C.A. No. 20-16435

D. Ct. No. CV-20-00202-PHX-ESW

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LINDA SISTO, et al.,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF OF APPELLEE

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III. STATEMENT OF JURISDICTION

A. District Court Jurisdiction

Plaintiffs-Appellants (Plaintiffs) filed this medical malpractice action against the United States under the Federal Tort Claims Act (FTCA), which contains a limited waiver of sovereign immunity and vests federal courts with jurisdiction over certain claims for injuries "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 1346(b)(1). Under the statute's Independent Contractor Exception, the FTCA does not authorize suits in federal court based on the acts of independent contractors or their employees. 28 U.S.C. § 2671; *Logue v. United States*, 412 U.S. 521, 530 (1973). The district court lacked jurisdiction in this case because Dr. Rickey Gross, the alleged tortfeasor, rendered the care at issue as an employee of an independent contractor. *See Carrillo v. United States*, 5 F.3d 1302, 1304 (9th Cir. 1993) ("The circuit courts are unanimous in holding that a contract physician is not an employee of the government under the FTCA.").

B. Appellate Court Jurisdiction

This Court has jurisdiction pursuant to 28 U.S.C. § 1291, based on the district court's dismissal of this action without prejudice on July 20, 2020. (CR 22.)[1]

[1] "CR" refers to the Clerk's Record, followed by the document number(s). "ER" refers to the Excerpts of Record, and will be preceded where required by the volume number and followed by the relevant page number(s).

C. Timeliness of Appeal

Plaintiffs filed a notice of appeal on July 25, 2020. (CR 41). The notice was timely pursuant to Fed. R. App. P. 4(b).

IV. ISSUE PRESENTED

Whether the actions of an employee of an independent contractor with a Native American Tribe can subject the United States to liability under the Federal Tort Claims Act despite the unambiguous language of 28 U.S.C. § 2671, which specifically retains the Government's sovereign immunity regarding acts performed by "any contractor with the United States."

V. STATEMENT OF THE CASE

A. Nature of the Case; Course of Proceedings

This case arises from the death of Tyrone Sisto, a San Carlos Apache tribal member, following his treatment at a hospital operated by the San Carlos Apache Healthcare Corporation (SCAHC). (CR 1.) On January 28, 2020, Mr. Sisto's mother and children, as statutory beneficiaries of the decedent (Plaintiffs), filed a complaint in the district court seeking damages against the United States under the FTCA. (CR 1; 2-ER-105.) On May 29, 2020, the United States filed a motion to dismiss, arguing the FTCA did not waive sovereign immunity. (CR 17.) Plaintiffs filed a response on June 22, 2020 (CR 19), and an amended response on June 23, 2020. (CR 20). The United States filed a reply on July 6, 2020. (CR 21.) The district court entered an order granting the motion and dismissing the case without prejudice on July 20, 2020. (CR 22; 1-ER-005-011.)

B. Statement of Facts

The district court considered the allegations in the complaint and contract documents between San Carlos Apache Healthcare Corporation and its independent contractor Tribal EM, PLLC (T-EM), including the contract itself and a certificate of insurance required by the contract. (CR 1; 2-ER-103-107; CR 17-1; 2-ER-062-097; CR 17-2; 2-ER-100-101.)

1. Allegations in the Complaint

On August 4, 2017, Tyrone Sisto presented to the SCAHC hospital for care. (2-ER-105.) He was seen by Dr. Rickey Gross, an emergency room physician. (2-ER-105.) Dr. Gross's documented assessment of Mr. Sisto was: viral syndrome, and viral myalgia. (2-ER-105.) After receiving IV fluids and pain and nausea medication, Mr. Sisto was discharged home. (2-ER-105.) Dr. Gross did not test Mr. Sisto for Rocky Mountain Spotted Fever or prescribe prophylactic antibiotics. (2-ER-105.)

On August 8, 2017, four days after presenting to Dr. Gross at the SCAHC hospital, Mr. Sisto was found dead in his home. (2-ER-106.) On August 28, 2017, the Center for Disease Control issued a final report analyzing the blood drawn on August 4, 2017 during Mr. Sisto's hospital visit, which confirmed Rocky Mountain Spotted Fever via Rickettsia molecular detection. (2-ER-106.) Plaintiffs allege the care provided by Dr. Gross was negligent and his negligence caused them damages. (2-ER-106.) Plaintiffs did not allege negligent acts by any other person besides Dr. Gross. (CR 1; 2-ER-103-107.)

SCAHC is a tribally-operated entity under Title I of the Indian Self-Determination and Education Assistance Act (ISDEAA), Pub. L. No. 93-638, § 1017, 88 Stat. 2203 (1975), which entered into a self-determination compact with the United States Health and Human Services Indian Health Service (IHS). (2-ER-

104.) Pursuant to 25 U.S.C. § 5321(d), tribal organizations like SCAHC are deemed to be part of the United States Public Health Service for application of the FTCA.

