No. 20-16435

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LINDA SISTO, a widow; TASHINA SISTO, an unmarried woman; TYRELL SISTO, an unmarried man; JEREMY SISTO, an unmarried man; KASHINA SISTO, an unmarried woman; LANNETTE SISTO, an unmarried woman; PURCELL SISTO, an unmarried man,

Plaintiffs - Appellants,

v.

UNITED STATES OF AMERICA,

Defendant - Appellee.

No. 20-16435

D.C. No. 2:20-cv-00202-ESW
U.S. District Court for Arizona, Phoenix

Hon. Eileen S. Willett
Magistrate Judge

OPENING BRIEF

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Corporate Disclosure Statement

In accordance with Fed. R. App. Proc. 26.1(a) and 28(a)(1), Plaintiffs-Appellants certify that neither they nor the United States are parents, nor subsidiaries, nor affiliates of any publicly-owned corporation.

DATED this 29th day of October, 2020.

/s/ David L. Abney, Esq.
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Introduction: Summary of Argument

Tyrone Sisto was an Apache. On May 22, 1966, he was born into the San Carlos Apache Tribe at San Carlos, Arizona. On August 8, 2017, Tyrone died in his San Carlos home at the age of 51. He died from Rocky Mountain Spotted Fever, a deadly tick-borne bacterial disease present in the San Carlos area.

Rocky Mountain Spotted Fever is a curable disease if diagnosed early and properly treated with antibiotics. The tragedy here is that, when Tyrone went to his tribal hospital after falling ill from Rocky Mountain Spotted Fever, the doctor he saw failed to diagnose and treat a diagnosable and treatable disease. The doctor thought it was a routine virus. It was not. Within a few days, Tyrone died.

Under the Federal Tort Claims Act, Tyrone's mother and children filed a claim for medical malpractice—followed by a lawsuit. The federal government's lawyers moved to dismiss for lack of subject-matter jurisdiction. They argued the malpracticing doctor was not working for the tribal hospital. But that was the only reason he was at the tribal hospital and saw tribal patients. The Magistrate Judge, however, ruled the malpracticing doctor was not working for the tribal hospital, and granted the federal government's motion to dismiss. From that error, Tyrone's mother and children are appealing.

Jurisdictional Statement

This Court has jurisdiction over this timely appeal under 28 U.S.C. § 1291.

Statement of the Issue Presented for Review

Subject-matter jurisdiction. A tribal organization operating an Apache tribal hospital granted staff privileges to a doctor to treat tribal patients. Under the Federal Tort Claims Act, did the district court have subject-matter jurisdiction over a lawsuit brought by the survivors of an Apache tribal patient for life-ending malpractice the doctor committed at the tribal hospital against that tribal patient?

Standard of Review

This Court reviews de novo the grant of a motion to dismiss for lack of subject-matter jurisdiction. *Doğan v. Barak*, 931 F.3d 888, 892 (9th Cir. 2019). This Court will accept as true all facts alleged in the Complaint and construe those facts in the light most favorable to the plaintiffs. *Snyder & Assocs. Acquisitions LLC v. United States*, 859 F.3d 1152, 1156-57 (9th Cir. 2017). Finally, this Court will draw all reasonable inferences from the alleged facts in the plaintiffs' favor. *Hyatt v. Yee*, 871 F.3d 1067, 1071 n. 15 (9th Cir. 2017).

Statement of the Case

This case concerns Federal Tort Claims Act subject-matter jurisdiction for a medical-malpractice lawsuit brought by the survivors of an Apache tribal patient against a doctor treating tribal patients at and on behalf of a tribal hospital under staff privileges granted to him by the tribal corporation that was responsible for running the tribal hospital—and deciding and controlling who could practice there.

Statement of Facts

Born in San Carlos, Arizona on May 22, 1966, Tyrone Sisto was a 51-year-old enrolled member of the San Carlos Apache Tribe. The area where he lived was beautiful, hilly, and rugged. It is also a prime region for ticks carrying Rocky Mountain Spotted Fever.[1] That bacterial disease is curable by antibiotics, although, if left untreated, it can be fatal.[2]

Normally, Tyrone was healthy. (Doc. 1, ¶ 10) (ER-105). On August 4, 2017, however, he was ill and needed medical care. After suffering from headaches, body aches, and a poor appetite for three days, he went to the tribal hospital—the San Carlos Apache Healthcare Corporation Hospital located in Peridot, Arizona. (Doc. 1, ¶ 10) (ER-105).

The Complaint alleged that Dr. Rickey Gross was an "employee" of the San Carlos Apache Healthcare Corporation Hospital. (Doc. 1, ¶ 11) (ER-105). In the context of a motion to dismiss for lack of subject-matter jurisdiction, that

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[1] *See, e.g.*, Anne T. Denogean, *Arizona Forest Visitors Urged to Check for Tick Bites*, Tucson Citizen 9A (Jun. 14, 2004) ("Ticks that carry the disease can be found in the forested mountains of northern, central, and eastern Arizona.").

