No._____

IN THE SUPREME COURT OF THE UNITED STATES

James Bennett and Pamela Bennett

vs.

United States of America

ON PETITION FOR A WRIT OF CERTIORARI TO

THE

NINTH CIRCUIT COURT OF APPEALS

APPENDICES SUPPORTING PETITION FOR A WRIT OF CERTIORARI

Pamela Bennett and James Bennett
P.O. Box 675733
Rancho Santa Fe, CA 92067
Ph: 760-294-8863

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APPENDIX A

Bureau of Prisons
Health Services
Inmate ISDS Report

Reg #: 32589-112 **Inmate Name:** BENNETT, JAMES DAVIS

SENSITIVE BUT UNCLASSIFIED – This information is confidential and must be appropriately safeguarded.

Transfer To: _____ Transfer Date: _____

Health Problems

Type	Health Problem	Status
Chronic	Low back pain, lumbago	Current
Chronic	PPD+ Prophy Complete	Current
Completed 2/10/11.		
Chronic	Dermatophytosis of other specified sites	Current
Upper scrotum		
Temporary/Acute	Oral aphthae	Current
Temporary/Acute	Cellulitis and abscess of unspecified site	Current

Medications: All medications to be continued until evaluated by a physician unless otherwise indicated. Bolded drugs required for transport.

Ibuprofen 400 MG Tab Exp: 03/26/2012 SIG: Take two tablets (800mg) by mouth three times daily with food as needed for pain **Ortho/Rheum clinic**

OTCs: Listing of all known OTCs this inmate is currently taking.
None

Pending Appointments
No Data Found

TB Clearance:

Last PPD Date: 09/15/2010
Last Chest X-Ray Date: 9/23/2010
TB Treatment:
TB Follow-up Recommended: No
Induration: 27mm
Results: NEGATIVE
Sx free for 30 days: Yes

Sickle Cell:
Sickle Cell Trait/Disease: Not applicable.
FOR ISDS ONLY

Limitations/Restrictions/Diets:

Comments:

Allergies
No Known Allergies

Devices / Equipment
Eye Glasses

Travel:
Direct Travel: No
Travel Restrictions:

UNIVERSAL PRECAUTIONS OBSERVED WHEN TRANSPORTING ANY INMATE:

Transfer From Institution: LOMPOC USP
Address 1: 3901 KLEIN BLVD
Address 2:
City/State/Zip: LOMPOC, California 93436
Phone Number: 8057352771

SENSITIVE BUT UNCLASSIFIED – This information is confidential and must be appropriately safeguarded.

Name/Title of Person Completing Form: Patel, Mahesh MLP, HSA Date: 03/19/2012

Inmate Name: BENNETT, JAMES DAVIS Reg #: 32589-112 DOB: 06/11/1953 Sex: M

APPENDIX B

JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	**CV 14-04697-RGK (Ex)**	Date	September 22, 2015
Title	***James Davis Bennett v. Jaspal Dhaliwal et al.***		

Present: The Honorable	R. GARY KLAUSNER, U.S. DISTRICT JUDGE	
Sharon L. Williams (Not Present)	Not Reported	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:	
Not Present	Not Present	

Proceedings: **(IN CHAMBERS) Order Re: Defendants' Motion for Summary Judgment (DE 38)**

I. INTRODUCTION

On June 6, 2014, James Davis Bennett ("Plaintiff") filed a Complaint against Jaspal Dhaliwal, MD, Richard Gross, MD, Annabel Rivera, MLP[1], Vincente Tejada, MLP, E. Casino, MLP, and Marsha Pinnell, RN (collectively, "Defendants"). Plaintiff brings a *Bivens* claim, alleging a violation of his Eighth Amendment right against cruel and unusual punishment based on Defendants' deliberate indifference to his serious medical needs while he was in prison.

On August 20, 2015, this Court granted Plaintiff's motion to voluntarily dismiss the case against Defendant E. Casino. On August 19, 2015, the remaining Defendants filed a Motion for Summary Judgment.

Presently before the Court is Defendants' Motion for Summary Judgment. For the following reasons, the Court **GRANTS** Defendants' motion.

II. FINDINGS OF UNDISPUTED FACTS

Defendants were at all relevant times employed by the Federal Bureau of Prisons and assigned to provide medical care to inmates at the Federal Correctional Institution in Lompoc, California ("Lompoc").

[1] A Mid-Level Practitioner, or MLP, is a physician assistant in the prison system who sees inmates during sick call appointments. MLPs are supervised by prison doctors.

In 2006, Plaintiff was convicted of wire fraud and bank fraud. While serving his sentence at the Federal Correctional Institution at Safford, Arizona ("Safford"), Plaintiff was exposed to another inmate with tuberculosis. Safford medical staff placed Plaintiff on a four-month prophylactic tuberculosis antibiotic regimen in 2010-2011.

On March 12, 2012, Plaintiff was transferred from Safford to Lompoc. The health services inmate transfer form accompanying Plaintiff's transfer reflected his prophylactic tuberculosis treatment and stated that he had no tuberculosis symptoms for the previous 30 days. On March 13, 2012, Defendant Pinnell conducted a health screen of Plaintiff upon his arrival at Lompoc. Throughout the month of March, Plaintiff underwent several physical examinations with Defendants Tejada and Rivera; each time, he complained of severe back pain. In response, Defendants administered injections of ketorolac (an anti-inflammatory drug), prescribed ibuprofen, ordered x-rays and laboratory tests, and authorized convalescent leave.

On April 9, 2012, Defendant Dhaliwal examined Plantiff and noted weight loss but no loss of appetite, vomiting, blood in the stool, or incontinence. Plaintiff complained again of severe back pain, so Defendant Dhaliwal prescribed another pain medication to supplement the ibuprofen as well as eight lab tests and an abdominal x-ray. The x-ray scans revealed partial compression of one vertebra. Blood tests also revealed elevated levels of two different proteins, which could be associated with infection or inflammation. In light of these test results, Defendant Dhaliwal added another prescription to treat the pain, authorized five additional tests, and ordered a consultation with an outside orthopedist.

On May 25, 2012, Defendant Tejada examined Plaintiff and indicated that his gait and mobility were markedly affected. In response, Defendant Tejada prescribed another pain medication, placed Plaintiff on two weeks of convalescent leave, and ordered an MRI exam to be performed within 60 days. Plaintiff visited the prison health clinic two more times in May, complaining of increased back pain.

Throughout June, Plaintiff visited health services four times and complained of severe back pain radiating throughout his body, limited mobility, and burning sensation in his extremities. Defendants ordered ketorolac injections, authorized convalescent leave, increased the dosage of his current medication, and added new pain medication.

On July 12, 2012, Plaintiff awoke unable to move his legs and experienced a severe burning sensation in both legs. Defendant Tejada ordered an emergency MRI of Plaintiff's back at the local hospital. The MRI results revealed a lesion on Plaintiff's spine. After several weeks of tests, the hospital diagnosed Plaintiff with Pott's disease on August 9, 2012.

It is also undisputed that at several points in Plaintiff's treatment regime, Defendants expressed skepticism about Plaintiff's complaints and noted that he appeared to be "manipulative" or "faking."

III. JUDICIAL STANDARD

Pursuant to Federal Rule of Civil Procedure 56(a), a court may grant summary judgment only where "there is no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Upon such a showing, the court may grant summary judgment on all or part of the claim. *See id.*

To prevail on a summary judgment motion, the moving party must show that there are no triable issues of material fact as to matters upon which it has the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). On issues where the moving party does not have the burden of proof at trial, the moving party needs to show only that there is an absence of evidence to support the

non-moving party's case. *See id.*

To defeat a summary judgment motion, the non-moving party may not merely rely on its pleadings or on conclusory statements. *Id.* at 324. Nor may the non-moving party merely attack or discredit the moving party's evidence. *See Nat'l Union Fire Ins. Co. v. Argonaut Ins. Co.*, 701 F.2d 95, 97 (9th Cir. 1983). The non-moving party must affirmatively present specific admissible evidence sufficient to create a genuine issue of material fact for trial. *Celotex*, 477 U.S. at 324.

