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Practitioners Take Note: Don't Get Bitten by the Federal Tort Claims Act

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PRACTITIONERS TAKE NOTE: DON'T GET BITTEN BY THE FEDERAL TORT CLAIMS ACT

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WHAT IS THE FEDERAL TORT CLAIMS ACT?

THE FEDERAL TORT CLAIM ACT CAN BE FOUND AT 28 U.S.C. CHAPTER 171 SECTIONS 2671-2680

- Section 2672. Administrative adjustment of claims under $25,000.
- Section 2674. U.S. shall be liable in same manner as a private individual but shall not be liable for interest prior to judgment or for punitive damages.
- In any case where death was caused, the law of the place where the act or omission complained of occurred provides or has been construed to provide for damages only punitive in nature the United States shall be liable or actual or compensatory damages measured by the pecuniary injuries resulting from such death to the persons collectively for whose benefit the action was brought.

THE FEDERAL TORT CLAIM ACT CAN BE FOUND AT 28 U.S.C. CHAPTER 171 SECTIONS 2671-2680

- Section 2675. Disposition by federal agency as a prerequisite. The failure of an agency to make final disposition of a claim within six (6) months after it is filed shall, at the option of the claimant and any time, thereafter, be deemed a final denial of the claim for purposes of this section.
- Section 2678. Maximum of 25% contingent fee.

THE FEDERAL TORT CLAIM ACT CAN BE FOUND AT 28 U.S.C. CHAPTER 171 SECTIONS 2671-2680

- <u>Section 2679. Exclusiveness of remedy</u>. If defendant acts within the scope of his office or employment, any civil action shall be deemed an action against the United States.
- <u>Section 2680. Exceptions</u>. Any claim based upon an act or omission of an employee of the government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation is valid, or is based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government, whether or not the discretion involved be abused. The FTCA does not apply to this.

D.J.S.-W. V. UNITED STATES OF AMERICA
962 F.3D 745 (3RD CIR. 2020)

THERE ARE SITUATIONS WHERE DOCTORS AND HOSPITALS MAY BE “DEEMED” FEDERAL ENTITIES UNDER THE FTCA.

IN THIRD CIRCUIT CASE DEALING WITH WHEN A FACILITY IS "DEEMED" TO BE UNDER THE FTCA, A MUST-READ CASE IS *LOMANDO V. UNITED STATES OF AMERICA*, 667 F.3D 363 (3RD CIR. 2011) GREENBERG, C.J. THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES MAY DEEM PHYSICIANS TO BE PUBLIC HEALTH SERVICE EMPLOYEES PURSUANT TO A PROVISION OF THE PUBLIC HEALTH SERVICE ACT AS AMENDED, 42 U.S.C. § 233(O). BY VIRTUE OF THAT DESIGNATION, THE PHYSICIANS FALL WITHIN THE SCOPE OF THE FEDERAL TORT CLAIMS ACT, 28 U.S.C. §§ 1346, 2671-2680, WHICH PRECLUDE A SUIT AGAINST THEM INDIVIDUALLY FOR THEIR SERVICES AT A HEALTH ENTITY AND SUBSTITUTED A SUIT AGAINST THE UNITED STATES AS THE EXCLUSIVE REMEDY FOR THEIR ALLEGED MALPRACTICE.

EVEN A CAREFUL ATTORNEY MAY NOT NECESSARILY KNOW WHEN AN ENTITY IS “DEEMED” TO BE A FEDERAL ENTITY AND FALL UNDER THE AUSPICES OF THE FEDERAL TORT CLAIMS ACT.

ENTITIES THAT RECEIVE FEDERAL FUNDING TO SERVE MEDICALLY UNDERSERVED POPULATIONS MAY BE SO DEEMED.

“HEALTH PRACTITIONERS” THAT SUCH ENTITIES EMPLOY MAY BE DEEMED EMPLOYEES OF THE PUBLIC HEALTH SERVICE.

AN ACTION AGAINST THE UNITED STATES UNDER THE FTCA HAS THE EXCLUSIVE REMEDY FOR PERSONS ALLEGING PERSONAL INJURY RESULTING FROM THEIR PERFORMANCE OF MEDICAL FUNCTIONS BY PUBLIC HEALTH SERVICES EMPLOYEES ACTING WITHIN THE SCOPE OF THEIR EMPLOYMENT.

THE *D.J.S.* CASE WAS AN OPINION BY FORMER PENNSYLVANIA ATTORNEY GENERAL MICHAEL FISHER OF THE THIRD CIRCUIT.

HE DISTINGUISHED PRIOR AUTHORITY AND DETERMINED THAT A LAWYER DID NOT PROPERLY INVESTIGATE WHO THE DOCTOR’S EMPLOYER REALLY WAS.

PLAINTIFF'S COUNSEL IN THIS CASE WAS CRITICIZED FOR NOT DOING HIS JOB, INCLUDING NOT VISITING THE HEALTH CARE FACILITY TO ASSURE WHETHER THE DOCTOR REALLY WORKED AND WHO HE WAS EMPLOYED BY.

MORE AND MORE FACILITIES ARE DEEMED FEDERAL FACILITIES, MEANING THAT SUITS AGAINST THEM ARE FTCA CASES, CREATING A TRAP FOR THE UNWARY.

IF THE ATTORNEY DOES NOT KNOW OR HAS NEVER RUN INTO A SPECIFIC DOCTOR OR HOSPITAL BEFORE, THE DUTY OF DILIGENCE TO CLOSELY INVESTIGATE THE EMPLOYER'S STATUS IS CRUCIAL.

MAKE IT A PRACTICE TO CALL, WRITE, AND CHECK THE INDICES AND DO EVERYTHING YOU CAN TO ASSURE WHO THE EMPLOYEE IS AND WHAT THE STATUS IS.

THAT MAY MEAN CHECKING THE WEBSITE OF THE SECRETARY OF STATE, THE PROFESSIONAL LICENSURE BOARD, AND VISITING THE FACILITY AND ASKING AS WELL AS CALLING COUNSEL.

UNDER THE *D.J.S.* CASE, YOU ABSOLUTELY CANNOT RELY ON PENNSYLVANIA'S MINOR'S TOLLING RULE BECAUSE IT DOES NOT APPLY IN FTCA CASES. ONLY EQUITABLE TOLLING APPLIES.

D.J.S.-W. INVOLVED A MINOR'S ACTION AGAINST A HOSPITAL AS A RESULT OF BIRTH TRAUMA DISMISSED BASED ON FAILURE TO SATISFY EQUITABLE TOLLING REQUIREMENTS OF FEDERAL TORT CLAIMS ACT.

CASE ORIGINALLY BROUGHT IN STATE COURT, AND PLAINTIFF'S COUNSEL WAS RELYING UPON PENNSYLVANIA'S MINOR'S TOLLING RULE.

MINOR'S TOLLING RULE DOES NOT APPLY IN FEDERAL COURT UNDER FTCA.

FOR FEDERAL EQUITABLE TOLLING TEST TO APPLY, THERE MUST BE: (1) PURSUIT OF RIGHTS DILIGENTLY; AND (2) SOME EXTRAORDINARY CIRCUMSTANCES STANDING IN THE WAY AND PREVENTING TIMELY FILING. *BOTH* MUST BE SATISFIED.

THE COURT WAS CRITICAL OF PLAINTIFF'S COUNSEL BECAUSE HE DID NOT TAKE REASONABLE STEPS TO CONFIRM THE DEFENDANT DR. GALLAGHER'S EMPLOYMENT STATUS.

THERE WAS NOTHING EXTRAORDINARY THAT PREVENTED PLAINTIFF'S COUNSEL FROM DISCOVERING DR. GALLAGHER'S TRUE AFFILIATIONS.

THE THIRD CIRCUIT CASE OF *SANTOS EX REL. BEATO V. UNITED STATES*, 559 F.3D 189 (3D CIR. 2009) WAS DISTINGUISHED.

IN *SANTOS*, THE COURT SAID THAT A TRAP HAD BEEN SET FOR PLAINTIFF'S COUNSEL; BUT NOT SO HERE.

THERE WERE NUMEROUS RED FLAGS, ACCORDING TO THE COURT, THAT WOULD HAVE CAUSED A DILIGENT PLAINTIFF OR HER COUNSEL TO INVESTIGATE DR. GALLAGHER’S EMPLOYMENT STATUS.

DR. GALLAGHER HAD TWO DIFFERENT ADDRESSES, ONE OF WHICH WAS PRIMARY HEALTH NETWORK.

IT COULD EASILY HAVE BEEN DISCOVERED THAT DR. GALLAGHER WAS EMPLOYED BY PRIMARY HEALTH NETWORK.

HAD COUNSEL INVESTIGATED PRIMARY HEALTH NETWORK HE COULD HAVE DISCOVERED THAT IT WAS A “DEEMED” FEDERAL ENTITY.

COUNSEL HAD AN OBLIGATION TO DISCUSS THE ISSUE WITH HIS CLIENT, EXPAND THE TEMPORAL SCOPE OF HIS RECORDS REQUEST, CALL SHARON HOSPITAL WHERE THE BABY WAS DELIVERED, OR DR. GALLAGHER, OR INVESTIGATE THE ADDRESS TO WHICH HE SENT ONE OF HIS RECORDS REQUESTS AND WHICH APPEARED ON SOME OF THE RECORDS HE RECEIVED.

COUNSEL DID NOT DO AN ADEQUATE INVESTIGATION, ACCORDING TO THE COURT.

THE PARTIES AGREED THAT PLAINTIFF'S CASE, WHICH WAS ORIGINALLY FILED IN STATE COURT ALMOST SEVEN YEARS AFTER THE MINOR'S BIRTH, THE DATE ON WHICH THE CLAIM ACCRUED, WAS NOT TIMELY PRESENTED TO THE APPROPRIATE AGENCY IN ACCORDANCE WITH THE REQUIREMENTS OF THE FEDERAL TORT CLAIMS ACT.

ALTHOUGH PLAINTIFF’S COUNSEL DELIBERATELY DELAYED FILING HER CASE IN RELIANCE UPON PENNSYLVANIA’S TOLLING STATUTE FOR MINORS, THAT LAW CANNOT SAVE PLAINTIFF MINOR’S UNTIMELY CLAIM AGAINST THE UNITED STATES BECAUSE STATE LAW TOLLING STATUTES DO NOT APPLY TO THE FEDERAL TORT CLAIMS ACT LIMITATIONS PERIOD.

THE SOLE ISSUE THUS WAS WHETHER MINOR PLAINTIFF HAD SHOWN THAT SHE WAS ENTITLED TO THE EXTRAORDINARY REMEDY OF EQUITABLE TOLLING OF THE FTCA'S LIMITATIONS PERIOD.

THE TWO REQUIREMENTS FOR TOLLING, EXTRAORDINARY CIRCUMSTANCES AND DILIGENCE, ARE DISTINCT ELEMENTS BOTH OF WHICH MUST BE SATISFIED FOR A LITIGANT TO BE ELIGIBLE FOR TOLLING.

FOR A LITIGANT TO BE ENTITLED TO EQUITABLE TOLLING SHE MUST ESTABLISH TWO ELEMENTS: (1) THAT SHE HAS BEEN PURSUING HER RIGHTS DILIGENTLY; AND (2) THAT SOME EXTRAORDINARY CIRCUMSTANCE STOOD IN HER WAY AND PREVENTED TIMELY FILING. BOTH MUST BE SATISFIED.

THE COURT CLARIFIED THAT, FOLLOWING THE SUPREME COURT'S GUIDANCE, A LITIGANT WILL ONLY MEET THE EXTRAORDINARY CIRCUMSTANCES PRONG OF THE TEST FOR EQUITABLE TOLLING ONCE SHE SHOWS THAT HER DELAY WAS ATTRIBUTABLE TO CIRCUMSTANCES THAT WERE BOTH EXTRAORDINARY AND BEYOND HER CONTROL.

IN *D.J.S.*, THE MINOR PLAINTIFF FAILED TO SATISFY EITHER PRONG OF THE TEST. SHE DID NOT DILIGENTLY PURSUE HER RIGHTS BECAUSE SHE FAILED TO TAKE REASONABLE STEPS TO CONFIRM DR. GALLAGHER'S EMPLOYMENT STATUS. NOR DID ANY CIRCUMSTANCES BOTH EXTRAORDINARY AND OUTSIDE HER CONTROL STAND IN THE WAY OF PREVENTING HER FROM DISCOVERING DR. GALLAGHER'S TRUE AFFILIATIONS.

THE COURT DISTINGUISHED THIS CASE FROM *SANTOS*, SUPRA. SANTOS WAS ALSO A MINOR. SANTOS OBTAINED MEDICAL RECORDS AND YET DID NOT HAVE A CLUE AS TO THE FEDERAL INVOLVEMENT. SANTOS' COUNSEL WENT TO FURTHER LENGTHS TO CONFIRM THE ALLEGED TORTFEASOR'S EMPLOYMENT STATUS THAN THE MINOR PLAINTIFF'S COUNSEL DID HERE. SANTOS PERFORMED A PUBLIC RECORDS SEARCH ON, CORRESPONDED WITH AND VISITED YORK HEALTH AS PART OF THE INVESTIGATION.

IN *D.J.S.-W.,* COUNSEL MERELY ASSUMED THAT DR. GALLAGHER WAS EMPLOYED BY SHARON HOSPITAL, WHICH HE KNEW TO BE A PRIVATE ENTITY, BECAUSE THE MINOR WAS BORN THERE, AND DR. GALLAGHER WAS LISTED AS A "TEAM MEMBER" ON ITS WEBSITE. COUNSEL ADMITTED THAT HE NEVER CORRESPONDED WITH, CALLED OR VISITED SHARON HOSPITAL OR DR. GALLAGHER TO CONFIRM THIS BELIEF.

THE COURT ALSO RELIED UPON NUMEROUS RED FLAGS THAT WOULD HAVE CAUSED A DILIGENT PLAINTIFF OR HER COUNSEL TO INVESTIGATE DR. GALLAGHER’S EMPLOYMENT STATUS.

THE COURT WROTE THAT IT WAS STRANGE THAT COUNSEL DID NOT ASK THE MINOR'S MOTHER WHERE SHE NORMALLY SAW DR. GALLAGHER FOR HER PRENATAL CARE OR EXPAND THE TEMPORAL SCOPE OF HIS RECORD REQUEST TO ENSURE THAT DR. GALLAGHER HAD NOT TREATED HER AT ANOTHER FACILITY.

PLAINTIFF’S OWN COUNSEL SENT RECORD REQUESTS TO SHARON HOSPITAL AND DR. GALLAGHER AT DIFFERENT ADDRESSES.

HAD COUNSEL VISITED OR SEARCHED THE ADDRESSES TO WHICH HIS OFFICE SENT THE REQUEST TO DR. GALLAGHER, HE WOULD HAVE DISCOVERED THAT IT WAS A STREET ADDRESS FOR PRIMARY HEALTH NETWORK.

PLAINTIFF'S COUNSEL SHOULD HAVE BEEN ON HEIGHTENED ALERT GIVEN HIS OWN PERSONAL EXPERIENCE IN LITIGATING A MALPRACTICE CASE INVOLVING THE SUBSTITUTION OF THE UNITED STATES FOR A DEFENDANT PHYSICIAN BECAUSE HE WAS AN EMPLOYEE OF A "DEEMED" FEDERAL ENTITY.

COUNSEL DID NOT INVESTIGATE THESE RED FLAGS.

IN THE COURT'S OPINION, PLAINTIFF'S COUNSEL COULD HAVE EASILY DISCOVERED THAT DR. GALLAGHER WAS EMPLOYED BY PRIMARY HEALTH NETWORK AND THEN WOULD HAVE INVESTIGATED PRIMARY HEALTH NETWORK AND DISCOVERED THAT IT WAS A "DEEMED" FEDERAL ENTITY.

IN SUM, PLAINTIFF'S COUNSEL DID NOT EXERCISE DUE DILIGENCE TO MEET THE EQUITABLE TOLLING STANDARD, AND THE CASE WAS DISMISSED. THE COURT OPINED THAT THERE WAS NO TRAP SET FOR PLAINTIFF AS THERE WAS IN THE *SANTOS* CASE. RATHER, THE COURT AGREED WITH THE DISTRICT COURT THAT "[T]HE REAL TRAP. . . [C]OUNSEL FELL INTO WAS THE ASSUMPTION THAT A DOCTOR WHO HAS A BIOGRAPHICAL PAGE ON A PRIVATE HEALTHCARE FACILITY'S WEBSITE . . . CANNOT BE EMPLOYED BY ANOTHER FACILITY OR ENTITY." *D.J.S.-W., SUPRA, AT *21*(INTERNAL CITATION OMITTED).

THE BOTTOM LINE: COUNSEL BEWARE!

28 USC Ch. 171: TORT CLAIMS PROCEDURE

From Title 28—JUDICIARY AND JUDICIAL PROCEDURE
PART VI—PARTICULAR PROCEEDINGS

CHAPTER 171—TORT CLAIMS PROCEDURE

Senate Revision Amendment

As printed in this report, this chapter should have read "173" and not "171". It was properly numbered "173" in the bill. However, the chapter was renumbered "171", without change in its section numbers, by Senate amendment. See 80th Congress Senate Report No. 1559.

Amendments

1966—Pub. L. 89–506, §9(b), July 18, 1966, 80 Stat. 308, substituted "claims" for "claims of $2,500 or less" in item 2672.

1959—Pub. L. 86–238, §1(2), Sept. 8, 1959, 73 Stat. 472, substituted "$2,500" for "$1,000" in item 2672.

§2671. Definitions

As used in this chapter and sections 1346(b) and 2401(b) of this title, 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, but does not include any contractor with the United States.

"Employee of the government" includes (1) officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 115, 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation, and (2) any officer or employee of a Federal public defender organization, except when such officer or employee performs professional services in the course of providing representation under section 3006A of title 18.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty.

(June 25, 1948, ch. 646, 62 Stat. 982; May 24, 1949, ch. 139, §124, 63 Stat. 106; Pub. L. 89–506, §8, July 18, 1966, 80 Stat. 307; Pub. L. 97–124, §1, Dec. 29, 1981, 95 Stat. 1666; Pub. L. 100–694, §3, Nov. 18, 1988, 102 Stat. 4564; Pub. L. 106–398, §1 [[div. A], title VI, §665(b)], Oct. 30, 2000, 114 Stat. 1654, 1654A-169; Pub. L. 106–518, title IV, §401, Nov. 13, 2000, 114 Stat. 2421.)

Historical and Revision Notes

1948 Act

Based on title 28, U.S.C., 1940 ed., §941 (Aug. 2, 1946, ch. 753, §402, 60 Stat. 842).
Changes were made in phraseology.

1949 Act

This section corrects a typographical error in section 2671 of title 28, U.S.C.

Amendments

2000—Pub. L. 106–518, in par. defining "Employee of the government", inserted "(1)" after "includes" and added cl. (2).

Pub. L. 106–398 inserted "115," after "members of the National Guard while engaged in training or duty under section" in par. defining "Employee of the government".

1988—Pub. L. 100–694 inserted "the judicial and legislative branches," after "departments," in first par.

1981—Pub. L. 97–124 inserted "members of the National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32," in definition of "Employee of the government" and "or a member of the National Guard as defined in section 101(3) of title 32" in definition of "Acting within the scope of his office or employment".

1966—Pub. L. 89–506 expanded definition of "Federal agency" to include military departments.

1949—Act May 24, 1949, corrected spelling of "office".

Effective Date of 2000 Amendment

Pub. L. 106–398, §1 [[div. A], title VI, §665(c)(2)], Oct. 30, 2000, 114 Stat. 1654, 1654A-169, provided that: "The amendment made by subsection (b) [amending this section] shall apply with respect to acts and omissions occurring before, on, or after the date of the enactment of this Act [Oct. 30, 2000]."

Effective Date of 1988 Amendment

Amendment by Pub. L. 100–694 effective Nov. 18, 1988, and applicable to all claims, civil actions, and proceedings pending on, or filed on or after, Nov. 18, 1988, see section 8 of Pub. L. 100–694, set out as a note under section 2679 of this title.

Effective Date of 1981 Amendment

Amendment by Pub. L. 97–124 applicable only with respect to claims arising on or after Dec. 29, 1981, see section 4 of Pub. L. 97–124, set out as a note under section 1089 of Title 10, Armed Forces.

Effective Date of 1966 Amendment

Amendment by Pub. L. 89–506 applicable to claims accruing six months or more after July 18, 1966, see section 10 of Pub. L. 89–506, set out as a note under section 2672 of this title.

Short Title

This chapter is popularly known as the Federal Tort Claims Act. The Federal Tort Claims Act was previously the official short title of title IV of act Aug. 2, 1946, ch. 753, 60 Stat. 842, which was classified principally to chapter 20 (§§921, 922, 931–934, 941–946) of former Title 28, Judicial Code and Judiciary. Title IV of act Aug. 2, 1946, was substantially repealed and reenacted as sections 1346(b) and 2671 et seq. of this title by act June 25, 1948, ch. 646, 62 Stat. 992, the first section of which enacted this title. For complete classification of title IV to the Code, see Tables. For distribution of former sections of Title 28 into this title, see Table at the beginning of this title.

Severability

Pub. L. 100–694, §7, Nov. 18, 1988, 102 Stat. 4565, provided that: "If any provision of this Act [see Short Title of 1988 Amendment note under section 1 of this title] or the amendments made by this Act or the application of the provision to any person or circumstance is held invalid, the remainder of this Act and such amendments and the application of the provision to any other person or circumstance shall not be affected by that invalidation."

Law Enforcement Officer Acting Within Scope of Office or Employment

Pub. L. 105–277, div. A, §101(h) [title VI, §627], Oct. 21, 1998, 112 Stat. 2681–480, 2681-519, as amended by Pub. L. 106–58, title VI, §623, Sept. 29, 1999, 113 Stat. 471, provided that:

"(a) Definitions.—In this section—

"(1) the term 'crime of violence' has the meaning given that term in section 16 of title 18, United States Code; and

"(2) the term 'law enforcement officer' means any employee described in subparagraph (A), (B), or (C) of section 8401(17) of title 5, United States Code; and any special agent in the Diplomatic Security Service of the Department of State.

"(b) Rule of Construction.—Effective on the date of the enactment of this Act [Oct. 21, 1998] and thereafter, and notwithstanding any other provision of law, for purposes of chapter 171 of title 28, United States Code, or any other provision of law relating to tort liability, a law enforcement officer shall be construed to be acting within the scope of his or her office or employment, if the officer takes reasonable action, including the use of force, to—

"(1) protect an individual in the presence of the officer from a crime of violence;

"(2) provide immediate assistance to an individual who has suffered or who is threatened with bodily harm; or

"(3) prevent the escape of any individual who the officer reasonably believes to have committed in the presence of the officer a crime of violence."

Congressional Findings and Purposes

Pub. L. 100–694, §2, Nov. 18, 1988, 102 Stat. 4563, provided that:

"(a) Findings.—The Congress finds and declares the following:

"(1) For more than 40 years the Federal Tort Claims Act [see Short Title note above] has been the legal mechanism for compensating persons injured by negligent or wrongful acts of Federal employees committed within the scope of their employment.

"(2) The United States, through the Federal Tort Claims Act, is responsible to injured persons for the common law torts of its employees in the same manner in which the common law historically has recognized the responsibility of an employer for torts committed by its employees within the scope of their employment.

"(3) Because Federal employees for many years have been protected from personal common law tort liability by a broad based immunity, the Federal Tort Claims Act has served as the sole means for compensating persons injured by the tortious conduct of Federal employees.

"(4) Recent judicial decisions, and particularly the decision of the United States Supreme Court in Westfall v. Erwin, have seriously eroded the common law tort immunity previously available to Federal employees.

"(5) This erosion of immunity of Federal employees from common law tort liability has created an immediate crisis involving the prospect of personal liability and the threat of protracted personal tort litigation for the entire Federal workforce.

"(6) The prospect of such liability will seriously undermine the morale and well being of Federal employees, impede the ability of agencies to carry out their missions, and diminish the vitality of the Federal Tort Claims Act as the proper remedy for Federal employee torts.

"(7) In its opinion in Westfall v. Erwin, the Supreme Court indicated that the Congress is in the best position to determine the extent to which Federal employees should be personally liable for common law torts, and that legislative consideration of this matter would be useful.

"(b) Purpose.—It is the purpose of this Act [see Short Title of 1988 Amendment note under section 1 of this title] to protect Federal employees from personal liability for common law torts committed within the scope of their employment, while providing persons injured by the common law torts of Federal employees with an appropriate remedy against the United States."

§2672. Administrative adjustment of claims

The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred: *Provided*, That any award, compromise, or settlement in excess of $25,000 shall be effected only with the prior written approval of the Attorney General or his designee. Notwithstanding the proviso contained in the preceding sentence, any award, compromise, or settlement may be effected without the prior written approval of the Attorney General or his or her designee, to the extent that the Attorney General delegates to the head of the agency the authority to make such award, compromise, or settlement. Such delegations may not exceed the authority delegated by the Attorney General to the United States attorneys to settle claims for money damages against the United States. Each Federal agency may use arbitration, or other alternative means of dispute resolution under the provisions of subchapter IV of chapter 5 of title 5, to settle any tort claim against the United States, to the extent of the agency's authority to award, compromise, or settle such claim without the prior written approval of the Attorney General or his or her designee.

Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award, compromise, settlement, or determination shall be final and conclusive on all officers of the Government, except when procured by means of fraud.

Any award, compromise, or settlement in an amount of $2,500 or less made pursuant to this section shall be paid by the head of the Federal agency concerned out of appropriations available to that agency. Payment of any award, compromise, or settlement in an amount in excess of $2,500 made pursuant to this section or made by the Attorney General in any amount pursuant to section 2677 of this title shall be paid in a manner similar to judgments and compromises in like causes and appropriations or funds available for the payment of such judgments and compromises are hereby made available for the payment of awards, compromises, or settlements under this chapter.

The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.

(June 25, 1948, ch. 646, 62 Stat. 983; Apr. 25, 1949, ch. 92, §2(b), 63 Stat. 62; May 24, 1949, ch. 139, §125, 63 Stat. 106; Sept. 23, 1950, ch. 1010, §9, 64 Stat. 987; Pub. L. 86–238, §1(1), Sept. 8, 1959, 73 Stat. 471; Pub. L. 89–506, §§1, 9(a), July 18, 1966, 80 Stat. 306, 308; Pub. L. 101–552, §8(a), Nov. 15, 1990, 104 Stat. 2746.)

Historical and Revision Notes

1948 Act

Based on title 28, U.S.C., 1940 ed., §921 (Aug. 2, 1946, ch. 753, §403, 60 Stat. 843).

The phrase "accruing on and after January 1, 1945" was omitted because executed as of the date of the enactment of this revised title.

Changes were made in phraseology.

1949 Act

This section corrects a typographical error in section 2672 of title 28, U.S.C.

Amendments

1990—Pub. L. 101–552 inserted at end of first par. "Notwithstanding the proviso contained in the preceding sentence, any award, compromise, or settlement may be effected without the prior written approval of the Attorney General or his or her designee, to the extent that the Attorney General delegates to the head of the agency the authority to make such award, compromise, or settlement. Such delegations may not exceed the authority delegated by the Attorney General to the United States attorneys to settle claims for money damages against the United States. Each Federal agency may use arbitration, or other alternative means of dispute resolution under the provisions of subchapter IV of chapter 5 of title 5, to settle any tort claim against the United States, to the extent of the agency's authority to award, compromise, or settle such claim without the prior written approval of the Attorney General or his or her designee."

1966—Pub. L. 89–506 substituted "claims" for "claims of $2,500 or less" in section catchline, authorized administrative settlement of tort claims, in accordance with regulations prescribed by the Attorney General, of up to $25,000 and, with the prior written approval of the Attorney General or his designee, in excess of $25,000, inserted "compromise" and "settlement" to list of administrative acts that would be final and conclusive on all officers of the government, authorized the payment of administrative settlements in excess of $2,500 in the manner similar to judgments and compromises in like causes, and made appropriations and funds which were available for the payment of such judgments and compromises available for the payment of awards, compromises, or settlements under this chapter.

1959—Pub. L. 86–238 substituted "$2,500" for "$1,000" in section catchline and text.

1950—Act Sept. 23, 1950, struck out requirement for specific authorization for payment of tort claims in appropriation acts.

1949—Act Apr. 25, 1949, inserted "accruing on or after January 1, 1945" after "United States" in first par.

Act May 24, 1949, substituted "2677" for "2678" in third par.

Effective Date of 1966 Amendment

Pub. L. 89–506, §10, July 18, 1966, 80 Stat. 308, provided that: "This Act [amending this section, sections 2401, 2671, 2675, 2677, 2678, and 2679 of this title, section 724a of former Title 31, Money and Finance, and former section 4116 of Title 38, Veterans' Benefits], shall apply to claims accruing six months or more after the date of its enactment [July 18, 1966]."

Laws Unaffected

Act Aug. 2, 1946, ch. 753, title IV, §424(b), 60 Stat. 847, provided that: "Nothing contained herein shall be deemed to repeal any provision of law authorizing any Federal agency to consider, ascertain, adjust, settle, determine, or pay any claim on account of damage to or loss of property or on account of personal injury or death, in cases in which such damage, loss, injury, or death was not caused by any negligent or wrongful act or omission of an employee of the Government while acting within the scope of his office or employment, or any other claim not cognizable under part 2 of this title."

§2673. Reports to Congress

The head of each federal agency shall report annually to Congress all claims paid by it under section 2672 of this title, stating the name of each claimant, the amount claimed, the amount awarded, and a brief description of the claim.

(June 25, 1948, ch. 646, 62 Stat. 983.)

Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., §922 (Aug. 2, 1946, ch. 753, §404, 60 Stat. 843).

Changes were made in phraseology.

Repeal

Pub. L. 89–348, §1(1), Nov. 8, 1965, 79 Stat. 1310, repealed the requirement that an annual report to Congress be made of the administrative adjustment of tort claims of $2,500 or less, stating the name of each claimant, the amount claimed, the amount awarded, and a brief description of the claim.

§2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.

(June 25, 1948, ch. 646, 62 Stat. 983; Pub. L. 100–694, §§4, 9(c), Nov. 18, 1988, 102 Stat. 4564, 4567.)

Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., §931(a) (Aug. 2, 1946, ch. 753, §410(a), 60 Stat. 843).

Section constitutes the liability provisions in the second sentence of section 931(a) of title 28, U.S.C., 1940 ed.

