UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

MICAH ROEMEN; TOM TEN EYCK, Guardian of Morgan Ten Eyck, and MICHELLE TEN EYCK, Guardian of Morgan Ten Eyck, Plaintiffs, vs. UNITED STATES OF AMERICA, ROBERT NEUENFELDT, individually and UNKNOWN SUPERVISORY PERSONNEL OF THE UNITED STATES, individually, Defendants.	Civ. No. 4:19-cv-04006-LLP **PLAINTIFFS' POST-TRIAL REPLY BRIEF**

COMES NOW Plaintiffs, by and through their undersigned counsel, and respectfully submits their Post-Trial Reply Brief.

I. This Court has Jurisdiction Over Plaintiffs' Claims.

a. Chief Neuenfeldt was a Federal Employee Acting Within the Course and Scope of His Employment.

The Government, at trial and now through its post-trial briefing, are attempting to maintain that Chief Robert Neuenfeldt was in a Flandreau Santee Sioux Tribe ("FSST") police uniform, driving a FSST police cruiser, wielding an FSST gun, and exerting the authority he believed he had as an FSST officer, but was somehow not acting within the course and scope of his employment. (Gov.'s Post Trial Br. pgs. 3-6.) Chief Neuenfeldt was a federal employee acting within the scope of his employment under the 638-contract. The Government's own certification, the evidence, and case law support this obvious contention.

On March 19, 2019, the Government certified that Chief Neuenfeldt, on June 17-18, 2017, was "***an employee of the federal Government and was acting within the scope of his office or employment at the time of the alleged conduct***." (*See* Doc. 12 at pg. 4) (emphasis added.) The Government has never withdrawn this certification and any attempt to do so at this point would be extremely prejudicial. Regardless, the Government is arguing in defiance of its own certification, which has been maintained for over five years now. The Government's own admission supports this Court's jurisdiction over Plaintiffs' claims.

Additionally, the evidence in this case clearly shows Chief Neuenfeldt was an employee of the Federal Government acting within the scope of his employment on June 17-18, 2017. The purpose of the 638-contract in question is for the facilitation of FSST law enforcement services. (Doc. 254-4 Ex. 220 at USA000027-000030.) Chief Neuenfeldt was hired and paid under the 638-contract. (*Id.*) The BIA Manual contemplates situations where Chief Neuenfeldt would have limited authority beyond the geographical boundary of the Flandreau Indian Reservation. (Doc. 250 Ex. 8 at pg. 281-82.) Chief Neuenfeldt was in an FSST police uniform, driving an FSST police cruiser, wielding an FSST police gun, exerting the authority he believed he had as an FSST officer, and he was even compensated for his work on June 17-18, 2017. (TT at 556:21-556:24; *see also* Doc. 249-4 Exs. 14B-14-C, Doc. 254-4 Ex. 222 at pg. 34.) The Government's argument hinges on the idea that an FSST officer cannot have some partial authority beyond the geographical boundary of their

jurisdiction.[1] However, the 638-contract, BIA Manual, and the actual evidence prove otherwise and such precedent would be absurd in light of South Dakota case law governing the issue. *Kirlin v. Halverson*, 2008 S.D. 107, ¶ 12, 758 N.W.2d 436, 444 (discussing "scope of employment" to mean "those acts which are so closely connected with what the servant is employed to do, and so fairly and reasonably incidental to it, that they may be regarded as methods, even though quite improper ones, of carrying out the objectives of the employment.")

This Court has clear jurisdiction over Plaintiffs' claims. Chief Neuenfeldt, although acting negligently and in violation of the BIA Manual dictates, was within the course scope of his employment. Any argument otherwise ignores the undisputed facts of this case.

Further, the Government's argument on officer safety either ignores or misstates the bulk of the record evidence in this case. The Government ignores the testimony of Sergeant Isaac Kurtz, Deputy Logan Baldini, and perhaps the most critical witness in this case: Chief Neuenfeldt. Instead, the Government relies on the conclusory testimony of its hired expert Ken Katsaris[2], which contradicts or misstates the bulk of the evidence in this case.

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[1] This Court examined the definition of "jurisdiction" as it used throughout the BIA Manual in the *Bourassa* case and specifically regarding Section 2-24-09(B)(3). *Bourassa v. U.S.*, 4:20-CV-04210-LLP, 2023 WL 5958975, at *16-*17 (D.S.D. Sept. 12, 2023). The Government confuses the difference between jurisdiction defined as "another agency" versus jurisdiction defined as territory "beyond the reservation line" throughout its jurisdiction argument.

[2] This Court should disregard the Government's retained expert Ken Katsaris entirely, as will be discussed below. However, as it relates to officer safety, Katsaris testified that Chief Neuenfeldt did not have to ***believe*** that officer safety was a consideration on the night in question to justify his involvement in

The evidence at trial confirmed this Court's understanding that "there were no officer safety considerations for Trooper Kurtz" which afforded Chief Neuenfeldt to continue the pursuit "once Trooper Kurtz lost contact with Bourassa." (Doc. 142 at pg. 18.) Kurtz's unrebutted testimony from trial provided there were no officer safety concerns on the night in question:

Q: And ***so there's no officer safety*** involved when Neuenfeldt's pushing down there, because there a(sic) no officers down there. Right?
A: ***Correct.***
Q: And when Neuenfeldt took off and was primary, there were no officers ahead of him. Were there?
A: No.
Q: You, in fact, had gone south on 484. And if Neuenfeldt starts pushing, right then there's no officer safety involved at all because you don't know of any officer whatsoever that's involved over(sic) than Neuenfeldt. Right?
A: I guess there were –
Q: At this point.
A: Sure. Yes.
Q: And, if there's a manual that says the only reason you could possibly take over as primary pursuit(sic) ***is officer safety, you're not – there's no danger for you, right, at this point?***
A: For me?
Q: Right.
A: ***Correct.***
Q: ***And there's no officer safety that you know of at the time he took over the pursuit that was involved in any***

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the pursuit. (TT at 1613:3-1613:13.) Then, Katsaris erroneously testified that Katsaris cannot "utilize" "20/20 hindsight" to analyze the issues he was being paid to testify about. (TT 1693:22-1694:5.) Katsaris only utilized "20/20 hindsight" to concoct a theory that officers were in danger on June 17-18, 2017, because the unrebutted testimony from the officers who were actually involved on the night in question all indicated officer safety was never an issue. The Government's position, if accepted, allows liability experts to come in six years after an incident occurs, exercise 20/20 hindsight in contradiction to the actual evidence, and create theories to absolve any negligent action that occurred.

manner at that point ahead, at this point. And I'm pointing at the point in which he became primary.

A: ***Correct.***

Q: And, ***there's no officer safety*** involved at 229A when he's headed down 229A because there were no officers up in that area. Were there?

A: ***No.***

Q: And there were no officers coming through from any other area because there was no road. Right?

A: Correct.

Q: So, there cannot – there could not have been ***any consideration of officer safety*** going down 229A because there were no officers there. Right?

A: ***Correct.***

Q: And it's a dead end. Right?

A: Yes.

(TT at 79:79:25-81:14) (emphasis added.) Deputy Baldini's unrebutted testimony from trial provided there were no officers close to Bourassa's fleeing vehicle:

Q: Thank you. At the time Neuenfeldt became primary and restarted this pursuit, ***do you agree that all officers you were aware of were down at this party on 484?***

A: ***Yes.***

Q: And then, in fact, Lieutenant Kurtz has testified already in this trial that when the crash took place at the end of 229A he was 7 to 10 miles away from the end of 229A. Do you have any reason to dispute that?

A: No.

Q: And you were ***never aware of any officers on 229A prior to Chief Neuenfeldt pursuing down 229A. Correct?***

A: ***Correct.***

(TT at 335:8-335:19) (emphasis added.) Most importantly, Chief Neuenfeldt testified there were no officer safety issues that would have allowed him to continue the pursuit with authority:

Q: You understand now, sir, that the pursuit policy says you cannot be primary ***unless there's officer safety involved.***
A: ***Correct.***
Q: And you took over primary down here on Exhibit 2, on 485th Avenue. Correct?
A: Correct.
Q: And also knew that Officer Kurtz headed south on 484. Correct?
A: Correct.
Q: So when he headed south, ***there was no officer safety at the time you took over***; was there? For Officer Kurtz?
A: For Officer Kurtz.
Q: Right?
A: ***Correct.***
Q: And there were no officers except you chasing. Right?
A: Behind them. There was other officers trying to get in position.
Q: Correct, ***there were no officers in the pursuit with you?***
A: ***No.***
Q: ***And there were no officer at the time you became primary in front of Tahlen Bourassa. Correct?***
A: ***I don't know their location.***

(TT at 458:17-459:13) (emphasis added.) The Government and its retained expert ignore the testimony of the officers who were actually involved with the events of June 17-18, 2017. *See Johnson v. Albertson's*, 2000 S.D. 47, ¶ 25, 610 N.W.2d 449, 455 (citing *Podio v. American Colloid Co.*, 162 N.W.2d 385, 387 (S.D. 1968)) (discussing where an expert's opinions are not grounded in the evidence of the case the expert's opinions should be disregarded).

The Government attempts to articulate that there were "objective officer safety concerns" on the night in question to align with Katsaris' testimony.

(Gov.'s Post Trial Br. pg. 7.) The "objective officer safety concerns[3]" the Government asserts are as follows:

(1) Safety concerns for "any officer who is in primary pursuit of a fleeing vehicle";

(2) Safety concerns for any officer "attempting to use tire deflation devices";

(3) Safety concerns for any officer "who is attempting to come and aid in pursuit"; and,

(4) Safety concerns "for any officer who attempts to apprehend a suspect at a later time, when, as here, you have a suspect who carelessly disregarded the safety of officers by disobeying commands to stop, striking Officer Neuenfeldt with his truck, avoiding tire deflation devices, and continuing the flight when other officers were attempting to aid and get in front of him so that they could deploy tire deflation spikes."

(*Id.* pg. 8.) The Government's argument on officer safety is not supported by the substantial amount of actual evidence in the record.

The primary pursuer in this chase, Sergeant Kurtz, unequivocally testified that there were no officer safety concerns when Chief Neuenfeldt took over the terminated pursuit or at any point going forward. (TT at 79:79:25-

[3] The list of "objective officer safety concerns" appear to be supported by numerous citations to the Trial Transcript. (Gov.'s Post Trial Br. pgs. 8.) However, the citations refer only to Ken Katsaris' conclusory testimony, (Katsaris' testimony is found at pages 1563-1706 within the Trial Transcript), and sparse factual testimony regarding the circumstances of the chase in question. None of the citations confront the unrebutted testimony from the officers involved with the chase who testified there were no officer safety concerns on June 17-18, 2017.

81:14.) Chief Neuenfeldt and his passenger Deputy Baldini testified to the same. (TT at 335:8-335:19 and 458:17-459:13.) Even if there were officer safety concerns prior to Sergeant Kurtz terminating his pursuit, the bulk of the evidence before this Court shows that such officer safety concerns certainly ceased by the time Sergeant Kurtz terminated. The Government and its retained expert completely ignore the actual testimony from the actual officers involved on the night in question.

There was no evidence provided to this Court that any officer was in danger while "attempting to use tire deflation devices.[4]" In fact, the Government chose not to call the one officer who attempted to use tire deflation devices on the night question: Trooper Chris Spielman, who attempted to use tire deflation devices early in the chase while Sergeant Kurtz was in primary pursuit. (TT at 45:21-45:25.) Instead, Plaintiff Micah Roemen, providing the only evidence on record regarding Trooper Spielman's attempt, testified that Bourassa simply turned before even meeting Trooper Spielman or the tire deflation devices allegedly deployed. (TT at 581:21-582:2.) Regardless of the fact that there is no evidence that Trooper Spielman's safety was at issue, if there was any evidence supporting the Government's position, its position is still controverted by the substantial evidence provided by Sergeant Kurtz, Deputy Baldini, and Chief Neuenfeldt. Any alleged concern about Trooper

[4] There is no evidence supporting the Government's assertion that "assisting law enforcement officers were attempting to continue to deploy stop sticks." (Gov.'s Post Trial Br. pg. 8 fn. 4.) Throughout the Government's brief there is a substantial amount of argument that carries zero evidentiary support.

Spielman's safety ceased by the time Sergeant Kurtz terminated his pursuit. (TT at 79:79:25-81:14) Instead, the Government and its retained expert, again, chose to completely ignore the testimony from the actual officers involved on the night in question.