IV. DISCUSSION

Defendants argue that summary judgment should be granted on the *Bivens* claim because Plaintiff has not produced evidence sufficient to show that his constitutional rights were violated. Defendants also maintain that they are entitled to qualified immunity. Because the Court concludes below that no triable issues of fact exist as to the *Bivens* claim, the Court need not reach the issue of qualified immunity.

A. *Bivens* Claims

A *Bivens* claim, derived from an eponymous Supreme Court decision, allows a private right of action for a citizen whose constitutional rights have been violated by federal officials acting under color of government authority. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). The constitutional provision at issue in the present *Bivens* action is the Eighth Amendment, which prohibits "deliberate indifference to serious medical needs of prisoners." *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). "A prison official is deliberately indifferent to the [plaintiff's medical] need if he 'knows of and disregards an excessive risk to inmate health.'" *Peralta v. Dillard*, 744 F.3d 1076, 1082 (9th Cir. 2014) (citing *Farmer v. Brennan*, 511 U.S. 825, 837 (1994)). In essence, a constitutional claim of deliberate medical indifference comprises two prongs: (1) defendant's *subjective* knowledge and disregard of (2) an *objectively* excessive risk to plaintiff's health and safety. *Hudson v. McMillian*, 503 U.S. 1, 8 (1992).

Defendants' Motion for Summary Judgment focuses exclusively on the *subjective* prong and does not dispute the objective prong. Thus, this Court assumes without deciding that the objective prong of the deliberate medical indifference test has been satisfied and focuses its analysis solely on the subjective prong of the test.

The subjective prong of the deliberate indifference test imposes a high burden, requiring a plaintiff to "prove that prison officials were aware of [a serious medical] condition and deliberately denied or delayed care . . . ." *Shinault v. Hawks*, 782 F.3d 1053, 1061 (9th Cir. 2015). "Mere negligence in diagnosing or treating a medical condition, without more, does not violate a prisoner's Eighth Amendment rights." *Hutchinson v. U.S.*, 838 F.2d 390, 394 (9th Cir. 1988) (citing *Estelle*, 429 U.S. at 106). "Even if a prison official *should* have been aware of the risk, if he 'was not, then [he] has not violated the Eighth Amendment, no matter how severe the risk.'" *Peralta*, 744 F.3d at 1086 (citing *Gibson v. Cnty. of Washoe*, 290 F.3d 1175, 1188 (9th Cir. 2002)) (emphasis in the original).

Plaintiff contends that Defendants were all aware of an inflammation or infection in his back but refused to offer appropriate medical care, ultimately resulting in a full-blown case of Pott's disease. In support of his claim that Defendants subjectively knew about the excessive risk but deliberately remained indifferent, Plaintiff cites to: (1) his physical symptoms and gradual deterioration, and (2) Defendants' skeptical remarks about the authenticity of Plaintiff's complaints. Plaintiff argues that the proffered evidence creates a triable issue of fact as to whether Defendants subjectively knew about and disregarded an excessive risk to his health.

1. Plaintiff's Physical Symptoms

Plaintiff points to his symptoms as an indication that any competent medical professional, including Defendants, should have been aware of a severe spinal pathology. For example, Plaintiff contends that on March 13, 2012, at his initial health screen, he exhibited weight loss, complained of back pain, and provided a health chart noting exposure to tuberculosis—all indicators of Pott's disease. Furthermore, Plaintiff maintains that on April 9, 2012, at his first examination with Defendant Dhaliwal, he complained of increasingly severe back pain, experienced even more weight loss, and exhibited elevated levels of two proteins that indicate inflammation or infection.

Throughout the months of May and June, Plaintiff visited the prison health clinic six times, complained of progressively severe back pain, and exhibited increasing weight loss. Plaintiff argues that, in light of his gradual deterioration, Defendants should have expedited his scheduled MRI or authorized an emergency MRI procedure. Defendants' failure to do so, according to Plaintiff, demonstrates a deliberate indifference to his serious medical needs.

The Court finds the evidence does not demonstrate a genuine issue of material fact as to whether Defendants knew of Plaintiff's severe spinal pathology. The operative inquiry in determining whether a defendant acted with deliberate indifference is not whether the defendant should have known but whether the defendant did, in fact, know of and ignore a serious medical risk. *Peralta*, 744 F.3d at 1086. The evidence proffered here does not demonstrate that any of the Defendants had actual knowledge of Plaintiff's true condition despite the symptoms. Plaintiff offers circumstantial evidence (his prior exposure to tuberculosis, his increasing weight loss, his severe back pain, and his elevated levels of certain proteins) from which, he argues, Defendants should have drawn an inference of a severe spinal pathology requiring emergency MRI testing. Such evidence, however, merely amounts to an allegation that Defendants should have known but failed to recognize the severity of Plaintiff's condition. In fact, there is ample undisputed evidence in the record that Plaintiff's symptoms were not clearly indicative of spinal pathology or Pott's disease. For instance, Plaintiff never exhibited loss of appetite, vomiting, blood in the stool, or incontinence—all indicators of active tuberculosis. Absent evidence of actual knowledge, Defendants' inability to accurately diagnose and treat the spinal pathology is at most tantamount to negligence, which cannot support a finding of deliberate indifference.

Moreover, the Court finds the evidence does not demonstrate a triable issue as to whether Defendants' conduct constituted deliberate indifference to Plaintiff's serious medical needs. The record is replete with evidence that Defendants embarked on an extensive treatment plan with Plaintiff in an attempt to relieve his back pain. *See Hutchinson*, 838 F.2d at 394 (rejecting a claim of deliberate indifference where "prison officials and the medical staff were attentive to [plaintiff's] needs"). Throughout the four-month period in question (March 12, 2012 - July 12, 2012), Plaintiff visited prison health services multiple times complaining of back pain. Each time Defendants provided Plaintiff with some form of relief and ordered further testing to discover the root of his pain. For instance, Defendants administered multiple injections of keterolac, prescribed four different pain medications, increased Plaintiff's dosage several times, ordered lab testing, authorized convalescent leave, and placed an order for MRI testing. Such undisputed evidence demonstrates that Defendants were attentive to Plaintiff's medical needs and endeavored to remedy his back pain.

Plaintiff takes issue with the timing of the MRI examination and argues that Defendants should have either expedited the testing or ordered an emergency exam in light of his deteriorating physical state. He relies on *Jett v. Penner* where the Ninth Circuit held that prison officials were deliberately indifferent to a plaintiff's medical needs because they unjustifiably delayed a necessary procedure. 439 F.3d 1091 (2006). Plaintiff's reliance on *Jett* is misplaced. In *Jett*, prison officials were aware of the plaintiff's fractured thumb and had authorized an appointment with an outside orthopedist. *Id.* at 1094.

Inexplicably, however, the plaintiff did not actually see an orthopedist until six months after the injury. *Id.* The present case is distinguishable because Plaintiff's MRI was not delayed needlessly—he was still within the 60-day routine waiting period when he was rushed to the hospital on July 12, 2012. A further distinction is that the prison officials in *Jett* were aware of the exact nature of the plaintiff's injury whereas here, the evidence does not demonstrate actual knowledge of Plaintiff's spinal pathology.

2. *Defendants' Skeptical Remarks*

Plaintiff also proffers evidence that Defendants, at various stages of his treatment, expressed skepticism about the genuineness of his complaints. Plaintiff offers evidence that Defendant Pinnell shouted, "You're faking. Don't come back." Other evidence indicates that Defendant Dhaliwal considered Plaintiff to be manipulating and lying about the extent of his injuries. On one occasion, Defendant Rivera testified that she was getting frustrated because Plaintiff continued complaining about the ineffectiveness of the pain medication.

