrantless covert video surveillance" or should have known of the practice; that Westport "implicitly or explicitly adopted and implemented careless and reckless policies, customs, or practices" that included unconstitutional searches; that Westport had the power to prevent unconstitutional searches and refused to do so; that Westport failed to adequately train officers on the law of search and seizure; and that, as a result, the plaintiffs suffered "general and special damages in connection with the deprivation of their constitutional rights guaranteed by the [F]ourth and [Fourteenth] [A]mendments[.]" (Am. Compl. II, ¶¶ 31-37.)

Because, as discussed above, the defendant officers did not conduct an unconstitutional search of the plaintiffs' property, the plaintiffs fail to allege a Monell claim. See Johnson v. City of New York, 551 F. App'x 14, 15 (2d Cir. 2014) ("Because he has not alleged a valid underlying constitutional deprivation, his claim against New York City pursuant to Monell v. Dep't of Soc. Servs., 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), must also fail. See City of Los Angeles v. Heller, 475 U.S. 796, 799, 106 S. Ct. 1571, 89 L. Ed. 2d 806 (1986) (stating that Monell liability does not lie where municipality's officer does not inflict constitutional harm).");

Segal v. City of New York, 459 F.3d 207, 219 (2d Cir. 2006) ("Monell does not provide a separate cause of action for the failure by the government to train its employees; it extends liability to a municipal organization where that organization's failure to train, or the policies or customs that it has sanctioned, led to an independent constitutional violation." (emphasis in original)).

Accordingly, the Second Count is being dismissed.[3]

C. Count Three -- Intentional Infliction of Emotional Distress

To state a claim for intentional infliction of emotional distress under Connecticut law, a plaintiff must allege:

> (1) that the actor intended to inflict emotional distress or that he knew or should have known that emotional distress was the likely result of his conduct; (2) that the conduct was extreme and outrageous; (3) that the defendant's conduct was the cause of the plaintiff's distress; and (4) that the emotional distress sustained by the plaintiff was severe.

Watts v. Chittenden, 301 Conn. 575, 586 (2011) (quoting Appleton v. Bd. of Educ., 254 Conn. 205, 210 (2000)).

[3] To the extent the plaintiffs allege that the defendant officers' actions violated their patients' reasonable expectation of privacy (see Am. Compl. ¶ 23 ("John and Alison Borg are both psychologists, and see patients from their home. The covert surveillance further captured details of John and Alison Borg's working life and those patients who visited, all of whom reasonably expected to enjoy the confidentiality of the therapist-patient relationship.")), they do not have standing to raise a Fourth Amendment claim on behalf of their patients.

In this case, the plaintiffs have failed to allege facts to support the first, second and fourth requirements. As to the first requirement, the plaintiffs have failed to adequately allege that the defendant officers intended to inflict emotional distress on the plaintiffs or that they should have known that emotional distress was the likely result of their conduct. They allege that the defendant officers' actions "were intentional, willful and deliberate, and caused the Plaintiffs to suffer from severe emotional distress, which the defendant officers knew or should have known would have resulted from their actions." (Am. Compl. III, ¶ 32.) However, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to satisfy the pleading requirements of Federal Rule of Civil Procedure 8(a). Iqbal, 556 U.S. at 678. The plaintiffs do not elsewhere make any factual allegations that could support the inference that the defendant officers intended to cause the plaintiffs emotional distress or should have known that their actions would cause such distress. To the extent the plaintiffs base their claim on the fact that the police intended to surveil the house and that the surveillance was distressing, the plaintiffs' claim also fails. See Abdella v. O'Toole, 343 F. Supp. 2d 129, 140 (D. Conn. 2004) ("A police search, legal or not, is likely to unnerve or distress most people, but an intentional infliction of emotional distress

claim requires some showing of an intent to cause emotional harm."). Therefore, the court concludes that the plaintiffs have failed to allege facts sufficient to satisfy the first requirement for a claim for intentional infliction of emotional distress.

To satisfy the second requirement of a claim for intentional infliction of emotional distress, the conduct complained of must be "extreme and outrageous." "Liability for intentional infliction of emotional distress requires conduct that exceeds 'all bounds usually tolerated by decent society. . . .'" Appleton, 254 Conn. at 210 (quoting Petyan v. Ellis, 200 Conn. 243, 254 n. 5 (1986) (quoting W. Prosser & W. Keeton, Torts (5th Ed. 1984) § 12, p. 60)).

> Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"

Id. at 211 (quoting Restatement (Second), Torts § 46, comment (d), p. 73 (1965)). The plaintiffs have not alleged facts to suggest that the installation of video surveillance cameras on neighboring property exceeds "all bounds usually tolerated by decent society." First, as discussed above, the court has concluded that the plaintiffs have failed to allege that the

defendant officers conducted an unlawful search. Additionally, they have failed to allege other facts that could provide a basis for their contention that the defendant officers' conduct was extreme and outrageous. For example, there is no allegation that the defendant officers observed anything that was not ordinarily visible to the plaintiffs' neighbors.

Also, while the plaintiffs allege that the defendant officers may have been able to observe patients who sought mental health treatment from the plaintiffs, they have not alleged that their neighbors or anyone passing by on the street could not have observed the same. Thus, this fact does not change the court's analysis, and the court concludes that the plaintiffs have failed to allege any facts to suggest that the defendant officers engaged in conduct that might be considered "extreme and outrageous."

In order to satisfy the fourth requirement the "distress must be 'so severe that no reasonable person could be expected to endure it.'" Craig v. Yale Univ. Sch. of Med., 838 F. Supp. 2d 4, 12 (D. Conn. 2011) (quoting Tomby v. Comty. Renewal Team, Inc., 2010 WL 5174404, at *7 (D. Conn. Dec. 15, 2010)). Comment j of Section 46 of the Restatement (Third) or Torts: Liability for Physical and Emotional Harm states that this requirement is satisfied

> when the person seeking recovery has suffered *severe* emotional harm. Complete emotional tranquility is seldom attainable in this world, and some degree of emotional harm, even significant harm, is part of the price of living in a complex and interactive society. Requiring proof that the emotional harm is severe (and the result of extreme and outrageous conduct) provides some assurance that the harm is genuine. Thus, the law intervenes only when the plaintiff's emotional harm is severe and when a person of ordinary sensitivities in the same circumstances would suffer severe harm. . . . Severe harm must be proved, but in many cases the extreme and outrageous character of the defendant's conduct is itself important evidence bearing on whether the requisite degree of harm resulted[.]

Restatement (Third) of Torts: Phys. & Emot. Harm § 46 cmt. j (Am. Law. Inst. 2012).

The plaintiffs allege that John and Alison Borg "have suffered and continue to suffer mental anguish, shock, fright, and embarrassment of having the government secretly videotaping the intimate details of their family life over a period of twelve weeks" and that "[t]he minor Plaintiff, Robin Borg, has suffered and continues to suffer from a heightened level of anxiety, fear of police, feeling unsafe in [her] own home, mental anguish, shock, fright, and embarrassment of having the government secretly videotaping the intimate details of her life over a period of twelve weeks." (Am. Compl. I, ¶¶ 28-29.) Although the plaintiffs are upset and distressed, they have not alleged facts sufficient to suggest that their distress was "so severe that no reasonable person could be expected to endure it." "Absent some evidence that plaintiff suffered these

symptoms to an extraordinary degree, the facts alleged in his pleadings and opposition papers, taken in the light most favorable to plaintiff, do not support his claim of severe emotional distress." Almonte v. Coca-Cola Bottling Co. of N.Y., Inc., 959 F. Supp. 569, 576 (D. Conn. 1997); see also Lachira v. Sutton, No. 3:05-cv-1585, 2007 WL 1346913, at *23 (D. Conn. May 7, 2007) (no evidence was provided to support a finding "that any emotional distress suffered was 'severe,' at a level which 'no reasonable person could be expected to endure,' or that she experienced her symptoms 'to an extraordinary degree'"); Colon v. Tucciarone, No. CIV 3:02CV00891PCD, 2003 WL 22455005, at *4 (D. Conn. July 21, 2003) ("Agitation, disturbance, fear, nervousness, embarrassment, pain, and loss of faith in the law following a traffic stop, arrest, and court appearance are by no means distress that no reasonable person can be expected to endure."). Compare Mellaly v. Eastman Kodak Co., 597 A.2d 846, 848 (Conn. Super. Ct. 1991) (severe emotional distress sufficiently alleged where plaintiff alleged he "became depressed, lost sleep, suffered from anxiety attacks, stress and felt physical pain, including high blood pressure, and suffered from rashes, skin problems and a swollen face resulting from anxiety."). So, although the plaintiffs allege that "[t]he emotional distress sustained by [them] was severe[,]" (Am. Compl. III, ¶ 34), this allegation is no more than a

