

1 alleges that after the clamp was discovered she brought her claim to the Office of the Attorney
2 General as provided for by 7 CMC § 2202(b), which was subsequently denied.¹ Plaintiffs then filed
3 the present lawsuit on June 8, 2016. The Complaint contained five claims: (1) that Defendant
4 Ramsey committed medical malpractice by leaving a surgical clamp in Plaintiff Elameto's body;
5 (2) Plaintiff Pua suffered emotional distress and loss of consortium as a result of the injuries
6 suffered by Plaintiff Elameto; (3) the Government Liability Act ("GLA"), 7 CMC §§ 2202–14, is
7 unconstitutional because it impermissibly deprives tort victims like Plaintiffs; (4) the
8 Commonwealth's denial of Plaintiff Elameto's medical malpractice claim constitutes actionable bad
9 faith; and (5) the denial of Plaintiffs' claims pursuant to 7 CMC § 2202(b) was done in bad faith,
10 which should be actionable.

11 On June 24, 2016, the Commonwealth filed a certification of scope of employment pursuant
12 to 7 CMC § 2210(a) and moved to have the Court dismiss Defendant Ramsey from the suit. Then,
13 on July 15, 2016, the Commonwealth filed a NMI R. Civ. P. 12(b)(6) motion to dismiss Plaintiffs'
14 complaint and to strike their jury demand. In its NMI R. Civ. P. 12(b)(6) motion, the
15 Commonwealth presented seven main arguments: (1) all of Plaintiffs' claims hinge on the central
16 medical malpractice claim, which is barred by the statute of limitations; (2) Plaintiff Pua's
17 emotional distress and loss of consortium claim cannot survive because Plaintiff Elameto and
18 Plaintiff Pua are not legally married; (3) Plaintiffs lack standing to challenge the GLA, but even if
19 they do have standing the GLA is constitutionally permissible; (4) the Commonwealth does not
20 recognize an independent tort of bad faith; (5) 7 CMC § 2202 does not impose a good faith
21 requirement nor does it make actionable claims of bad faith; (6) 7 CMC § 2202(a)(2) prohibits
22 punitive damages against the Commonwealth; and (7) 7 CMC § 2202(e) provides that jury trials for
23 tort claims are prohibited where the Commonwealth does not consent.

24 ¹ Plaintiff Elameto's spouse Plaintiff Pua also brought an emotional distress and loss of consortium claim.

1 A hearing on the Commonwealth's NMI R. Civ. P. 12(b)(6) motion was scheduled for
2 October 25, 2016 at 1:30 p.m. in Courtroom 220A. Before the October 25, 2016 hearing, the
3 Commonwealth filed three additional motions: (1) a motion to strike portions of Plaintiffs'
4 opposition to the Commonwealth's NMI R. Civ. P. 12(b)(6) motion,² (2) a motion to strike portions
5 of Plaintiffs' reply brief regarding their objection to the substitution of Defendant Ramsey,³ and (3)
6 a motion for sanctions.⁴ At the October 25, 2016 hearing, the Court heard arguments on the
7 Commonwealth's NMI R. Civ. P. 12(b)(6) motion as well as the Commonwealth's motions to
8 strike. Due to the complexity of the issues raised at the October 25, 2016 hearing, the Court found it
9 appropriate to have supplemental briefing and evidentiary hearings on the GLA issues as well as the
10 marriage issue. On February 7, 2017 at 1:30 p.m. in Courtroom 220A, the Court heard supplemental
11 arguments from the parties on the GLA issues. On February 27, 2017 at 10:00 a.m. in Courtroom
12 220A, the Court held a hearing on the marriage issue; at which, the Commonwealth withdrew its
13 NMI R. Civ. P. 12(b)(6) motion as to Plaintiff Pua's emotional distress and loss of consortium
14 claim.

15 In sum, at this time, there are five motions pending before the Court: (1) the
16 Commonwealth's NMI R. Civ. P. 12(b)(6) motion to dismiss and strike Plaintiffs' jury demand; (2)
17 the Commonwealth's motion to dismiss Defendant Ramsey pursuant to 7 CMC § 2210(a); (3) the
18 Commonwealth's NMI R. Civ. P. 12(f) motion to strike portions of Plaintiffs' opposition to the
19 Commonwealth's NMI R. Civ. P. 12(b)(6) motion; (4) the Commonwealth's NMI R. Civ. P. 12(f)
20 motion to strike portions of Plaintiffs' reply brief on the issue of dismissing Defendant Ramsey; and
21 (5) the Commonwealth's NMI R. Civ. P. 11 motion for sanctions.

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23 ² The motion to strike was filed on September 26, 2016.

³ The second motion to strike was filed on October 4, 2016.

24 ⁴ The sanctions motion was filed on October 13, 2016 and was heard during a separate hearing, which took place on December 13, 2016 at 1:30 p.m. in Courtroom 220A.

1 **III. THRESHOLD RULINGS**

2 As a threshold matter, the Court finds it appropriate to **DENY**: the Commonwealth’s NMI
3 R. Civ. P. 12(f) motion to strike portions of Plaintiffs’ opposition to the Commonwealth’s NMI R.
4 Civ. P. 12(b)(6) motion; the Commonwealth’s NMI R. Civ. P. 12(f) motion to strike portions of
5 Plaintiffs’ reply brief on the issue of dismissing Defendant Ramsey; and the Commonwealth’s NMI
6 R. Civ. P. 11 motion for sanctions, as these motions have very little to no merit. The Court finds
7 that the foregoing motions to strike and motion for sanctions are improper and the parties are put on
8 notice that further motions, which only serve to harass, delay, or frustrate the proceedings may
9 result in sanctions being imposed against the party bringing such a motion. The Court will devote
10 its time to addressing the substance of the dispute as it currently stands before the Court, i.e. ruling
11 on the Commonwealth’s NMI R. Civ. P. 12(b)(6) motion to dismiss and strike Plaintiffs’ jury
12 demand as well as the Commonwealth’s motion to dismiss Defendant Ramsey pursuant to 7 CMC §
13 2210(a).

14 **IV. LEGAL STANDARD**

15 A NMI R. Civ. P. 12(b)(6) motion tests the legal sufficiency of the claims asserted in a
16 complaint. *Camacho v. Micronesian Dev. Co.*, 2008 MP 8 ¶ 10. To survive a NMI R. Civ. P.
17 12(b)(6) motion to dismiss, a “complaint must contain either direct allegations on every material
18 point necessary to sustain a recovery on any legal theory, even though it may not be the theory
19 suggested or intended by the pleader, or contain allegations from which an inference fairly may be
20 drawn that evidence on these material points will be introduced at trial.” *In re Adoption of Magofna*,
21 1 NMI 449, 454 (1990) (citations omitted). This standard ensures that a pleading party pleads
22 enough direct and indirect allegations to provide “fair notice of the nature of the action.” *Syed v.*
23 *Mobil Oil Mariana Islands, Inc.*, 2012 MP 20 ¶ 19 (citing *Magofna*, 1 NMI at 454). In deciding a
24 motion to dismiss under NMI R. Civ. P. 12(b)(6), the court must assume as true all factual

1 allegations in the challenged pleading and construe them in a light most favorable to the non-
2 moving party. *Cepeda v. Hefner*, 3 NMI 121, 127–28 (1992) (citations omitted); *Govendo v.*
3 *Marianas Pub. Land Corp.*, 2 NMI 482, 490 (1992) (citation omitted).