Further, the Government failed to establish the location of any of the officers who were allegedly "attempting to come and aid in the pursuit." The substantial evidence actually shows there were no officers near the pursuit, other than Chief Neuenfeldt. The Government chose not to play Exhibit 209 at trial and asks the Court to "re-listen to the audio when considering the issue" of officer safety. (Gov.'s Post Trial Br. pg. 8 fn. 5.) Exhibit 209 does not support the Government's position.

The Government's position that Exhibit 209 "unequivocally illustrates the number of officers involved and the information those officers relayed or possessed during Bourassa's flight" is misleading. (*Id.* at pg. 8.) Exhibit 209 is radio traffic from officers, dispatching stations, and multiple jurisdictions, as far as Pierre and Minnesota. The Government never established the locations of any of the radio communicants at trial or that the preservation of the communications were contemporaneous to actual events happening. As such, the Government's reliance and assertion that Exhibit 209 carries its argument that multiple officers were "attempting to come and aid in the pursuit" is not only unsupported by the record but misleading. In fact, the substantial evidence in the record shows that there were no other officers near the chase in question and at the point Bourassa's truck wrecked Sergeant Kurtz was 7-10

miles away from the end of 229A. (TT at 99:13-99:16.) The Government and its retained expert, again, chose to completely ignore the actual evidence on record in this case.

The Government argues directly, and implicitly, that there were "ongoing officer safety concerns for any officer" who may have come into contact with Bourassa "at a later time." (Gov.'s Post Trial Br. pg. 8.) While, again, the Government and its retained expert ignore the substantial evidence on record showing that Bourassa did not hear any "commands to stop," never struck "Neuenfeldt with his truck," did not endanger Trooper Spielman, and that no other officers were near this chase, its argument is belied by Section 2-24-09(B)(3) of the BIA Manual and the Manual itself.

Hypothetically, if officer safety issues were always "ongoing" for any officer who may come into contact with Bourassa, hours or days or weeks later, why does Section 2-24-09(B)(3) mandate that Chief Neuenfeldt discontinue any pursuit if there are no officer safety concerns? Under the Government's theory, ***every pursuit*** presents officer safety concerns which necessitate an ongoing continuum that justifies an officer's choice to continue outside their jurisdiction, for hours or days or weeks after the pursuit. If the Government's theory had merit, Section 2-24-09(B)(3) would not mandate discontinuing a pursuit, because officer safety issues would exist with every single pursuit. The Government's theory is in direct conflict with the policy consideration Section 2-24-09(B)(3) articulates and is controverted by the Section's plain language.

Similarly, if officer safety issues were always "ongoing" for any officer who may come into contact with a fleeing suspect, hours or days or weeks later, why does the BIA Manual require officers to "end their involvement in a pursuit" when there is a "potential for apprehending the suspect . . . by other means" or where the identity of the suspect is known? (Doc. 250 Ex. 8 at pg. 276-77.) Under the Government's theory, even if there were other means to apprehend the suspect or the suspect's identity is known, the ongoing continuum of officer safety justifies an officer's choice to continue the pursuit. The Government's theory, if accepted, all but eliminates the BIA Manual's factors that necessitate ending an officer's involvement in a pursuit.

The Government's position on officer safety either misstates the substantial evidence in the record or is controverted by the same.[5] The evidence on record confirmed this Court's ruling at the Motion to Dismiss stage of this case. (Doc. 142 at pg. 18.) This Court has jurisdiction over Plaintiffs' claims for relief.

II. Officer Neuenfeldt's Negligence Proximately Caused the Injuries to Micah and Morgan.

The Government never articulates or attempts to articulate how Chief Neuenfeldt exercised "ordinary care or skill not to injure" Micah or Morgan. *Schreiner v. United States*, Civ. No. 03-5069, 2005 WL 1668429, at *3-4 (D.S.D.

[5] The Government's use of the *Alberty* case is flawed. (Gov.'s Post Trial Br. pg. 11 fn. 7.) The discretionary language was affirmed by the Eighth Circuit as "couched in discretion." *Alberty v. United States*, 54 F.4th 571, 576 (8th Cir. 2022.) Within their opinion, the 8th Circuit never discusses or asserts that "the alleged 'mandate' is couched in permissive terms" as the Government mistakenly argues. (Gov.'s Post Trial Br. pg. 11 fn. 7.)

Jul. 18, 2005); *see also Bourassa*, 4:20-CV-04210-LLP, 2023 WL 5958975, at *13. Failing to even present argument under the standard that applies to Chief Neuenfeldt's actions is fatal to the Government's defense. (*See* Doc. 155 pg. 12.)

Instead, the Government spends a significant amount of time in its Response Brief arguing that "Plaintiffs were unable to show that an act of Officer Neuenfeldt ***combined with Bourassa's negligence***" to proximately cause the injuries that Micah and Morgan sustained. (Gov.'s Post Trial Br. pgs. 12-29, 34-35, and and 86) (emphasis added.) As this Court has already ruled, "[t]he Government will not be relieved from liability unless Bourassa's negligence, operating alone, ***without Officer Neuenfeldt's*** negligence contributing thereto, was the sole cause of Plaintiffs' injuries." (Doc. 155 pg. 15) (citing *Howard v. Bennet*, 894 N.W.2d 391, 395 (S.D. 2017)). Instead, the Government spends only two pages arguing that Bourassa's negligence superseded Chief Neuenfeldt's negligence, (Gov.'s Post Trial Br. pgs. 28-29), and a significant amount of argument deflecting from the reckless, rogue, negligent, and insane actions Chief Neuenfeldt undertook on the night in question.

Chief Neuenfeldt owed a clear duty to Micah and Morgan to exercise "ordinary care or skill not to injure" them. (*See* Doc. 155 pg. 12); *see also Schreiner*, Civ. No. 03-5069, 2005 WL 1668429, at *3-4; *see also Bourassa*, 4:20-CV-04210-LLP, 2023 WL 5958975, at *13. Considering Chief Neuenfeldt's duty to Micah and Morgan on the night in question related to operating his police cruiser, he had a duty to operate the vehicle as an "ordinarily prudent or

reasonable person exercises under the same or similar circumstances." *Bourassa*, 4:20-CV-04210-LLP, 2023 WL 5958975, at *13 (citing *Doyen v. Lamb*, 49 N.W.2d 382, 383 (S.D. 1951); *see also Blacksmith v. U.S.*, Civ. No. 06-5022, 2008 WL 11506053 (D.S.D. Jan. 16, 2018) (concluding that under South Dakota law, an officer even owes a duty of care to a fleeing suspect).

Deputy Baldini unequivocally testified that Chief Neuenfeldt did not voice or exhibit any behavior that indicated Neuenfeldt was concerned with the safety of Micah or Morgan:

> Q: And at no point in time did you see any concern or did Neuenfeldt voice any concern for the safety of the individuals in this truck he was pursuing. Correct?
>
> A: Correct.
>
> Q: And similarly, there was no indication or concern about the safety again of the individuals in this truck when he's driving a hundred miles an hour on gravel roads. Correct?
>
> MS WARNER: Objection. Speculation.
>
> THE COURT: Overruled.
>
> BY MR. CASEY:
>
> Q: You may answer.
>
> A: Correct.
>
> Q: And there was no indication that Neuenfeldt could have cared less about the safety of anybody else on the road; not just the individuals in this truck or yourself, whether they were crossroads or the actual roads he was on. No indication whatsoever. Correct?
>
> MS WARNER: Objection.
>
> THE COURT: Overruled.
>
> MS WARNER: Testifying?
>
> BY MR. CASEY:

Q: You may answer.

A: Correct.

(TT at 365:17-366:14.) There is no evidence on record, nor did the Government argue, that Chief Neuenfeldt exercised "ordinary care or skill not to injure" Micah or Morgan. Instead, the substantial evidence submitted to this Court shows that there was zero justification to force Micah and Morgan into guaranteed peril and injury.

Chief Neuenfeldt's pursuit of Bourassa was at night, the vast majority of the pursuit route was on gravel, a portion of the pursuit went through a corn field, and the entirety of the pursuit was at speeds in excess of 55 mph and reached 100 mph multiple times. (TT at 328:5-328:15, 331:12-332:11, and 342:20-343:8.) For the entirety of the pursuit, Chief Neuenfeldt was right behind Bourassa's truck, including on 229A. (TT at 583:11-584:8.) The substantial evidence on record indicates Chief Neuenfeldt pushed Bourassa's truck down 229A:

- Baldini testified that the speeds down 229A, like the entire pursuit, were in excess of 55 mph and reached 90 to 100 mph an hour, and that Chief Neuenfeldt was pursuing Bourassa's truck down 229A, (TT at 328:12-328:15 and 342:20-343:2);
- Micah testified that Chief Neuenfeldt was directly behind Bourassa's truck on 229A and Chief Neuenfeldt was driving fast, (TT at 585:6-585:18);

- Chief Neuenfeldt testified he was so close to Bourassa's truck on 229A that dust was obscuring his vision, (TT at 500:6-501:2 and 502:17-503:5);
- The Government's retained expert Katsaris testified that Chief Neuenfeldt's dust testimony indicates how close he was to Bourassa's truck, (TT at 1684:24-1685:5);
- Chief Neuenfeldt's cruiser had the capability to catch Bourassa's truck almost immediately, (TT at 713:7-16, 729:3-729:24, and 785:11-787:10; *see also* Doc. 259 at pg. 44); and,
- Chief Neuenfeldt laid down skid marks from braking and crashed through the dead-end on 229A, which he knew was there all along, (Doc. 249-4 Ex. 41-46.)

Chief Neuenfeldt pushed Bourassa down 229A and guaranteed injury to Morgan and Micah.

The officers involved in this chase testified that pursuits at high speeds are dangerous and that high-speed pursuits are even more dangerous on gravel roads. Deputy Baldini testified it was dangerous to Micah and Morgan to pursue Bourassa at 100 mph, on gravel roads, at night. (TT at 310:8-310:24, 316:6-316:11, and 333:1-333:25.) Sergeant Kurtz also testified it is extremely dangerous to pursue at high speeds on gravel roads. (TT at 47:20-47:25). In fact, Sergeant Kurtz backed off during his pursuit because of how dangerous the conditions of the chase were. (TT at 51:24-52:3.) Even Chief Neuenfeldt admitted that pursuing Micah and Morgan on gravel roads at high speeds is

risky and dangerous. (TT at 485-486 462.) The substantial evidence shows the pursuit was extremely dangerous to Micah and Morgan.

The most dangerous aspect of the pursuit was Chief Neuenfeldt's pursuit of Bourassa down 229A. Sergeant Kurtz testified that he would not have pursued Bourassa's truck down 229A and a reasonable police officer wouldn't have either. (TT at 147:4-147:22.) Officer Baldini testified that a reasonable police officer would have never pursued down 229A. (TT at 345:25-346:3.) Chief Brian Arnold testified that a reasonable police officer would not push Bourassa down 229A. (TT at 384:13-384:16.) Nick Cottier testified that Chief Neuenfeldt's pursuit of Bourassa down 229A was not appropriate and he would have never done it. (TT 292:2-292:14.) Instead of pursuing and pushing Bourassa down 229A, there was significant testimony regarding a lesser coercive and safer option for Chief Neuenfeldt: waiting at the beginning of 229A. Sergeant Kurtz, Officer Baldini, and Chief Arnold all testified waiting at the beginning of 229A was a safer option. (TT at 79:2-79:12, 147:4-147:18, and 383:22-384:16.) The unrebutted testimony of the South Dakota law enforcement officers in this case is in direct contradiction to the Government's theory.

All of Chief Neuenfeldt's actions on the June 17-18, 2017, begs the question: what possible justification could exist to allow Chief Neuenfeldt to push Morgan and Micah into guaranteed peril and injury? The Government's answer is Bourassa fled from a routine traffic stop, Bourassa was unable to be identified and apprehended by less coercive means, and Bourassa intentionally

struck Chief Neuenfeldt with his truck. The Government's position is unsustainable given the substantial evidence on record.