"[t]hreadbare recital[] of the elements of a cause of action" and does not satisfy the pleading requirements of Federal Rule of Civil Procedure 8(a). Iqbal, 556 U.S. at 678.

Because the plaintiffs have failed to allege facts to support the first, second and fourth elements of a claim for intentional infliction of emotional distress, the Third Count is being dismissed.

D. Fourth and Fifth Counts: Negligent Infliction of Emotional Distress and Negligence

1. Governmental Immunity

The defendants argue that the Fourth and Fifth Counts, brought against the defendant officers, are barred by the doctrine of governmental immunity. Although governmental immunity is generally raised as an affirmative defense, "[a]n affirmative defense may be raised by a pre-answer motion to dismiss under Rule 12(b)(6), without resort to summary judgment procedure, if the defense appears on the face of the complaint." McKenna v. Wright, 386 F.3d 432, 436 (2d Cir. 2004) (quoting Pani v. Empire Blue Cross Blue Shield, 152 F.3d 67 (2d Cir. 1998)).

Under Connecticut law, "[m]unicipal officials are immune from liability for negligence arising out of their discretionary acts[.]" Doe v. Petersen, 279 Conn. 607, 614 (2006). "The hallmark of a discretionary act is that it requires the exercise

of judgment.... In contrast, [m]inisterial refers to a duty which is to be performed in a prescribed manner without the exercise of judgment or discretion." Violano v. Fernandez, 280 Conn. 310, 318 (2006) (alterations in original) (quoting Martel v. Metro. Dist. Comm'n, 275 Conn. 38, 48-49 (2005)). It is undisputed that the defendant officers' acts were discretionary. (See Mem. of Law in Supp. of Mot. to Dismiss (Doc. No. 10-1) at 14-16 (arguing that the defendant officers' acts were discretionary); Opp. at 16 (arguing that imminent harm exception applies)).

There are three recognized exceptions to discretionary act immunity:

> First, liability may be imposed for a discretionary act when the alleged conduct involves malice, wantonness or intent to injure. E.g., Mulligan v. Rioux, 229 Conn. 716, 728, 732, 643 A.2d 1226 (1994). Second, liability may be imposed for a discretionary act when a statute provides for a cause of action against a municipality or municipal official for failure to enforce certain laws. See, e.g., Sestito v. Groton, 178 Conn. 520, 525-28, 423 A.2d 165 (1979). Third, liability may be imposed when "the circumstances make it apparent to the public officer that his or her failure to act would be likely to subject an identifiable person to imminent harm...." Evon v. Andrews, supra, 211 Conn. at 505, 559 A.2d 1131.

Petersen, 279 Conn. at 615-16 (footnote omitted). The plaintiffs argue that the imminent harm exception applies. They argue that the danger to the plaintiffs "was limited in duration--the search was continuous over a twelve week period, and limited in geographical scope to the Borg's residence, thereby meeting the

imminent requirement. Equally apparent was that their conduct subjected the Borg's to harm, as alleged in the Complaint." (Opp. at 17.)

As a threshold matter, the court notes that in Haynes v. City of Middletown, the Connecticut Supreme Court articulated the imminent harm to identifiable persons exception to government immunity as follows:

> "This court has recognized an exception to discretionary act immunity that allows for liability when the circumstances make it apparent to the public officer that his or her failure to act would be likely to subject an identifiable person to imminent harm.... This identifiable person-imminent harm exception has three requirements: (1) an imminent harm; (2) an identifiable victim; and (3) a public official to whom it is apparent that his or her conduct is likely to subject that victim to that harm.... All three must be proven in order for the exception to apply."