Other provisions of section 931(a) of title 28, U.S.C., 1940 ed., are incorporated in sections 1346(b), 1402, 2402, 2411, and 2412 of this title, but the provision of such section 931(a) that the United States shall not be liable for interest prior to judgment was omitted as unnecessary in view of section 2411 of this title, which provides that interest on judgments against the United States shall be computed from the date of judgment. Such section 2411 is made applicable to tort-claim actions by section 932 of title 28, U.S.C., 1940 ed.

Changes were made in phraseology.

Senate Revision Amendment

For Senate amendment to this section, see 80th Congress Senate Report No. 1559, amendment No. 60.

Amendments

1988—Pub. L. 100–694 inserted two pars. at end entitling the United States and the Tennessee Valley Authority to assert any defense based upon judicial or legislative immunity.

Effective Date of 1988 Amendment

Amendment by Pub. L. 100–694 effective Nov. 18, 1988, and applicable to all claims, civil actions, and proceedings pending on, or filed on or after, Nov. 18, 1988, see section 8 of Pub. L. 100–694 set out as a note under section 2679 of this title.

§2675. Disposition by federal agency as prerequisite; evidence

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death 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, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

(June 25, 1948, ch. 646, 62 Stat. 983; May 24, 1949, ch. 139, §126, 63 Stat. 107; Pub. L. 89–506, §2, July 18, 1966, 80 Stat. 306.)

Historical and Revision Notes

1948 Act

Based on title 28, U.S.C., 1940 ed., §931(b) (Aug. 2, 1946, ch. 753, §410(b), 60 Stat. 844).

Section constitutes all of section 931(b), except the first sentence, of title 28, U.S.C., 1940 ed. The remainder of such section 931(b) is incorporated in section 2677 of this title.

Changes were made in phraseology.

1949 Act

This section corrects a typographical error in section 2675(b) of title 28, U.S.C.

References in Text

The Federal Rules of Civil Procedure, referred to in subsec. (a), are set out in the Appendix to this title.

Amendments

1966—Subsec. (a). Pub. L. 89–506, §2(a), required that all administrative claims be filed with the agency or department and finally denied by the agency and sent by certified or registered mail prior to the filing of a court action against the United States, provided that the claimant be given the option of considering the claim to have been denied if the agency fails to make final disposition of the claim within six months of presentation of the claim to the agency, and provided that the requirements of the subsection would not apply to claims asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

Subsec. (b). Pub. L. 89–506, §2(b), struck out provisions under which a claimant could, upon 15 days written notice, withdraw a claim from the agency and institute an action thereon.

1949—Subsec. (b). Act May 24, 1949, substituted "section" for "subsection".

Effective Date of 1966 Amendment

Amendment by Pub. L. 89–506 applicable to claims accruing six months or more after July 18, 1966, see section 10 of Pub. L. 89–506, set out as a note under section 2672 of this title.

§2676. Judgment as bar

The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

(June 25, 1948, ch. 646, 62 Stat. 984.)

Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., §931(b) (Aug. 2, 1946, ch. 753, §410(b), 60 Stat. 844).

Section constitutes the first sentence of section 931(b) of title 28, U.S.C., 1940 ed. Other provisions of such section 931(b) are incorporated in section 2675 of this title.
Changes were made in phraseology.

Senate Revision Amendment

This section was eliminated by Senate amendment. See 80th Congress Senate Report No. 1559.

§2677. Compromise

The Attorney General or his designee may arbitrate, compromise, or settle any claim cognizable under section 1346(b) of this title, after the commencement of an action thereon.

(June 25, 1948, ch. 646, 62 Stat. 984; Pub. L. 89–506, §3, July 18, 1966, 80 Stat. 307.)

Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., §934 (Aug. 2, 1946, ch. 753, §413, 60 Stat. 845).
Changes were made in phraseology.

Senate Revision Amendment

This section was renumbered "2676" by Senate amendment. See 80th Congress Senate Report No. 1559.

Amendments

1966—Pub. L. 89–506 struck out provision requiring that approval of court be obtained before Attorney General could arbitrate, compromise, or settle a claim after commencement of an action thereon.

Effective Date of 1966 Amendment

Amendment by Pub. L. 89–506 applicable to claims accruing six months or more after July 18, 1966, see section 10 of Pub. L. 89–506, set out as a note under section 2672 of this title.

§2678. Attorney fees; penalty

No attorney shall charge, demand, receive, or collect for services rendered, fees in excess of 25 per centum of any judgment rendered pursuant to section 1346(b) of this title or any settlement made pursuant to section 2677 of this title, or in excess of 20 per centum of any award, compromise, or settlement made pursuant to section 2672 of this title.

Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under this section, if recovery be had, shall be fined not more than $2,000 or imprisoned not more than one year, or both.

(June 25, 1948, ch. 646, 62 Stat. 984; Pub. L. 89–506, §4, July 18, 1966, 80 Stat. 307.)

Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., §944 (Aug. 2, 1946, ch. 753, §422, 60 Stat. 846).
Words "shall be guilty of a misdemeanor" and "shall, upon conviction thereof", in the second sentence, were omitted in conformity with revised title 18, U.S.C., Crimes and Criminal Procedure (H.R. 1600, 80th Cong.). See sections 1 and 2 of said revised title 18.
Changes were made in phraseology.

Senate Revision Amendment

This section was renumbered "2677" by Senate amendment. See 80th Congress Senate Report No. 1559.

Amendments

1966—Pub. L. 89–506 raised the limitations on allowable attorneys fees from 10 to 20 percent for administrative settlements and from 20 to 25 percent for fees in cases after suit is filed and removed the requirement of agency or court allowance of the amount of attorneys fees.

Effective Date of 1966 Amendment

Amendment by Pub. L. 89–506 applicable to claims accruing six months or more after July 18, 1966, see section 10 of Pub. L. 89–506, set out as a note under section 2672 of this title.

§2679. Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government—

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) [1] of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if—

(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

(June 25, 1948, ch. 646, 62 Stat. 984; Pub. L. 87–258, §1, Sept. 21, 1961, 75 Stat. 539; Pub. L. 89–506, §5(a), July 18, 1966, 80 Stat. 307; Pub. L. 100–694, §§5, 6, Nov. 18, 1988, 102 Stat. 4564.)

Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., §945 (Aug. 2, 1946, ch. 753, §423, 60 Stat. 846).
Changes were made in phraseology.

Senate Revision Amendment

The catchline and text of this section were changed and the section was renumbered "2678" by Senate amendment. See 80th Congress Senate Report No. 1559.

References in Text

The Federal Rules of Civil Procedure, referred to in subsec. (d)(3), are set out in the Appendix to this title.

Amendments

1988—Subsec. (b). Pub. L. 100–694, §5, amended subsec. (b) generally. Prior to amendment, subsec. (b) read as follows: "The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property or personal injury or death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim."

Subsec. (d). Pub. L. 100–694, §6, amended subsec. (d) generally. Prior to amendment, subsec. (d) read as follows: "Upon a certification by the Attorney General that the defendant employee was acting within the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending and the proceedings deemed a tort action brought against the United States under the provisions of this title and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (b) of this section is not available against the United States, the case shall be remanded to the State court."

1966—Subsec. (b). Pub. L. 89–506 inserted reference to section 2672 of this title and substituted "remedy" for "remedy by suit".

1961—Pub. L. 87–258 designated existing provisions as subsec. (a) and added subsecs. (b) to (e).

Effective Date of 1988 Amendment

Pub. L. 100–694, §8, Nov. 18, 1988, 102 Stat. 4565, provided that:

"(a) General Rule.—This Act and the amendments made by this Act [enacting section 831c–2 of Title 16, Conservation, amending this section and sections 2671 and 2674 of this title, and enacting provisions set out as notes under this section and section 2671 of this title] shall take effect on the date of the enactment of this Act [Nov. 18, 1988].

"(b) Applicability to Proceedings.—The amendments made by this Act [amending this section and sections 2671 and 2674 of this title] shall apply to all claims, civil actions, and proceedings pending on, or filed on or after, the date of the enactment of this Act.

"(c) Pending State Proceedings.—With respect to any civil action or proceeding pending in a State court to which the amendments made by this Act apply, and as to which the period for removal under section 2679(d) of title 28, United States Code (as amended by section 6 of this Act), has expired, the Attorney General shall have 60 days after the date of the enactment of this Act during which to seek removal under such section 2679(d).

"(d) Claims Accruing Before Enactment.—With respect to any civil action or proceeding to which the amendments made by this Act apply in which the claim accrued before the date of the enactment of this Act, the period during which the claim shall be deemed to be timely presented under section 2679(d)(5) of title 28, United States Code (as amended by section 6 of this Act) shall be that period within which the claim could have been timely filed under applicable State law, but in no event shall such period exceed two years from the date of the enactment of this Act."

Effective Date of 1966 Amendment

Amendment by Pub. L. 89–506 applicable to claims accruing six months or more after July 18, 1966, see section 10 of Pub. L. 89–506, set out as a note under section 2672 of this title.

Effective Date of 1961 Amendment

Pub. L. 87–258, §2, Sept. 21, 1961, 75 Stat. 539, provided that: "The amendments made by this Act [amending this section] shall be deemed to be in effect six months after the enactment hereof [Sept. 21, 1961] but any rights or liabilities then existing shall not be affected."

[1] So in original. Probably should be a reference to Rule 4(i).

§2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if—

(1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;

(2) the interest of the claimant was not forfeited;

(3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and

(4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law..[1]

(d) Any claim for which a remedy is provided by chapter 309 or 311 of title 46 relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1–31 of Title 50, Appendix.[2]

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

[(g) Repealed. Sept. 26, 1950, ch. 1049, §13 (5), 64 Stat. 1043.]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

(June 25, 1948, ch. 646, 62 Stat. 984; July 16, 1949, ch. 340, 63 Stat. 444; Sept. 26, 1950, ch. 1049, §§2(a)(2), 13(5), 64 Stat. 1038, 1043; Pub. L. 86–168, title II, §202(b), Aug. 18, 1959, 73 Stat. 389; Pub. L. 93–253, §2, Mar. 16, 1974, 88 Stat. 50; Pub. L. 106–185, §3(a), Apr. 25, 2000, 114 Stat. 211; Pub. L. 109–304, §17(f)(4), Oct. 6, 2006, 120 Stat. 1708.)

Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., §943 (Aug. 2, 1946, ch. 753, §421, 60 Stat. 845).

Changes were made in phraseology.

Section 946 of title 28, U.S.C., 1940 ed., which was derived from section 424(b) of the Federal Tort Claims Act, was omitted from this revised title. It preserved the existing authority of federal agencies to settle tort claims not cognizable under section 2672 of this title. Certain enumerated laws granting such authority were specifically repealed by section 424(a) of the Federal Tort Claims Act, which section was also omitted from this revised title. These provisions were not included in this revised title as they are not properly a part of a code of general and permanent law.

Senate Revision Amendment

Sections 2680 and 2681 were renumbered "2679" and "2680", respectively, by Senate amendment. See 80th Congress Senate Report No. 1559.

References in Text

Sections 1–31 of Title 50, Appendix, referred to in subsec. (e), was in the original source of this section (section 943 of act Aug. 2, 1946) a reference to the Trading with the Enemy Act, as amended. The Trading with the Enemy Act is now comprised of sections 1 to 43, which were formerly classified to sections 1 to 6, 7 to 39, and 41 to 44 of the former Appendix to Title 50, War and National Defense, prior to editorial reclassification as chapter 53 (§4301 et seq.) of Title 50. For complete classification of this Act to the Code, see Tables.

The date of the enactment of this proviso, referred to in subsec. (h), means Mar. 16, 1974, the date on which Pub. L. 93–253, which enacted the proviso, was approved.

Panama Canal Company, referred to in subsec. (m), deemed to refer to Panama Canal Commission, see section 3602(b)(5) of Title 22, Foreign Relations and Intercourse.

Amendments

2006—Subsec. (d). Pub. L. 109–304 substituted "chapter 309 or 311 of title 46" for "sections 741–752, 781–790 of Title 46,".

2000—Subsec. (c). Pub. L. 106–185 substituted "any goods, merchandise, or other property" for "any goods or merchandise" and "law enforcement" for "law-enforcement", inserted ", except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if—", and added pars. (1) to (4).

1974—Subsec. (h). Pub. L. 93–253 inserted proviso.

1959—Subsec. (n). Pub. L. 86–168 added subsec. (n).

1950—Subsec. (g). Act Sept. 26, 1950, §13(5), repealed subsec. (g).

Subsec. (m). Act Sept. 26, 1950, §2, substituted "Panama Canal Company" for "Panama Railroad Company".

1949—Subsec. (m). Act July 16, 1949, added subsec. (m).

Effective Date of 2000 Amendment

Amendment by Pub. L. 106–185 applicable to any forfeiture proceeding commenced on or after the date that is 120 days after Apr. 25, 2000, see section 21 of Pub. L. 106–185, set out as a note under section 1324 of Title 8, Aliens and Nationality.

Effective Date of 1959 Amendment

Amendment by Pub. L. 86–168 effective Jan. 1, 1960, see section 203(c) of Pub. L. 86–168.

Effective Date of 1950 Amendment

Amendment by act Sept. 26, 1950, to take effect upon effective date of transfer to the Panama Canal Company, pursuant to the provisions of section 256 of the former Canal Zone Code, as added by section 10 of that act, of the Panama Canal together with the facilities and appurtenances related thereto, see section 14 of act Sept. 26, 1950.

Transfer of Functions

For transfer of authorities, functions, personnel, and assets of the Coast Guard, including the authorities and functions of the Secretary of Transportation relating thereto, to the Department of Homeland Security, and for treatment of related references, see sections 468(b), 551(d), 552(d), and 557 of Title 6, Domestic Security, and the Department of Homeland Security Reorganization Plan of November 25, 2002, as modified, set out as a note under section 542 of Title 6.

Coast Guard transferred to Department of Transportation and all functions, powers, and duties, relating to Coast Guard, of Secretary of the Treasury and of all other offices and officers of Department of the Treasury transferred to Secretary of Transportation by Pub. L. 89–670, §6(b)(1), Oct. 15, 1966, 80 Stat. 938. Section 6(b)(2) of Pub. L. 89–670, however, provided that notwithstanding such transfer of functions, Coast Guard shall operate as part of Navy in time of war or when President directs as provided in former section 3 (now 103) of Title 14, Coast Guard. See section 108 of Title 49, Transportation.

For transfer of certain functions relating to claims and litigation, insofar as they pertain to the Air Force, from Secretary of the Army to Secretary of the Air Force, see Secretary of Defense Transfer Order No. 34 [§1a(2)(4)], eff. July 1, 1949.

Northern Mariana Islands—Applicability of Subsec. (k)

Pub. L. 97–357, title II, §204, Oct. 19, 1982, 96 Stat. 1708, provided: "That the Northern Mariana Islands shall not be considered a foreign country for purposes of subsection (k) of section 2680 of title 28, United States Code, with respect to claims which accrued no more than two years prior to the effective date of this Act [Oct. 19, 1982]."

Termination of National Emergency

Declaration of national emergency in effect on Sept. 14, 1976, was terminated two years from that date by section 1601 of Title 50, War and National Defense.

Applicability of Subsec. (j)

Joint Res. July 3, 1952, ch. 570, §1(a)(32), 66 Stat. 333, as amended by Joint Res. Mar. 31, 1953, ch. 13, §1, 67 Stat. 18, and Joint Res. June 30, 1953, ch. 172, 67 Stat. 132, provided that subsec. (j) of this section, in addition to coming into full force and effect in time of war, should continue in force until six months after the termination of the national emergency proclaimed by the President on Dec. 16, 1950 by 1950 Proc. No. 2914, 15 F.R. 9029, set out as a note preceding section 1 of Title 50, War and National Defense, or such earlier date or dates as may be provided for by Congress, but in no event beyond Aug. 1, 1953. Section 7 of Joint Res. July 3, 1952, provided that it should become effective June 16, 1952.

Joint Res. July 3, 1952, ch. 570, §6, 66 Stat. 334, repealed Joint Res. Apr. 14, 1952, ch. 204, 66 Stat. 54 as amended by Joint Res. May 28, 1952, ch. 339, 66 Stat. 96; Joint Res. June 14, 1952, ch. 437, 66 Stat. 137; Joint Res. June 30, 1952, ch. 526, 66 Stat. 296, which continued provisions of subsec. (j) of this section until July 3, 1952. This repeal was made effective June 16, 1952, by section 7 of Joint Res. July 3, 1952.

[1] *So in original.*

[2] *See References in Text note below.*

Bitten By The Federal Tort Claims Act
By Clifford A. Rieders, Esquire
(07/07/20)

D.J.S.-W. v. United States of America, 2020 U.S. Appl LEXIS 19311 (3rd Cir. June 22, 2020), is an extraordinarily important case for every practitioner to read who has ever thought of litigating a medical matter in state or federal court. Although it arose in the context of the Federal Tort Claims Act ("FTCA"), it deals with a situation where doctors or hospitals may be "deemed" federal entities under the FTCA. Even a careful attorney may not necessarily know that what was thought and assumed to be a private entity or a state actor is actually considered by law to fall under the auspices of the Federal Tort Claims Act.

Under federal law, entities that receive federal funding to serve medically underserved populations, as well as "health practitioners that such entities employ[,] 'shall be deemed to be [employees] of the Public Health Service." ... [A]n action against the United States under the FTCA is the exclusive remedy for persons alleging 'personal injury . . . resulting from the performance of medical . . . functions' by Public Health Service employees acting within the scope of their employment." *Id.*, at *3 (internal citations omitted).

In an opinion written by former Attorney General Michael Fisher, the Third Circuit, distinguished prior authority and determined that a lawyer did not properly investigate who the doctor's employer really was. Plaintiff's counsel in this case was trashed for not doing his job, including not visiting the health care facility to assure where the doctor really worked and who he was employed by.

This is a highly significant case. More and more facilities are "deemed" federal facilities, meaning that suits against them are FTCA cases., creating a trap for the unwary. Particularly if the attorney does not know or has never run into a specific doctor or hospital before, the duty of diligence to closely investigate the employer's status is crucial. In our office, we make it a practice to call, write, check the indices and do everything we can to assure who the employer is and what their status is. Nevertheless, it is not always easy to determine whether a facility has been "deemed" to be a federal entity.

The other important lesson of this opinion is that you absolutely CANNOT rely on Pennsylvania's Minor's Tolling Rule because it does not apply in FTCA cases. Only equitable tolling applies.

The following bullet points should be kept in mind:

- *D.J.S.-W.* involved a minor's action against a hospital as a result of birth trauma dismissed based on failure to satisfy equitable tolling requirements of Federal Tort Claims Act.

- Case originally brought in state court, and plaintiff's counsel was relying upon Pennsylvania's Minor's Tolling Rule.
- ***Minor's Tolling Rule does not apply in federal court under FTCA.***
- For federal equitable tolling test to apply, there must be: (1) pursuit of rights diligently; and (2) some extraordinary circumstances standing in the way and preventing timely filing. ***Both*** must be satisfied.
- The Court was critical of plaintiff's counsel because he did not take reasonable steps to confirm the defendant Dr. Gallagher's employment status.
- There was nothing extraordinary that prevented plaintiff's counsel from discovering Dr. Gallagher's true affiliations.
- The Third Circuit case of *Santos ex rel. Beato v. United States*, 559 F.3d 189 (3d Cir. 2009) was distinguished.
- In *Santos*, the Court said that a trap had been set for plaintiff's counsel; but not so here.
- There were numerous red flags, according to the Court, that would have caused a diligent plaintiff or her counsel to investigate Dr. Gallagher's employment status.
- Dr. Gallagher had two different addresses, one of which was Primary Health Network.
- It could easily have been discovered that Dr. Gallagher was employed by Primary Health Network.
- Had counsel investigated Primary Health Network he could have discovered that it was a "deemed" federal entity.
- Counsel had an obligation to discuss the issue with his client, expand the temporal scope of his records request, call Sharon Hospital where the baby was delivered, or Dr. Gallagher, or investigate the address to which he sent one of his records requests and which appeared on some of the records he received.
- Counsel did not do an adequate investigation, according to the Court.

The parties agreed that plaintiff's case, which was originally filed in state court almost seven years after the minor's birth, the date on which the claim accrued, was not timely presented to the appropriate agency in accordance with the requirements of the Federal Tort Claims Act. Although plaintiff's counsel deliberately delayed filing her case in reliance upon Pennsylvania's tolling statute for minors, that law cannot save plaintiff minor's untimely claim against the United States because state law tolling statutes do not apply to the Federal Tort Claims Act limitations period. The sole issue thus was whether minor plaintiff had shown that she was entitled to the extraordinary remedy of equitable tolling of the FTCA's limitations period.

The two requirements for tolling, extraordinary circumstances and diligence, are distinct elements both of which must be satisfied for a litigant to be eligible for tolling. For a litigant to be entitled to equitable tolling she must establish two elements: (1) that she has been pursuing her rights diligently; and (2) that some extraordinary circumstance stood in her way and prevented timely filing. **Both** must be satisfied. The Court clarified that, following the Supreme Court's guidance, a litigant will only meet the extraordinary circumstances prong of the test for equitable tolling once she shows that her delay was attributable to circumstances that were both extraordinary **and** beyond her control.

Here, minor plaintiff failed to satisfy either prong of the test. She did not diligently pursue her rights because she failed to take reasonable steps to confirm Dr. Gallagher's employment status. Nor did any circumstances both extraordinary and outside her control stand in the way of preventing her from discovering Dr. Gallagher's true affiliations.

The Court distinguished this case from *Santos*, supra.. Santos was also a minor. Santos obtained medical records and yet did not have a clue as to the federal involvement. Santos' counsel went to further lengths to confirm the alleged tortfeasor's employment status than the minor plaintiff's counsel did here. Santos performed a public records search on, corresponded with and visited York Health as part of the investigation. In *D.J.S.-W.,* counsel merely assumed that Dr. Gallagher was employed by Sharon Hospital, which he knew to be a private entity, because the minor was born there and Dr. Gallagher was listed as a "team member" on its website. Counsel admitted that he never corresponded with, called or visited Sharon Hospital or Dr. Gallagher to confirm this belief.

The Court also relied upon numerous red flags that would have caused a diligent plaintiff or her counsel to investigate Dr. Gallagher's employment status. The Court wrote that it was strange that counsel did not ask the minor's mother where she normally saw Dr. Gallagher for her prenatal care or expand the temporal scope of his record request to ensure that Dr. Gallagher had not treated her at another facility. Plaintiff's own counsel sent record requests to Sharon Hospital and Dr. Gallagher at different addresses. Had counsel visited or searched the addresses to which his office sent the request to Dr. Gallagher, he would have discovered that it was a street address for Primary Health Network. Finally, plaintiff's counsel should have been on heightened alert given his own personal experience in litigating a malpractice case involving the substitution of the United States for a defendant physician because he was an employee of a "deemed" federal entity. Counsel did not investigate these red flags. In the Court's opinion, plaintiff's counsel could have easily discovered that Dr. Gallagher was employed by Primary Health Network and then would have investigated Primary Health Network and discovered that it was a "deemed" federal entity.

In sum, plaintiff's counsel did not exercise due diligence to meet the equitable tolling standard, and the case was dismissed. The Court opined that there was no trap set for plaintiff as there was in the *Santos* case. Rather, the Court agreed with the District Court that "[t]he real trap. . . [c]ounsel fell into was the assumption that a doctor who has a biographical page on a private healthcare facility's website . . . cannot be employed by another facility or entity." *D.J.S.-W., supra, at *21*(internal citation omitted).

The bottom line: **counsel beware!**

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Bitten By The Federal Tort Claims Act

- What is the Federal Tort Claims Act?
- The Federal Tort Claims Act can be found at 28 U.S.C. Chapter 171, Sections 2671-2680.
    - Section 2672. Administrative adjustment of claims under $25,000.
    - Section 2674. U.S. shall be liable in same manner as a private individual but shall not be liable for interest prior to judgment or for punitive damages.
    - In any case where death was caused, the law of the place where the act or omission complained of occurred provides or has been construed to provide for damages only punitive in nature the United States shall be liable or actual or compensatory damages measured by the pecuniary injuries resulting from such death to the persons collectively for whose benefit the action was brought.
    - Section 2675. Disposition by federal agency as a prerequisite. The failure of an agency to make final disposition of a claim within six (6) months after it is filed shall, at the option of the claimant and any time thereafter, be deemed a final denial of the claim for purposes of this section.
    - Section 2678. Maximum of 25% contingent fee.
    - Section 2679. Exclusiveness of remedy. If defendant acts within the scope of his office or employment, any civil action shall be deemed an action against the United States.
    - Section 2680. Exceptions. Any claim based upon an act or omission of an employee of the government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation is valid, or is based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government, whether or not the discretion involved be abused. The FTCA does not apply to this.
- *D.J.S.-W. v. United States of America*, 962 F.3d 745 (3rd Cir. 2020).
- There are situations where doctors and hospitals may be "deemed" federal entities under the FTCA.
- In Third Circuit case dealing with when a facility is "deemed" to be under the FTCA, a must-read case is *Lomando v. United States of America*, 667 F.3d 363 (3rd Cir. 2011) Greenberg, C.J. The United States Department of Health and Human Services may deem physicians to be Public Health Service employees pursuant to a provision of the Public Health Service Act as amended, 42 U.S.C. § 233(o). By virtue of that designation, the physicians fall within the scope of the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671-2680, which preclude a suit against them individually for their services at a health entity and substituted a suit against the United States as the exclusive remedy for their alleged malpractice.
- Even a careful attorney may not necessarily know when an entity is "deemed" to be a federal entity and fall under the auspices of the Federal Tort Claims Act.

- Entities that receive federal funding to serve medically underserved populations may be so deemed.
- "Health practitioners" that such entities employ may be deemed employees of the public health service.
- An action against the United States under the FTCA has the exclusive remedy for persons alleging personal injury resulting from their performance of medical functions by public health services employees acting within the scope of their employment.
- The *D.J.S.* case was an opinion by former Pennsylvania Attorney General Michael Fisher of the Third Circuit.
- He distinguished prior authority and determined that a lawyer did not properly investigate who the doctor's employer really was.
- Plaintiff's counsel in this case was criticized for not doing his job, including not visiting the health care facility to assure whether the doctor really worked and who he was employed by.
- More and more facilities are deemed federal facilities, meaning that suits against them are FTCA cases, creating a trap for the unwary.
- If the attorney does not know or has never run into a specific doctor or hospital before, the duty of diligence to closely investigate the employer's status is crucial.
- Make it a practice to call, write, and check the indices and do everything you can to assure who the employee is and what the status is.
- That may mean checking the website of the Secretary of State, the professional licensure board, and visiting the facility and asking as well as calling counsel.
- Under the *D.J.S.* case, you absolutely **cannot** rely on Pennsylvania's Minor's Tolling Rule because it does not apply in FTCA cases. Only equitable tolling applies.
- *D.J.S.-W*. involved a minor's action against a hospital as a result of birth trauma dismissed based on failure to satisfy equitable tolling requirements of Federal Tort Claims Act.
- Case originally brought in state court, and plaintiff's counsel was relying upon Pennsylvania's Minor's Tolling Rule.
- ***Minor's Tolling Rule does not apply in federal court under FTCA.***
- For federal equitable tolling test to apply, there must be: (1) pursuit of rights diligently; and (2) some extraordinary circumstances standing in the way and preventing timely filing. ***Both*** must be satisfied.
- The Court was critical of plaintiff's counsel because he did not take reasonable steps to confirm the defendant Dr. Gallagher's employment status.
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- The Third Circuit case of *Santos ex rel. Beato v. United States*, 559 F.3d 189 (3d Cir. 2009) was distinguished.
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- Counsel did not do an adequate investigation, according to the Court.
- The parties agreed that plaintiff's case, which was originally filed in state court almost seven years after the minor's birth, the date on which the claim accrued, was not timely presented to the appropriate agency in accordance with the requirements of the Federal Tort Claims Act.
- Although plaintiff's counsel deliberately delayed filing her case in reliance upon Pennsylvania's tolling statute for minors, that law cannot save plaintiff minor's untimely claim against the United States because state law tolling statutes do not apply to the Federal Tort Claims Act limitations period.
- The sole issue thus was whether minor plaintiff had shown that she was entitled to the extraordinary remedy of equitable tolling of the FTCA's limitations period.
- The two requirements for tolling, extraordinary circumstances and diligence, are distinct elements both of which must be satisfied for a litigant to be eligible for tolling.
- For a litigant to be entitled to equitable tolling she must establish two elements: (1) that she has been pursuing her rights diligently; and (2) that some extraordinary circumstance stood in her way and prevented timely filing. **Both** must be satisfied.
- The Court clarified that, following the Supreme Court's guidance, a litigant will only meet the extraordinary circumstances prong of the test for equitable tolling once she shows that her delay was attributable to circumstances that were both extraordinary **and** beyond her control.
- In *D.J.S.*, the minor plaintiff failed to satisfy either prong of the test. She did not diligently pursue her rights because she failed to take reasonable steps to confirm Dr. Gallagher's employment status. Nor did any circumstances both extraordinary and outside her control stand in the way of preventing her from discovering Dr. Gallagher's true affiliations.
- The Court distinguished this case from *Santos*, supra. Santos was also a minor. Santos obtained medical records and yet did not have a clue as to the federal involvement. Santos' counsel went to further lengths to confirm the alleged tortfeasor's employment status than the minor plaintiff's counsel did

here. Santos performed a public records search on, corresponded with and visited York Health as part of the investigation.