2. Contract Documents Between SCAHC and T-EM

T-EM is an Arizona Professional Limited Liability Company. (2-ER-062.) Effective February 3, 2016, T-EM and SCAHC entered a three-year Emergency Department Services Agreement for the provision of emergency department services at facilities operated by SCAHC (the Agreement). (2-ER-062, 088.) Paragraph 4.1 of the Agreement expressly identifies T-EM as an independent contractor. It states T-EM "is and shall at all times be an independent contractor with respect to SCAHC in the performance of its obligations under" the Agreement, and nothing in the Agreement "shall be construed to create an employer/employee… relationship between SCAHC and T-EM" or any "T-EM Provider." (2-ER-071.) The service delivery area covered by the Agreement is the San Carlos Apache Reservation, including the SCAHC hospital where Mr. Sisto was treated on August 4, 2017. (2-ER-097.)

Rickey L. Gross, M.D., an employee of T-EM, is listed as one of several "T-EM Providers" in the Agreement—that is, as a provider of "Professional Services" including evaluation, diagnosis, and treatment of patients at the emergency department, and determination of whether an urgent medical condition exists as required by the applicable standard of care. (2-ER-064-066, 089-090, 094.) T-EM

was "solely responsible" for paying Dr. Gross's compensation, health insurance, worker's compensation insurance, life insurance, professional liability insurance, retirement contributions, benefits, and taxes. (2-ER-071.)

T-EM purchased professional liability insurance for the negligent acts and omissions of Dr. Gross as a T-EM Provider. The Agreement required T-EM to purchase and maintain a policy of continuous coverage of professional liability insurance "for the negligent acts and omissions of T-EM and T-EM Providers in the delivery of health care services under this Agreement." (2-ER-072-073.) Moreover, T-EM expressly indemnified SCAHC from and against all claims arising out of the negligent acts or omissions of T-EM or any employee of T-EM, including any T-EM Provider while providing professional services under the Agreement. (2-ER-073-074.) T-EM actually purchased a professional liability insurance policy to cover Dr. Gross and that insurance policy was in effect on August 4, 2017. (2-ER-100-101.)

The Agreement required T-EM to ensure that each T-EM Provider complied with performance standards. (2-ER-070.) Moreover, pursuant to the Agreement, T-EM supplied a Medical Director who managed and directed the day-to-day work of T-EM Providers like Dr. Gross. (2-ER-065-066, 091-092.)

3. The District Court's Order

In its July 7, 2020 order, the district court provided a detailed analysis of the contract documents and concluded that Dr. Gross is an independent contractor for purposes of the FTCA. (1-ER-007-008.) After discussing several provisions of the Agreement, including Paragraph 4.1, the court made the following findings:

> Plaintiffs do not sufficiently dispute that Dr. Gross was employed by T-EM. (Doc. 17 at 3 ¶ 13; Doc. 20 at 5). As a T-EM Provider, the Agreement required T-EM to be solely responsible for paying Dr. Gross' compensation and benefits. (Doc. 17-1 at 11, ¶ 4.1). The Agreement required T-EM to ensure that each T-EM Provider complied with performance standards. (*Id.* at 10, ¶ 3.6). Pursuant to the Agreement, T-EM maintained professional liability insurance for the negligent acts and omissions of Dr. Gross as a T-EM Provider. (Doc. 17-2). The Court finds that neither the SCAHC nor the Government had sufficient control over Dr. Gross' practice of medicine to render Dr. Gross a federal employee. The Court thus concludes that Dr. Gross was an independent contractor.

(1-ER-008.)

The district court considered and rejected Plaintiffs' arguments that a variety of statutes and regulations "displace and supersede all variations of the federal independent-contractor defense to FTCA coverage" for Dr. Gross's care. (1-ER-008.) For example, the court observed that the underlying documents made clear that Dr. Gross never entered into a "personal services contract" with SCAHC:

> Here, to support their argument that Dr. Gross entered into a "personal services contract" with SCAHC, Plaintiffs rely on the Letter of Acknowledgment that Dr. Gross signed on January 27, 2016. However, the Letter of Acknowledgment expressly states that Dr. Gross acknowledges that: "I have no employment, independent contractor or

> other contractual relationship with SCAHC, that my right to practice at SCAH as a T-EM Provider is derived solely through my employment or contractual relationship with T-EM." The Court does not find that there was a "personal services contract" between Dr. Gross and SCAHC. As Dr. Gross was not working under a personal services contract with SCAHC, the Government correctly asserts that 25 U.S.C. § 5321(d), 25 C.F.R. § 900.193, and 42 U.S.C. § 233(a) do not apply.

(1-ER-009-010 (internal citations omitted).)

Moreover, the district court rejected Plaintiff's reliance on 25 U.S.C. § 1680c(e)(1) and 25 C.F.R. § 900.199, which both require a showing that Dr. Gross entered into a contract in which he agreed to perform services for Indian Health Service beneficiaries *in exchange for* receiving hospital privileges at the SCAHC hospital. (1-ER-010.) The record contains no such agreement. (1-ER-010.) The court found that none of the other statutory or regulatory provisions cited by Plaintiffs conferred subject matter jurisdiction, and it therefore granted the United States' motion to dismiss. (1-ER-011.) As explained below, that decision should be affirmed.