[2] *See* Holly M. Biggs, et al., *Diagnosis and Management of Tickborne Rickettsial Diseases: Rocky Mountain Spotted Fever and Other Spotted Fever Group Rickettsioses, Ehrlichioses, and Anaplasmosis—United States*, 65(2) Morbidity and Mortality Weekly Report: Recommendations and Reports 1 (May 13, 2016) ("Tickborne rickettsial diseases continue to cause severe illness and death in otherwise healthy adults and children, despite the availability of low-cost, effective antibacterial therapy. Recognition early in the clinical course is critical because this is the period when antibacterial therapy is most effective.").

allegation should have been accepted as true. In any event, Dr. Gross saw Tyrone on August 4, 2017. (Doc. 1, ¶ 11) (ER-105). Lab tests showed hyponatremia (low sodium concentration in the blood), thrombocytopenia (abnormally low levels of platelets, also called thrombocytes, in the blood), elevated liver enzymes, elevated bilirubin, and hyperglycemia (excessive amount of glucose circulates in the blood plasma) (Doc. 1, ¶ 12) (ER-105).[3]

Dr. Gross's incorrect documented assessment was that Tyrone was suffering from viral syndrome (a term used for symptoms caused by a virus) and viral myalgia (muscle pain or muscle ache caused by a virus). (Doc. 1, ¶ 13) (ER-105). Tyrone was really suffering from a bacterial infection, namely, Rocky Mountain Spotted Fever. (Doc. 1, ¶ 16) (ER-106).[4]

Dr. Gross never provided any explanation why he diagnosed a viral illness instead of a bacterial infection. (Doc. 1, ¶ 14) (ER-105). Dr. Gross did not examine Tyrone for Rocky Mountain Spotted Fever and did not start Tyrone on doxycycline, a broad-spectrum, tetracycline-class antibiotic used to treat infections

[3] For Rocky Mountain Spotted Fever, laboratory tests may, as in our case, demonstrate such findings as hyponatremia, thrombocytopenia, and abnormal liver enzymes. Michael Gottlieb, et al., *The Evaluation and Management of Rocky Mountain Spotted Fever in the Emergency Department: A Review of the Literature*, 55(1) J. Emergency Med. 42 (July 2018).

[4] Rocky Mountain spotted fever is still the most lethal tick-vectored illness in the United States. . . . Early diagnosis and treatment save lives." Edwin J. Masters, et al., *Rocky Mountain Spotted Fever: A Clinician's Dilemma*, 163 Arch. Internal Med. 769 (April 14, 2003).

caused by bacteria such as Rocky Mountain Spotted Fever. (Doc. 1, ¶ 14) (ER-105). Dr. Gross failed to do that although Tyrone lived in a region known for its high prevalence of Rocky Mountain Spotted Fever. (Doc. 1, ¶ 14) (ER-105).

After receiving intravenous fluids and pain and nausea medications at the tribal hospital, Tyrone was released home. (Doc. 1, ¶ 13) (ER-105). Tyrone was found dead at his home four days later. (Doc. 1, ¶ 15) (ER-106). He had a rash over his body. There were ticks throughout his room and one on his body. (Doc. 1, ¶ 15) (ER-106).

On August 28, 2017, the Center for Disease Control issued a final report for Tyrone's August 4, 2017 hospital-visit blood draw. (Doc. 1, ¶ 16) (ER-106). By Rickettsia molecular detection, the CDC report confirmed a diagnosis of Rocky Mountain Spotted Fever. (Doc. 1, ¶ 16) (ER-106).

Procedural History

Tyrone Sisto's mother and children filed a claim against the United States under the FTCA. (ER-109). After claim denial, they sued the United States on January 20, 2020. (Doc. 1) (ER-103). On May 29, 2020, the United States filed a motion to dismiss for lack of subject-matter jurisdiction. (Doc. 17) (ER-049). On June 23, 2020, the Sistos filed their amended response. (Doc. 20) (ER-031).

On July 7, 2020, the United States filed its reply. (Doc. 21) (ER-019). Thirteen days later, on July 20, 2020, without having held oral argument, the

Magistrate Judge filed an Order granting the motion to dismiss. (Doc. 22) (ER-005). The Sistos filed the notice of appeal on July 25, 2020. (Doc. 23) (ER-016).

Legal Argument

Tyrone Sisto's survivors filed a Federal Tort Claims Act ("FTCA") action asserting that Dr. Rickey Gross's medical malpractice killed Tyrone Sisto. The United States argues this action does not fall within the FTCA. But for the following reasons this is an FTCA action.

Part of the proper analysis of this situation requires an appreciation of the importance Arizona courts place on a hospital's duty of care to its patients. The San Carlos Apache Healthcare Corporation, in its operation of a tribal hospital in Arizona through agents and employees such as Dr. Rickey Gross, who are granted staff privileges to work there on behalf of the hospital and treat tribal patients, is subject to that high standard:

> Having undertaken one of mankind's most critically important and delicate fields of endeavor, concomitantly therewith the hospital must assume the grave responsibility of pursuing this calling with appropriate care. The care and service dispensed through this high trust, however technical, complex and esoteric its character may be, must meet standards of responsibility commensurate with the undertaking to preserve and protect the health, and indeed, the very lives of those placed in the hospital's keeping.

Beeck v. Tucson General Hospital, 18 Ariz. App. 165, 169 (1972).

We also cannot overlook the fundamental, inclusive principle that, under the FTCA, an "employee of the government" includes "officers or employees of any

federal agency . . . *and* persons acting on behalf of a federal agency in an official capacity." 28 U.S.C. § 2671 (emphasis added). Dr. Rickey Gross was a physician with tribally-granted hospital staff privileges acting on behalf of the San Carlos Apache Healthcare Corporation in an official capacity in caring for tribal patients such as Tyrone Sisto at a tribal hospital. Thus, under the plain words of 28 U.S.C. § 2671, Dr. Gross would be considered an FTCA-covered federal employee. The same result attains under the more detailed analysis provided below.

1. Under 25 U.S.C. § 5321(d), the FTCA applies to Dr. Rickey Gross. Thus, there is FTCA subject-matter jurisdiction.

The FTCA expressly applies to many of the contracts entered into under the terms of the Indian Self Determination and Education Assistance Act ("ISDEAA"). In particular, 25 U.S.C. § 5396(a) states that, with some irrelevant exceptions, all of the FTCA's provisions apply to "compacts" (contracts) and funding agreements the ISDEAA authorized.