The Court finds that the evidence of Defendants' skeptical remarks does not create a triable issue of fact as to deliberate indifference. As discussed above, Defendants responded attentively throughout the treatment process and attempted various remedies to alleviate Plaintiff's pain. Moreover, Defendants did not possess the subjective knowledge necessary for deliberate indifference. Thus, despite the doubts Defendants may have harbored about Plaintiff's genuineness, they continued to provide treatment and did not withhold medical attention because of their skepticism. In light of Defendants' continued medical care and lack of subjective knowledge about Plaintiff's spinal pathology, a reasonable jury could not conclude, simply based on the skeptical remarks recited above, that Defendants wantonly disregarded Plaintiff's serious medical needs.

Accordingly, the Court finds that Plaintiff's evidence does not create a triable issue of fact as to deliberate indifference.

V. CONCLUSION

For the foregoing reasons, the Court **GRANTS** Defendant's Motion for Summary Judgment.

IT IS SO ORDERED.

_____ : _____

Initials of Preparer _____

APPENDIX C

NOT FOR PUBLICATION

FILED

DEC 5 2017

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES DAVIS BENNETT, Plaintiff-Appellant, v. JASPAL DHALIWAL, et al., Defendants-Appellees.	No. 15-56448 D.C. No. 2:14-CV-04697-RGK-E MEMORANDUM*
JAMES DAVIS BENNETT and PAMELA BENNETT, Plaintiffs-Appellants, v. UNITED STATES OF AMERICA, Defendant-Appellee.	No. 16-55694 D.C. No. 2:15-CV-01923-RGK-E

Appeal from the United States District Court
for the Central District of California
R. Gary Klausner, District Judge, Presiding

* These two cases were consolidated for oral argument and are now consolidated for decision. This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Argued and Submitted November 16, 2017
Pasadena, California

Before: NGUYEN and HURWITZ, Circuit Judges, and SEEBORG,** District Judge.

While incarcerated at federal correctional facilities, James Davis Bennett contracted tuberculosis and Pott's disease. He brought a *Bivens* suit against five medical professionals at the Lompoc, California federal correctional institution. After exhausting administrative remedies, Bennett and his wife later filed a Federal Tort Claims Act ("FTCA") suit against the United States.

In these appeals, the Bennetts challenge the district court's denial of their motion for voluntary dismissal of the FTCA action and its subsequent dismissal of that action with prejudice for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b). Bennett also appeals the district court's summary judgment against him in the *Bivens* action. In the FTCA action, we vacate and remand with instructions to dismiss the action without prejudice, but we affirm the summary judgment in the *Bivens* action.

1. The district court abused its discretion in rejecting the Bennetts' voluntary motion to dismiss the FTCA action without prejudice and in

** The Honorable Richard Seeborg, United States District Judge for the Northern District of California, sitting by designation.

subsequently dismissing the action for failure to prosecute. *See Al-Torki v. Kaempen*, 78 F.3d 1381, 1384 (9th Cir. 1996). The Bennetts repeatedly notified both the district court and the United States before trial of their intention not to proceed with the FTCA action, eventually seeking to dismiss that suit without prejudice pursuant to Rule 41(a)(2). "A district court should grant a motion for voluntary dismissal . . . unless a defendant can show that it will suffer some plain legal prejudice as a result." *Smith v. Lenches*, 263 F.3d 972, 975 (9th Cir. 2001); *see also Westlands Water Dist. v. United States*, 100 F.3d 94, 96 (9th Cir. 1996) (finding abuse of discretion in failure to grant Rule 41(a)(2) motion). The United States would not have suffered any legal prejudice from a voluntary dismissal. *See Hyde & Drath v. Baker*, 24 F.3d 1162, 1169 (9th Cir. 1994). Any loss of the FTCA's judgment bar defense does not constitute legal prejudice, as it represented only the loss of a mere potential defense that had not yet accrued to the United States.

2. We review the district court's grant of summary judgment against Bennett in his Eighth Amendment *Bivens* action de novo. *Oswalt v. Resolute Indus., Inc.*, 642 F.3d 856, 859 (9th Cir. 2011). In order to bring a successful Eighth Amendment deliberate indifference claim, "mere malpractice, or even gross negligence, does not suffice." *Wood v. Housewright*, 900 F.2d 1332, 1334 (9th

Cir. 1990). We conclude that no genuine issue of material fact exists as to whether the medical professionals acted with deliberate indifference to Bennett's serious medical needs.

a. With respect to Dr. Richard Gross, midlevel practitioner Annabel Rivera, and Nurse Marsha Pinnell, the record presents no issue of material fact as to their knowledge of Bennett's serious medical need, let alone deliberate indifference. Gross never personally interacted with Bennett, but instead only supervised his treatment by co-signing the medical notes made by the other medical professionals and approving their recommended treatment, including pain medication, an MRI, and a consultation with an outside orthopedist. No evidence in the record suggests that Rivera had actual knowledge of Bennett's serious medical need, nor that she was deliberately indifferent to any such need, as she prescribed him the medications that he requested. Nor is there any evidence that Pinnell knew of Bennett's serious medical need.

b. Vincente Tejada had perhaps the most contact with Bennett during the period in question. Nonetheless, no evidence in the record supports that he had actual knowledge of Bennett's serious medical need. Nor was Tejada deliberately indifferent to Bennett's needs, as he prescribed various pain medications and anti-inflammatory injections, ordered several lab tests and x-rays, ordered the first and

emergency MRI, and placed Bennett on convalescent leave over the course of his treatment. The record reflects that Tejada attempted to diagnose the source of Bennett's pain through various tests, and was responsive to Bennett's requests for medications and injections to relieve his pain in the meantime.

c. Although Dr. Jaspal Dhaliwal's deposition suggests that he may have known Bennett had a serious medical need, the record is nonetheless clear that he did not act with deliberate indifference to that need. Over the course of Bennett's visits, Dhaliwal evaluated his symptoms and responded with an attendant course of treatment. Dhaliwal adjusted his treatment according to Bennett's feedback, prescribing him new medications for pain, constipation, and hypothyroidism, or modifying the dosages on those medications. Dhaliwal ordered several x-ray and lab tests in an effort properly to diagnose the source of Bennett's pain. Dhaliwal's failure to order a more timely MRI may arguably constitute negligence, but given the amount of medical care he provided to Bennett, as well as his responsiveness to his pain, no reasonable jury could conclude that he was deliberately indifferent to Bennett's needs.

3. We therefore **VACATE** the district court's order granting dismissal with prejudice in the FTCA action for failure to prosecute and **REMAND** with

instructions to dismiss without prejudice. We **AFFIRM** the district court's order entering summary judgment against Bennett in his *Bivens* action.

APPENDIX D

Pott disease

From Wikipedia, the free encyclopedia
(Redirected from Pott's Disease)

Pott's disease or **Pott disease** is a presentation of extrapulmonary tuberculosis that affects the spine, a kind of tuberculous arthritis of the intervertebral joints. It is named after Percivall Pott (1714–1788), a London surgeon who trained at St Bartholomew's Hospital, London. The lower thoracic and upper lumbar vertebrae are the areas of the spine most often affected. Scientifically, it is called tuberculous spondylitis and it is most commonly localized in the thoracic portion of the spine. Pott's disease results from haematogenous spread of tuberculosis from other sites, often pulmonary. The infection then spreads from two adjacent vertebrae into the adjoining intervertebral disc space. If only one vertebra is affected, the disc is normal, but if two are involved, the disc, which is avascular, cannot receive nutrients and collapses. The disc tissue dies and is broken down by caseation, leading to vertebral narrowing and eventually to vertebral collapse and spinal damage. A dry soft tissue mass often forms and superinfection is rare.

Pott's Disease

Classification and external resources

ICD-10	A18.0, M49.0
ICD-9	015.0
MeSH	D014399

Contents

- 1 Signs and symptoms
- 2 Diagnosis
- 3 Late complications
- 4 Prevention
- 5 Therapy
- 6 Cultural references
- 7 External links

Tuberculosis of the spine in an Egyptian mummy

Signs and symptoms

- back pain
- fever
- night sweating
- anorexia
- Spinal mass, sometimes associated with numbness, paraesthesia, or muscle weakness of the legs

Diagnosis

- blood tests

- CBC : leukocytisis – elevated erythrocyte sedimentation rate >100 mm/h

- tuberculin skin test

- Tuberculin skin test (purified protein derivative [PPD]) results are positive in 84-95% of patients with Pott disease who

are not infected with HIV.