VI. SUMMARY OF ARGUMENT

This is a lawsuit filed against the United States pursuant to the FTCA alleging negligence by Dr. Gross. Plaintiffs incorrectly alleged in the complaint that Dr. Gross was an employee of the United States. In fact, Dr. Gross was an employee of T-EM, an independent contractor of SCAHC. The government is not liable for the acts of its independent contractors. *Logue*, 412 U.S. at 530; *Carrillo*, 5 F.3d at 1304. The FTCA is a limited waiver of sovereign immunity. For the FTCA to waive sovereign immunity in this case, where Dr. Gross was the sole alleged tortfeasor, Plaintiffs had the burden to demonstrate that Dr. Gross should be deemed an employee of the United States pursuant to the provisions of the ISDEAA. Plaintiffs provided no legal or factual basis—and none exists—for this proposition. Therefore, the district court correctly dismissed the lawsuit for lack of subject matter jurisdiction under the FTCA, and this Court should affirm.

VII. ARGUMENTS

A. The District Court Properly Dismissed the Lawsuit Because the United States Did Not Waive Its Sovereign Immunity.

1. Standard of Review

This Court reviews *de novo* subject matter jurisdiction determinations under the FTCA. *Autery v. United States*, 424 F.3d 944, 956 (9th Cir. 2005). The district court's findings of fact relevant to its determination are reviewed for clear error. *Ass'n of Am. Med. Colls. v. United States*, 217 F.3d 770, 778 (9th Cir. 2000).

To establish subject matter jurisdiction in an action against the United States, there must be: (1) "statutory authority vesting a district court with subject matter jurisdiction;" and (2) "a waiver of sovereign immunity." *Alvarado v. Table Mountain Rancheria*, 509 F.3d 1008, 1016 (9th Cir. 2007). Thus, even where statutory authority vests the district court with jurisdiction, the United States cannot be sued unless it has expressly consented to be sued. *Dunn & Black P.S. v. United States*, 492 F.3d 1084, 1087-88 (9th Cir. 2007). Waivers of sovereign immunity "cannot be implied, but must be unequivocally expressed." *Id.* at 1088. The scope of any such waiver must be strictly construed "in favor of the sovereign." *Id.* A party suing the United States bears the burden of demonstrating both elements of subject matter jurisdiction; where it fails to do so, "dismissal of the action is required." *Id. See also Cato v. United States*, 70 F.3d 1103, 1107 (9th Cir. 1995) (plaintiff bears the burden of showing a waiver of sovereign immunity).

When a defendant makes a factual attack on subject matter jurisdiction, "no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." *Thornhill Pub. v. Gen. Tel. & Elec. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). In considering a Rule 12(b)(1) motion, the court "is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction." *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988); *see also St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989).

2. The FTCA Excludes Independent Contractors—Like T-EM and Its Employees—From Coverage.

The district court lacked subject matter jurisdiction because the FTCA does not waive sovereign immunity for the acts or omissions of an independent contractor. The United States is immune from suit unless it consents to be sued. *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 475 (1994). The FTCA is a limited waiver of that sovereign immunity, under which the United States is liable to the same extent as a private party for certain torts of federal employees "in accordance with the law of the place where the act or omission occurred." 28 U.S.C. §1346(b)(1). This limited waiver explicitly excludes "any contractor with the United States" from the definition of "[e]mployee of the government." 28 U.S.C. § 2671

(the Independent Contractor Exception). *Logue*, 412 U.S. at 528; *United States v. Becker*, 378 F.2d 319, 321 (9th Cir. 1967).

This Court has long held that the FTCA's Independent Contractor Exception applies to contracted physicians practicing medicine in federal facilities. In *Carrillo*, the Court recognized that "[b]ecause a physician must exercise his own professional judgment, no one controls the detailed physical performance of his duties." 5 F.3d at 1305 (*quoting Lurch v. United States*, 719 F.2d 333, 337 (10th Cir. 1983)). Accordingly, physicians are independent contractors because the federal government does not "ha[ve] any control over [a doctor's] practice of medicine" or their "actions in diagnosing and treating patients." 5 F.3d at 1305.

The Ninth Circuit is not alone in so holding. Rather, the Court observed in *Carrillo* that other circuits are "unanimous in holding that a contract physician is not an employee of the government under the FTCA." 5 F.3d at 1304 (collecting cases from the Second, Fourth, Eighth and Tenth Circuits). *Carrillo* remains the touchstone for analyzing claims identical to those asserted by Plaintiffs here. *See, e.g.*, *Lee v. United States*, 2020 WL 6573258, at *11 (D. Ariz. Sept. 18, 2020) (applying *Carrillo*; holding that "[b]ecause Dr. Reifler was a contract provider who was free to make his own, independent medical decisions while providing services at Chinle, the FTCA does not waive the Government's sovereign immunity to suit as to any claims arising from [his] alleged negligence"); *Yoe v. United States*, 2019

WL 3501457, at *5 (D. Ariz. Aug. 1, 2019) (applying *Carrillo*; "the Court finds that the Defendant did not have sufficient control over Murtagh's practice of medicine under the control test").