Under the ISDEAA, the San Carlos Apache Healthcare Corporation is a tribally-operated entity. It entered into a self-determination "compact" (contract) with the U.S. Department of Health and Human Services' Indian Health Service. (Doc. 17, ¶ 8) (ER-050). "Congress amended the ISDEAA," in fact, "to allow FTCA recovery when death or injury results from the performance of a self-determination contract." *Lumas v. United States*, No. 19-CV-0294 W (WVG), 2019 WL 5086576 at *2 (S.D. Cal. Oct. 10, 2019).

Because Congress wanted to limit the liability of tribes that agreed to the ISDEAA, Congress deemed tribes, their organizations, and their contractors to be federal employees while acting within the scope of their employment in carrying out a self-determination contract under the ISDEAA. *Snyder v. Navajo Nation*, 382 F.3d 892, 897 (9th Cir. 2004).

Under 25 U.S.C. § 5321(d), tribal organizations such as the San Carlos Apache Healthcare Corporation are "deemed to be part of the Public Health Service in the Department of Health and Human Services." Thus, the FTCA applies to the San Carlos Apache Healthcare Corporation. The United States has admitted that. (Doc. 17, ¶ 8) (ER-050).

More important, 25 U.S.C. § 5321(d)'s terms also broadly cover and protect: (1) all of the San Carlos Apache Healthcare Corporation's employees; (2) those acting on behalf of the organization or on behalf of one of its contractors; *and* (3) "any individual who provides health care services pursuant to a personal services contract with a tribal organization for the provision of services in any facility owned, operated, or constructed under the jurisdiction of the Indian Health Service." *Id*.

Dr. Gross was an and employee of, and was acting on behalf of, the San Carlos Apache Healthcare Corporation in his provision of medical care at a tribal hospital to tribal patients. He was also an agent and employee of, and acting on

behalf of, his medical practice ("Tribal EM, PLLC"). It was a San Carlos Apache Healthcare Corporation contractor providing medical care to tribal patients at the tribal hospital. Dr. Gross was, in other words, working both for the tribal hospital and for his own medical practice in providing medical care to tribal patients at a tribal hospital. That simply makes him something hardly uncommon—a "dual agent"[5] or, perhaps more accurately, a "joint employee."[6] For those reasons alone, Dr. Gross was subject to the protections of the FTCA through 25 U.S.C. § 5321(d), meaning that there is subject-matter jurisdiction for this action.

In addition, Dr. Gross was giving medical care to tribal patients at a tribal hospital operated under the Indian Health Service's jurisdiction under a personal services contract. That also places him under the FTCA through 25 U.S.C. § 5321(d). Therefore, under that aspect of 25 U.S.C. § 5321(d), a key foundational question is: What is a "personal services contract?"

2. Dr. Rickey Gross treated his tribal patients at the tribal hospital under a tribal "personal services contract."

The relevant federal statutes and regulations do not define what a "personal

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[5] A dual agent is an "agent who represents both parties in a single transaction." *Black's Law Dictionary* 79 (11th ed. 2019).

[6] *Special Fund Division/No Insurance Section v. Industrial Commission*, 172 Ariz. 319, 322 (App. 1992) ("Joint employment occurs when a single employee, under contract with two employers, and under the simultaneous control of both, simultaneously performs services for both employers.") (citation omitted). *See also Harris v. Quinn*, 573 U.S. 616, 660 n. 1 (2014) (Kagan, J., dissenting) ("But employment law has a real name—joint employees—for workers subject at once to the authority of two or more employers (a not uncommon phenomenon).").

services contract" may be. Notably, in its motion to dismiss (Doc. 17) (ER-049) and in its reply in support of that motion (Doc. 21) (ER-019), the United States never even tried to define the term "personal services contract."

When a term in a statute is undefined, federal courts apply its ordinary meaning. *Mohamad v. Palestinian Authority*, 566 U.S. 449, 454 (2012). "To assess a statute, we start with the text and, unless otherwise defined, give the words their ordinary meaning." *Planned Parenthood of Greater Washington and N. Idaho v. U.S. Dept. of Health & Human Services*, 946 F.3d 1100, 1112 (9th Cir. 2020).

In its ordinary meaning, a "personal services contract" is a contract requiring a party to act personally, that does not allow substitution, and involves provision of unique personal services. *Black's Law Dictionary* 408-09 (11th ed. 2019). That is a description that would apply to the physician-patient relationship. American courts, in fact, "regularly view doctors and their patients as standing in a fiduciary relationship." *Corcoran v. United Healthcare, Inc.*, 965 F.2d 1321, 1338 (9th Cir.), *cert. denied*, 506 U.S. 1033 (1992). The relationship rests on the "personal trust" the patient has in the doctor, a trust "essential to the doctor-patient relationship." *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997). The relationship between doctor and patient is, in short, uniquely personal and uniquely based on confidence and trust. It requires the exercise of skill, judgment, and expertise.

A "personal services contract" is similarly "generally defined as a contract

that is based on a relationship of trust and confidence or that requires a party to exercise skill, judgment, or expertise." *Fransmart, LLC v. Freshii Dev., LLC*, 768 F.Supp.2d 851, 860 (E.D. Va. 2011). *See also In re Rooster, Inc.*, 100 B.R. 228, 232 (Bankr. E.D. Pa. 1989) (Personal services contract "contemplates performance of contracted-for duties involving the exercise of special knowledge, judgment, taste, skill, or ability.").

In the federal-government context, a "personal services contract" is also sometimes defined as "a contract that, by its express terms, or as administered, makes the contractor employee *appear* to be a regular government employee." Michael K. Grimaldi, *Abolishing the Prohibition on Personal Services Contracts*, 38(1) J. Legis. 71, 74 (2012) (italics added). A reasonable inference is that Dr. Gross would have appeared to be an ordinary, regular tribal employee to his tribal patients at the tribal hospital.