First, the Government has attempted to couch the initial stop of Bourassa outside of the house party as an "investigatory stop" to presumably justify Chief Neuenfeldt pulling his gun on Bourassa before Bourassa's truck even came to a stop. (Gov.'s Post Trial Br. pgs. 17-18 and 20.) Neither Chief Neuenfeldt nor Sergeant Kurtz testified the initial stop of Bourassa was an investigatory stop; instead, the substantial evidence shows it was a routine traffic stop. (TT at 88:7-88:12, 189:2-189:10, and 515:4-515:7.) Instead, the Government's retained expert Katsaris created the fiction that the initial stop of Bourassa was an "investigatory stop" on the last day of trial. (TT at 1585:11-1587:4 and 1663:1-1664:8)

The Government argues in its brief, citing Katsaris' conclusive testimony at length:

> In response to this lack of compliance, Officer Neuenfeldt drew his firearm. This action was justified as, at this point, given the location and timing of the stop and that law enforcement officers had no idea who they were dealing with and what the suspect's intentions were. A significant portion of South Dakota residents own, and indeed many carry firearms, and the response time to draw a firearm in response to a suspect's action can mean the difference between life and death.

(Gov.'s Post Trial Br. pg. 19) (citations omitted.) Notwithstanding the fact that Chief Neuenfeldt pulled his gun before Bourassa came to a stop and the fact that Chief Neuenfeldt never testified that the reason he pulled his gun was because "[a] portion of South Dakota residents own . . . [or] . . . carry firearms," the Government's position would create dangerous precedent. The

Government, and its retained expert Katsaris, believe that in any state where a "significant portion" of the population own and carry firearms it is justifiable for officers to draw their gun before a traffic stop even occurs. Bourassa's seizure was a simple traffic stop and Chief Neuenfeldt's decision to pull a gun before Bourassa even stopped, exhibits the type of rogue officer the Government is trying to defend.[6]

Second, Bourassa's identity was known and if it wasn't immediately known, there was enough information to allow law enforcement to apprehend him by less coercive means. The Government summarily dismisses the evidence supporting that Bourassa's identity was known. (Gov.'s Post Trial Br. pg. 9 fn. 6.) However, Nick Cottier's unrebutted testimony indicated that Chief Neuenfeldt told him that Neuenfeldt positively identified Bourassa prior to the pursuit. (TT at 281:1-281:4.) In addition, the occupants of Deputy Carl Brakke's cruiser positively identified Bourassa "from Dell Rapids who was involved in a stand off a year ago." (Doc. 249-4 Ex. 35 pg. 1.) So, even if Bourassa's identity was not definitively known at the time of the chase, there were enough "means to ascertain the suspect's identity" and capture Bourassa by a process that would not knowingly endanger Micah and Morgan and thrust them into certain peril. The Government cannot dismiss the objectively safer processes of capture that were available to Chief Neuenfeldt. Chief Neuenfeldt's

[6] This Court even pressed the Government on the fact that Chief Neuenfeldt was a "Rogue police officer [the Government was] doing [its] best to defend." (at 1352:9-1352:12.) The Government did not disagree with the Court's characterization of Chief Neuenfeldt. (*Id.*)

duty to Micah and Morgan, the passengers of Bourassa vehicle, was paramount. As such, any attempt to justify Chief Neuenfeldt's actions regarding Bourassa's allegedly unknown identity and Chief Neuenfeldt's obsessive need to capture Bourassa on the night in question should be disregarded.

Third, the substantial evidence on record supports the finding that Chief Neuenfeldt was never hit. The Government has not carried its burden in proving that Neuenfeldt was struck by Bourassa's truck. Instead, the substantial evidence on record indicates that Chief Neuenfeldt was lying in an effort to justify the continuation of the unnecessary pursuit. Even the Government's retained expert Katsaris testified that if Chief Neuenfeldt was not struck by Bourassa's truck and the alleged "serious offense" did not occur, his pursuit of Bourassa was not justified:

> Q: If he's not telling the truth on whether he got hit, there isn't a serious offense at all. Is there? Yes or no?
>
> A: I can't answer it because I'm not assessing credibility. I was assessing evidence. I have already provided the evidence that I believed supported the fact that he was hit. I can't go to credibility.
>
> Q: I'm going to a hypothetical. The Judge will make that determination. And the hypothetical is this: Hypothetically if Neuenfeldt did not get impacted, you would agree with me there's no seriousness of the offense because he's lying.
>
> A: On a hypothetical, eliminating all the evidence, because you didn't give it to me, I would agree with you.

(TT at 1649:6-1649:18.) Since the substantial evidence on record indicates that Chief Neuenfeldt was never struck by Bourassa's truck, the pursuit was

not justified and there must be a finding that he was not struck by Bourassa's truck.[7]

a. Neither Micah nor Morgan Contributed to the Cause of Their Injuries.

The Government's attempts to blame Micah and Morgan for the injuries they sustained should be disregarded. First, the substantial evidence on record shows that neither Micah nor Morgan did anything to contribute to their injuries. Chief Neuenfeldt himself testified that the neither Micah nor Morgan did anything wrong on the night and morning in question:

Q: And you knew there were passengers in that truck; didn't you?

A: Yes.

Q: You knew they weren't driving?

A: Yes.

Q: And you knew that you didn't know of one thing they did to cause or contribute to this, and you don't know of one thing they did wrong at any point. Do you?

A: The passengers? No.

(TT at 490:12-490:20.) Officer Baldini testified to the same:

Q: Are you alleging that our clients, or the passengers of this truck, Morgan Ten Eyck and Micah Roemen, are you alleging that they did anything wrong in this pursuit?

A: No.

(TT at 324:22-324:25.) Sergeant Kurtz testified to the same:

Q: The kids in Tahlen Bourassa's vehicle are passengers. Right?

[7] The Government's expert Joseph Peles did not establish Chief Neuenfeldt was struck by Bourassa's truck. (*See* Plf.'s Post Trial Br. pgs. 14-16.) In fact, the Court even questioned Peles' theory multiple times stating the Court was having "a hard time buying" Peles' dirty bumper theory. (TT at 268:14-268:19 and 1707:9-1704:24.)

A: Yes.

Q: They're supposed to be at the top of the list of foremost safety because they're part of the public. Right?

A: Yes.

Q: And you know of nothing that the passengers did wrong. Do you?

A: No.

(TT at 77:8-77:17.)

Second, the Government, without evidence or authority, attempts to argue that Morgan and Micah should have "attempted to exit the vehicle" and that they had other reasonable alternatives to avoid injury. (Gov.'s Br. pgs. 31-32.) Micah credibly testified the reason he didn't get out of Bourassa's truck was because he was "scared" and did not know "when Tahlen was going to take off again." (TT at 582:20-582:24.) Regardless of the fact that Micah's belief that he could not get out of Bourassa's truck was reasonable, South Dakota has already determined that "reasonable minds cannot differ on the jeopardy involved in stepping from a moving vehicle." *Goepfert v. Filler*, 563 N.W.2d 140, 142 (S.D. 1997). Chief Neuenfeldt's negligence left "no reasonable alternative" to avoid injury. *Bourassa*, No. 4:20-CV-4210-LLP, 2023 WL 5958975, at *15 (citing *Goepfert,* 563 N.W.2d at 144). Morgan was between Bourassa and Micah, the doors were locked, and as soon as Chief Neuenfeldt began pursuing Bourassa, Bourassa reacted and continued to flee. There were no reasonable alternatives for Micah or Morgan. As such, the Government's argument that Micah or Morgan should have exited Bourassa's truck is unsustainable with the evidence on record and the law that applies to it.

Lastly, the Government's argument that Micah and Morgan had a "duty to give some warning of danger" implies that the duty discussed in *Hanisch* applies to Micah and Morgan. (Gov.'s Br. pg 30.) South Dakota's Supreme Court discussed in *Hanisch* that a "duty to give some warning of danger" applies to a passenger, when "a danger not obvious to the driver" arises. *Hanisch v. Body*, 90 N.W.2d 924, 927 (S.D. 1958). Here, this Court has already discussed that the circumstances of the chase presented "a risk that no adult person of average intelligence can deny." *Bourassa,* No. 4:20-CV-4210-LLP, 2023 WL 5958975, at *14. As such, under *Hanisch,* neither Micah nor Morgan had a duty to warn Bourassa of the danger that Chief Neuenfeldt was pushing all three into "that no adult person of average intelligence can deny." *Id.*

III. This Court should Disregard Chief Neuenfeldt and Ken Katsaris' Testimony Entirely.

The Government's position on liability and jurisdiction relies, almost exclusively, on the testimony and credibility of Chief Neuenfeldt and its retained expert Katsaris. For the following reasons, this Court should disregard both witnesses' testimony in their entirety.

Of all the witnesses who testified during trial, Chief Neuenfeldt was the least credible.[8] While Plaintiffs incorporate by reference the portion from their initial Post Trial Brief discussing Neuenfeldt's credibility issues, (*See* Plf.'s Post Trial Br. pgs. 16-19), certain aspects of Neuenfeldt's credibility issues merit repeating:

[8] In fact, even Katsarsis recognized that Chief Neuenfeldt's credibility had been "impugned." (TT at 1643:16-1643:21.)

- Chief Neuenfeldt was fired by Sheriff Troy Wellman for being dishonest, untrustworthy, and disregarding mandatory dictates for an officer, (TT at 133:18-134:8, 139:5-139:17, 139:18-140:1);

- Against the law and policy, Neuenfeldt solicited other officers to help him stalk another deputy sheriff during his time with the Moody County Sheriff's Office, (TT at 136:22-137:15);

- Officers were not allowed to call Neuenfeldt for help while he was at Moody County, because Neuenfeldt could not be trusted, (TT at 141:6-141:21);

- Sheriff Wellman testified that believes Neuenfeldt is dangerous and makes stupid decisions, (TT at 143:23-144:3);

- On two separate occasions, Neuenfeldt chased individuals in high-speed pursuits outside of his jurisdiction in violation of his jurisdictional limitations, (TT at 447:1-448:12 and 449:22-452:6);

- Chief Neuenfeldt lied to Deputy Baldini and Avera medical staff in the aftermath of the chase in question, stating that the truck "spun him around", "did not knock him down", and he did not fall, (Doc. 249-4 Ex. 18 at USA000760 and Ex. 15 at USA000764; TT at 240:25-241:9, 320:2-320:19, 475:7-475:476:10, and, 480:16-480:22);

- Chief Neuenfeldt was not sure he was even hit only months after the night in question when he was interviewed by BIA investigator Brock Baker, (TT at 481:20-484:14); and,

- Chief Neuenfeldt has pivoted[9] throughout the entirety of this lawsuit on how the front of Bourassa's truck allegedly struck his left upper thigh area at 20 mph, (TT at 473:5-475:12, 1536:13-1537:25, and 473:5-475:12.)

Chief Neuenfeldt's negligence is the reason this lawsuit started and his testimony was pivotal to the Government's defense of his actions. However, his testimony not only established that he is a rogue cop who caused the Plaintiffs injuries, but that he is also prone to dishonesty and is not credible. Chief

[9] The Government's retained expert Peles even disagrees with Chief Neuenfeldt's story of the event. (TT at 1536:13-1537:25.)

Neuenfeldt's testimony should be disregarded in its entirety. *See* S.D. Pattern Jury Instructions 1-30-30 (2008 Ed., 2022 updates); *Stockwell v. Stockwell*, 2010 S.D. 79, ¶ 24, 790 N.W.2d 52, 61-62.

Ken Katsaris was hired by the Government to provide testimony regarding "law enforcement policy, procedures, training, and supervision." (Doc. 254-4 Ex. 221 pg. 4.) Katsaris provided a multitude of opinions in an attempt to justify Officer Neuenfeldt's actions on the night question and in an attempt to establish that this Court lacks jurisdiction[10] over this case. This Court should disregard Katsaris' testimony for the following reasons:

- Katsaris' testimony directly contradicts a substantial amount of evidence in this case:
    - Katsaris concocted the fiction that the initial stop of Bourassa was an "investigatory stop" when Sergeant Kurtz, Deputy Baldini, and Chief Neuenfeldt provided unrebutted testimony it was a routine traffic stop, (TT at 88:7-88:12, 189:2-189:10, 515:4-515:7, 1585:11-1587:4, and 1663:1-1664:8);
    - Katsaris concocted the fiction that Chief Neuenfeldt and Deputy Baldini were running "containment", when neither testified that the purpose of their attempt to stop Bourassa[11] was for containment and actually testified that it was routine traffic stop, (TT at 1587:5-1588:5);
    - Katsaris misleadingly stated that Sergeant Kurtz "put out orders" that he was attempting to get in front of Bourassa's truck following his termination and that he somehow "temporarily authorized" Chief Neuenfeldt to become primary pursuer, when Sergeant Kurtz provided unrebutted testimony he did not authorize Chief

[10] While Katsaris attempts to outline why this Court lacks jurisdiction, he also testified that he was not hired to provide testimony in regards to jurisdiction. (TT at 1637:18-1638:2 and 1675:4-1675:13.)