Carrillo and similar cases are based on the well-established "control test," which courts use to distinguish employees or agents from independent contractors. 5 F.3d at 1304-05. "The critical test for distinguishing an agent from a contractor is the existence of federal authority to control and supervise the "detailed physical performance" and "day-to-day operations" of the contractor, and not whether the agent must comply with federal standards and regulations." *Ducey v. United States*, 713 F.2d 504, 516 (9th Cir. 1983) (citations omitted). "[I]n the absence of the authority of federal employees to supervise the day-to-day operations of a contractor, the mere ability of the government to compel compliance with federal standards is not sufficient to create an agency relationship." *Id*. "While 'by contract, the [federal] Government may fix specific and precise conditions to implement federal objectives,' such restrictions required by regulation 'do not convert the acts of entrepreneurs ... into federal governmental acts.'" *Id*.

Moreover, "the real test is control over the primary activity contracted for and not for the peripheral, administrative acts relating to such activity." *Carrillo*, 5 F.3d at 1305 (*citing Wood v. Standard Prods. Co., Inc.*, 671 F.2d 825, 832 (4th Cir. 1982)). Accordingly, "[t]he United States may 'fix specific and precise conditions

to implement federal objectives' without becoming liable for an independent contractor's negligence." *Autery*, 424 F.3d at 957 (quoting *United States v. Orleans*, 425 U.S. 807, 816 (1971)).

The district court correctly found that the contract between SCAHC and T-EM identified T-EM as an independent contractor and Dr. Gross as its employee. (*See* 1-ER-007-008.) As set forth in Paragraph 4.1 of the Agreement:

> 4.1 Independent Contractor. T-EM is and shall at all times be an independent contractor with respect to SCAHC in the performance of its obligations under this Agreement. Nothing in this Agreement shall be construed to create an employer/employee, joint venture, lease or landlord/tenant relationship between SCAHC and T-EM, any T-EM Provider, or any T-EM Agent. T-EM shall not, and shall ensure that each T-EM Provider and T-EM Agent does not, hold itself, himself or herself out as an officer, agent or employee of SCAHC or incur any contractual or financial obligation on behalf of SCAHC, without SCAHC's prior written consent. Except as otherwise set forth in this Agreement, TEM shall be solely responsible for paying all expenses, including compensation, health and disability insurance, worker's compensation insurance, life insurance, professional liability insurance, retirement plan contributions, employee benefits, income taxes, FICA, FUTA, SDI and all other payroll, employment or other taxes and withholdings, with respect to T-EM Providers, T-EM Agents, and any other person employed by or contracting with T-EM.

(2-ER-071.)

As a T-EM provider, Dr. Gross was responsible for providing medical care based on the exercise of his own independent professional medical judgment. The T-EM Providers' duties, called "professional services" in the Agreement with SCAHC, included:

> (a) The evaluation, diagnosis, treatment, supervision, and management of unanticipated and unscheduled occurrences of health complaints and crises, whether emergent or urgent, with respect to patients presenting to the Department;
>
> (b) The determination of whether an emergency or urgent medical condition exists, as required by applicable federal, state, and/or local law and the applicable standard of care, including without limitation any medical screening examination required by 42 U.S.C. Section 1395dd and implementing regulations;
>
> (c) The coordination of specialty consultation and treatment of patients presenting to the Department in need of specialty medical care or treatment;
>
> (d) The coordination of care among T-EM Providers, the patient's attending physician and any other provider of care or treatment, including consulting specialists, for professional medical services rendered in the Department.

(2-ER-090.)

Pursuant to the contract documents, T-EM, not SCAHC, provided daily supervision and control of Dr. Gross and his day-to-day responsibilities. T-EM supplied its own Emergency Department Director to supervise the T-EM Providers' provision of medical care. (2-ER-065-066, 091-092.)

Moreover, as in *Carrillo*, T-EM agreed to purchase and maintain professional liability insurance for the T-EM Providers, and to indemnify SCAHC for any liability-producing act or omission. (2-ER-072-074.) And T-EM actually *did* purchase professional liability insurance covering the professional services provided by Dr. Gross for the time period including the events involving Mr. Sisto. (2-ER-100.)

Meanwhile, SCAHC's obligations under the Agreement were to pay T-EM (2-ER-064), and, if it wished to do so, to establish standards of conduct and integrity and rules and by laws for T-EM Providers to follow (2-ER-067-068). SCAHC also agreed to assume some administrative duties such as billing, collection, and expense reimbursement. (2-ER-075-076.) The Agreement also contains lengthy sections describing the circumstances under which SCAHC may demand that T-EM remove a Provider. (2-ER-080-082.) Notably, SCAHC lacked the authority to fire the T-EM Providers, only to ask or demand that T-EM do so. (*See* 2-ER-080-082.)

Simply put, to the extent that he was subject to day-to-day physical management and supervision, Dr. Gross was supervised by T-EM, not SCAHC. Moreover, as a physician and as a T-EM Provider, Dr. Gross was ethically and contractually-bound to exercise his own independent professional medical judgment in treating patients. Under controlling Circuit precedent, the FTCA's independent contractor exception applies to contracted physicians like T-EM's providers, including Dr. Gross, who practice medicine in federal facilities. The district court properly dismissed this lawsuit against the United States because there is no FTCA waiver of sovereign immunity.