- In *D.J.S.-W.,* counsel merely assumed that Dr. Gallagher was employed by Sharon Hospital, which he knew to be a private entity, because the minor was born there and Dr. Gallagher was listed as a "team member" on its website. Counsel admitted that he never corresponded with, called or visited Sharon Hospital or Dr. Gallagher to confirm this belief.
- The Court also relied upon numerous red flags that would have caused a diligent plaintiff or her counsel to investigate Dr. Gallagher's employment status.
- The Court wrote that it was strange that counsel did not ask the minor's mother where she normally saw Dr. Gallagher for her prenatal care or expand the temporal scope of his record request to ensure that Dr. Gallagher had not treated her at another facility.
- Plaintiff's own counsel sent record requests to Sharon Hospital and Dr. Gallagher at different addresses.
- Had counsel visited or searched the addresses to which his office sent the request to Dr. Gallagher, he would have discovered that it was a street address for Primary Health Network.
- Plaintiff's counsel should have been on heightened alert given his own personal experience in litigating a malpractice case involving the substitution of the United States for a defendant physician because he was an employee of a "deemed" federal entity.
- Counsel did not investigate these red flags.
- In the Court's opinion, plaintiff's counsel could have easily discovered that Dr. Gallagher was employed by Primary Health Network and then would have investigated Primary Health Network and discovered that it was a "deemed" federal entity.
- In sum, plaintiff's counsel did not exercise due diligence to meet the equitable tolling standard, and the case was dismissed. The Court opined that there was no trap set for plaintiff as there was in the *Santos* case. Rather, the Court agreed with the District Court that "[t]he real trap. . . [c]ounsel fell into was the assumption that a doctor who has a biographical page on a private healthcare facility's website . . . cannot be employed by another facility or entity." *D.J.S.-W., supra, at *21*(internal citation omitted).
- The bottom line: **counsel beware!**

D.J.S.-W. v. United States, 962 F.3d 745

United States Court of Appeals for the Third Circuit

April 22, 2020, Submitted Pursuant to Third Circuit L.A.R. 34.1(a); June 22, 2020, Opinion Filed

No. 19-2434

Reporter

962 F.3d 745 * | 2020 U.S. App. LEXIS 19311 ** | 2020 WL 3407763

D.J.S.-W., a minor, by her natural mother and legal guardian, D'ERICKA STEWART, Appellant v. UNITED STATES OF AMERICA

Prior History: [**1] On Appeal from the United States District Court for the Western District of Pennsylvania. (D.C. No. 2-17-cv-01335). Chief District Judge: Honorable Mark R. Hornak.
Stewart-Wilson v. United States, 2019 U.S. Dist. LEXIS 71577 (W.D. Pa., Apr. 29, 2019)

Core Terms

tolling, equitable, diligently, entity, website, prong, untimely, birth, extraordinary-circumstances, equitable-tolling, malpractice, stood, corresponded, delivery, trap

Case Summary

Overview

HOLDINGS: [1]-Limitations period under 28 U.S.C.S. § 2675 for filing an FTCA medical malpractice claim did not have to be equitably tolled for a seven-year-old claimant who had sustained a shoulder injury during birth because she did not show that she diligently pursued her rights, given that she failed to take reasonable steps to confirm the doctor's employment status. She also failed to show that extraordinary circumstances prevented her from discovering the doctor's true affiliations. The action was not saved by counsel's reliance on Pennsylvania's tolling statute because state-law tolling statutes do not apply to the FTCA's limitations period.

Outcome

Judgment affirmed.

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Healthcare > Public Health & Welfare Law > Healthcare
Torts > ... > Liability > Federal Tort Claims Act > Jurisdiction

HN1 **Public Health & Welfare, Healthcare**
Under federal law, entities that receive federal funding to serve medically underserved populations, as well as health practitioners that such entities employ, shall be deemed to be employees of the Public Health Service. This status is highly significant because an action against the United States under the FTCA is the exclusive remedy for persons alleging personal injury resulting from the performance of medical functions by Public Health Service employees acting within the scope of their employment. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness
View more legal topics

HN2 **Entitlement as Matter of Law, Appropriateness**
Review of the District Court's summary judgment decision is plenary. Summary judgment is appropriate if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). More like this Headnote

Shepardize - Narrow by this Headnote (0)

Torts > ... > Liability > Federal Tort Claims Act > Elements

HN3 **Federal Tort Claims Act, Elements**
As a sovereign, the United States is immune from suit unless it consents to be sued. The FTCA represents a limited waiver of that sovereign immunity, providing that the United States shall be liable, respecting certain tort claims, in the same manner and to the same extent as a private individual under like circumstances, 28 U.S.C.S. § 2674. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Torts > ... > Liability > Federal Tort Claims Act > Procedural Matters

HN4 **Federal Tort Claims Act, Procedural Matters**
Bringing a claim under the FTCA requires following various procedural requirements. The FTCA dictates that a tort claim against the United States shall be forever barred unless it is presented to the appropriate Federal agency within two years after it accrues and then brought to federal court within six months after the agency acts on the claim. If the agency fails to act within six months, the claimant may proceed to file her case in district court. 28 U.S.C.S. § 2675(a). More like this Headnote

Shepardize - Narrow by this Headnote (0)

Torts > ... > Liability > Federal Tort Claims Act > Procedural Matters

HN5 **Federal Tort Claims Act, Procedural Matters**
The time limits in the FTCA are just time limits, not jurisdictional requirements, and, therefore, a court can toll them on equitable grounds. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Torts > ... > Liability > Federal Tort Claims Act > Procedural Matters
View more legal topics

HN6 **Federal Tort Claims Act, Procedural Matters**

A court may rescue a claim otherwise barred as untimely by a statute of limitations when a plaintiff shows she has been prevented from filing in a timely manner due to sufficiently inequitable circumstances. Tolling is an extraordinary remedy, and is proper only when the principles of equity would make the rigid application of a limitation period unfair. It is especially appropriate to be restrictive in extending this remedy in cases involving the waiver of the sovereign immunity of the United States, such as those arising under the FTCA. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Torts > Procedural Matters > Statute of Limitations > Tolling

HN7 **Statute of Limitations, Tolling**

The United States Court of Appeals for the Third Circuit uses the term equitable tolling broadly to encompass several situations under which a statute of limitations period may be tolled on equitable grounds. There are three principal, though not exclusive, situations in which equitable tolling may be appropriate: (1) where the defendant has actively misled the plaintiff respecting the plaintiff's cause of action; (2) where the plaintiff in some extraordinary way has been prevented from asserting her rights; or (3) where the plaintiff has timely asserted her rights mistakenly in the wrong forum. A litigant will not receive the benefit of tolling in any of these situations unless she exercised due diligence in pursuing and preserving her claim. That is, tolling will never extend to a garden variety claim of excusable neglect, such as a simple miscalculation that leads a lawyer to miss a filing deadline. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Torts > Procedural Matters > Statute of Limitations > Tolling

HN8 **Statute of Limitations, Tolling**

To be entitled to equitable tolling, a plaintiff must show that she in some extraordinary way has been prevented from asserting her rights, and that she exercised due diligence in pursuing and preserving her claim. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Torts > Procedural Matters > Statute of Limitations > Tolling

HN9 **Statute of Limitations, Tolling**

The two requirements for equitable tolling are distinct prongs, both of which a litigant must satisfy before equitable tolling may apply. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Torts > Procedural Matters > Statute of Limitations > Tolling

HN10 **Statute of Limitations, Tolling**

A litigant will only meet the extraordinary-circumstances prong of the test for equitable tolling when she shows that her delay was attributable to circumstances that were both extraordinary and beyond her control. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Torts > Procedural Matters > Statute of Limitations > Tolling

HN11 **Statute of Limitations, Tolling**

For a litigant to be entitled to equitable tolling, she must establish two elements: (1) that she has been pursuing her rights diligently, and (2) that some extraordinary circumstance stood in her way and prevented timely filing. The two components are distinct elements, both of which the litigant must satisfy. And to meet the extraordinary-circumstances element, the litigant must show that the circumstances were extraordinary and beyond her control. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Torts > Procedural Matters > Statute of Limitations > Tolling

HN12 **Statute of Limitations, Tolling**

The principles of equitable tolling do not extend to a garden variety claim of excusable neglect. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Counsel: For Appellant: Vincent A. Coppola, Pribanic Pribanic & Archinaco, Pittsburgh, PA.

For Appellee: Scott W. Brady, United States Attorney, Haley F. Warden-Rodgers, Laura S. Irwin, Office of United States Attorney, Pittsburgh, PA.

Judges: Before: HARDIMAN, RENDELL and FISHER, Circuit Judges.

Opinion by: FISHER

Opinion

[*747] OPINION OF THE COURT

FISHER, *Circuit Judge*.

D.J.S.-W., a young girl who sustained a shoulder injury during birth, argues that the limitations period for filing her medical malpractice claim under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-80, should be equitably tolled. Because D.J.S.-W. fails to show both that she diligently pursued her rights and that extraordinary circumstances prevented her from timely filing, we decline to accord her such an exceptional remedy. Accordingly, we will affirm the District Court's grant of summary judgment to the United States.

I.

In late 2009, D.J.S.-W. was born at Sharon Regional Health Center (Sharon Hospital) in Mercer County, Pennsylvania, under the care of John Gallagher, M.D. During delivery, D.J.S.-W. sustained a [**2] brachial plexus injury, which allegedly caused permanent damage to her right shoulder and arm.

In the next few months, D.J.S.-W.'s mother retained counsel to pursue D.J.S.-W.'s potential malpractice claims against Sharon Hospital and Dr. Gallagher. In 2010 and 2011, in preparing to file D.J.S.-W.'s case, counsel requested medical and billing records from Sharon Hospital on three occasions. During this time, counsel also sent one request for medical records directly to Dr. Gallagher. All four requests were limited temporally "to those records pertinent to the time when Dr. Gallagher's alleged negligence occurred—the delivery of [D.J.S.-W.] . . . and the 12 hours prior to the delivery, the time at which [D.J.S.-W.'s mother] presented to Sharon . . . Hospital to give birth." App. 204 ¶ 12. Beyond these record requests, counsel also visited Sharon Hospital's website, which listed Dr. Gallagher as an Obstetrics & Gynecology doctor, and conducted a Google search of both Sharon Hospital and Dr. Gallagher.

D.J.S.-W.'s counsel believed that Dr. Gallagher was privately employed because Dr. Gallagher delivered D.J.S.-W. at Sharon Hospital—an entity against which counsel had previously litigated [**3] and knew to be private—and was listed on the Sharon Hospital website. Despite his investigatory efforts in preparing to file her case, D.J.S.-W.'s counsel did not discover that at the time of D.J.S.-W.'s birth, Dr. Gallagher was employed by Primary Health Network, a "deemed" federal entity eligible for FTCA malpractice coverage. **HN1** Under federal law, entities that receive federal funding to serve medically underserved populations, as well as "health practitioners that such entities employ[,] 'shall be deemed to be [employees] of the Public Health Service.'" *Lomando v. United States*, 667 F.3d 363, 371 (3d Cir. 2011) (second alteration in original) (quoting 42 U.S.C. § 233(g)(1)(A)). This status "is highly significant" because "an action against the United States under the FTCA is the exclusive remedy for persons alleging 'personal injury . . . resulting from the performance of medical . . . functions' by Public Health Service employees acting within the scope of their employment." *Id.* (quoting 42 U.S.C. § 233(a)). Indeed, D.J.S.-W.'s counsel had litigated a prior case in which the United States substituted itself for a defendant doctor because he was a "deemed" federal employee.

During the preparation of D.J.S.-W.'s case, counsel did not visit or call Sharon Hospital, Dr. Gallagher, or [**4] any Primary Health Network office. He did not search the Health Resources and Services Administration database, which would have revealed **[*748]** that Primary Health Network was a "deemed" federal entity (although, at the time, it did not list individual providers like Dr. Gallagher). Nor did counsel visit Primary Health Network's website or search Primary Health Network on Google. At the time, its website and each of its offices indicated that Primary Health Network was a "Federally Qualified Health Center."

Furthermore, counsel never requested medical records from Primary Health Network, nor did he ask for records from any healthcare provider or facility that identified a responsive date range earlier than D.J.S.-W.'s birth in November 2009. Records from before D.J.S.-W.'s birth, however, show that at the time of her birth, her mother had been a patient of Dr. Gallagher's for over ten years and had visited the Primary Health Network office in Sharon, Pennsylvania. Of the medical records counsel did ask for, he sent one request directly to "John Gallagher, M.D., One Dayton Way, Suite 6, Sharon, PA 16146"—the street address of a Primary Health Network office. App. 236. And of the records Dr. [**5] Gallagher sent in response to counsel's request, two pages included the words "Primary Health Network" at the bottom of the page immediately above Dr. Gallagher's name and mailing address. *D.J.S.-W. v. United States*, No. 2:17-cv-01335, 2019 U.S. Dist. LEXIS 71577, 2019 WL 1894707, at *3, *11 (W.D. Pa. Apr. 29, 2019).

In late 2016—nearly seven years after the allegedly negligent delivery—D.J.S.-W.'s mother filed suit on D.J.S.-W.'s behalf against Dr. Gallagher and Sharon Hospital in Pennsylvania state court. Despite Pennsylvania's two-year limitation for bringing personal injury actions, *see* 42 Pa. Cons. Stat. § 5524(2), D.J.S.-W.'s counsel, "[a]cting according to his custom and practice," deliberately delayed filing D.J.S.-W.'s case "in anticipation of acquiring additional knowledge regarding the severity and permanency of [her] injuries," App. 211 ¶ 72. In doing so, counsel relied on a Pennsylvania statute, 42 Pa. Cons. Stat. § 5533(b)(1), which tolls a minor plaintiff's action until she turns eighteen.

Soon after the case was filed, the Government removed it to the U.S. District Court for the Western District of Pennsylvania and moved to substitute the United States for Dr. Gallagher because he was working within the scope of his federal employment with Primary Health Network at the time of the allegedly negligent delivery. [**6] The District Court granted the motion for substitution, at which point the United States moved to dismiss on the basis that D.J.S.-W. failed to timely exhaust her administrative remedies as required under the FTCA. The District Court then dismissed the case against the United States without prejudice and remanded the case against Sharon Hospital for lack of subject-matter jurisdiction. 1

After exhausting administrative remedies, 2 D.J.S.-W.'s counsel filed anew D.J.S.-W.'s claim against the United States in the District Court. The United States moved to dismiss, arguing that her action was untimely under the FTCA. The District Court denied the motion, ordering the parties to engage in limited discovery regarding the FTCA's statute of limitations and equitable tolling.

At the close of discovery, the United States moved for summary judgment, again arguing that D.J.S.-W.'s suit was **[*749]** untimely. Although conceding that she did not timely file, D.J.S.-W. argued that she was entitled to equitable tolling of the FTCA's limitations period because she—or more accurately, her counsel—"had no reason to know that [Dr. Gallagher] was a 'deemed' federal employee or that further inquiry into his status [**7] was required." Supp. App. 26. The District Court disagreed, holding that D.J.S.-W. failed to "meet her burden to obtain the extraordinary remedy of equitable tolling." *D.J.S.-W.*, 2019 U.S. Dist. LEXIS 71577, 2019 WL 1894707, at *10. Accordingly, the Court granted the Government's motion for summary judgment because D.J.S.-W.'s "negligence claim against the United States is . . . barred as untimely." *Id.* D.J.S.-W. appeals.

II. 3

HN3 "As a sovereign, the United States is immune from suit unless it consents to be sued." *Sconiers v. United States*, 896 F.3d 595, 597 (3d Cir. 2018) (quoting *White-Squire v. U.S. Postal Serv.*, 592 F.3d 453, 456 (3d Cir. 2010)). The FTCA represents "a limited waiver of th[at] sovereign immunity," *Santos ex rel. Beato v. United States*, 559 F.3d 189, 193 (3d Cir. 2009), providing that "[t]he United States shall be liable, respecting . . .

[certain] tort claims, in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. § 2674.

HN4 Bringing a claim under the FTCA requires following various procedural requirements. The FTCA dictates that "a tort claim against the United States 'shall be forever barred' unless it is presented to the 'appropriate Federal agency within two years after [it] accrues' and then brought to federal court 'within six months' after the agency acts on the claim." *United States v. Wong*, 575 U.S. 402, 405, 135 S. Ct. 1625, 191 L. Ed. 2d 533 (2015) (quoting 28 U.S.C. § 2401(b)). If the agency fails to act within six months, the claimant may proceed to file her case in district court. [**8] 28 U.S.C. § 2675(a).

Here, both parties agree that D.J.S.-W.'s case—which was first filed in state court almost seven years after her birth, the date on which her claim accrued—was not timely presented to the appropriate agency in accordance with these requirements. And although D.J.S.-W.'s counsel deliberately delayed filing her case in reliance on Pennsylvania's tolling statute, that law cannot save D.J.S.-W.'s untimely claim against the United States because "state-law tolling statutes do not apply to the FTCA's limitations period." *Santos*, 559 F.3d at 193. Thus, the sole issue on appeal is whether D.J.S.-W. has shown that she is entitled to the extraordinary remedy of equitable tolling of the FTCA's limitations period. 4 We first clarify the test that a litigant seeking equitable tolling must satisfy. We then explain why D.J.S.-W. fails to meet that standard in this case.

A. Our Equitable-Tolling Test

HN6 It is well established that a court may "rescue a claim otherwise barred as untimely by a statute of limitations when a **[*750]** plaintiff [shows she] has 'been prevented from filing in a timely manner due to sufficiently inequitable circumstances.'" *Id.* at 197 (quoting *Seitzinger v. Reading Hosp. & Med. Ctr.*, 165 F.3d 236, 240 (3d Cir. 1999)). Tolling "is [an] extraordinary" remedy, *id.*, and "is proper only when the [**9] 'principles of equity would make [the] rigid application [of a limitation period] unfair,'" *Miller v. N.J. State Dep't of Corr.*, 145 F.3d 616, 618 (3d Cir. 1998) (alterations in original) (quoting *Shendock v. Dir., Office of Workers' Comp. Programs*, 893 F.2d 1458, 1462 (3d Cir. 1990) (en banc)). "It is especially appropriate to be restrictive" in extending this remedy "in cases involving the waiver of the sovereign immunity of the United States," such as those arising under the FTCA. *Santos*, 559 F.3d at 197-98.

HN7 Our Court uses the term "equitable tolling" broadly to encompass several situations under which a statute of limitations period may be tolled on equitable grounds. We have said that:

> [T]here are three principal, though not exclusive, situations in which equitable tolling may be appropriate: (1) where the defendant has actively misled the plaintiff respecting the plaintiff's cause of action; (2) where the plaintiff in some extraordinary way has been prevented from asserting . . . her rights; or (3) where the plaintiff has timely asserted . . . her rights mistakenly in the wrong forum. 5

Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1387 (3d Cir. 1994), *abrogated on other grounds by Rotkiske v. Klemm*, 890 F.3d 422, 428 (3d Cir. 2018) (en banc), *aff'd* 140 S. Ct. 355, 205 L. Ed. 2d 291 (2019). In addition, a litigant "will not receive the benefit of" tolling in any of these situations "unless she exercised due diligence in pursuing and preserving her claim." *Santos*, 559 F.3d at 197. That is, tolling will never extend to "a garden variety [**10] claim of excusable neglect, such as a simple miscalculation that leads a lawyer to miss a filing deadline." *Holland*, 560 U.S. at 651-52 (internal quotation marks and citations omitted).

The second tolling situation is at issue here—D.J.S.-W. argues that she encountered extraordinary circumstances that prevented her from timely filing. 6 HN8 Thus, to be entitled to equitable tolling, D.J.S.-W. must show that she "in some extraordinary way has been prevented from asserting . . . her rights," and that she "exercised due **[*751]** diligence in pursuing and preserving her claim." *See Santos*, 559 F.3d at 197 (internal quotation marks omitted). This is the same test that the Supreme Court uses to assess whether a petitioner may be entitled to equitable tolling in the habeas context. *See Holland*, 560 U.S. at 649 ("[A] 'petitioner' is 'entitled to equitable tolling' only if he shows '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S. Ct. 1807, 161 L. Ed. 2d 669 (2005))). In *Menominee Indian Tribe of Wisconsin v. United States*, the Supreme Court applied the same test to assess a Tribe's claim that equitable tolling should excuse its failure to timely present a contract dispute to a federal contracting [**11] officer. 136 S. Ct. 750, 754-56, 193 L. Ed. 2d 652 (2016). In doing so, the Court noted that it has "never held that [*Holland*'s] equitable-tolling test necessarily applies outside the habeas context" and, therefore, it has not yet "decide[d] whether an even stricter" or "a more generous test" may apply to nonhabeas cases. Id. at 756 n.2. 7

Nevertheless, because the *Holland* test is the same as our test for assessing equitable tolling in the nonhabeas context, *Menominee* is instructive. In particular, the Court made two observations that help us more clearly define the contours of our test.

First, it stated that the two requirements—extraordinary circumstances and diligence—are "distinct elements," both of which must be satisfied for a litigant to be eligible for tolling. *Id.* at 756. Treating the two requirements as separate prongs, the Court said, was consistent with its prior language describing the components as "elements," *id.* (citing *Pace*, 544 U.S. at 418), and its practice of denying "requests for equitable tolling where a litigant failed to satisfy one without addressing whether he satisfied the other," *id.* (citing *Lawrence v. Florida*, 549 U.S. 327, 336-37, 127 S. Ct. 1079, 166 L. Ed. 2d 924 (2007), and *Pace*, 544 U.S. at 418).

We agree with this characterization of the equitable-tolling test. Although our prior case law may appear to have blended the two [**12] components, this is merely a reflection of the fact that, in practice, the two elements often go hand in hand. For example, if no extraordinary circumstances stood in the litigant's way, but she nevertheless failed to timely file, it is likely that she did not diligently investigate and pursue her claim. *See, e.g.*, *id.* at 756-57 (declining to equitably toll limitations period because Tribe's failure to timely present its claims was caused "not by an obstacle outside its control, but by [its] mistaken belief that presentment was unneeded"); *Hedges v. United States*, 404 F.3d 744, 752-54 (3d Cir. 2005) (declining to equitably toll limitations period because plaintiff's pro se status and mental incompetence were not extraordinary circumstances and "[d]iligent research would likely have revealed . . . the existence" of his claim). Similarly, if, despite pursuing her claim diligently, a litigant was still unable to timely file, it is likely that some extraordinary circumstance stood in her way and prevented her from doing so. *See* *Santos*, 559 F.3d at 198-203 (holding plaintiff entitled to equitable tolling when she "diligently and vigorously pursued her claim" and, yet, she was unable to ascertain hospital's federal status). Today, we **[*752]** follow *Menominee's* guidance and confirm that ***HN9*** the two [**13] requirements are distinct prongs, both of which a litigant must satisfy before equitable tolling may apply.

Second, the Supreme Court also "reaffirm[ed]" that the extraordinary-circumstances element "is met only where the circumstances that caused a litigant's delay are both extraordinary *and* beyond [her] control." *Menominee*, 136 S. Ct. at 756. We agree with this description of the extraordinary-circumstances prong. Indeed, because equitable tolling is an extreme remedy that we extend "only sparingly," *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990), it "would make little sense if [it] were available when a litigant was responsible for [her] *own* delay," *Menominee*, 136 S. Ct. at 756. In addition, because the extraordinary-circumstances and diligence components are distinct elements, "the diligence prong already covers those affairs within the litigant's control" and the "extraordinary-circumstances prong, by contrast, is meant to cover matters outside [her] control." *Menominee*, 136 S. Ct. at 756. Accordingly, we also clarify today, following the Supreme Court's guidance, that ***HN10*** a litigant will only meet the extraordinary-circumstances prong of our test for equitable tolling when she shows that her delay was attributable to circumstances that were "both extraordinary *and* beyond [her] control." *Id.*

HN11 In sum, for a litigant [**14] to be entitled to equitable tolling, she must establish two elements: "(1) that [s]he has been pursuing her rights diligently, and (2) that some extraordinary circumstance stood in h[er] way and prevented timely filing." *Id.* at 755; *see also* *Santos*, 559 F.3d at 197. The two components are distinct elements, both of which the litigant must satisfy. And to meet the extraordinary-circumstances element, the litigant must show that the circumstances were "extraordinary *and* beyond [her] control." *Menominee*, 136 S. Ct. at 756.

B. D.J.S.-W. Fails to Meet Our Equitable-Tolling Standard

Here, D.J.S.-W. fails to satisfy either prong of this test. She did not diligently pursue her rights because she failed to take reasonable steps to confirm Dr. Gallagher's employment status. Nor did any circumstances, both extraordinary and outside her control, stand in her way and prevent her "from discovering Dr. Gallagher's true affiliations." *D.J.S.-W.*, 2019 U.S. Dist. LEXIS 71577, 2019 WL 1894707, at *9 (citing *Menominee*,136 S. Ct. at 755).

D.J.S.-W. emphasizes our decision in *Santos*, in which we tolled the FTCA's limitations period to rescue Santos's untimely claim because the government had created a trap that prevented her from learning, despite her counsel's diligent investigation, that her alleged tortfeasors were federally employed. 559 F.3d at 204. *Santos* is similar [**15] to this case: a minor filed medical malpractice claims in state court against a healthcare facility, known as York Health, and several of its employees. *Id.* at 190-91. Her counsel filed her suit after the two-year limitations period had run in reliance on Pennsylvania's tolling statute. *Id.* at 191. As it turned out, however, York Health was a "deemed" federal entity. *Id.* at 191-92. After the government substituted the United States as defendant and moved for summary judgment, Santos argued that the FTCA's limitations period should be equitably tolled. *Id.* at 192.

We agreed with Santos and reversed the district court's grant of summary judgment to the United States. *Id.* at 204. Santos, we said, diligently pursued her claim: she hired counsel, "who requested and reviewed her medical records, [and] visited, corresponded with, and performed a **[*753]** public records search on York Health." *Id.* at 198. Yet, "[n]one of these inquiries, records, visits, or correspondence gave him a clue that the healthcare providers or York Health had been deemed federal employees." *Id.* at 200-01. York Health's federal status, we concluded, "if not covert, was at least oblique." *Id.* at 202. Although York Health's website indicated that it received funds from federal sources and that it was a "federally-qualified [**16] health center," there were no "publicly available sources of information from which Santos could have learned" that York Health was in fact a federal entity. *Id.* at 201-03. Moreover, "even if the information had been available," there were no circumstances that "should have led [Santos's counsel] to inquire into York Health's federal status" in the first place. *Id.* at 203. Thus, we held that "the equitable tolling doctrine applie[d] . . . to toll the FTCA's statute of limitations." *Id.* at 204. 8

Despite D.J.S.-W.'s arguments to the contrary, even a cursory read of *Santos* reveals that Santos's counsel went to far greater lengths to confirm her alleged tortfeasors' employment status than D.J.S.-W.'s counsel did here. While counsel in *Santos* performed a public records search on, corresponded with, and visited York Health as part of his investigation, D.J.S.-W.'s counsel merely assumed that Dr. Gallagher was employed by Sharon Hospital—which he knew to be a private entity—because D.J.S.-W. was born there and Dr. Gallagher was listed as a "team member" on its website. But, as D.J.S.-W.'s counsel admits, he never corresponded with, called, or visited Sharon Hospital or Dr. Gallagher to confirm this [**17] belief.

D.J.S.-W. argues that her counsel's efforts were diligent because there was no "trigger" that would have prompted him to examine Dr. Gallagher's true employer, Primary Health Network. Appellant's Br. 15. This is not so. There were numerous red flags that would have caused a diligent plaintiff or her counsel to investigate Dr. Gallagher's employment status. As the District Court observed, "[i]t ordinarily should not come as a surprise to a medical malpractice lawyer . . . that an obstetric physician's relationship to a hospital may simply be" that he has "admitting privileges to deliver his patients' babies." *D.J.S.-W.*, 2019 U.S. Dist. LEXIS 71577, 2019 WL 1894707, at *9 (internal footnote omitted). Given that such an arrangement is not uncommon, it seems strange that counsel did not either ask D.J.S.-W.'s mother "where she normally saw Dr. Gallagher for her prenatal care" or expand the temporal scope of his record request to ensure Dr. Gallagher had not treated her at another facility. *Id.*

There were also other triggers that should have prompted counsel to investigate Dr. Gallagher's employment status. For example, counsel's own law office sent record requests to Sharon Hospital and Dr. Gallagher at different addresses. Indeed, had counsel [**18] visited or searched the address to which his office sent the request **[*754]** to Dr. Gallagher, he would have discovered that it was a street address for Primary Health Network. In addition, two of the pages of records sent by Dr. Gallagher in response to that request contained the phrase "Primary Health Network" at the bottom of the page above Dr. Gallagher's name and address. *See* 2019 U.S. Dist. LEXIS 71577, [WL] at *3, *11. Finally, D.J.S.-W.'s counsel should have been on heightened alert given his own personal experience in litigating a malpractice case involving the substitution of the United States for a defendant physician because he was an employee of a "deemed" federal entity.

Had counsel taken the reasonable step of investigating these red flags, he could have easily discovered that Dr. Gallagher was employed by Primary Health Network. Had counsel then investigated Primary Health Network, he could have discovered that it was a "deemed" federal entity. Indeed, unlike counsel in *Santos*, who corresponded with, performed a public search on, and visited York Health, D.J.S.-W.'s counsel did not take any of these steps. Had he visited a Primary Health Network office or searched its website, he would have seen that Primary Health Network [**19] "held itself out as a 'federally qualified health center' via," *inter alia*, "physical signs in its waiting rooms . . . and notices on its website." 2019 U.S. Dist. LEXIS 71577, [WL] at *9. If, like in *Santos*, these statements were insufficient to alert counsel to Primary Health Network's "deemed" federal status, *see* *Santos*, 559 F.3d at 201-02, he could have double checked by searching Primary Health Network in the Health Resources and Services Administration database.

In sum, D.J.S.-W. did not exercise due diligence to meet our equitable-tolling standard. ***HN12*** Rather, her effort here—or, more accurately, her counsel's effort—was, at most, a "garden variety claim of excusable neglect," *see* *Irwin*, 498 U.S. at 96, to which "[t]he principles of equitable tolling . . . do not extend," *Santos*, 559 F.3d at 197.

Because a plaintiff must meet both prongs of the equitable-tolling test, we could conclude our discussion here, having determined that D.J.S.-W. did not diligently pursue her claim. *See* *Menominee*, 136 S. Ct. at 757 n.5. We briefly note, however, that D.J.S.-W. also fails to demonstrate that any extraordinary circumstances "stood in h[er] way and prevented timely filing." *Id.* at 755 (quoting *Holland*, 560 U.S. at 649). The plaintiff in *Santos* encountered extraordinary circumstances because the government had created "a potential statute of limitations trap" that [**20] prevented her from discovering the defendant's federal status. 559 F.3d at 202 (quoting *Valdez*, 518 F.3d at 183). The government itself ensured that "York Health's federal status, if not covert, was at least oblique," and there were no "publicly available sources of information from which Santos could have learned this critical fact," nor were there any "circumstances [that] should have led her to inquire into York Health's federal status." *Id.* at 203.