[11] This Court even recognized that Katsaris was "putting his view on things as opposed to what the actual testimony" was. (TT at 1588:2-1588:5.)

Neuenfeldt to do anything on the night in question[12] and Chief Neuenfeldt himself admitted that Kurtz never requested he become primary, (TT at 1594:9-1595:16, 38:9-38:20, and 485:8-485:10);

- Katsaris testified that gravel roads were not a factor that made the pursuit in question more dangerous, when Sergeant Kurtz, Deputy Baldini and Chief Neuenfeldt, the three officers actually involved in the chase, testified it was a factor that made the pursuit riskier and more dangerous, (TT at 47:3-48:13, 310:8-310:17, 316:6-316:11, and 462:19-162:24);

- Katsaris testified that the pursuit was "45, 50 miles an hour sometimes over the speed limit" when the unrebutted testimony from the officers involved was that the entirety of the pursuit was well in excess of 55 mph and reached 100 mph multiple times, (TT at 328:5-328:15, 331:12-332:11, 342:20-343:8, and 1608:25-1609:22); and,

- Katsaris testified that an officer does not need to consider the safety of the passengers in a fleeing vehicle when making a decision to pursue, even though every officer testified opposite, (TT at 21:4-21:19, 277:12-277:20, 310:14-310:18, 373:7-373:17, 490:8-490:14, and 1683:18-1684:9).

- Katsaris testified that if a policy has a mandatory requirement to contact a supervisor when a pursuit begins that the officer should disregard the mandatory policy, (TT at 1631:22-1632:1);

- Up until he took the stand at trial, Katsaris maintained that burglary was one of the "pre-pursuit factors" that justified Chief Neuenfeldt's chase, because Micah and Morgan were potentially involved in a "home burglary", (Doc. 254-4 Ex. 221 at pg. 7), and then Katsaris abandoned his theory on the stand testifying he did not believe it was a pre-pursuit factor involving "seriousness of the offense," (TT at 1653:3-1653:19); and,

- Katsaris testified that the "assured clear distance ahead" rule does not apply to Chief Neuenfeldt without providing any justification, evidence, or law supporting his position, (TT at 1686:3-1686:10.)

[12] This Court, again, recognized that Katsaris' testimony was in contradiction to Sergeant Kurtz's testimony, stating "the Court will rely upon its own recollection and the record, which I believe is different." (TT at 1595:5-1595:9.)

The substantial evidence on record indicates that officer safety was not at issue on the night in question. Notwithstanding the fact that the officers actually involved with the pursuit in question testified there were no officer safety concerns, Katsaris attempted to concoct officer safety concerns six years after the pursuit:

- Katsaris testified that Chief Brian Arnold was an officer safety concern because he was "attempting to come to the aid" of Chief Neuenfeldt, when Chief Neuenfeldt testified that he neither knew where Chief Arnold was nor that Chief Arnold would be "attempting to come" and involve himself, (TT at 460:3-460:15 and 1611:24-1613:2);

- Katsaris testified that officer safety was at issue until Bourassa was caught, even if it was hours or days or weeks later, (TT at 1607:18-1608:24 and 1613:14-1614:10); and,

- Katsaris testified crashing into the dead-end at 229A was the "last thing you would think" would happen when pursuing a "vehicle down a dead-end road" when multiple officers testified pursuing down a dead-end road is risky, dangerous and that a reasonable police officer would have waited at the beginning of the dead-end road and not pursued, (TT at 147:4-147:25, 292:5-292:14, 384:3-384:16, 398:4-398:8, 345:25-3456:3, 488:19-488:25, 1623:16-1624:1625).

Katsaris' testimony cannot overcome the substantial evidence on record controverting his opinions. Under South Dakota law, the value of his opinion is "no better than the facts upon which [it] is based . . . [and] . . . [i]t cannot rise above its foundation and proves nothing if its factual basis is not true." *Johnson*, 2000 S.D. 47, ¶ 25, 610 N.W.2d at 455 (citing *Podio*, 162 N.W.2d at 387). Here, Katsaris' opinion ignores or contradicts the factual basis and foundation it rests upon. Katsaris' testimony should be disregarded in its entirety.

IV. Tahlen Bourassa's Alleged Negligence did not Supersede Officer Neuenfeldt's Original Negligence.

Throughout its entire brief, the Government either directly or indirectly blames Bourassa for causing Micah and Morgan's injuries. As discussed above, this Court has already ruled that "[t]he Government will not be relieved from liability unless Bourassa's negligence, operating alone, ***without Officer Neuenfeldt's*** negligence contributing thereto, was the sole cause of Plaintiffs' injuries." (Doc. 155 pg. 15) (citing *Howard*, 894 N.W.2d at 395). The Government has failed to establish that Bourassa's negligence supervened and superseded Chief Neuenfeldt's original negligence and was the sole cause of Micah and Morgan's injuries.

First, the Government only spends two pages arguing that Chief Neuenfeldt's pursuit of Bourassa down 229A was "unforeseeable and 'surprised' both Deputy Baldini and Officer Neuenfeldt . . . because it made no sense at all." (Gov.'s Post Trial Br. pg. 29.) However, the Government ignores the fact that it was plainly foreseeable that if Chief Neuenfeldt continued to pursue and push Bourassa, that Bourassa would continue to flee. The only reason Bourassa ended up at 229A was because of Chief Neuenfeldt's reckless pursuit of him.

It is fatal to the Government's theory on superseding cause that Bourassa did not flee when he was not being pursued. Even the Government's retained expert Katsaris recognized that when Chief Neuenfeldt was not pursuing Bourassa, he stopped his vehicle. (TT at 1694:24-1695:17.) Regardless of the fact that Chief Neuenfeldt's actions put Micah and Morgan

into guaranteed peril, Chief Neuenfeldt continued to pursue and push Bourassa when Bourassa turned down 229A. As such, Bourassa's alleged negligence is not an intervention so "foreign to the risk the original actor created." *Braun v. New Hope Tp.*, 2002 S.D. 67, ¶ 12, 646 N.W.2d 737, 740. Instead, Bourassa's actions were the "natural and continuous sequence of causal connection" that resulted from Chief Neuenfeldt's negligence and did not constitute a "new and independent cause." *Id.* (citing *Schmeling v. Jorgensen*, 84 N.W.2d 558, 564 (S.D. 1957)).

Second, the Government's reliance on SDCL § 3-21-9 absolving Chief Neuenfeldt's overwhelming negligence is not supported by the record or South Dakota law. (Gov.'s Post Trial Br. pgs. 34-35.) The record is void of any evidence that Bourassa was under arrest or could be arrested for anything. Regardless, SDCL § 3-21-9 does not in any way bar Plaintiffs' claims, because the Government failed to establish that Bourassa's negligence supervened or superseded Chief Neuenfeldt's negligence. (*See* Doc. 155 pg. 18.)

Last, the Government argues that "South Dakota law requires the Court to apportion the degree of fault among" "joint tortfeasors." (Gov.'s Post Trial Br. pg. 86.) Again, this Court has already ruled that the Government cannot blame Bourassa under any sort of concurrent negligence argument, because the Government failed to make Bourassa a party to this action. (Doc. 155 pg. 14; Doc. 162 pg. 2 ¶ 4.) Bourassa is not a "joint tortfeasor" in this lawsuit and the Government has failed to prove that Bourassa's negligence supervened or superseded Chief Neuenfeldt's negligence.

V. Damages

The Government's negligence caused significant damages to both Micah and Morgan. While the Government takes issue with the damages caused by its negligence, the damages award this Court may consider is governed by the evidence and this Court's discretion. The Government claims that "Plaintiffs have failed to carry their burden in establishing their claimed damages; they have failed to establish what *the law* requires." (Gov.'s Post Trial Br. pg. 36.) State substantive law governs the issue of damages. *See e.g. LeGrande v. U.S.*, 687 F.3d 800 (7th Cir. 2012).

"[T]he law" in South Dakota affords considerable discretion to this Court, when it considers any award for noneconomic/general damages for Micah or Morgan:

> There are no accurate means of monetarily evaluating the detriment caused plaintiff by [their] pain, suffering and discomfort. Of necessity the amount of damages to be awarded therefore is largely left to the good judgment of the jury. And when courts scrutinize the exercise of that judgment they must keep in mind the reduced value of our dollar. In passing on the question of whether such award is legally excessive the trial judge exercises a judicial discretion. Because of his participation in the trial he is in a better position than we are to make this determination.

Reindl v. Opitz, 217 N.W.2d 873, 877 (S.D. 1974) (citing *Ross v. Foss*, 92 N.W.2d 147, 153 (S.D. 1958)) (citations omitted). In fact, compensatory noneconomic/general damages do not have a "mathematical or rule of thumb computation, and no substitute for simple human evaluation has been authoritatively suggested" by South Dakota law. *Plank v. Heirigs*, 156 N.W.2d 193, 203 (S.D. 1968). All that is required is that evidence is presented to show

that such damages are reasonably certain to occur or have occurred. *Jorgenson v. Dronebarger*, 143 N.W.2d 869, 873-74 (S.D. 1966). If this Court finds that Plaintiffs should be awarded medical expenses, it is reversible error to not award pain and suffering. *Reinfeld v. Hutcheson*, 2010 S.D. 42, ¶¶ 16-19, 783 N.W.2d 284, 289-90.

> South Dakota law also speaks to "excessive" damages:
>
> We think this award a generous one. However, this is immaterial because more than mere generosity must be made to appear before a court is justified in disturbing it. This it may do only if it is so extremely excessive as to justify the inference or conclusion that it is the product of corruption, passion or prejudice. In this connection the court may consider occurrences in the course of the trial that may have caused the jury to be biased or prejudiced.

Reindl, 217 N.W.2d at 877 (citations omitted). Damages awards challenged as excessive are routinely affirmed in South Dakota and under the FTCA. South Dakota recently affirmed a verdict in which the jury awarded $813,480 for noneconomic/general damages when the economic/special damages totaled $66,520. *Weber v. Rains*, 2019 S.D. 53, ¶¶ 14-15, 933 N.W.2d 471, 476. The affirmed noneconomic/general damages award represented over ten times the amount of economic/special damages awarded. *Id.* The Ninth Circuit affirmed an FTCA award of $31 million in noneconomic/special damages challenged as excessive, where a four-year old was the victim of an accident that left her as a ventilator-dependent quadriplegic. *Gutierrez ex rel. Gutierrez v. U.S.*, 323 Fed.Appx. 493, 484 (9th Cir. 2009). The Ninth Circuit reasoned that even though the four-year-old was severely injured she was aware of her limitations and the effect on her life. *Id.* In fact, the Eighth Circuit upheld an FTCA award

where a North Dakota District Court calculated noneconomic/special damages by "simply doubling the [economic/special damages]." *Wilkinson v. U.S.*, 564 F.3d 927, 934 (8th Cir. 2009). It is also worth noting that damages are not "punitive" simply because they are large. *Wheat v. U.S.*, 860 F.2d 1256, 1263 (5th Cir. 1988).

a. Micah Roemen

The Government spends a substantial amount of time rehashing the arguments made in opposition to Micah's motion to amend (Doc. 267.) Plaintiff believes these issues have been sufficiently presented and argued, therefore, there is no reason to repeat them here. As a result, Micah relies on the pleadings already submitted to the Court regarding his request to increase the award of damages to $2,500,000.

i. The Unrebutted Evidence at Trial Supports Micah's Request for Lost Wages.

The Government argues that Micah's claim for lost wages is not supported by the evidence because a vocational expert was not called at trial. A vocational expert is not required to prove lost wages and the evidence supporting Micah's claim was not rebutted by the Government. First, Dr. Reed clearly testified that Micah's permanent condition would prevent him from any employment requiring time on his feet:

Q: What about periods of prolonged standing? So if he is standing on that leg for, you know, eight hours, would you expect this syndrome to affect his ability to do that?
And I apologize, I'm going to shut this shade while you answer this. I have sun in my eyes.
A: So again, the artery entrapment itself shouldn't affect

his ability to stand. But it became clear that even with the artery released he was continuing to have issues with his leg that we couldn't pinpoint another vascular issue with. And you may recall from even the follow-up visit we repeated his CAT scan, CT angiogram, to evaluate the artery again and could not demonstrate that his artery was compressed, nor could we demonstrate that he was having problems with venous reflux. The test was relatively normal.

