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October 3, 2019

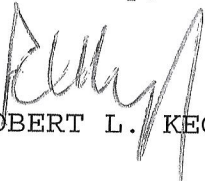
Senator Therese M. Terlaje
35th Guam Legislature
Guam Congress building
163 Chalan Santo Papa
Hagatna, Guam 96910

Re: October 3, 2019 Testimony

Dear Senator Terlaje,

Enclosed is proposed testimony for consideration at the October 3, 2019, hearing pertaining to the Guam Mandatory Medical Malpractice Arbitration Act. If you need additional copies or would like a scanned emailed copy please let me know. I look forward to attending the hearing tonight.

Sincerely,

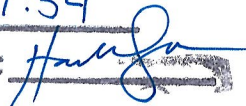

ROBERT L. KEOGH

RLK/tbm

**Senator
Therese M. Terlaje**

OCT 03 2019

Time: 11:54

Received by: 

TESTIMONY OF ROBERT L. KEOGH
GUAM MEDICAL MALPRACTICE MANDATORY ARBITRATION ACT (MMMAA)
OCTOBER 3, 2019

Thank you for the opportunity to provide testimony regarding my experience under the current statutory framework established by The Guam MMMAA, 10 GCA §10100, et seq. (the Mandatory Arbitration Act).

I have been practicing law on Guam and the Micronesian Islands since 1977. My law practice focuses primarily on plaintiff personal injury claims which include medical malpractice cases. I have represented clients in cases in the Superior Court of Guam prior to the passage of the Mandatory Arbitration Act, as well as several cases pursued under the provisions of the Act.

I have also represented clients in medical malpractice cases against the United States of America in the District Court of Guam pursuant to the Federal Tort Claims Act and also against the Government of Guam in the Superior Court pursuant to the Guam Government Claims Act. These medical malpractice cases against the federal and local governments do not involve the application of Guam's Mandatory Arbitration Act.

I have listened to the testimony presented at the September 19 hearing and will comment later upon some of the issues raised there. First, however, I will provide details of my experience in 2 arbitration cases I have recently been involved in to demonstrate the enormous burden placed upon claimants by Guam's Mandatory Arbitration Act.

Case One:

The claimants were a husband and wife who went to a local urgent care clinic. Unbeknownst to them at the time, the husband presented with classic symptoms of a medical condition known as cauda equina syndrome, a spinal condition that required urgent or emergent surgical intervention. His condition was misdiagnosed and by the time he was able to obtain proper surgical care in the Philippines he suffered a permanent and debilitating neurological condition affecting his groin and lower extremities. A claim was pursued through the American Arbitration Association pursuant to the Mandatory Arbitration Act. The arbitration process took nearly 5 years to complete. The Claimants' costs of arbitration alone amounted to **\$47,186.00**. I provide herewith a document marked Attachment A which details the costs incurred. This cost represents only the Claimants' share of the AAA administrative charges. The Respondent Clinic incurred similar charges since the Arbitrators ordered the costs of arbitration to be split evenly between the parties.

In addition to the \$47,186.00 in arbitration costs, the Claimants incurred litigation expenses in the amount of \$66,066.00 which covered costs of travel to investigate and take the deposition of off-island witnesses, deposition transcripts for other witnesses, claimant's expert witness fees, and payment of the deposition fees of Respondent's expert, and other litigation costs.

By the conclusion of the proceeding, Claimants had incurred \$113,252.00 in expenses to pursue their medical malpractice claim.

The arbitration panel consisted of a local Guam attorney, a Guam based architect and a doctor from Hawaii. The arbitration trial was held at a Hilton Hotel conference room. The cost of the room rental was split by the parties. The airfare, hotel and per diem expenses of the Hawaii doctor were also split by the parties. At the conclusion of the arbitration proceeding the Claimants were awarded \$1,315,822.80. Neither party filed for a trial de novo and the award was paid.

Case Two:

Claimant brought a dental malpractice claim against a Guam dentist based upon the failure of 9 dental implants. The claim was initially pursued pursuant to the Mandatory Arbitration Act through the American Arbitration Association and an arbitration trial was held in 2009. The Arbitration Panel consisted of a local lawyer, a local doctor and a local businessman. The panel never reached the merits of the claim since the panel dismissed the case on statute of limitations grounds.

Claimant's share of the AAA arbitration administrative fees was \$17,806.62.

Despite the potential penalty risk under the Act of having to pay the dentist's attorney's fees and expert witness fees if he did not improve his position by 40%, Claimant filed for a trial de novo in the Superior Court. (The absurdity of the penalty provision in the Arbitration Act is demonstrated by this case. Since Claimant received nothing through arbitration it was impossible for him to improve his position by 40%. 40% of nothing is still nothing.)

4 years later, in 2013, a jury trial was held in the Superior Court. Claimant was awarded \$62,236.35. The jury award was for \$113,157.00, reduced by 45% for comparative negligence. See Attachment B.

The dentist appealed to the Guam Supreme Court which reversed and remanded the case for a new trial. The case was settled before a new trial was held. See, Kennedy v. Sule, 2015 Guam 38.

In both of the above cases the Claimants had sufficient funds to afford the exorbitant arbitration expenses. In my years of experience, most potential claimants who come to me for a consultation do not. In nearly all potential medical malpractice claims on which I am consulted, once the prospective expenses are described, the Claimants chose not to pursue their claim due to inability to afford the costs.

Medical institutions and members of the medical community are accorded special protection under Guam law in ways not given to any other potential defendant in a civil negligence case. A case in point is that while the statute of limitations for any negligence claim is two (2) years, the statute of limitations on a medical malpractice claim is set at one (1) year. 7 GCA §11308. Also, any claim against any health care institution or professional, whether in tort **or contract**, is required pursuant to the Mandatory Arbitration Act to be pursued through expensive arbitration before access to court is even allowed. Further, the penalty provisions embedded in the Arbitration Act (See, 10 G.C.A. §§10142 and 10143) provide a formidable deterrent to seeking post arbitration relief through the courts. The Mandatory Arbitration Act protects all health care professionals and health care institutions and their employees or agents. The health care professionals protected by the Arbitration Act include; doctors, dentists, nurses, physician assistants, nurse practitioners, chiropractors, optometrists, podiatrists, pharmacists, physical therapists, osteopaths, psychologists, acupuncturists, audiologists, speech pathologists, respiratory therapists, nutritionists, clinical dieticians, cosmetologists and even veterinarians.

On the other hand, Guam law that is designed to protect the general public from potential bad medical practice is ignored and unenforced. Case in point, 10 GCA §12212.1, part of the Guam Medical Practices Act, requires the Medical Board to establish and maintain a searchable website that **shall** contain a wide variety of information about each practitioner including a listing of any civil judgments or arbitration awards for death or personal injury caused by the physician's negligence, error or omission in practice. No such searchable website exists. Guam's people are given no information that is made readily available to them to make proper and informed decisions as to the competency of a health care provider who would be caring for them or their loved ones.

Notwithstanding the Mandatory Arbitration Act, medical malpractice claims are already inherently expensive to pursue. A significant component of the litigation expense in a medical malpractice case is the retention of the services of expert witnesses to provide evidence in a very elemental part of the claim, i.e., "that the medical care provided fell below the standard of care." In my experience, experts' fees are quite high, and I guess for good reason as experts have worked long and hard to acquire the expertise in their field of specialty. Guam Chief Judge Frances Tydingco-Gatewood stated the following in her opinion in Rutledge v. United States, 2008 WL 3914965 (D. Guam), a medical malpractice case against the U.S. Government where I represented the plaintiffs.

Although there is no Guam law on the issue of standard of care, generally in cases of medical malpractice what is or is not the proper standard is a question for experts and it should be established only by their expert testimony. "In professional malpractice cases, expert opinion testimony is required to prove or disprove that the defendant performed in accordance with the prevailing standard of care, except in cases where the negligence is obvious to laymen."

Id., at *14 (citations omitted). See, Attachment C.

Thus, no medical malpractice case can proceed unless the claimant has retained the services of a qualified, credentialed expert witness who will testify under oath that in his or her opinion, to a reasonable degree of medical certainty, the treatment provided by the defendant doctor fell below the standard of care. A legal process known as a Daubert motion exists to challenge the expertise of any expert. A judge can strike the testimony of an expert witness if the expert does not possess appropriate credentials to render an opinion on the medical issue involved.

Victims of medical malpractice are, oftentimes, made uniquely vulnerable by the negligent treatment they have suffered. They are often subjected to debilitating consequences of the malpractice, are out of work and thus financially as well as physically compromised. Faced with a one year statute of limitations, the excessive costs of arbitration and litigation plus the difficulty in finding an attorney who is willing to handle their case, potential claimants find, far more often than not, that their claims will just have to go unredressed. The Mandatory Arbitration Act exacerbates their circumstance inordinately and, in essence, tends to erode rather than promote corrective justice.

I would like to address a few of the points raised during the September 19 hearing that I believe were not properly explained.

LIABILITY CAPS

Caps on non-economic damages was discussed at the hearing and offered as a suitable means of protecting any defendant from a large damage award. Non-economic damages are essentially what is generally referred to as pain and suffering. Caps on pain and suffering are an inherently biased way of placing the entire burden of medical malpractice, or any negligence, upon the victim. Why? There is no reasonable basis for this policy. Guam law provides that damages must at all time be reasonable. Judges can reduce large damage awards to a reasonable level by a process called remittitur. There is no evidence that excessive jury awards are a problem on Guam.

Liability caps is an approach aggressively pursued by the insurance industry in the United states in recent years to limit jury awards in negligence claims.

I strongly urge every member of this panel to watch a documentary, available on Amazon Prime, and perhaps on other platforms, called **Hot Coffee**. The documentary treats 3 separate issues dealing with the insurance industries efforts to enact "tort reform," which is a term used to refer to limiting jury awards in negligence cases. The 3 issues are: 1. As the title suggests, the massive effort by the insurance industry to distort the verdict and outcome of the now famous McDonalds coffee case; 2. The efforts by the insurance industry to enact liability caps in as many states as possible; and 3. The effort by the insurance industry to enact laws state by state for the election, as opposed to appointment, of judges. The reason for this is that in elections, massive amounts of money can be spent by insurance companies to support favorable or "friendly" judges.

One anecdote from the documentary about caps was particularly compelling. A woman's teenage son was rendered quadriplegic through the negligence of a third party. Pursuant to an initiative in their state a few years earlier a cap of \$250,000 was enacted on non-economic damages. The woman's son was thus able to collect only \$250,000 for the pain and suffering he would endure for the remainder of his life due to the cap. When asked by the interviewer if she had voted for the initiative the woman responded yes, but that she thought the cap would only apply to "frivolous cases."

Of course the caps apply to **ALL** cases, whether frivolous or not. Caps are an insidious means of protecting insurance companies from high damage awards. They are not designed to stop frivolous cases. They are designed to limit awards in **ALL** cases, regardless of their merit. **JUDGES, NOT CAPS**, are the best way to prevent frivolous cases. If a case can be readily determined to be frivolous it is subject to being dismissed by a fair and honest judge on summary judgment. Caps are only designed to protect insurance companies and defendants.

ARBITRATION FEES CANNOT BE WAIVED

It was incorrectly stated at the September 19 hearing that the AAA can **WAIVE** arbitration fees and costs. Not so! For individuals who can prove financial hardship, the AAA will, on a case by case basis, **DEFER, NOT WAIVE**, their filing fee. Thus, regardless of the outcome of the arbitration, the fee will have to be paid at the end of the proceeding. The claimants in Case One cited above were charged a filing fee of \$10,200.00. This arbitration filing fee is hefty compared to a plaintiff's \$300.00 filing fee for a case initiated in the Superior Court of Guam or \$400.00, if filed with the District Court of Guam.