According to D.J.S.-W., the circumstances in her case were similarly extraordinary. She argues that Dr. Gallagher created a trap, like that in *Santos*, because he knew that his biography on Sharon Hospital's website "created the illusion" that he was employed by "that private hospital," which could, in turn, "relax the guard of even the most diligent person." Appellant's Br. 14. There was, however, no trap here, and Dr. Gallagher's employment with Primary Health Network was far from "oblique." As discussed above, had counsel discussed the issue with his client, expanded the temporal scope of his record requests, called Sharon Hospital or Dr. Gallagher, or investigated the address to **[*755]** which he sent one of his record requests and which appeared on some of the records he received, he would [**21] have discovered Dr. Gallagher's true employer. As the District Court stated, "[t]he real trap that . . . [c]ounsel fell into was the assumption that a doctor who has a biographical page on a private healthcare facility's website . . . cannot be employed by another facility or entity." *D.J.S.-W.*, 2019 U.S. Dist. LEXIS 71577, 2019 WL 1894707, at *8. This miscalculation was certainly not "beyond [counsel's] control," and, thus, no extraordinary circumstances stood in D.J.S.-W.'s way to prevent her from timely filing her claim.[9] *See* *Menominee*, 136 S. Ct. at 756.

III.

Because we conclude that equitable tolling does not save D.J.S.-W.'s [**22] untimely claim, we will affirm the District Court's order granting summary judgment in favor of the United States.

Footnotes

[1] The case against Sharon Hospital was still pending in state court when the parties briefed this appeal.

[2] D.J.S.-W. presented her claims to the U.S. Department of Health and Human Services. Her administrative claim was deemed denied when the agency failed to act within six months. *See* 28 U.S.C. § 2675(a).

[3] The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1346(b)(1), and we have jurisdiction under 28 U.S.C. § 1291. ***HN2*** "Our review of the District Court's [summary judgment] decision is plenary." *State Auto Prop. & Cas. Ins. v. Pro Design, P.C.*, 566 F.3d 86, 89 (3d Cir. 2009). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

[4] ***HN5*** "The time limits in the FTCA are just time limits," not jurisdictional requirements, and, therefore, "a court can toll them on equitable grounds." *Wong*, 575 U.S. at 412.

[5] Our Court often refers to all three of these situations "as falling under the overarching heading of 'equitable tolling'" because each "tolls a limitations period on equitable grounds." *Edmonson v. Eagle Nat'l Bank*, 922 F.3d 535, 550 (4th Cir. 2019) (describing the Third Circuit's approach). Other circuits use the phrase to refer only to the second situation in our list—that is, "when a plaintiff's failure to timely file suit

is *not* attributable [to] wrongful conduct by the defendant." *Id.*; *see also* *Zappone v. United States*, 870 F.3d 551, 556 (6th Cir. 2017); *Valdez ex rel. Donely v. United States*, 518 F.3d 173, 183 (2d Cir. 2008); *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451 (7th Cir. 1990). In recent years, the Supreme Court has also used the phrase "equitable tolling" in this more specific sense. *See* *Holland v. Florida*, 560 U.S. 631, 644-45, 130 S. Ct. 2549, 177 L. Ed. 2d 130 (2010). As we explain above, only the second of our three tolling scenarios is at issue here, so we need not (and do not) resolve the difference in terminology.

6 D.J.S.-W. does not explicitly state that her claim falls under the second tolling situation in our list. But her argument relies heavily on *Santos*, which involved the second tolling doctrine. *See* 559 F.3d at 203. Furthermore, neither of the other two bases applies—D.J.S.-W. does not argue that she was actively misled, and all parties agree that she did not timely assert her claim in state court. Nor does D.J.S.-W. argue that any other tolling doctrine should apply.

7 In recent years, the Court has also referenced the *Holland* equitable-tolling test in other nonhabeas cases. *See, e.g.*, *Wong*, 575 U.S. at 407-08; *Lozano v. Montoya Alvarez*, 572 U.S. 1, 10, 134 S. Ct. 1224, 188 L. Ed. 2d 200 (2014).

8 The Government argues that "*Menominee* may undermine the holding in *Santos*" because "Santos's counsel's erroneous belief that York Health was a private entity . . . was neither extraordinary nor 'an obstacle beyond [his] control.'" Appellee's Br. 25-26 (quoting *Menominee*, 136 S. Ct. at 756 & n.3). We disagree. In *Santos*, we concluded that the government had created a "trap" for litigants like Santos because there were no "publicly available sources of information from which Santos could have" discovered York Health's federal status, nor were there any circumstances that should have "led her to inquire into York Health's federal status." 559 F.3d at 203. Despite diligent research, the opacity of York Health's federal status was an extraordinary circumstance that stood in Santos's way and prevented her from timely filing. Thus, our holding in *Santos* would not change under the clarified test we discuss today.

9 D.J.S.-W. argues that Dr. Gallagher "bore responsibility to make sure that his status was *unambiguous* to his patients." Appellant's Br. 14. Accordingly, she asks us to announce a rule that doctors like Dr. Gallagher who generally treat patients at private hospitals, "may not insulate [themselves] against application of equitable tolling" unless they notify "the patient in some reasonably direct manner of the federal affiliation." Appellant's Br. 15. But it is D.J.S.-W. who bore the burden to timely assert her rights or to show that, despite her diligent investigation, she was prevented from doing so by extraordinary circumstances. D.J.S.-W. offers no legal basis for imposing an affirmative reporting requirement on healthcare providers like Dr. Gallagher. *See, e.g.*, *Arteaga v. United States*, 711 F.3d 828, 834 (7th Cir. 2013) ("No physician, clinic, hospital, or other medical provider is required to provide patients with detailed instructions on how to sue the provider for malpractice."); *Hedges*, 404 F.3d at 752 (rejecting argument that "the Government has an affirmative duty to inform litigants, including *pro se* litigants, that they have viable judicial . . . remedies").

Lomando v. United States, 667 F.3d 363

United States Court of Appeals for the Third Circuit

October 6, 2011, Submitted under Third Circuit LAR 34.1(a); December 30, 2011, Filed

No. 11-1957

Reporter

667 F.3d 363 * | 2011 U.S. App. LEXIS 26018 ** | 80 A.L.R. Fed. 2d 699

INES LOMANDO, as Administratrix Ad Prosequendum of the Estate of Laura Lomando, deceased, Appellant v. UNITED STATES OF AMERICA; STEPHANIE REYNOLDS, D.O.; TREVOR TALBERT, M.D.; DAVID HYPPOLITE, M.D.; PARKER FAMILY HEALTH CENTER; RIVERVIEW MEDICAL CENTER; EMERGENCY PHYSICIAN ASSOCIATES NORTH JERSEY, PC; JOHN DOE, #1 through #5, MARY MOE #1 through #5, and XYZ CORPORATION #1 through #5 (fictitious names representing unknown physicians, nurses, technicians, medical groups, medical facilities)

Prior History: [**1] On Appeal from the United States District Court for the District of New Jersey. (D.C. Civ. No. 08-4177). Honorable Freda L. Wolfson, District Judge.
Lomando v. United States, 2011 U.S. Dist. LEXIS 28116 (D.N.J., Mar. 18, 2011)

Core Terms

specialty, volunteer, medicine, ABMS, clinical, malpractice, nonprofit, respondeat, subspecialty, entities, patients, practitioners, omission, similarly-placed, board-certified, qualifications, charitable, licensed, subspecialist, occurrence, preemption, profession, vicarious, symptoms

Case Summary

Procedural Posture

Plaintiff, the administratrix ad prosequendum of a decedent's estate, sued defendants, the United States, physicians and their employer, volunteer physicians, a free clinic, and a medical center, in the United States District Court for the District of New Jersey for medical malpractice and wrongful death. The district court granted summary judgment in favor of defendants. The administratrix appealed.

Overview

The decedent sought treatment at the free clinic and the medical center, which allegedly failed to diagnose her non-Hodgkins lymphoma. The court of appeals held that, under 28 U.S.C.S. § 1346(b)(1) of the Federal Tort Claims Act, 28 U.S.C.S. §§ 1346, 2671-2680, and 42 U.S.C.S. § 233(o), the United States was liable to the same extent that the free clinic would have been for the conduct of the volunteer physicians who worked there. Pursuant to 28 U.S.C.S. § 2674, the U.S. could assert a charitable immunity defense under the New Jersey

Charitable Immunity Act, N.J. Stat. Ann. § 2A:53A-7 (2011) because both a similarly situated private employer and the volunteer physicians would have been entitled to that defense. The claims against physicians who treated the decedent at the medical center failed under N.J. Stat. Ann. § 2A:53A-41 (2011) because the physicians were specialists in emergency medicine and the administratrix's experts were not specialists in that field. However, the district court erred by refusing to take into account treatment rendered by a non-party physician assistant in considering the claim against the employer; § 2A:53A-41 did not apply to the assistant.

Outcome

The district court's judgment was reversed and remanded as to the claims against the employer. The judgment was otherwise affirmed.

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Civil Procedure > Appeals > Standards of Review > De Novo Review

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HN1 Standards of Review, De Novo Review

A court of appeals exercises plenary review over an order granting defendants summary judgment, applying the same standard that the district court applied. In this plenary review, the court of appeals can affirm the summary judgment only if there was no genuine issue as to any material fact and the prevailing defendants were entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A genuine dispute is one that may reasonably be resolved in favor of either party. A material fact is one that might affect the outcome of the suit under the governing law. The court of appeals must view the record in the light most favorable to the non-moving party, and the court must draw all reasonable inferences that the record supports in her favor. To the extent that the district court's opinion contains conclusions of law, the court of appeals' review is de novo. More like this Headnote

Shepardize - Narrow by this Headnote (25) 1

Public Health & Welfare Law > Healthcare > General Overview

HN2 Public Health & Welfare Law, Healthcare

Under 42 U.S.C.S. § 254b(c)(1)(A), the government may make grants to public and nonprofit private entities for projects to plan and develop health centers which will serve medically underserved populations. More like this Headnote

Shepardize - Narrow by this Headnote (5)

Healthcare Law > ... > Actions Against Facilities > Governmental & Nonprofit Liability > Federal Tort Claims Act

Public Health & Welfare Law > Healthcare > General Overview

Torts > ... > Liability > Federal Tort Claims Act > Employees

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HN3 Governmental & Nonprofit Liability, Federal Tort Claims Act

The Federally Supported Health Centers Assistance Act of 1992, 42 U.S.C.S. §§ 201, 233, creates a process by which public and nonprofit private entities receiving federal funds pursuant to 42 U.S.C.S. § 254b(c)(1)(A) and health practitioners that such entities employ shall be deemed to be employees of the Public Health Service. 42 U.S.C.S. § 233(g)(1)(A). This treatment of health care centers receiving § 254b funding and practitioners at them is highly significant, for an action against the United States under the Federal Tort Claims Act, 28 U.S.C.S. §§ 1346, 2671-2680, is the exclusive remedy for persons alleging personal injury, including death, resulting from the performance of medical or related functions by Public Health Service employees acting within the scope of their employment. 42 U.S.C.S. § 233(a). More like this Headnote

Shepardize - Narrow by this Headnote (19) 2

Healthcare Law > ... > Actions Against Facilities > Governmental & Nonprofit Liability > Federal Tort Claims Act
Public Health & Welfare Law > Healthcare > General Overview
Torts > ... > Liability > Federal Tort Claims Act > Employees

HN4 Governmental & Nonprofit Liability, Federal Tort Claims Act

In 1996, in an effort to expand access to health care services to low-income individuals in medically underserved areas, Congress conferred deemed "employee" status and attendant Federal Tort Claims Act (FTCA), 28 U.S.C.S. §§ 1346, 2671-2680, coverage on a second and distinct category of persons: health practitioners who volunteer at free clinics. Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 U.S.C.S. § 233(o). Congress did not condition the award of this immunity on the government making grants to the clinics. Under the HIPAA, volunteer health practitioners who at free clinics provide a "qualifying health service" shall in providing services for the free clinic, be deemed to be employees of the Public Health Service. 42 U.S.C.S. § 233(o)(1). The HIPAA likewise makes explicit that an FTCA action against the United States is the sole remedy through which medical malpractice and similar claims may be brought on account of the services of such volunteers. 42 U.S.C.S. § 233(o)(5). More like this Headnote

Shepardize - Narrow by this Headnote (20) 2

Healthcare Law > ... > Actions Against Facilities > Governmental & Nonprofit Liability > Federal Tort Claims Act
Public Health & Welfare Law > Healthcare > General Overview
Torts > ... > Liability > Federal Tort Claims Act > Employees

HN5 Governmental & Nonprofit Liability, Federal Tort Claims Act

Unlike a health care center receiving 42 U.S.C.S. § 254b funding which may be deemed an employee of the Public Health Service (PHS) under 42 U.S.C.S. § 233(g), a free clinic is not deemed an employee of the PHS, and thus the Federal Tort Claims Act (FTCA), 28 U.S.C.S. §§ 1346, 2671-2680, does not preclude a suit against the clinic. 42 U.S.C.S. § 233(o)(5)(B). The subsection extending FTCA coverage to volunteers at free clinics may not be construed as deeming any free clinic to be an employee of the Public Health Service. More like this Headnote

Shepardize - Narrow by this Headnote (14) 2

Torts > ... > Liability > Federal Tort Claims Act > Elements
View more legal topics

HN6 Federal Tort Claims Act, Elements

Subject to exceptions, the Federal Tort Claims Act waives the sovereign immunity of the United States in its district courts for tort claims 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, under circumstances in which the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. 28 U.S.C.S. § 1346(b)(1). More like this Headnote

Shepardize - Narrow by this Headnote (23) 3

Torts > ... > Liability > Federal Tort Claims Act > Elements
View more legal topics

HN7 Federal Tort Claims Act, Elements

42 U.S.C.S. § 1346 contains two basic principles that govern Federal Tort Claims Act (FTCA) claims. First, the FTCA does not itself create a substantive cause of action against the United States; rather, it provides a mechanism for bringing a state law tort action against the federal government in federal court. The cause of action in an FTCA claim must come from state tort law. Accordingly, the extent of the United States' liability under the FTCA is generally determined by reference to state law. Second, the United States is liable only to the extent that in the same circumstances the applicable local law would hold "a private person" responsible. 28 U.S.C.S. § 1346(b)(1). Congress reiterated that precept in 28 U.S.C.S. § 2674, which provides that the United States is answerable under the FTCA in the same manner and to the same extent as a private individual under like circumstances. More like this Headnote

Shepardize - Narrow by this Headnote (34) 1

Torts > ... > Liability > Federal Tort Claims Act > Elements
View more legal topics

HN8 Federal Tort Claims Act, Elements
The United States occupies the role of a similarly placed private employer under the Federal Tort Claims Act (FTCA): Under the Federal Tort Claims Act, 28 U.S.C.S. §§ 1346(b), 2674, the United States is liable for injury caused by the negligent act of a government employee to the same extent a private employer would be liable. Such liability for the acts or omissions of a civilian or military federal employee is determined by the law of respondeat superior of the state in which the act or omission occurred. More like this Headnote

Shepardize - Narrow by this Headnote (23) 1

Torts > ... > Liability > Federal Tort Claims Act > Scope of Employment
View more legal topics

HN9 Federal Tort Claims Act, Scope of Employment
The United States Supreme Court has described the United States' role under the Federal Tort Claims Act (FTCA), 28 U.S.C.S. §§ 1346, 2671-2680, as equivalent to that of an employer answering under respondeat superior liability. Where the United States certifies in response to an FTCA claim that an employee was acting within the scope of his employment with respect to his actions concerning the claim, the United States, by certifying, is exposing itself to liability as would any other employer at common law who admits that an employee acted within the scope of his employment. Generally, FTCA cases unfold much as cases do against other employers who concede respondeat superior liability. Congress intended to permit liability essentially based on the intentionally wrongful or careless conduct of government employees, for which the government is to be made liable according to state law under the doctrine of respondeat superior. More like this Headnote

Shepardize - Narrow by this Headnote (18) 1

Torts > ... > Liability > Federal Tort Claims Act > Scope of Employment
View more legal topics

HN10 Federal Tort Claims Act, Scope of Employment
Looking to the text of the Federal Tort Claims Act (FTCA), the act shadows precisely the common law of respondeat superior liability, providing that the United States is subject to suit for the negligent acts of any employee of the government while acting within the scope of his office or employment. 28 U.S.C.S. § 1346(b)(1). The doctrine of respondeat superior renders an employer or master vicariously liable for a tort committed by his employee or servant while acting within the scope of employment. Thus, the plain language of the FTCA, which treats the United States as liable for the tortious actions of its employees, creates a remedial scheme under which the United States would be liable as an employer in like circumstances. 28 U.S.C.S. § 2671 note provides that the United States, through the Federal Tort Claims Act, is responsible to injured persons for the common law torts of its employees in the same manner in which the common law historically has recognized the responsibility of an employer for torts committed by its employees within the scope of their employment. More like this Headnote

Shepardize - Narrow by this Headnote (26) 2

Torts > ... > Liability > Federal Tort Claims Act > Elements

HN11 Federal Tort Claims Act, Elements
The Federal Tort Claims Act, 28 U.S.C.S. §§ 1346, 2671-2680, provides that the United States will be liable to the extent that a private employer would be liable in similar circumstances in the same locality. More like this Headnote

Shepardize - Narrow by this Headnote (8)

Healthcare Law > ... > Actions Against Facilities > Governmental & Nonprofit Liability >
Federal Tort Claims Act

Public Health & Welfare Law > Healthcare > General Overview
Torts > ... > Liability > Federal Tort Claims Act > Elements
View more legal topics

HN12 Governmental & Nonprofit Liability, Federal Tort Claims Act
Though there is a dearth of guidance on the issue of how to characterize a similarly placed private employer of a volunteer physician deemed an employee of the Public Health Service under 42 U.S.C.S. § 233(o), it seems that equating the United States to a free clinic, rather than a hospital or practice group that employs the physicians for compensation, is the only way to ensure that the United States' liability under the Federal Tort Claims Act, 28 U.S.C.S. §§ 1346, 2671-2680, is the same as that of a "private person" in similar circumstances. More like this Headnote

Shepardize - Narrow by this Headnote (16) 1 1

Torts > Public Entity Liability > Immunities > Absolute Immunity
View more legal topics

HN13 Immunities, Absolute Immunity
In 1988, Congress clarified the terms of the United States' waiver of sovereign immunity under the Federal Tort Claims Act (FTCA), 28 U.S.C.S. §§ 1346, 2671-2680, through the Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563 (codified as amended at scattered portions of the United States Code). The Westfall Act provides for absolute immunity to federal employees in the wake of Westfall v. Erwin by making suit against the United States under the FTCA the exclusive remedy for negligent or wrongful acts by federal employees committed within the scope of employment. More like this Headnote

Shepardize - Narrow by this Headnote (26) 4

Torts > Public Entity Liability > Immunities > General Overview
View more legal topics

HN14 Public Entity Liability, Immunities
See 28 U.S.C.S. § 2674. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Torts > ... > Liability > Federal Tort Claims Act > Employees
View more legal topics

HN15 Federal Tort Claims Act, Employees
The text of 28 U.S.C.S. § 2674 is straightforward, and its import clear. If the language of a statute expresses Congress's intent with sufficient precision, the inquiry ends there and the statute is enforced according to its terms. The United States as the employer may assert any defense rooted in judicial or legislative immunity which would have been available to its employee had he not been a deemed employee and, instead, had been a defendant in the action at hand. Section 2674 thus allows the United States to avail itself of any judicially or legislatively based immunity to which its employees for purposes of the FTCA would have been entitled if they were the defendants. This provision for immunity is superimposed on Congress's intent in enacting the FTCA to position the United States for liability purposes in the position of a private employer. More like this Headnote

Shepardize - Narrow by this Headnote (5)

Torts > ... > Liability > Federal Tort Claims Act > General Overview
View more legal topics

HN16 Liability, Federal Tort Claims Act
28 U.S.C.S. § 2674 does not state exhaustively those defenses to which the United States is entitled; rather, it reserves explicitly the United States' right to assert any other defenses to which it is entitled. The "other defenses" to which the United States is entitled include not only those defenses the United States may invoke independently, but also any defenses available to a similarly placed private employer answering for the alleged torts of its employee. More like this Headnote

Shepardize - Narrow by this Headnote (5) 1

Torts > ... > Defenses > Specific Immunities > Charitable Immunity
View more legal topics

HN17 Specific Immunities, Charitable Immunity
Congress clarified in the report accompanying the Federal Employees Liability Reform and Tort Compensation Act of 1988 that the specific designation of immunities does not imply that traditional common law defenses are not available. Ordinary tort defenses, such as contributory negligence, assumption of risk, estoppels, waiver and res judicata, as applicable, continue to be available to the United States. 28 U.S.C.S. § 2674 authorizes the United States to utilize all of the defenses to which it is independently entitled. Defenses available to a similarly placed employer may be rooted in the common law, or they may be created statutorily, as in the case of the immunity conferred on charitable nonprofit entities and their volunteers under the New Jersey Charitable Immunity Act, N.J. Stat. Ann. § 2A:53A-7 (2011). Of course, the actual availability, vel non, of these defenses generally will depend on the law of the state in which the allegedly wrongful act occurred because the applicable state law defines the scope of the United States' liability under the Federal Tort Claims Act. More like this Headnote

Shepardize - Narrow by this Headnote (8) 1

Torts > ... > Defenses > Specific Immunities > Charitable Immunity

HN18 Specific Immunities, Charitable Immunity
The New Jersey Charitable Immunity Act, N.J. Stat. Ann. § 2A:53A-7 (2011), confers immunity on nonprofit entities organized for a charitable purpose as well as on the volunteers of those entities. More like this Headnote

Shepardize - Narrow by this Headnote (1)

Torts > ... > Defenses > Specific Immunities > Charitable Immunity

HN19 Specific Immunities, Charitable Immunity
See N.J. Stat. § 2A:53A-7(a). More like this Headnote

Shepardize - Narrow by this Headnote (0)

Torts > ... > Defenses > Specific Immunities > Charitable Immunity

HN20 Specific Immunities, Charitable Immunity
See N.J. Stat. § 2A:53A-7.1(b). More like this Headnote

Shepardize - Narrow by this Headnote (0)

Torts > ... > Defenses > Specific Immunities > Charitable Immunity

HN21 Specific Immunities, Charitable Immunity
There is no requirement in the New Jersey Charitable Immunity Act, N.J. Stat. Ann. § 2A:53A-7 (2011), that an entity must be free to be organized for a charitable purpose. More like this Headnote

Shepardize - Narrow by this Headnote (1)

Governments > Federal Government > Employees & Officials
Healthcare Law > ... > Actions Against Facilities > Governmental & Nonprofit Liability >
Federal Tort Claims Act
Public Health & Welfare Law > Healthcare > General Overview
Torts > ... > Liability > Federal Tort Claims Act > Employees

HN22 Federal Government, Employees & Officials
Under 42 U.S.C.S. § 233(o), a volunteer physician is deemed to be an employee of the Public Health Service (PHS) but only for purposes of 42 U.S.C.S. § 233. Section 233 does not provide for remuneration for employees of the PHS; rather, that section addresses only civil actions or proceedings against commissioned officers or

employees of the PHS, and provides that an action under the Federal Tort Claims Act, 28 U.S.C.S. §§ 1346, 2671-2680, is the exclusive basis for such suits. 42 U.S.C.S. § 233(a). Accordingly, persons "deemed" to be employees of the PHS under 42 U.S.C.S. § 233(o) are not federal employees receiving compensation for their work by the federal government to the end that they are no longer rendering their services as "volunteers" at a free clinic. To the contrary, the employee designation is a legal construct effective only for the purposes of § 233. In addressing the status of health care practitioners at clinics receiving 42 U.S.C.S. § 254b funding who similarly are deemed PHS employees, it has been noted that health care workers at private clinics, even ones receiving some federal aid, are not federal employees in the usual sense. After all, they do not perform a traditional government function or work in a government building, and they are not on the federal payroll. More like this Headnote

Shepardize - Narrow by this Headnote (14) 1 2

Governments > Federal Government > Employees & Officials
Public Health & Welfare Law > Healthcare > General Overview

HN23 Federal Government, Employees & Officials
Under 42 U.S.C.S. § 233(o)(2)(D), an individual must not receive recompense, i.e., he or she must render "volunteer services," to be deemed an employee of the Public Health Service. More like this Headnote

Shepardize - Narrow by this Headnote (1) 1

Constitutional Law > Supremacy Clause > Federal Preemption

HN24 Supremacy Clause, Federal Preemption
The Supremacy Clause invalidates state law that interferes with or is contrary to federal law. Federal law can supersede state law in three ways: (1) express preemption, (2) field preemption, and (3) conflict preemption. Conflict preemption nullifies state law inasmuch as it conflicts with federal law, either where compliance with both laws is impossible or where state law erects an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. More like this Headnote

Shepardize - Narrow by this Headnote (2)

Healthcare Law > ... > Actions Against Facilities > Governmental & Nonprofit Liability > Federal Tort Claims Act
Public Health & Welfare Law > Healthcare > General Overview
Torts > ... > Defenses > Specific Immunities > Charitable Immunity
View more legal topics

HN25 Governmental & Nonprofit Liability, Federal Tort Claims Act
Congress has waived the sovereign immunity of the United States for tort actions against volunteer physicians "deemed" federal employees under 42 U.S.C.S. § 233(o), and thereby has provided that a claim against the United States under the Federal Tort Claims Act is an injured party's exclusive remedy in such circumstances. However, 28 U.S.C.S. § 2674, which permits the United States to invoke the defense provided by the New Jersey Charitable Immunity Act, N.J. Stat. Ann. § 2A:53A-7 (2011), circumscribes that waiver. The government consents to be liable to private parties and may yield this consent upon such terms and under such restrictions as it may think just. More like this Headnote

Shepardize - Narrow by this Headnote (18) 2

Constitutional Law > Supremacy Clause > Federal Preemption
Healthcare Law > ... > Actions Against Facilities > Governmental & Nonprofit Liability > Federal Tort Claims Act
Torts > ... > Defenses > Specific Immunities > Charitable Immunity
View more legal topics

HN26 Supremacy Clause, Federal Preemption
Each of the 50 states has passed laws to limit the liability of volunteers in a variety of circumstances. 42 U.S.C.S. § 233(o) does not preempt those laws beyond the preemption provided in the Federal Tort Claims Act, 28

U.S.C.S. §§ 1346, 2671-2680. Instead, the United States shall be liable in the same manner and to the same extent as a private individual in the same circumstances under state law. More like this Headnote

Shepardize - Narrow by this Headnote (7)

Torts > ... > Liability > Federal Tort Claims Act > Employees

HN27 **Federal Tort Claims Act, Employees**

The "exclusive remedy" provision of the Federal Tort Claims Act, 28 U.S.C.S. §§ 1346, 2671-2680, is intended to substitute the United States as the solely permissible defendant. Therefore, suits against federal employees are precluded even where the United States has a defense which prevents an actual recovery. Congress has recognized that the required substitution of the United States as the defendant in tort suits filed against government employees will sometimes foreclose a tort plaintiff's recovery altogether. More like this Headnote

Shepardize - Narrow by this Headnote (5)

Torts > Malpractice & Professional Liability > Healthcare Providers

HN28 **Malpractice & Professional Liability, Healthcare Providers**

To state a prima facie case of medical malpractice in New Jersey, ordinarily a plaintiff must present expert testimony establishing (1) the applicable standard of care; (2) a deviation from that standard of care; and (3) that the deviation proximately caused the injury. More like this Headnote

Shepardize - Narrow by this Headnote (1)

Evidence > ... > Testimony > Expert Witnesses > Qualifications

Torts > Malpractice & Professional Liability > Healthcare Providers

HN29 **Expert Witnesses, Qualifications**

As part of an effort at comprehensive tort reform and to counter a severe increase in medical malpractice liability insurance premiums, in 2004 the New Jersey Legislature enacted the New Jersey Medical Care Access and Responsibility and Patients First Act, N.J. Stat. Ann. §§2A:53A-37 to 2A:53A-42 (2011). Among other things, the Access and Responsibility Act provides more detailed standards for a testifying expert, generally requiring the challenging expert to be equivalently qualified to the defendant. More like this Headnote

Shepardize - Narrow by this Headnote (2)

Evidence > ... > Testimony > Expert Witnesses > Qualifications

Torts > Malpractice & Professional Liability > Healthcare Providers

HN30 **Expert Witnesses, Qualifications**

See N.J. Stat. Ann. § 2A:53A-41. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Evidence > ... > Testimony > Expert Witnesses > Qualifications

Torts > Malpractice & Professional Liability > Healthcare Providers

HN31 **Expert Witnesses, Qualifications**

N.J. Stat. Ann. § 2A:53A-41(b) governs the scenario in which a defendant health-care provider is a "general practitioner." Thus, the statute sets forth three distinct categories embodying this kind-for-kind rule: (1) those who are specialists in a field recognized by the American Board of Medical Specialties (ABMS) or American Osteopathic Association (AOA) but who are not board certified in that specialty; (2) those who are specialists in a field recognized by the ABMS or AOA and who are board certified in that specialty; and (3) those who are "general practitioners." More like this Headnote

Shepardize - Narrow by this Headnote (1)

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN32 **Reviewability of Lower Court Decisions, Preservation for Review**

Generally, failure to raise an issue in the district court results in its waiver on appeal. Nonetheless, the waiver rule is one of discretion rather than jurisdiction, and it may be relaxed whenever the public interest so warrants. When considering whether to address an issue not previously raised, a court considers whether the issue is a pure question of law where refusal to reach the issue would result in a miscarriage of justice or where the issue's resolution is of public importance. In considering a waiver claim, a court takes into account also the dual purposes of the doctrine: ensuring that the necessary evidentiary development occurs in the trial court, and preventing surprise to the parties when a case is decided on some basis on which they have not presented argument. More like this Headnote

Shepardize - Narrow by this Headnote (1)

Evidence > ... > Testimony > Expert Witnesses > Qualifications
Torts > Malpractice & Professional Liability > Healthcare Providers

HN33 **Expert Witnesses, Qualifications**

For purposes of determining whether a health care provider is an emergency medicine specialist under N.J. Stat. Ann. § 2A:53A-41, the American Board of Medical Specialties defines the specialty of emergency medicine as the immediate decision making and action necessary to prevent death or any further disability in both the pre-hospital setting by directing emergency medical technicians and in the emergency department. This specialty involves immediate recognition, evaluation, care, stabilization and disposition of a generally diversified population of adult and pediatric patients in response to acute illness and injury. The ABEM describes the practice of emergency medicine as beginning with the recognition of patterns in the patient's presentation that points to a specific diagnosis or diagnoses. Pattern recognition is both the hallmark and cornerstone of the clinical practice of emergency medicine, guiding the diagnostic tests and therapeutic interventions during the entire patient encounter. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Evidence > ... > Testimony > Expert Witnesses > Qualifications
Torts > Malpractice & Professional Liability > Healthcare Providers