So he still continued to struggle with swelling and difficulties with heaviness and aching in his leg that were not present, you know, before he had trauma. And so I think that that was his struggle, is even with the popliteal artery entrapment released and the artery not being, you know, no longer being compressed, we still -- I still was concerned about the vein. We ruled out any venous insufficiency.

And then we also -- I had one of the local radiologists do a study on his vein directly where we are putting dye into the vein to see if it was narrowed or things like that that were causing this.

And so in the end it was -- we couldn't identify anything from a vascular perspective that was causing these elements. All we could say is that before his trauma he was normal, his legs were normal and he had, you know, he was doing his job. And after that, you know, it just -- it wasn't the same.

And so while we made sure that the artery was free of any problems and we surmised and figured out the vein was not a problem, he still continues to struggle. And I don't have a vascular answer for all that. But he still continued to struggle even when we couldn't find any blood vessel abnormalities after the multiple surgeries.

(Id. at 26:4-27:18.) The substantial evidence in the record also demonstrates that Micah's condition will affect him for the rest of his life:

Q: And similarly, Doctor, is it your opinion to a reasonable degree of medical probability that Mr. Roemen's condition is chronic and will require future treatment?

A: Yeah, I believe that his leg is never going to be the same as it was before the trauma. And while he has good artery perfusion and he has venous return from his leg, there still can be many different reasons sometimes why people have swelling and pain. And that, you know, I

> fear for him that's going to be the rest of his life. I mean he has gone quite a bit of time now with this and, you know, when we see something that's lingering for years, you know, it's going to be something unfortunately I think he is going to have to live with.

(*Id.* at 36:1-19.)

It is important to note that Dr. Reed's testimony was unrefuted by the Government. Additionally, Micah's testimony regarding his struggles with certain types of work was also unrefuted. (TT at 566:10-566:18, 568:19-569:6, 571:15-572:10, and 578:17-578:20.) In fact, when questioned on cross examination, the Government reaffirmed Micah's claim for lost wages and failed to challenge his testimony. (TT at 586:17-587:15.) The trier of fact, this Court, was presented with sufficient evidence from Micah and his treating expert that he is no longer able to pursue his dream of being an aviation mechanic and any other job in his market, which might afford him gainful employment, will be complicated by his ongoing leg pain and physical limitations.

ii. Micah's Injuries and Pain and Suffering is Objective, Plainly Apparent, and Without Comparison.

The Government is correct: there is no mathematical formula or rule of thumb when computing damages for pain and suffering. *Plank*, 156 N.W.2d at 203. This element of damages is highly subjective and left solely with the trier of fact: this Court. In fact, courts have held the Court has broad discretion in awarding general damages in an FTCA case, such as this. *Lockhart v. U.S.*, 834 F.3d 952, 958 (8th Cir. 2016); *see also Santistevan v. U.S.*, 610 F.Supp.2d 1036, 1044 (D. S.D. March 31, 2009). However, expert testimony is not needed

for Micah's pain and suffering because his injuries, the pain and suffering they have caused and will continue to cause, are obvious.

The pain endured by Micah as a result of the rollover was not and cannot be contested by the Government. If the Government chose to contest any of Micah's pain and suffering, the Government had the opportunity to at trial. However, the Government chose not to.[13] In addition, there is no disputing the pain associated with the numerous medical procedures and treatment, because it is "objective" and "plainly apparent." *See Koenig v. Weber*, 174 N.W.2d 218, 221-22 (S.D. 1970) (citing *Klein v. W. Hodgman & Sons, Inc.*, 85 N.W.2d 289 (S.D. 1957)). Micah broke numerous bones and required placement of a halo that utilized set screws that were literally drilled into his skull.

The most damaging pain Micah has experienced is through the mental distress he has and will continue to experience. The Government argues that past pain and suffering should be limited to "immediately after the accident" because he did not present a claim for lost wages and did not seek mental health assistance. (Gov.'s Post Trial Br. pg. 50.) Micah's mental distress is equally obvious and plainly apparent, as the physical pain he continues to suffer to this day. The Government's arguments are not supported by any law

[13] Instead of cross-examining Micah at trial on a number of alleged issues with his damages requests, the Government has instead chosen to cite to his deposition and discovery answers throughout its brief in an attempt to refute Micah's requests for damages. (Gov.'s Post Trial Br. pgs. 38, 40, 42, and 44-49.) Neither Micah's deposition nor his discovery answers were admitted into evidence and neither overcomes his unrebutted testimony. Plaintiff requests that the Court strike from the record any reference to the evidence that was never submitted to this Court.

and the Government's argument is controverted by the fact that Micah is still experiencing suffering from the horrific night in question.

Further, the South Dakota Supreme Court affirmed the lower court's decision to grant a new trial where a jury awarded past and future medical expense ***but denied*** recovery for pain and suffering related to those injuries. *Reinfeld*, 2010 SD 42, ¶ 19, 783 N.W.2d at 290. Micah's past and future medical expenses and injuries could have been challenged by the Government at trial but the Government chose not to. If this Court finds the Government liable, it must award the full value of past and future medical expenses and must also award for pain and suffering associated with those injuries. Micah provided unrefuted testimony to this Court how this experience has changed his life forever and explained his permanent physical restrictions. This testimony was not refuted and therefore must be accepted by this Court.

Prior to this tragedy, Micah was an avid runner and was physically capable of doing anything. Micah was a young kid with the rest of his life ahead of him. As a result of his permanent leg injury, he is no longer able to run and unable to even be on his feet or sit for long periods of time. The joy that running once provided has been forever taken from him. The freedom from daily pain is gone. The ability to be physically capable will never return. Most devastating for Micah is his inability to pursue the career of his dreams. Micah testified that he chose aviation maintenance because of his grandfather. Micah was able to complete his schooling for aviation maintenance and worked in the field for a short time but his leg pain and injuries became too much for

the day-to-day duties of the job. There is simply no amount of money that could give back what has been taken. Micah deserves full compensation in the amount of **$2,500,000.**

b. Morgan Ten Eyck

The Government asserts that Morgan's claim for damages is "excessive and subject to offset" for three reasons:

1. "[I]t is extremely unlikely that Morgan will achieve a normal life expectancy";
2. "Dahlberg's and Frankenfeld's reports suffer from" errors; and,
3. "[P]ayments made by the United States via TRICARE must be offset against special damages the Court may award."

(Gov.'s Post Trial Br. pg. 54.) The Government's arguments are not sustainable given the evidence on record in this case.

Projections indicate that Morgan will potentially live a shortened life. However, the Government's retained opinion on Morgan's life expectancy should be disregarded. The evidence and testimony at trial revealed the Government's retained opinion was extremely biased, the foundation for the retained opinion was materially flawed, and the Government's retained expert ignored readily available data to make an accurate prediction for Morgan's life expectancy. As such, this Court should disregard the Government's retained opinion on life expectancy.

Further, the Government's expert Kent Jayne should be disregarded entirely. Outside of the fact that Jayne did not prepare an alternative life care plan for Morgan controverting Dahlberg's plan, Jayne's testimony also

exhibited that he was not credible in assessing Morgan's future lost earnings. In addition, his assessment of potential "independence and community involvement" that Dahlberg allegedly failed to observe for Morgan shows Jayne lacks credibility. This Court should disregard Jayne's testimony in its entirety.

i. Dr. Robert Shavelle's Life Expectancy Opinion should be Disregarded, Because He Failed to Compare Morgan to Similarly Situated Patients and Never Explained How He "Accounted" for that Foundational Flaw.

The Government retained Dr. Robert Shavelle a medical researcher and professional defense witness to testify regarding Morgan's life expectancy. Shavelle testified that 95% of his "earned revenue" is from "consulting in a litigation context" and 95% of such consultations are for the defense. (TT at 849:16-850:10.) Shavelle testified that he had been retained at least once a week for the past 20 years for defense consultations and had been paid $18,000 by the Government at the point he testified at trial.[14] (TT at 850:850:7-851:10.) Shavelle testified he makes a significant amount of money testifying for the defense. (*Id.*)

Notwithstanding the significant financial incentive to testify for the Government and one-sided prejudice Shavelle's background presents, the foundation for Shavelle's opinion in this case is pointedly flawed. Shavelle's opinion relies upon four academic articles, of which he was an author. (TT at 838:25-841:3; *See* Doc. 254-4 Ex. 239.) The four academic articles rely on

[14] While Shavelle has never testified in open court how much income he derives from defense consultations, (TT at 850:11-850:20), simple arithmetic reveals that Shavelle has made roughly $18,500,000 in the past 20 years testifying for the defense.

collected data, which is then used to come to hypothetical conclusions regarding life expectancy.[15] (*Id.*) The projections found in the four academic articles are significantly flawed, as they are applied to Morgan, because they include individuals who died within the first six years of their injuries, unlike Morgan. (TT at 842:1-842:18, 848:6-848:10, and 861:22-862:3.) As such, the projections found on the first page of Ex. 239 should be disregarded entirely. (Doc. 254-4 Ex. 239 pg. 1.)

The projections stemming from the flawed data are ***significantly*** lower than projections from data sets ***excluding patients*** who have died within first six years following an injury, as Dr. Michael Freeman testified:

> Q: Yes. But what is the – if you did quantify it, what is the final result differential in – when you look at his figures and if you take out or take into account, if you can, the statistical effect of his approach versus yours on that sole issue, the six-year death rate, so to speak.
>
> A: ***It's approximately 20 years***. It truncates after approximately 20 years of expected survival.

(TT at 1078:14-1078:20) (emphasis added.) Even Dr. Shavelle testified it was unfair to compare Morgan with patients who have died within the first six years of their injury:

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[15] The collected data from the four academic articles that form the foundation for Shavelle's opinion of Morgan's life expectancy come from two sources: California Department of Social Services and National Traumatic Brain Injury Model Systems. (TT at 862:12-862:24.) Both data sets include patients who died within the first six years of their injuries, unlike Morgan. (TT at 842:1-842:18, 848:6-848:10, and 861:22-862:3.) Shavelle was unable to remove the patients who died within the first six years of their injuries from his projections because he no longer possesses that data. However, ignoring more applicable data, Shavelle relied on the flawed data for the foundation of his opinion in this case.

Q: Right. The foundation includes individuals that have died within the first six years since they were injured. Right?

A: In some cases, yes.

Q: And you stated – I actually wrote it down – you said on direct it's not fair if you compare Morgan Ten Eyck to someone who died within the first – excuse me. It's not fair if you compare Morgan Ten Eyck to somebody who has factors that are important to life expectancy – you understand what I'm referencing there, the number of factors you talk about in your articles and you discussed on direct? You understand that?

A: ***I think you're asking me is it important to make a fair comparison; and if so, I agree.***

. . .

A: Today I said after the first few years, one or two years, time since injury does not affect survival, once we account for everything else. And what's really important is the everything else. ***We have to compare similarly situated people. Otherwise, it's not a fair comparison.***

Q: I agree with that completely. But in any event, you published an article that discussed that mortality was higher between one- and five-years post-injury as compared to five years post-injury. Yes or no? You published that. Yes?[16]

A: I was the author and it was published, and yes, I believe we used that crude grouping, one to five years, back in 2001.

(TT at 841:4-841:17 and 865:16-866:3.)

Shavelle attempted to argue that he "accounted" for the flawed foundation of his opinion by stating "I didn't compare her with people who were

[16] Shavelle's own published literature flip flops on the significance of time since injury. However, the time since injury factor does not absolve Shavelle's decision to compare Morgan to patients who have died within the first six years of their injury, unlike Morgan. If found liable, Shavelle's opinion reduces the financial responsibility of the Government, who is paying Shavelle an exorbitant amount of money to render his opinion.

just injured or within the first couple years post-injury." (TT at 842:5-842-6.) However, Shavelle never explained how he avoided comparing Morgan with patients who died within the first six years of their injury when Shavelle cannot extrapolate those individuals out of the data sets that he relies on for his opinion.[17] Notwithstanding the fact that the Government's exhibits that provide the foundation for Shavelle's opinion in this case ***all include patients who died within the first six years of their injury***, Shavelle failed to explain how he removed those same patients out of the comparison for Morgan's life expectancy. Under the Government's own argument, a life expectancy expert's failure to "explain in detail [their] methodology" should result in the expert's opinions being disregarded as unreliable.[18] *Finkelstein v. Prudential Fin. Inc.*, No. CV-21-00657-PHX-MTL, 2023 WL 6970280 at *9 (D. Ariz. Oct. 23, 2023).