- radiographs of the spine

- Radiographic changes associated with Pott disease present relatively late. The following are radiographic changes characteristic of spinal tuberculosis on plain radiography:

```
Lytic destruction of anterior portion of vertebral body
Increased anterior wedging
Collapse of vertebral body
Reactive sclerosis on a progressive lytic process
Enlarged psoas shadow with or without calcification
```

- Additional radiographic findings may include the following:

```
Vertebral end plates are osteoporotic.
Intervertebral disks may be shrunk or destroyed.
Vertebral bodies show variable degrees of destruction.
Fusiform paravertebral shadows suggest abscess formation.
Bone lesions may occur at more than one level.
```

- bone scan
- CT of the spine
- bone biopsy
- MRI

Late complications

- Vertebral collapse resulting in kyphosis
- Spinal cord compression
- sinus formation
- paraplegia (so called Pott's paraplegia)

Prevention

Controlling the spread of tuberculosis infection can prevent tuberculous spondylitis and arthritis. Patients who have a positive PPD test (but not active tuberculosis) may decrease their risk by properly taking medicines to prevent tuberculosis. To effectively treat tuberculosis, it is crucial that patients take their medications exactly as prescribed.

Therapy

- non-operative – antituberculous drugs
- Chiropractic treatments
- analgesics
- immobilization of the spine region by rod (Hull)
- Surgery may be necessary, especially to drain spinal abscesses or to stabilize the spine
- Richards intramedullary hip screw – facilitating for bone healing
- Kuntcher Nail – intramedullary rod
- Austin Moore – intrameduallary rod (for Hemiarthroplasty)

APPENDIX E

FILED

MAR 5 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES DAVIS BENNETT and PAMELA BENNETT, Plaintiffs-Appellants, v. UNITED STATES OF AMERICA, Defendant-Appellee.	No. 16-55694 D.C. No. 2:15-cv-01923-RGK-E Central District of California, Los Angeles ORDER

JAMES DAVIS BENNETT, Plaintiff-Appellant, v. JASPAL DHALIWAL, M.D.; et al., Defendants-Appellees.	No. 15-56448 D.C. No. 2:14-cv-04697-RGK-E

Before: NGUYEN and HURWITZ, Circuit Judges, and SEEBORG,* District Judge.

The panel has voted to deny the petitions for panel rehearing. Judges Nguyen and Hurwitz have voted to deny the petitions for rehearing en banc, and Judge Seeborg so recommends. The full court has been advised of the petitions for rehearing en banc and no judge has requested a vote on whether to rehear the matters

* The Honorable Richard Seeborg, United States District Judge for the Northern District of California, sitting by designation.

en banc. Fed. R. App. P. 35.

The petitions for panel rehearing and rehearing en banc, **Dkt. 53** in 16-55694 and **Dkt. 54** in 15-56448, are **DENIED**.

APPENDIX F

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	**CV 15-01923-RGK (Ex)**	Date	April 20, 2016
Title	***James Davis Bennett and Pamela Bennett v. United States***		

Present: The Honorable	R. GARY KLAUSNER, U.S. DISTRICT JUDGE	
Sharon L. Williams (Not Present)	Not Reported	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:	
Not Present	Not Present	

Proceedings: **(IN CHAMBERS) Order Re: Defendants' Motion for Summary Judgment (DE 54)**

I. INTRODUCTION

On March 16, 2015, James Davis Bennett and Pamela Bennett ("Plaintiffs") filed a Complaint against the United States of America ("the Government") seeking damages under the Federal Tort Claims Act ("FTCA").

In 2006, Bennett[1] was convicted of wire fraud and bank fraud. He initially served his sentence at the Federal Correctional Institution at Safford, Arizona ("Safford") and was later transferred to the United States Penitentiary at Lompoc, California ("Lompoc"). While in custody, Bennett contracted a case of tuberculosis that ultimately resulted in Pott's disease and caused him paralysis.

Plaintiffs bring an FTCA claim seeking damages on the following claims: (1) Medical Negligence premised on contraction of tuberculosis at Safford, (2) Medical Negligence premised on failure to diagnose and treat active tuberculosis at Safford, (3) Negligent Supervision of medical staff at Safford, (4) Intentional Infliction of Emotional Distress at Safford, (5) Loss of Consortium resulting from harms caused at Safford, (6) Medical Negligence premised on failure to diagnose and treat Pott's disease at Lompoc, (7) Negligent Supervision of medical staff at Lompoc, (8) Intentional Infliction of Emotional Distress at Lompoc, (9) Loss of Consortium resulting from harms caused at Lompoc

Presently before the Court is the Government's Motion for Summary Judgment on the following claims: Medical Negligence premised on contraction of tuberculosis at Safford (claim 1) and Negligent

[1] All mentions of "Bennett" in this Order refer to James Davis Bennett, not his wife Pamela Bennett.

Supervision at both Safford and Lompoc (claims 3 and 7). For the following reasons, the Court **GRANTS IN PART** and **DENIES IN PART** the Government's motion.

II. FINDINGS OF UNDISPUTED FACTS

A. Contracting Tuberculosis and Initial Treatment

Bennett was incarcerated at Safford between 2007 and 2011. While there, he was housed for about a year in the same unit as an inmate ("Index Case")[2] with a chronic cough. The Index Case was taken to the local hospital in July 2010 and was diagnosed with active tuberculosis. Upon discovery of the Index Case, the Bureau of Prisons ("BOP") sent a team of public health infectious disease specialists to determine the extent of the exposure and raise awareness by educating inmates about the signs and symptoms of tuberculosis.

The contact investigators administered a tuberculin skin test to Bennett on July 22, 2010. The tuberculin skin test determines level of exposure by measuring the diameter of induration (palpable raised, hardened area) across the forearm in millimeters. Bennett's induration from the July 2010 test was 0 millimeters.

Bennett received another test on September 15, 2010, yielding an induration of 27 millimeters. The note from Bennett's September 2010 encounter indicates that he denied any signs or symptoms of active tuberculosis, but Safford medical staff ordered a chest x-ray, six lab tests, and a follow-up appointment with the clinical director. Bennett's September 2010 chest x-ray showed no signs of active tuberculosis and his lab test results were normal.

In October 2010, Bennett visited the clinical director again. The note from Bennett's October 2010 visit with the clinical director indicates the clinical director checked his symptoms and vital signs and noted no cough, breathing difficulties, shortness of breath, blood-tinged sputum, night sweats, or fever. The note from Bennett's October 2010 visit with the clinical director indicates the clinical director put him on a four-month regimen of rifampin, a prophylactic tuberculosis medication.

Over the next two months, Bennett met with the clinical director for two follow-up visits, in November and December 2010. The notes from both visits indicate Bennett reported no complaints or symptoms of active tuberculosis. Bennett finished his rifampin regimen in February 2011.

B. Bennett's First Administrative Tort Claim

[2]In medical terminology, an "Index Case" refers to the first identified case in a group of related cases of a particular communicable or heritable disease—in this case tuberculosis.

Bennett filed an initial administrative tort claim in late 2010, which was received by BOP on January 20, 2011. The claim alleged that on or about July 22, 2010, he was infected with tuberculosis, has been suffering from continuous pain, and was denied medical attention.

BOP denied Bennett's January 2011 administrative tort claim on April 14, 2011. The denial letter also informed Bennett that he had six months from the date of the letter within which to bring suit in district court.

C. Transfer to Lompoc and Continued Treatment[3]

On March 12, 2012, Bennett was transferred from Safford to Lompoc. The health services inmate transfer form accompanying his transfer reflected his prophylactic tuberculosis treatment and stated that he had no tuberculosis symptoms for the previous 30 days. On March 13, 2012, prison officials conducted a health screen of Bennett upon his arrival. Throughout the month of March, Bennett underwent several physical examinations with prison medical officials; each time, he complained of severe back pain. In response, medical personnel administered injections of ketorolac (an anti-inflammatory drug), prescribed ibuprofen, ordered x-rays and laboratory tests, and authorized convalescent leave.