This does not leave Plaintiffs without a remedy. They may pursue their claims against Dr. Gross and T-EM—an Arizona PLLC that maintained professional liability insurance for Dr. Gross—in state court pursuant to Arizona law.

B. The Opening Brief Lacks Any Legal or Factual Argument Under Which Dr. Gross Could Be Deemed an Employee of the United States.

1. 28 U.S.C. § 2671 Does Not Render Dr. Gross a Federal Employee.

Plaintiffs contend Dr. Gross was "acting on behalf of a federal agency in an official capacity," so he should be considered an FTCA-covered federal employee pursuant to 28 U.S.C. § 2671 and 25 U.S.C. § 5321(d). (Op. Br. at 6-7.) Plaintiffs' argument is incorrect under 28 U.S.C. § 2671's plain terms. Specifically, although the term "federal agency" "includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States," it does "not include any contractor with the United States." 28 U.S.C. § 2671. Thus, 28 U.S.C. § 2671 explicitly does not apply to independent contractors like T-EM. Moreover, the "acting on behalf of" language Plaintiffs quote (Op. Br. at 7) does not apply to corporations like T-EM (or any corporations at all). *Adams v. United States*, 420 F.3d 1049, 1053-55 (9th Cir. 2005).

2. There Is No General FTCA Coverage Rule in 25 U.S.C. § 5321(d) Applicable to Independent Contractors.

Plaintiffs rely on *Snyder v. Navajo Nation*, 382 F.3d 892, 897 (9th Cir. 2004) and 25 U.S.C. § 5321(d) to argue that the ISDEAA extends FTCA coverage to "contractors." (Op. Br. at 7-9.) This argument misconstrues *Snyder*'s holding and 25 U.S.C. § 5321(d). Neither authority supports Plaintiffs' argument.

Snyder interpreted the Fair Labor Standards Act (FLSA), not the FTCA. 382 F.3d at 894. It held that that the ISDEAA did not authorize FLSA suits against the United States. *Id*. at 897. Further, *Snyder* did not at all suggest that Congress deemed contractors of tribes to be federal employees while carrying out a self-determination contract under the ISDEAA. (*Cf*. Op. Br. at 8.) Instead, *Snyder* made clear that "Congress . . . provided that the United States would subject itself to suit under the . . . FTCA . . . for torts of *tribal employees* hired and acting pursuant to such self-determination contracts under the ISDEAA." *Id*. at 896-97 (emphasis added). Dr. Gross was not a tribal employee—he was an employee of T-EM—so even if *Snyder* was applicable, he would be outside of its reach.

Next, Plaintiffs' gloss on 25 U.S.C. § 5321(d) is not only contrary to that provision's clear language, but also case law interpreting the statutory scheme. Plaintiffs argue 25 U.S.C. § 5321(d)'s "acting on behalf of" language should be interpreted to include Dr. Gross because he worked at the SCAHC hospital, somehow making him a joint employee of T-EM and SCAHC despite the Agreement's clear terms. (Op. Br. at 9.) But § 5321(d) explicitly includes three categories of persons who should be deemed employees of the United States, none of which applies here.

First, the statute applies to employees of the tribal entity that contracted with the Indian Health Service. 25 U.S.C. § 5321(d). Here, because SCAHC is the tribal

entity that contracted with the Indian Health Service, that provision refers to employees of SCAHC.

Second, the statute references "those acting on behalf of the organization or contractor as provided in section 2671 of Title 28." 25 U.S.C. § 5321(d). Dr. Gross does not fall into this category. The use of "contractor" in this sentence, which appears in a parenthetical referring to "carrying out any such contract or agreement," means the "Indian contractor" that entered into the ISDEAA contract with the United States—in this case, SCAHC. 25 U.S.C. § 5321(d). Indeed, it is apparent from statutory language that the phrase "organization or contractor" in the parenthetical refers back to the "tribal organization or Indian contractor" mentioned earlier in the sentence, not to previously unmentioned corporate subcontractors of the tribal organization or Indian contractor. 25 U.S.C. § 5321(d). The pertinent text states:

> For purposes of section 233 of Title 42, with respect to claims by any person… for personal injury, including death, resulting from the performance… of medical, surgical, dental, or related functions… an Indian tribe, a *tribal organization or Indian contractor* carrying out a contract, grant agreement, or cooperative agreement… is deemed to be part of the Public Health Service… while carrying out any such contract or agreement and its employees (including those acting on behalf of the *organization or contractor* as provided in section 2671 of Title 28…) are deemed employees of the Service while acting within the scope of their employment in carrying out the contract or agreement….

25 U.S.C. § 5321(d) (emphasis added). Plaintiffs' contrary construction—that the provision applies to "those acting on behalf of the organization or *on behalf of one of its* contractors" (Op. Br. at 8 (emphasis added))—would expand FTCA liability

beyond the clear terms of the statute. At bottom, this section applies to employees working on behalf of SCAHC (the contractor), and has no applicability to SCAHC's sub-contractor T-EM or T-EM's employees.

Third, the statute applies to "an 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." 25 U.S.C. § 5321(d). Dr. Gross is not a personal services contractor, as explained in the next section below.