To the contrary, Dr. Michael Freeman and Dr. Alan Weintraub used epidemiological studies that were available to Shavelle, not authored by Shavelle, more recent than Shavelle's articles, and, most importantly, studies

[17] There was no possible way for Shavelle to "account" for his flawed foundation, because the four articles he relies on were all published between 2007 and 2015 and he no longer possesses the data which they rely on.

[18] The Government uses the *Finkelstein* Motion to Strike Dr. Michael Freeman to support the argument that this Court should not rely on Dr. Freeman. (Gov.'s Post Trial Br. pg. 57 fn. 39.) However, Dr. Freeman's report was excluded in *Finkelstein* at the discretion of the Court, the issues of life expectancy were different in *Finkelstein* than here, and, critically, here, Dr. Freeman has adequately explained the methodology by which he came to his opinion about Morgan's life expectancy. (TT at 1040-1077.) To the contrary, Shavelle has failed to explain in detail his own methodology of "accounting" for the flawed foundation of his life expectancy opinion. Under *Finkelstein* and the Government's own argument, Shavelle's opinions should be excluded.

which accurately account for Morgan's circumstances. As such, this Court should follow to the opinions of Dr. Freeman and Dr. Weintraub.

Dr. Freeman adequately and thoroughly explained the methodology underlying his opinion that Morgan will live an additional **47.1 years** throughout the course of his trial testimony. (*See e.g.* 1048-1060.) Critically, he identified the flawed foundation that Shavelle was relying upon:

> Q: Doctor, I just – I would like to open it up to you so you can kind of discuss what were the errors you found in Dr. Shavelle's life expectancy opinion.
>
> A: Well, the biggest problems that I observed related to incorporation of data on mortality death rate that was within the time that Ms. Ten Eyck has already survived, that were from his studies. Because it's well established, including in Dr. Shavelle's own writings, it's well established that the first five years after the traumatic brain injury, incorporates the highest rate of mortality. To include that time in evaluating the life expectancy for someone who's already survived more than six years after the injury is penalizing them for a death that can't apply to them. As Ms. Ten Eyck is already more than six years out, we should not be looking at mortality rates to apply to a general population analysis, which is how you would arrive at a life expectancy for an individual; we should only be looking at death rates from six years and out, rather than anything before six years. So that was the primary and most glaring.

(TT at 1045:11-1046:6.) Inclusion of patients who died within the first six years of their injury acts like a boat anchor significantly reducing Morgan's life expectancy. (TT at 1046:18-1047:23.) If Shavelle had excluded the patients who had died within the first six years of injury from his flawed foundation, Morgan's life expectancy would have catapulted to 44 years. (TT at 1078:14-1078:20.)

Dr. Freeman used two studies more recent in time that ***excluded patients*** who had died within the first six years of their injuries.[19] (TT at 1058:1-1059:16; *see also* Doc. 249-9 Ex. 125.) The more recent studies Dr. Freeman had the benefit of using did not include patients who died within the first six years of their injury, which is significant because it does not weigh down the life expectancy estimations, but is also significant because after six years "the death rate . . . stays much closer to the average mortality rate in the general population." (TT at 1059:4-1059:16; *see also* Doc. 249-5 Ex. 93 pg. 12.) Using Dr. Freeman's more accurate epidemiological studies and sound methodology, he came to an estimate of **47.1 years**. (TT at 1058:1-1059:19.)

Dr. Alan Weintraub's clinical experience of providing comprehensive care to over 10,000 brain-injured patients like Morgan, comprehensive in-person neurological examination of Morgan, and experience with relevant research makes his opinion anything but "anecdotal", as the Government argues.[20] Dr.

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[19] The Government claims that "Dr. Freeman's opinion on the time since injury affecting Morgan's life expectancy is not supported by recent research and is therefore unreliable and should be disregarded." (Gov.'s Post Trial Br. pg. 59.) The epidemiological studies that support Dr. Freeman's opinion on time since injury are more recent than the dated studies that Shavelle relies on. (Doc. 249-9 at Ex. 125.) Neither the Government nor Shavelle offered more recent studies contrary to Dr. Freeman's opinion.

[20] The Government argues that Dr. Weintraub's clinical work is not "grounded in the science or study of life expectancy" when Dr. Weintraub's own day-to-day work and research aids patients similarly situated to Morgan in beating statistical life expectancy projections based on actuarial tables. (TT at 982:14-984:1.) The Government also failed to refute Shavelle's own published opinion that "[t]he input of a clinician can be very helpful" in determining life expectancy for a given individual. (Doc. 254-5 Ex. 232 at pg. 257.)

Weintraub agreed with Dr. Freeman that Shavelle's "selective look at the literature" leads to a suspect projection for life expectancy. (TT at 993:12-994:16.) Instead, Dr. Weintraub combined his vast experience with recent literature that analyzes a of number relevant factors that Shavelle's studies ignore, and, like Dr. Freeman, came to a prediction that Morgan will live much longer than Shavelle suggested:

> Q: Okay. But you're giving an opinion here today, and I wanted to know why you think it's speculative for Dr. Shavelle to come to the opinions he did.
>
> A: Because it's a select look at the literature. It doesn't take into account a handful of variables that are not in his literature but are – but it is somewhat available in other literature. And I think it really does a disservice for people specifically with brain injury planning practically for the resources of their future needs. And just as a little anecdote, there was a wonderful research study done not far from here in Olmstead County.[21] This is the Mayo Clinic, Minnesota, Rochester County, that looked at what happened to brain injury survivors in this area with severe disability. And they applied a completely different statistical model than the model than the model(sic) that Drs. Harrison, Felix, Brooks, and Shavelle did in their studies. Which, by the way, the early research only showed a reduction of life expectancy of four to seven years, when you looked at everybody. It's only later on that Dr. Shavelle's research broke it down into the inability to walk and what that does. Buy anyway, in their study and in their conclusions, they specifically state that those times of life expectancy

[21] The Olmstead study was done in Olmstead County, Minnesota, applied a statistical model that is focused on predictive resource allocations, is published and peer reviewed, and analyzes a number of relevant factors that Dr. Shavelle's study ignores. (TT at 993:12-999:3.)

analyses should not done(sic) for predictive resource allocation for persons with severe brain injury.

Q: What's that mean?

A: That means be very careful taking those life expectancy charts that come out of the California data set or even TBI model systems and using them inappropriately, applying them to Morgan's situation for life care planning and future resource allocation.

. . .

Q: Okay.

A: What the Olmstead study was at the end of the day you can't use these life expectancy tables for individual case planning; because you have to look at all of these other factors, and most data sets don't have those factors. Okay. So why did I – where did I come up with my recommendation?

Q: Yes.

A: So if you want to look at it kind of naively, I could have said it would be a four-to-seven years reduction. But when I looked at her, of course, I looked at her risk factors. And then I looked at some other research. There's some great research out of Israel, Palestine, that looked at people who survived five years with severe injuries, inability to walk. And they found 25 years later 90 percent of them were still alive. 88 percent, to be exact. So that sways you a little bit. And again, you're putting something together here that's a little bit difficult. So I decided I would look closely at how long she's lived and assume what we know about people who are completely paralyzed and require total care. And the best data for that is the National Spinal Cord Injury Data Center that deals with quadriplegics. And I went into the literature, and I went into their data set and they actually have a calculation you can do. And I did it. And I applied the fact that she was paralyzed from the neck down, had full sensation in her body but still required total care. **And it came out to almost 40 – it came out to 40 years.** So what is 40 years and how old is she no?

Q: 26?

A: And I put it in on the basis of how old she is now. **So that's age 66.**

(TT at 993:12-994:16 and 999:24-1001:6.)

The Government should not benefit from Neuenfeldt's negligence, because of the flawed opinion of the professional defense witness Shavelle. In all statistical likelihood, the injuries suffered by Morgan because of Neuenfeldt's negligence will condense her life to some degree.[22] Given her progress thus far, Plaintiffs believe her enjoyment of life will likely be diminished. But, with a properly allocated life care plan based on a realistic and accurate life expectancy projection, Morgan can beat the statistical projections she has been fighting and overcoming since this tragic event altered her life permanently. This Court should follow the opinions of Dr. Freeman and Dr. Weintraub.

ii. Morgan's Life Care Plan and Future Damages should be Awarded in Full.

The main critique of Jack Dahlberg's Life Care Plan and Donald Frankenfeld's forensic evaluation is that both do not utilize Shavelle's flawed life expectancy projection for their future projections for Morgan. (Gov.'s Post Trial Br. pgs. 62 and 70-75.) As such, Plaintiffs reincorporate the above argument regarding life expectancy by reference, because such argument

[22] The Government argues repeatedly that Dr. Freeman and Dr. Weintraub agreed with Shavelle that a number of Morgan's circumstances indicate a reduction in her life expectancy. (Gov.'s Post Trial Br. pgs. 57-61.) However, both Dr. Freeman and Dr. Weintraub accounted for ***all*** of Morgan's circumstances in coming to their opinions, which supports a smaller reduction in life expectancy compared to Shavelle's opinion.

applies to the Government's criticism of Dahlberg and Frankenfeld, in the context of life expectancy. The remainder of the Government's argument relies on the testimony of its retained expert Kent Jayne. For the following reasons, this Court should disregard Jayne's testimony entirely.[23]

1. Dahlberg's Life Care Plan and the Cost of Additional Attendants should be Awarded in Full.

Morgan should be awarded damages for a handicap accessible van, because prior to the tragic events she was a victim of, she never needed a handicap accessible van; however, now, for the rest of her life, a handicap accessible van is medically necessary. The Government argues that Morgan only needs the cost of a van conversion. (Gov.'s Post Trial Br. pgs. 64-65.) Not only did Dahlberg reasonably deduct the cost of a standardized automobile from the handicap accessible van line item in his report, the Government's own expert admits that a van is a necessary cost for Morgan.

Dahlberg explained his methodology, in which he offset cost of a converted van with a standard automobile:

> Q: But what's actually required is the accessibility conversion of a van. Correct?
> A: Yes.
> Q: And that would cost significantly less than what you have in your report?
> A: Um – well, I stated in the first paragraph what the full cost will be for the modified van, and I deducted a standard car because she would have needed one had she not been

[23] Plaintiffs request this Court revisit their initial Post Trial Brief when considering the credibility of Jayne's opinion. (*See* Plf.'s Post Trial Br. pgs. 71-73.) Jayne's opinion on Dahlberg not including "independence and community involvement" for Morgan exhibits the lack of credibility Jayne's testimony carries. (TT at 1419:2-1422:13.)

> injured. And that's how I cam up with the purchase price of $52,000 and change.

(TT at 943:15-944:2.) Instead of relying Dahlberg's market research for the cost of a handicap accessible van and the cost of a standard automobile, the Government encourages this Court to rely on Jayne's speculative and contradicting testimony.

Jayne testified that van conversions "can be done in this area ***I think*** for between $28,000 and $29,000." (TT at 1384:19-1385:19) (emphasis added.) However, Jayne himself testified that "a van would be necessary" for the van conversion kit, "but that would be a separate item." (TT at 1385:14-1385:19.) Jayne's only issue with Dahlberg's methodology for the handicap accessible van was that Dahlberg did not include the van as a separate line item; however, Jayne clearly agrees that a "van would be necessary" for Morgan and testified that a van for conversion costs "another $60,000, approximately." (1385:11-1385:12.)

Jayne's own testimony controverts the Government's request. The Government argues that if Dahlberg's van line item is accepted by the Court "it would essentially be providing the Ten Eycks the cost of a free van—which they would need to purchase anyway considering the number of individuals in their family." (Gov.'s Post Trial Br. pgs. 65.) There is no evidence in the record showing that the Ten Eyck's need a van because of "the number of individuals in their family." In fact, the only reason a handicap accessible van is necessary is because of the Government's negligence. As such, this Court should award Dahlberg's projection for the necessity of Morgan's handicap accessible van.