On April 9, 2012, medical personnel examined Bennett and noted weight loss but no loss of appetite, vomiting, blood in the stool, or incontinence. Bennett complained again of severe back pain, so medical personnel prescribed another pain medication to supplement the ibuprofen as well as eight lab tests and an abdominal x-ray. The x-ray scans revealed partial compression of one vertebra. Blood tests also revealed elevated levels of two different proteins, which could be associated with infection or inflammation. In light of these test results, medical personnel added another prescription to treat the pain, authorized five additional tests, and ordered a consultation with an outside orthopedist.

On May 25, 2012, medical personnel examined Bennett and indicated that his gait and mobility were markedly affected. In response, medical personnel prescribed another pain medication, placed Bennett on two weeks of convalescent leave, and ordered an MRI exam to be performed within 60 days. Bennett visited the prison health clinic two more times in May, complaining of increased back pain.

Throughout June, Bennett visited health services four times and complained of severe back pain radiating throughout his body, limited mobility, and a burning sensation in his extremities. Medical personnel ordered ketorolac injections, authorized convalescent leave, increased the dosage of his current medication, and added new pain medication.

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[3] The account of events occurring at Lompoc is incorporated by reference from summary judgment filings in a related *Bivens* action Plaintiffs brought. (Pl.s' Mot. Opp'n Summ. J. 8 n.7, ECF No. 55.)

On July 12, 2012, Bennett awoke unable to move his legs and experienced a severe burning sensation in both legs. Medical personnel ordered an emergency MRI of Bennett's back at the local hospital. The MRI results revealed a lesion on Bennett's spine. After several weeks of tests, the hospital diagnosed Bennett with Pott's disease on August 9, 2012. As a result of the Pott's disease, Bennett is now permanently disabled.

All told, between March and July 2012, Lompoc medical staff saw Bennett a total of 20 times, ordered 17 lab tests, conducted four x-rays, prescribed nine different medications, and authorized convalescent leave from work.

D. Bennett's Second Administrative Tort Claim

Bennett presented a second administrative tort claim to BOP that was received on October 28, 2013. The claim alleged that Bennett had been exposed to tuberculosis at Safford and that Safford and Lompoc medical staff failed to appropriately diagnose and treat his disease. Bennett presented an amended claim to the BOP, which was received on March 10, 2014. Also on March 10, 2014, Pamela Bennett presented an administrative tort claim for loss of consortium.

On January 21, 2015, BOP denied both Bennett's 2013 administrative tort claim and Pamela Bennett's March 2014 administrative tort claim.

E. BOP's Peer-Review Process

Plaintiffs' negligent-supervision claims allege that BOP medical personnel negligently executed a policy requiring "Bureau health care providers . . . [to] have at least one external peer review conducted every two years." (Feinberg Decl. PB-21 at 10-11, ECF No. 57.) The peer-review process entails an evaluation of "clinical performance" and "clinical judgment," and if the review process reveals "deficiencies in clinical knowledge or skills," the BOP policy provides for "corrective action." (Feinberg Decl. PB-21 at 10-11, ECF No. 57.)

Relying on deposition testimony from lead medical officials at Safford and Lompoc, Plaintiffs contend that BOP medical personnel failed to comply with the peer-review process. Dr. Eduardo Ferriol, the lead physician at Safford, testified that throughout his 20-year career, he never saw the results of a single peer review; instead, after the peer review was conducted, the prison warden would independently review the report and inform Ferriol whether his admitting privileges would be renewed for another two-year term. (Ferriol Depo. 39-41, ECF No. 57.)[4] Dr. Jaspal Dhaliwal, the lead physician at Lompoc,

[4] The Ferriol deposition can be found at PB 94, the Dhaliwal deposition can be found at PB 53, and the Pelton deposition can be found at PB 93, all attached to the Feinberg Declaration, ECF No. 57.

testified that he received copies of the peer-review reports "most of the time" but it "may be possible" that he did not receive the results on certain occasions. (Dhaliwal Depo. 33-34, ECF No. 57.)

Plaintiffs further submit testimony from Dr. James Pelton, the medical director of BOP's western region, which further reveals BOP's negligent implementation of the peer-review system. Pelton testified that he had submitted a peer-review report critically evaluating Ferriol and stating that "closer attention needs to be given to inmates with acute medical conditions" because an "inmate with pneumonia later diagnosed with TB [the Index Case] was lost to followup." (Pelton Depo. 176-77, ECF No. 55.) Likewise, Pelton testified that he took disciplinary action against Dhaliwal for his failure to timely diagnose Bennett's case of active case tuberculosis. (Pelton Depo. 45-53, ECF No. 55.) Despite these critical remarks in the peer-review process, however, both Ferriol and Dhaliwal testified that they do not recall a single instance in which they were told that they failed to properly exercise clinical judgment. (Ferriol Depo. 39-41, 56, 231-32; Dhaliwal Depo. 32-38, ECF No. 57.)

III. JUDICIAL STANDARD

Pursuant to Federal Rule of Civil Procedure 56(a), a court may grant summary judgment only where "there is no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Upon such a showing, the court may grant summary judgment on all or part of the claim. *See id.*

To prevail on a summary judgment motion, the moving party must show that there are no triable issues of material fact as to matters upon which it has the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). On issues where the moving party does not have the burden of proof at trial, the moving party needs to show only that there is an absence of evidence to support the non-moving party's case. *See id.*

To defeat a summary judgment motion, the non-moving party may not merely rely on its pleadings or on conclusory statements. *Id.* at 324. Nor may the non-moving party merely attack or discredit the moving party's evidence. *See Nat'l Union Fire Ins. Co. v. Argonaut Ins. Co.*, 701 F.2d 95, 97 (9th Cir. 1983). The non-moving party must affirmatively present specific admissible evidence sufficient to create a genuine issue of material fact for trial. *Celotex*, 477 U.S. at 324.

IV. DISCUSSION

The Government advances three arguments on summary judgment. First, it contends that Plaintiffs' first claim alleging medical negligence premised on exposure to and contraction of tuberculosis is time barred. Second, it maintains that Plaintiffs' third and seventh claims based on

negligent supervision are barred by the FTCA's discretionary-function exception.[5] Finally, the Government argues that any claim alleging misdiagnosis or mistreatment of the Index Case is time barred and not based on any duty to Plaintiffs.

A. FTCA Statute of Limitations

The FTCA imposes two limitations periods. First, an aggrieved party must file an administrative tort claim with the offending federal agency within two years after a claim accrues. 28 U.S.C.A. § 2401(b). Next, if the federal agency denies the claim, the aggrieved party must file suit in district court within six months of claim denial. *Id.* In situations involving medical malpractice, the claim does not accrue "until a plaintiff knows of both the existence of an injury and its cause." *Hensley v. United States*, 531 F.3d 1052, 1056 (9th Cir. 2008). "When the injury and its cause are known, the claim accrues even though the plaintiff may not then be aware that the injury may have been negligently inflicted." *Herrera-Diaz By & Through Herrera-Diaz v. U.S. Dep't of Navy*, 845 F.2d 1534, 1536 (9th Cir. 1988).

The only claim the Government challenges as untimely is Plaintiffs' first claim, which alleges that Safford medical personnel violated their duty "to prevent Mr. Bennett from being exposed to and contracting tuberculosis." (Compl. ¶120, ECF No. 1.) The ensuing analysis, then, is confined only to the single, discrete injury of contracting latent tuberculosis—not the separate injuries that ultimately manifested years later, such as active tuberculosis or Pott's disease.[6]

The Court finds that Plaintiffs' first claim alleging exposure to and contraction of tuberculosis accrued in September 2010, rendering it untimely. Bennett contracted tuberculosis at Safford in July 2010 after exposure to the Index Case. Two months later, in September 2010, Bennett first learned from the results of a tuberculin skin test that he was afflicted with latent tuberculosis. At that time, Bennett also knew, or should have known, the cause of his exposure because he was housed with the Index Case whom he had seen coughing up blood, wearing a coat in the warm Arizona weather, and eventually being escorted out of the prison on a stretcher. Moreover, in July 2010, prison officials alerted the inmates that the Index Case had been diagnosed with active tuberculosis and explained basic facts and symptoms about the disease. Thus, Plaintiffs' first claim accrued at the latest in September 2010 when Bennett had all the information necessary to know both his injury (latent tuberculosis) and its cause (exposure to the Index Case). Based on this time line, Plaintiffs were required to file an administrative

[5] The Government also seeks summary judgment on any Intentional Infliction of Emotional Distress or Loss of Consortium claims stemming from claims 1, 3, and 7.