Section 5321(d) is not a catchall provision that can be used to deem every independent contractor who works at the SCAHC hospital an employee of the United States. Only direct employees of SCAHC, people acting on behalf of SCAHC, and people working at SCAHC pursuant to a personal services contract are deemed employees for the purpose of FTCA coverage. To hold otherwise would make 28 U.S.C. § 2671's contractor limitation meaningless, as the Supreme Court has explained:

> [W]e are not persuaded that employees of a contractor with the Government, whose physical performance is not subject to governmental supervision, are to be treated as 'acting on behalf of' a federal agency simply because they are performing tasks that would otherwise be performed by salaried employees of the Government. If this were to be the law, the exclusion of contractors from the definition of 'Federal agency' in § 2671 would be virtually meaningless, since it would be a rare situation indeed in which an independent contractor with the Government would be performing tasks that would not otherwise be performed by salaried Government employees.

Logue, 412 U.S. at 531-32.

3. Dr. Gross Did Not Enter Into a Personal Services Contract with SCAHC.

Although Plaintiffs contend that Dr. Gross was a personal services contractor of SCAHC, it is clear from the Agreement that (1) there was no contract at all between SCAHC and Dr. Gross, and (2) performance of any contractual obligation specifically by Dr. Gross was not a material part of the Agreement between SCAHC and T-EM.

Section 5321(d) states in part that "an individual who provides health care services pursuant to a personal services contract with a tribal organization" is deemed to be a government employee. The plain meaning of the term "individual" is a person—such as Dr. Gross—not a corporation, such as T-EM. Dr. Gross is not an "individual" who was providing "health care services pursuant to a personal services contract with a tribal organization" because he had no such contract with the Tribe.

This common sense and plain meaning of the language is reinforced by the associated regulation, which states: "[FTCA] 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 IHS." 25 C.F.R. §900.193. The expansion of FTCA

coverage to an "individual who provides health care services pursuant to a personal services contract" does not apply to an employee of a subcontractor.

Plaintiff has not argued a personal service contract could exist in the absence of an actual contract, and those courts that have specifically addressed the issue have found that a contract is required. *See, e.g.*, *Wooten v. Hudson*, 71 F. Supp. 2d 1149, 1153 (E.D. Okla. 1999) ("By its clear and unambiguous terms, the statute [25 U.S.C. § 5321(d)] requires that the individual must be a party to a contract with a tribal organization.").

The Tenth Circuit has examined medical contracts similar to the one at issue here and determined they are not personal services contracts. For example, in *Tsosie v. United States*, 452 F.3d 1161, 1163-65 (10th Cir. 2006), the plaintiff claimed an emergency room physician's negligent act while working at a hospital run by the Indian Health Service was covered by the FTCA. The ER physician in *Tsosie* was an employee of a contractor, Medical Doctor Associates, Inc., which had signed a contract with the Indian Health Service to provide ER physicians. The *Tsosie* court used a "control" test to determine whether the "federal government has the power to control the detailed physical performance of the individual," and determined it did not. *Id.* Notably, the first item on the "control" test was the intent of the parties.

Here, the Agreement states that T-EM is an independent contractor, and the Letter of Acknowledgement (which appears to be a form) states that there is no contract at all between the T-EM Providers and SCAHC. (2-ER-071, 095.)

Similarly, in a case arising within this Circuit, the bankruptcy court had to determine whether several contracts between individual physicians and a bankrupt HMO were assignable because if they were, then they were not personal services contracts. *In re Health Plan of Redwoods*, 286 B.R. 407, 409-10 (Bankr. N.D. Cal. 2002). Even though the physicians there actually signed individual contracts with the HMO itself, the court nevertheless easily concluded based on the contractual language that the contracts at issue were not personal services contracts:

> While a contract for a physician's services might have been considered ipso facto a personal service contract 50 or 100 years ago, everything about these contracts and the nature of modern medical care militates against a finding that the contracts in question here are personal service contracts. Absolutely nothing… supports a finding that the contracts or the services to be rendered under them are sui generis. All of the physician contracts are essentially identical, and do not require the physicians to perform personally. They only require that the physician provide services to members, and require physicians to make arrangements to assure care of his/her Member patients after hours or when Physician is otherwise absent, consistent with Health Plan's administrative requirements. The court concludes with little difficulty that the contracts in question… are assumable.

Id.

Here, Dr. Gross does not even have a contract with SCAHC. There is a contract between T-EM and SCAHC; Dr. Gross is simply an employee of T-EM.

The Agreement does not identify any particular act that must be performed by Dr. Gross as opposed to any other physician at the facility. Dr. Gross can be fired at will by T-EM, with or without SCAHC's approval. (2-ER-080-082; *see also* 2-ER-095.) This is the antithesis of an unassumable unassignable contract between Dr. Gross and SCAHC.

Plaintiffs claim a page of the Agreement styled as a "Letter of Acknowledgement" creates a personal services contract between SCAHC and Dr. Gross. (Op. Br. at 20; 2-ER-095.) It is no such thing, and is not even signed by Dr. Gross.[2] And even if it was a form document to be signed by all T-EM Providers, including Dr. Gross at a later date, the "Letter of Acknowledgement" states that the T-EM Provider acknowledges that "I have no employment, independent contractor or other contractual relationship with SCAHC, that my right to practice at SCAHC as a T-EM Provider is derived solely through my employment or contractual relationship with T-EM." (2-ER-095.) Indeed, it is clear that the "Letter of Acknowledgement" serves as an explicit notice to the providers that SCAHC has a contract only with T-EM, not with the individual medical providers employed by T-EM. Such a document expressly disclaiming a contractual relationship cannot serve to create a personal services contract.