In summary, the relationship of doctor to patient is one based on trust and confidence. It requires the doctor to exercise skill, judgment, and expertise in providing unique, individualized, personal services to each patient. In providing medical services to Tyrone Sisto, therefore, Dr. Gross had a duty to exercise skill, judgment, and expertise in providing unique, individualized, personal services. Thus, his contract to provide medical services to Tyrone Sisto was a "personal services contract."

Moreover, under the personal services contract through which Dr. Gross provided medical services to tribal members at a tribal hospital, Dr. Gross personally attended each of those individual tribal patients in the tribal hospital emergency room. He was indistinguishable from any other doctor that San Carlos Apache Healthcare Corporation employed in its capacity as a government healthcare employer. He worked there under staff privileges that the San Carlos Apache Healthcare Corporation had granted specifically to him as an individual healthcare provider for tribal patients. (Doc. 21, Page 7 of 11 at 7:10-21) (ER-025); (Doc. 21, Page 8 of 11 at 8:12-13) (ER-026).

In addition, Dr. Gross was *required* to remain a member in good standing of the tribal hospital's active medical staff. (Doc. 17-1, Exh. A at 8, ¶ 3.4(a)) (ER-069). That is, he was actually on the tribal hospital's staff. Thus, Dr. Gross was acting as, and necessarily appeared to each of his tribal patients to be, a regular tribal hospital government employee who was treating individual tribal patients. His contract was thus a "personal services contract."

Indeed, under substantive principles of Arizona law, Dr. Gross's acts and omissions make the tribal hospital (which is admittedly subject to the FTCA) liable for his malpractice under the FTCA. Dr. Gross, after all, as a member of the tribal hospital staff who was granted privileges to treat the tribal patients at the tribal hospital, was acting as the tribal hospital's actual, de facto, ostensible, and implied

agent.[7] The tribal hospital is therefore liable under the FTCA for his malpractice.

Persons providing healthcare services under a personal services contract with a tribal organization are "deemed" to be "employees of the [Public Health] Service while acting within the scope of their employment in carrying out the contract or agreement." 25 U.S.C. § 5321(d). The United States itself admits Dr. Gross was providing healthcare services through a contractor ("Tribal EM, PLLC") that had a contract to provide healthcare services to the San Carlos Apache Healthcare Corporation and to its patients. (Doc. 17, Pages 2-3, ¶¶ 9-11) (ER-050 to ER-051).

While personally performing professional healthcare services for tribal members who went to the San Carlos Apache Healthcare Corporation hospital for

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[7] *See, e.g.*, *Banner University Medical Center Tucson Campus, LLC v. Gordon*, 249 Ariz. 132, 137 ¶ 14 (App. 2020); *Beeck v. Tucson General Hospital*, 18 Ariz. App. 165, 169-71 (1972); *Gregg v. National Med. Health Care Servs., Inc.*, 145 Ariz. 51, 55 (App. 1985); *Barrett v. Samaritan Health Services, Inc.*, 153 Ariz. 138, 146 (App. 1987). *See also Joslin v. Yuma Regional Medical Center, Inc.*, 69 F.3d 544 (9th Cir. 1995) ("The evidence of the relationship among YRMC, the physicians, and the patient in this case was sufficient to raise a material issue of ostensible agency, both at the emergency room level and at the radiology level.").

It is also fair to regard Dr. Gross as a "joint employee" of both his own medical group and of the tribal hospital where he advanced the interests of both employers by providing medical care to tribal patients at the tribal hospital based on staff privileges that the tribal hospital had granted to him. *See Modern Workers Compensation* § 106.38 (2019) ("A joint employee is any person who has an express or implied contract of employment with more than one joint employer at the same time, whose work is controlled by more than one joint employer, and who is engaged in the performance of work for more than one joint employer."). Either as an agent of the San Carlos Apache Healthcare Corporation or as its joint employee, the FTCA would apply to Dr. Gross.

their medical care, Dr. Gross was acting on behalf of the San Carlos Apache Healthcare Corporation *and* on behalf of one of its contractors ("Tribal EM, PLLC"). Throughout that endeavor, Dr. Gross was a healthcare provider to whom the tribal hospital had granted staff privileges to provide healthcare services to tribal members under a personal services contract with a tribal organization at a tribal hospital owned and operated under the Indian Health Service's jurisdiction.

As a result, 25 U.S.C. § 5321(d) and the other federal statutes and federal regulations discussed in this brief apply to Dr. Gross. Because 25 U.S.C. § 5321(d) applies to Dr. Gross, he is considered to be the same as an employee of the Public Health Service. So the FTCA remedy that applies against the United States for torts committed by its employees applies to Dr. Gross as well.

3. Under 42 U.S.C. § 233(a) and 25 U.S.C. § 1680c(e)(1), the FTCA applies to Dr. Rickey Gross. Thus, there is FTCA subject-matter jurisdiction.

FTCA subject-matter jurisdiction in this action also exists under 42 U.S.C. § 233(a), which provides:

> The remedy against the United States provided [under the FTCA], for damage for personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigation, by any commissioned officer or employee of the Public Health Service while acting within the scope of his office or employment, *shall be exclusive of any other civil action or proceeding* by reason of the same subject-matter against the officer or employee (or his estate) whose act or omission gave rise to the claim.

42 U.S.C. § 233(a) (emphasis added).

The result is much the same under 25 U.S.C. § 1680c(e)(1), which provides that: "Hospital privileges in health facilities operated and maintained by the [Indian Health] Service or operated under a contract or compact pursuant to the Indian Self-Determination and Education Assistance Act . . . may be extended to non-Service health care practitioners who provide services to [eligible] individuals."