HN34 **Expert Witnesses, Qualifications**

Where a medical malpractice defendant is a specialist or sub specialist, the person providing the testimony against him shall have specialized at the time of the occurrence that is the basis for the action in the same specialty or subspecialty. N.J. Stat. Ann. § 2A:53A-41(a). Further, where the defendant is board certified, the witness against him must also be board certified in the same specialty or subspecialty. Alternatively, the witness shall be a physician credentialed by a hospital to treat the condition or perform the procedure that is the basis of the claim, N.J. Stat. Ann. § 2A:53A-41(a)(1), and during the year immediately preceding the date of the occurrence that is the basis of the claim or action, shall have devoted a majority of his professional time to active clinical practice or teaching of the specialty or subspecialty. N.J. Stat. Ann. § 2A:53A-41(a)(2). The requirements imposed by N.J. Stat. Ann. § 2A:53A-41(a)(1) and (a)(2) have been labeled as "additional qualifications" an expert witness must meet beyond those delineated in N.J. Stat. Ann. § 2A:53A-41(a). More like this Headnote

Shepardize - Narrow by this Headnote (5) 1

Evidence > ... > Testimony > Expert Witnesses > Qualifications
Torts > Malpractice & Professional Liability > Healthcare Providers

HN35 **Expert Witnesses, Qualifications**

The Supreme Court of New Jersey has construed N.J. Stat. Ann. § 2A:53A-41(a) to require that an expert offering testimony against a board-certified specialist share that specialty and meet the requirements of either N.J. Stat. Ann. § 2A:53A-41(a)(1) or (a)(2). In this way, the court made clear that the hospital credential provision of N.J. Stat. Ann. § 2A:53A-41(a)(1) is an alternative to the board certification plus teaching or clinical practice requirements of N.J. Stat. Ann. § 2A:53A-41(a)(2), but it is not an alternative to the specialization requirement of N.J. Stat. Ann. § 2A:53A-41(a). More like this Headnote

Shepardize - Narrow by this Headnote (1)

Torts > ... > Employers > Scope of Employment > General Overview

View more legal topics

HN36 Employers, Scope of Employment

New Jersey courts apply the common law principle of respondeat superior liability, and thus in that state an employer can be found liable for the negligence of an employee causing injuries to third parties, if, at the time of the occurrence, the employee was acting within the scope of his or her employment. New Jersey law, however, does not include a requirement that a litigant include the allegedly negligent employee as a defendant in an action seeking to impose respondeat superior liability on an employer. Whether the employees were named as defendants is legally irrelevant to a defendant's liability for their conduct under the doctrine of respondeat superior. More like this Headnote

Shepardize - Narrow by this Headnote (1)

Civil Procedure > Parties > Joinder of Parties > Compulsory Joinder
Torts > Vicarious Liability > General Overview

HN37 Joinder of Parties, Compulsory Joinder

In cases not involving the New Jersey Tort Claims Act, N.J. Stat. Ann. § 59:2-2 (2011), in which a plaintiff seeks recovery on the theory of respondeat superior, there is no requirement that the plaintiff join as a defendant the individual upon whose act or failure to act vicarious liability is predicated. Indeed, the plaintiff has the option to sue the party vicariously liable for the conduct of an agent in one law suit and thereafter, pursue the agent in a separate suit. In such cases, the concept of mandatory joinder does not apply. A person injured by the negligence of an agent or servant may sue the agent or servant and the principal or master in one suit, or may proceed against them in separate suits. The rationale of the rule that a plaintiff is entitled to pursue all those who are independently liable to him for his harm until one full satisfaction is obtained is equally applicable whether the liability is actual or vicarious. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Business & Corporate Law > ... > Duties & Liabilities > Causes of Action & Remedies > General Overview
Civil Procedure > Parties > Joinder of Parties > Compulsory Joinder
Torts > Procedural Matters > Commencement & Prosecution > General Overview

HN38 Duties & Liabilities, Causes of Action & Remedies

Fed. R. Civ. P. 19 does not require the joinder of joint tortfeasors, nor does it require joinder of principal and agent. It has long been the rule that it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit. More like this Headnote

Shepardize - Narrow by this Headnote (4)

Civil Procedure > Parties > Joinder of Parties > General Overview

HN39 Parties, Joinder of Parties

Under New Jersey law, a party to any litigation is obligated to reveal the existence of any non-party who should be joined or who might have potential liability to any party on the basis of the same transactional facts. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview
Governments > Courts > Judicial Precedent

HN40 Preliminary Considerations, Federal & State Interrelationships

In the absence of a controlling decision by a state's supreme court, a federal court must predict how it would rule if faced with the issue. In making this prediction, the federal court looks to decisions of state intermediate appellate courts, of federal courts interpreting that state's law, and of other state supreme courts that have addressed the issue, as well as to analogous decisions, considered dicta, scholarly works, and any other reliable data tending convincingly to show how the highest court in the state would decide the issue at hand. More like this Headnote

Shepardize - Narrow by this Headnote (3) 1

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview
Governments > Legislation > Interpretation

HN41 **Preliminary Considerations, Federal & State Interrelationships**
In interpreting a state statute, a federal court first examines its text as the state's supreme court would do in any case of statutory interpretation. The analysis begins with the plain language of the statute. If the language is plain and clearly reveals the statute's meaning, the court's sole function is to enforce the statute according to its terms. If the statute suggests more than one interpretation, the broader legislative scheme, its history, and relevant sponsor statements may also inform the court's interpretation in light of the statute's overall policy and purpose. In interpreting a statute, the state courts' overriding goal must be to determine the legislature's intent.
More like this Headnote

Shepardize - Narrow by this Headnote (2)

Evidence > ... > Testimony > Expert Witnesses > Qualifications
Healthcare Law > Healthcare Litigation > Actions Against Healthcare Workers > Doctors & Physicians
Torts > Malpractice & Professional Liability > Healthcare Providers

HN42 **Expert Witnesses, Qualifications**
N.J. Stat. Ann. § 2A:53A-41(a) applies to a health care provider only if she is a specialist or subspecialist recognized by the American Board of Medical Specialties (ABMS) or the American Osteopathic Association (AOA) and the care or treatment at issue involves that specialty or subspecialty recognized by the ABMS or AOA. N.J. Stat. Ann. § 2A:53A-41. The ABMS is made up of Member Boards, including the American Board of Emergency Medicine, which are responsible for certifying physicians. Similarly, the AOA oversees Specialty Certifying Boards, which certify doctors of osteopathic medicine. Thus, it would seem that N.J. Stat. Ann. § 2A:53A-41(a) applies only to persons offering testimony against specialized or licensed physicians. More like this Headnote

Shepardize - Narrow by this Headnote (1)

Evidence > ... > Testimony > Expert Witnesses > Qualifications
Healthcare Law > Healthcare Litigation > Actions Against Healthcare Workers > Doctors & Physicians
Torts > Malpractice & Professional Liability > Healthcare Providers

HN43 **Expert Witnesses, Qualifications**
N.J. Stat. Ann. § 2A:53A-41(a)(2)(a) provides that an expert must be engaged in the active clinical practice of the same health care profession in which the defendant is licensed, and § 2A:53A-41(a)(2)(b) provides similarly that the expert must have participated in the instruction of students in the same health care profession in which the defendant is licensed. This language, of course, gives rise to the inference that the statute encompasses more than one type of health care profession. Nevertheless, these provisions apply only in the circumstance that the defendant is board-certified in a specialty that the American Board of Medical Specialties or American Osteopathic Association recognizes, and those entities recognize specialties only for physicians. More like this Headnote

Shepardize - Narrow by this Headnote (1)

Evidence > ... > Testimony > Expert Witnesses > Qualifications
Healthcare Law > Healthcare Litigation > Actions Against Healthcare Workers > Doctors & Physicians
Torts > Malpractice & Professional Liability > Healthcare Providers

HN44 **Expert Witnesses, Qualifications**
Considering the text of the statute as a whole, N.J. Stat. Ann. § 2A:53A-41(a) applies only to physicians. More like this Headnote

Shepardize - Narrow by this Headnote (0)

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For David Hyppolite, M.D.: Martin J. McGreevy, Oakhurst, NJ.

Judges: BEFORE: McKEE, Chief Judge, and FUENTES and GREENBERG, Circuit Judges.

Opinion by: GREENBERG

Opinion

[*367] OPINION OF THE COURT

GREENBERG, Circuit Judge.

I. INTRODUCTION

This matter comes on before this Court on appeal from the District Court's March 18, 2011 order implementing a comprehensive opinion granting motions that certain defendants, now the appellees in this appeal, brought seeking [**2] summary judgment. See Lomando v. United States, No. 08-4177, 2011 U.S. Dist. LEXIS 28116, 2011 WL 1042900 (D.N.J. Mar. 18, 2011). Appellant Ines Lomando ("Lomando"), as administratix ad prosequendum of the estate of her daughter, Laura Lomando ("Laura"), brought this medical malpractice and wrongful death action against parties involved in Laura's health **[*368]** care that culminated in her death on September 21, 2006. For the reasons that follow, we will affirm in part, reverse in part, and remand the case to the District Court for further proceedings with respect to one defendant.

II. FACTUAL and PROCEDURAL HISTORY

On August 23, August 28, September 9, and September 11, 2006, Laura sought and received treatment at the Parker Family Health Center ("Parker Health"), a free New Jersey nonprofit health clinic, for an area of swelling on the left side of her neck. Three volunteer physicians at Parker Health, Drs. Zaven Ayanian, Lynn Helmer, and Timothy Sullivan, none of whom has been a party in this case, cared for Laura during these visits. Effective in January 2006, and during all periods that Laura received treatment from Parker Health, the United States Department of Health and Human Services deemed those physicians to be [**3] Public Health Service ("PHS") employees pursuant to a provision of the Public Health Service Act ("PHSA"), as amended, 42 U.S.C. § 233(o). By virtue of that designation, the physicians fell within the scope of the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346, 2671-2680, which precluded a suit against them individually for their services at Parker Health and substituted a suit against the United States as the exclusive remedy for their alleged malpractice.

In September 2006, Laura also sought treatment for her swollen neck and other symptoms at the Riverview Medical Center's Emergency Room Department, a facility where the physicians did not enjoy the PHSA and FTCA protections from litigation shielding the Parker Health physicians. Specifically, Laura visited Riverview on September 3, 5, 15, and 20, 2006, where Ms. Theresa Biedenbach, a physician assistant, and Drs. Stephanie Reynolds, Trevor Talbert, and David Hyppolite evaluated her. Laura's September 20 visit to Riverview would be her last, for the next day she died of spontaneous tumor lysis syndrome caused by an underlying condition of non-Hodgkins lymphoma.

Lomando filed suit under the FTCA and New Jersey law in the District [**4] Court on August 20, 2008, and filed an amended complaint on September 30, 2008. [1] She named the following defendants in the action: the United States, Parker Health, Riverview Medical Center, Drs. Reynolds, Talbert, and Hyppolite, and Emergency Physician Associates of North Jersey, P.C. ("Emergency Physician Associates"), the employer of the three individual defendants and Ms. Biedenbach. Lomando, however, did not include Ms. Biedenbach as a defendant, an omission that, as we shall see, had significant consequences in this litigation.

On February 23, 2011, the District Court granted Parker Health's unopposed motion for summary judgment predicated on its claim of immunity under the New Jersey Charitable Immunity Act, which we discuss at length below. Inasmuch as Lomando is not challenging this disposition Parker Health is not participating in this appeal. On March 18, 2011, the

District Court granted summary judgment to all remaining defendants except Dr. Hyppolite who did not seek summary judgment, but in the exercise of its discretion the Court declined [**5] to exercise supplemental jurisdiction over the claims against him and therefore the action was terminated in **[*369]** the District Court. 2

The District Court had different reasons for granting the contested motions for summary judgment to different defendants. The Court granted summary judgment to Riverview Medical Center because Lomando failed to provide expert testimony against Riverview as required to establish a prima facie case of liability for medical malpractice under New Jersey law. We, however, are not concerned with this disposition as Lomando does not challenge it on this appeal. Thus, Riverview, like Parker Health, is not participating in this appeal.

The District Court addressed two distinct but related questions in dealing with Lomando's FTCA claim against the United States. The United States contended that because a provision of the FTCA, 28 U.S.C. § 2674, provides that the United States "shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim," [**6] the United States was entitled to claim any immunity available to the volunteer physicians of Parker Health. In support of this claim of immunity, the United States invoked the Volunteer Protection Act of 1997 ("WA"), 42 U.S.C. § 14503(a), which immunizes volunteers of nonprofit organizations and governmental entities from claims alleging negligence based on acts committed within the scope of such volunteerism, and the New Jersey Charitable Immunity Act ("NJCIA"), N.J. Stat. Ann. § 2A:53A-7 (West 2011), which immunizes charitable nonprofit entities and their volunteers from liability for negligence in similar circumstances. Lomando countered that 28 U.S.C. § 2674 did not permit the United States to rely on immunities available to the volunteer physicians at Parker Health because under the FTCA "the [U]nited States stands in the shoes of the nonprofit health center and may assert only those immunities available to such centers under federal and state law." Lomando, 2011 U.S. Dist. LEXIS 28116, 2011 WL 1042900, at *5.

The parties' contentions thus raised the independent but intertwined questions of: first, whether under the FTCA the United States assumes the role of a similarly-placed private employer or stands in [**7] the shoes of the immunized employee, and, second, whether under the FTCA the United States can assert its employees' immunities and defenses. The District Court dealt with these questions first by citing variant case law that illustrated that the United States has been equated to both a private employer and an immunized employee in FTCA cases. Shifting its analysis, the Court then examined section 2674, and stated that the text "strongly suggests that it permits the United States to assert immunities available to its employees." 2011 U.S. Dist. LEXIS 28116, [WL] at *6. Ultimately, however, the Court did not rule on either issue, but, instead, held that under the NJCIA both Parker Health, as a nonprofit health center, and Drs. Ayanian, Helmer, and Sullivan, as volunteer physicians at Parker Health, are immune from suit. 3 Accordingly, the Court concluded that pursuant to section 2674 the United States is entitled to the immunity from suit that the **[*370]** NJCIA granted, regardless of whether it derived that immunity from the immunity of Parker Health or the individual physicians. 4

The District Court held that Drs. Reynolds and Talbert, physicians who evaluated Laura at Riverview, were entitled to summary judgment because Lomando's experts' qualifications failed to meet the requirements of N.J. Stat. Ann. § 2A:53A-41 (West 2011) with respect to witnesses in medical malpractice actions. That statute ordinarily requires that in cases alleging medical malpractice by a health practitioner in a medically-recognized specialty where the care at issue involved that specialty, a plaintiff must offer expert testimony from a practitioner in that same specialty. In this regard, the Court held that because Drs. Reynolds and Talbert are board-certified specialists in emergency medicine, a specialty that the American Board [**9] of Medical Specialties recognizes, and Laura's care involved emergency medicine, Lomando was required to produce expert testimony from specialists in emergency medicine. Thus, statements that Lomando's experts, Drs. Mark Fialk and James Hayes, neither of whom is an emergency medicine specialist, submitted were insufficient to satisfy N.J. Stat. Ann. § 2A:53A-41.

Finally, the Court concluded that Emergency Physician Associates was entitled to summary judgment because Lomando had not produced any expert statements alleging that it had deviated from the applicable standard of care, apart from the testimony against Drs. Reynolds and Talbert that the Court had rejected. 5 In granting Emergency Physician Associates summary judgment, the Court declined to consider statements that Lomando's experts submitted alleging deviations from the applicable standard of care by Emergency Physician Associates' employee, Ms. Biedenbach, because Lomando "ha[d] not named [Ms. Biedenbach] as a defendant." Lomando, 2011 U.S. Dist. LEXIS 28116, 2011 WL 1042900, at *10 n.10.

Lomando asserts that the District Court erred in holding that the United States is immune from suit under the NJCIA, as she contends that: (1) the physicians at Parker Health were not "volunteers" for purposes of the NJCIA because they were "employees" of the Public Health Service and (2) the decision permitting the United States to avail itself of the NJCIA immunity conflicted with the scheme that the FTCA envisioned and thus created a conflict between state and federal law. Lomando also argues that the Court erred in its conclusion that N.J. Stat. Ann. § 2A:53A-41 applies

[**11] to the present case, and contends that Drs. Reynolds and Talbert provided care that did not involve the practice of emergency medicine. Alternatively, Lomando asserts that even if that statute applies, Dr. Fialk's qualifications were sufficient for him to give expert testimony in this case. Finally, Lomando challenges **[*371]** the Court's decision not to consider treatment that Ms. Biedenbach provided to Laura in support of Lomando's claims against Emergency Physician Associates.

III. JURISDICTION and STANDARD of REVIEW

The District Court had jurisdiction over Lomando's FTCA claims pursuant to 28 U.S.C. § 1346(b), and over her state law claims pursuant to 28 U.S.C. § 1367(a). We have jurisdiction under 28 U.S.C. § 1291.

HN1 We exercise plenary review over the order granting appellees summary judgment, applying the same standard that the District Court applied. See Knopick v. Connelly, 639 F.3d 600, 606 (3d Cir. 2011); Azur v. Chase Bank, USA, Nat'l Ass'n, 601 F.3d 212, 216 (3d Cir. 2010). In this plenary review, we can affirm the summary judgment only if "there [wa]s no genuine issue as to any material fact and the [prevailing defendants were] entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); [**12] see also Melrose, Inc. v. City of Pittsburgh, 613 F.3d 380, 387 (3d Cir. 2010). A genuine dispute is one that "may reasonably be resolved in favor of either party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986). A material fact is one "that might affect the outcome of the suit under the governing law." Id. at 248, 106 S.Ct. at 2510. We must view the record in the light most favorable to Lomando as the non-moving party, and we must draw all reasonable inferences that the record supports in her favor. See Kaucher v. Cnty. of Bucks, 455 F.3d 418, 423 (3d Cir. 2006). To the extent that the District Court's opinion contains conclusions of law, our review is de novo. See Azur, 601 F.3d at 216.

IV. DISCUSSION and ANALYSIS

(1) Whether the District Court erred as a matter of law in determining that the United States is immune from suit under the NJCIA, N.J. Stat. Ann. § 2A:53A-7(a), and 28 U.S.C. §2674?

(a) The Role of the United States under the FTCA and 42 U.S.C. §233(o)

HN2 Under 42 U.S.C. § 254b(c)(1)(A), the government "may make grants to public and nonprofit private entities for projects to plan and develop health centers which will serve medically underserved [**13] populations." As the court described in Wilson v. Big Sandy Health Care, Inc., 576 F.3d 329, 333 (6th Cir. 2009), "[i]n part due to the relatively high cost of obtaining malpractice insurance for treatment of . . . high-risk patients . . . the efforts to provide necessary medical care in ... underserved areas initially faced significant roadblocks." In response, Congress passed the Federally Supported Health Centers Assistance Act of 1992 ("1992 Act"), Pub. L. No. 102-501, 106 Stat. 3268 (codified as amended at 42 U.S.C. §§ 201, 233).

HN3 The 1992 Act created a process by which "public and nonprofit private entities" receiving federal funds pursuant to 42 U.S.C. § 254b(c)(1)(A) and health practitioners that such entities employ "shall be deemed to be [employees] of the Public Health Service." 42 U.S.C. § 233(g)(1)(A). This treatment of health care centers receiving section 254b funding and practitioners at them is highly significant, for an action against the United States under the FTCA is the exclusive remedy for persons alleging "personal injury, including death, resulting from the performance of medical ... or related functions" by Public Health Service employees acting within the scope [**14] of their employment. 42 U.S.C. § 233(a); **[*372]** see also 42 U.S.C. § 233(g)(1)(A) (reiterating subsection 233(a)'s exclusivity clause).

HN4 In 1996 in an effort to "expand access to health care services to low-income individuals in medically underserved areas," H.R. Rep. No. 104-736, at 234 (1996) (Conf. Rep.), reprinted in 1996 U.S.C.C.A.N. 1990, 2091, Congress conferred the same deemed "employee" status and attendant FTCA coverage on a second and distinct category of persons: health practitioners who volunteer at free clinics. See Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), Pub. L. No. 104-191, § 194, 110 Stat. 1936, 1988-91 (1996) (codified as amended at 42 U.S.C. §233(o)). Congress did not condition the award of this immunity on the government making grants to the clinics. Under the HIPAA, volunteer health practitioners who at free clinics provide a "qualifying health service" "shall in providing services for the free clinic, be deemed to be [employees] of the Public Health Service." 42 U.S.C. § 233(o)(1). 6 The HIPAA likewise made explicit that an FTCA action against the United States is the sole remedy through which medical malpractice and similar claims may be [**15] brought on account of the services of such volunteers. See 42 U.S.C. § 233(o)(5). In this case, the physicians who treated Laura at Parker Health were deemed employees of the Public Health Service pursuant to 42 U.S.C. § 233(o) because Parker Health is a free clinic and the physicians there provided their services as volunteers. 7 See app. at 215 (Letter from Department of Health and Human Services to Volunteers in Health (Jan. 27, 2006) (deeming Parker Health physicians employees of PHS pursuant to 42 U.S.C. §233(o)).

HN6 Subject to exceptions not at issue in this case, the FTCA waives the sovereign immunity of the United States in its district courts for tort claims "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, under circumstances [in which] the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1). HN7 Section 1346 contains two basic principles that govern FTCA claims.

First, "the FTCA does not itself create a substantive cause of action against the United States; rather, it provides a mechanism for bringing a state law tort action against the federal government in federal court." In re Orthopedic Bone Screw Prod. Liab. Litig., 264 F.3d 344, 362 (3d Cir. 2001); see also CNA v. United States, 535 F.3d 132, 141 (3d Cir. 2008) [**17] ("The cause of action in an FTCA claim . . . must come from state tort law."). Accordingly, "the extent of the United States' liability under the FTCA is generally determined by reference to state law." In re **[*373]** Orthopedic, 264 F.3d at 362 (internal quotation marks and citation omitted); see also Santos ex rel. Beato v. United States, 559 F.3d 189, 193 (3d Cir. 2009) (noting that "substantively the FTCA follows state liability law"). The parties agree that because Laura's treatment and death were in New Jersey, the law of that state is applicable here.

Second, the United States is liable only to the extent that in the same circumstances the applicable local law would hold "a private person" responsible. 28 U.S.C. § 1346(b)(1). Congress reiterated that precept in 28 U.S.C. § 2674, which provides that the United States is answerable under the FTCA "in the same manner and to the same extent as a private individual under like circumstances." See also United States v. Olson, 546 U.S. 43, 46, 126 S.Ct. 510, 512, 163 L. Ed. 2d 306 (2005) ("Our cases have consistently adhered to this 'private person' standard."). The FTCA's provision that the United States shall be liable to the same extent as "a private person" [**18] or "private individual" does not specify whether the United States is liable to the extent that a similarly-placed private employer would be liable or to the extent its employee if not an employee of the federal government would be liable. Seemingly, this omission has engendered the variant case law that the District Court cited.

We addressed this distinction between employer and employee in McSwain v. United States, 422 F.2d 1086, 1087-88 (3d Cir. 1970), in which we clarified that HN8 the United States occupies the role of a similarly-placed private employer under the FTCA:

> Under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2674, the United States is liable for injury caused by the negligent act of a government employee to the same extent a private employer would be liable. Such liability for the acts or omissions of a civilian or military federal employee is determined by the law of respondeat superior of the state in which the act or omission occurred.

(citing Williams v. United States, 350 U.S. 857, 76 S.Ct. 100, 100 L. Ed. 761 (1955)); see also Matsko v. United States, 372 F.3d 556, 561 (3d Cir. 2004) (distinguishing plaintiff's claim that United States failed to protect him from an intentional [**19] tort by a government employee from traditional FTCA "respondeat superior claim for" the government employee's actions). 8

[*374] HN9 The Supreme Court likewise has described the United States' role under the FTCA as equivalent to that of an employer answering under respondeat superior liability. In Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 427, 115 S.Ct. 2227, 2232, 132 L. Ed. 2d 375 (1995), the Court observed that where the United States certifies in response to an FTCA claim that an employee was acting within the scope of his employment with respect to his actions concerning the claim, "the United States, by certifying, is ... exposing itself [**21] to liability as would any other employer at common law who admits that an employee acted within the scope of his employment." (citing Restatement (Second) of Agency § 219 (1958)) (emphasis added); Lamagno, 515 U.S. at 420, 115 S.Ct. at 2229 ("Generally, [FTCA] cases unfold much as cases do against other employers who concede respondeat superior liability."); see also Laird v. Nelms, 406 U.S. 797, 801, 92 S.Ct. 1899, 1901-02, 32 L. Ed. 2d 499 (1972) ("Congress intended to permit liability essentially based on the intentionally wrongful or careless conduct of Government employees, for which the Government was to be made liable according to state law under the doctrine of respondeat superior . . . .").

HN10 Looking to the text of the FTCA, we note that the act shadows precisely the common law of respondeat superior liability, providing that the United States is subject to suit for the negligent acts of "any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 1346(b)(1) (emphasis added); see 1 S. Speiser, C. Krause, & A. Gans, The American Law of Torts § 4.3, pp. 581-82 (2003) ("[I]t is hornbook law that the doctrine of respondeat superior renders an employer or [**22] master vicariously liable for a tort committed by his employee or servant while acting within the scope of employment."); Restatement (Third) of Agency § 2.04 ("An employer is subject to liability for torts committed by employees acting within the scope of their employment."). Thus, the plain language of the FTCA, which treats the United States as liable for the tortious actions of its employees, creates a remedial scheme under which the United States would be liable as an employer in like circumstances. See also 28 U.S.C. § 2671 note ("The United States, through the Federal Tort Claims Act, is responsible to injured persons for the common law torts of its employees in the same manner in which the common law historically has recognized the responsibility of an employer for torts committed by its employees within the scope of their employment.") (emphasis added).

In sum, ***HN11*** the FTCA provides that the United States will be liable to the extent that a private employer would be liable in similar circumstances in the same locality. In this case, then, the United States stands in the shoes that a similarly-placed private employer of the physicians, i.e., a free non-profit health center, would [**23] stand and answers for the allegedly tortious conduct of the United States' deemed employees, the volunteer physicians at that health center. 9 We turn now to the question **[*375]** of what defenses the United States may invoke in that position.

(b) The Defenses of the United States under the FTCA

HN13 In 1988, Congress clarified the terms of the United States' waiver of sovereign immunity under the FTCA through the Federal Employees Liability Reform and Tort Compensation Act of 1988 ("Westfall Act"), Pub. L. No. 100-694, 102 Stat. 4563 (codified as amended at scattered portions of the United States Code). The Westfall Act provided for absolute immunity to federal employees in the wake of Westfall v. Erwin, 484 U.S. 292, 108 S.Ct. 580, 98 L. Ed. 2d 619 (1988), [**25] by making suit against the United States under the FTCA the exclusive remedy for negligent or wrongful acts by federal employees committed within the scope of employment. 10 As significant to this case, the Westfall Act also added the following provision to the FTCA:

> ***HN14*** With respect to any claim under [the FTCA], the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

28 U.S.C. § 2674. ***HN15*** The text of section 2674 is straightforward, and its import clear. See United States v. Gregg, 226 F.3d 253. 257 (3d Cir. 2000) ("If the language of the statute expresses Congress's intent with sufficient precision, the inquiry ends there and the statute is enforced according to its terms."). The United States as the employer may assert any defense rooted in judicial or legislative immunity which would have been available to its employee had he not been a deemed employee of the PHS and, instead, had been a defendant in the action at hand. In this case, section 2674 thus [**26] allows the United States to avail itself of any judicially- or legislatively-based immunity to which the individual physicians — its employees for purposes of the FTCA — would have been entitled if they were the defendants. This provision for immunity is superimposed on Congress's intent in enacting the FTCA to position the United States for liability purposes in the position of a private employer.

It is important to note that ***HN16*** section 2674 does not state exhaustively those defenses to which the United States is entitled; rather, it reserves explicitly the United **[*376]** States' right to assert "any other defenses to which [it] is entitled." The "other defenses" to which the United States is entitled include not only those defenses the United States may invoke independently, but also any defenses available to a similarly-placed [**27] private employer answering for the alleged torts of its employee. In this vein, ***HN17*** Congress clarified in the report accompanying the Westfall Act that "the specific designation of these immunities does not imply that traditional common law defenses are not available. . . . [O]rdinary tort defenses, such as contributory negligence, assumption of risk, estoppels, waiver and res judicata, as applicable, continue to be available to the United States." H.R. Rep. No. 100-700, at 4 (1988). reprinted in 1988 U.S.C.CA.N. 5945, 5948; see also id., at 7, 1988 U.S.C.CA.N. at 5952 (28 U.S.C. § 2674 "would authorize the United States to utilize all of the defenses to which it is independently entitled."). Defenses available to a similarly-placed employer may be rooted in the common law, or they may be created statutorily, as in the case of the immunity conferred on charitable nonprofit entities and their volunteers under the NJCIA. Of course, the actual availability, vel non, of these defenses generally will depend on the law of the state in which the allegedly wrongful act occurred because the applicable state law defines the scope of the United States' liability under the FTCA. See, e.g., Rodriquez v. United States, 823 F.2d 735, 741-44, 745 (3d Cir. 1987) [**28] (New Jersey law on comparative negligence established extent to which recovery by plaintiffs against United States could be limited in FTCA case).

Having determined the scope of the defenses available to the United States in an action under the FTCA, we decide now whether the NJCIA provides an immunity defense in this case. ***HN18*** The NJCIA, N.J. Stat. Ann. § 2A:53A-7, confers immunity on nonprofit entities organized for a charitable purpose as well as on the volunteers of those entities. The act reads, in pertinent part:

> HN19 No nonprofit corporation, society or association organized exclusively for . . . charitable . . . purposes or its ... volunteers shall . . . be liable to respond in damages to any person who shall suffer damage from the negligence of any agent or servant of such corporation . . . where such person is a beneficiary, to whatever degree, of the works of such nonprofit corporation . . . .