313 Conn. 303, 312-13 (2014) (quoting Edgerton v. Clinton, 311 Conn. 217, 230-31 (2014)). Thus, while there is a reference in the third requirement to the public official's "conduct," it appears from the context that the only conduct being referenced is conduct that constitutes a "failure to act."

The plaintiffs find support in Brooks v. Powers, 165 Conn. App. 44 (2016), for their argument that the defendants are liable here because "their conduct subjected the Borg's to harm." There the court stated that the Connecticut Supreme Court had "stated [the] exception in two different ways" and described the first when a public official's failure to act would be

likely to subject an identifiable person to imminent harm and the second as when the three requirements set forth in Haynes are satisfied.[4] The discussion in Brooks, however, is based

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[4] As a threshold matter, we must determine the general contours of the imminent harm, identifiable victim exception. Our Supreme Court has stated that exception in two different ways.

First, the court has said that the exception applies if "the circumstances make it apparent to the public officer that his or her failure to act would be likely to subject an identifiable person to imminent harm...."(Emphasis added; internal quotation marks omitted.) Haynes v. Middletown, supra, 314 Conn. at 312, 101 A.3d 249. Read literally, this would mean that if it is clear before the officer acts that doing nothing likely would result in harm to the victim, then the exception applies, immunity is turned off, and whatever response or nonresponse the officer makes must be reasonable; a negligent response would subject the officer to liability. On this reading, the exception would operate as an off switch for immunity in a subset of high stakes situations, requiring officers to act reasonably when someone's life was on the line.

Second, the court has said that the exception applies if the plaintiff can show "(1) an imminent harm; (2) an identifiable victim; and (3) a public official to whom it is apparent that his or her conduct is likely to subject that victim to that harm." (Emphasis added; internal quotation marks omitted.) Id., at 313, 101 A.3d 249. Read literally, this would mean that an officer who has identified a victim as threatened by imminent harm is still free to respond unreasonably, so long as it is not apparent that the officer's particular response will likely result in harm to the victim. On this reading, the exception would generally permit officers to act unreasonably, even in high stakes situations, but would peel back that immunity if an officer showed a particularly egregious disregard for life.

We conclude that our Supreme Court's immunity jurisprudence supports the second reading of the exception. A plaintiff must therefore prove not only that it was apparent that a victim was at risk of imminent harm, but also that it was apparent that the defendants' chosen

entirely on a reading of Haynes and the language in Haynes clearly states the principle that the exception exists in the context of a failure to act.

Thus, the court concludes that one of the requirements for pleading the imminent harm to identifiable persons exception here is pleading facts that could show that the circumstances made it apparent to the defendant officers that their failure to act would be likely to subject the plaintiffs to imminent harm. Here, however, the plaintiffs have alleged that the defendant officers acted in a certain way, not that they failed to act and thus subjected the plaintiffs to imminent harm. Accordingly, the plaintiffs have not satisfied this requirement for pleading the imminent harm to identifiable persons exception.

In addition, the plaintiffs have failed to allege facts that satisfy the imminent harm requirement. To the extent the plaintiffs argue that the defendant officers' actions exposed them to imminent harm, they do not identify that imminent harm specifically in either the Fourth or Fifth Counts or in their opposition. (See Opp. at 17 ("[e]qually apparent was that their conduct subjected the Borg's to harm, as alleged in the Complaint").) To the extent the "imminent harm" is violation of

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> response or nonresponse to the imminent danger would likely subject the victim to that harm.

Brooks v. Powers, 165 Conn. App. 44, 60–61 (2016).

the plaintiffs' Fourth and Fourteenth Amendment rights, that claim is unavailing because the court has concluded that the plaintiffs have not adequately alleged such a violation. To the extent the "imminent harm" is emotional distress experienced by the plaintiffs, such harm is not the type of "dangerous condition" that rises to a level so as to invoke the imminent harm to identifiable victim exception. See Bento v. City of Milford, No. 3:13CV1385, 2014 WL 1690390, at *6 (D. Conn. Apr. 29, 2014) ("courts in this state have also held that the imminent harm complained of must be physical in nature in order for the exception to apply"); Pane v. City of Danbury, No. CV97347235S, 2002 WL 31466332, at *9 (Conn. Super. Ct. Oct. 18, 2002), aff'd, 267 Conn. 669 (2004)[5] ("Cases where plaintiffs allege "imminent harm" typically involve physical harm rather than emotional distress."[6]).