[6] Plaintiffs allege separate negligence claims premised on the ultimate injuries that resulted from exposure, such as active tuberculosis and Pott's disease (claims 2 and 6). These negligence claims are not challenged by the Government or implicated in this discussion.

tort claim with BOP within two years of the September 2010 claim accrual. They timely did so in late 2010. BOP subsequently denied the claim in April 2011, triggering the six-month limitations period for filing suit in district court. Plaintiffs, however, did not file suit in district court until almost four years later in March 2015. Therefore, Plaintiffs' first claim based on Bennett's exposure to and contraction of tuberculosis is barred by the FTCA.

Plaintiffs contend that the relevant injury underlying their first claim is not merely Bennett's exposure to and contraction of tuberculosis. Instead, Plaintiffs construe the injury as the moment when the latent tuberculosis manifested into Pott's disease in July 2012. Because Plaintiffs filed a second administrative tort claim in March 2014 (within two years of the July 2012 injury) and initiated the lawsuit in March 2015 (within six months of BOP's January 2015 claim denial), they contend that their first claim is timely. In other words, Plaintiffs argue that their first claim did not accrue until the full extent of Bennett's damage was discovered. The Court disagrees.

The Ninth Circuit has held, "[O]ne who knows that an injurious tort has been committed against him by the Government may [not] delay the filing of his suit until the time, however long, when he becomes knowledgeable as to the precise extent of the damage resulting from the tort." *Ashley v. United States*, 413 F.2d 490, 493 (9th Cir. 1969). Where, as here, a plaintiff suffers an initial injury that subsequently develops into a more severe condition because of alleged medical negligence, the plaintiff has suffered two discrete injuries giving rise to two different claims with separate accrual dates. *Raddatz v. United States*, 750 F.2d 791 (9th Cir. 1984).

The Ninth Circuit's decision in *Raddatz* is particularly instructive. The plaintiff there was a member of the Navy who brought an FTCA claim stemming from an initial injury that subsequently manifested into a more severe condition. *Id.* at 793. The initial injury occurred on February 28, 1977 when an Army doctor negligently inserted an intrauterine device ("IUD") and perforated plaintiff's uterus. *Id.* In the subsequent months, Navy doctors failed to diagnose or treat the injured uterus, which developed an infection. *Id.* On March 29, 1977, the plaintiff learned that the infection had spread, resulting in pelvic inflammatory disease ("P.I.D."). *Id.* The district court held that plaintiff's claims against the Army and Navy accrued at the same time—on February 28, 1977, when the IUD was improperly inserted. *Id.* at 795. Because the plaintiff had filed suit on March 1, 1979, the district court found the action untimely under the two-year limitations period. *Id.* The Ninth Circuit reversed and explained that the plaintiff had actually suffered two discrete injuries, each with its own accrual date. *Id.* at 795. The first claim accrued on February 28, 1977 when the plaintiff learned that the Army doctor had injured her uterus in the course of inserting the IUD. *Id.* at 796. The second claim, however, did not accrue until the plaintiff had discovered the full extent of the damaged caused by the negligent IUD insertion, on February 29, 1977. Accordingly, the Ninth Circuit ruled that the second claim was timely. *Id.* at 798.

Here, Bennett suffered an initial injury (latent tuberculosis), which developed into a more serious harm (active tuberculosis and Pott's disease) because prison medical officials allegedly failed to

diagnose and treat his condition. Likewise in *Raddatz*, the plaintiff experienced an initial injury (perforated uterus), which developed into a more severe harm (pelvic inflammatory disease) because Navy medical personnel allegedly failed to diagnose and treat her infection. Even though in both cases the initial injury combined with alleged medical negligence to produce the same damage, *Raddatz* teaches that the two injuries remain distinct with separate accrual dates. *Id.* at 795 ("The fact that the same damage was alleged as a result of the separate acts of the Army and Navy does not fuse or merge the two claims into one."). Accordingly, the Court rejects Plaintiffs' argument that their first claim accrued only when Bennett discovered the full extent of the damage resulting from his exposure to tuberculosis.

Plaintiffs rebut by invoking Ninth Circuit precedent supposedly holding that for FTCA accrual purposes, "the injury is the development of the problem into a more serious condition which poses greater danger to the patient or which requires more extensive treatment." *Augustine v. United States*, 704 F.2d 1074, 1078 (9th Cir. 1983). This single quote, unmoored from its context, is of no help to Plaintiffs. In *Augustine*, the Ninth Circuit articulated an accrual rule applicable to medical malpractice claims premised on a failure to diagnose or treat an undetected condition. The court explained,

> Where a claim of medical malpractice is based on the failure to diagnose or treat a pre-existing condition, the injury is not the mere undetected existence of the medical problem at the time the physician failed to diagnose or treat the patient or the mere continuance of that same undiagnosed problem in substantially the same state. *Rather, the injury is the development of the problem into a more serious condition which poses greater danger to the patient or which requires more extensive treatment.*

Id. (emphasis added).

Here, Plaintiffs' first claim is not based on a failure to diagnose or treat an undetected condition; rather, the claim stems from Bennett's contraction of latent tuberculosis, an injury Bennett knew about in September 2010. In fact, Plaintiffs have asserted a separate claim alleging failure to treat or diagnose Plaintiff's active tuberculosis (claim 2). The Government has not challenged this claim and even concedes that the special accrual rule in *Augustine* applies to claim 2. (Def.'s Reply ISO Mot. Summ. J. 2 n.1, ECF No. 60.) Thus, Plaintiffs' reliance on *Augustine* to save their first claim is misplaced.

Next, Plaintiffs rely on a Seventh Circuit case, *Goodhand v. United States*,[7] in which the court

[7] Plaintiffs also invoke another Seventh Circuit case, *Devbrow v. Kalu*, 705 F.3d 765 (7th Cir. 2013). There, the court merely reiterated the established principle that a plaintiff's claim accrues at the moment he discovers his injury. *Id.* at 766. In the present case, Bennett discovered

began by reiterating the unremarkable proposition that "the plaintiff cannot wait until the full gravity of his injury is known" before filing suit. 40 F.3d 209, 212-13 (7th Cir. 1994). The court in *Goodhand* carved out an exception for those situations "in which at first the injury reasonably seems trivial, and only much later is it discovered to be serious enough to warrant the expense of a precomplaint investigation." *Id.* at 213. The exception articulated in *Goodhand* is inapplicable to the instant action because Bennett's initial injury here was not trivial. Several courts, including the Ninth Circuit, have recognized that exposure to and contraction of tuberculosis is a grave injury that gives rise to a claim for medical negligence. *Tai Huynh v. Hubbard*, 471 F. App'x 591 (9th Cir. 2012); *Hassel v. Sisto*, No. CIV10-0191, 2010 WL 2511282, at *3 (E.D. Cal. June 17, 2010); *Andrews v. Cervantes*, No. CIVS03-1218, 2009 WL 800915, at *5 (E.D. Cal. Mar. 25, 2009) ("[Plaintiff's] allegation that he was exposed to and contracted tuberculosis in 1987 suffices to show that a cause of action accrued that year.").