Even the United States has admitted that hospital staff privileges in the tribal hospital were extended to Dr. Gross. (Doc. 21, Page 7 of 11 at 7:10-21) (ER-025); (Doc. 21, Page 8 of 11 at 8:12-13) (ER-026). In addition to that, "non-Service health care practitioners may, as part of the privileging process, be designated as employees of the Federal Government for purposes of [the FTCA] only with respect to acts or omissions which occur in the course of providing services to eligible individuals as a part of the conditions under which such hospital privileges are extended." 25 U.S.C. § 1680c(e)(1). The FTCA applies to Dr. Gross because the malpractice he committed occurred in the course of providing services to a tribal member at a tribal hospital which had extended staff privileges at that tribal hospital to Dr. Gross.

Indeed, that admitted grant of staff privileges to treat tribal patients at a tribal hospital is an additional factor confirming that the FTCA remedy against Dr. Gross is—as 25 U.S.C. § 5321(d) and 42 U.S.C. § 233(a) jointly provide and indicate—the exclusive remedy.

4. The FTCA applies under 25 C.F.R. § 900.199. Thus, there is FTCA subject-matter jurisdiction.

But even if Dr. Gross were not considered a Public Health Service employee under the joint operation of 42 U.S.C. § 233(a) and 25 U.S.C. § 5321(d), the FTCA would still apply to Dr. Gross and would still constitute the exclusive remedy for his malpractice. That is so under the terms of 25 C.F.R. § 900.199, a plain-language federal regulation that states:

> **§ 900.199.** Does FTCA coverage extend to health care practitioners to whom staff privileges have been extended in contractor health care facilities operated under a self-determination contract[8] on the condition that such practitioner provide health services to IHS beneficiaries covered by FTCA?
>
> ***Yes, health care practitioners with staff privileges in a facility operated by a contractor are covered when they perform services to IHS beneficiaries.*** Such personnel are not covered when providing services to non-IHS beneficiaries.

25 C.F.R. § 900.199 (bolding and emphasis added).

Admittedly, the San Carlos Apache Healthcare Corporation gave hospital

[8] A "self-determination contract" is a contract or cooperative agreement such as the compact that the San Carlos Apache Healthcare Corporation entered into with the Indian Health Service. 25 U.S.C. § 5304(j) (defining "self-determination contract"). The United States has admitted that the tribal hospital was operating under a "self-determination compact with the HHC Indian Health Service" and that the San Carlos Apache Healthcare Corporation was "deemed part of the United States Public Health Service for application of the FTCA." (Doc. 17 at ¶ 8) (ER-050). Thus, Dr. Gross, who was part of a private practice, falls within the scope of the FTCA because he was working at the tribal hospital and treating tribal patients exclusively because of staff privileges granted to him by the San Carlos Apache Healthcare Corporation. He was acting as its employee and as its actual, de facto, ostensible, and implied agent at all times while he was doing that.

staff privileges to Dr. Gross to practice on tribal patients at a tribal hospital. (Doc. 21, Page 7 of 11 at 7:10-21) (ER-025); (Doc. 21, Page 8 of 11 at 8:12-13) (ER-026). It did not and could not give those privileges to the medical practice for which Dr. Gross worked. Staff privileges go to doctors, not to medical practices.

Despite that, at the district court, the United States argued that the staff privileges Dr. Gross received to practice on tribal patients at the tribal hospital were only granted because he was a member of a medical practice ("Tribal EM, PLLC"). (Doc. 21 at 5:23-24) (ER-023); (Doc. 21 at 7:17-21) (ER-025); (Doc. 21 at 8:12-15) (ER-026). But under 25 C.F.R. § 900.199, it does not matter that Dr. Gross's staff privileges might self-destruct if his medical practice defaulted on its contract with the San Carlos Apache Healthcare Corporation. What matters, in fact, all that matters, is that the San Carlos Apache Healthcare Corporation granted staff privileges to Dr. Gross to practice on tribal patients at the tribal hospital. Once that happened, the FTCA covered him when he performed services for Tyrone Sisto. 25 C.F.R. § 900.199.

That is, the FTCA covered Dr. Gross because he had received staff privileges to personally provide professional healthcare services to an Indian Health Service beneficiary (Tyrone Sisto) at a tribal healthcare facility operated under a self-determination contract. 25 C.F.R. § 900.199. In addition, as noted above, Dr. Gross was the tribal hospital's ostensible, actual, de facto, and implied

agent. That makes the San Carlos Apache Healthcare Corporation liable for his misconduct. Thus, the FTCA applies to Dr. Gross, in accordance with basic agency law and under 25 C.F.R. § 900.199's plain terms.

Because 25 C.F.R. § 900.199's plain terms are clear and dispositive, there is no need to discuss further authorities. Under that federal regulation there is FTCA subject-matter jurisdiction.

5. The FTCA applies under 25 C.F.R. § 900.193. Thus, there is FTCA subject-matter jurisdiction.

In addition, under 25 C.F.R. § 900.193, FTCA coverage *also* extends to individuals who provide healthcare services under a "personal services contract" providing services in a facility that is owned, operated, or constructed under the jurisdiction of the Indian Health Service, including a facility that an Indian tribe or tribal organization owns, but that is operated under a self-determination contract with the Indian Health Service.

In full, 25 C.F.R. § 900.193, another plain-language federal regulation on these subjects, states:

> **§ 900.193.** Does FTCA coverage extend to individuals who provide health care services under a personal services contract providing services in a facility that is owned, operated, or constructed under the jurisdiction of the IHS?
>
> Yes. The coverage extends to individual personal services contractors providing health services in such a facility, including a facility owned by an Indian tribe or tribal organization but operated under a self-determination contract with [the] IHS.

25 C.F.R. § 900.193 (bolding omitted; underlining added).

Dr. Gross fits within the scope of 25 C.F.R. § 900.193. The FTCA covers Dr. Gross because he was personally providing professional healthcare services to Tyrone Sisto under a personal services contract at the San Carlos Apache Healthcare Corporation hospital at Peridot, Arizona, The San Carlos Tribe owned and that facility, which operated under a self-determination contract with the Indian Health Service. 25 C.F.R. § 900.193.