Attachment D is a letter from the American Arbitration Association sent in connection with Case One above demonstrating how they dealt with a hardship request by the Claimants. They charged \$1,200.00 up front and deferred \$9,200 of the filing fee which ultimately had to be paid at the end of the proceeding.

On top of the burdensome filing fee, which is by far the smaller portion of the arbitration expense, the fees of the arbitrators, frequently charged at a rate of \$350 per hour or more, cannot be waived or deferred. These costs must be paid up front. As pointed out earlier in Case One, the total cost of arbitration alone was \$47,186.00.

In contrast, other civil litigants in the Superior Court of Guam or District Court of Guam have judges made available to them at no additional cost. These litigants do not have to pay Judges any hourly fee for their time in studying and deciding the case. Litigants also do not have to pay for use of the courtroom and pay for the Judge's airfare, hotel room and per diem just to hear their case at a trial. These expenses are borne by all taxpayers thus spreading the costs over the population at large. This is how a society is designed to work.

ALTERNATIVES TO THE AMERICAN ARBITRATION ASSOCIATION

At the September 19 hearing it was mentioned that there are alternatives to the AAA for administering proceedings on Guam under the Mandatory Arbitration Act. There are no viable alternatives.

First of all, PAMS was mentioned as a local alternative. It is not. One of the principal owners of PAMS is attorney Mitch Thompson, who more often than not is the defense counsel on medical malpractice claims. How could a Claimant's attorney possibly justify to his or her client using an arbitration company owned by the opposing attorney? Also, through past inquiries PAMS has advised that they do not handle medical malpractice claims. PAMS is not a viable alternative.

In addition, Section 10101(a) of The Arbitration Act defines "Association" as "The American Arbitration Association or other entity organized to arbitrate disputes pursuant to this chapter." There is no other entity organized to arbitrate disputes pursuant to this chapter. By statute, Claimants are locked into the expensive AAA to arbitrate their claims.

STANDARD OF CARE ON GUAM

I was stunned to hear it mentioned at the September 19 hearing that the standard of care of medical practice on Guam is below that of U.S. locations. To practice medicine on Guam a physician must be a graduate of a U.S. medical school or have obtained a residency or specialized certification in the U.S. Whether there are or there aren't certain diagnostic facilities available on Guam, this does not relieve the practicing doctor from performing his or her duties to the same standard of care as any other U.S. trained and licensed physician. I urge you to ask each and every doctor who testifies at this proceeding if the "Standard of Care" that they provide their patients here on Guam is lower than the standard of care they would provide if they were practicing elsewhere.

I do not know of any other jurisdiction in the United States that statutorily mandates all medical malpractice cases to be arbitrated before claimants can have access to the courts. Most arbitrations are consented to by the parties in contracts or after the claim arises. Nevertheless, some state legislatures and state courts have attempted to invalidate certain mandatory arbitration **agreements**, in instances where there is a perception that requiring the parties to settle their disputes through arbitration would be unfair, contrary to public policy, or would somehow not protect the interests of vulnerable individuals.

In my opinion, the Guam Mandatory Medical Malpractice Arbitration Act has been put into law simply to protect the medical community at the expense of the victims of medical negligence. Before enactment of the Mandatory Arbitration Act, malpractice claims could proceed directly to court for a modest filing fee. There is no evidence of a "crisis" on Guam regarding medical malpractice claims. There is no preamble statement in the Mandatory Arbitration Act asserting that there is such a crisis that the law is seeking to remedy. Again, in my opinion, the most equitable approach to ending the burdens imposed by the Guam Mandatory Medical Malpractice Arbitration Act is simply to repeal the law and allow victims of medical negligence direct access to courts like all other civil litigants. The victims of medical negligence should be treated no differently than the victims of a negligent driver of a motor vehicle or a property owner who allows an inherently dangerous condition to exist on their property. The judicial system and process is designed to provide equal access to justice to everyone. Forcing victims of medical, dental, or even veterinarian negligence to pursue inordinately expensive arbitration amounts to nothing more than an abject denial of that right to equal justice.

AMERICAN ARBITRATION ASSOCIATION
Detail Invoice/Statements for Case No. 74-20-1200-0294-1-TM

REFERENCE #	DESCRIPTION	AMOUNT	BALANCE
10342801	Initial Administrative Fee	1,000.00	\$1,000.00
10343319	Initial Administrative Fee	9,200.00	10,200.00
10541404	Your share of Neutral Compensation Deposit covering 4 hours of Preliminary Matters	1,200.00	11,400.00
11023674	Your share of Neutral Compensation Deposit covering 8 hours of Study and Preliminary Matters	2,200.00	13,600.00
11041187	Final Fee	4,000.00	17,600.00
11041195	Arbitrator's Compensation for 4 days of hearing	9,200.00	26,800.00
11041209	Arbitrator's Compensation for 20 hours of study time	5,500.00	32,300.00
11041218	Expenses to be reimbursed to Arbitrator for airfare, hotel	2,136.00	34,436.00
11421766	Arbitrator's Compensation for hearing and study time	12,250.00	46,686.00
11421769	Expenses to be reimbursed to Arbitrator for travel and hearing room rental	500.00	47,186.00
TOTAL CHARGES			\$47,186.00

FILED
SUPERIOR COURT
OF GUAM

IN THE SUPERIOR COURT OF GUAM

HAGATNA, GUAM

SEP 26 AM 11:26

MICHAEL W. KENNEDY,

Plaintiff,

vs.

HUGH SULE,

Defendant.

SUPERIOR COURT OF GUAM

Civil Case No. CV0499-02

VERDICT FORM

WE, THE JURY answer to questions submitted to us as follows:

1. Was Dr. Hugh Sule negligent in the treatment of Michael Kennedy?

☒ Yes

☐ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was Dr. Sule's negligence a substantial factor in causing harm to Mr. Kennedy?

☒ Yes

☐ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. What are Mr. Kennedy's total damages? Do not reduce the damages based on fault, if any, of Mr. Kennedy. Do not consider any bridgework performed on Mr. Kennedy's lower jaw.

Past Economic Loss \$ 10,537

Future Economic Loss \$ 72,620

Past Noneconomic Loss

Past physical pain and mental suffering
resulting from the injury \$ 0

Past loss of enjoyment of life
resulting from the injury\$ 0

Past disfigurement
resulting from the injury\$ 0

Past inconvenience
resulting from the injury\$ 14,000.-

Future Noneconomic Loss

Future physical pain and mental suffering
resulting from the injury\$ 0

Future loss of enjoyment of life
resulting from the injury\$ 0

Future disfigurement
resulting from the injury\$ 0

Future inconvenience
resulting from the injury\$ 14,000.-

TOTAL ECONOMIC & NONECONOMIC DAMAGES\$ 113,157.-

If Mr. Kennedy has proved any damages, then answer question 4. If Mr. Kennedy has not proved any damages, then stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was Mr. Kennedy negligent?

☒ Yes

☐ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was Mr. Kennedy's negligence a substantial factor in causing his harm?

☒ Yes

☐ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What percentage of responsibility for Mr. Kennedy's harm do you assign to:

Dr. Sule: 55 %

Mr. Kennedy: 45 %

TOTAL: 100 %

Signed

FOREPERSON

Dated: 26 Sept 13

After it has been signed, deliver this verdict form to the Judge.

1 LAW OFFICE OF
2 **ROBERT L. KEOGH**

3 POST OFFICE BOX GZ
4 HAGATÑA, GUAM 96932
5 TELEPHONE (671) 472-6895

MAHER & THOMPSON, P.C.

FILED
SUPERIOR COURT
OF GUAM

2013 DEC -6 AM 9:35

CLERK OF COURT

Attorneys for Plaintiff

IN THE SUPERIOR COURT OF GUAM

6 **MICHAEL W. KENNEDY,**
7
8 Plaintiff,

CIVIL CASE NO. CV0499-02

9 vs.

JUDGMENT

10 **HUGH SULE,**
11 Defendant.

12
13
14 This action came on for trial before the Court and a Jury,
15 Honorable James L. Canto II presiding, and the issues having been
16 duly tried and the Jury having duly rendered its verdict;

17
18 It is Ordered and Adjudged that Plaintiff Michael W. Kennedy
19 recover from the Defendant Hugh Sule the sum of Sixty Two Thousand
20 Two Hundred Thirty Six and 35/100 (\$62,236.35) with interest at the
21 rate of 6% per annum as provided by law, plus his costs of action.

22
23
24
25 DATE: DEC 04 2013


26 **HONORABLE JAMES L. CANTO II**
27 Judge, Superior Court of Guam

I do hereby certify that the foregoing
is a full true and correct copy of the
original on file in the office of the
clerk of the Superior Court of Guam.
Dated at Hagatña, Guam

DEC 06 2013

 **James R. Borja**
Deputy Clerk, Superior Court of Guam

By: AARON T. QUITUGUA
Deputy Clerk
Supreme Court of Guam

Westlaw.

Slip Copy
Slip Copy, 2008 WL 3914965 (D.Guam)

Page 1

HRutledge v. U.S.
D.Guam, 2008.

Only the Westlaw citation is currently available.

District Court of Guam.

Deborah K. RUTLEDGE and Thomas, R. Rutledge,
Plaintiffs,

v.

UNITED STATES of America, Defendant.

Civil No. 06-00008.

Aug. 21, 2008.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FRANCES M. TYDINGCO-GATEWOOD, Chief Judge.

*1 This matter came before the court for a bench trial beginning February 19, 2008 and concluding on March 18, 2008. The Plaintiffs, Deborah K. Rutledge and Thomas R. Rutledge, were represented by Robert L. Keogh, Esq. The Defendant, the United States of America, was represented by Assistant United States Attorney Mikel Schwab and Special Assistant United States Attorney Katharyne Clarke from Louisiana. The Plaintiffs brought this medical malpractice action against the United States under the Federal Tort Claims Act.

THE COURT, having considered the evidence, oral and documentary, hereby issues the following Findings of Fact and Conclusions of Law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.^{FN1}

FN1. To the extent that a finding of fact should be deemed a conclusion of law, or a conclusion of law deemed a finding of fact, it shall so be considered.

JURISDICTION AND VENUE

Plaintiffs brought this action under the Federal Tort Claims Act for damages arising out of the alleged negligent acts or omissions of employees of the United States of America ("United States") while acting within the course and scope of their employment under circumstances where the United States, if a private person, would be liable to the Plaintiffs under the laws of Guam, where the acts or omissions complained of occurred. 28 U.S.C. § 1346(b); Nationwide Mut. Ins. Co. v. Liberatore, 408 F.3d 1158, 1163 (9th Cir.2005).

Plaintiffs satisfied the conditions precedent to bringing a lawsuit against the United States under the Federal Tort Claims Act. See 28 U.S.C. §§ 2401 and 2675. (Plaintiffs' Trial Ex. 2).

This court has original jurisdiction pursuant to the provisions of 28 U.S.C. §§ 1331 and 1346(b)(1). Jurisdiction of this court over the United States is invoked pursuant to 28 U.S.C. § 2671, et. seq.

Venue in the District Court of Guam is proper under 28 U.S.C. § 1402 because the negligent acts and omissions complained of occurred on Guam.