4 **V. DISCUSSION**

5 The Commonwealth’s NMI R. Civ. P. 12(b)(6) motion to dismiss and strike Plaintiffs’ jury
6 demand as well as the Commonwealth’s substitution motion pursuant to 7 CMC § 2210(a) presents
7 the Court with five main legal issues:⁵ (A) whether Plaintiffs’ claims are barred by the statute of
8 limitations; (B) whether Plaintiffs have standing to pursue a declaratory judgment that the GLA is
9 unconstitutional; (C) whether Plaintiffs’ constitutional arguments make denial of the
10 Commonwealth’s motions appropriate; (D) whether 7 CMC § 2202 provides for a cause of action
11 for bad faith; and (E) whether the Commonwealth recognizes an independent tort of bad faith.

12 **A. The Statute of Limitations for Medical Malpractice Claims.**

13 In its NMI R. Civ. P. 12(b)(6) motion, the Commonwealth argues that Plaintiff Elameto’s
14 medical malpractice claim is barred by the statute of limitations; 7 CMC § 2503(c) prescribes a two
15 year statute of limitations for medical malpractice claims and Plaintiffs’ complaint was filed over
16 fourteen years after the alleged malpractice. The Commonwealth also argues that the rest of
17 Plaintiffs’ claims are barred because they are derivative of the medical malpractice claim, which is
18 barred by the statute of limitations. Additionally, the Commonwealth contends that even if the
19 Court were to determine that a more permissive discovery rule were to be applied, Plaintiff
20 Elameto’s malpractice claim must fail because the Complaint sets out facts, which demonstrate that
21 Plaintiff Elameto should have know of her injury. Essentially, the Commonwealth contends that
22 even under a more liberal statute of limitations standard Plaintiff Elameto failed to exercise

23 ⁵ During the Court’s February 27, 2017 hearing, the Commonwealth decided that it wanted to withdraw its arguments
24 related to the viability of Plaintiff Pua’s emotional distress and loss of consortium claim. The Commonwealth expressed
that it wants to preserve the issue so that it can be re-raised in a later NMI R. Civ. P. 56 motion, should this case get to
that stage.

1 reasonable diligence to discover the alleged mistake sooner, therefore her claim is barred by the
2 statute of limitations.

3 In response, Plaintiff Elameto argues that due to the nature of the alleged tort, a surgical
4 clamp was left inside her body; the vast majority of jurisdictions apply a discovery standard
5 whereby the two year statute of limitations is tolled until such time as the surgical clamp was or
6 should have been discovered. *See Soloviev v. Markoff*, 1:14-CV-00019, 2015 U.S. Dist. LEXIS
7 49180, *13–25 (D.N.M.I. Apr. 13, 2015) (outlining the practices of various jurisdictions as well as
8 discussing what test[s] would likely be adopted by the Commonwealth courts). Plaintiff Elameto
9 contends that she only learned of the alleged mistake made during her surgery at CHC when the
10 surgical clamp was discovered during another unrelated surgery performed in Guam. She then
11 brought her claim within two years of discovering the mistake; the statute of limitations does not
12 bar her claim. Additionally, Plaintiff Elameto argues that the Commonwealth’s subsidiary, “should
13 have known,” argument relies on contested facts making dismissal at a NMI R. Civ. P. 12(b)(6)
14 stage inappropriate. *See Cepeda*, 3 NMI at 127–28; *Govendo*, 2 NMI at 490 (discussing how a court
15 must construe the facts and pleadings in the light most favorable to the non-moving party).

16 At this stage of the proceedings, the Court addresses the contours of the Commonwealth’s
17 statute of limitations for medical malpractice claims as well as how Plaintiff Elameto’s claim fits
18 within the standard.

19 1. Breadth of the Commonwealth’s Medical Malpractice Statute of Limitations.

20 The Commonwealth’s statute of limitation for medical malpractice claims is codified in 7
21 CMC § 2503, which provides: “The following actions shall be commenced only within two years
22 after the cause of action accrues: . . . (c) Actions for malpractice, error, or mistake against
23 physicians, surgeons, dentists, medical or dental practitioners, and medical or dental assistants.”
24 The Commonwealth Code does not define when a “cause of action accrues.” As such, the Court

1 looks to case law from the Commonwealth to see if courts have previously dealt with the issue of
2 when a cause of action accrues.

3 The most applicable case to the question of accrual is *Bd. of Trs. of the N. Mariana Islands*
4 *Ret. Fund v. Ada*, 2012 MP 10 ¶¶ 30–31, which dealt with the issue of when a cause of action
5 accrues when someone is denied retirement benefits. While the subject matter in *Ada* is dissimilar
6 to the present case, its reasoning is instructive because the NMI Supreme Court suggested that when
7 an action accrues includes a calculus of when a person should reasonably have known and/or was
8 put on notice. *See Id.* Essentially, *Ada* indicates that a liberal statute of limitations test applies in the
9 Commonwealth. This interpretation of *Ada* was first raised by the District Court of the Northern
10 Mariana Islands in *Soloviev* where the court opined:

11 The reasoning and holding in *Ada* indicates that if presented with a close question
12 about accrual of a medical-malpractice claim, the Commonwealth Supreme Court
13 would examine other states’ rules specific to malpractice claims and adopt one that
 delays accrual or tolls the limitations statute until some point later than the date of
 the negligent act

14 2015 U.S. Dist. LEXIS at *10. The Court finds the *Soloviev* court’s reasoning and articulation of
15 the rules regarding accrual of medical malpractice claims to be persuasive. A discovery standard
16 should govern medical malpractice claims in the Commonwealth. The need to adopt a more flexible
17 statute of limitations test is especially true in cases of medical malpractice because it can take years
18 for a mistake to be discovered.

19 Even though *Ada* is controlling it is still appropriate for the Court to conduct a 7 CMC §
20 3401 inquiry.⁶ Similarly to the *Soloviev* court, this Court looks to the practice of other jurisdictions

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23 ⁶ “In all proceedings, the rules of the common law, as expressed in the restatements of the law approved by the
24 American Law Institute and, to the extent not so expressed as generally understood and applied in the United States,
shall be the rules of decision in the courts of the Commonwealth, in the absence of written law or local customary law
to the contrary; provided, that no person shall be subject to criminal prosecution except under the written law of the
Commonwealth.”

1 when determining the statute of limitations standard that applies to medical malpractice claims. *See*
2 *Soloviev*, 2015 U.S. Dist. LEXIS at *5–6.

3 Although the general rule is that the statute of limitations runs from the date of the wrongful
4 conduct, the vast majority of United States jurisdictions have adopted a discovery standard whereby
5 the statute of limitations begins to run from the time the injury is discovered or should have been
6 discovered. *See generally Id.* at *6–25 (discussing a number of different tests from a variety of
7 different jurisdictions). Particularly, in cases involving foreign objects, courts around the country
8 have recognized the so-called foreign-object rule:

9 Where a malpractice claim is based upon leaving a foreign substance, such as gauze,
10 sponges, or surgical clamps, in a patient’s body, the statute of limitations generally
11 runs not from the date of the practitioner’s wrongful act or omission but from the
12 time when the act of malpractice with resulting injury is, or by reasonable diligence
13 could be, discovered by the patient.

14 *Id.* at *19 (quoting 61 Am. Jur. 2d Physicians, Surgeons, Etc. § 304 (2012)).

15 In addition to case law, a large number of state statutes specifically recognize the foreign-
16 object rule. For example, Wisconsin’s rule states:

17 When a foreign object which has no therapeutic or diagnostic purpose or effect has
18 been left in a patient's body, an action shall be commenced within one year after the
19 patient is aware or, in the exercise of reasonable care, should have been aware of the
20 presence of the object

21 Wis. Stat. Ann. § 893.55(1m)(3). Another apt example is Ohio’s statute, which provides:

22 If the alleged basis of a medical claim, dental claim, optometric claim, or
23 chiropractic claim is the occurrence of an act or omission that involves a foreign
24 object that is left in the body of the person making the claim, the person may
commence an action upon the claim not later than one year after the person
discovered the foreign object or not later than one year after the person, with
reasonable care and diligence, should have discovered the foreign object.