The decision to extend FTCA coverage this broadly was designed to assist Native American Tribes in their provision and allocation of healthcare resources:

> *Coverage [under the FTCA] extends to individuals providing health services to the tribal contractor under personal services contracts in facilities operated under ISDEAA contracts or compacts*, and also to tribal employees paid from tribal funds other than those provided through the contract or compact, as long as the services or activities from which the claim arose were performed in carrying out the contract or compact. For covered categories of claims, an FTCA claim against the United States is the exclusive remedy, meaning that any employee or personal services contractor for the tribe, acting within the scope of his or her employment in carrying out an ISDEAA contract, will be shielded from liability by the FTCA. FTCA coverage was extended to tribes under the ISDEAA because Congress recognized that the diversion of program funds to purchase liability insurance led to a decrease in funding for direct services, putting contracting tribes at a disadvantage and contravening the federal trust responsibility.

Geoffrey D. Strommer, Starla K. Roels, and Caroline P. Mayhew, *Tribal Sovereign Immunity and Self-Regulation of Health Care Services*, 21 J. Health Care L. &

Pol'y 115, 145 (2018) (emphasis added).

It is true there is a federal regulation providing that subcontractors are generally not covered by the FTCA. 25 C.F.R. § 900.189. But there is an exception to that general rule for 25 C.F.R. § 900.199 "personal services contracts." *See* 25 C.F.R. § 900.189.

Dr. Gross had entered into a "personal services contract," entitled "Letter of Acknowledgment," in which Dr. Gross acknowledged he had "clinical privileges" and was to personally provide his "Professional Services" at the San Carlos Apache Healthcare Corporation in its emergency department. (Doc. 17-1, Exh. A at Page 34) (ER-095).

The stated purpose of the "Emergency Department Services Agreement" between the San Carlos Apache Healthcare Corporation and Dr. Gross's other and immediate employer ("Tribal EM, PLLC") was to provide medical personnel (such as Dr. Gross) who would personally provide their professional services and use their clinical staff privileges for the benefit of patients presenting at the tribal hospital's emergency department. (Doc. 17-1, Exh. A at Page 3-4, ¶ 2.2(a) to (c)) (ER-064 to ER-065); (Doc. 17-1, Exh. A at Page 5, ¶¶ 2.5(a) and (c)) (ER-066); (Doc. 17-1, Exh. A at Pages 8-9, ¶¶ 3.4(a) to (c)) (ER-069 to ER-070); (Doc. 17-1, Exh. A at Page 14, ¶¶ 4.10 to 4.11) (ER-075); (Doc. 17-1, Exh. A at Page 14, ¶¶ 5.1(a) and (b)) (ER-075); (Doc. 17-1, Exh. A at Page 21, ¶ 7.2) (ER-082) (Doc. 17-

1, Exh. A at Pages 28-29, Exh. 2.2 "Professional Services") (ER-089 to ER-090).

Indeed, "when a T/TO [tribe or tribal organization] has a contract or compact under the ISDEAA, the T/TO's employees (*including persons providing services through a personal services contract*) are covered by the FTCA against liability for torts that arise from carrying out the ISDEAA contract or compact, thus reducing the need for separate, comprehensive liability or malpractice insurance." Starla Kay Roels and Liz Malerba, *New Opportunities for Innovative Healthcare Partnerships with Indian Tribes and Tribal Organizations*, 28 No. 1 Health Law. 25, 29 (Oct. 2015) (emphasis added).

It is true that the "Emergency Department Services Agreement" describes the entity ("Tribal EM, PLLC") that the San Carlos Apache Healthcare Corporation had contracted with as an "independent contractor." (Doc. 17-1, Exh. A at Page 10, ¶ 4.1) (ER-071).

But that does not change Dr. Gross's status as a subcontractor using his tribal-granted clinical staff privileges to provide personal professional services under a personal services contract to tribal patients presenting at the emergency department of the San Carlos Apache Healthcare Corporation Hospital at Peridot, Arizona—including to tribal patient Tyrone Sisto. The FTCA's terms and protections thus apply to Dr. Gross.

6. Federal statutes and regulations—including 25 U.S.C. § 5321(d), 42 U.S.C. § 233(a), 25 C.F.R. § 900.193, and 25 C.F.R. § 900.199—displace

and trump the federal common-law independent-contractor defense.

The Magistrate Judge concluded there was no FTCA coverage under the federal general common-law "independent-contractor defense." (Doc. 22, 4:25-28) (ER-008). The federal common-law "independent-contractor defense" provides that the United States may not be held liable for negligent acts or omissions committed by employees of government contractors whose daily operations are not closely supervised by United States officials—in essence, eliminating vicarious liability as a theory of recovery against the United States. *See United States v. Orleans*, 425 U.S. 807, 815 (1976); *Wood v. United States*, 290 F.3d 29, 36 n. 4 (1st Cir. 2002).

But federal statutes, and federal regulations created to help implement those statutes, trump and displace any contrary federal common-law doctrines. After all, "it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law." *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 316 (1981) (federal statutes displace federal common law). *See also American Electric Power Co., Inc. v. Connecticut*, 564 U.S. 410, 423-24 (2011) (A federal act and the agency action that it authorizes displace federal common law.).

Here, specific, clear federal statutes—and specific, clear federal regulations created to implement those federal statutes—displace and supersede all variations of the federal independent-contractor defense to FTCA coverage for Dr. Gross's

malpractice. Those federal statutes and regulations include:

- 25 U.S.C. § 1680c(e)(1)
- 25 U.S.C. § 5304(j)
- 25 U.S.C. § 5321(d)
- 25 U.S.C. § 5396(a)
- 42 U.S.C. § 233(a)
- 25 C.F.R. § 900.189
- 25 C.F.R. § 900.193
- 25 C.F.R. § 900.199

In this case, those federal statutes and regulations displace the federal common-law independent-contractor defense.