FINDINGS OF FACT

1. Plaintiff Deborah K. Rutledge ("Mrs. Rutledge") at all times pertinent herein was married to an active duty service member and considered a United States Air Force dependent. As the spouse of an active duty service member, Mrs. Rutledge's primary health care benefits

were provided by the Department of Defense through a network of medical clinics and hospitals. (Testimony ("Test.") Mrs. Rutledge, 2/19/08).

2. Plaintiff Master Sergeant Thomas R. Rutledge ("Master Sergeant Rutledge") was, at all relevant times, an active duty service member in the United States Air Force. (Test. Master Sergeant Rutledge, 3/4/08).

3. During the months of July and August of 2004, Mrs. Rutledge received medical treatment rendered by government employees of the military health care network located on Guam. (Test. Mrs. Rutledge, 2/19/08).

***JULY 27, 2004 APPOINTMENT AT ANDERSEN
AIR FORCE BASE CLINIC***

4. Mrs. Rutledge received medical care at the Andersen Air Force Base Family Practice Clinic on July 27, 2004, August 2, 2004 and August 17, 2004. (Test. Mrs. Rutledge, 2/19/08, Plaintiffs' Trial Exs. 3, 5, and 8).

*2 5. Mrs. Rutledge first sought treatment at the Andersen Air Force Base Clinic on July 27, 2004, because when she awoke that morning, "the right side of [her] vagina felt numb." (Test. Mrs. Rutledge, 2/19/08).

6. Mrs. Rutledge called Andersen Air Force Base Clinic and told the receptionist at the Clinic that she needed an appointment because her vagina felt numb. Specifically, she stated that she needed to see a doctor about her condition. She received an appointment for 2:40 p.m. the same day. (Test. Mrs. Rutledge, 2/19/08).

7. When Mrs. Rutledge arrived at the Andersen Air Force

Base Clinic, personnel provided her with a form called "Low Back Pain-Adult" (hereinafter referred to as "Adult Low Back Pain form"). This form included a checklist of symptoms relevant to the evaluation of low back pain in an adult. (Test. Mrs. Rutledge, 2/19/08, Defendant's Trial Ex. M 5).

8. Mrs. Rutledge completed the checklist portion of the form. She checked "yes" to the following questions: "pain worse at night in bed," "new urine or stool problems like leakage or incontinence," and "loss of sensation in the groin area." (Test. Mrs. Rutledge, 2/19/08, Defendant's Trial Ex. M 5).

9. Mrs. Rutledge was seen by Nurse Practitioner Natalie Y. Giscombe on July 27, 2004. At that time, Nurse Practitioner Giscombe was an Air Force officer, holding the rank of Major in the United States Navy, and was licensed to practice as an adult nurse practitioner. (Test. Giscombe, 2/22/08, 3/12/08).

10. Major Giscombe has since been promoted and presently holds the rank of Lieutenant Colonel (hereinafter referred to as "Lt. Col. Giscombe") in the United States Navy. (Test. Giscombe, 2/22/08).

11. Lt. Col. Giscombe ordered a urinalysis for Mrs. Rutledge. (Test. Giscombe, 2/22/08, Defendant's Trial Ex. M 7).

12. Mrs. Rutledge remained at the Andersen Air Force Base Clinic to await the results of the urinalysis. After Lt. Col. Giscombe received the results, she informed Mrs. Rutledge that the urinalysis was normal and did not show signs of a urinary tract infection. (Test. Giscombe, 2/22/08).

13. Lt. Col. Giscombe diagnosed Mrs. Rutledge with right sciatica and prescribed Naproxen, Vicodin, and Flexoril for Mrs. Rutledge. She did not order an x-ray because she believed it was not warranted at that time. (Test. Mrs. Rutledge, 2/19/08, Test. Giscombe, 2/22/08, Defendant's Trial Ex. M 6).

14. After the urinalysis ruled out the possibility of a urinary tract infection, no further testing was performed to investigate Mrs. Rutledge's complaint of urination frequency. Lt. Col. Giscombe concluded that since Mrs. Rutledge was "new to Guam," she was drinking a lot of water. In fact, Mrs. Rutledge had arrived on Guam almost ten months before, in October 2003. (Test. Mrs. Rutledge, 2/19/08, Test. Giscombe, 2/22/08).

15. Plaintiffs' expert, Dr. Gary Towle, Board Certified in Emergency Medicine, testified that it was below the standard of care to fail to perform further testing to investigate Mrs. Rutledge's complaint of urination frequency after the urinalysis ruled out the possibility of a urinary tract infection.

*3 16. At the July 27, 2004 appointment, Lt. Col. Giscombe did not address Mrs. Rutledge's complaint of loss of sensation in the groin area. (Mrs. Rutledge, 2/19/08).

17. At the July 27, 2004 appointment, Lt. Col. Giscombe did not request Mrs. Rutledge to undress during her examination. Lt. Col. Giscombe failed to consult with her physician preceptor. Lt. Col. Giscombe did not refer Mrs. Rutledge to a specialist. (Test. Mrs. Rutledge, 2/19/08, Test. Giscombe, 2/22/08).

18. The United States expert, Dr. Michael W. Meriwether, Board Certified in Neurological Surgery, testified that the

only accurate way to test for numbness is to have the patient undress so that the affected area is exposed for examination. (Test. Meriwether, 3/10/08).

19. As a Nurse Practitioner, Lt. Col. Giscombe is considered a midlevel provider. (Plaintiffs' Trial Ex. 33).

20. A physician preceptor is a medical doctor in the Air Force who is assigned to a midlevel provider to review their work. Even though Lt. Col. Giscombe was assigned a particular physician preceptor in July and August of 2004, she was free to consult any one of the three other preceptors at the Andersen Air Force Base Clinic. (Test. Giscombe, 2/22/08).

21. Mrs. Rutledge believed she was being treated by a physician and that Lt. Col. Giscombe was a medical doctor. Consistent with this belief, even three months after her initial visit to the Andersen Air Force Base Clinic, the Plaintiffs referred to Lt. Col. Giscombe as Dr. Giscombe, when the Plaintiffs wrote a letter of complaint to the United States Air Force in October 2004. (Test. Mrs. Rutledge, 2/19/08, Defendant's Trial Ex. Y).

22. The court finds that, even assuming *arguendo*, that Lt. Col. Giscombe informed Mrs. Rutledge that she was a nurse practitioner and not a medical doctor, her actions on July 27, 2004, still fell below the standard of care when she failed to consult a physician preceptor about Mrs. Rutledge's case.

23. Mrs. Rutledge's condition did not improve after the July 27, 2008 appointment. Her condition worsened, and she experienced greater numbness in her vaginal area, and experienced numbness in her buttocks, the backs of her thighs, and soles of her feet. Additionally, she testified that she needed to press on her bladder in order to urinate.

(Test.Mrs.Rutledge, 2/19/08).

(Test.Mrs.Rutledge, 2/19/08).

**AUGUST 2, 2004 APPOINTMENT AT ANDERSEN
AIR FORCE BASE CLINIC**

24. Mrs. Rutledge called the Andersen Air Force Base Clinic on August 2, 2004, and insisted on receiving an appointment with a physician for the same day. She informed the appointment clerk of her inability to urinate without pressing on her bladder, and that the sensation of numbness had spread to her lower body. Mrs. Rutledge subsequently received an appointment at the Andersen Air Force Base Clinic for treatment that same day. (Test. Mrs. Rutledge, 2/19/08, Defendant's Trial Ex. M 8).

25. Staff at the Andersen Air Force Base Clinic again provided Mrs. Rutledge with the Adult Low Back Pain form. (Test. Mrs. Rutledge, 2/19/08, Defendant's Trial Ex. M 8).

*4 26. Mrs. Rutledge completed the checklist portion of the form. She checked "yes" to the question "loss of sensation in groin area." (Test. Mrs. Rutledge, 2/19/08, Defendant's Trial Ex. M 8).

27. At the second visit, on August 2, 2004, Mrs. Rutledge was seen by Captain Steven Rau ("Capt.Rau"), an Air Force officer and a licensed physician assistant. (Test.Rau, 2/25/08).

28. Mrs. Rutledge informed Capt. Rau of her worsening condition and explained that she was experiencing greater numbness in her vagina, and that the numbness had spread to her buttocks, the backs of her thighs, and soles of her feet. Additionally, she told Capt. Rau that she needed to press on her bladder in order to urinate.

29. Capt. Rau documented her complaint as "numbness in her right gluteal/thigh area, pain down her left leg to her calf." (Defendant's Trial Ex. M 8).

30. Capt. Rau was aware that this was Mrs. Rutledge's second visit to the Andersen Air Force Base Clinic for unresolved back pain and urinary complaints because he had reviewed her previous urinalysis lab results on the computer. (Test.Rau, 2/25/08).

31. On the August 2, 2004 visit, Capt. Rau performed a physical examination of Mrs. Rutledge and ordered L-spine x-rays. Just like Lt. Col. Giscombe, he did not ask Mrs. Rutledge to undress during his examination. Capt. Rau also did not perform tests addressing her complaint of numbness. (Test.Rau, 2/25/08, Test.Mrs.Rutledge, 2/19/08).

32. Capt. Rau concluded that Mrs. Rutledge was dehydrated based upon the specific gravity in her July 27, 2004 urinalysis lab results. (Test.Rau, 2/25/08).

33. Capt. Rau told Mrs. Rutledge that a radiologist at the United States Naval Hospital ("Naval Hospital") would read the x-ray and that the results would be back in one to three weeks. (Test.Rau, 2/25/08).

34. Capt. Rau briefly looked at the x-rays taken on the August 2, 2004 visit, and told Mrs. Rutledge that he did not see any "overtly concerning abnormalities on the x-ray" but that the radiologist at Naval Hospital would be able to examine them more thoroughly. (Test.Rau, 2/25/08).

35. Capt. Rau prescribed Valium to be taken instead of the Flexoril prescribed by Lt. Col. Giscombe. Mrs. Rutledge was told to continue the use of both Naproxen and Vicodin. (Test. Rau, 3/12/08, Defendant's Trial Ex. M 9).

36. Mrs. Rutledge testified that Capt. Rau told her he would prescribe physical therapy for her back at the Naval Hospital. She testified that Capt. Rau told her to call the Naval Hospital that afternoon to set up an appointment, and in the meantime he would submit her referral for physical therapy at Naval Hospital. (Test. Mrs. Rutledge, 2/19/08).

37. When Mrs. Rutledge called the Naval Hospital later that afternoon, as instructed by Capt. Rau, she discovered that Naval Hospital had no record of any referral for her. She subsequently called the Andersen Air Force Base Clinic to inform it of the situation, but never received any follow-up. She concluded that Capt. Rau had changed his mind about her need for physical therapy. (Test. Mrs. Rutledge, 2/19/08).

*5 38. At the August 2, 2004 appointment, Capt. Rau instructed Mrs. Rutledge to return to the Andersen Air Force Base Clinic if her symptoms failed to improve. (Test. Rau, 3/12/08, Defendant's Trial Ex. M 9).

39. Just like Lt. Col. Giscombe, Capt. Rau did not consult with his supervising physician preceptor concerning Mrs. Rutledge's condition. The August 2, 2004 medical record of Mrs. Rutledge by Capt. Rau was neither reviewed nor countersigned by Capt. Rau's physician preceptor at any time. (Test. Rau, 2/25/08).

40. According to Capt. Rau in August of 2004, not all of the medical records were regularly reviewed by a physician preceptor at the Andersen Air Force Base

Clinic. The policy was for medical doctors to randomly review approximately 10% of a physician assistant's records at the end of every month. (Test. Rau, 2/25/08).