Ohio Rev. Code Ann. § 2305.113(D)(2).

1 The exact wording of each state's statute and/or case law interpretation differs to some
2 extent, but the theme running throughout this area of law is the same; with medical malpractice
3 claims tolling is required because in many instances it is very difficult if not impossible to discover
4 medical malpractice until well after the care in question was rendered. *See generally Soloviev*, 2015
5 U.S. Dist. LEXIS at *6–25. Applying a traditional and narrow statute of limitations for medical
6 malpractice claims would have the effect of barring otherwise meritorious claims even when the
7 tort victim neither knew nor had reason to know that they had been the victim of medical
8 malpractice. This is especially true when a foreign-object has allegedly been left in a patient's body.
9 *Id.* at *18–25. After reviewing the practices of other jurisdictions within the American political
10 family as well as the NMI Supreme Court's *Ada* opinion it is evident that the foreign-object rule
11 applies in the Commonwealth.

12 2. Application of the Foreign-Object Rule to the Present Case.

13 Here, Plaintiff Elameto alleges that a six inch surgical clamp was left in her body in August
14 of 2000 during a surgery performed by Defendant Ramsey at CHC. The clamp was allegedly only
15 discovered in 2014 by surgeons at Guam Memorial Hospital. This case appears to be a textbook
16 example of a foreign object being left in a patient's body, which was only discovered years later
17 during a subsequent and unrelated surgical operation. 7 CMC § 2503 does not bar Plaintiff
18 Elameto's medical malpractice claim because applying the foreign-object rule it is evident that the
19 two year clock on her claim did not start to run in 2000; instead, the statute of limitations began to
20 run in 2014 when the surgical clamp was actually discovered. Plaintiffs' complaint was brought
21 within the two year window running from the discovery of the clamp and as such is not time barred.

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1 3. The Commonwealth's Argument that Plaintiff Elameto Did Not Exercise Reasonable
2 Diligence Fails Because Doubts are Resolved in Her Favor as the Non-Moving Party.

3 The Commonwealth also argues that, even if the Court were to determine that a discovery
4 standard and/or the foreign-object rule applies in the Commonwealth, Plaintiff Elameto's claim
5 should nonetheless be barred because on the face of the Complaint it is clear that Plaintiff Elameto
6 should have discovered the clamp years earlier and as such the statute of limitations has run.
7 Specifically, the Commonwealth focuses on paragraphs 17, 18, 29, and 31 of the Complaint, which
8 state:

9 17. However, Remedio did not feel better after the surgery and was not comfortable
10 returning to CHC for treatment.

11 18. Following the surgery, Remedio experienced irregular periods, pain, fatigue,
12 sleep disruption, interference with the activities of daily living, and reduced interest
13 and ability to enjoy activities she had previously engaged in.

14 29. As a direct and proximate result of the negligent conduct of the CNMI, its
15 employees and Dr. Iyer and Dr. Ramsey, Remedio was hurt and injured in her
16 health, strength and activity, sustaining injury to her body and shock to her nervous
17 system and person, all of which injuries have caused, and continue to cause her great
18 mental and physical and nervous pain and suffering, and loss of enjoyment of life.

19 31. As a direct and proximate result of the negligent conduct of the CNMI, its
20 employees and Dr. Iyer and Dr. Ramsey, Remedio was unable to attend to her usual
21 activities, and had to substantially remove herself from her usual routine due to the
22 hurt and injury in her health, strength and activity, sustained injuries to her body and
23 shock to the nervous system and person, and loss of enjoyment of life.

24 The Commonwealth places significant emphasis on the fact that as alleged it was fourteen
years between the time of the alleged injury and the actual discovery of the clamp. The
Commonwealth contends that if Plaintiff Elameto was indeed suffering after the surgery a diligent
person would have sought further medical advice, during which the clamp would have been
discovered. The Commonwealth argues that if a person has surgery and then suffers serious adverse
effects, as alleged here, a reasonable person would seek further medical advice instead of suffering

1 for fourteen years. Essentially, the Commonwealth’s argument is that even under a liberal statute of
2 limitations standard Plaintiff Elameto’s claim cannot survive because the clamp should have been
3 discovered long before it was because a reasonable person would have gone to a doctor, that doctor
4 would have ordered an x-ray, and the clamp would have thus been discovered.

5 The Commonwealth’s argument fails because (1) there is no guarantee that a doctor would
6 have discovered the clamp and (2) even if there is some question about whether Plaintiff Elameto
7 should have seen a doctor at a NMI R. Civ. P. 12(b)(6) stage all doubts are resolved in her favor, as
8 the non-moving party. While it may be possible that the clamp would have been discovered had
9 Plaintiff Elameto gone to a doctor, it is also possible that it would never have been detected due to
10 the fact that there are numerous possible diagnoses that could explain “irregular periods, pain,
11 fatigue, sleep disruption, interference with the activities of daily living, and reduced interest and
12 ability to enjoy activities she had previously engaged in.” *See* Complaint at ¶ 18. Leaving a foreign
13 object in a patient is a “never event” in the medical field and it is entirely possible that if Plaintiff
14 Elameto had gone to a doctor after the surgery that she would be misdiagnosed with some other
15 ailment.⁷ For the Commonwealth’s “should have known” argument to work the Court must infer
16 the kind of care that Plaintiff Elameto would have received. Yet, at this stage in the proceedings, the
17 Court does not read the complaint with an eye to the moving party’s position, but instead reads facts
18 and inferences in favor of the non-moving party, Plaintiff Elameto. *See Cepeda*, 3 NMI at 127–28;
19 *Govendo*, 2 NMI at 490.

20 The Court recognizes that it is debatable whether an objective patient in Plaintiff Elameto’s
21 position would have sought out additional medical treatment upon developing the aforementioned
22 symptoms. However, since it is debatable, the law requires that the Court resolve doubts in favor of

23 ⁷ The Court reiterates that the rationale of the foreign-object rule is that it is generally extremely difficult for a medical
24 malpractice victim to be on notice that a foreign object was left inside them. *See generally Soloviev*, 2015 U.S. Dist.
LEXIS at *6–25.

1 the non-moving party. Based on the foregoing, Plaintiff Elameto’s medical malpractice claim
2 survives the Commonwealth’s NMI R. Civ. P. 12(b)(6) motion because the cause of action did not
3 “accrue” until the foreign object was discovered or should have been discovered through the
4 exercise of reasonable diligence. As to the statute of limitations issue, 7 CMC § 2503(c), the
5 Commonwealth’s NMI R. Civ. P. 12(b)(6) motion is **DENIED**. Plaintiffs’ medical malpractice
6 claim does not fail as a matter of law. Additionally, since the medical malpractice claim survives
7 the remaining derivative claims are not presumptively barred.

8 **B. Plaintiffs’ Standing to Challenge The GLA.**

9 In its NMI R. Civ. P. 12(b)(6) motion, the Commonwealth argues that Plaintiffs’ request for
10 declaratory relief, see 7 CMC § 2421,⁸ as to the constitutionality of various aspects of the GLA
11 should be dismissed because Plaintiffs lack standing. The Commonwealth argues that Plaintiffs’
12 alleged injuries under the act are speculative and unripe for judicial review. Plaintiffs respond that
13 their complaint sets out how the GLA creates a statutory scheme that once activated impacts a tort
14 claim from start to finish. Moreover, Plaintiffs contend that the GLA should be viewed holistically
15 so that once a plaintiff demonstrates that they have been injured by one step in the process he or she
16 should then be allowed to challenge the entire act. The Court must determine, as a threshold and
17 jurisdictional matter, whether Plaintiffs have the requisite standing to challenge the GLA.