Next, the Government asks this Court to reduce the cost of Morgan's annual "medical procedures" from $53,749.04 to $8,882.44 on the basis that "Morgan's medical care is almost exclusively covered by TRICARE" and under TRICARE the Ten Eycks only had to pay $6,000 annually for Morgan. (Gov.'s Post Trial Br. pg. 65.) As discussed below, the Government's theory relies on the premise that the Ten Eycks will continue to use TRICARE for their health insurance needs going forward. As both Tom and Michelle unequivocally testified, they do not intend to utilize TRICARE:

> Q: If you had the means to by(sic) different kinds of insurance than Tricare, would you explore that?
> A: I definitely would.
> . . .
> Q: So if there was an option for private healthcare in the marketplace, is it something you would desire to have?
> A: I would jump on it.
> Q: If there wasn't an option, if you couldn't find private health insurance in the marketplace but you had the means to pay for Morgan's care, is that preferable to deal with Tricare?
> A: Yes. Way more preferable. We have a contractual thing with Tricare. I pay – we pay premiums to receive medical care and coverage. And they're violating their own policies by not covering most of the things that we need covered that are approved under policy, like her botox.

(TT at 1181:8-1181:10 and 1229:16-1230:2.) The Government's theory on the reduction on Morgan's needed medical procedures should be disregarded. Dahlberg's methodical assessment and calculation avoids all speculation, where as the Government's theory assumes the Ten Eycks will continue to use TRICARE, which is not only speculative but directly contrary to the substantial evidence in this case.

Morgan needs multiple attendants hired from an agency and Dahlberg's report only projects the cost of one agency-hired attendant. The Government argues that Morgan's request for attendant care is "either a complete misunderstanding of Dahlberg's report and the record in this case, or is a deliberate gross inflation of Morgan's alleged damages." (Gov.'s Post Trial Br. pg. 66.) The Government claims that Dahlberg's report "already takes into account the need for multiple attendants." (*Id.*) The Government, yet again, ignores the testimony regarding multiple attendants and the actual language of Dahlberg's report.

Morgan will need multiple attendants for her care and Dahlberg's Life Care Plan only allocates annual cost for one attendant. Dr. Weintraub discussed how important it is for Morgan to have 24/7 attendant care, which means multiple attendants must be hired:

Q: Is it important for Morgan for her future that attendants be hired and are confident at what they do?
A: Oh, yes. I mean the training that goes into being a CNA, if you will, a certified nursing assistant, is important. And then you have to really be trained specifically for the individual you're managing and their family. So absolutely.
Q: Are you familiar with attendant care in general in your practice dealing with people that have these types of injuries.
A: Yes, sir.
Q: Okay. His honor asked a question whether or not you need to have multiple attendants do the attendant care. What has your experience been?
A: I thought that was a very astute question, because it's absolutely true. You have to have a number of people hired. You probably have too many people hired and then you need another few just to deal with, you know, the things that happen. You don't have consistency, you need backup, you need weekends. I mean you think about how many hours

there are in a week to cover all the shifts, it's going to take three or four people. And then you have a hub, and then you have to have three or four people. People often go –

A: Well let me stop you.

A: Go ahead.

Q: You talked about how good care is by Michelle and Tom and their family. Your feeling is it's important to have attendant care for Morgan going forward? And if so, why?

A: Well, yeah. I mean regardless of who's doing it, they have to be skilled, loving, and you know, trained, and be there for a long period of time. And that's why you need to consider agency support in many states. Where I come from, you have to have agency support. That's the only way to do it. And the agencies end up sometimes hiring families to do it. But that's the only way to sort of legally and liability wise do it nowadays.

Q: So why is it important to involve an agency in the hiring of those attendants?

A: Well, because of liability laws, worker's comp laws. I mean you have to have all the resources in place. This is no small task. I mean we're not just talking about Morgan here, we're talking about her family. I mean even when you have 24/7 care going on with hired help, the person responsible for that, in this case it's her parents, they can't work. Well, mom can't work. She's got to be available to problem-solve what happens with the attendants and the care. So it's a complicated burden, regardless of whether you're doing the hands-on care or responsible for being certain the hands-on care is happening properly.

(TT 1003:11-1005:8.) Morgan even needs attendants when she goes to inpatient centers:

Q: In regards to the attendant care. Is that attendant care important even if she gets into a rehabilitation center for a period of time?

A: By that question do you mean if her parents decided to try to help her a little bit more, she'd go into an inpatient center?

Q: Sure.

A: In Morgan's situation, you'd send her attendant with her, because they know her the best. And as common practice, I

> actually wouldn't admit her in my patient rehab center once she has her 24/7 routines down with high-quality attendant care, because that rehab center is going to change things and create problems. So I would have the attendant with her, in her care.

(TT at 1006:17-1007:4.) Dahlberg testified Morgan will need more than one attendant:

EXAMINATION BY THE COURT

> Q: When you're talking home healthcare for 24 hours, you're really talking about four, maybe five people; aren't you? Because you've got somebody that wants to vacation, somebody else is sick, somebody else has to go to a wedding. What is the normal number of people you actually have to have if you're going to have 24-hour care?
>
> A: Well, in a perfect setting, you're going to have at least two primaries that are doing 12-hour shifts. You may have three primaries doing 8-hour shifts. And then a reserve to cover for vacations, illnesses, like you're saying. That would make it a four-or-five-deep pool. So it's basically the family is almost running their own employment agency where they have to have people in the wings, and those people are going to have to be reimbursed; those that are not directly working on any one day but are there to for vacation coverage or whatever it may be.

(TT at 967:12-968:2.) The unrebutted evidence has shown that Morgan will need multiple attendants for her care.

In addition, Dahlberg's report only contemplates a single "home health aide – Available 24 hours per day at $31.57" per hour on average. (Doc. 249-6 pg. 15.) The Government is requesting this Court to interpret the singular noun "home health aide" to mean multiple home health aides and is also requesting this Court divide the cost of a single home health aide by four. (Gov.'s Post Trial Br. pg. 66.) The Court should do neither. Dr. Weintraub and Dahlberg

testified that Morgan will need multiple attendants on call and around the clock. In addition, Dahlberg's report only considers the cost of a single "home health aide." The Government did not provide any evidence to controvert the fact that Morgan needs multiple attendants and Dahlberg's conservative report only accounts for one. The substantial evidence in the record indicates that the cost for multiple attendants should be awarded to Morgan. (*See* Plf.'s Post Trial Br. pg. 73 and 85.)

Beyond needing multiple attendants, Dahlberg's market analysis for the cost of an agency attendant was methodical, described thoroughly during his testimony, and appropriate to come to the cost identified in his report.[24] Dahlberg explained that he surveyed and localized the cost of attendant care in Morgan's market and arrived at $31.57 an hour. (TT at 951:2-951:18.) The Government's expert Jayne failed to engage in the same methodical market analysis to come to his figure, which conveniently ignores Morgan's need for an agency hire and is approximately half of the hourly wage. (TT at 1387:11-1388:14.) In fact, Jayne did admit that an "agency cost would be approximately $32 per hour" but that "the Ten Eyck family has, as requested and asked, that, you know, they have a direct-hire." (*Id.*) This Court should disregard Jayne's analysis on attendant care because it ignores Tom and Michelle's testimony

[24] In an effort to undercut the cost of an attendant, the Government has attempted to assert that the Ten Eycks want a direct hire, as opposed to an agency hire. (Gov.'s Post Trial Br. pg. 67.) The argument ignores Michelle Ten Eyck's testimony completely. (TT at 1298:4-1298:15.) The Government quoted Michelle's testimony in its brief, but omitted the phrase "I need an agency" from her testimony. (*Id.*); (*see also* Gov.'s Post Trial Br. pg. 67.)

regarding agency care and is not informed by the same methodical market research that Dahlberg used. This Court should award Morgan's annual medical and needs in full. (*See* Plf.'s Post Trial Br. pg. 73 and 85.)

2. Frankenfeld's Projections Rely on Substantial Evidence that Morgan "would have become a registered nurse and probably more."

The Court was presented with reliable testimony from a highly respected economist, Donald Frankenfeld, who supported the projections for both the cost of Morgan's future medical needs and Morgan's lost wages. The Government's primary issue with Frankenfeld's opinions were in regards to Morgan's lost wages.[25]

The only attempt to refute Frankenfeld's opinions regarding lost earnings was to argue that Morgan would never have become a nurse because in high school she suffered from a single bout of anxiety and depression. (Gov.'s Post Trial Br. pgs. 71-74.) It is difficult to comprehend how the Government justified taking such an inappropriate position.

Michelle Ten Eyck explained that Morgan was being bullied early in high school and took action to cope with the bullying:

Q: And Tom had discussed there was kind of this acute time period during her sophomore year where it was more intense. Do you remember hearing that?

A: Oh, yes.

[25] The Government's issue with Frankenfeld's projections for Morgan's future medical care relates to their issues with Dahlberg and Morgan's projected life expectancy. (Gov.'s Post Trial Br. pg. 71.) As such, Plaintiff's arguments as to Dahlberg and Morgan's projected life expectancy similarly apply to the Government's issue with Frankenfeld's projections based on the same.

Q: And she, in fact, checked herself in to go get some direction and help for that depression and anxiety? Do you remember that hearing that?

A: Yes. That – the last incident, you know, where they peed in her boots, and then they took her toothbrush and they scrubbed the toilet with it. And they just – they had done some not-so-nice stuff to her. And I think that was probably the icing on the cake for her, and she just said I just need to know to cope with this.

Q: And did she figure out a plan with how to cope with these issues she was having?

A: Yeah. She would come home and she had just said mom, I just – she talked ot her dad and I and said I want to go down to behavioral health because it will be the quickest way for me to get help. And I just need to figure out how to deal with all of this. And -- oh, sorry. Go ahead.

Q: Are you finished? I didn't mean to interrupt you.

A: Yeah, sorry.

(TT at 1241:25-1241:21.) Tom Ten Eyck expanded at length that the temporary episode did not require Morgan to be "hospitalized," Morgan's issues were temporary, and anxiety did not prevent her from succeeding in a college setting. (TT at 1194:12-1196:20.) Morgan was very upset about the bullying, took it upon herself to obtain help, and moved on with her life. She should not be penalized now for this life experience.

In fact, the Government's expert Jayne admitted that Morgan was accepted into nursing school, taking classes, and that it is very common for people in the nursing profession to suffer from depression and anxiety. (TT 1416:12-1418:16). Frankenfeld's opinion that she would have become a nurse if not for the Government's gross negligence is not speculative and is reasonably calculated given the available evidence.

The Government cites to the *Lewis v. Travaline,* where the Southern District of Indiana found that Frankenfeld's opinion regarding the Plaintiff's earning capacity was not supported. *Lewis v. Travaline*, 2020 WL 9351306 at *2 (S.D. Ind., Dec. 11, 2020). However, in *Lewis* the District Court of Indiana determined that there was not any evidence supporting the conclusion that the plaintiff had the ability to earn income as a substance abuse counselor. *Id.* Here, Morgan was accepted into nursing school, taking general classes to get ahead of the nursing school schedule, performing well academically, and there was "no doubt . . . that [Morgan] would have become a registered nurse and probably more." (TT at 1155:7-1155:14, 1199:24-1199:25, 1240:3-1240:9, and 1250:1-1250-16.) Morgan's case is unlike *Lewis* and this Court should adhere to Frankenfeld's opinion.

Expert opinions should not be based merely on subjective beliefs or unsupported speculation. *Kuper v. Lincoln-Uninion Elec. Co.,* 1996 SD 145, ¶39, 557 N.W.2d 748. "Of course, it would be unreasonable to conclude that the subject of scientific testimony must be 'known' to a certainty; arguably, there are no certainties in science. *Id.* The Government is asking this Court to apply the incorrect standard that Frankenfeld's opinions concerning lost wages be made ***with absolute certainty***. Prior to this horrific accident, Morgan was doing well academically, was admitted to nursing school, and was taking general classes to prepare for nursing school. It is not as if Morgan was an eight-year-old child who someday wished to be a nurse. The Government's argument that a single bout of depression in high school, where Morgan

proactively sought out help and the issue resolved, is determinative that Morgan would not become a nurse is merely a subjective belief and should be disregarded.

iii. Morgan's Pain and Suffering and Loss of Enjoyment of Life.

