

1 HONORABLE RONALD B. LEIGHTON  
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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT TACOMA

10 B.T., et al.

11 Plaintiff,

12 v.

13 UNITED STATE OF AMERICA, et al.,

14 Defendant.  
15

CASE NO. C13-5166 RBL

ORDER DENYING PARTIAL  
SUMMARY JUDGEMENT

[DKT. #43]

16 THIS MATTER is before the Court on Plaintiff B.T.'s Motion for Partial Summary  
17 Judgment on Causation and Injuries [Dkt. #43]. B.T. seeks judgment as a matter of law that  
18 Defendant United States' actions were the proximate cause of his injuries. B.T. also seeks  
19 judgment as a matter of law that his injuries include (1) the need for internal fixation to treat his  
20 scoliosis and (2) pulmonary injury with decreased lung capacity as a result of his scoliosis.  
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22 In 2007, B.T. visited Dr. McMann, a urologist, at Tripler Army Medical Center to treat a  
23 testicular mass. During the visit, B.T. had an x-ray taken of his chest. Radiologists Fisher and  
24 Ruess noted a curve in B.T.'s spine and reported it to Dr. McMann, who noted it in her records.  
25 Dr. McMann did not physically examine B.T.'s spine, question B.T.'s parents, inform them of  
26 the curvature, or refer them to a specialist.  
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1 Doctors later diagnosed B.T. with scoliosis. During the course of treatment, B.T.'s  
2 parents examined his prior medical records, and discovered the previous spinal curvature notes.  
3 They brought this action for medical malpractice against the United States, McMann, Ruess, and  
4 Fisher. B.T. claims that the doctors should have followed up on the curvature in the x-ray and  
5 that, if they had, his scoliosis would not have been as severe as it is.  
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7 B.T. now moves for partial summary judgment arguing that the United States' only  
8 expert in causation and injuries, Dr. Kregel, does not dispute the testimony of B.T.'s experts  
9 who claim that B.T. was severely injured and that McMann, Ruess, and Fisher are the cause. The  
10 United States responds that Dr. Kregel's testimony clearly asserts that McMann, Ruess, and  
11 Fisher's actions did not cause B.T.'s injuries and that, because B.T. has not established  
12 causation, summary judgment on damages is not appropriate at this time.  
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## 14 I. DISCUSSION

### 15 A. Summary Judgment Standard

16 Summary judgment is appropriate when, viewing the facts in the light most favorable to  
17 the non-moving party, there is no genuine issue of material fact which would preclude summary  
18 judgment as a matter of law. Once the moving party has satisfied its burden, it is entitled to  
19 summary judgment if the non-moving party fails to present, by affidavits, depositions, answers to  
20 interrogatories, or admissions on file, "specific facts showing that there is a genuine issue for  
21 trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). "The mere existence of a scintilla of  
22 evidence in support of the non-moving party's position is not sufficient." *Triton Energy Corp. v.*  
23 *Square D Co.*, 68 F.3d 1216, 1221 (9<sup>th</sup> Cir. 1995). Factual disputes whose resolution would not  
24 affect the outcome of the suit are irrelevant to the consideration of a motion for summary  
25 judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In other words,  
26 "summary judgment should be granted where the non-moving party fails to offer evidence from  
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1 which a reasonable [fact finder] could return a [decision] in its favor.” *Triton Energy*, 68 F.3d at  
2 1220.

3 **B. Proximate Cause**

4 B.T. argues that the United States has no expert to contradict the cause-related testimony  
5 of B.T.’s own experts. B.T. points to various statements by Dr. Kregel implying that he accepts  
6 the conclusions of B.T.’s experts. For example:  
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8 [Question]: Do you accept that Dr. D’Astous, based upon his experience in  
9 casting, is able to achieve a normal spine in 30 to 40 percent of the kids he treats  
if casting is started at the appropriate time?

10 [Dr. Kregel]: If that’s what he says, I have no reason to object to that.

11 [Dkt. #44, Exh. 17]. B.T. argues that these admissions remove all questions of fact regarding  
12 causation.

13 Individual statements such as those referenced by B.T. do not conclude all questions of  
14 fact. Dr. Kregel clearly states in his report that he believes McMann, Ruess, and Fisher’s action  
15 did not cause B.T.’s injury:  
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17 *It seems also most likely that he would still have required scoliosis surgery at a*  
18 *later date, and still have restrictive pulmonary disease. The contention that*  
19 *complete resolution of the curve would have probably occurred, a vastly shorter*  
20 *period of treatment would have probably been required, and that there was a high*  
likelihood of complete resolution of B.T.’s scoliosis within a few years of  
initiating treatment, if it had been recognized earlier is an overstatement. *None of*  
*these contentions are likely.*

21 [Dkt. 47] (emphasis added). Conflicting opinions between experts on opposing sides create a  
22 material question of fact. Plaintiff’s Motion for Summary judgment on the issue of causation is  
23 DENIED and that issue will be determined at trial.  
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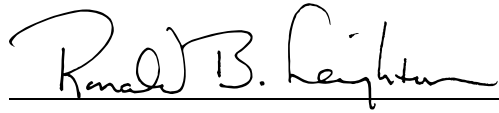
25 **C. Injuries**

26 B.T. similarly argues that the United States also has no expert to contradict that B.T.’s  
27 injuries include (1) the need for internal fixation to treat his scoliosis and (2) pulmonary injury  
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1 with decreased lung capacity as a result of his scoliosis. Because this court has already denied  
2 summary judgment on the issues of proximate cause and liability (*see* Dkt. #49), summary  
3 judgment on damages is premature at this time. Plaintiff's Motion for Summary judgment on the  
4 issue of damages is DENIED and that issue will be determined at trial.  
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6 IT IS SO ORDERED.

7 Dated this 1<sup>st</sup> day of August, 2014.

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10 RONALD B. LEIGHTON  
11 UNITED STATES DISTRICT JUDGE  
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