41. Capt. Rau failed to adequately address and investigate Mrs. Rutledge's complaint of loss of sensation in her groin area. Plaintiffs' expert, Dr. Towle, testified that failing to perform further testing to investigate Mrs. Rutledge's continuing complaint of urination frequency and consult with a supervising physician preceptor was below the standard of care. (Test. Towle 2/25/08).

42. Mrs. Rutledge believed she was being treated by a physician and that Capt. Rau was a medical doctor. Consistent with this belief, even three months after her initial visit to the Andersen Air Force Base Clinic, the Plaintiffs referred to Capt. Rau as Dr. Rau, when the Plaintiffs wrote a letter of complaint to the United States Air Force in October 2004. (Test. Mrs. Rutledge, 2/19/08, Defendant's Trial Ex. Y).

43. The court finds that, even assuming *arguendo*, that Capt. Rau informed Mrs. Rutledge that he was a physician assistant and not a medical doctor, his actions on August 2, 2004, fell below the standard of care when he failed to consult a physician preceptor about her case.

44. Mrs. Rutledge testified that after her August 2, 2004 appointment, her condition did not improve, so she called the Andersen Air Force Base Clinic for a referral to the Naval Hospital. (Test. Mrs. Rutledge, 2/19/08).

45. On August 16, 2004, Mrs. Rutledge called the Andersen Air Force Base Clinic for the third time since her symptoms began, complaining of back pain and numbness. Mrs. Rutledge informed the receptionist that the medication she was taking was not working and she

wanted a referral to Naval Hospital. (Test. King, 3/12/08, Defendant's Trial Ex. M 13).

46. Triage nurse Captain Stephanie King ("Capt. King") returned Mrs. Rutledge's call. Mrs. Rutledge told Capt. King that the medication was not working and that she wanted a referral to the Naval Hospital Orthopedic Clinic. In order to obtain a referral, Mrs. Rutledge was told she first had to come in for an appointment. Capt. King scheduled Mrs. Rutledge for a 9:45 a.m. appointment the next day at the Andersen Air Force Base Clinic. (Test. King, 3/12/08, Defendant's Trial Ex. M 13).

**AUGUST 17, 2004 APPOINTMENT AT ANDERSEN
AIR FORCE BASE CLINIC**

*6 47. On August 17, 2004, Mrs. Rutledge arrived for her scheduled appointment at the Andersen Air Force Base Clinic. Upon checking in for her appointment at the reception area, Mrs. Rutledge was again handed the Adult Low Back Pain form. She refused to fill it out because she had completed it twice in the past and received no relief. Mrs. Rutledge told the staff she would not answer any question on the Adult Low Back Pain form because she was only there to get a referral to Naval Hospital. (Test. Mrs. Rutledge, 2/19/08).

48. Instead of receiving an immediate referral she was taken to see Lt. Col. Giscombe. On August 17, 2004, Mrs. Rutledge still believed Lt. Col. Giscombe to be a physician. Mrs. Rutledge refused to be examined by Lt. Col. Giscombe, and instead insisted on a referral. Mrs. Rutledge made sure that Lt. Col. Giscombe enter the referral into the computer system in her presence, because the last time a physical therapy referral was ordered by Capt. Rau, it was never transmitted to Naval Hospital. Lt. Col. Giscombe entered the referral into the computer. The meeting with Lt. Col. Giscombe lasted approximately 10

minutes. (Test. Mrs. Rutledge, 2/19/08).

49. When Lt. Col. Giscombe saw Mrs. Rutledge on August 17, 2004, she recalled previously having examined Mrs. Rutledge on July 27, 2004. Lt. Col. Giscombe also knew from the record of her x-ray results, that Mrs. Rutledge had been seen at the Andersen Air Force Base Clinic on August 2, 2004. (Test. Giscombe, 2/22/08).

50. Mrs. Rutledge testified that Lt. Col. Giscombe told her after reviewing her chart, that it looked like she had a herniated disc. Mrs. Rutledge then asked Lt. Col. Giscombe when she was going to be informed of that diagnosis. Mrs. Rutledge testified that Lt. Col. Giscombe failed to respond to the question. (Test. Mrs. Rutledge, 2/19/08).

51. Mrs. Rutledge informed Lt. Col. Giscombe of her worsening condition and explained to her that she experienced greater numbness in her vagina, and that the numbness had spread to her buttocks, the backs of her thighs, and soles of her feet. Additionally, she testified that she told Lt. Col. Giscombe that she needed to press on her bladder in order to urinate. She told Lt. Col. Giscombe that nothing was getting better, and that her condition was worsening. (Test. Mrs. Rutledge, 2/19/08).

52. Lt. Col. Giscombe did not further investigate Mrs. Rutledge's complaint of vaginal numbness on August 17, 2004. Just like the July 27, 2004 visit, she did not ask Mrs. Rutledge to undress. Lt. Col. Giscombe failed to perform any tests regarding Mrs. Rutledge's complaints of numbness. (Test. Mrs. Rutledge, 2/19/08).

53. The United States' expert, Dr. Meriwether, testified that the only accurate way to test for numbness is to have the patient undress so that the affected area is exposed for

examination. (Test .Meriwether, 3/10/08).

54. Lt. Col. Giscombe knew that the only way to test for numbness in the perineal area would be to perform a vaginal exam and/or a rectal exam. Just as on July 27, 2004, Lt. Col. Giscombe failed to consult with her physician preceptor and failed to refer Mrs. Rutledge to a specialist. (Test.Giscombe, 2/22/08).

*7 55. Dr. Towle testified that failing to consult with her physician preceptor given Mrs. Rutledge's symptoms, fell below the standard of care owed to Mrs. Rutledge. (Test.Towle, 2/25/08).

56. Pursuant to Andersen Air Force Base 36th Medical Group Instruction 40-112 (Plaintiffs' Trial Ex. 33), which was in effect in July and August 2004, as a mid-level provider, Lt. Col. Giscombe was required to refer her patient to her assigned physician preceptor as her patient had not improved after the second visit. Because Lt. Col. Giscombe was referring Mrs. Rutledge to higher specialty care, she did not think it was necessary to refer Mrs. Rutledge to her physician preceptor. (Test.Giscombe, 2/22/08).

57. Lt. Col. Giscombe discontinued the use of Naproxen, as Mrs. Rutledge said it was ineffective, and instead prescribed Vioxx for pain. (Test. Giscombe, 2/22/08, Defendant's Trial Ex. M 15).

ORTHOPEDIST REFERRAL TO NAVAL HOSPITAL

58. The referral given by Lt. Col. Giscombe to Mrs. Rutledge on August 17, 2004, was a *routine referral* and not an *emergency or urgent referral* with an orthopedist at

the Naval Hospital. As a result, Mrs. Rutledge was not given an appointment to see an orthopedist at the Naval Hospital until August 23, 2004. (Test. Giscombe, 2/22/08, emphasis added).

59. Mrs. Rutledge's condition did not improve during the period between her August 17, 2004 appointment, and her scheduled August 23, 2004 appointment. She testified that during that time she was in constant pain and had difficulty sleeping. (Test.Mrs.Rutledge, 2/19/08).

60. Super Typhoon Chaba was approaching Guam over the weekend of August 21, 2004. Due to the impending storm, the Naval Hospital called Mrs. Rutledge on August 22, 2004, to cancel the orthopedic appointment scheduled for August 23, 2004. She was told that the appointment would be rescheduled after the storm passed, and that she would be among one of the first people called to reschedule and given one of the earliest appointment times, since her appointment had been scheduled for Monday morning. (Test. Mrs. Rutledge, 2/19/08, Test. Master Sergeant Rutledge, 3/4/08).

61. On or about August 24, 2004, Mrs. Rutledge experienced an episode of fecal incontinence while she was vacuuming. She attributed this event to stress. She considered it an "accident" and was ignorant of the medical significance of this event. (Test.Mrs.Rutledge, 2/19/08).

62. Mrs. Rutledge neither called 911 nor sought immediate medical care following her episode of fecal incontinence. Mrs. Rutledge testified that both Lt. Col. Giscombe and Capt. Rau never informed her that she should seek immediate medical attention if she experienced fecal incontinence. (Test. Mrs. Rutledge, 2/19/08, Test. Master Sergeant Rutledge, 3/4/08, Defendant's Trial Ex. N 1).

63. No one from the Naval Hospital called between August 22 and August 25, 2004 to reschedule Mrs. Rutledge's appointment. On August 25, 2004, Mrs. Rutledge called the Naval Hospital to reschedule her orthopedic appointment. She insisted on receiving an appointment for that week. She received an appointment for August 27, 2004. (Test.Mrs.Rutledge, 2/19/08).

*8 64. On August 27, 2004, Mrs. Rutledge was seen at the Naval Hospital by orthopedic surgeon, Dr. Douglas Duncan. Because she felt she was unable to drive herself, Mrs. Rutledge's neighbor drove her to the appointment. (Test.Mrs.Rutledge, 2/19/08).

65. Mrs. Rutledge informed Dr. Duncan of all of her symptoms, including the numbness in her vaginal area, buttocks, the backs of her thighs, and soles of her feet. She did not immediately inform him of her episode of fecal incontinence. However, she told him about the episode when he questioned her about her bladder and bowel problems. Based on the history of her symptoms, Dr. Duncan had Mrs. Rutledge undress and performed a physical examination which included a rectal exam and a post void residual urine examination. He determined that she had little to no rectal tone, was incontinent of bowel, and was experiencing symptoms of Cauda Equina Syndrome. He immediately arranged for Mrs. Rutledge to be admitted to the Naval Hospital pending an emergency medical air evacuation to the Tripler Army Medical Center in Hawaii. (Test.Mrs.Rutledge, 2/19/08, Test.Duncan, 2/22/08).

66. On August 27, 2004, Dr. Duncan immediately diagnosed Mrs. Rutledge with Cauda Equina Syndrome, and noted on his report that she had the condition for approximately three weeks.^{FN2}(Test.Duncan, 2/22/08).

FN2. The court notes the professionalism and quick thinking exhibited by Dr. Duncan, who had only arrived on Guam six days before. Although Guam was Dr. Duncan's first duty station as an orthopedic surgeon, he immediately recognized the gravity of Mrs. Rutledge's situation and took quick action to address the damage to Mrs. Rutledge's nerves and to prevent further damage from occurring.

IMMEDIATE TRANSFER TO HAWAII'S TRIPLER ARMY MEDICAL CENTER

67. Dr. Joseph Orchowski ("Dr.Orchowski"), a neurosurgeon at Hawaii's Tripler Army Medical Center, had agreed, upon telephone consultation with Dr. Duncan, to accept Mrs. Rutledge for emergency care. Upon arrival at Tripler Army Medical Center, on August 27, 2004, Dr. Orchowski ordered a magnetic resonance imaging test ("MRI"), which confirmed the preliminary diagnosis of a large herniated L5-S 1 disc causing Cauda Equina Syndrome. As a result, Dr. Orchowski performed an emergency discectomy. (Deposition of Dr. Orchowski, 3/1/07, p. 10-17).

68. Plaintiffs met with Dr. Orchowski after the surgery in preparation for their return to Guam. At that time, Dr. Orchowski told them that it may take up to two years for Mrs. Rutledge's neurological symptoms to improve. He further stated that "it was unfortunate that the disc set [on Mrs. Rutledge's nerves] for three weeks."^{FN3}(Test.Mrs.Rutledge, 2/20/08).