The pain and suffering and loss of life enjoyment Morgan has endured and will endure because of the catastrophic injuries she has sustained at the fault of the Government is substantial. Not a single person on Earth would accept any amount, no matter how large, to trade places with Morgan. The evidence in this case and the law governing the same merits the following awards for pain and suffering and loss of enjoyment of life:

- Pain and Suffering: $60,345,549.50; and,
- Loss of Enjoyment of Life: $60,345,549.60;

The Government asserts that "Morgan's request for over $120 million in damages for pain and suffering and loss of life enjoyment is completely untethered to any damages formulas and is beyond excessive." (Gov.'s Post Trial Br. pg. 75.) The Government then asserts that the facts of Morgan's circumstances, which resulted in "injuries, resulting disabilities, and lost opportunities . . . do nothing to legally substantiate such a request." (*Id.*) The Government's position is contrary to its own argument, contrary to the law that controls nonecomonic/general damages, and, yet again, ignores the substantial evidence on record supporting such an award.

First, the Government cites South Dakota law stating "[a]wards for [pain and suffering and loss of life enjoyment] are highly subjective because there is

no mathematical formula or 'rule of thumb' computation." (Gov.'s Post Trial Br. pg. 49 (citing *Plank*, 156 N.W.2d at 203). Then, the Government criticizes Morgan's request for noneconomic/general damages as "untethered to any damages formula." (Gov.'s Post Trial Br. pg. 75.) There is no computation legally required for general damages because general damages are a question for this Court and South Dakota affords "wide latitude" to this Court in determining that amount. *See Cedar v. Johnson*, 2018 S.D. 80, ¶¶18-29, 921 N.W.2d 178, 183-84. South Dakota is clear that a computation/formula is not required for noneconomic/general damages. This Court has "wide latitude" in determining such an amount.

Second, case law supports Morgan's request for general damages. The Eighth Circuit affirmed an FTCA award where a North Dakota District Court calculated noneconomic/general damages by "simply doubling the [economic/special] damages." *Wilkinson*, 564 F.3d 927, 934. Similarly, the Supreme Court of South Dakota affirmed an award where the noneconomic/general damages were well over ten times the amount of economic/special damages. *Weber*, 2019 S.D. 53, ¶¶ 14-15, 933 N.W.2d at 476. Here, Morgan's request for pain and suffering is roughly twice the amount of economic/special damages she is owed. Morgan's request for loss of life enjoyment is also roughly twice the amount of economic/special damages she is owed. The significance of Morgan's damages are not comparable; however,

case law comparisons show that Morgan's request is not "beyond excessive" as the Government posits.[26]

Last, the substantial evidence in this case merits the reward Morgan requests. Morgan's injuries were catastrophic.[27] The pain and suffering she endured and will endure in continuing to beat the odds in front of her is beyond significant.[28] Everyday she is in pain and every day she suffers. What she has lost, and what she is still set to lose in the future, escapes any explanation the words of this brief could communicate. However, perhaps the greatest agony Morgan realizes on a day-to-day basis is the fact that she has not lost her mind, her memories, and herself.

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[26] Throughout its brief, the Government continually asserts that Plaintiffs are asking for damages to "punish" the Government and thus such damages are punitive damages not allowed under the FTCA. (Gov.'s Post Trial Br. pgs. 36, 77 fn. 66, 81 fn. 73, and 85 fn. 77. However, damages are not "punitive" simply because they are large. *Wheat*, 860 F.2d at 1263. If this was a case where requested economic/special damages were $50,000 and requested noneconomic/general damages were $150,000, the Government would not be making any sort of "excessive" argument.

[27] The Ninth Circuit affirmed an FTCA award of $31 million in noneconomic/special damages challenged as excessive, where a four-year old was the victim of an accident that left her as a ventilator-dependent quadriplegic. *Gutierrez ex rel. Gutierrez*, 323 Fed.Appx. at 484. The Ninth Circuit reasoned that even though the four-year-old was severely injured she was aware of her limitations and the effect on her life. *Id.* Morgan, like the young child in *Gutierrez*, is acutely aware of the suffering and loss she endures daily.

[28] The substantial cost of Morgan's medical care exhibits the type of pain, suffering, and loss Morgan has sustained and will sustain going forward. What is an individual losing and/or suffering, if she requires over $1.2 million in annual medical costs just to live her life?

In many ways, the greatest blessing Morgan and her family have is that Morgan is still Morgan. Morgan laughs and enjoys the company of her family every day, just as she had before the accident. She recognizes, knows, and communicates in her own unique way with her family and friends. She is able to recall with hysterical laughter memories about her Uncle Todd. She recognizes her favorite music and her favorite movies. She engages with her family and teases her sisters when they tease her. Morgan is still Morgan in many ways; but, Morgan will never become what she could have become absent the events of June 17-18, 2017. The greatest loss for Morgan is that Morgan is aware of her limited reality, every single day. The imprisonment forced upon Morgan by Chief Neuenfeldt's negligence is a suffering that no amount of money could ever compensate.

iv. The Ten Eycks Contracted for the Benefit of TRICARE Healthcare Coverage.

The Ten Eycks paid monthly premiums and incurred out-of-pocket expenses while contracting for the TRICARE Reserve Select Plan that provided Morgan coverage for her medical needs akin to private health insurance. The Government failed to establish that it is entitled to an offset for past medical expenses, because the evidence at trial established that the Ten Eycks have contracted for the prospect of a double recovery. (*See* Doc. 228 pg. 6.)

Tom Ten Eyck testified the Ten Eycks pay monthly premiums and cost-share for their TRICARE benefits. (TT at 1182:14-1182:19.) Michelle Ten Eyck also confirmed that the Ten Eycks were contracting for TRICARE benefits, because they paid monthly premiums and out-of-pocket costs like co-pays. (TT

at 1224:4-1224:23.) The Government's own witnesses confirmed that the Ten Eycks were contracting for the benefits they were receiving from TRICARE. (TT at 1366:25-1367:23, 1372:16-1372:24, and 1721:1-1721:13.) In fact, Dr. Richard Ruck testified that if the Ten Eycks chose to, they could always disenroll from TRICARE and go find private health insurance, just like any health insurance contract in the private marketplace. (TT at 1723:7-1723:18.) The Ten Eycks and the Government's own witnesses established that the Ten Eycks contracted to make their TRICARE benefits possible.

Under *Overton*, this Court should not offset the amounts paid by TRICARE against any damages for past medical expenses awarded to Morgan. *Overton v. United States*, 619 F.2d 1299, 1302 (8th Cir. 1980). The Eighth Circuit in *Overton* supports Morgan's position because there has been a significant "showing . . . that [the Ten Eycks] . . . paid a special levy or fee to make the benefits possible." *Overton*, 619 F.2d at 1308-09; *see also Amlotte v. U.S.*, 292 F.Supp.2d 922, 931-32 (E.D. Mich. Nov. 17, 2003) (concluding that Medicare benefits were collateral and more like an insurance policy, because insured paid to make such benefits possible through payroll deductions); *Manko v. U.S.*, 636 F.Supp. 1419, 1451 (W.D. Mo. June 5, 1986) (concluding that Medicare benefits were a collateral source because individual paid premiums to make the Medicare benefits possible); *U.S. v. Price*, 288 F.2d 448, 450-51 (4th Cir. 1961) (discussing where benefits are made possible by contributions of employees, such benefits are collateral); *U.S. v. Brooks*, 176 F.2d 482, 485 (4th Cir. 1949) (discussing where decedent bought and paid for

life insurance through the Government, such insurance was collateral). The Eighth Circuit's reasoning on this issue is in-line with South Dakota law. *Larmon v. United States*, 200 F.Supp.3d 896, 910 (D.S.D. July 29, 2016) (citing *Papke v. Harbert*, 2007 S.D. 87, ¶ 70, 738 N.W.2d 510, 533).

The Government asserts that the premiums the Ten Eycks paid to make Morgan's benefits possible are "required by law and are statutorily required to be credited to the current year appropriation, which is then reallocated to pay for the administration of the TRICARE program." (Gov.'s Post Trial Br. pg. 83.) There is no record evidence of the Government's assertion. There is no law to support the Government's assertion. Instead, the Government is simply offering argument without any sort of record or legal support.

Regardless, the Government's position does not change the fact that the premiums and cost-sharing that the Ten Eycks shouldered made Morgan's benefits possible. Additionally, the Government's focus on the origin of Morgan's TRICARE benefits assumes that FTCA damages also originate from the same source. However, FTCA damages are paid out of an allocated fund separate from the General Treasury: the Judgment Fund. (Doc. 249-9 Ex. 126); *see also* 31 C.F.R. § 256.1.

In any event, the Government should not enjoy an offset, simply because it was the insurer for Morgan's healthcare coverage and the tortfeasor that caused her need for the significant care the Government now wants offset:

> [I]t is possible for a defendant to simultaneously wear two hats. The necessity for multiple payments arises not because the defendant is being doubly-penalized, but because the defendant-

> tortfeasor and defendant-insurer owe the plaintiff multiple legal obligations. . . . The defendant is now being asked to pay these same medical expenses as compensatory damages. Even though the same defendant is being asked to pay the same damages twice, it is patent that the nature of the two payments is different. The nature of the first is as a payment from defendant as insurer to the plaintiff as the insured. The nature of the second is as a payment from defendant as tortfeasor to the plaintiff as the party injured by the defendant's negligence. It is axiomatic that the plaintiff is entitled to receive the benefit of her bargain under the insurance contract, irrespective of the fact that the carrier servicing that contract may also be the tortfeasor.

Karsten v. Kaiser Found. Health Plan of Mid-Atl. State, Inc., 808 F.Supp. 1253, 1257-58 (E.D. Va. Dec. 21, 1992), *aff'd*, 36 F.3d 8 (4th Cir. 1994) (cited with approval by *Molzof v. United States*, 6 F.3d 461, 465-66 (7th Cir. 1993)); *see also Overton*, 619 F.2d at 1307.

v. The Government's Request for a Reversionary Trust Must be Denied.

The Government asserts in its request for a Reversionary Trust for Morgan that "it is undisputed that TRICARE . . . will pay for future medical expenses she incurs." (Gov.'s Post Trial Br. pg. 84.) Once again, the Government is either ignoring the substantial contrary evidence in the record or is attempting to mislead the Court.

First, the Court has already ruled the Court "will not off-set any potential future benefits from the damage award." (Doc. 228 pg. 8.) The Government's request for a reversionary interest in a future offset of Morgan's future medical expenses awarded contravenes this Court's previous ruling on this issue. As such, the Government's request must be denied.

Second, the Ten Eycks will not be using TRICARE benefits in the future, if they have means to seek out private health insurance for Morgan:

> Q: If you had the means to by(sic) different kinds of insurance than Tricare, would you explore that?
>
> A: I definitely would.
>
> . . .
>
> Q: So if there was an option for private healthcare in the marketplace, is it something you would desire to have?
>
> A: I would jump on it.
>
> Q: If there wasn't an option, if you couldn't find private health insurance in the marketplace but you had the means to pay for Morgan's care, is that preferable to deal with Tricare?
>
> A: Yes. Way more preferable. We have a contractual thing with Tricare. I pay – we pay premiums to receive medical care and coverage. And they're violating their own policies by not covering most of the things that we need covered that are approved under policy, like her botox.

(TT at 1181:8-1181:10 and 1229:16-1230:2.) There is not any evidence supporting the argument that the Ten Eycks will continue to use TRICARE for Morgan's health insurance. In fact, the substantial evidence on record indicates the opposite. The Government's assertion that it is undisputed the Ten Eycks will continue to use TRICARE for Morgan's healthcare needs is misleading and should be disregarded. As such, the Governemnt's request must be denied.

Last, the Government fails to cite any authority that supports its request. Of course, this Court has inherent discretion to "establish a reversionary trust to protect incapacitated plaintiffs before it." *See e.g. Hull v. U.S.*, 971 F.2d 1499 (10th Cir. 1992). However, here, Morgan has two legally appointed guardians who care for her and protect her with zealous advocacy: her parents, Tom and

Michelle Ten Eyck. The Government's request that Morgan's parents be replaced by "an independent, professional corporate trustee" is not only offensive, but ignores the substantial evidence of the wonderful care Morgan's parents have delivered everyday since the Government's negligence constructively crumbled their daughter's future. As such, the Government's request must be denied.

VI. CONCLUSION

The Government's position is unsustainable given the governing law of this case and the substantial evidence before this Court. Plaintiffs request this Court find in their favor and award the damages requested by Plaintiffs.

Respectfully submitted this 7th day of June, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of June, 2024, I sent to:

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via e-filing, through PACER, a true and correct copy of the foregoing **PLAINTIFFS' POST-TRIAL REPLY BRIEF** relative to the above-entitled matter.

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