[5] Pane, 267 Conn. 669 (2004) was overruled by Grady v. Town of Somers, 984 A.2d 684 (2009). However, claims against the individual employee were withdrawn from the case before after the Superior Court decision in Pane, 2002 WL 31466332.

[6] See Elliott v. City of Waterbury, 245 Conn. 385, 715 A.2d 27 (1998) (decedent killed by hunter while on city-owned property); Purzycki v. Fairfield, 244 Conn. 101, 708 A.2d 937 (1998) (student injured in unsupervised school hallway); Fraser v. United States, 236 Conn. 625, 674 A.2d 811 (1996) (decedent stabbed at federal medical center); Burns v. Board of Education, 228 Conn. 640, 638 A.2d 1 (1994) (student injured by fall in school courtyard); Evon v. Andrews, 211 Conn. 501, 559 A.2d 1131 (1989); Gordon v. Bridgeport Housing Authority, supra, 208 Conn. 161, 544 A.2d 1185 (decedent attacked at city housing authority project); Shore v. Stonington, 187 Conn. 147, 444 A.2d 1379

Therefore, the defendant officers are entitled to governmental immunity with respect to the Fourth and Fifth Counts, and these counts are being dismissed.

2. Fourth Count: Negligent Infliction of Emotional Distress

Even if the defendant officers were not entitled to governmental immunity with respect to the claim for negligent infliction of emotional distress, it should be dismissed because the plaintiffs have failed to state a claim upon which relief can be granted.

To state a claim for negligent infliction of emotional distress, a plaintiff must allege that "(1) the defendant's conduct created an unreasonable risk of causing the plaintiff emotional distress; (2) the plaintiff's distress was foreseeable; (3) the emotional distress was severe enough that it might result in illness or bodily harm; and (4) the defendant's conduct was the cause of the plaintiff's distress." See Hall v. Bergman, 296 Conn. 169, 182 n.8 (2010) (quoting Carrol v. Allstate Ins. Co., 262 Conn. 433, 444 (2003)).

The plaintiffs allege that "[t]he defendant officers were negligent in causing the Plaintiff[s] to suffer emotional distress in that the defendants should have realized that their conduct involved an unreasonable risk of causing emotional

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(1982) (decedent killed by vehicle driven by intoxicated driver).

distress, and that distress might result in illness or bodily harm, and did cause the plaintiff bodily harm." (Am. Compl. IV, ¶ 31.) As an initial matter, this is a threadbare recital of the elements of a cause of action and does not satisfy the pleading requirements of Federal Rule of Civil Procedure 8(a).

However, even if the court were to accept this conclusory allegation as sufficient to satisfy the requirements of Rule 8(a), the plaintiffs have nonetheless failed to state a claim upon which relief can be granted. The plaintiffs allege that the defendant officers' conduct caused them to suffer "mental anguish, shock, fright, and embarrassment" as well as "anxiety, fear of police, feeling unsafe in own home, mental anguish, shock, fright, and embarrassment[.]" (Id. I, ¶¶ 28-29.)

Assuming arguendo that this harm is sufficiently severe for purposes of a claim for negligent infliction of emotional distress, but see Abdella, 343 F. Supp. 2d at 140-41, the plaintiffs have failed to allege facts sufficient to suggest that such harm was foreseeable to the defendants.

> The foreseeability requirement in a negligent infliction of emotional distress claim is more specific than the standard negligence requirement that an actor should have foreseen that his tortious conduct was likely to cause harm. Scanlon v. Connecticut Light & Power Co., 258 Conn. 436, 446-47, 782 A.2d 87 (2001). In order to state a claim for negligent infliction of emotional distress, the plaintiff must plead that the actor should have foreseen that her behavior would likely cause harm of a specific nature, i.e., emotional distress likely to lead to illness or bodily harm. Id.