[2] The "Letter of Acknowledgement" appears to be signed by John Shufeldt, Manager of T-EM. (*Compare* 2-ER-095 *with* 2-ER-088.)

Further, the Letter of Acknowledgement describes a clear removal structure: SCAHC can ask for providers to be removed by T-EM, but T-EM is the entity with the power to fire its employees. (2-ER-095.) T-EM has the authority to fire the Provider without SCAHC's approval at any time, and once T-EM fires or removes a provider, the provider automatically loses all hospital privileges. (2-ER-095.) That is, the T-EM Provider does not have personal clinical privileges at the hospital unconnected with his employment by T-EM. The "Letter of Acknowledgement" cannot possibly be a personal services contract between SCAHC and Dr. Gross given that T-EM has the unlimited authority to fire Dr. Gross regardless of SCAHC's opinion on the matter, depriving SCAHC of Dr. Gross's services.

Directly contrary to *Carrillo*, 5 F.3d at 1304, which found that physicians were independent contractors because the federal government did not "ha[ve] any control over [the doctor's] practice of medicine" or his "actions in diagnosing and treating patients," Plaintiffs argue that the doctor-patient relationship is of such a character that all physician services are *personal*, and therefore all physician contracts must be personal services contracts. (Op. Br. at 10-11.)

Even Plaintiffs' cases do not support their theory that a personal services contract exists between SCAHC and Dr. Gross. (Op. Br. at 11 (citing *Fransmart, LLC v. Freshii Dev.*, LLC, 768 F. Supp. 2d 851, 861 (E.D. Va. 2011); *In re Rooster, Inc.*, 100 B.R. 228, 234 (Bankr. E.D. Pa. 1989)). In each case, courts found no

personal services contract existed for reasons equally applicable here. For example, in *Fransmart, LLC*, the court found that the contract "between two corporate entities" did not make "performance by a particular person… a material term of the contract." *Fransmart, LLC*, 768 F. Supp. 2d at 861; *see also In re Rooster, Inc*. 100 B.R. 228, 234 (Bankr. E.D. Pa. 1989) ("There simply are no contractual terms requiring the personal performance of any identified employee for any particular duty."). Similarly here, Plaintiffs cannot point to any term of the Agreement here that required *Dr. Gross specifically* to perform any duties as a material term of the contract. No such term exists in the Agreement. Rather, Dr. Gross is merely listed as an employee of T-EM, subject to termination by T-EM. (2-ER-094.)

Plaintiffs also claim the hospital would be liable under Arizona common law for Dr. Gross's acts. (Op. Br. at 13 & n.7.) Plaintiffs do not contend Arizona case law regarding hospital liability should apply to the issue before this court, and it does not apply. Whether or not a private hospital would be liable in like circumstances under Arizona state law is irrelevant, and was waived because it was not briefed or discussed in the trial court. *See, e.g.*, *Meyer v. Portfolio Recovery Associates, LLP*, 707 F.3d 1036, 1044 (9th Cir. 2012) (arguments not raised before the district court are waived). Regardless, whether the United States has waived its sovereign immunity through the provisions of the FTCA and the ISDEAA is purely a question of federal law. *See Logue*, 412 U.S. at 528; *Becker*, 378 F.2d at 321.

As the district court correctly found, because Dr. Gross was not working under a personal services contract, the provisions of 25 U.S.C. § 5321(d) and 25 C.F.R. § 900.193 providing FTCA coverage for personal service contractors do not apply here. (1-ER-009-010.) Instead, the general exception to FTCA coverage for independent contractors applies. There is no FTCA coverage for Dr. Gross's actions and therefore no subject matter jurisdiction in the district court.

4. The Staff Privileges Statute and Regulation Do Not Apply.

Plaintiffs also argue that under either 25 U.S.C. § 1680c(e)(1) or 25 C.F.R. § 900.199, the FTCA covers Dr. Gross because he had staff privileges at the SCAHC hospital. Yet these provisions only apply where a doctor contracts to provide medical services to Indian Health Service beneficiaries specifically in exchange for the receipt of hospital staff privileges. 25 U.S.C. § 1680c(e)(1) provides:

> Hospital privileges in health facilities operated and maintained by the 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 individuals described in subsection (a), (b), (c), or (d). Such non-Service health care practitioners may, as part of the privileging process, be designated as employees of the Federal Government for purposes of section 1346(b) and chapter 171 of Title 28 (relating to Federal tort claims) 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) (emphasis added). 25 C.F.R. § 900.199 addresses the same situation:

> 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 *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 (emphasis added).