It is true that, in its motion to dismiss, the United States did at least mention that, under 25 U.S.C. § 5321(d), the San Carlos Apache Healthcare Corporation was deemed to be part of the U.S. Public Health Service for purposes of applying the FTCA. (Doc. 17 at Page 2, ¶ 8). But other than that one brief mention of one of the relevant federal statutes, the United States did not discuss the merits of *any* of the relevant federal statutes making the FTCA apply to Dr. Gross. And the United States failed to mention—much less discuss—even *one* of the federal regulations making the FTCA applicable to Dr. Gross.

The United States also failed to acknowledge, much less discuss, the fact

that the above-mentioned federal statutes and regulations making the FTCA applicable to Dr. Gross *displace* the federal independent-contractor defense that was the sole basis for the motion to dismiss.

The FTCA *usually* does not apply to contractors. *See* 28 U.S.C. § 2671; *Yoe v. United States*, No. CV-18-08112-PCT-SPL, 2019 WL 3501457 at *3 (D. Ariz. Aug. 1, 2019). But this is not a usual case. In this case, since Dr. Gross was using his tribal-granted hospital staff privileges to perform his emergency-room duties for specific tribal patients at a tribal hospital.

In light of his personal-services contract to treat specific tribal patients at a tribal hospital, the FTCA applies to Dr. Gross through the joint operation of federal statutes and regulations, including 25 U.S.C. § 1680c(e)(1), 25 U.S.C. § 5304(j), 25 U.S.C. § 5321(d), 25 U.S.C. § 5396(a), 42 U.S.C. § 233(a), 25 C.F.R. § 900.189, 25 C.F.R. § 900.193, and 25 C.F.R. § 900.199.

"Usual" and general rules cannot defeat specific federal statutes and regulations displacing the federal common-law independent-contractor defense. Specific regulations and statutes trump "usual" and general rules. It is, in fact, "'a commonplace of statutory construction that the specific governs the general.'" *Andrews v. Sirius XM Radio Inc.*, 932 F.3d 1253, 1263 (9th Cir. 2019) (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992)).

The canon of statutory construction that a specific provision governs over a

general one also applies to regulations. *Karczewski v. DCH Mission Valley LLC*, 862 F.3d 1006, 1016 n. 4 (9th Cir. 2017). *See also Gutierrez v. Industrial Commission*, 226 Ariz. 395, 396 ¶ 5 (2011) (Courts apply the same interpretive rules when construing statues and regulations.).

Significantly, at the district court the United States admitted that, if the San Carlos Apache Healthcare Corporation "granted privileges" to "physicians *on the condition that such practitioner* [sic] *provide health services to IHS beneficiaries* at the hospital, then those physicians would be covered by the FTCA *when they perform services to IHS beneficiaries*." (Doc. 21 at 7:11-15) (emphasis in original) (ER-025). Since that is what happened, the FTCA applies.

7. If 48 C.F.R § 37.104 applies, it does not change the outcome.

There is a general federal regulation, 48 C.F.R. § 37.104, dealing with federal-agency personal services contracts. The San Carlos Apache Healthcare Corporation is not a federal agency, and is not subject to 48 C.F.R. § 37.104. But if it were, that regulation would not change the outcome.

To start, 48 C.F.R. § 37.104(a) states that: "A personal services contract is characterized by the employer-employee relationship it creates between the Government and the contractor's personnel." In fact, a personal services contract, employer-employee relationship occurs when, as a result of (i) the contract's terms or (ii) the manner of its administration during performance, contractor personnel

are subject to the relatively continuous supervision and control of a Government officer or employee. 48 C.F.R. § 37.104(c)(1)(i) & (ii). Here, under the terms of the emergency-department contract, Dr. Gross was part of an apparent employer-employee relationship and was, by reasonable inference, subject to the hospital's relatively continuous supervision and control.

In fact, 48 C.F.R. § 37.104(c)(2) directs that "each contract must be judged in the light of its own facts and circumstances," with "the key question always being: Will the Government exercise relatively continuous supervision and control over the contractor personnel performing the contract?" Here, the hospital necessarily had "relatively continuous" supervision and control over its own emergency department and the doctors providing services there.

Under the applicable federal regulations, elements that "should be used as a guide in assessing whether a contract is "personal in nature" include:

(1) "Performance on site." 48 C.F.R. § 37.104(d)(1).

Dr. Gross performed his medical services for Tyrone Sisto on site at the tribal hospital's emergency department.

(2) "Principal tools and equipment furnished by the Government." 48 C.F.R. § 37.104(d)(2).

The tribal hospital furnished Dr. Gross's tools and equipment. (Doc. 17-1, Page 2, ¶ (E)(vii); Page 9, ¶ 3.9; Page 19, ¶ 6.5(c)) (ER-061; ER-070; ER-080).

(3) "Services are applied directly to the integral effort of agencies or an organizational subpart in furtherance of assigned function or mission." 48 C.F.R. § 37.104(d)(3).

Everything Dr. Gross did in relation to treating Tyrone Sisto concerned and applied directly to the tribal hospital's function and mission to serve its emergency-department tribal patients, including Tyrone.

(4) "Comparable services, meeting comparable needs, are performed in the same or similar agencies using civil service personnel." 48 C.F.R. § 37.104(d)(4).

The reason San Carlos Apache Hospital Corporation entered into a contract to obtain the services of Dr. Gross and other emergency-room doctors was to avoid having to use its own medical personnel to staff its emergency room. (Doc. 17-1, Page 1, ¶ B) (ER-062).