Olson v. Bristol-Burlington Health Dist., 87 Conn. App. 1, 5, (2005). The plaintiffs have not alleged facts sufficient to suggest that the defendant officers should have foreseen that their behavior would likely cause emotional distress so severe as to be likely to lead to illness or bodily harm. First, as discussed above, they have not alleged facts to show that the defendants' search was unlawful. Second, they have not alleged facts sufficient to suggest that the manner in which the defendant officers surveilled the plaintiffs would foreseeably create an unreasonable risk of emotional distress. Cf. Olson, 87 Conn. App. at 5 ("to prevail on a claim of negligent infliction of emotional distress arising in the employment setting, a plaintiff need not plead or prove that the discharge, itself, was wrongful, but only that the defendant's conduct in the termination process created an unreasonable risk of emotional distress"). Although it is reasonably foreseeable that a covert surveillance operation would be upsetting to the person being surveilled, it is not reasonably foreseeable that a covert surveillance operation in and of itself creates an unreasonable risk of causing emotional distress so severe that it might result in illness or bodily harm. See Abdella, 343 F. Supp. 2d at 141 ("Plaintiffs allege that they are worried, depressed, unhappy in their community and that they have lost trust in the police. Any police activity may reasonably result in exactly the

type of response described by the plaintiffs, regardless of its legality. As unfortunate as these experiences are, the court cannot conclude that a police search involves an unreasonable risk of such distress, or that the distress alleged by plaintiffs is so severe as to cause illness or bodily harm without some proof of such harm, and the record is devoid of sufficient proof on this point.")

Because, as alleged here, neither the fact that the defendant officers conducted video surveillance of the property nor the manner in which they conducted the surveillance could create an unreasonable risk of causing the plaintiff foreseeable emotional distress that would be severe enough that it might result in illness or bodily harm, the plaintiffs have failed to state a claim for negligent infliction of emotional distress.

3. Fifth Count: Negligence

Even if the defendant officers were not entitled to governmental immunity with respect to the claim of negligence, it should be dismissed because the plaintiffs have failed to state a claim upon which relief can be granted.

"The essential elements of a cause of action in negligence are well established: duty; breach of that duty; causation; and actual injury." RK Constructors, Inc. v. Fusco Corp., 231 Conn. 381, 384 (1994). The plaintiffs allege that "[a]s . . . police officers for the Town of Westport, the defendant officers owed

the Plaintiffs a duty of care." (Am. Compl. V, ¶ 31.) However, they do not allege the basis, the nature, or the scope of the police officers' alleged duty to the plaintiffs. They allege that the supposed duty was breached "by the aforementioned search, which had no justification or excuse in law, and [was] instead illegal, improper and unrelated to any activity in which law enforcement officers may rightfully engage in the course of protecting persons or property or ensuring civil order." (Id. V, ¶ 32.) It seems, then, that the alleged duty the plaintiffs claim was owed by the defendant officers is one to follow the law with respect to searches. As discussed above, however, the plaintiffs have not adequately alleged that the defendant officers have failed to do so. Accordingly, the plaintiffs have failed to state a claim for negligence upon which relief can be granted.

E. Sixth Count: Indemnity Pursuant to Conn. Gen. Stat. § 52-557n

Connecticut General Statutes Section 52-557n(a)(1) provides in pertinent part

> (a) (1) Except as otherwise provided by law, a political subdivision of the state shall be liable for damages to person or property caused by: (A) The negligent acts or omissions of such political subdivision or any employee, officer or agent thereof acting within the scope of his employment or official duties . . .

Conn. Gen. Stat. § 52-557n(a)(1). Section 52-557n(a)(2) provides an exception for discretionary acts:

> (2) Except as otherwise provided by law, a political subdivision of the state shall not be liable for damages to person or property caused by . . . negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law.

Conn. Gen. Stat. § 52-557n(a)(2). The defendant officers' conduct in this case was discretionary and none of the three exceptions to governmental immunity apply. Thus, the plaintiffs have failed to state a claim for indemnity under Conn. Gen. Stat. § 52-557n. See Violano, 280 Conn. at 335 ("[T]he municipality and its official or employee will be immune from liability for their negligence if the act complained of was discretionary in nature and does not fall within the three exceptions to discretionary act immunity.").

Therefore, the Sixth Count is being dismissed.