Under the statute and the regulation, whether the physician agreed to provide medical services to IHS beneficiaries in exchange for the receipt of hospital staff privileges is the determining factor. For the statute and regulation to apply here, there must be a condition in an agreement between SCAHC and the physician with mutual consideration of privileges in exchange for treating IHS beneficiaries. As the district court correctly found, no such agreement existed between Dr. Gross and SCAHC. (1-ER-010.) There was no contract between Dr. Gross and SCAHC at all, let alone in which Dr. Gross agreed to perform services for IHS beneficiaries in exchange for hospital privileges.

Similarly, there was no "privileging process" at all. Dr. Gross's privileges were granted solely because he was an employee of T-EM. (2-ER-095.) The Agreement explicitly states that Dr. Gross's privileges would immediately cease when his employment by T-EM ended. (2-ER-095.) Thus, the privileging statute and regulation do not supersede the independent contractor exception to FTCA

coverage. *See Lee*, 2020 WL 6573258, at *15-16 (rejecting identical argument that hospital privileges converted an independent contractor into a covered FTCA employee; 25 U.S.C. § 1680c(e)(1) "must be narrowly construed in favor of the Government"); *Yoe*, 2019 WL 3501457, at *5 (applying FTCA's independent contractor exception).

5. The Other Statutes Mentioned in the Opening Brief Do Not Apply.

None of the other statutes or regulations Plaintiffs cite helps them avoid the independent contractor exclusion to FTCA coverage. (*See* Op. Br. at 21-30.)

The statutes Plaintiffs cite are inapposite. 25 U.S.C. § 5304(j) defines a self-determination contract like the one entered into by SCAHC and the United States. 25 U.S.C. § 5396(a) merely incorporates other statutes into the ISDEAA. 42 U.S.C. § 233(a) makes the FTCA the exclusive remedy for claims against Public Health Service officers and employees arising from the performance of medical, surgical, or dental services when they are acting within the scope of their employment. Dr. Gross was not an employee of the Public Health Service. (*See* Part B.2., *supra*.)

25 C.F.R. § 900.189 cuts against Plaintiffs' position. (*Cf.* Op. Br. at 23.) That regulation states that subcontractors of ISDEAA contractors are *not* covered by the FTCA. 25 C.F.R. § 900.189. Legally, only a "tribe, tribal organization, [or] Indian contractor that could itself enter into a self-determination contract, not a private party retained to work on a project funded by a self-determination contract," is entitled to

coverage under the FTCA pursuant to the ISDEAA. *FGS Constructors, Inc. v. Carlow*, 64 F.3d 1230, 1235 (8th Cir. 1995); *see also Demontiney v. United States*, 54 Fed. Cl. 780, 791 (Fed. Cl. 2002) (declining to exercise jurisdiction over a claim against the United States based on the alleged negligence of an engineering contractor hired by a tribe to work on a project funded by the ISDEAA, finding no privity of contract between United States and subcontractor). The parties agree that under the regulation, SCAHC is the ISDEAA contractor. (2-ER-033; Op. Br. at 8.) T-EM does not have an ISDEAA contract with the United States, and it cannot be considered an Indian contractor such that its employees would be entitled to be treated as federal employees under the ISDEAA. SCAHC contracted with T-EM to provide staffing for the emergency department of its hospital. Therefore, T-EM is a subcontractor of SCAHC—it is not an Indian contractor as contemplated in the ISDEAA.[3]

In sum, no statute, regulation or case allows Plaintiffs to avoid the independent contractor exclusion from FTCA coverage. Rather, as the district court correctly found, Dr. Gross was employed and insured by T-EM, an independent contractor.

[3] Plaintiffs argue that SCAHC is not a federal agency and therefore is not subject to 48 C.F.R. § 37.104. (Op. Br. at 25.) That's right: that regulation is not applicable to the facts of this case. It applies to personal services contracts between a government agency and a private contractor, not to contracts between an Indian tribe, tribal organization or Indian contractor and a government Agency under the ISDEAA.

The Independent Contractor Exception squarely applies here, and this Court should affirm the district court's order determining it lacked subject matter jurisdiction.

VIII. CONCLUSION

For the foregoing reasons, the district court's order dismissing this case for lack of subject matter jurisdiction should be affirmed.

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IX. STATEMENT OF RELATED CASES

To the knowledge of counsel, there are no related cases pending.

X. CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NO. 20-16435

I certify that: (check appropriate option(s))

☒ 1. Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening/answering/reply/cross-appeal brief is

☒ Proportionately spaced, has a typeface of 14 points or more and contains 7,102 words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words), or is

☐ Monospaced, has 10.5 or fewer characters per inch and contains _____ words or ___ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words or 1,300 lines of text; reply briefs must not exceed 7,000 words or 650 lines of text).

☐ 2. The attached brief is **not** subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because

☐ This brief complies with Fed. R. App. P. 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages;

☐ This brief complies with a page or size-volume limitation established by separate court order dated __ and is

☐ Proportionately spaced, has a typeface of 14 points or more and contains ___ words, or is

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January 29, 2021
Date

s/ Brock J. Heathcotte
BROCK J. HEATHCOTTE
Assistant U.S. Attorney

XI. CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of January, 2021, I electronically filed the Brief of Appellee with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

s/ Brock J. Heathcotte
BROCK J. HEATHCOTTE
Assistant U.S. Attorney