FN3. At trial on March 13, 2008, the court ruled that the statement made by Dr. Orchowski was non-hearsay as admission by a party opponent.

69. Mrs. Rutledge ran into Capt. Rau in the spring of 2005 at the Andersen Air Force Base Health and Wellness Center, where he told her, "I'm sorry for what happened to you." (Test.Rau, 2/25/08).

DR. MERIWETHER'S TESTIMONY

70. The United States failed to present any testimony on the standard of care for negligence actions on Guam, nor did it address the standard of care when cross examining any of the Plaintiffs' medical expert witnesses.^{FN4}

^{FN4}. The court finds it disturbing that the United States attorneys failed to present a defense in this regard, particularly in light of the fact that millions of dollars were at risk in this action.

71. The United States presented expert opinion testimony through Dr. Michael W. Meriwether, who testified on cross examination that typical symptoms of Cauda Equina Syndrome include: pain, saddle anesthesia (numbness in groin and perineal areas), bowel or bladder dysfunction (including incontinence, retention, constipation, and urination frequency) and bilateral symptoms. Dr. Meriwether testified that the appearance of these symptoms would constitute an emergency situation, and would need to be addressed immediately. (Test.Meriwether, 3/10/08).

*9 72. Dr. Meriwether also testified that not all Cauda Equina Syndrome patients present with all the signs and symptoms of Cauda Equina Syndrome. (Defendant's Trial Ex. A, RUT 399).

73. The medical records of Mrs. Rutledge's first visit to the Andersen Air Force Base Clinic on July 27, 2004

contained signs and symptoms indicative of Cauda Equina Syndrome. On that day, Mrs. Rutledge complained of loss of sensation in the groin area (saddle anesthesia), with 4-5 days low back pain and a new urinary symptom identified as urination frequency. (Defendant's Trial Ex. M 5).

74. Dr. Meriwether admitted that three of the four symptoms of Cauda Equina Syndrome that he listed in his testimony were present at Mrs. Rutledge's July 27, 2004 visit. (Test.Meriwether, 3/10/08).

75. Dr. Meriwether testified that it is his personal practice to make his patients undress at least to their undergarments when testing for numbness. He testified that in order to accurately test for perineal numbness, a patient would have to remove both their clothes and undergarments. (Test.Meriwether, 3/10/08).

76. The August 2, 2004 medical records from the Andersen Air Force Base Clinic demonstrate a progressing deterioration of Mrs. Rutledge's neurological condition specifically involving her sacral nerve roots. By August 2, 2004, her symptoms had become bilateral and were described as numbness in her right gluteal/perineal area, and pain down her left leg. (Defendant's Trial Ex. M 8).

77. By the time Mrs. Rutledge sought further treatment on August 17, 2004, she had a positive limp clearly indicating a continued progressive decline of her condition. (Defendant's Trial Ex. M 14-15).

78. When Mrs. Rutledge presented at the Naval Hospital on August 27, 2004, with a history of two days fecal incontinence, her condition was immediately diagnosed as Cauda Equina Syndrome. Her rectal tone was altered, and she had urine retention as confirmed by a urine residual analysis test. An MRI taken several hours later in Hawaii

confirmed the diagnosis. (Test.Duncan, 2/22/08).

79. Dr. Meriwether testified that the key to diagnosing Cauda Equina Syndrome in a patient is by taking an MRI. An MRI, though available on Guam in July and August 2004, was not taken of Mrs. Rutledge's lumbosacral spine at any time during her treatment at the Andersen Air Force Base Clinic on July 27, 2004, August 2, 2004 and August 17, 2004. (Defendant's Trial Ex. M 5).

80. The court finds that the signs and symptoms of Cauda Equina Syndrome were already present when Mrs. Rutledge consulted at the Andersen Air Force Base Clinic on July 27, 2004, August 2, 2004 and August 17, 2004.

81. The healthcare providers at the Andersen Air Force Base Clinic failed to recognize the alarming neurological symptoms of Mrs. Rutledge as needing emergency medical attention. Mrs. Rutledge was under the mistaken belief that she was under the care of medical doctors. Nothing in their treatment of her complaints led her to believe that her condition was serious or emergent. It is reasonable that the emergency nature of Mrs. Rutledge's condition would not be immediately apparent to Mrs. Rutledge, a woman with zero medical background or training.

DR. STEELE'S TESTIMONY

*10 82. Plaintiffs' expert, Dr. John C. Steele ("Dr. Steele"), a neurologist, testified that if Mrs. Rutledge had been properly diagnosed and treated in a timely manner on July 27, 2004, she would not suffer from permanent disability today. (Test.Steele, 3/3/08).

83. Dr. Steele testified, within a reasonable degree of

medical certainty, that if Mrs. Rutledge had been properly diagnosed and treated in a timely manner on August 2, 2004, she would have only minor residual urinary symptoms. (Test.Steele, 3/3/08).

84. Dr. Steele testified that if Mrs. Rutledge had been properly diagnosed and treated in a timely manner on August 17, 2004, Mrs. Rutledge would have suffered residual symptoms of urinary retention and overflow incontinence, but she would not have bowel incontinence and it would be unlikely for her to have significant leg weakness, gait abnormality, or painful paresthesiae. (Plaintiffs' Trial Ex. 22, Test. Steele, 3/3/08).

85. Dr. Steele personally examined Mrs. Rutledge on two separate occasions, on June 2, 2006, and on February 17, 2008. Dr. Steele reviewed and classified her physical deficits and performed a disability rating pursuant to the American Medical Association Guidelines. Dr. Steele found that Mrs. Rutledge suffered a "gait disorder" due to her antalgic gait. He further found that she suffered from bowel and bladder neurological disorders and neurological sexual impairment. (Test.Steele, 2/29/08).

86. After assessing these impairments under the American Medical Association Guidelines, Dr. Steele assigned a 76 to 96 percent whole person disability after the June 2, 2006 examination and increased it to an 88 to 98 percent whole person disability after the February 17, 2008 examination. (Test.Steele, 2/29/08).

87. Dr. Steele routinely performs this type of assessment in his practice to determine if a person is entitled to medical retirement benefits from the Government of Guam Retirement Fund. The disability assessment is not meant to imply that the person being assessed is totally unable to perform some functions of daily life, but rather it is an evaluation of a person's disability of functional capacity

when compared to a "normal" population. (Test.Steele, 3/3/08).

THE SUFFERING OF MRS. RUTLEDGE AND MASTER SERGEANT RUTLEDGE

88. As a result of the delay in diagnosing Mrs. Rutledge's worsening condition of Cauda Equina Syndrome, her sacral nerve roots were irreversibly damaged. Consequently, Mrs. Rutledge suffers permanent neurological and genito-urinary injuries and resulting damages. She has numb buttocks, a numb vagina, a neurogenic bladder, bowel dysfunction and neuropathic pain for which she takes several different medications. Mrs. Rutledge also suffers from paresthesia down the back of her legs and feet. Her intermittent neuropathic pain has been described as a searing, burning pain that could last anywhere from 45 to 60 seconds. This paralyzing pain can strike at any time and in any part of her body where her spinal nerve roots and their anatomic distributions have been damaged. Mrs. Rutledge's current condition is not likely to improve given the fact that it has been four years since the date of her injury. Mrs. Rutledge has difficulty sleeping through the night and relies on hypnotic medication such as Ambien. She is unable to sit like a normal person, unable to walk for an extended period of time without experiencing pain, and is permanently disabled as a whole person. (Plaintiffs' Trial Ex. 21).

*11 89. As a result of Mrs. Rutledge's permanent neurological and genito-urinary injuries, her husband, Master Sergeant Rutledge has suffered the loss of love, companionship, consortium, and services usually provided by a spouse in good health and of unimpaired vigor and strength. Before his wife's injuries, the couple was always "on the go." They went shopping, to the movies, attended social gatherings and barbeques, went dancing, and bowling. Presently, Mrs. Rutledge confines herself to her home where she can sleep, rest, and have the comfort of

her own bathroom readily available and close by. (Test. Mrs. Rutledge, 2/20/08, Test. Master Sergeant Rutledge, 3/4/08).

90. Prior to this incident, Master Sergeant Rutledge and Mrs. Rutledge enjoyed an active sexual life with normal sexual intercourse approximately 2-4 times a week (Plaintiffs' Trial Ex. 21 p. 6). As a result of his wife's injuries, they have not engaged in any satisfying sexual activity. Master Sergeant Rutledge testified that they have had sex "maybe twice" in the past year. (Test. Master Sergeant Rutledge, 3/4/08).

TESTIMONY OF ECONOMIC EXPERTS

91. Plaintiff Deborah K. Rutledge, born in December of 1960, was 43 years old when she sustained injuries in this case. Her life expectancy, based upon the *United States Life Tables 2003*, from National Center for Health Statistics, contained in the United States' economic expert's report from the date of injury is 38.3 years to age 81.9. (Defendant's Trial Ex. U).

92. On the matter of economic damages, Plaintiffs and Defendant each presented expert testimony on Mrs. Rutledge's past and future lost income. Plaintiffs presented testimony by Gary Hiles, Chief Economist for the Government of Guam, Department of Labor. ("Mr.Hiles").

93. Mr. Hiles used Mrs. Rutledge's history of earnings throughout her life and the growth rate represented in that earnings history to project her future earning capacity through regression analysis. (Test.Hiles, 3/5/08).

94. The United States presented testimony by Dr. Laura Taylor ("Dr.Taylor"), who has a Ph.D. in Economics and

has testified in various other courts as a forensic economic consultant.

95. In calculating the lost earning capacity of Mrs. Rutledge, Dr. Taylor used the mean annual earnings in each of the occupations of Cashier, Retail Sales, and Supervisor of Food Service. The base wage for Supervisor of Food Service is higher than the employment history wage used by Mr. Hiles in his calculations. (Test. Taylor, 3/6/08).

96. Dr. Taylor testified that her calculations for earnings in each of these three occupations included fringe benefits, payroll taxes, and the discount rate. She also made two separate calculations of each of these three occupations: one that included income taxes and one that excluded income taxes. (Test. Taylor, 3/6/08, Defendant's Trial Ex. U).

97. Beginning in 2005 all of Dr. Taylor's calculations on Mrs. Rutledge's earnings are reduced by the 0.76 employment factor to account for statistically expected periods of voluntary unemployment. No involuntary unemployment was assumed. (Defendant's Trial Ex. U).

*12 98. In predicting loss of income, it is important to consider Mrs. Rutledge's past work history. Mrs. Rutledge testified at trial about her history of employment. Her highest salary earned was when she was a general manager at a Wendy's restaurant. (Test. Mrs. Rutledge, 2/20/08).

99. Mrs. Rutledge has been employed throughout her adult life. She began working as a cashier in 1978 at the age of 17 at a Kentucky Fried Chicken restaurant. She worked there until 1981. She then went to work for Wendy's. She worked there for 12 years. She started as a cashier, then was subsequently promoted to shift manager, assistant

manager, co-manager, and finally as a general manager. She became a general manager in 1991-1992. She made roughly \$21,000 per year as a general manager. She resigned from her position at Wendy's in 1993, to try something different and to spend more time with her child. (Test. Mrs. Rutledge, 2/20/08).