N.J. Stat. § 2A:53A-7(a). A further provision of the NJCIA provides similarly that HN20 "no person who provides volunteer services or assistance for any nonprofit corporation . . . shall be liable in any action for damages as a result of his acts of commission or omission arising out of and in the [**29] course of his rendering the volunteer service or assistance." N.J. Stat. § 2A:53A-7.1(b). 11

Lomando concedes that if the volunteer physicians "were not deemed federal employees and if they were named defendants in a state court action [for the injuries involved in this case] they would be immune from liability under [the NJCIA]." Appellant's br. at 13. 12 Nevertheless, Lomando contends that "once [the volunteer **[*377]** physicians] are deemed federal employees, they should no longer be viewed as volunteers." Id. at 12. Lomando bases this argument on the theory that "the definition of an employee is directly contrary to that of a volunteer," with the former expecting some form of compensation and the latter rendering his or her services without such an expectation. Id. Lomando asserts, as well, that a decision applying the statutory immunity derived from the NJCIA in this case would contravene the Supremacy Clause of the United States Constitution, U.S. Const. art. VI cl. 2, because the NJCIA provides an immunity defense that is inconsistent with [**30] the remedial scheme of recovery in 42 U.S.C. §233 and the FTCA. Id. at 16. We find both of these contentions unpersuasive.

Lomando fundamentally misapplies the effect of the physicians' "deemed" employee designation. HN22 Under 42 U.S.C. § 233(o), a volunteer physician is "deemed to be an employee of the Public Health Service" but only "[f]or purposes of [42 U.S.C. §233]." Section 233 does not provide for remuneration for employees of the PHS; rather, that section addresses only "[c]ivil actions or proceedings against commissioned officers or employees" of the PHS, and provides that an action under the FTCA is the exclusive basis for such suits. See 42 U.S.C. § 233(a). Accordingly, persons "deemed" to be employees of the PHS under 42 U.S.C. § 233(o) are not federal employees receiving compensation for their work by the federal government to the [**31] end that they are no longer rendering their services as "volunteers" at a free clinic. To the contrary, the employee designation is a legal construct effective only for the purposes of section 233. In addressing the status of health care practitioners at clinics receiving section 254b funding who similarly are deemed PHS employees, we have noted that "[h]ealth care workers at private clinics, even ones receiving some federal aid, are not federal employees in the usual sense. After all, they do not perform a traditional government function or work in a government building, and they are not on the federal payroll." Santos, 559 F.3d at 200 (quoting Santos ex rel. Beato v. United States, 523 F. Supp. 2d 435, 442 (M.D. Pa. 2007)) (internal quotation marks omitted). 13

Lomando's contention that the Supremacy Clause abrogates the NJCIA in the context of this case likewise fails. HN24 The Supremacy Clause invalidates state law that "interferes with or is contrary to federal law." Free v. Bland, 369 U.S. 663, 666, 82 S.Ct. 1089, 1092, 8 L. Ed. 2d 180 (1962) (citing Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 210, 6 L.Ed. 23 (1824)). Federal law can supersede state law in three ways: (1) express preemption, (2) field preemption, and (3) conflict preemption. Farina v. Nokia Inc., 625 F.3d 97, 115 (3d Cir. 2010) (citing Hillsborough Cnty. v. Automated Med. Labs., Inc., 471 U.S. 707, 713, 105 S.Ct. 2371, 2375, 85 L. Ed. 2d 714 (1985)). Lomando bases her Supremacy Clause argument on conflict preemption, which "nullifies state law inasmuch as it conflicts with federal law, either where compliance with both laws is impossible or where state law erects an 'obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" Farina, 625 F.3d at 115 (quoting Hillsborough **[*378]** Cnty., 471 U.S. at 713, 105 S.Ct. at 2375). Lomando urges that under 42 U.S.C. § 233(a) Congress intended to provide a means of financial recovery for tort [**33] victims injured by volunteer physicians and "[r]ecoveries that are allowed under [s]ection 233(a) should not be immunized by state law," because that immunization leaves victims without a remedy. Appellant's br. at 17.

It is true that HN25 Congress has waived the sovereign immunity of the United States for tort actions against volunteer physicians "deemed" federal employees under 42 U.S.C. § 233(o), and thereby has provided that a claim against the United States under the FTCA is an injured party's exclusive remedy in such circumstances. However, 28 U.S.C. §2674, which permits the United States to invoke the defense provided by the NJCIA, circumscribes that waiver. See United States v. Jicarilla Apache Nation, ___ U.S. ___, ___, 131 S. Ct. 2313, 2323, 180 L. Ed. 2d 187 (2011) ("The Government consents to be liable to private parties 'and may yield this consent upon such terms and under such restrictions as it may think just.'" (quoting Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 283, 15 L. Ed. 372 (1856)). Section 2674 clearly expresses Congress' objectives in this regard, and that intent is made all the more forceful by the legislative history surrounding the enactment of 42 U.S.C. §233(o). In addressing [**34] subsection 233(o), Congress stated:

> The Committee is aware that HN26 each of the 50 states have passed laws to limit the liability of volunteers in a variety of circumstances. This provision does not preempt those laws beyond the preemption provided in the Federal Tort Claims Act. Instead, the United States shall be liable in the same manner and to the same extent as a private individual in the same circumstances under State law.

H.R. Rep. No. 104-736, at 279, 1996 U.S.C.C.A.N. at 2092 (emphasis added).

Application of the NJCIA coupled with the exclusive force of the FTCA preclude Lomando from making a recovery from the United States predicated on the alleged malpractice of the Parker Health volunteer physicians. Contrary to Lomando's contentions, however, this outcome is not at all inconsistent with Congress' objectives. See H.R. Rep. No. 100-700, at 6, 1988 U.S.C.C.A.N. at 5950 (HN27 "The 'exclusive remedy' provision of [the FTCA] is intended to substitute the United States as the solely permissible defendant .... Therefore, suits against Federal employees are precluded even where the United States has a defense which prevents an actual recovery.") (emphasis added); see also United States v. Smith, 499 U.S. 160, 166, 111 S.Ct. 1180, 1185, 113 L. Ed. 2d 134 (1991)("Congress [**35] recognized that the required substitution of the United States as the defendant in tort suits filed against Government employees would sometimes foreclose a tort plaintiffs recovery altogether."). Accordingly, in upholding the District Court decision applying the NJCIA to bar this action against the United States, we are not making a ruling in any way contrary to the terms or intent of 42 U.S.C. § 233(o) or the FTCA. Therefore, the Supremacy Clause does not bar the result we reach in this case.

In summary, we hold that the District Court did not err in holding that the United States was immune from this suit. The United States is entitled to the protection of the immunity the NJCIA provides because a similarly-placed private employer would be entitled to that defense and the United States' deemed employees in this **[*379]** case, the individual physicians, would be entitled to that defense as well. 14

> (2) Whether the District Court erred in deciding that the treatment provided to Laura by Drs. Reynolds and Talbert constituted emergency medicine such that N.J. Stat. Ann. § 2A:53A-41 applies? If the Court did not so err, did one of Lomando's experts, Dr. Fialk, satisfy N.J. Stat. Ann. § 2A:53A-41?

HN28 To state a prima facie case of medical malpractice in New Jersey, ordinarily "a plaintiff must present expert testimony establishing (1) the applicable standard of care; (2) a deviation from that standard of care; and (3) that the deviation proximately caused the injury." Gardner v. Pawliw, 150 N.J. 359, 696 A.2d 599, 608 (N.J. 1997) (citations omitted). HN29 As part of an effort at comprehensive tort reform and to counter a severe increase in medical malpractice liability insurance premiums, in 2004 the New Jersey Legislature enacted the New Jersey Medical Care Access and Responsibility and Patients First Act ("Access and Responsibility Act"), N.J. Stat. Ann. §§2A:53A-37 to -42 (West 2011). Among other things, the Access and Responsibility Act "provides more detailed standards for a testifying expert . . . , generally requiring the challenging expert to be equivalently-qualified to the defendant." Ryan v. Renny, 203 N.J. 37, 999 A.2d 427, 436 (N.J. 2010). 15

The legislature set forth these standards in N.J. Stat. Ann. § 2A:53A-41, which provides, in relevant part:

> HN30 In an action alleging medical malpractice, a person shall not give expert testimony ... on the appropriate standard of practice or care unless the person is licensed as a physician or other health care professional in the United States and meets the following criteria:
>
>> (a) If the party against whom or on whose behalf the testimony is offered is a specialist or subspecialist recognized by the American Board of Medical Specialties ['ABMS'] or the American Osteopathic Association ['AOA'] and the care or treatment at issue involves that specialty or subspecialty recognized by the [ABMS] or [AOA], the person providing the testimony shall have specialized at the time of the occurrence that is the basis for the action in the same specialty or subspecialty, recognized by the [ABMS] or the [AOA], as the party against whom or on whose behalf the testimony is offered, and if the person against whom or on whose [**38] behalf the testimony is being offered is board certified and the care or treatment at issue involves that board specialty or subspecialty recognized by the [ABMS] or the [AOA], the expert witness shall be:
>>
>>> (1) a physician credentialed by a hospital to treat patients for the medical condition, or to perform the procedure, that is the basis for the claim or action; or
>>>
>>> (2) a specialist or subspecialist recognized by the [ABMS] or the [AOA] who is board certified in the same specialty or subspecialty recognized **[*380]** by the [ABMS] or the [AOA], and during the year immediately preceding the date

of the occurrence that is the basis for the claim or action, shall have devoted a majority of his professional time to either:

(a) the active clinical practice of the same health care profession in which the defendant is licensed, and if the defendant is a specialist or subspecialist recognized by the [ABMS] or the [AOA], the active clinical practice of that subspecialty recognized by the [ABMS] or the [AOA]; or

(b) [the instruction of students in an accredited medical school, accredited health professional school, accredited residency program or research program] in the same health care profession in which [**39] the defendant is licensed, and, if that party is a specialist or subspecialist recognized by the [ABMS] or the [AOA] [one of the aforementioned programs] in the same specialty or subspecialty recognized by the [ABMS] or the [AOA]; or

(c) both.

HN31 N.J. Stat. Ann. § 2A:53A-41(b) also governs the scenario in which the defendant health-care provider is a "general practitioner." Thus, "[t]he statute sets forth three distinct categories embodying this kind-for-kind rule: (1) those who are specialists in a field recognized by the [ABMS or AOA] but who are not board certified in that specialty; (2) those who are specialists in a field recognized by the ABMS [or AOA] and who are board certified in that specialty; and (3) those who are 'general practitioners.'" Buck v. Henry, 207 N.J. 377, 25 A.3d 240, 247 (N.J. 2011).

Drs. Reynolds and Talbert are board-certified specialists in emergency medicine, a specialty that the ABMS and the AOA recognize.**16** Lomando submitted statements by two experts, Drs. Fialk and Hayes, neither of whom is a specialist in the field of emergency medicine, in the District Court. Lomando contended, however, that N.J. Stat. Ann. § 2A:53A-41 did not apply to her claims against Drs. Reynolds [**40] and Talbert because they provided care that did not "involve" their specialty of emergency medicine. The Court rejected this argument, finding that they rendered care on September 5, 15, and 20 that constituted the practice of emergency medicine, as the ABMS and American Board of Emergency Medicine ("ABEM") define that field.**17** Lomando contends that the Court erred in making this finding, and argues that the physicians' treatment of Laura on September 5 and 15 "involved [the] general skill and knowledge of a physician and did not require the specialized training of an emergency department physician." Appellant's br. at 9.**18**

Lomando now raises an additional argument that she did not present squarely to the District Court. Lomando contends that because Dr. Fialk "is board certified in oncology and has hospital appointments **[*381]** to treat patients with cancer" and because "the basis" for Lomando's claim is the "failure to diagnose lymphoma," Dr. Fialk's qualifications satisfy N.J. Stat. Ann. § 2A:53A-41(a)(1). Appellant's br. at 18-19. We address these arguments in turn.**19**

(a) The Care Provided by Drs. Reynolds and Talbert Involved Emergency Medicine.

HN33 The ABMS defines the specialty of emergency medicine [**43] as:

> the immediate decision making and action necessary to prevent death or any further disability in both the pre-hospital setting by directing emergency medical technicians and in the emergency department. This special[ty involves] immediate recognition, evaluation, care, stabilization and disposition of a generally diversified population of adult and pediatric patients in response to acute illness and injury.

Lomando, 2011 U.S. Dist. LEXIS 28116, 2011 WL 1042900, at * 12; see also Buck, 25 A.3d at 249 (referencing the ABMS definition of "emergency medicine"). The ABEM describes the practice of emergency medicine as "begin[ning] with the recognition of patterns in the patient's presentation that points to a specific diagnosis or diagnoses. Pattern recognition is both the hallmark and cornerstone of the clinical practice of Emergency Medicine, guiding the diagnostic tests and therapeutic interventions during the entire patient encounter." Lomando, 2011 U.S. Dist. LEXIS 28116, 2011 WL 1042900, at *12 (emphasis in original deleted).**20** Bearing in mind these definitions of emergency medicine, we agree with the District Court that Drs. Reynolds and Talbert provided Laura with care involving the practice of emergency medicine.

On September 5, Laura arrived at Riverview Medical Center's Emergency Department complaining of the acute symptoms of chest pain and tightness, nausea, diarrhea, and shortness of breath. In response, **[*382]** Dr. Reynolds examined Laura, ordered that she be given medication intravenously for her chest tightness, and instructed her to stop taking certain medication, the consumption of which coincided with the advent of Laura's chest tightness, nausea, and diarrhea. During the examination, Dr. Reynolds became aware that Laura's left lymph node was swollen. Once Laura's nausea and chest pain improved, she was discharged from the hospital with a working diagnosis of reaction to medication, muscle strain, and a swollen salivary duct. In line with the ABMS definition of emergency medicine, Laura's symptoms on this visit were largely acute, [**45] and Dr. Reynolds engaged in the task of "evaluation" and "stabilization" of Laura in response to those symptoms.

On September 15, Laura presented to Riverview's Emergency Department with a history of Epstein-Barr Syndrome, a fever, and showing signs of dehydration. Laura's incoming patient report notified Riverview that she was suspicious for meningitis, had neck pain, and an enlarged lymph node on the left side of her neck. Upon examination, Dr. Talbert observed that Laura had left anterior adenopathy. Dr. Talbert ordered that fluids and medication be given to Laura to treat her dehydration and fever, and ordered that she be given a mononucleosis test. Once Laura's fever decreased and she was in stable condition, she was discharged from the hospital. Again, consistently with the ABMS definition of emergency medicine, Dr. Talbert engaged in the "immediate decision making and action necessary" to care for and ultimately "stabiliz[e]" Laura. Further, based on Laura's pattern of symptoms at that visit, Dr. Talbert ordered the diagnostic test for mononucleosis.

Though we do not hold that treatment provided in an emergency room necessarily involves the practice of emergency medicine, the [**46] care that Drs. Reynolds and Talbert provided was emergency medicine and falls within the practice of emergency care as the applicable certifying bodies define that field. Accordingly, the District Court correctly concluded that N.J. Stat. Ann. § 2A:53A-41(a) applied.

(b) Dr. Fialk's qualifications do not satisfy N.J. Stat. Ann. §2A:53A-41(a)(1).

We turn now to Lomando's contention, that even if N.J. Stat. Ann. § 2A:53A-41(a) applies, Dr. Fialk's qualifications meet the requirements of N.J. Stat. Ann. §2A:53A-41(a)(1). As stated, Drs. Reynolds and Talbert are board-certified specialists in emergency medicine; thus, Lomando was required to provide testimony prepared by experts who met the requirements imposed on experts who testify against board-certified specialists. There is a question, however, as to what those requirements may be. In Lomando's view, an expert offering testimony against a board-certified specialist need not share that specialty, but rather the expert only must satisfy the hospital appointment mandate of N.J. Stat. Ann. § 2A:53A-41(a)(1) or the board certification plus clinical or instructional experience requirements of N.J. Stat. Ann. § 2A:53A-41(a)(2). In this regard, [**47] Lomando contends that because Dr. Fialk has "hospital appointments to treat patients with cancer," appellant's br. at 18, his qualifications satisfy the mandates of N.J. Stat. Ann. § 2A:53A-41(a)(1).

The Supreme Court of New Jersey has observed that N. J. Stat. Ann. § 2A:53A-41 is "far from a model of clarity." Buck, 25 A.3d at 247. In Ryan, however, that court had provided its interpretation of the statute, describing it thusly:

> ***HN34*** [W]here the defendant is a specialist or sub specialist, the person providing **[*383]** the testimony against him 'shall have specialized at the time of the occurrence that is the basis for the action in the same specialty or subspecialty[.]' N.J. Stat. Ann. § 2A:53A-41(a). Further, where the defendant is board certified, the witness against him must also be board certified in the same specialty or subspecialty, [Here, the Court inserted the following footnote: 'Alternatively, the witness shall be "a physician credentialed by a hospital" to treat the condition or perform the procedure that is the basis of the claim. N.J. Stat. Ann. § 2A:53A-41(a)(1).'], and 'during the year immediately preceding the date of the occurrence that is the basis of the claim or action, shall [**48] have devoted a majority of his professional time to' active clinical practice or teaching of the specialty or subspecialty. N.J. Stat. Ann. § 2A:53A-41(a)(2).

999 A.2d at 440 (original emphasis omitted and current emphasis added); see also Buck, 25 A.3d at 247 (labeling the requirements imposed by N.J. Stat. Ann. §2A:53A-41(a)(1) and -41(a)(2) as "additional qualifications" an expert witness must meet beyond those delineated in N.J. Stat. Ann. § 2A:53A-41(a)); New Jersey State Bar Ass'n v. State, 387 N.J. Super. 24, 902 A.2d 944,952-53 (N.J. Super. Ct. App. Div. 2006) (adopting the same formulation for N.J. Stat. Ann. § 2A:53A-41). Thus, ***HN35*** the Supreme Court of New Jersey has construed N.J. Stat. Ann. § 2A:53A-41(a) to require that an expert offering testimony against a board-certified specialist share that specialty and meet the requirements of either N.J. Stat. Ann. §2A:53A-41(a)(1) or -41(a)(2). In this way, the court made clear that the hospital credential provision of N.J. Stat. Ann. § 2A:53A-41(a)(1) is an alternative to the board certification plus teaching or clinical practice requirements of N.J. Stat. Ann. § 2A:53A-41(a)(2), but it is not an alternative to the specialization requirement of N.J. Stat. Ann. § 2A:53A-41(a).

Accordingly, [**49] Dr. Fialk may not offer testimony against Dr. Reynolds or Dr. Talbert regarding the care provided by those physicians to Laura because he is not a specialist in the field of emergency medicine.

> (3) Whether the District Court erred in refusing to consider the treatment Ms. Biedenbach rendered for purposes of Lomando's claim against Ms. Biedenbach's employer, Emergency Physician Associates? If the Court so erred, does N.J. Stat. Ann. § 2A:53A-41 apply to testimony concerning Ms. Biedenbach?
>
> (a) Lomando was not required to name Ms. Biedenbach as a defendant.

The District Court stated that it would "not consider the treatment provided by Ms. Biedenbach in connection with" Emergency Physician Associates' summary judgment motion solely because Lomando "ha[d] not named [Ms. Biedenbach] as a defendant." Lomando, 2011 U.S. Dist. LEXIS 28116, 2011 WL 1042900, at *10 n.10. Lomando contends that the Court's refusal to consider treatment that Ms. Biedenbach provided in support of Lomando's claim against her employer, Emergency Physician Associates, was legal error, and we agree.

HN36 New Jersey courts apply the common law principle of respondeat superior liability, and thus in that state "an employer can be found liable for the negligence [**50] of an employee causing injuries to third parties, if, at the time of the occurrence, the employee was acting within the scope of his or her employment." Carter v. Reynolds, 175 N.J. 402, 815 A.2d 460, 463 (N.J. 2003) (citing Lehmann v. Toys 'R' Us. Inc., 132 N.J. 587, 626 A.2d 445, 461-62 (N.J. 1993)). New Jersey law, however, does **[*384]** not include a requirement that a litigant include the allegedly negligent employee as a defendant in an action seeking to impose respondeat superior liability on an employer. See Zukowitz v. Halperin, 360 N.J. Super. 69, 821 A.2d 527, 530 (N.J. Super. Ct. App. Div. 2003) ("The judge erred in dismissing plaintiff's common law claim based upon vicarious liability for the negligence of defendant's employees. See, e.g., Printing Mart-Morristown v. Sharp Elecs. Corp., [116 N.J. 739, 563 A.2d 31, 47-48 (N.J. 1989)]. Whether the [employees] were named as defendants is legally irrelevant to defendant's liability for their conduct under the doctrine of respondeat superior. See McFadden v. Turner, [159 N.J. Super. 360, 388 A.2d 244 (N.J. Super. Ct. App. Div. 1978)]."); Marion v. Borough of Manasquan, 231 N.J. Super. 320, 555 A.2d 699, 702 (N.J. Super. Ct. App. Div. 1989) (HN37 "In cases not involving the [Tort Claims Act, N.J. Stat. Ann. § 59:2-2 (West 2011)] 21 in which [**51] a plaintiff seeks recovery on the theory of respondeat superior, there is no requirement that the plaintiff join as a defendant the individual upon whose act or failure to act vicarious liability is predicated. Indeed, the plaintiff has the option to sue the party vicariously liable for the conduct of an agent in one law suit and thereafter, pursue the agent in a separate suit. In such cases, the concept of mandatory joinder does not apply." (citing McFadden, 388 A.2d at 245-46)); Moss v. Jones, 93 N.J. Super. 179, 225 A.2d 369, 372 (N.J. Super. Ct. App. Div. 1966) ("We conclude that a person injured by the negligence of an agent or servant may sue the agent or servant and the principal or master in one suit, or may proceed against them in separate suits . . . ."); see also Great Northern Ins. Co. v. Leontarakis, 387 N.J. Super. 583, 904 A.2d 846, 853 (N.J. Super. Ct. App. Div. 2006) ("The rationale of the rule — 'that plaintiff is entitled to pursue all those who are independently liable to him for his harm until one full satisfaction is obtained' — is equally applicable whether the liability is actual or vicarious." (quoting McFadden, 388 A.2d at 247)). 22 Furthermore, "[i]t is well-established that HN38 [Federal Rule of Civil Procedure] 19 [**52] does not require the joinder of joint tortfeasors[;] [n]or does it require joinder of principal and agent." Nottingham v. Gen. Am. Commc'ns Corp., 811 F.2d 873, 880 (5th Cir. 1987) (per curiam) (citations omitted); see also Temple v. Synthes Corp., Ltd., 498 U.S. 5, 7, 111 S. Ct. 315, 316, 112 L. Ed. 2d 263 (1990) ("It has long been the rule that it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit.").

Accordingly, we hold that the District Court erred when it excluded from consideration the care that Ms. Biedenbach provided in assessing Lomando's claim against Emergency Physician Associates. The Court was not precluded from taking into account Ms. Biedenbach's care in considering Lomando's claim against her employer **[*385]** notwithstanding Ms. Biedenbach's non-party status.

(b) N.J. Stat. Ann. § 2A:53A-41 does not apply to physician assistants.

We now reach the final issue in this appeal, which also relates to Ms. Biedenbach: whether N.J. Stat. Ann. §2A:53A-41 applies to expert testimony offered to evaluate the care she provided. Lomando contends that N.J. Stat. Ann. §2A:53A-41 does not apply to non-physicians, while appellee Emergency Physician Associates asserts that the statute encompasses physician assistants. Because the question of whether N.J. Stat. Ann. § 2A:53A-41 applies to Ms. Biedenbach is a potentially dispositive legal question in this case, we will address the matter.

To the best of our knowledge, the New Jersey [**54] Supreme Court has yet to confront explicitly the question of whether N.J. Stat. Ann. § 2A:53A-41 applies only to physicians, or whether its scope is broader. 23 HN40 "In the absence of a controlling decision by the [New Jersey] Supreme Court, we must predict how it would rule if faced with the issue." See Spence v. ESAB Grp., Inc., 623 F.3d 212, 216 (3d Cir. 2010). In making this prediction, we look to "'decisions of state intermediate appellate courts, of federal courts interpreting that state's law, and of other state supreme courts that have addressed the issue,'" as well as to "'analogous decisions, considered dicta, scholarly works, and any other reliable data tending convincingly to show how the highest court in the state would decide the issue at hand.'" Id. at 216-17 (quoting Norfolk S. Ry. Co. v. Basell USA Inc., 512 F.3d 86, 92 (3d Cir. 2008)).

Of course, HN41 in interpreting a statute, we first examine its text as the Supreme Court of New Jersey would do in any case of statutory interpretation. 24 DiProspero v. Penn, 183 N.J. 477, 874 A.2d 1039, 1049 (N.J. 2005) ("Our analysis . . . begins with the plain language of the statute.") (citing Miah v. Ahmed, 179 N.J. 511, 846 A.2d 1244, 1249 (N.J. 2004)). "If the language is plain and clearly reveals the statute's meaning, the Court's sole function is to enforce the statute according to its terms." Frugis v. Bracigliano, 177 N.J. 250, 827 A.2d 1040, 1058 (N.J. 2003). "If the statute suggests more than one interpretation, the broader legislative scheme, its history, [**56] and relevant sponsor statements may also inform the Court's interpretation in light of the statute's overall policy and purpose." Id. In interpreting a statute, the New Jersey courts' "overriding goal must be to determine the Legislature's intent." Frugis, 827 A.2d at 1058 (quoting Cornblatt, [*386] P.A. v. Barow, 153 N.J. 218, 708 A.2d 401, 407 (N.J. 1998)); see also DiProspero, 874 A.2d at 1048 ("The Legislature's intent is the paramount goal when interpreting a statute.").

HN42 N.J. Stat. Ann. § 2A:53A-41(a) applies to Ms. Biedenbach only if she is "a specialist or subspecialist recognized by the [ABMS] or the [AOA] and the care or treatment at issue involves that specialty or subspecialty recognized by the [ABMS] or [AOA]." N.J. Stat. Ann. § 2A:53A-41. **25** The ABMS is made up of Member Boards, including the ABEM, which are responsible for "certify[ing] physicians." http://abms.org/who_we_help/physicians/specialties.aspx. [**57] Similarly, the AOA oversees Specialty Certifying Boards, which certify doctors of osteopathic medicine. http://www.osteopathic.org/inside-aoa/development/aoa-board-certification/Pages/default.aspx. Thus, it would seem that N.J. Stat. Ann. § 2A:53A-41(a) applies only to persons offering testimony against specialized or licensed physicians. In this vein, we reject Emergency Physician Associates' argument that N.J. Stat. Ann. §2A:53A-41(a)applies because Ms. Biedenbach practices in emergency rooms and because "Ms. Biedenbach's care and treatment of [Laura] involved the ABMS recognized specialty of Emergency Medicine." Appellee's br. at 22. **26** It may be that Ms. Biedenbach practices emergency care as the general public understands that term, and it may be that the care she provided to Laura involved that practice; however, it cannot be said that Ms. Biedenbach is a specialist in emergency medicine as the ABMS or AOA define that field or that the treatment she rendered to Laura involved that recognized specialty because those entities define and recognize specialties applicable only to physicians.

Concededly, N.J. Stat. Ann. §§2A:53A-41 includes some text in tension with our reading of the statute. ***HN43*** Paragraph 41(a)(2)(a) provides that an expert must be engaged in "the active clinical practice of the same health care profession in which the defendant is licensed," and paragraph 41(a)(2)(b) provides similarly that the expert must have participated in the "instruction of students . . . in the same health care profession in which the defendant is licensed." (emphasis added). This language, of course, gives rise to the inference that the statute encompasses more than one type of health care profession. Nevertheless, these provisions apply only in the circumstance that the defendant is board-certified in a specialty that the ABMS or AOA recognizes, and [**59] as explained above, those entities recognize specialties only for physicians. **27**

[*387] ***HN44*** Considering the text of the statute as a whole, we conclude that N.J. Stat. Ann. § 2A:53A-41(a) applies only to physicians. We note that this conclusion is in line with the New Jersey Legislature's purpose in enacting the Access and Responsibility Act. In New Jersey State Bar Ass'n v. State, 382 N.J. Super. 284, 888 A.2d 526, 535 (N.J. Super. Ct. Ch. Div. 2005), the Superior Court extensively recounted the legislative history of the [**60] Access and Responsibility Act, and described the purpose thusly: "The overarching concern that came out of the hearings [on the Act] and the problem the bill aimed to solve (as noted in the legislative purpose) . . . [was that] 'as a consequence of the cost of medical malpractice insurance, many physicians feel they cannot afford to practice medicine, and, therefore the medical services needed will not be available to [New Jersey's] citizens.'" (quoting August 2002 Hearing (comments of Assemblyman Edwards)) (emphasis added). In this regard, the legislature sought to remedy the situation that the physicians being forced out were often specialists in obstetrics and gynecology, emergency medicine, and surgery, and that "physicians in other specialties report[ed] high double-digit premium increases and fewer companies willing to write coverage." 888 A.2d at 535 (emphasis added) (internal quotation marks and citation omitted); id. at 536 ("Of particular concern was the number of doctors, particularly obstetrician/gynecologists, who discontinued parts of their practice or retired altogether due to the inability to afford their liability coverage.") (emphasis added). Accordingly, "[t]he goals [**61] of the final legislation were to 'reform the State's ailing medical malpractice insurance system to provide insurance relief for doctors and ensure that patients in New Jersey' will be able to get the treatment they seek." Id. at 536 (quoting Press Release from offices of Senators Vitale and Lesniak (Mar. 22, 2004)).

As a physician assistant, Ms. Biedenbach thus is excluded from the criteria for testimony that N.J. Stat. Ann. § 2A:53A-41(a) specifies. We express no opinion as to whether the expert statements that Lomando submitted are otherwise sufficient for the case against Emergency Physician Associates to proceed, and we remand the matter to the District Court so that it may determine the course of the case against that defendant. **28**

V. CONCLUSION

For the foregoing reasons, we will affirm the order of March 18, 2011, in part, will reverse it in part, and will remand the case to the District Court for further proceedings but only against Emergency Physician Associates as we are affirming the summary judgments in favor of all other **[*388]** appellees. Costs are allowed on this appeal in favor of all appellees other than Emergency Physician Associates against Lomando and in favor of Lomando against [**63] Emergency Physician Associates.

Footnotes

1 Initially, Lomando filed suit in the New Jersey Superior Court, but that court dismissed the case without prejudice on October 31, 2008.

2 Lomando since has filed suit in the New Jersey Superior Court against Dr. Hyppolite.

3 As we have indicated, Parker Health predicated its uncontested successful motion for summary judgment on its claim to immunity under the NJCIA. [**8] Lomando does not challenge that disposition on this appeal.