Plaintiffs concede "that exposure to tuberculosis in its latent form *can* support a cause of action" for medical malpractice. (Pl.s' Opp'n to Mot. Summ. J. 17:1-2, ECF No. 55.) They argue, however, that even if contracting latent tuberculosis is an actionable claim, "there can be multiple causes of action related to a single event." (Pl.s' Opp'n to Mot. Summ. J. 17:3-4, ECF No. 55.) With this statement Plaintiffs have unwittingly undermined their own position. By stating that "there can be multiple causes of action related to a single event," Plaintiffs acknowledge that separate, distinct claims can combine to produce a single harm. Of course, as discussed earlier, in a situation where separate claims result in a single harm, each distinct claim carries its own accrual date. *Raddatz*, 750 F.2d at 795. As explained above, Plaintiffs' first claim accrued in September 2010 when Bennett learned that he had contracted tuberculosis.

Finally, Plaintiffs invoke a Fifth Circuit principle referred to as the "traumatic event/latent manifestation" doctrine. "A traumatic event/latent manifestation case is one in which the plaintiff has sustained both immediate and latent injuries caused by a noticeable, traumatic occurrence. At the time of the traumatic event, the plaintiff realizes both that he is injured and what is responsible for causing the injury. The full extent of the harm, however, has not become manifest." *Albertson v. T.J. Stevenson & Co.*, 749 F.2d 223, 231 (5th Cir. 1984). In such a situation, the court considers several factors to determine timeliness: "[F]irst and foremost, the severity of the traumatic event and initial symptoms; second, the plaintiff's correlation of his ultimate injury with the traumatic event; and third, the plaintiff's reasonable reliance on the opinions of medical experts." *Pretus v. Diamond Offshore Drilling, Inc.*, 571 F.3d 478, 484 (5th Cir. 2009).

Plaintiffs' reliance on Fifth Circuit precedent is unavailing for two reasons. First, this Court declines to adopt a novel doctrine from outside the Ninth Circuit when ample guidance exists within our own circuit. Second, the "traumatic event/latent manifestation" doctrine may not be as helpful as

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his injury in September 2010 when he learned that he had been exposed to and contracted latent tuberculosis. *Devbrow* does not mandate a different outcome.

Plaintiffs claim because Bennett's situation likely does not satisfy the first, and most important, factor. Under the first factor, courts generally extend the limitations period only where the traumatic event causes mild symptoms or minor injuries, which do not alert the plaintiff that a latent injury may potentially develop. *Pretus*, 571 F.3d at 484 ("Where the event is not particularly traumatic and the initial symptoms are not severe, such that the plaintiff did not discover and should not have discovered the latent injury until later, the discovery rule may apply [to extend the limitations period]"); *Albertson*, 749 F.2d at 233 (refusing to extend the limitations period and explaining, "This is not a case in which, coinciding with the trauma, [a plaintiff] experienced and noticed only a minor injury and at a later time discovered an unexpected latent injury that was unknown and unknowable at the time of the traumatic event").

In the present case, Plaintiffs define the "traumatic event" as Bennett's exposure to and contraction of latent tuberculosis, and they construe the "latent manifestation" as the active tuberculosis and Pott's disease that ultimately developed. The traumatic event here does not satisfy the first prong of the "traumatic event/latent manifestation" test because Bennett did not merely suffer minor injuries or mild symptoms. Quite the opposite, Bennett was afflicted with a serious disease, latent tuberculosis, that reasonably placed him on notice of the potential for active tuberculosis. *Beech v. United States*, 345 F.2d 872, 874 (5th Cir. 1965) ("Where the trauma coincides with the negligent act and some damage is discernible at the time, the [FTCA] two-year statute of limitations begins to run, even though the ultimate damage is unknown or unpredictable."). Therefore, Plaintiffs' guidance on Fifth Circuit law is unpersuasive.

Accordingly, the Court concludes that Plaintiffs' first claim alleging medical negligence premised on Bennett's exposure to and contraction of tuberculosis is time barred.

B. Discretionary-Function Exception

The FTCA precludes claims "based upon the exercise or performance . . . [of] a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C.A. § 2680(a). "The Supreme Court has established a two-step process for evaluating whether a claim falls within the discretionary function exception." *Chadd v. United States*, 794 F.3d 1104, 1108-09 (9th Cir. 2015). First, courts inquire whether the challenged conduct is discretionary in nature, meaning an act that involves choice or judgment. *Id.* at 1109. Second, even if the conduct involves an element of judgment, the conduct is protected by the discretionary-function exception "only if it implements social, economic or political policy." *Gasho v. United States*, 39 F.3d 1420, 1435 (9th Cir. 1994). "Although Plaintiffs bear the initial burden to establish subject matter jurisdiction under the FTCA, it is the government's burden to establish that the discretionary function exception applies." *Young v. United States*, 769 F.3d 1047, 1052 (9th Cir. 2014).

The Government argues that Plaintiffs' claims alleging negligent supervision at Lompoc and Safford (claims 3 and 7) are barred by the discretionary-function exception. The Court disagrees.

1. *First Prong: Challenged Conduct*

Under the first prong of the discretionary-function analysis, the Court examines whether a federal statute, regulation, or policy mandates a specific course of action. "If 'a federal statute, regulation, or policy specifically prescribes a course of action for the employee to follow,' then the employee can be held liable for failing to follow the prescribed directive." *Dichter-Mad Family Partners, LLP v. United States*, 707 F. Supp. 2d 1016, 1027 (C.D. Cal. 2010), *aff'd*, 709 F.3d 749 (9th Cir. 2013). "Whether a challenged action falls within the discretionary function exception requires a particularized analysis of the specific agency action challenged." *GATX/Airlog Co. v. United States*, 286 F.3d 1168, 1174 (9th Cir. 2002).

The Court finds that Plaintiffs have identified a specific policy mandating a particular course of conduct. Specifically, they point to the peer-review process, which requires BOP medical personnel to receive an external critical evaluation every two years. The process also sets forth a scheme of corrective action in the event the peer review uncovers any deficient performance. Relying on the evidence discussed in the factual background section, Plaintiffs contend that BOP officials negligently conducted the peer-review process. For instance, Ferriol testified that he never saw the results of a single peer review, and Dhaliwal acknowledged that there may have been some instances in which he did not receive his peer-review report. (Ferriol Depo. 39-41; Dhaliwal Depo. 33-34, ECF No. 57.) Additionally, despite the fact that both Ferriol and Dhaliwal were reprimanded for poor clinical performance, neither physician recalled a single incident in which he received an unsatisfactory clinical evaluation. (Ferriol Depo. 39-41, 56, 231-32; Dhaliwal Depo. 32-38, ECF No. 57.)

In response, the Government attaches declarations from BOP administrators testifying that the peer reviews were conducted with requisite frequency. (Pelton Decl. ¶3; Carrasca Decl. ¶¶ 4-5, ECF No. 60.) According to the Government, the sole requirement under BOP's peer-review process is for medical personnel to conduct the reviews once every two years, regardless of the manner—whether negligent or deficient—in which the evaluations are performed. (Def.'s Reply ISO Mot. Summ. J. 4 n.3, ECF No. 60.) ("The only dictate is that the peer reviews occur—which they did.") This argument has no merit. Surely BOP would not design an oversight policy requiring peer reviews without expecting the evaluations to be conducted in a reasonable and competent manner.

Finally, the Government argues that the BOP policy does not mandate the precise manner of conducting the peer reviews, which means that medical personnel are vested with discretion in executing the peer-review process. Therefore, the Government maintains, any claim of negligence in performing the peer reviews "is nothing more than a claim of negligence in performing a discretionary function—which, under the discretionary function exception, is not actionable." (Def.'s Reply ISO Mot. Summ. J. 4:18-5:1, ECF No. 60.) The Court agrees that the BOP policy allows medical personnel some discretion in conducting the reviews. However, the mere fact that employees are endowed with discretion does not automatically trigger the discretionary-function bar. Instead, as the Court explains

under prong two, the discretion must be the type that "implements social, economic or political policy." *Gasho*, 39 F.3d at 1435.