100. She returned to work for Wendy's in 1998. She started as a co-manager, then became general manager. She worked as a general manager until a month before her marriage, in May 2001. She resigned to prepare for the wedding and pack up her house, when she moved. She went back to work in August of 2001, as a receptionist for an optometrist, and was also studying to become an optician. She worked until May 2003, when she resigned because she was planning on attending college. Instead, in June of 2003, Master Sergeant Rutledge received orders to deploy to Guam. (Test. Mrs. Rutledge, 2/20/08).

101. Mrs. Rutledge did not work while on Guam. At the time Mrs. Rutledge developed Cauda Equina Syndrome, she was unemployed. Her original plan while on Guam was to remain voluntarily unemployed, and after she left Guam she would go to college to become a librarian, or become a manager at Wendy's. However, she changed her mind and applied to work at a pet store because she was bored and wanted part-time work. (Test. Mrs. Rutledge, 2/20/08).

102. Mrs. Rutledge has not been employed since leaving her receptionist position in 2003. She does not believe she is currently employable because she takes medicine that makes her drowsy, she does not drive, and, if she feels ill, she either spends the day in bed or on her couch. (Test. Mrs. Rutledge, 2/20/08).

103. After a careful review of the documents and analysis prepared by both economists, the court is persuaded by the

testimony of the United States' expert, Dr. Taylor, and uses her calculations in determining damages as they concern loss of income.^{FN5}

FN5. The court was very impressed with the credentials, expert report, and testimony at trial of the United States economic expert, Dr. Laura J. Taylor.

104. Plaintiffs' economic expert's report has credited Mrs. Rutledge twice for the same benefit by including both the employer's social security tax paid on Mrs. Rutledge's behalf during her work years as a fringe benefit received by Mrs. Rutledge and by including that same benefit during her retirement years in his calculations of her lost social security benefits. (Plaintiffs' Trial Ex. 23).

105. At the same time, Plaintiffs' economic expert's report has failed to account for the mandatory tax that Mrs. Rutledge would have to pay out of her earnings during her work life in order to participate in the social security system in her retirement years. (Plaintiffs' Trial Ex. 23).

*13 106. Plaintiffs' economic expert's report also failed to account for statistically expected periods of voluntary unemployment. (Plaintiffs' Trial Ex. 23).

107. Plaintiffs' economic expert's report extended Mrs. Rutledge's work life to a statistically improbable age. (Plaintiffs' Trial Ex. 23).

108. Plaintiffs' economic expert's report increased Mrs. Rutledge's earnings at the aggressive, and highly improbable rate of 5%. This is almost twice the projected long-run rate of inflation. This rate also exceeds projections of average wage growth across all

occupations. (Plaintiffs' Trial Ex. 23).

109. Mrs. Rutledge testified that she is unable to perform a substantial amount of her normal household chores such as cleaning, vacuuming, laundry and ironing, which she was able to perform prior to her injury. She further testified to two quotes she received from home cleaning services. One of the quotes received by Mrs. Rutledge from American Maid was for \$50.00 per hour and the other quote from Home Maid Service, Inc. was for the amount of \$95.00 per week after an initial \$300.00 deep cleaning for the first visit. (Plaintiffs' Trial Ex. 29).

110. The specifics of the economic damages award is set forth below in the court's discussion on damages.

CONCLUSIONS OF LAW

Under the Federal Tort Claims Act, the United States is liable in damages to an injured party for injuries arising from a negligent act or omission of its employees, if a private person would be liable under the law of the place where the act or omission occurred. See 28 U.S.C. § 1346(b); Mass. Bonding & Ins. Co. v. United States, 352 U.S. 128, 128-29, 77 S.Ct. 186, 1 L.Ed.2d 189 (1956).

Whether the United States is liable for the negligence of its employees is a question of state law. See 28 U.S.C. §§ 1346(b). Accordingly, the court will apply Guam law, which is where the alleged negligent acts and/or omissions occurred. Brock v. United States, 601 F.2d 976, 978 (9th Cir.1979). Guam law will apply to both substantive tort liability as well as to the nature and measure of damages to be awarded. See Lawson v. United States, 454 F.Supp.2d 373, 417 (D.Md.2006).

The Plaintiffs in the present case have the burden of proving, by the greater weight of evidence, the following: 1) United States owed Plaintiffs a duty or obligation, recognized by law, requiring the United States to conform to a certain standard of conduct, for the protection of others against unreasonable risks of harm; 2) a breach of that duty by the United States, or failure to conform to the required standard; 3) the breach of duty by the United States is the proximate cause of Plaintiffs' injuries; and 4) as a result of Plaintiffs' injuries, they have suffered actual loss or damages. *Merchant v. Nanyo Realty, Inc.*, 1998 Guam 26 ¶ 14.

STANDARD OF CARE

The Defendant, United States, is required to provide healthcare services within a certain standard of care. The standard of care on Guam is defined as "[t]he prevailing standard of duty, practice, or care by a reasonable physician in the same field practicing medicine in the community at the time of the alleged malpractice." (10 GCA § 10106).

*14 Although there is no Guam law on the issue of standard of care, generally in cases of medical malpractice what is or is not the proper standard is a question for experts and it should be established only by their expert testimony. "In professional malpractice cases, expert opinion testimony is required to prove or disprove that the defendant performed in accordance with the prevailing standard of care, except in cases where the negligence is obvious to laymen." See *Garibay v. Hemmat*, 161 Cal.App.4th 735, 741, 74 Cal.Rptr.3d 715, 719 (Ct.App.2008) (quoting *Kelley v. Trunk*, 66 Cal.App.4th 519, 523, 78 Cal.Rptr.2d 122 (Ct.App.1998)).

The court finds from the testimony of Plaintiffs' expert, Dr. Towle, that the standard of care for midlevel providers

in an urgent care clinic such as the Andersen Air Force Base Clinic required that the neurological basis of Mrs. Rutledge's complaint of groin numbness be investigated and diagnosed during her visits at the Andersen Air Force Base Clinic and that a consultation with the midlevel provider's physician preceptor on the same day should have been made. The court finds that the standard of care also required that her treating healthcare providers follow up on her urinary symptoms after the urinalysis did not explain what could be causing said symptoms.

FAILURE TO CONFORM TO REQUIRED STANDARD OF CARE

At no time during Mrs. Rutledge's three healthcare visits to the Andersen Air Force Base Clinic did any of her healthcare providers investigate a differential diagnosis to address her progressing urinary complaints. Nor did her healthcare providers address her continued complaint of numbness in her groin in the context of progressive low back pain and other additional neurological complaints of pain and numbness in her legs.

Plaintiffs' expert, Dr. Towle, testified that a differential diagnosis is a method used by physicians to rank the potential diagnostic possibilities most consistent with a patient's complaints. In all three of Mrs. Rutledge's Andersen Air Force Base Clinic visits, her presenting signs and symptoms were clearly far in excess of what is seen in a normal adult patient experiencing low back pain.

On her first visit to the Andersen Air Force Base Clinic on July 27, 2004, Mrs. Rutledge already presented with mild symptoms consistent with Cauda Equina Syndrome; specifically urination frequency, numbness in the groin and 4-5 days of low back pain. Dr. Meriwether agreed that most patients do not present with all of the symptoms characteristics of Cauda Equina Syndrome (Defendant's

Trial Ex. A, RUT 401), because it is impossible, in a significant portion of patients, to exclude the diagnosis of a prolapsed intervertebral disc with suspected cauda equina compromise. Dr. Meriwether further agreed with the recommendation of the authors of the study he attached to his report that urgent MRI assessment is necessary in all patients who present with new onset urinary symptoms in the context of lumbar back pain or sciatica. (Defendant's Trial Ex. A, RUT 404). Compliance with the standard of care as established by the testimony of Dr. Towle required a recognition of Mrs. Rutledge's neurological symptoms as unusual and required, at the very least, a consultation with a physician preceptor. The court concludes that the treatment provided by Lt. Col. Giscombe to Mrs. Rutledge at the Andersen Air Force Base Clinic on July 27, 2004 fell below the standard of care required under the circumstances and the overall treatment was therefore negligent.

***15** On August 2, 2004, Mrs. Rutledge presented with additional signs and symptoms indicative of a continuing serious neurological problem. Capt. Rau's differential diagnosis of musculoskeletal back pain clearly did not take into consideration Mrs. Rutledge's urinary complaints, her complaint of numbness in the groin or her bilateral numbness and pain symptoms in the context of her progressing low back pain. Compliance with the standard of care as established by the testimony of Dr. Towle required a recognition of Mrs. Rutledge's progressing neurological symptoms as unusual and not typical of an adult low back pain patient which required at the very least a consultation with a physician preceptor. The court concludes that the treatment provided by Capt. Rau to Mrs. Rutledge at the Andersen Air Force Base Clinic on August 2, 2004, fell below the standard of care owed to Mrs. Rutledge and the overall treatment was therefore negligent.

Capt. Rau's medical record of his consultation with Mrs. Rutledge was neither reviewed nor countersigned by his

supervising physician. This failure by a supervising physician preceptor to review and countersign his physician assistant's August 2, 2004 medical record within 7 days is below the standard of care established by Guam law, (10 G.C.A. § 121607(a) and (b)), and the overall treatment is therefore negligent.

On August 17, 2004, Mrs. Rutledge presented with worsening neurological symptoms and four weeks of progressively worsening low back pain. She was determined to have 'radiculopathic (radiating) pain to her left lower extremity to foot, positive limp, numbness in her right thigh/ and inferior aspect of right glut/perineal area.' (Defendant's Trial Ex. M 14).

At that time an MRI was already being suggested by the radiologist who had given his findings of degenerative disc disease at the L5-S1 and suggested a correlation with the patient's symptoms. (Defendant's Trial Ex. M 11). Despite these findings, a *routine referral* was given by the midlevel provider to orthopedics at the Naval Hospital. (Emphasis added).

Compliance with the standard of care as testified to by Dr. Towle required a recognition of Mrs. Rutledge's progressing neurological symptoms as unusual, progressing, and alarming which required *immediate and urgent consultation* with a physician preceptor or a neurological or orthopedic specialist. The court concludes that the treatment provided by Lt. Col. Giscombe to Mrs. Rutledge at the Andersen Air Force Base Clinic on August 17, 2004 fell below the standard of care owed to her and the overall treatment was therefore negligent. (Emphasis added).

Furthermore, on August 17, 2004, Mrs. Rutledge's third visit to the Andersen Air Force Base Clinic, Lt. Col. Giscombe was mandatorily required to comply with 36th

Medical Group Instruction 40-112 (Plaintiffs' Trial Ex. 33). As a midlevel provider, Lt. Col. Giscombe was mandated to consult with her assigned physician preceptor if a patient's condition had not resolved after the second visit. The court concludes that Lt. Col. Giscombe's *routine referral* of Mrs. Rutledge to orthopedics at the Naval Hospital did not constitute compliance with the said Andersen Air Force Base regulatory requirement and therefore the overall treatment rendered to Mrs. Rutledge was negligent. (Emphasis added).

*16 It must be noted that Plaintiffs' Exhibit 33 consists of the 36th Medical Group Instruction 40-112 effective June 15, 2005 and January 24, 2007. Plaintiffs assert that the 36th Medical Group Instruction 40-112, effective on May 28, 2004, referenced therein and which Lt. Col. Giscombe testified was the same, was requested by Plaintiffs and never produced by the Defendant during discovery. "[W]here relevant evidence which would properly be part of a case is within the control of a party whose interests it would naturally be to produce it and he fails to do so, without satisfactory explanation, the only inference which the finder of fact may draw is that such evidence would be unfavorable to him. In so holding, we have noted, '(t)his rule is uniformly applied by the courts and is an integral part of our jurisprudence.' " *Pier 67, Inc. v. King County*, 89 Wash.2d 379, 385-6, 573 P.2d 2, 6 (1977) (citing *British Columbia Brewers (1918) Ltd. v. King County*, 17 Wash.2d 437, 455, 135 P.2d 870, 877 (1943)), *see also* *Albertson's, Inc. v. Arriaga*, No. 04-03-00697-CV, 2004 WL 2045389, at *2 (Tex.App. Sept. 14, 2004) ("[A] party's failure to produce evidence within its control raises the presumption that, if produced, the evidence would operate against him."). This is the case here.