18 “Standing is a concept utilized to determine if a party is sufficiently affected so as to insure
19 that a justiciable controversy is presented to the court.” *Commonwealth v. Anglo*, 1999 MP 6 ¶ 8
20 (internal quotation marks and citations omitted).

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23 ⁸ “In a case of actual controversy within its jurisdiction, the Commonwealth Trial Court, upon the filing of an
24 appropriate pleading, may declare the rights and other legal relations of any interested party seeking the declaration,
whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final
judgment or decree and shall be reviewable as such. Further necessary or proper relief based on a declaratory judgment
or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been
determined by the judgment.”

1 As articulated by the United States Supreme Court, standing requires that a plaintiff:
2 (1) must have suffered an injury in fact—an invasion of a legally protected interest
3 which is a) concrete and particularized, and b) actual or imminent, not conjectural or
4 hypothetical; (2) there must be a causal connection between the injury and the
5 conduct complained of—the injury has to be fairly traceable to the challenged action
6 of the defendant, and not the result of independent action of some third party not
7 before the court; and (3) it must be likely, as opposed to merely speculative that the
8 injury will be redressed by a favorable decision.

9 *Estate of Ogumoro v. Ko*, 2011 MP 11 ¶ 19 (citing *San Luis & Delta-Mendota Water Auth. v.*
10 *Salazar*, 638 F.3d 1163, 1169 (9th Cir. 2011) (citing in turn *Lujan v. Defenders of Wildlife*, 504
11 U.S. 555, 560–61 (1992))) (internal quotation marks omitted). These elements are often distilled
12 down to: injury-in-fact, causation, and redressability. *See, e.g., Ogumoro*, 2011 MP 11 ¶ 19 (citing
13 *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 485 (9th Cir. 2011); *Chapman v. Pier 1*
14 *Imps. (U.S.), Inc.*, 631 F.3d 939, 946 (9th Cir. 2011)).

15 1. Injury-in-Fact.

16 First, when reviewing whether a plaintiff has standing the Court must decide whether the
17 plaintiff has sufficiently articulated how he or she has been harmed. *See Ogumoro*, 2011 MP 11 ¶
18 19. Moreover, the plaintiff must demonstrate that the injury is concrete and particularized as well
19 as actual or imminent. *Id.*

20 Here, the Commonwealth primarily points to the GLA’s damages cap, see 7 CMC
21 2202(a)(1), to support its argument that Plaintiffs’ claim of injury is hypothetical. Specifically, there
22 has been no judgment in this case, which was then reduced as a result of the cap. The
23 Commonwealth is correct that the damages cap has not yet been activated. However, the
24 Commonwealth neglects to account for the fact that numerous provisions of the GLA have already
25 been activated in this case. Activated provisions of the GLA include: 7 CMC § 2202(b), which
26 required Plaintiffs to submit their claim to the Office of the Attorney General before filing suit; 7
27 CMC § 2202(e), which generally bars Plaintiffs’ jury demand; and 7 CMC §§ 2210(a) and (c),

1 which allows the Commonwealth to substitute in for Defendant Ramsey. The Commonwealth has
2 argued in its filings that Defendant Ramsey should be immediately dismissed from this matter as
3 well as claimed that Plaintiffs' jury demand should be immediately stricken pursuant to the GLA.
4 These are not hypothetical injuries, but are currently at issue.

5 Essentially, on the one hand, the Commonwealth argues that any challenge to the GLA is
6 hypothetical because the damages cap has not yet been activated and on the other hand invokes the
7 GLA to argue that the Court should dismiss Defendant Ramsey, strike Plaintiffs' jury demand,
8 dismiss Plaintiffs' prayer for punitive damages, as well as Plaintiffs' statutory bad faith claim. The
9 GLA's provisions have concretely impacted Plaintiffs in that they had to delay filing their claims,
10 may not be entitled to a jury and/or punitive damages, and may be unable to pursue Defendant
11 Ramsey who is the alleged tortfeasor.

12 Here, the damages cap, substitution of Defendant Ramsey, Plaintiffs' jury demand,
13 Plaintiffs' request for punitive damages, and Plaintiffs' various theories about the implementation
14 of the GLA up to this point in the case are ripe for judicial review because the GLA has generally
15 been activated. Based on the foregoing, the injury-in-fact element of the standing analysis is
16 satisfied.

17 2. Causation.

18 In addition to an injury the plaintiff must be able to tie his or her injury to the actions of the
19 defendant. *See Ogunoro*, 2011 MP 11 ¶ 19. Here, but for the existence of the GLA Plaintiffs:
20 would not have had to file their claim with the Office of the Attorney General, would be entitled to
21 a jury trial, would be able to seek punitive damages, and would not have any eventual award
22 reduced if it exceeds the damages cap. The causation element has been satisfied.

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1 3. Redressability.

2 Finally, in order to satisfy standing it must be likely that the injury would be addressed by a
3 favorable decision by the court. *Id.* In this case, Plaintiffs request that the Court strike down the
4 entire GLA as constituting an unconstitutional statutory scheme. If indeed the Court were to find
5 the GLA unconstitutional Plaintiffs injuries would be addressed in that they would be able to pursue
6 Defendant Ramsey, have a jury trial, request punitive damages, and not have any award reduced if
7 it exceeds the damages cap. The redressability element of the standing analysis is satisfied.

8 4. Conclusion as to Standing.

9 In sum, as to the standing issue the Court **DENIES** the Commonwealth's NMI R. Civ. P.
10 12(b)(6) motion.

11 **C. Constitutionality of the GLA.**

12 Since Plaintiffs have standing to challenge the GLA the question turns to whether Plaintiffs'
13 substantive constitutional arguments impact the disposition of the Commonwealth's NMI R. Civ. P.
14 12(b)(6) motion and motion to dismiss Defendant Ramsey pursuant to 7 CMC § 2210(a). Plaintiffs
15 argue that the Court should apply a heightened level of scrutiny to the GLA under a due process
16 analysis, see NMI CONST. art. I, § 5 and U.S. CONST. amend. 14,⁹ and/or an equal protection
17 analysis, see NMI CONST. art. I, § 6 and U.S. CONST. amend. 14.¹⁰ The Court is tasked with
18 determining the constitutionality of the GLA's provisions governing: the cap on damages, the
19 substitution of government employees, the prohibition on punitive damages, and the limited
20 availability of jury trials. In doing so, the Court will first examine Plaintiffs' substantive due
21 process arguments.

22 _____
23 ⁹ "Because the Commonwealth and U.S. Constitutions are essentially coextensive in regard to due process protections,
we analyze the . . . facts as if the two bodies of law are one." *Castro v. Castro*, 2009 MP 8 ¶ 16.

24 ¹⁰ NMI CONST. art. I, § 6 mirrors U.S. CONST. amend. 14 and as such the Court analyzes the two areas as one. *See*
Commonwealth v. Minto, 2011 MP 14 ¶ 26.

1 1. Substantive Due Process Legal Standard.

2 When analyzing a substantive due process claim the Court must first determine what level
3 of scrutiny applies. *See Castro v. Castro*, 2009 MP 8 ¶ 17. The level of scrutiny applicable
4 determines the level of deference given to the government’s position. *See Id.* at ¶¶ 16–26
5 (highlighting that if no fundamental right is burdened then the Court applies rational basis review,
6 which affords great deference to the political branches). The Court applies strict scrutiny if a
7 fundamental right has been burdened. *See Commonwealth v. Minto*, 2011 MP 14 ¶¶ 22–27. Strict
8 scrutiny requires the Court to examine the law to ensure that it is “narrowly tailored to serve a
9 compelling state interest.” *Id.* at ¶ 23 (citing *Wash. v. Glucksberg*, 521 U.S. 702, 721 (1997); *In re*
10 *Seman*, 3 NMI 57, 67 (1992)). If no fundamental right is burdened or no suspect class is present
11 then the Court applies rationale basis and the Court must determine whether the law is “rationally
12 related to a legitimate state objective.” *See Limon v. Camacho*, 1996 MP 18 ¶ 33 (citing *In re*
13 *Blankenship*, 3 NMI 209, 219 (1992)).