4 A firm decision on the issue of whether the United States is entitled to assert its deemed employees' defenses under 28 U.S.C. § 2674 would have been necessary if the Court had predicated the United States' immunity on the VPA, because that act differs from the NJCIA in that it grants immunity only to volunteers of nonprofit organizations and not to the organizations themselves. 42 U.S.C. § 14503(a).

5 Because Lomando had not made specific allegations against Emergency Physician Associates apart from those predicated on the treatment by the individual practitioners [**10] that it employed, the Court "treat[ed] all arguments applicable to the doctors as equally applicable to the group." Lomando, 2011 U.S. Dist. LEXIS 28116, 2011 WL 1042900, at *10 n.10.

6 ***HN5*** Unlike a health care center receiving section 254b funding which may be deemed an employee of the PHS under 42 U.S.C. § 233(g), a free clinic is not deemed an employee of the PHS and thus the FTCA did not preclude Lomando's suit against Parker Health. See 42 U.S.C. § 233(o)(5)(B) (The subsection extending FTCA coverage to volunteers at free clinics "may not be construed as deeming any free clinic to be an employee of the Public Health Service.").

7 42 U.S.C. § 233(o) specifies the criteria for an entity to be regarded as a "free clinic," what conditions must be met in order for a health care practitioner to be considered a "free clinic health professional," and what constitutes [**16] a "qualifying health service." See 42 U.S.C. § 233(o)(2)-(o)(4). Because the parties do not dispute that Parker Health is a free clinic, and that the Secretary of Health and Human Services deemed the volunteer physicians who treated Laura at Parker Health to be federal employees, we do not set forth those provisions.

8 Most courts of appeals have determined consistently with this view that the FTCA imposes liability on the United States to the extent that a private employer would be liable in similar circumstances in the pertinent locality. See Haceesa v. United States, 309 F.3d 722, 729 (10th Cir. 2002) ("[T]he Government's liability under the FTCA is limited to that of a private employer under like circumstances."); Day v. Massachusetts Air Nat'l Guard, 167 F.3d 678, 681 (1st Cir. 1999) (The United States has consented to be sued under the FTCA "provided that in the same circumstances a private employer would be liable for the acts of his employee under the local law."); Taber v. Maine, 67 F.3d 1029, 1048 (2d Cir. 1995) ("Pursuant to the FTCA, courts merely determine whether analogous behavior by a private-sector employee would give rise to some form of fault-based vicarious liability on the part of a private-sector employer."); Johnson v. Sawyer, 47 F.3d 716, 730 (5th Cir. 1995) (en banc) ("All FTCA liability is respondeat superior liability. . . . Under the FTCA, the United [**20] States is not liable if the private employer would not be liable pursuant to local law."). But courts do not always follow this approach for in Knowles v. United States, 91 F.3d 1147, 1150 (8th Cir. 1996), the court held that the United States is liable to the extent the immunized employee would be liable under local law. But see St. John v. United States, 240 F.3d 671, 676 (8th Cir. 2001) ("The FTCA is a limited waiver of sovereign

immunity, allowing the federal government to be sued for the actions of 'any employee of the Government while acting within the scope of his office or employment' under circumstances where the United States would be liable if it were a private employer.").

9 This case appears to be the first precedential opinion to address squarely the interaction of 42 U.S.C. § 233(o) and the FTCA. The District Court stated that Knowles v. United States, 29 F.3d 1261 (8th Cir. 1994), stands for the proposition that the United States "stands in the shoes of both health institutions and physicians" in cases such as this one. Lomando, 2011 U.S. Dist. LEXIS 28116, 2011 WL 1042900, at *5 n.6 (citing Knowles, 29 F.3d at 1265 ("In this case, the United States is standing in the shoes of a hospital, a doctor, two nurses, and the [Medical Service Specialists].")). We think, however, that Knowles is of limited precedential value here as it did not deal with private physicians who were "deemed" federal employees under 42 U.S.C. § 233(o), but rather involved a suit against a military base hospital and its employees. See 29 F.3d at 1262-63. ***HN12*** Though there is a dearth of guidance on the issue of how to characterize a similarly-placed private employer of a volunteer [**24] physician deemed an employee of the PHS under 42 U.S.C. § 233(o), it seems that equating the United States to a free clinic, rather than a hospital or practice group that employs the physicians for compensation, is the only way to ensure that the United States' liability under the FTCA is the same as that of a "private person" in similar circumstances. If the United States is treated as a paying employer, the entire statutory predicate of this case, that the physicians were deemed employees precisely because they were volunteers at a free clinic, must be ignored, and, further, the United States' liability would be expanded beyond that of a similarly-placed entity, simply by virtue of application of the FTCA.

10 In Westfall, the Court held that government employees were absolutely immune only from suits based on acts that were both within the scope of employment and discretionary in nature. 484 U.S. at 300, 108 S.Ct. at 585. The Westfall Act eliminated the requirement that for the employee to have immunity the allegedly wrongful acts must have involved the exercise of discretion.

11 Although Parker Health is a free clinic, ***HN21*** there is no requirement in the NJCIA that an entity must be free to be organized for a charitable purpose.

12 Because Lomando does not dispute that all aspects of the NJCIA would have been satisfied here in the absence of the deemed employee designation, we do not review the District Court's conclusion that the requirements of the NJCIA were satisfied. Consequently, we treat Parker Health and its volunteers as being immune from suit under New Jersey law.

13 This is, of course, to say nothing of the fact that Lomando's position on this point, if accepted, would render null the entirety of 42 U.S.C. § 233(o) dealing with volunteers at free clinics. ***HN23*** Under 42 U.S.C. § 233(o)(2)(D), an individual must not receive recompense, i.e., he or she must render "[v]olunteer services," to be deemed an employee of the PHS. In Lomando's view, however, once deemed an "employee" by virtue of such [**32] volunteerism, the individual is no longer a "volunteer."

14 Inasmuch [**36] as we conclude that the United States is immune from suit under the NJCIA, we need not determine whether the VPA also may have provided it with an immunity defense.

15 These standards apply also to an affidavit of merit supporting a malpractice claim that a New [**37] Jersey statute requires for the initiation of a malpractice action, N.J. Stat. Ann. § 2A:53A-27 (West 2011), but compliance with that statute is not raised as an issue in this case.

16 Dr. Reynolds is a doctor of osteopathic medicine; thus, the AOA certified her in emergency medicine.

17 As noted, Laura visited the Riverview Medical Center's Emergency Room Department on September 3, 5, 15, and 20, 2006. Ms. Biedenbach evaluated Laura on September 3, see appellant's br. at 5, and because the District Court refused to consider the treatment Ms. Biedenbach provided, the Court did not include the events of September 3 in its discussion of N.J. Stat. Ann. § 2A:53A-41.

18 Lomando seemingly has abandoned her contention that the care rendered on September [**41] 20 did not constitute emergency medicine. See appellant's br. at 9, 23.

19 HN32 "'Generally, failure to raise an issue in the District Court results in its waiver on appeal.'" Webb v. City of Philadelphia, 562 F.3d 256, 263 (3d Cir. 2009) (quoting Huber v. Taylor, 469 F.3d 67, 74 (3d Cir. 2006)). Nonetheless, the waiver rule "is one of discretion rather than jurisdiction," and "it may be relaxed whenever the public interest . . . so warrants." Barefoot Architect, Inc. v. Bunge, 632 F.3d 822, 834-35, 54 V.I. 948 (3d Cir. 2011) (internal quotation marks and citations omitted); see also Webb, 562 F.3d at 263. When considering whether to address an issue not previously raised, a court considers [**42] whether the issue is "a pure question of law . . . where refusal to reach the issue would result in a miscarriage of justice or where the issue's resolution is of public importance." Huber, 469 F.3d at 74-75. In considering a waiver claim, a court takes into account also the dual purposes of the doctrine: "ensuring that the necessary evidentiary development occurs in the trial court, and preventing surprise to the parties when a case is decided on some basis on which they have not presented argument." Barefoot, 632 F.3d at 835 (citing Hormel v. Helvering, 312 U.S. 552, 556, 61 S.Ct. 719, 721, 85 L. Ed. 1037 (1941)); see also Huber, 469 F.3d at 75.

It would not serve the purposes of the waiver rule to apply it in this case. Evidentiary development is largely irrelevant to the question of law at issue here, and appellees were on notice from the inception of this case that the application of N.J. Stat. Ann. § 2A:53A-41 was at issue, even if Lomando did not invoke the specific paragraph we now consider. In this vein, appellees explicitly argued in the District Court that Lomando's experts did not satisfy N.J. Stat. Ann. § 2A:53A-41(a)(1). See app. at 300.

20 The ABEM is "one of [**44] 24 medical specialty certification boards recognized by the [ABMS]" and is the entity actually responsible for certifying physicians in emergency medicine. http://www.abem.org/PUBLIC/portal/alias_Rainbow/lang_en-US/tabID_3333/DesktopDefault.aspx. Because we are not aware of an AOA definition of emergency medicine, we reference only the ABMS and ABEM definition.

21 The Tort Claims Act deals with claims against public entities and employees and is not applicable here.

22 In Cogdell v. Hospital Center at Orange, 116 N.J. 7, 560 A.2d 1169, 1178 (N.J. 1989), the New Jersey Supreme Court adopted a mandatory joinder rule requiring that "to the extent possible" New Jersey courts "determine an entire controversy in a single judicial proceeding[,]" that determination "necessarily embrac[ing] not only joinder of single related claims between the parties but also joinder of all persons who have a material interest in the controversy." That rule proved to be highly controversial and has been replaced by a mechanism of disclosure whereby HN39 "a party to any litigation is obligated to reveal the existence of any non-party who should be joined or who might [**53] have 'potential liability to any party on the basis of the same transactional facts.'" Kent Motor Cars, Inc. v. Reynolds and Reynolds, Co., 207 N.J. 428, 25 A.3d 1027, 1037 (N.J. 2011).

23 Notably in Buck the New Jersey Supreme Court appeared to assume that the statute applied only to physicians. 25 A.3d at 247 ("The basic principle behind [N.J. Stat. Ann. §2A:53A-41] is that the challenging expert who executes an affidavit of merit in a medical malpractice case, generally, should be equivalently-qualified to the defendant [**55] physician.") (emphasis added) (internal quotation marks and citation omitted); id. at 248 ("Under [N.J. Stat. Ann. §2A:53A-41(a)], the first inquiry must be whether a physician is a specialist or general practitioner. If the physician is a specialist, then the second inquiry must be whether the treatment that is the basis of the malpractice action 'involves' the physician's specialty.") (emphasis added). But we cannot regard Buck as conclusive on the point, as the court's use of the word "physician" merely might reflect the identity of the parties in that case.

24

We are not aware of any precedential opinions by the New Jersey Superior Court, Appellate Division, on whether N.J. Stat. Ann. § 2A:53A-41 applies to a physician assistant. In conformity with the practice of this Court, we will not refer to the Appellate Division's not precedential opinions dealing with the issue.

25

Emergency Physician Associates does not contend that Ms. Biedenbach qualifies as a board-certified [**58] specialist in emergency medicine.

26

Emergency Physician Associates appears to argue as well that because the training required to become a physician assistant is "almost the same at that obtained by physicians," appellee's br. at 21, N.J. Stat. Ann. § 2A:53A-41(a) applies. The level of training required to become a physician assistant is entirely irrelevant to whether those professionals are encompassed by N.J. Stat. Ann. § 2A:53A-41(a).

27

The ambiguous drafting of N.J. Stat. Ann. § 2A:53A-41 renders strict reliance on the text problematic. For example, paragraphs 41(a)(2)(a) and 41(a)(2)(b) also include language that reads "if the defendant is a specialist or subspecialist recognized by the [ABMS] or the [AOA]" the clinical practice or pedagogical experience must be in that recognized specialty or subspecialty. Again, paragraphs 41(a)(2)(a) and 41(a)(2)(b) apply only where the defendant is a board-certified specialist in a recognized specialty. A board-certified specialist is, obviously, a specialist recognized by the ABMS or AOA. Accordingly, the purpose of the "if language of paragraphs 41(a)(2)(a) and 41(a)(2)(b) is not clear.

28

Of course we do not express an opinion on whether the District Court should decline to exercise supplemental jurisdiction over the case against Emergency Physician Associates. Assuming that it retains the case, the question for the Court will remain whether the standards applicable to experts offering testimony against a "general practitioner," N.J. Stat. Ann. § 2A:53A-41(b), apply to Ms. Biedenbach. So far as we are aware, the New Jersey courts have [**62] not addressed this question with respect to a physician assistant. We note, however, that N.J. Stat. Ann. § 2A:53A-41(b) does not reference the ABMS or AOA, and provides simply that if the defendant "is a general practitioner," the expert, during the year preceding the date of the alleged negligence, must have devoted a majority of his professional time to "active clinical practice as a general practitioner" or active clinical practice encompassing the condition or procedure that is the basis for the claim, or the instruction of students in a school, residency, or research program "in the same health care profession" as the defendant. We do not offer our opinion on this point, which the parties have not addressed in their briefs.

Santos v. United States, 559 F.3d 189

United States Court of Appeals for the Third Circuit

December 2, 2008, Argued; March 11, 2009, Filed

No. 07-4613

Reporter

559 F.3d 189 * | 2009 U.S. App. LEXIS 5128 **

MERCY N. SANTOS, a Minor by Jenny Beato, her Parent and Natural Guardian, Appellant v. UNITED STATES OF AMERICA

Prior History: [**1] On Appeal from the United States District Court for the Middle District of Pennsylvania. (D.C. Civ. No. 06-01216). Honorable Sylvia H. Rambo, District Judge.
Santos v. United States, 523 F. Supp. 2d 435, 2007 U.S. Dist. LEXIS 88175 (M.D. Pa., 2007)

Core Terms

equitable tolling, statute of limitations, federal employee, employees, diligent, inquire, clinic, district court, two year, tolling, limitations period, due diligence, accrued, cases, legal status, circumstances, malpractice, equitable, tolling statute, discover, court of appeals, defendants', investigate, notice, allegation of negligence, limitation provision, healthcare provider, medical record, limitations, entities

Case Summary

Procedural Posture

Appellant minor, through her parent, sought review of an order from the United States District Court for the Middle District of Pennsylvania, which granted summary judgment to defendant United States of America in this medical malpractice case under the Federal Tort Claims Act, 28 U.S.C.S. §§ 1346(b), 2671 et seq. (FTCA).

Overview

The minor was six years old when her mother sought medical care at a pediatric clinic for swelling and pain in the minor's teeth and jaw. The minor was prescribed an antibiotic and referred to a dental clinic. Later it was determined that the minor had developed an infection of the bone and bone marrow that had destroyed parts of her top two cervical vertebrae and left her with permanent damage. The minor pursed a medical malpractice claim against the clinic, but learned after filing her claim in state court that the clinic and its employees had been deemed federal employee for purposes of the FTCA. While the minor's state suit would have been timely, her suit was not timely under the FTCA's two-year statute of limitations. The district court granted summary judgment to the United States as a result and rejected the minor's equitable tolling argument. On review, the court reversed because it concluded that the minor used reasonable diligence to pursue her claim and had no reason to inquire as to the possible federal status of the clinic and its employees. The claim was thus timely under 28 U.S.C.S. § 2401(b).

Outcome

The court reversed the order of the district court granting summary judgment to the United States, and remanded the case to the district court for further proceedings consistent with this opinion.

LexisNexis® Headnotes

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

Governments > Legislation > Statute of Limitations > Judicial Review

HN1 **Summary Judgment Review, Standards of Review**

A federal appellate court's standard of review of a district court's order granting summary judgment is plenary, as is its review of a district court's finding that a plaintiff failed to file her action within the period the applicable statute of limitations allowed. More like this Headnote

Shepardize - Narrow by this Headnote (6)

Torts > ... > Liability > Federal Tort Claims Act > General Overview

HN2 **Liability, Federal Tort Claims Act**

See 28 U.S.C.S. § 2674. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Torts > ... > Liability > Federal Tort Claims Act > Jurisdiction

View more legal topics

HN3 **Federal Tort Claims Act, Jurisdiction**

To make a claim under the Federal Tort Claims Act, 28 U.S.C.S. §§ 1346(b), 2671 et seq. (FTCA), a claimant first must file her claim with the administrative agency allegedly responsible for her injuries. 28 U.S.C.S. § 2675(a). If the agency denies the claim or fails to resolve it within six months, she then may file an action on her claim in a district court. 28 U.S.C.S. §§ 2675(a), 2672. District courts have exclusive jurisdiction over suits against the United States brought under the FTCA. 28 U.S.C.S. § 1346(b). More like this Headnote

Shepardize - Narrow by this Headnote (22)

Torts > ... > Liability > Federal Tort Claims Act > Procedural Matters

HN4 **Federal Tort Claims Act, Procedural Matters**

Even though substantively the Federal Tort Claims Act (FTCA) follows state liability law, it includes a two-year limitations provision stating that a tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues. 28 U.S.C.S. § 2401(b). Moreover, federal law, not state law, governs the determination of the often decisive question to answer for statute of limitations purposes of when a claim has accrued under the FTCA. Similarly, state-law tolling statutes do not apply to the FTCA's limitations period. More like this Headnote

Shepardize - Narrow by this Headnote (38) 1

Governments > Legislation > Statute of Limitations > Governmental Entities
Torts > ... > Liability > Federal Tort Claims Act > Procedural Matters

HN5 **Statute of Limitations, Governmental Entities**

In a 1988 amendment to the Federal Tort Claims Act (FTCA), the Westfall Act, 28 U.S.C.S. § 2671 et seq., Congress established a procedure for a claimant to follow if she initially files a FTCA claim in the wrong forum. The FTCA now provides that tort claims filed in state court against federal employees acting within the scope of their employment shall be removed to the district court of the United States where the claim is pending and the United States shall be substituted as the party defendant. 28 U.S.C.S. § 2679(d)(2). The amendment also includes a clause that saves from being barred by the statute of limitations certain timely claims filed in the wrong forum, such as in a state or a federal court rather than with the appropriate administrative agency. Pursuant to this savings clause an errant plaintiff whose suit is removed to a district court, and then dismissed because she failed to bring the timely required administrative claim, will be credited with the date that she filed her claim in the wrong forum for purposes of the FTCA's statute of limitations. Such claims will be deemed timely under 28 U.S.C.S. § 2401(b) if the claim would have been timely had it been filed on the date the underlying civil action was commenced, and the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action. 28 U.S.C.S. § 2679(d)(5). More like this Headnote

Shepardize - Narrow by this Headnote (60) 2 7

Governments > Legislation > Statute of Limitations > Governmental Entities
Torts > ... > Liability > Federal Tort Claims Act > Procedural Matters
View more legal topics

HN6 **Statute of Limitations, Governmental Entities**

The U.S. Supreme Court has held that federal statutes of limitations are not jurisdictional and that the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States. The Court observed that this general rule is likely to be a realistic assessment of legislative intent as well as a practically useful principle of interpretation. More like this Headnote

Shepardize - Narrow by this Headnote (10) 2

Governments > Legislation > Statute of Limitations > Governmental Entities
Torts > ... > Liability > Federal Tort Claims Act > Procedural Matters
View more legal topics

HN7 **Statute of Limitations, Governmental Entities**

The United States Court of Appeals for the Third Circuit has held that the Federal Tort Claims Act's statute of limitations is not jurisdictional, and thus in appropriate circumstances the equitable tolling doctrine can apply in actions under it. More like this Headnote

Shepardize - Narrow by this Headnote (45) 3

Governments > Legislation > Interpretation

HN8 **Legislation, Interpretation**

The U.S. Supreme Court has held that, where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Banking Law > Consumer Protection > Fair Credit Reporting > Liability for Violations
Governments > Legislation > Statute of Limitations > Tolling
Torts > ... > Liability > Federal Tort Claims Act > Procedural Matters

HN9 **Fair Credit Reporting, Liability for Violations**

The United States Court of Appeals for the Third Circuit believes that Congress, in adopting the statute of limitations in the Federal Tort Claims Act (FTCA), 28 U.S.C.S. §§ 2679(d)(5); 2401(b), did not demonstrate that it intended to preclude equitable tolling as it did in the Fair Credit Reporting Act (FCRA), 15 U.S.C.S. § 1681p, because Congress structured the two statutes differently. Thus, while Congress placed the FCRA's exception to the limitations provision within the same sentence as the general limitations provision connected by "except," 15 U.S.C.S. § 1681p, in contrast it placed the FTCA's savings clause providing that certain claims filed within two years with the wrong agency are timely in a section distinct from the limitations provision. 28 U.S.C.S. §§ 2679(d)(5); 2401(b). The placement of the separate statutory savings provision does not suggest that Congress intended it to preclude equitable tolling, which the Supreme Court has presumed and held to apply in actions against the United States, particularly in an area of law where equitable concerns may be greater. More like this Headnote

Shepardize - Narrow by this Headnote (41) 5

Governments > Legislation > Statute of Limitations > Governmental Entities
Torts > ... > Liability > Federal Tort Claims Act > Procedural Matters
View more legal topics

HN10 **Statute of Limitations, Governmental Entities**

The Federal Tort Claims Act, 28 U.S.C.S. §§ 1346(b), 2671 et seq. (FTCA), waives the sovereign immunity of the United States to the extent that it is liable on tort claims in the same manner and to the same extent as a private individual under like circumstances, but includes a straightforward limitations provision separate from the waiver of immunity section. 28 U.S.C.S. §§ 2674, 2401(b). Considering that the FTCA creates tort liability in the same manner as liability is imposed on private individuals, the limitation provision is non-technical with a period of only two years, the circumstances surrounding tort and medical malpractice claims reasonably may justify applying equitable tolling to such claims, and neither the text nor structure of the freestanding statutory tolling provision suggests that Congress intended to preclude equitable tolling, the holding of the United States Court of Appeals for the Third Circuit in Hughes that there can be equitable tolling in suits under the FTCA remains good law which survives later Supreme Court decisions. More like this Headnote

Shepardize - Narrow by this Headnote (53) 1 8

Governments > Legislation > Statute of Limitations > Tolling
Torts > ... > Statute of Limitations > Tolling > General Overview

HN11 **Statute of Limitations, Tolling**

Equitable tolling, if available, can rescue a claim otherwise barred as untimely by a statute of limitations when a plaintiff has been prevented from filing in a timely manner due to sufficiently inequitable circumstances. This occurs (1) where the defendant has actively misled the plaintiff respecting the plaintiff's cause of action; (2) where the plaintiff in some extraordinary way has been prevented from asserting his or her rights; or (3) where the plaintiff has timely asserted his or her rights mistakenly in the wrong forum. More like this Headnote

Shepardize - Narrow by this Headnote (648) 446

Governments > Legislation > Statute of Limitations > Tolling
Torts > ... > Statute of Limitations > Tolling > General Overview
View more legal topics

HN12 **Statute of Limitations, Tolling**

A plaintiff will not receive the benefit of equitable tolling unless she exercised due diligence in pursuing and preserving her claim. The principles of equitable tolling thus do not extend to garden-variety claims of excusable neglect. The remedy of equitable tolling is extraordinary, and it is extended only sparingly. It is especially appropriate to be restrictive with respect to extension of equitable tolling in cases involving the waiver of the sovereign immunity of the United States. The Supreme Court made that point clear when it indicated that inasmuch as the Federal Tort Claims Act, 28 U.S.C.S. §§ 1346(b), 2671 et seq. (FTCA), waives the immunity of the United States, in construing the FTCA's statute of limitations, which is a condition of that waiver, courts should not take it upon themselves to extend the waiver beyond that which Congress intended, and also should not assume the authority to narrow the waiver that Congress intended. More like this Headnote

Shepardize - Narrow by this Headnote (162) 1 33

Torts > ... > Statute of Limitations > Tolling > Discovery Rule

View more legal topics

HN13 **Tolling, Discovery Rule**

The discovery rule, which governs a claim's accrual date for statute of limitations purposes, is distinct from equitable tolling, which applies where circumstances unfairly prevent a plaintiff from asserting her claim. More like this Headnote

Shepardize - Narrow by this Headnote (8)

Counsel: For Appellant: David J. Foster (argued), Costopoulos, Foster & Fields, Lemoyne, PA.

For Appellee: Michael J. Butler, Office of the United States Attorney, Harrisburg, PA; Gregory G. Katsas, Acting Assistant Attorney General, Civil Division, Phyllis J. Pyles, Director, Torts Branch, James G. Touhey, Jr., Assistant Director, Torts Branch, Conor Kells (argued), Trial Attorney, Torts Branch, Civil Division, U.S. Department of Justice, Washington, D.C.

Judges: BEFORE: AMBRO and GREENBERG, Circuit Judges, and O'NEILL, * District Judge. O'Neill, J., dissenting.

Opinion by: GREENBERG

Opinion

[*190] OPINION OF THE COURT

GREENBERG, *Circuit Judge*.

I. INTRODUCTION

This matter comes on before this Court on an appeal by plaintiff Mercy Nicole Santos by Jenny Beato, her Parent and Natural Guardian, from an order of the District Court entered on November 30, 2007, granting summary judgment to defendant United States of America in this medical malpractice [**2] case under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 *et seq.* ("FTCA"). The District Court concluded that the FTCA's two-year statute of limitations barred Santos's claim, rejecting her contention that the running of the limitations period should be equitably tolled so that her action would be timely. *Santos v. United States, 523 F. Supp. 2d 435 (M.D. Pa. 2007)*. Because we conclude that the statute of limitations should be equitably tolled, we will reverse the order of November 30, 2007, and will remand this matter to the District Court for further proceedings.

II. BACKGROUND

Mercy Nicole Santos was six years old when on November 20, 2002, her mother, Jenny Beato, took her to York Health Corporation's ("York Health") 1 pediatric clinic in York, Pennsylvania, because she had a swollen jaw and a fever. 2 A clinic physician diagnosed Santos as having tooth decay, prescribed an antibiotic, and referred her to York Health's dental clinic. Nevertheless, the swelling continued and her condition worsened. Accordingly, Santos, on November 27, 2002, returned to **[*191]** the pediatric clinic, where the personnel again referred her to the dental clinic and again prescribed an antibiotic. Santos [**3] then sought care at the York Health dental clinic, where a dentist extracted a decaying tooth in the belief that it created a small mass on Santos's lower jaw and was responsible for Santos's continuing fever. Yet when Santos returned to the dental clinic two days later for a follow-up appointment, the swelling and fever had not abated. A dentist examined her and told her to come back on December 2, 2002, which she did. Subsequently, on December 12 and December 18, 2002, she went to the pediatric clinic complaining of worsening neck pain and stiffness. The personnel there prescribed antibiotics and painkillers and again referred her to the dental clinic, where a dentist again observed her swelling and neck stiffness but made no further diagnosis.

On December 22, 2002, Santos's mother took her to the emergency room at York Hospital, a regional facility distinct from York Health, because her neck pain, swelling, and fever all had grown more severe. Personnel at the hospital performed a Computed Tomography scan, or CT scan, that revealed a deep neck-space infection extending from below Santos's jaw into her cervical spine. Santos had developed osteomyelitis, an infection of the bone and bone marrow, that had destroyed parts of her top two cervical vertebrae. After 19 days of surgery and other hospital treatments for the severe infection, and several months of wearing a cervical collar, Santos's top two vertebrae grew back fully fused together on the right side. This vertebrae fusion permanently impairs her movement, as she cannot turn her head to look over her shoulder, and the fusion likely will cause Santos to suffer from an accelerated degenerative disc [**5] disease in the vertebrae below the fused vertebrae.

Santos's mother retained counsel for her daughter, who investigated Santos's potential liability claim against York Health and its employees. Santos's counsel identified four persons he believed were the negligent healthcare workers who caused Santos's injury, a doctor, two dentists, and a physician assistant, and also identified their employer, York Health, an apparently private corporation. Thereafter, Santos's counsel performed a public records search on York Health, corresponded with York Health, obtained Santos's medical records, visited the clinic, and reviewed pertinent records onsite. To evaluate Santos's potential liability claim, her counsel retained a family practice expert, a dental expert, a professor of pediatric otolaryngology, and a board-certified spinal surgeon, all of whom prepared expert reports.

On May 25, 2005, about two years and five months after a physician at York Hospital diagnosed Santos with osteomyelitis, her counsel filed a malpractice action on her behalf in the Court of Common Pleas of York County, Pennsylvania, against the allegedly negligent parties, York Health and the four professional employees. [**6] Santos's counsel believed that notwithstanding Pennsylvania's two-year statute of limitations on malpractice actions set forth in 42 Pa. Cons. Stat. Ann. § 5524 (West 2004), her filing was timely because a Pennsylvania statute, 42 Pa. Cons. Stat. § 5533(b)(1)(i)-(ii) (West 2004), tolls the statute of limitations in a civil action brought on behalf of a minor until she reaches her majority at the age of 18 years. Undoubtedly, if the tolling statute had been applicable, his belief would have been correct.

Santos's investigations did not reveal, however, that for treatment purposes under the FTCA the allegedly negligent healthcare workers and their employer, York Health, all had been deemed employees **[*192]** of the United States pursuant to the Public Health Service Act, 42 U.S.C. § 5201 *et seq.*, as amended by the Federally Supported Health Centers Assistance Act of 1992, Pub. L. No. 102-501, 106 Stat. 3268 (1992). *See* Public Health Service Act, 42 U.S.C. § 233(g)-(n). 3 This investigative failure was understandable as publicly available information did not reveal their federal status for malpractice purposes, though there was public information explaining that York Health received aid from, among [**7] numerous benefactors, the federal government, and the clinic did not appear to be a federal facility. The state-court defendants' federal status was critical because the FTCA's statute of limitations requires a malpractice claimant to bring an administrative claim with the applicable federal agency, here the Department of Health and Human Services, within two years after her cause of action accrues. Moreover, and as critical in this litigation, the FTCA does not include a tolling provision for minors comparable to that of Pennsylvania and many other states. 28 U.S.C. § 2401(b).