***DEFENDANT'S BREACH OF DUTY IS THE
PROXIMATE CAUSE OF PLAINTIFFS' INJURIES***

The court concludes that the Plaintiffs have met their

burden of proving that the United States' employees, namely, Lt. Col. Natalie Y. Giscombe, Adult Nurse Practitioner, and Capt. Steven D. Rau, Certified Physician Assistant, had a duty to diagnose and treat Mrs. Rutledge with the requisite care and skill ordinarily used by healthcare providers in the same field of medicine practicing under similar circumstances, and they failed in that duty. The United States' employees were repeatedly negligent in providing medical care and treatment to Mrs. Rutledge in all her visits to their medical facility at the Andersen Air Force Base Clinic, namely, on July 27, 2004, August 2, 2004 and August 17, 2004.

The court further concludes that the failure by the United States' medical employees to timely and properly treat Mrs. Rutledge is the direct cause of her neurological injuries and resulting damages, as well as the resulting loss of consortium of Mrs. Rutledge's husband, Master Sergeant Rutledge. No evidence was adduced at trial to show that Mrs. Rutledge's injuries and resulting permanent neurological problems and the resulting damages were caused by anything other than the delayed diagnosis of her Cauda Equina Syndrome.

The court finds that but for the negligent conduct of the United States, the damages complained of by Plaintiffs would not have occurred. The court is persuaded by the testimony of Dr. Steele, that Mrs. Rutledge would likely have recovered without any neurological damage if she had been diagnosed and treated in a timely manner on July 27, 2004; that Mrs. Rutledge would, within a reasonable degree of medical certainty, have only minor urinary symptoms if she had been diagnosed and treated in a timely manner on August 2, 2004; that Mrs. Rutledge would have suffered residual symptoms of urinary retention and overflow incontinence, but she would not have bowel incontinence and would unlikely have had significant leg weakness, gait abnormality or painful paresthesiae if she had been diagnosed and treated in a timely manner on August 17, 2004. (Plaintiffs' Trial Ex.

22 p. 2).

applicable local law

***BOTH PLAINTIFFS HAVE SUFFERED ACTUAL
LOSS AND DAMAGES***

...

*17 In Federal Tort Claims Act cases, the law of the state where the negligence occurred governs substantive tort liability, including the nature and measure of damages to be awarded. Calva-Cerqueira v. United States, 281 F.Supp.2d 279, 292 (D.D.C.2003) (citing Richards v. United States, 369 U.S. 1, 11, 82 S.Ct. 585, 7 L.Ed.2d 492 (1962)).

(c) *Non-economic loss* shall mean loss for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship; loss of consortium, other than loss of domestic service; hedonic damages; injury to reputation and all other non-pecuniary losses of any kind or nature.

Under Guam law, there is no limit to the amount of damages that can be awarded to plaintiffs in a medical malpractice case. Title 10 of the G.C.A. § 10131 specifically states that “damages shall be monetary only and shall be without limitation as to nature or amount unless otherwise provided by law.” The only limitation to the award of damages to Plaintiffs here is the limitation imposed by the Federal Tort Claims Act, which is the amount of the claim presented to the federal agency. In this case, Mrs. Rutledge requests an award of \$10,000,000.00 for her economic and non-economic damages and Master Sergeant Rutledge requests an award of \$1,000,000.00, for non-economic damages.

Having made the determination that the government care providers breached the prevailing standards of care which proximately caused the injury to the Plaintiffs, the court makes the following conclusions with respect to damages:

ECONOMIC DAMAGES

As to economic damages, Mrs. Rutledge is entitled to loss of earnings and earnings capacity and other benefits related to employment as well as replacement services loss. See 7 G.C.A. § 16102(a). The purpose of compensatory damages is to make the plaintiffs whole. Fajardo v. Liberty House Guam, 2000 Guam 4.

Additionally, Title 7 of the Guam Code Annotated, sections 16102(a) and (c) define economic and non-economic losses as follows:

Loss of Income

(a) *Economic loss* shall mean any pecuniary loss resulting from harm, including the loss of earnings or other benefits related to employment, medical expense loss, replacement services loss, loss due to death, burial costs, and loss of business or employment opportunities, to the extent recovery for such loss is allowed under

Mrs. Rutledge is seeking \$970,000.00 for past, present, and future loss of income and other opportunities. This figure represents the calculations submitted by Mr. Hiles. As noted above, after careful consideration, the court adopts the calculations of Dr. Taylor in United States Exhibit U. The court calculates damages for Mrs. Rutledge under the occupation of Supervisor of Food

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Slip Copy, 2008 WL 3914965 (D.Guam)

Service, and excludes income taxes as representing a fair lost wage earning capacity.

*18 The court concludes that Mrs. Rutledge, as recommended by Dr. Taylor, is entitled to \$470,904.00 for past, present and future loss income and other opportunities.

Replacement Services

"Replacement services loss" is a type of economic loss as defined by Guam law. 7 GCA § 16102(a). Replacement services loss is the value of obtaining ordinary and necessary services in lieu of those the injured person would have performed, not for income, but for the benefit of himself or herself or his or her family, if he or she had not been injured. *See Lenz v. Depositors Ins. Co.*, 561 N.W.2d 559, 561 (Minn.App.1997).

The court finds that as a result of her permanent neurological injuries and deficits, Mrs. Rutledge is unable to perform a substantial amount of her normal household chores, which she was able to adequately perform prior to her injury. Those chores include cleaning, vacuuming, laundry and ironing.

Consequently, the court concludes that Mrs. Rutledge is entitled to compensation for replacement services loss in the amount of \$187,720.00 calculated at \$95.00 per week for 52 weeks a year, multiplied by 38 years. The court prefers not to perform a present value calculation of this amount since any such reduction in value would most likely be outweighed by the increased costs of such services in the future.

NON-ECONOMIC DAMAGES

In awarding non-economic damages, the court in *Scott v. United States*, 884 F.2d 1280 (9th Cir.1989) held that damages awarded for physical impairment and loss of enjoyment of life were not duplicative. Likewise, in *Ogden v. J. Steel Erecting, Inc.*, 201 Ariz. 32, 31 P.3d 806 (Ct.App.2001), the court held that "hedonic damages can be a component of a general damages claim, distinguishable from, and are not duplicative of, damages for pain and suffering." *Id.* at 38, 31 P.3d 806, 31 P.2d at 812.

As to non-economic damages, the court concludes that Plaintiff Mrs. Rutledge is entitled to damages for physical and emotional pain and suffering, inconvenience, physical impairment, disfigurement and loss of enjoyment of life. The court also concludes that Master Sergeant Rutledge is entitled to damages for loss of consortium.

Pain and Suffering

There is no definite and specific rule for a court to follow in arriving at a dollar figure for actual compensation for pain and suffering. Pain and suffering includes mental suffering. "Anxiety, shock and worry are examples of what might be included under mental pain and suffering, and loss of capacity to work, labor and enjoy life-separately from monetary earnings-may be considered as an item causing mental suffering." *MacDonald v. United States*, 900 F.Supp. 483, 488 (M.D.Ga.1995). Since Mrs. Rutledge's pain and suffering will continue into the future, the court will award damages for her future pain and suffering. *See Id.*

Mrs. Rutledge is fully aware of her many neurological and genito-urinary deficits. She has numbness in her vagina and buttocks and feels that part of her is "dead." (Test.

Mrs. Rutledge 2/20/08). She suffered, and continues to suffer, mental anguish when she is told that her neurological and genito-urinary conditions are not likely to improve. She will always have a numb buttock, a numb vagina, and a neurogenic bladder necessitating that she consume a cocktail of medications. She has limited control over her bowels and is often constipated. Mrs. Rutledge also suffers from paresthesia down the back of her legs and feet. She experiences intermittent neuropathic pain which has been described as a searing, burning pain, that could last anywhere from 45 to 60 seconds. This paralyzing pain can strike anywhere where her spinal nerve roots and their anatomic distributions have been damaged. Her neuropathic pain symptoms appear consistent with her neurological injury because they affect only the areas where her nerves below the L5-S 1 distribution have been damaged.

*19 Mrs. Rutledge is also conscious and frustrated about her inability to function sexually. Mrs. Rutledge has paresthesia and anaesthesia in certain parts of her body and decreased sensation down her leg and right heel. She has a minimal ankle reflex (1+) on the right and no ankle reflex is present on the left which is evidence of a permanent neurological injury. She often suffers depression and has had to come to grips with her permanent neurological deficits.

The court finds that Mrs. Rutledge suffers from physical and mental pain and suffering as a result of her permanent neurological and genito-urinary injuries. She has endured past suffering, current suffering, and will continue to endure it well into the future. In determining damages for the future consequences of a tort, a plaintiff must prove with reasonable certainty that the future consequence will occur or is likely to occur. See Wood v. Day, 859 F.2d 1490, 1493 (D.C.Cir.1988). The court is persuaded by the testimony of Dr. Steele that Mrs. Rutledge's neurological deficits are likely to remain as they are and not likely to improve given that almost four years have passed since her

injury and subsequent discectomy.

Mrs. Rutledge, born in December of 1960, was 43 years old when she sustained injury in this case. Her life expectancy, based on Dr. Taylor's report, from the date of injury is 38 years or approximately 13,870 days, 1,976 weeks or 456 months.

As cited by the Plaintiffs, the court is persuaded by a prior appellate decision, Porter v. Tupaz, DCA No. 82-0180A, 1984 WL 48854 (D. Guam, App. Div. June 12, 1984). In Porter v. Tupaz, this court, sitting in its appellate division capacity over Guam Superior Court cases, held that an award of \$1,500.00 per month for 12 months for a "common whiplash" temporary 12 month injury was not an unreasonable or erroneous award. *Id.* at *6. The court finds that Mrs. Rutledge's neurological and genito-urinary injuries are permanent and considerably more severe than a "common whiplash" injury, and thus deserving of a substantially higher award than what is reflected in Porter v. Tupaz. The court further notes that the Porter award was made in 1984, more than 24 years ago.

The court concludes that Mrs. Rutledge is entitled to an award for past, present and future physical and mental pain and suffering. As damages for her pain and suffering, the court finds and awards as damages to Mrs. Rutledge the sum of \$3,467,500.00; calculated at \$250.00 per day for 13,870 days.

Inconvenience

Mrs. Rutledge no longer enjoys the convenience of many of the things normal people take for granted. She is unable to drive herself to places of interest and must always depend on another person to care for her. She is unable to enjoy the convenience of having normal bowel and

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bladder movements. Mrs. Rutledge takes several medications for her various neurological deficits and must suffer the inconvenience of their side effects.

*20 The court concludes that Mrs. Rutledge is entitled to a separate award for past, present and future inconvenience. As damages for her inconvenience, the court finds and awards as damages to Mrs. Rutledge the sum of \$346,750.00; calculated at \$25.00 per day for 13,870 days.