14 2. Summary of Plaintiffs’ Substantive Due Process Argument.

15 Plaintiffs argue that the GLA is unconstitutional and thus the Commonwealth’s NMI R. Civ.
16 P. 12(b)(6) motion and motion to dismiss Defendant Ramsey should be denied because the GLA’s
17 provisions, taken individually and as a whole, offend both the United States and Commonwealth’s
18 Due Process Clause, see NMI CONST. art. I, § 5 and U.S. CONST. amend. 14. Specifically, Plaintiffs
19 contend that strict scrutiny is the applicable standard because the GLA burdens Plaintiffs’ ability to
20 be made whole for the injuries they suffered, which is a burden on their constitutionally codified
21 right to privacy, see NMI CONST. art. I, § 10. The Court is tasked with determining whether the
22 GLA’s damages cap, substitution provision, prohibition on punitive damages, and restriction on
23 jury trials burden any fundamental right. If not, the Court applies the rational basis test. Conversely,
24 if a fundamental right is at play then the Court applies strict scrutiny. *See Castro*, 2009 MP 8 ¶ 17.

1 Essentially, the Court must determine whether NMI CONST. art. I, § 10, the right to privacy, is a
2 fundamental right.

3 3. The Right to Privacy is a Fundamental Right.

4 When interpreting a constitutional provision the Court must always first look to the plain
5 meaning of the text. *See Dept. of Public Lands v. Commonwealth*, 2010 MP 14 ¶ 17 (citing
6 *Camacho v. N. Marianas Ret. Fund*, 1 NMI 362, 368 (1990)). NMI CONST. art. I, § 10 provides:
7 “The right of individual privacy shall not be infringed except upon a showing of compelling
8 interest.” NMI CONST. art. I, § 10’s plain language indicates that the right to privacy is a
9 fundamental right in the Commonwealth because it states “shall not be infringed except upon a
10 showing of compelling interest.” NMI CONST. art. I, § 10 tracks the test for strict scrutiny, which
11 shows that the right to privacy is fundamental. *See generally Castro*, 2009 MP 8 ¶ 17 (discussing
12 how a burden on a fundamental right can only be maintained upon a showing of a compelling
13 justification). Further, the *Analysis of the Constitution of the Commonwealth of the Northern*
14 *Mariana Islands*, 25 (Dec. 6, 1976) (“Analysis”), specifically provides that the right to privacy is “a
15 constitutionally protected fundamental right.”¹¹

16 4. The GLA’s Provisions Burden Plaintiffs’ Fundamental Right to Privacy.

17 The question then becomes whether the GLA’s damages cap, substitution provision,
18 prohibition on punitive damages, and restriction on jury trials burdens Plaintiffs’ rights under NMI
19 CONST. art. I, § 10. If yes, then the Court applies strict scrutiny; if no, then the Court applies
20 rational basis review. *See Castro*, 2009 MP 8 ¶ 17. The Analysis gives the Court considerable
21

22 ¹¹ The Analysis is authoritative because it is a part of the NMI Constitution’s legislative history, which can and should
23 be used by a court when the text of a constitutional provision is ambiguous and the court is attempting, to fulfill its
24 duty, to give effect to the intentions of the framers. *See DPL*, 2010 MP 14 ¶ 17 (citing *Aldan-Pierce v. Mafnas*, 2 NMI
122, 163 (1991)). Moreover, the NMI Supreme Court has consistently “recognized that the Analysis ‘is extremely
persuasive authority when one is called upon to discern the intent of the framers when the language of the Constitution
presents an ambiguity.’” *Id.* at ¶ 7 (quoting in part *Rayphand v. Tenorio*, 2003 MP 12 ¶ 71).

1 guidance on the breadth and purpose of NMI CONST. art. I, § 10, including the ability of a plaintiff
2 to bring suit alleging violations, it states:

3 The right to individual privacy guaranteed by this section is not absolute. The public
4 has an interest in protecting the health, safety and welfare of the community
5 composed of individuals. Each individual makes a compromise when that individual
6 chooses to live with others and to enjoy the benefits of society. *This constitutional
7 provision recognizes the necessary balance between the individual's right to privacy
8 and the public's right to protect and promote the health and safety of the community.
9 It sets the balance in favor of the individual, by making the individual's right to
10 privacy a constitutionally protected fundamental right. Any time an individual
11 believes his or her privacy has been intruded upon, that individual has a right to
12 seek judicial action stopping the intrusion, preventing future intrusions of the same
13 kind, and granting compensation for the harm caused by the intrusion.*

14 When an action is brought claiming an invasion of the right to individual privacy
15 established by this section, and the individual bringing the action offers sufficient
16 evidence to establish the intrusion, *the defendant being sued must justify the
17 intrusion by demonstrating a compelling government interest in the intrusion. This
18 places a heavy burden on the defendant whether the defendant is the government or
19 a private individual.* First, the defendant must show a public purpose for the
20 intrusion. A public purpose is a purpose that advances the health, safety, or welfare
21 of the community. The term public purpose includes the need to enforce the laws, to
22 protect the health of the people, and to permit the dissemination of public
23 information. Second, the defendant must demonstrate that the public purpose
24 advanced was necessary and could not have been accomplished in any other less
intrusive way. If the public purpose could have been accomplished by any other less
intrusive means, then the intrusion cannot be justified under this section.

25–26 (emphasis added).

Here, Plaintiffs argue that NMI CONST. art. I, § 10 is genuinely at issue because the GLA's
restrictions hinder their ability to effectively seek redress for “unconsented physical intrusions.” *See*
Analysis at 25. Plaintiffs contend that leaving a surgical clamp in Plaintiff Elameto's body was an
unconsented physical intrusion and that seeking redress for such a serious constitutional violation
should be afforded strict scrutiny. Plaintiffs emphasize that the Analysis, an authoritative expression
of the framers' intentions, unequivocally provides that a plaintiff is entitled to bring suit when the
right to privacy is implicated; despite this, the GLA restricts a plaintiff's ability to bring suit and be
made whole for a violation of the right.

1 The Commonwealth counters that it is widely recognized that the ability to recover damages
2 in tort is not a fundamental right, nor is the ability to sue the sovereign. *See, e.g., Carson v. Maurer,*
3 424 A.2d 825, 830–31 (N.H. 1980) (reversed on other grounds). The Commonwealth contends that
4 Plaintiffs are improperly attempting to couch the primary alleged tort in this case, leaving a surgical
5 clamp in Plaintiff Elameto’s body, as a constitutional violation in order for the Court to apply
6 heightened scrutiny.

7 While the Commonwealth is correct that the general rule is that the right to recover a certain
8 measure of damages is not generally fundamental, this case highlights that individual provisions of
9 the NMI Constitution, like NMI CONST. art. I, § 10, include a constitutionally protected right to
10 recover damages. The GLA’s provisions taken individually and as a whole restricts the ability of
11 Plaintiffs to seek redress for their injuries suffered as a result of the medical clamp, which was
12 allegedly left inside Plaintiff Elameto’s body. Leaving a medical clamp in a patient is an
13 unconsented physical intrusion, thus Plaintiffs claims allege violations of NMI CONST. art. I, § 10.
14 The Commonwealth asks the Court to rule that the GLA is not subject to strict scrutiny by virtue of
15 NMI CONST. art. I, § 10, which would undermine the essential purpose of the constitutional
16 provision because it would, in practice, allow the Commonwealth to avoid paying compensation in
17 the amount that would make Plaintiffs whole, as well as shield Defendant Ramsey from being held
18 responsible. The Analysis highlights that a plaintiff’s private right of action under NMI CONST. art.
19 I, § 10 is to be afforded significant protections, strict scrutiny must be applied, because when in
20 doubt the framers of the NMI Constitution wanted to ensure that individual rights prevail over more
21 general governmental objectives.