(5) "The need for the type of service provided can reasonably be expected to last beyond one year." 48 C.F.R. § 37.104(d)(5).

As part of its permanent, multi-year mission as an acute-care hospital, the San Carlos Apache Healthcare Corporation hospital operates an emergency department for tribal patients. (Doc. 17-1, Page 1, ¶ A) (ER-062).

(6) "The inherent nature of the service, or the manner in which it is provided reasonably requires directly or indirectly, Government direction or supervision of contractor employees in order to – (i) Adequately protect the Government's interest; (ii) Retain control of the function involved; or (iii) Retain full personal responsibility for the function supported in a duly authorized Federal officer or employee." 48 C.F.R. § 37.104(d)(6).

The inherent nature of tribal emergency-room services, and the stakes involved, require direct and indirect supervision and direction to protect both the tribal emergency-room patients from harm and the tribal hospital itself from liability. (Doc. 17-1 at Page 1, ¶ (E)(i)) (ER-062).

Indeed, one of the Emergency Department Services Agreement's stated purposes was "giving" the San Carlos Apache Healthcare Corporation "greater control over the [Emergency] Department." (Doc. 17-1; Page 2, ¶ (E)(vii)) (ER-063). As a result, all of Dr. Gross's professional actions had to be done under the tribal hospital's "control" *and* "in accordance with the" hospital's "professional supervision policies and procedures." (Doc. 17-1, Page 6, ¶ 2.7) (ER-067).

8. The federal statutes and regulations discussed above supersede any contrary contract provisions.

Certainly, the contract "Letter of Acknowledgment" provides that "I have no employment, independent contractor, or other contractual relationship" with the San Carlos Apache Healthcare Corporation. (Doc. 17-1, Exh. A at Page 34, ¶ 2) (ER-095). The reality, however, is that under the plain terms of the federal statutes and regulations discussed above, the FTCA covers Dr. Gross.

Dr. Gross, after all, was a healthcare practitioner with tribal-granted staff privileges in a tribal emergency-room facility operated by a tribal hospital and performing direct, unique, individualized personal services for tribal patients.

In fact, as a matter of law, the terms of those federal regulations and statutes

were made part of the relevant contracts and the "Letter of Acknowledgment." This Court has explained that it "is well settled that existing laws are read into contracts in order to fix the rights and obligations of the parties. This is also true of valid regulations having the force and effect of laws of general application." *Rehart v. Clark*, 448 F.2d 170, 173 (9th Cir. 1971).

A contract incorporates the law in force at the time of its execution. *State ex rel. Romley v. Gaines*, 205 Ariz. 138, 142 ¶ 13 (App. 2003) ("Regardless of the language of a contract, it is always to be construed in the light of the law then in force.") (quotation and alteration omitted); *Ward v. Chevron U.S.A. Inc.*, 123 Ariz. 208, 209 (App. 1979) ("The law in force at [the date of execution] form[s] a part of each contract."). Therefore, "'a valid statute is automatically part of any contract affected by it, even if the statute is not specifically mentioned in the contract.'" *Banner Health v. Med. Sav. Ins. Co.*, 216 Ariz. 146, 150 ¶ 15 (App. 2007) (quoting *Higginbottom v. State*, 203 Ariz. 139, 142 ¶ 11 (App. 2002)).

No term in the "Letter of Acknowledgment" or in any other contract that may be relevant in this case can overcome the federal regulations and statutes that apply the FTCA to Dr. Gross. That is, "where a contract is incompatible with a statute, the statute governs." *Higginbottom*, 203 Ariz. at 142 ¶ 11 (quoting *Huskie v. Ames Brothers Motor & Supply Co.*, 139 Ariz. 396, 402 (App. 1984)).

In short, the federal statutes and regulations discussed above trump and

supersede *any* contrary or incompatible contract clauses—including any that purport to transform Dr. Gross into a non-employee, independent contractor.

Conclusion

Under this case's unique facts, and in accordance with the interplay of the relevant federal statutes and regulations, the Federal Tort Claims Act applies to Dr. Gross and makes the United States liable for his malpractice.

Those relevant federal statutes and regulations displace and supersede any and all variations of the federal common-law, independent-contractor defense that the United States has raised—and displace and supersede any purportedly contrary contract provisions. Since Dr. Gross used tribally-granted hospital staff privileges, and acted as an agent and employee of the hospital when treating tribal patients such as Tyrone Sisto, the district court had FTCA subject-matter jurisdiction over this action, and should have denied the motion to dismiss.

The Sistos thus ask this Court to vacate the order dismissing their lawsuit and to remand this matter for further proceedings. They further ask for an award of the reasonable costs they have incurred in prosecuting this appeal.

DATED this 29th day of October, 2020.

/s/ David L. Abney, Esq.
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Statement of Related Cases

I certify that no other cases are deemed related, in the sense that Ninth Circuit Rule 28-2.6 defines related cases.

DATED this 29th day of October, 2020.

/s/ David L. Abney, Esq.
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Certificate of Compliance
Pursuant to 9th Circuit Rule 32-1 and Fed. R. App. Proc. 32(a)(5) & (6), and 32(f), for Case No. 20-16435

I certify that this brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief is 7,375 words long, excluding the portions exempted by Fed. R. App. P. 32(f). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

DATED this 29th of October, 2020.

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Certificate of Service

I certify that I electronically filed the foregoing brief with the Clerk of the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system on this 29th day of October, 2020. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the

appellate CM/ECF service.

DATED this 29th day of October, 2020.

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Certificate for Brief in Paper Format for
9th Circuit Case No. No. 20-16435

I certify that the written version of this brief is identical to the version submitted electronically on October 29, 2020, and that a copy of the written version of this brief was transmitted on this same date to the following parties registered with the CM/ECF system:

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