F. Seventh Count: Indemnity Pursuant to Conn. Gen. Stat. § 7-465

Connecticut General Statutes Sections 7-465 provides, in pertinent part:

> Any town, city or borough, notwithstanding any inconsistent provision of law, general, special or local, shall pay on behalf of any employee of such municipality . . . all sums which such employee becomes obligated to pay by reason of the liability imposed upon such employee by law for damages awarded for infringement of any person's civil rights or for physical damages to person or property, except as set forth in this section, if the employee, at the time of the occurrence, accident, physical injury or damages complained of, was acting in the performance of his duties and within the scope of his employment, and if such occurrence, accident, physical injury or damage was not the result of

any wilful or wanton act of such employee in the discharge of such duty.

Conn. Gen. Stat. § 7-465. The court has concluded that the plaintiffs have failed to state a claim against the defendant officers. Therefore, the plaintiffs also have failed to state a claim for indemnification pursuant to Conn. Gen. Stat. § 7-465, and the Seventh Count is being dismissed. See Myers v. City of Hartford, 84 Conn. App. 395, 401 (2004) ("Under § 7-465, the municipality's duty to indemnify attaches only when the employee is found to be liable and the employee's actions do not fall within the exception for wilful and wanton acts."); Singhaviroj v. Bd. of Educ. of Town of Fairfield, 301 Conn. 1, 5 n.4 (2011) (noting that an indemnification claim brought under Conn. Gen. Stat. § 7-465 is "derivative of the plaintiff's claim under 42 U.S.C. § 1983 because the plaintiff cannot prevail under § 7-465 unless he prevails under § 1983").

IV. CONCLUSION

For the reasons set forth above, the Motion to Dismiss (Doc. No. 10) is hereby GRANTED.

The Clerk shall close this case.

It is so ordered.

Signed this 18th day of August 2016, at Hartford, Connecticut.

/s/
Alvin W. Thompson
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JOHN BORG;	:	**CIVIL ACTION NO.**
ALISON BORG	:	**3:15-cv-01380 (AWT)**
JOHN BORG, PPA, ROBIN BORG	:	
Plaintiffs	:	
	:	
v.	:	
	:	
TOWN OF WESTPORT, et al	:	
Defendants	:	**SEPTEMBER 8, 2016**

NOTICE OF APPEAL

Notice is hereby given that the Plaintiffs in the above named action, John Borg, Alison Borg, and John Borg, p.p.a. Robin Borg, hereby appeals to the United States Court of Appeals for the Second Circuit, from the order [Doc. 29] granting the Defendants' Chief of Police Dale E. Call, Detective John Rocke, Detective George Taylor, Detective Anthony Prezioso, Officer John Lacioma, and Officer Daniel Paz' Motion to Dismiss the action based on the pleadings pursuant to Fed.R.Civ.P. 12(b)(6), entered in this action on the 18th day of August 2016.

THE PLAINTIFFS,

BY: **/s/ A. Paul Spinella**
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CERTIFICATION

I HEREBY CERTIFY that on September 8, 2016, a copy of foregoing Notice of Appeal was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

/s/ A.Paul Spinella
A. Paul Spinella, Esq.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

JOHN BORG; **ALISON BORG;** **JOHN BORG, PPA, ROBIN BORG,**	:	**CASE NO. 3:15-CV-1380 (AWT)**
Plaintiffs,	:	
v.	:	
TOWN OF WESPORT; **DALE E. CALL, CHIEF OF POLICE;** **DETECTIVE JOHN ROCKE;** **DETECTIVE GEORGE TAYLOR;** **DETECTIVE ANTHONY P. PREZIOSO;** **OFFICER JOHN LACHIOMA;** **OFFICER DANIEL PAZ,**	:	
Defendants.	:	

JUDGMENT

This action having come on for consideration of the defendants' motion to dismiss the plaintiffs' amended complaint, before the Honorable Alvin W. Thompson, United States District Judge.

The Court having considered the full record of the case including applicable principles of law, granted the defendants' motion to dismiss. It is therefore;

ORDERED, ADJUDGED AND DECREED that judgment is hereby entered dismissing the case and the case is closed.

Dated at Hartford, Connecticut, this 15th day of September, 2016.

ROBIN D. TABORA, Clerk

By /s/ Linda S. Ferguson
Linda S. Ferguson
Deputy Clerk

EOD: 9/15/16