22 Therefore, the Court will address the GLA’s provisions individually in order to highlight
23 more explicitly how Plaintiffs’ right to privacy is burdened by the GLA. The Court will examine:
24

1 (i) the damages cap, (ii) the substitution provision, (iii) the prohibition on punitive damages, and
2 (iv) the restriction on jury trials.

3 *i. The Damages Cap.*

4 The Commonwealth argues that the damages cap, 7 CMC § 2202(a)(1), is applicable to this
5 case and thus any eventual award of damages must be reduced by the Court down to the statutory
6 cap levels. 7 CMC § 2202(a)(1) provides:

7 The Commonwealth and any employees engaged in the performance of services on
8 behalf of the Commonwealth shall not be liable in tort for more than \$50,000 in an
9 action for wrongful death. Liability in other tortious occurrences shall be limited to
\$100,000 per person, or \$200,000 per occurrence.

10 Under 7 CMC § 2202(a)(1), regardless of the actual damages award, the award must be reduced
11 down to the statutory cap levels. 7 CMC § 2202(a)(1) has the purpose and effect of shifting the
12 financial burden of torts committed by the Commonwealth onto severely injured tort victims. If an
13 award is below the statutory cap the victim receives full compensation, but if a tort victim is
14 severely injured to a level above the cap the Commonwealth is only required to make partial
15 payment. 7 CMC § 2202(a)(1) burdens Plaintiffs' rights under NMI CONST. art. I, § 10 because the
16 Analysis specifically provides that: "Any time an individual believes his or her privacy has been
17 intruded upon, that individual has a right to seek judicial action stopping the intrusion, *preventing*
18 *future intrusions of the same kind*, and *granting compensation for the harm caused by the*
19 *intrusion.*" Analysis at 25–26 (emphasis added). Restricting the measure of damages, which is paid
20 to a tort victim whose right to privacy has been violated has the effect of denying the tort victim
21 adequate compensation and lessens the deterrent effect of a damages award.

22 Further, to unconditionally uphold a statute, which prevents a severely injured person from
23 being made whole would run counter to the very purpose of the right of action under NMI CONST.
24 art. I, § 10 because it is designed to increase individual rights, not constrain them. *See* Analysis at

1 24–26. 7 CMC § 2202(a)(1) burdens Plaintiffs’ fundamental right under NMI CONST. art. I, § 10 to
2 receive compensation and ensure deterrence of future violations. As such, the only way that 7 CMC
3 § 2202(a)(1) can be maintained is if the Commonwealth can establish that 7 CMC § 2202(a)(1)
4 serves a compelling interest. *See Castro*, 2009 MP 8 ¶ 17. If the Commonwealth meets its burden to
5 establish that 7 CMC § 2202(a)(1) serves a compelling interest then the Commonwealth must show
6 that 7 CMC § 2202(a)(1) is narrowly tailored to serve the Commonwealth’s compelling interest. *Id.*

7 *ii. Substitution of Defendant Ramsey.*

8 In its substitution motion filed June 24, 2016, the Commonwealth contends that Defendant
9 Ramsey should be immediately dismissed from this case pursuant to 7 CMC § 2210(a), which
10 provides:

11 Upon certification by the Attorney General that the defendant employee was acting
12 within the scope of his/her office or employment at the time of the incident out of
13 which the claim arose, any civil action or proceeding commenced upon such claim in
14 a court against an employee shall be deemed an action against the Commonwealth
and the Commonwealth shall be substituted as the party defendant, if the
Commonwealth was not already a defendant in the suit. An order dismissing the
employee from the suit shall be entered.

15 7 CMC § 2210(a) allows the Commonwealth to shield its employees from liability even in
16 situations where the alleged tort includes an “unconsented physical intrusion.” *See* Analysis at 24. 7
17 CMC § 2210(a) effectively bars a party whose cause of action evokes NMI CONST. art. I, § 10 from
18 pursuing the private person who is the agent of the harm. 7 CMC § 2210(a) is inconsistent with the
19 Analysis’ authoritative guidance because a plaintiff is entitled to bring a NMI CONST. art. I, § 10
20 claim against “the government *or a private individual.*” Analysis at 25 (emphasis added).¹² The
21 Analysis highlights that the government or a private person can violate NMI CONST. art. I, § 10 and
22 that a plaintiff is entitled to bring a claim against the alleged violator, who is then charged with
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24 ¹² “This places a heavy burden on the defendant whether the defendant is the government or a private individual.”
Analysis at 25.

1 defending the suit. 7 CMC § 2210(a) thus burdens Plaintiffs’ fundamental right to pursue violations
2 of NMI CONST. art. I, § 10 because it allows Defendant Ramsey to be dismissed from the suit even
3 though he is the specific party who allegedly violated Plaintiff Elameto’s right to be free from
4 unconsented physical intrusions. Strict scrutiny thus applies and 7 CMC § 2210(a) is presumed to
5 be unconstitutional as applied to Plaintiffs. 7 CMC § 2210(a) can only be maintained if the
6 Commonwealth can establish that 7 CMC § 2210(a) serves a compelling interest and that it is
7 narrowly tailored to serve such interest. *See Castro*, 2009 MP 8 ¶17. If the Commonwealth fails to
8 satisfy its burden then the Court must deny the Commonwealth’s substitution motion, Plaintiffs
9 would be allowed to proceed against the alleged tortfeasor, Defendant Ramsey.

10 *iii. The Prohibition on Punitive Damages.*

11 In its NMI R. Civ. P. 12(b)(6) motion, the Commonwealth requests that the Court dismiss
12 Plaintiffs’ request for punitive damages pursuant to 7 CMC § 2202(a)(2), which provides: “The
13 Commonwealth shall not be liable for interest prior to judgment, court fees, witness fees, or for
14 punitive damages.” Like the damages cap, 7 CMC § 2202(a)(1), the prohibition on punitive
15 damages, 7 CMC § 2202(a)(2), burdens the ability of Plaintiffs to ensure deterrence of future
16 constitutional violations. The framers of the NMI Constitution envisioned that NMI CONST. art. I, §
17 10 would allow injured persons to be made whole and that violations would be punished so that
18 future violations are deterred. *See Analysis* at 25–26. Specifically, the *Analysis* provides: “Any time
19 an individual believes his or her privacy has been intruded upon, that individual has a right to seek
20 judicial action stopping the intrusion, *preventing future intrusions of the same kind*, and granting
21 compensation for the harm caused by the intrusion.”¹³ *Analysis* at 25–26 (emphasis added).
22 Punitive damages, by their very nature, are designed to punish egregious conduct and provide

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24 ¹³ The *Analysis* envisions not only compensation, but also punishment, which has the effect of deterring future violations.