2. *Second Prong: Policy Considerations*

Under the second part of the discretionary-function analysis, courts evaluate whether the challenged government conduct is "susceptible to policy analysis" or involves a "decision grounded in social, economic, and political policy." *O'Toole v. United States*, 295 F.3d 1029, 1033-34 (9th Cir. 2002). The Ninth Circuit has held that this second prong is subject to two important limiting principles. First is the design/implementation dichotomy, which holds that "the design of a course of governmental action is shielded by the discretionary function exception, whereas the implementation of that course of action is not." *Whisnant v. United States*, 400 F.3d 1177, 1181 (9th Cir. 2005). "Second, and relatedly, matters of scientific and professional judgment—particularly judgments concerning safety—are rarely considered to be susceptible to social, economic, or political policy." *Id.*

Applying these limiting principles to the present case, the Court finds that the discretionary-function exception does not bar Plaintiffs' negligent supervision claims. First, Plaintiffs are not challenging the design of BOP's peer-review process; rather, they allege that the manner of implementation was negligent because medical personnel supposedly failed to review their evaluation reports. Second, the type of discretion in conducting the peer reviews involves "matters of scientific and professional judgment," as medical personnel are charged with evaluating the clinical performance of their peers. Therefore, the discretionary acts involved in BOP's peer-review process do not implicate "social, economic, or political policy."

The Government rebuts by arguing that the Supreme Court has eschewed the distinction between operational and planning decisions and held that "if a regulation allows the employee discretion, the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations." *Terbush v. United States*, 516 F.3d 1125, 1130 (9th Cir. 2008) (quoting *United States v. Gaubert*, 499 U.S. 315, 324–25 (1991)).

Before addressing the Government's argument, the Court briefly clarifies an important point. The operational/planning dichotomy invoked by the Government is separate from the design/implementation distinction relied on by Plaintiffs. As the Ninth Circuit explained, "The design/implementation distinction should be differentiated from the operational/planning distinction . . . the former concerns the nature of the decision, while the latter concerns the identity of the decisionmaker." *Whisnant*, 400 F.3d at 1181 n.1. In other words, the operational/planning dichotomy simply requires a court to disregard the identity of a decision maker when determining whether the challenged conduct falls within the discretionary-function exception. The design/implementation distinction, however, does not involve the identity of the government actor; instead, it looks solely at the nature of the challenged activity. The dispute here centers on the nature of the challenged conduct,

namely whether the BOP peer-review process involves discretion that implicates policy concerns. Accordingly, because the identify of the decision maker is not at issue, the Court finds the operational/planning dichotomy inapplicable.

Once the Court disregards the operational/planning distinction, the Government's only remaining argument is that the peer-review process vests BOP medical personnel with discretion by listing general suggestions about how to conduct the evaluations. Even though implementation, as opposed to design, generally does not qualify for protection under the discretionary-function test, the Ninth Circuit has recognized an exception under which "[t]he implementation of a government policy is shielded where the implementation itself implicates policy concerns, such as where government officials must consider competing firefighter safety and public safety considerations in deciding how to fight a forest fire." *Myers v. United States*, 652 F.3d 1021, 1032 (9th Cir. 2011). Examples include situations "where government officials must consider competing fire-fighter safety and public safety considerations in deciding how to fight a forest fire, balance prison safety and inmate privacy considerations in deciding how to search a prisoner's cell in response to a reported threat of violence, or weigh various regulatory objectives in deciding whether to certify a new aircraft design." *Whisnant*, 400 F.3d at 1182.

Here, the Court does not find that the discretion involved in performing the peer reviews entails the policy considerations Congress intended to protect. For starters, the Government has not identified a single specific policy concern or explained precisely how conducting the peer-reviews implicates important policy considerations. Additionally, the peer reviews require medical professionals to evaluate the clinical performance of their peers by presumably relying on their medical training and professional judgment. As explained above, "matters of scientific and professional judgment—particularly judgments concerning safety—are rarely considered to be susceptible to social, economic, or political policy." *Id.* at 1181. Accordingly, the Court rejects the Government's argument.

Finally, the Government argues that Plaintiffs' negligent supervision claim is barred by the discretionary-function exception to the extent the claim relies on any conduct beyond the peer reviews, "including any claims that the doctors at Safford and Lompoc negligently supervised the mid-level practitioners and nurses." (Def.'s Reply ISO Mot. Summ. J. 5 n.6, ECF No. 60.) The Court agrees.

Well-established Ninth Circuit precedent teaches that "decisions relating to the hiring, training, and supervision of employees usually involve policy judgments of the type Congress intended the discretionary function exception to shield." *Vickers v. United States*, 228 F.3d 944, 950 (9th Cir. 2000); *Nurse v. United States*, 226 F.3d 996, 1001 (9th Cir. 2000) ("[A]llegedly negligent and reckless employment, supervision and training" of government employees "fall squarely within the [FTCA] discretionary exception"). Of course, this general principle that negligent supervision claims are prohibited by the discretionary-function bar does not apply if the plaintiff identifies a specific supervision policy that government actors have allegedly violated because a "supervising government employee[] has no discretion to violate a policy." *Foster v. United States*, No. CV-14-00719, 2015 WL

727933, at *4 (D. Ariz. Feb. 19, 2015).

In the present case, the discretionary-function exception does not bar Plaintiffs' negligent-supervision claim only insofar as it is predicated on the allegedly negligent peer-review process. Beyond that, however, Plaintiffs may not bring a negligence claim alleging that BOP generally failed to supervise its medical personnel because "the decision[s] of whether and how to retain and supervise an employee . . . are the type[s] of discretionary judgments that the exclusion was designed to protect." *Doe v. Holy See*, 557 F.3d 1066, 1084 (9th Cir. 2009).

C. Claims Alleging Misdiagnosis or Mistreatment of the Index Case

Although the Complaint does not allege a claim for misdiagnosis or mistreatment of the Index Case, the Government contends that Plaintiffs have disclosed expert reports opining that Safford's medical treatment of the Index Case fell below the standard of care. The Government contends that Plaintiffs may not assert a claim on behalf of the Index Case because "[t]o make out a viable negligence claim, the plaintiffs must show the United States breached a duty *to the plaintiffs*—for example, a duty to other inmates to isolate an inmate with active tuberculosis." (Def.'s Mot. Summ. J. 15:16-18, ECF No. 54.)

Plaintiffs rebut that they are not alleging breach of a duty exclusively owed to the Index Case; rather, they claim that "by failing to care for the Index Case's infectious disease, Safford's medical providers violated a duty of care to all inmates and BOP staff at risk to contract the disease." (Pl.'s Opp'n to Mot. Summ. J. 20:8-10, ECF No. 55.)

It appears that there may be considerable overlap between BOP's treatment of the Index Case and its duty owed to Bennett and other inmates. In certain situations, the same conduct very well could constitute a breach of duty to both the Index Case as well as his fellow inmates at Safford. To the extent BOP's handling of the Index Case violated a duty owed to Bennett, Plaintiffs may introduce evidence on that point. Plaintiffs may not, however, proceed on a theory of negligence premised on a duty owed exclusively to the Index Case. Accordingly, the United States is entitled to summary judgment insofar as Plaintiffs' negligence claims rest on allegations that BOP breached a duty solely to the Index Case.

V. CONCLUSION

For the foregoing reasons, the Court **GRANTS IN PART** and **DENIES IN PART** the Government's Motion for Summary Judgment.

The Court **GRANTS** summary judgment in favor of the Government on Plaintiffs' first claim alleging medical negligence premised on Bennett's exposure to and contraction of tuberculosis. The

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. **CV 15-01923-RGK (Ex)** Date April 20, 2016

Title ***James Davis Bennett and Pamela Bennett v. United States***

Court also **GRANTS** summary judgment on any claim alleging negligence solely on the ground that Safford medical providers violated a duty of care to the Index Case. Also, summary judgment is **GRANTED** on the loss of consortium and intentional infliction of emotional distress claims to the extent they are based on Plaintiffs' first claim.

The Court **DENIES** summary judgment on Plaintiffs' third and seventh claims alleging negligent supervision predicated on BOP's allegedly deficient execution of the peer-review process. Summary judgment is denied only as to claims of negligent supervision based on the peer-review policy; any claims alleging general negligence in supervising medical personnel are barred by the discretionary-function exception.

IT IS SO ORDERED.

_____ : _____

Initials of Preparer _____