Physical Impairment

Prior to this incident, Mrs. Rutledge enjoyed an active sexual life with normal sexual intercourse approximately 2-4 times a week (Plaintiffs' Trial Ex. 21 p. 6). As a result of her neurological and genito-urinary injuries, Mrs. Rutledge has no feeling in her vagina and is no longer able to give and receive sexual pleasure. In addition, her neurological deficits and resulting damages have practically rendered her unable to bear children which both she and her husband had planned to have.

Guam law defines physical disability as a "physical impairment which substantially limits one or more of a person's major life activities."⁷ G.C.A. § 22101(7). This definition of physical impairment is similarly defined by the Americans With Disabilities Act ("ADA"), 42 U.S.C. § 12102(2)(A) (defining disability as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual"). The Rehabilitation Act, federal legislation that empowers Americans with disabilities to maximize employment, economic and educational activities, defines a 'major life activity' as an activity of central importance to daily life, including "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."^{FN6} 45 C.F.R. §

84.3(j)(2)(ii).

FN6. This definition is recited verbatim in the Senate and House committee reports on the ADA and in the EEOC's ADA regulations. See S.Rep. No. 101-116, at 22 (1989); H.R.Rep. No. 101-485, pt. 2 at 52 (1990) (Committee on Education and Labor); H.R.Rep. No. 101-485, pt. 3 at 28 (1990) (Committee on the Judiciary); 29 C.F.R. § 1630.2(I).

The Ninth Circuit in *McAlindin v. County of San Diego*, 192 F.3d 1226 (9th Cir.1999) stated that "engaging in sexual relations, just like procreation, is a major life activity. The number of people who engage in sexual relations is plainly larger than the number who choose to have children. Moreover ... sexuality is important in how 'we define ourselves and how we are perceived by others' and is a fundamental part of how we bond in intimate relationships." *Id.* at 1234, (citing *EEOC v. R.J. Gallagher Co.*, 181 F.3d 645, 654 (5th Cir.1999)).

The Supreme Court in *Bragdon v. Abbott*, 524 U.S. 624, 638, 118 S.Ct. 2196, 2199, 141 L.Ed.2d 540 (1998) commented that the ADA's list is merely illustrative and not exhaustive and thus, it had little difficulty in concluding that reproduction and the sexual dynamics surrounding it are central to the life process itself and is a major life activity.^{FN7}

FN7. The United States Supreme Court has explained that the list in the ADA must be construed with regulations implementing the federal Rehabilitation Act. *Id.* at 638, 118 S.Ct. at 2205.

The court concludes that Mrs. Rutledge is entitled to a

separate award for past, present and future physical impairment. As damages for her physical impairment, the court finds and awards as damages to Mrs. Rutledge the sum of \$1,000,000.00.

Disfigurement

As a result of her neurological injuries and the resulting damages therefrom, Mrs. Rutledge walks with an altered gait which is a broad-based way of walking to avoid pain and provide stability. This altered gait has been described by Dr. Steele and Mrs. Rutledge's other healthcare providers as an "antalgic gait." Her gait was clearly demonstrated to the court. A disfigurement caused by an altered gait and which affects a person's overall appearance is a disfigurement of the entire body. See Streets v. Tim O'Connell and Son, Inc., No. 00A-01-012 RRC, 2000 WL 1211522, at *1 (Del.Super. July 21, 2000) (unpublished). Mrs. Rutledge's antalgic gait clearly affects her overall appearance and easily identifies her from afar as someone who has suffered a neurological injury. See Humphrey v. United States, No. 2:04 CV 72 DDN, 2006 WL 2850548, at *7 (E.D.Mo. Sept.30, 2006).

*21 The court concludes that disfigurement is an element of damages that Mrs. Rutledge is entitled to under Guam law. As damages for her permanent disfigurement, the court finds and awards as damages to Mrs. Rutledge the sum of \$50,000.00.

Loss of Enjoyment of Life

Evidence adduced at trial clearly established that there is permanent impairment to Mrs. Rutledge's ability to enjoy life. She is constantly in need of rest from feelings of fatigue. Although she is able to engage in activities such as shopping, walking, or even weeding the garden, she has

to "pay for it" in terms of the pain she feels after the activities, according to the testimony of Master Sergeant Rutledge. (Test. Master Sergeant Rutledge, 3/4/08). Mrs. Rutledge has limited her outside excursions and social activities as she tires easily, is usually in pain, and prefers to be near her own bathroom where she can spend an otherwise embarrassingly long time in the toilet waiting for her bowel movement to occur. Mrs. Rutledge has difficulty sleeping through the night and relies on hypnotic medication such as Ambien. The court accepts Dr. Steele's findings that Mrs. Rutledge's neurological condition will not likely improve.

The court concludes that Mrs. Rutledge is entitled to an award for past, present and future loss of the capacity for the enjoyment of life. As damages for her loss of the capacity for the enjoyment of life, the court finds and awards as damages to Mrs. Rutledge the sum of \$1,387,000.00; calculated at \$100.00 per day for 13,870 days.

Loss of Consortium

Master Sergeant Rutledge is seeking \$1,000,000.00 for past, present, and future loss of consortium. On Guam, a loss of consortium claim is considered a derivative claim. See Dueñas v. Yama's Co., Inc. Civ. 90-00064A, 1992 WL 97213, at *1 (D. Guam App. Div. April 6, 1992). Master Sergeant Rutledge is a devoted husband who is supportive of his wife's needs and is careful not to impose demands upon his injured wife. Many couples wed, committed to being devoted to one another "in sickness and in health", but most do not imagine a future which includes a seriously injured and partially dependent spouse every hour of every day of each year. Such is the reality for Master Sergeant Rutledge. The court concludes that Master Sergeant Rutledge has experienced, and will continue to experience, a loss of consortium due to his wife's condition. This condition is the result of the

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Slip Copy, 2008 WL 3914965 (D.Guam)

negligence of the United States and the failure of the Andersen Air Force Base Clinic practitioners to act within the standard of care owed to Mrs. Rutledge.

Prior to this incident, Master Sergeant Rutledge and Mrs. Rutledge enjoyed an active sexual life with normal sexual intercourse approximately 2-4 times a week (Plaintiffs' Trial Ex. 21 p. 6). As a result of his wife's injuries, they have not engaged in any satisfying sexual activity. Master Sergeant Rutledge testified that they have had sex "maybe twice" in the past year. (Test. Master Sergeant Rutledge, 3/4/08).

*22 The court once again notes the decision in *Porter*, where the Appellate Division held that an award of \$450.00 per month for 12 months for a spouse's loss of consortium claim based upon a "common whiplash" injury was not an unreasonable or erroneous award. *Porter*, 1984 WL 48854, at *6. The court concludes that Master Sergeant Rutledge's loss of consortium damages are considerably more severe and permanent than those experienced from a temporary "common whiplash" injury, and thus deserve a substantially higher award than what is reflected in *Porter*.

The court concludes that Master Sergeant Rutledge is entitled to an award for past, present and future loss of consortium. Since he is younger than his wife, the court bases his loss of consortium claim on Mrs. Rutledge's life expectancy of 38 years. As damages for his loss of consortium, the court finds and awards as damages to Master Sergeant Rutledge the sum of \$592,800.00 for past, present and future loss of consortium calculated at \$300.00 per week for 52 weeks a year, multiplied by 38 years.

SUMMARY

Based on the above, the court finds that (1) the Defendant United States owed a duty of care to Mrs. Rutledge and Master Sergeant Rutledge, that is, Lt. Col. Giscombe, Adult Nurse Practitioner and Capt. Steven D. Rau, Certified Physician Assistant, United States employees, owed to Mrs. Rutledge the requisite care and skill ordinarily used by healthcare providers in the same field of medicine practicing under similar circumstances; (2) the Defendant United States breached such duty of care; (3) such breach of the duty of care owed by the Defendant United States of America was the direct and proximate cause of injuries suffered by Mrs. Rutledge and Master Sergeant Rutledge; and (4) as a result of such breach by the Defendant United States, the Plaintiffs Deborah K. Rutledge and Thomas R. Rutledge are entitled to the following compensatory damages:

- **\$470,904.00** for past, present and future loss income and other opportunities of Mrs. Rutledge;
- **\$187,720.00** for past, present and future replacement services loss of Mrs. Rutledge calculated at \$95.00 per week for 52 weeks multiplied by 38 years;
- **\$3,467,500.00** for past, present and future pain and suffering of Mrs. Rutledge calculated at \$250.00 per day, for 13,870 days;
- **\$346,750.00** for past, present and future inconvenience of Mrs. Rutledge calculated at \$25.00 per day for 13,870 days;
- **\$1,000,000.00** for the permanent physical impairment of Mrs. Rutledge;
- **\$50,000.00** for the permanent disfigurement of Mrs.

Rutledge;

States. Each party to bear its own costs and attorney's fees.

- **\$1,387,000.00** for past, present and future loss of enjoyment of life of Mrs. Rutledge calculated at \$100.00 per day for 13,870 days; and

SO ORDERED.

- **\$592,800.00** for past, present and future loss of consortium of Thomas R. Rutledge calculated at \$300.00 per week for 52 weeks multiplied by 38 years.

D.Guam,2008.
Rutledge v. U.S.
Slip Copy, 2008 WL 3914965 (D.Guam)

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The total award to Plaintiff Deborah K. Rutledge is **\$6,909,874 .00.**

*23 The total award to Plaintiff Thomas R. Rutledge is **\$592,800.00 .**

The combined total award to Plaintiffs is **\$7,502,674.00.**

The court notes that no damage award is sought by Plaintiffs for past or future medical expenses since Mrs. Rutledge is eligible for military medical benefits. The damages awarded herein are only for those itemized above. No award is made for past or future medical expenses and the judgment entered in this matter does not, in any respect, include such an award.

In accordance with the foregoing Findings of Fact and Conclusions of Law, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that upon consideration of the evidence produced at trial by the Plaintiffs, Master Sergeant Rutledge and Mrs. Rutledge, and the evidence of the Defendant, United States, that Judgment shall be entered in **FAVOR** of Mrs. Rutledge and Master Sergeant Rutledge on their causes of action for medical malpractice under the Federal Tort Claims Act, and **AGAINST** United



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LAW OFFICE OF
ROBERT L. KEOGH

Dear Mr. Keogh,

After careful consideration of your request, the Association has determined to defer \$9,200.00 of the Initial Filing Fee of \$10,200.00 and your Final Fee of \$4,000.00 which is incurred for all cases that proceed to their first hearing. Therefore, in order to initiate this matter, the Association will require a Filing Fee of \$1,000.00. If we do not receive this fee within 7 days, we will return all paperwork, and will not consider this matter properly filed. The \$9,200.00 balance of the Filing Fee and the \$4,000.00 balance of the Final Fee, if applicable, will be due at the conclusion of the case regardless of the outcome.

You may also view case financial information, as well as make payments with a credit card online via AAA's WebFile.

The Association has no authority to defer arbitrator compensation and expenses or non-Association hearing room expenses. These charges will be due and payable when invoices are sent, in accordance with the Rules.

If you agree to the above terms, please return a signed copy of this letter, together with the \$1,000.00 fee in order for the Association to proceed with further administration of this matter. This consideration will be accepted until June 28, 2012, at which time the above deferral will be withdrawn.

Please feel free to contact the undersigned if you have any questions.

Sincerely,

Kristen Parsells
Case Filing Coordinator
856-679-4615
ParsellsK@adr.org

Supervisor Information: Tara Parvey, 856-679-4602, ParveyT@adr.org