1 powerful deterrence to dissuade violations. *See, e.g., Exxon Shipping Co. v. Baker*, 554 U.S. 471,
2 492–93 (2008) (discussing how “the consensus today is that punitives are aimed not at
3 compensation but principally at retribution and deterring harmful conduct.”). 7 CMC § 2202(a)(2)
4 burdens Plaintiffs’ interest in deterring further violations. As such, the Commonwealth must
5 establish a compelling interest, which is narrowly tailored. *See Castro*, 2009 MP 8 ¶ 17. At this
6 point, 7 CMC § 2202(a)(2) is presumptively unconstitutional as applied to Plaintiffs and the
7 Commonwealth must overcome its burden to show that 7 CMC § 2202(a)(2) is constitutionally
8 permissible. *Id.* If the Commonwealth cannot do so, the Court must deny the Commonwealth’s
9 NMI R. Civ. P. 12(b)(6) motion, Plaintiffs would be allowed to seek punitive damages from the
10 Commonwealth.

11 *iv. The Restriction on Jury Trials.*

12 The Commonwealth also seeks to have Plaintiffs’ jury demand dismissed and struck from
13 Plaintiffs’ complaint pursuant to 7 CMC § 2202(e), which provides: “There shall be no jury trials of
14 tort actions against the Commonwealth or its employees unless requested, or assented to, by the
15 Commonwealth.” 7 CMC § 2202(e) burdens Plaintiffs’ rights under NMI CONST. art. I, § 10
16 because it favors the government over the individual. The Analysis states that a plaintiff is entitled
17 to bring his or her claim invoking all applicable remedies and legal procedures normally afforded in
18 the Commonwealth. *See generally* Analysis at 25 (“*It sets the balance in favor of the individual, by*
19 *making the individual’s right to privacy a constitutionally protected fundamental right.*”) (emphasis
20 added). Jury trials are generally allowed in the Commonwealth, see 7 CMC § 3101(b)(1),¹⁴ and as
21 such Plaintiffs should be afforded that right. Since 7 CMC § 2202(e) burdens Plaintiffs’ rights
22 under NMI CONST. art. I, § 10 the Commonwealth must satisfy its burden to show that the law can
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24 ¹⁴ “In civil actions where the amount claimed or value of the property involved exceeds \$1,000 exclusive of interest and costs, the parties shall be entitled to a trial by a jury of six persons”

1 survive strict scrutiny, that 7 CMC § 2202(e) serves a compelling interest and that 7 CMC §
2 2202(e) is narrowly tailored to achieve said interest. *See Castro*, 2009 MP 8 ¶ 17.

3 v. *The GLA Provisions at Issue are Subject to Strict Scrutiny.*

4 Based on the foregoing, the Commonwealth has the burden to demonstrate that the GLA’s
5 damages cap, the substitution provision, the bar on punitive damages, and the restrictions on the
6 availability of jury trials can survive strict scrutiny because as applied in this case these provisions
7 burden Plaintiffs’ fundamental right to privacy under NMI CONST. art. I, § 10.

8 5. The Commonwealth Fails to Establish a Compelling Interest.

9 To determine whether the GLA provisions at issue can survive strict scrutiny, the Court
10 must examine whether the Commonwealth has proffered a compelling interest, which fits within the
11 public purpose standard articulated in the Analysis. *See Castro*, 2009 MP 8 ¶ 17; *see also Minto*,
12 2011 MP 14 ¶¶ 22–25 (highlighting how a court applies strict scrutiny). If the Commonwealth can
13 establish a compelling interest then the question turns to whether the GLA is narrowly tailored to
14 achieve the Commonwealth’s proffered goal. *See Minto*, 2011 MP 14 ¶¶ 22–25. Further, when
15 applying strict scrutiny the Court presumes that the law at issue is unconstitutional and it is the
16 government’s burden to establish that the law should be upheld. *See generally Castro*, 2009 MP 8 ¶
17 17.

18 The Analysis dictates that promoting health, safety, and/or the welfare of the community are
19 the necessary preconditions for the Court to make a finding that the Commonwealth has satisfied its
20 burden to show a compelling interest. *See Analysis* at 26 (“First, the defendant must show a public
21 purpose for the intrusion. A public purpose is a purpose that advances health, safety or welfare of
22 the community. The term public purpose includes the need to enforce the laws, to protect the health
23 of the people, and to permit the dissemination of public information.”). Examples of compelling
24 interests, which have been upheld by courts include: controlling immigration, *see Minto*, 2011 MP

1 14 ¶ 24; restricting voting to persons who meet a bona fide residency requirement, see *Charfauros*
2 *v. Bd. Of Elections*, 1998 MP 16 ¶ 48; protecting the life of the nation in a time of war, see
3 *Korematsu v. United States*, 323 U.S. 214, 217 (1944); and promoting diversity in the context of
4 university admissions programs, see *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312–15
5 (1978).

6 In this case, the Commonwealth has advanced two interests purportedly justifying the
7 GLA’s restrictions on Plaintiffs’ claims: (1) the Commonwealth treasury needs to be protected and
8 (2) the GLA helps to promote public employment. The Commonwealth contends that the GLA is
9 needed because large monetary awards threaten the ability of the Commonwealth to effectively
10 function; without the damages cap, the bar on punitive damages, and the ability to restrict jury trials
11 the Commonwealth is exposed to an untenable risk of runaway judgments.

12 Generally, an economic regulation, such as protecting the government’s coffers, survives
13 rational basis review. See generally *United States R. Ret. Bd. v. Fritz*, 449 U.S. 166, 175–79 (1980)
14 (discussing how economic regulations are presumptively valid under rational basis review); see also
15 *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *New Orleans v. Dukes*, 427 U.S. 297, 303–04 (1976).
16 However, the Court is not aware of a single example of a purely economic regulation being upheld
17 as a compelling government interest. Recognizing economic regulations as compelling interests
18 would supplant fundamental rights because the Legislature would simply be able to conjure an
19 economic rationale for restricting a fundamental right.

20 For example, in *Zablocki v. Redhail*, 434 U.S. 374 (1978), the U.S. Supreme Court struck
21 down a Wisconsin law, which prohibited persons who owed child support from marrying without
22 first obtaining a court order. Presumably, if a mere economic rationale were enough to satisfy strict
23 scrutiny, the law at issue in *Zablocki* could have been upheld on the grounds the legislature was
24 seeking to protect the public coffers by ensuring that persons owing child support pay what they

1 owe. *See Zablocki*, 434 U.S. at 388–90 (discussing the state’s rationales for restricting a person’s
2 fundamental right to marry, specifically rejecting the state’s “collection device” rationale). The
3 *Zablocki* court made clear that burdening a fundamental right requires a much more robust
4 rationale. Here, the GLA’s provisions, just like the restrictions on the right to marry in *Zablocki*, are
5 subject to strict scrutiny. As such, the Commonwealth is required to show a compelling interest and
6 not merely a legitimate interest. The Commonwealth’s protection of the public coffers argument
7 fails for the aforementioned reasons.

8 The Commonwealth also argues that the GLA serves the compelling state interest of
9 promoting public employment. In particular, the substitution provision is purported to serve the
10 purpose of incentivizing public employment because it provides public employees, like Defendant
11 Ramsey, with a general guarantee that the Commonwealth will defend suits brought against them.
12 Strict scrutiny requires that the state present a much more robust rationale for burdening a protected
13 constitutional interest. Promoting public employment, like protecting the government’s coffers, is
14 an economic regulation, which survives rational basis review, but does not amount to a compelling
15 interest.

16 6. Conclusion as to Plaintiffs’ Substantive Due Process Argument.

17 The Commonwealth has failed to establish a compelling interest. As such, the GLA’s
18 damages cap, substitution provision, prohibition on punitive damages, and restriction on the
19 availability of jury trials fail constitutional examination. The Commonwealth’s NMI R. Civ. P.
20 12(b)(6) motion and motion to strike Plaintiffs’ jury demand as well as its motion to dismiss
21 Defendant Ramsey are **DENIED** for the aforementioned reasons. The Court need not reach and
22 address the question of whether the GLA is narrowly tailored and/or whether the GLA runs afoul of
23 equal protection. As discussed above, the foregoing provisions of the GLA unconstitutionally
24 burden Plaintiffs’ right to privacy under NMI CONST. art. I, § 10.

1 **D. Bad Faith Under 7 CMC § 2202.**

2 In addition to the constitutionality of the GLA, the Court also addresses the question of
3 whether 7 CMC § 2202 provides a statutory cause of action for bad faith. When the Court interprets
4 a statute it applies the plain meaning. *See Commonwealth v. Guiao*, 2017 MP 2 ¶ 12 (Slip Op. Mar.
5 20, 2017) (citing *Commonwealth v. Kaipat*, 4 NMI 300, 304 (1995)). 7 CMC § 2202 provides, in
6 full:

7 (a) The Commonwealth government shall be liable in tort for damages arising from
8 the negligent acts of employees of the Commonwealth acting within the scope of
9 their office or employment; provided, that: (1) The Commonwealth and any
10 employees engaged in the performance of services on behalf of the Commonwealth
11 shall not be liable in tort for more than \$50,000 in an action for wrongful death.
12 Liability in other tortious occurrences shall be limited to \$100,000 per person, or
\$200,000 per occurrence. (2) The Commonwealth shall not be liable for interest
prior to judgment, court fees, witness fees, or for punitive damages. (3) If the
Commonwealth is insured for a greater amount, the governmental liability shall be
the same as the insurance coverage. (4) This section does not in any way impair,
limit or modify the rights and obligations under any government insurance policy.

13 (b) An action shall not be instituted upon a claim against the Commonwealth for
14 money damages for injury or loss of property or personal injury or death caused by
15 the negligent act or omission of any employee of the Commonwealth while acting
16 within the scope of his/her employment, unless the claimant shall have first
17 presented the claim to the Attorney General and the claim shall have been finally
18 denied by the Attorney General, in writing, and the claimant so notified. The failure
19 of the Attorney General to make final disposition of a claim within 90 days after it is
presented shall be deemed a final denial of the claim for purposes of this section.
The provisions of this section shall not apply to such claims as may be properly
asserted as third party complaints, counterclaims, or cross-claims under the
Commonwealth Rules of Civil Procedure in a civil action. Every claim shall be
presented within the period of limitations provided by statute for civil actions of a
like nature.

20 (c) Action shall not be later instituted for any sum in excess of the amount of the
21 claim presented to the Attorney General, except where the increased amount is based
22 upon newly discovered evidence not reasonably discoverable at the time of
presentation of the claim, or upon allegation and proof of intervening facts relating
to the amount of the claim.

23 (d) Disposition of any claim by the Attorney General shall not be competent
24 evidence of liability or amount of damages.

1 (e) There shall be no jury trials of tort actions against the Commonwealth or its
2 employees unless requested, or assented to, by the Commonwealth.

3 Here, the Commonwealth contends that the Court must dismiss Plaintiffs' statutory bad faith
4 claim because the text of the statute does not speak to the existence of a claim for bad faith.
5 Plaintiffs respond that their statutory bad faith claim should be allowed to proceed because they
6 allege that the Attorney General has denied claims as a litigation tactic instead of settling valid
7 claims, which is the goal of the act and the processes detailed in 7 CMC § 2202 as well as other
8 provisions of the GLA. At this time, the Court **GRANTS** the Commonwealth's NMI R. Civ. P.
9 12(b)(6) motion as to Plaintiffs' statutory bad faith claim because Plaintiffs have failed to provide
10 legal support for their contention that the GLA includes an implied cause of action based on good
11 faith contract principles.

12 **E. Bad Faith as a Separate Cause of Action.**

13 Next, the Court addresses the question of whether Plaintiffs' fourth cause of action for so-
14 called "bad faith" should be dismissed. The Commonwealth argues that Plaintiffs' general bad faith
15 claim fails because such a cause of action has never been recognized in the Commonwealth and
16 even if the Commonwealth did, Plaintiffs have failed to sufficiently plead how the Commonwealth
17 has acted in bad faith. Plaintiffs respond that the Commonwealth owes Plaintiff Elameto a duty of
18 good faith because insurance contract principles should be applied to the Commonwealth's conduct
19 because it is a self insurer.

20 Generally speaking, with insurance contracts an insurer has a duty to act in good faith. *See*
21 *Ishimatsu v. Royal Crown Ins. Co.*, 2010 MP 8 ¶ 13. "To prove bad faith in the insurance context, 'a
22 plaintiff must show: (1) benefits due under the policy were withheld; and (2) the reason for
23 withholding benefits was unreasonable or without proper cause.'" *Id.* (quoting in part *Guebara v.*
24 *Allstate Ins. Co.*, 237 F.3d 987, 992 (9th Cir. 2001)).

1 Plaintiffs argue that the Court should apply the NMI Supreme Court's bad faith standard
2 from *Ishimatsu* to the Commonwealth's denial of Plaintiffs' claims because the Commonwealth has
3 failed to purchase medical malpractice insurance and/or another form of liability insurance and
4 should thus be considered a self insurer. Plaintiffs' argument is novel, but fails for lack of legal
5 support. In *Ishimatsu*, the NMI Supreme Court was dealing with a situation where an insurer denied
6 coverage where, pursuant to a contract, benefits were owed. *See Id.* at ¶¶ 12–18. Here, there is no
7 insurance agreement between the Commonwealth and Plaintiffs. The bad faith principles articulated
8 in *Ishimatsu* do not make up an independent cause of action. *Id.* An insurer's duty of good faith
9 only arises if there is an underlying contract. *Id.* Here, no such contract is in existence.

10 Additionally, Plaintiffs argue that the Commonwealth, as the sovereign, has a special
11 relationship with its citizens, which supports some sort of added good faith obligation. Yet,
12 Plaintiffs do not provide the Court with legal support for their contention that the Commonwealth
13 occupies a special role, which justifies imposing a heightened legal duty.

14 At this time, Plaintiffs' fourth cause of action cannot proceed as a matter of law because no
15 independent cause of action for bad faith currently exists. As such, the Court **GRANTS** the
16 Commonwealth's NMI R. Civ. P. 12(b)(6) motion as to Plaintiffs' fourth cause of action.

17 VI. CONCLUSION

18 Based on the foregoing, the Court:

- 19 1. **DENIES** the Commonwealth's NMI R. Civ. P. 12(b)(6) motion as to the statute of limitations,
20 Plaintiffs' standing to challenge the GLA, Plaintiffs' ability to seek damages in excess of the
21 GLA's damages cap, Plaintiffs' ability to seek punitive damages, and Plaintiffs' ability to seek a
22 jury trial because the applicable provisions of the GLA are unconstitutional as they violate
23 Plaintiffs' fundamental right to privacy;

- 1 2. **DENIES** the Commonwealth's request to dismiss Defendant Ramsey pursuant to 7 CMC §
2 2210(a) because this provision of the GLA is unconstitutional as it violates Plaintiffs'
3 fundamental right to privacy;
- 4 3. **DENIES** the Commonwealth's NMI R. Civ. P. 12(f) motion to strike portions of Plaintiffs'
5 opposition brief;
- 6 4. **DENIES** the Commonwealth's NMI R. Civ. P. 12(f) motion to strike portions of Plaintiffs'
7 reply brief;
- 8 5. **DENIES** the Commonwealth's NMI R. Civ. P. 11 sanctions motion; and
- 9 6. **GRANTS** the Commonwealth's NMI R. Civ. P. 12(b)(6) motion as to the statutory bad faith
10 claim and the independent claim of bad faith.

11 **IT IS SO ORDERED** this 11th day of August, 2017.

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13 /s/ _____
14 **JOSEPH N. CAMACHO**
15 Associate Judge
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