On September 2, 2005, as the FTCA provides, the Attorney General's designee certified that the state-court defendants were federal employees acting within the scope of their employment and removed the case to the District Court. 28 U.S.C. § 2679(d)(2). The Government then substituted the United States as the sole party defendant. *Id*. Santos and the Government thereafter stipulated to a voluntary dismissal of the removed [**8] action without prejudice so that Santos could bring an administrative claim as the FTCA requires. 28 U.S.C. § 2675(a). 4

Santos did not challenge the removal of her case to the District Court or the substitution of parties and, accordingly, she filed the contemplated administrative claim. The Department of Health and Human Services, however, failed to take action on her claim for six months, and its inaction was deemed a denial of her claim. She then filed this suit in the District Court. After answering the complaint, the Government moved for judgment on the pleadings, or, in the alternative, for summary judgment, on the ground that the FTCA's two-year statute of limitations barred Santos's claim. On the proceedings on the motion, Santos acknowledged that she filed her claim in the state court more than two years after its accrual, but argued that the FTCA's statute of limitations should be equitably [**9] tolled so that her claim would be timely because she did not know that the allegedly negligent healthcare providers had been deemed federal employees. The District Court rejected Santos's tolling argument and found that her claim was untimely because in its view she had not exercised due diligence in inquiring into the federal status of York Health and the individual providers. Thus, the Court granted summary judgment to the United States. *Santos*, 523 F. Supp. 2d 436-37. Santos then filed a timely appeal.

III. JURISDICTION AND STANDARD OF REVIEW

The District Court had subject-matter jurisdiction under the FTCA, 28 U.S.C. § 1346(b), **[*193]** and we exercise jurisdiction under 28 U.S.C. § 1291. ***HN1*** Our standard of review of the District Court's order granting summary judgment is plenary, *see Doe v. Abington Friends Sch.*, 480 F.3d 252, 256 (3d Cir. 2007), as is our review of the District Court's finding that Santos failed to file her action within the period the statute of limitations allowed. *See KingVision Pay-Per-View, Corp. v. 898 Belmont, Inc.*, 366 F.3d 217, 220 (3d Cir. 2004).

IV. DISCUSSION

A. The Federal Tort Claims Act

As she recognizes, Santos must seek her recovery by proceeding under the FTCA, [**10] 28 U.S.C. §§ 1346(b), 2671 *et seq.*, a limited waiver of the sovereign immunity of the United States providing that:

> ***HN2*** The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

28 U.S.C. § 2674. ***HN3*** To make a claim under the FTCA, a claimant first must file her claim with the administrative agency allegedly responsible for her injuries. 28 U.S.C. § 2675(a); *see Reo v. United States Postal Serv.*, 98 F.3d 73, 75 (3d Cir. 1996) (discussing the FTCA). If the agency denies the claim or fails to resolve it within six months, as happened here, she then may file an action on her claim in a district court. 28 U.S.C. §§ 2675(a), 2672. District courts have exclusive jurisdiction over suits against the United States brought under the FTCA. 28 U.S.C. § 1346(b).

HN4 Even though substantively the FTCA follows state liability law, it includes a two-year limitations provision stating that "a tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate [**11] Federal agency within two years after such claim accrues . . . ." 28 U.S.C. § 2401(b). Moreover, federal law, not state law, governs the determination of the often decisive question to answer for statute of limitations purposes of when a claim has accrued under the FTCA. *Miller v. Philadelphia Geriatric Ctr.*, 463 F.3d 266, 270 (3d Cir. 2006); *Zeleznik v. United States*, 770 F.2d 20, 22 (3d Cir. 1985). Similarly, state-law tolling statutes do not apply to the FTCA's limitations period, and thus the Pennsylvania tolling statute, the basis for Santos's timing in bringing her state-court action, is inapplicable here. *Id*. at 22; *Sexton v. United States*, 266 U.S. App. D.C. 17, 832 F.2d 629, 633 n.4 (D.C. Cir. 1987) (citing *Zeleznik*); *see also* *Phillips v. United States*, 260 F.3d 1316, 1318-20 (11th Cir. 2001).

Obviously, under the FTCA as originally enacted, if a claimant pursued her claim in the wrong forum she might find the claim barred. Congress apparently regarded this result as harsh. Consequently, ***HN5*** in a 1988 amendment to the FTCA, the Westfall Act, 28 U.S.C. §§ 2671 *et seq.*, Congress established a procedure for a claimant to follow if she initially files a FTCA claim in the wrong forum. The FTCA now provides [**12] that tort claims filed in state court against federal employees acting within the scope of their employment "shall be removed . . . to the district court of the United States [where the claim is pending] . . . and the United States shall be substituted as the party defendant." 28 U.S.C. § 2679(d)(2). The amendment also includes a clause that saves from being barred by the statute of limitations certain timely claims filed in the wrong forum, such as in a state or a federal court rather than with the appropriate administrative agency. Pursuant to this savings clause an errant plaintiff whose suit is removed to a district court, and then dismissed because **[*194]** she failed to bring the timely required administrative claim, will be credited with the date that she filed her claim in the wrong forum for purposes of the FTCA's statute of limitations. Such claims will be deemed timely under section 2401(b) if

> (A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and (B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

28 U.S.C. § 2679(d)(5). Unfortunately for Santos, the absence of a [**13] tolling provision in section 2679(d)(5) meant that the claim she filed in the state court after the FTCA's two-year statute of limitations period had expired was not statutorily saved, and she does not contend otherwise.

It is undisputed that Santos's claim accrued on December 22, 2002, when she was six years old, when her mother took her to the York Hospital emergency room and the physicians there correctly identified her osteomyelitis by use of a CT scan. Accordingly, when Santos commenced her action against York Health and four of its employees in the Court of Common Pleas of York County, Pennsylvania, on May 22, 2005, more than two years had elapsed after her claim accrued. It therefore follows that in the absence of equitable tolling extending the time for her to file her claim, 28 U.S.C. § 2401(b) would bar her claim as untimely because even if Santos had filed her claim with the Department of Health and Human Services on May 22, 2005, it would have been untimely. Consequently, the FTCA's savings clause does not apply to her claim, a point not in dispute. Nevertheless, Santos argues that, in what she regards as the extraordinary circumstances of her case (i.e., her reasonable [**14] diligence through her counsel in pursuing her claim), the difficulty in determining that York Health and its employees had been deemed federal employees, and the approximately 11-year difference between the state-law and FTCA limitations periods, the FTCA's statute of limitations should be equitably tolled so that her claim is deemed to be timely.

B. The Equitable Tolling Doctrine Applies to the FTCA's Statute of Limitations.

The first disputed issue that we must address is whether in any circumstance there can be equitable tolling to relax the FTCA's limitations period. At one time we held that the FTCA's statute of limitations was jurisdictional. *See, e.g.*, *Bradley v. United States*, 856 F.2d 575, 577-78 (3d Cir. 1988), *vacated on other grounds*, 490 U.S. 1002, 109 S. Ct. 1634, 104 L. Ed. 2d 150 (1989). ***HN6*** But the Supreme Court subsequently held that federal statutes of limitations are not jurisdictional and that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." *Irwin v. Dep't of Veteran Affairs*, 498 U.S. 89, 93-96, 111 S.Ct. 453, 456-57, 112 L. Ed. 2d 435 (1990). The Court reasoned that "[o]nce Congress has made such a [**15] waiver [of its sovereign immunity], we think that making the rule of equitable tolling applicable to suits against the Government, in the same way that is applicable to private suits, amounts to little, if any, broadening of the congressional waiver." *Id*. at 95, 111 S.Ct. at 457. The Court observed that this general rule "is likely to be a realistic assessment of legislative intent as well as a practically useful principle of interpretation." *Id*.

Applying *Irwin*, we have held that ***HN7*** the FTCA's statute of limitations is not jurisdictional, and thus in appropriate circumstances the equitable tolling doctrine can **[*195]** apply in actions under it. *Hughes v. United States*, 263 F.3d 272, 278 (3d Cir. 2001); *see Hedges v. United States*, 404 F.3d 744, 748 (3d Cir. 2005) (federal courts apply equitable tolling to wide range of cases against the Government, including FTCA claims). Other courts of appeals also have applied equitable tolling in suits against the United States. *Hedges*, 404 F.3d at 748 (citing other courts of appeals); *T.L. ex rel. Ingram v. United States*, 443 F.3d 956, 961 (8th Cir. 2006) (citing courts of appeals holding that FTCA's limitations provision is jurisdictional but that equitable [**16] tolling nevertheless applies because Congress so intended). On the other hand, a court of appeals quite recently held that the FTCA's statute of limitation is jurisdictional and thus if a case is brought beyond the limitations period the court does "not have jurisdiction and, therefore, cannot apply the doctrines of equitable estoppel or equitable tolling that might otherwise allow [the] Plaintiff's case to proceed." *Marley v. United States*, 548 F.3d 1286, 1289 (9th Cir. 2008).

The Government contends, however, that we should not equitably toll the statute of limitations in this case notwithstanding Santos's asserted diligence in pursuing her action and in doing so attempting to identify the correct defendants. It predicates this argument on the FTCA's savings clause, which deems timely claims brought erroneously in state court, rather than before the appropriate federal agency, within two years after they accrue. 28 U.S.C. § 2679(d)(5). The Government contends that inasmuch as Congress explicitly provided a statutory exception to the FTCA's limitations period, we should not recognize additional nonstatutory equitable exceptions to the statutory limitations period. In support of its [**17] position, the Government cites *TRW v. Andrews*, 534 U.S. 19, 122 S.Ct. 441, 151 L. Ed. 2d 339 (2001), a case under the Fair Credit Reporting Act ("FCRA"), which in certain circumstances confers a private right of action on consumers so that they may sue credit agencies. The FCRA, as in effect at the time of *TRW*, contained a statute of limitations providing that actions to enforce liability under the FCRA must be brought "within two years from the date [liability accrues]" except in cases of willful misrepresentation by the defendant, in which case claims must be brought "within two years after [the plaintiff's] discovery . . . of the misrepresentation." *TRW*, 534 U.S. at 22, 122 S.Ct. at 444 (citing 15 U.S.C. § 1681p) (1994 ed.) (internal quotation marks omitted).

The issue presented in *TRW* was whether a general discovery rule, which delays the beginning of a limitations period until the plaintiff knew or should have known of her injury, applied in determining when a claim accrues under the FCRA. The Court held that a general discovery rule was not applicable in calculating the FCRA's limitations period because the statute's text and structure establishing the two-year limitation period and in the same [**18] sentence a specific and limited exception for cases of willful misrepresentation, evinced congressional intent to preclude judicial implication of a broader discovery rule. The Court reasoned that a judicially recognized general discovery rule under the FCRA would render the narrower statutory misrepresentation rule "insignificant, if not wholly superfluous." *See id*. at 31, 444 S.Ct. at 449. The Court explained that ***HN8*** "[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Id*. at 28, 444 S.Ct. at 447 (internal citations and quotation marks omitted).

HN9 We believe that Congress, in adopting the statute of limitations in the FTCA, did **[*196]** not demonstrate that it intended to preclude equitable tolling as it did in the FCRA. We reach this conclusion because Congress structured the two statutes differently. Thus, while Congress placed the FCRA's exception to the limitations provision within the same sentence as the general limitations provision connected by "except," 15 U.S.C. § 1681p (1994 ed.), in contrast it placed the FTCA's savings clause providing that certain [**19] claims filed within two years with the wrong agency are timely in a section distinct from the limitations provision. 28 U.S.C. §§ 2679(d)(5); 2401(b). The placement of the separate statutory savings provision does not suggest that Congress intended it to preclude equitable tolling, which the Supreme Court has presumed and held to apply in actions against the United States, *Irwin*, 498 U.S. at 95-96, 111 S.Ct. at 458; see *also Hughes*, 263 F.3d at 278; *Hedges*, 404 F.3d at 748; *Ingram*, 443 F.3d at 960-61, particularly in an area of law where equitable concerns may be greater. *TRW*, 534 U.S. at 27, 122 S.Ct. at 446-47 (distinguishing claim in that case, private action against a credit agency under FCRA, from medical malpractice claims).

The Government also argues that equitably tolling the statute of limitations would render the FTCA's savings clause "insignificant, if not wholly superfluous." *See id*. at 31, 122 S.Ct. at 449. But we reject this argument because the savings clause is applicable in cases in which equitable tolling would not be. For example, the

FTCA's savings clause lacks any due diligence requirement and thus encompasses a "garden-variety claim of excusable neglect," a situation [**20] in which equitable tolling would not apply. *See* *Irwin*, 498 U.S. at 96, 111 S.Ct. at 458.

At bottom, the Government's argument seems to blur two issues: whether equitable tolling can apply to the FTCA's limitations period in any circumstance and whether it should apply in this case. We view the Government's arguments supporting the first contention as a subtle invitation to overrule *Hughes*, but we cannot take that step as that case is binding on us. Third Circuit IOP 9.1. Consequently, we will address the second issue and do so below.

In reaching our result that equitable tolling is possible under the FTCA, we recognize that the reasoning in certain recent Supreme Court decisions might call into question whether equitable tolling is available in FTCA claims and thus raise doubt as to the continuing viability of our holding in *Hughes*. *See* *John R. Sand & Gravel Co. v. United States*, 128 S.Ct. 750, 755-56, 169 L. Ed. 2d 591 (2008) (distinguishing statutes of limitations protecting individual defendants, subject to waiver and equitable tolling, from those limiting the scope of governmental waiver of sovereign immunity, where equitable considerations are less likely to apply); *United States v. Beggerly*, 524 U.S. 38, 48-49, 118 S.Ct. 1862, 1868, 141 L. Ed. 2d 32 (1998) [**21] (equitable tolling not available in Quiet Title Act claims against United States, where limitations period was 12 years and limitations period already effectively allowed for equitable tolling); *United States v. Brockamp*, 519 U.S. 347, 350-54, 117 S.Ct. 849, 850-53, 136 L. Ed. 2d 818 (1997) (equitable tolling not available to tax refund claims, where limitation provision was detailed and technical, and where applying equitable tolling could create an immense administrative burden); *United States v. Kubrick*, 444 U.S. 111, 117-18, 100 S.Ct. 352, 357, 62 L. Ed. 2d 259 (1979) (cautioning courts neither to extend nor to narrow the FTCA's statute of limitations from what Congress intended, because assertion of a claim within the limitations period is a condition of FTCA's **[*197]** waiver of sovereign immunity); *see also* *Marley*, 548 F.3d at 1289.

Notwithstanding the foregoing cases, *Irwin* remains good law, for the Court in *John R*. applied but did not overrule *Irwin* in holding that its presumption that equitable tolling applied had been rebutted. *John R.*, 128 S.Ct. at 755-56. Consequently, these cases do not lead us to conclude that equitable tolling cannot apply under the FTCA.

HN10 The FTCA waives the sovereign immunity of the United States [**22] to the extent that it is liable on tort claims "in the same manner and to the same extent as a private individual under like circumstances," but includes a straightforward limitations provision separate from the waiver of immunity section. 28 U.S.C. §§ 2674, 2401(b). Considering that the FTCA creates tort liability "in the same manner" as liability is imposed on private individuals, the limitation provision is non-technical with a period of only two years, the circumstances surrounding tort and medical malpractice claims reasonably may justify applying equitable tolling to such claims, and neither the text nor structure of the freestanding statutory tolling provision suggests that Congress intended to preclude equitable tolling, we think that our holding in *Hughes* that there can be equitable tolling in suits under the FTCA remains good law which survives the later Supreme Court decisions to which we have referred. *Hughes*, 263 F.3d at 278; *accord* *Ingram*, 443 F.3d at 961-63 (equitable tolling applies even though limitation provision is jurisdictional); *see* *Hedges*, 404 F.3d at 748-51 (discussing factors to consider in determining whether *Irwin* presumption is rebutted); *but see* *Marley*, 548 F.3d at 1290. [**23] Thus, though we agree with the Government that "the statute of limitations was not tolled due to [Santos's] status as a minor," appellee's br. at 16, we conclude that we cannot in all circumstances preclude equitable tolling of the statute of limitations in FTCA actions because if we did so we unjustifiably would take upon ourselves the authority to narrow the congressional waiver of the sovereign immunity of the United States. *See* *Kubrick*, 444 U.S. at 117-18, 100 S.Ct. at 357.

C. Equitable Tolling Applies Here.

Inasmuch as equitable tolling can apply in cases under the FTCA, we turn to the question whether we should equitably toll the FTCA's statute of limitations in this case. ***HN11*** Equitable tolling, if available, can rescue a claim otherwise barred as untimely by a statute of limitations when a plaintiff has "been prevented from filing in a timely manner due to sufficiently inequitable circumstances." *Seitzinger v. Reading Hosp. & Med. Ctr.*, 165 F.3d 236, 240 (3d Cir. 1999). "This occurs (1) where the defendant has actively misled the plaintiff respecting the plaintiff's cause of action; (2) where the plaintiff in some extraordinary way has been prevented from asserting his or her rights; [**24] or (3) where the plaintiff has timely asserted his or her rights mistakenly in the wrong forum." *Hedges*, 404 F.3d at 751 (internal citations omitted); *School Dist. v. Marshall*, 657 F.2d 16, 19-20 (3d Cir. 1981) (internal citations omitted).

But ***HN12*** a plaintiff will not receive the benefit of equitable tolling unless she exercised due diligence in pursuing and preserving her claim. *Irwin*, 498 U.S. at 96, 111 S.Ct. at 457-58. The principles of equitable tolling thus do not extend to "garden-variety claims of excusable neglect." *Id*. at 96, 111 S.Ct. at 458. The remedy of equitable tolling is extraordinary, and we extend it "only sparingly." *Id*. at 96, 111 S.Ct. at 457; *Hedges*, 404 F.3d at 751. It is especially appropriate to **[*198]** be restrictive with respect to extension of equitable tolling in cases involving the waiver of the sovereign immunity of the United States. The Supreme Court made that point clear when it indicated that inasmuch as the FTCA "waives the immunity of the United States, . . . in construing the [FTCA's] statute of limitations, which is a condition of that waiver, we should not take it upon ourselves to extend the waiver beyond that which Congress intended," and the Court should [**25] not "assume the authority to narrow the waiver that Congress intended." *Kubrick*, 444 U.S. at 117-19, 100 S.Ct. at 357.

1. Santos Otherwise Diligently Pursued Her Claim.

It is clear that even though Santos did not determine before she brought her state court action that York Health and its employees had been deemed to be federal employees for FTCA purposes in malpractice actions, she diligently and vigorously pursued her claim. In this regard, after her claim accrued on December 22, 2002, she retained diligent counsel, who requested and reviewed her medical records, visited, corresponded with, and performed a public records search on York Health, and retained a family practice expert, a dental expert, a professor of pediatric otolaryngology, and a board-certified spinal surgeon, all of whom prepared expert reports. We have brought considerable experience to the federal bench which we are confident allows us to identify a diligent counsel, and based on that experience and our examination of the record in this case we believe that no reasonable person can doubt that Santos's counsel was diligent. Yet we do not suggest that Santos's mere compliance with the statutorily tolled state statute [**26] of limitations and her counsel's thorough preparation of her case entitles her to equitable tolling under the FTCA. *See* *Norman v. United States*, 373 U.S. App. D.C. 312, 467 F.3d 773, 776 (D.C. Cir. 2006). On the other hand, Santos's compliance with state law and preparation of her case do evidence her general diligence and thus are significant, even though her diligence in itself could not overcome her failure to identify York Health and its personnel as federal employees.

2. Santos Diligently Inquired into the Employment Status of York Health and its Personnel.

The Government argues, however, that even if Santos generally was diligent, she did not exercise due diligence in inquiring into the employment status of York Health and its healthcare providers with respect to malpractice claims. Consequently, it contends that equitable tolling should not apply, even if Santos had been diligent with respect to the other aspects of her case. In support of its contention, the Government cites our decision in *Zeleznik v. United States*, 770 F.2d 20. 5 *Zeleznik* was an action against the Immigration and Naturalization Service ("INS") for the wrongful death of the plaintiffs' son. The plaintiffs sued the INS when they discovered, [**27] more than two years after their son's death, that the INS had released their son's killer just days before the murder even though the killer had confessed to the INS that he did not have an authorized status in the United States, was in fraudulent possession of a United States passport, and had been involved in illegal drug sales. *Id*. at 20-22.

We held in *Zeleznik* that the FTCA's two-year statute of limitations barred the **[*199]** plaintiffs' claim because it had accrued when they learned of their son's death and its immediate cause. Thus, they were put on notice of the need to investigate their claim even though at the time of his death they had not learned of the INS's involvement. We explained, following the Supreme Court's decision in *Kubrick*, that "the accrual date is not postponed until the injured party knows every fact necessary to bring his action." *Id*. at 23. Because the plaintiffs knew of their son's death and its immediate cause, even though they did not know of the INS's involvement, they possessed sufficient critical facts to investigate their claim, and inasmuch [**28] as the INS did not actively conceal its involvement in the case, the accrual of the claim was not postponed by reason of the plaintiffs' lack of actual notice of that involvement. *Id*. at 24.

But the issue here is not when Santos's claim accrued, as that date is undisputed. It therefore follows that *Zeleznik* is not directly on point. In this regard, we emphasize that ***HN13*** the discovery rule, which governs a claim's accrual date for statute of limitations purposes, is distinct from equitable tolling, which applies where circumstances unfairly prevent a plaintiff from asserting her claim. *See* *Hedges*, 404 F.3d at 750-51 (distinguishing between an equitable discovery rule governing when a claim accrues and equitable tolling); *see also* *Valdez v. United States*, 518 F.3d 173, 182 (2d Cir. 2008) ("Equitable tolling is frequently confused both with fraudulent concealment on the one hand and with the discovery rule--governing . . . accrual--on the other.") (internal citations and quotation marks omitted); *Norman*, 467 F.3d at 774-78 (addressing equitable estoppel issue where date that claim accrued was undisputed). The issue here is whether the limitations period should be tolled because the circumstances [**29] of this particular case unfairly precluded Santos from timely filing her claim.

The Government cites cases from other courts of appeals holding that equitable tolling did not apply in those cases to the FTCA's statute of limitations because the plaintiffs bringing state-law suits failed to perform reasonable investigations that would have demonstrated that the defendants had been deemed federal employees covered by the FTCA. *Norman*, 467 F.3d 777-78; *Ingram*, 443 F.3d at 964; *Gonzalez v. United States*, 284 F.3d 281, 291-92 (1st Cir. 2002). In *Norman*, the plaintiff who was struck by an automobile brought an untimely suit against the driver, a federal agency employee covered by the FTCA, without investigating either the driver or his employer. *Norman*, 467 F.3d at 774-76. The Court of Appeals for the District of Columbia Circuit concluded that equitable tolling did not apply because "at no time during the FTCA's two-year statute of limitations did [the plaintiff] make any effort--diligent or otherwise--to identify [the defendant's] employer." *Id.* at 778. *Norman* is instructive because it contrasts with this case, in which Santos correctly identified the entity that was the employer of the [**30] four individual state-court defendants for all purposes other than under the FTCA.

In *Gonzalez*, a medical malpractice case, there was no evidence that the plaintiff made "any inquiry whatsoever" into the employment of the defendants, who were federal employees covered by the FTCA. *Gonzalez*, 284 F.3d at 291. The Court of Appeals for the First Circuit held that the FTCA's limitations period was not equitably tolled because "[a]lthough the plaintiff did not know the federal status of the defendants at the time of her treatment, she and her attorneys had two years to ascertain the legal status of the doctors **[*200]** and could easily have learned it." *Id.* at 291.

Similarly, the Court of Appeals for the Eighth Circuit in *Ingram*, also a medical malpractice case, declined to toll the FTCA's statute of limitations where the plaintiff was unaware of, but the Government did not hide, the fact that the allegedly negligent doctor was a federal employee subject to the FTCA. *Ingram*, 443 F.3d at 963-65 (citing *Garza v. United States Bureau of Prisons*, 284 F.3d 930, 935 (8th Cir. 2002)). In both *Norman* and *Gonzalez*, a simple investigation could have revealed the critical information, i.e., the federal or non-federal [**31] employment status of the defendants. *Norman*, 467 F.3d at 776-78; *Gonzalez*, 284 F.3d at 291. *But see* *Ingram*, 443 F.3d at 963-64; *cf.* *Gould v. United States*, 905 F.2d 738, 745 (4th Cir. 1990) (en banc) (where issue was accrual of claim under FTCA, plaintiff could have ascertained that defendant, a commissioned officer of United States Public Health Service, was a federal employee simply by contacting Department of Health and Human Services). 6

In this case, the District Court noted that it was not clear whether Santos knew or should have known that York Health received federal funds, but nevertheless found that Santos "failed to exercise due diligence by attempting to ascertain the federal [**32] status of her health care providers." *Santos*, 523 F. Supp. 2d at 443. The District Court reached its conclusion because of Santos's admission that she did not confirm her belief based on correspondence with and inquiries into York Health and its employees that the allegedly negligent healthcare workers and their employer were subject to claims under Pennsylvania law.

Yet Santos's belief was far from a baseless assumption. *See* *Gonzalez*, 284 F.3d at 292 (plaintiff who "failed to make any inquiries whatsoever" into employment status of allegedly negligent healthcare providers not duly diligent). To start with, York Health apparently looked like a private clinic, and except for FTCA purposes the clinic and its employees were private actors, rather than federal employees. As the District Court explained, the "[h]ealth care workers at private clinics, even ones receiving some federal aid, are not federal employees in the usual sense. After all, they do not perform a traditional government function or work in a government building, and they are not on the federal payroll." *Santos*, 523 F. Supp. 2d at 442. Moreover, Santos based her implicit conclusion that York Health and its employees could [**33] be liable under state law on inquiries, reviews of records, and other contacts with York Health. Santos's counsel identified the individuals whose alleged negligence injured her, and further identified their employer, York Health, an apparently private corporation that he investigated by performing a public records search. *Cf. Norman*, 466 F.3d at 776 (plaintiff suing individual defendant without determining individual defendant's employer was not duly diligent).

In addition, we reiterate that Santos's counsel corresponded with York Health, obtained Santos's medical records, visited its facility, and retained several expert witnesses. None of these inquiries, records, visits, or correspondence gave him a clue **[*201]** that the healthcare providers or York Health had been deemed federal employees or that Santos should contact the Department of Health and Human Services for more information about them. Indeed, the District Court acknowledged that Santos's "assumption that her doctors were private actors subject to state law . . . was not at all unreasonable." 523 F. Supp. 2d at 442.

The Government nonetheless claims that Santos could have ascertained that the FTCA protected York Health and its healthcare [**34] providers, and undoubtedly if she had been alerted to the need to explore their federal employment status then the Government's contention would be correct. Specifically, according to the Government, "[s]ources of information, including the very webpage cited in the affidavit of Plaintiff's counsel [as not revealing that York Health had been deemed a federal employee], were available, from which the status of York Health could be ascertained." Appellee's br. at 24. This website's main page stated that York Health receives funding from various federal, state, local, and charitable sources:

> The York Health Corporation receives grant support from the United States Department of Health and Human Services, the United Way of York County, the Family Health Council of Central Pennsylvania, the York County Community Development Department, the York City Bureau of Health, and the Pennsylvania Commission on Crime and Delinquency.

Id. at 10 (citing archived website). 7 In addition, the webpage indicated that York Health was a "federally-qualified health center." 8

The foregoing statements indicated that York Health received partial federal financial support from the Government. But they would not reveal to a reasonably diligent plaintiff that its doctors and clinics had been deemed federal employees under the Public Heath Service Act, 42 U.S.C. § 233(g)-(n), and thus were subject to the FTCA inasmuch as the Government gives financial aid to many entities, public and private, but their employees are not thereby federalized. In this regard, we point out York Health and its employees did not become employees of the other entities supporting them. With respect to the significance or not of federal aid, we cannot conceive that anyone would contend that on the basis of the common law application of the doctrine of *respondeat superior* the entities contributing to York Health's funding, including the United States itself, would be liable for York Health's employees' malpractice. After all, if making a contribution to an entity could have such a consequence, [**36] contributions to many charities, service and community organizations, foundations, and other nonprofit organizations would cease. Surely potential donors to such entities would not run the risk that by making their contributions they would become liable for a future plaintiff's injuries attributable to such an entity's torts. Furthermore, if York Health was a federal employee it would not be expected that charitable organizations and state and local governmental agencies would be giving it aid. 9

[*202] The Government asserts that in addition to the website, which did not indicate that York Health and its employees had been deemed federal employees, other "sources of information . . . were available" from which Santos could have learned this critical fact. Appellee's br at 24. At oral argument, [**37] when we asked what publicly available information would have alerted Santos that the allegedly negligent healthcare providers and York Health had been deemed federal employees, the Government stated that the Department of Health and Human Services maintains a database of clinics that receive funding and are deemed federal employees. Yet the Government did not indicate that the database was publicly available, or how it would be accessed, and the record does not specify where there is a public source setting forth the information. The absence of such a source is not surprising. As the District Court noted, the FTCA does not include a "requirement that deemed facilities publicize their status as federal entities, nor does [the Department of Health and Human Services] publish this information." *Santos*, 523 F. Supp. 2d at 442.

The Government also asserts that "[a] simple inquiry directed at the health center would have been sufficient in and of itself." Appellee's br. at 30. While the record does not indicate whether this assertion is true, clearly it presents an odd scenario in which Santos, a potential claimant, should have relied on her adversary to inform her of the applicability of [**38] the FTCA and its two-year statute of limitations. In any case, the Government does not contend that the healthcare providers or York Health would have been obligated legally to reveal their federal status. Moreover, while we do not doubt that the management of York Health understood its FTCA liability status, we are by no means certain that this knowledge extended to its employees, and the record is silent on this point. Overall, it seems to us, as far as we can see from the record, that Santos and her counsel had no reason to inquire as to the possible federal status of York Health and its employees.

3. Santos Was Precluded from Discovering That York Health and the Defendant Caregivers Were Federal Employees.

So where should Santos have looked to determine that the caregivers and York Health had been deemed federal employees, and what information could have alerted her of the need to do so? As a practical matter, York Health's federal status, if not covert, was at least oblique. Of course, Santos faces her statute of limitations barrier because of the Government's

> failure to disclose that physicians . . . who provide services in private voluntary hospitals and in what appear to be private [**39] clinics, are *de jure* federal employees. Patients receiving such treatment are not aware, because they are never told or put on any notice, that the clinics they attend are government-funded or that doctors treating them are government employees. Such an omission does not rise to the level of fraud. Nevertheless, by not formulating a regulation that would require notice to a patient that the doctor rendering service to him is an employee of the United States, the Department of Health & Human Services has created a potential statute of limitations trap in states [that] may provide a longer period of time than the FTCA to file a complaint. The **[*203]** number of cases in which the United States has sought to take advantage of this trap suggests that it is aware of the consequences of its failure to disclose the material facts of federal employment by doctors who might reasonably be viewed as private practitioners. This conduct, if anything, is more problematic than the non-disclosure that justified invoking the doctrine of equitable tolling in [an earlier case].

Valdez, 518 F.3d at 183 (internal citations omitted); *see Albright v. Keystone Rural Health Center*, 320 F. Supp. 2d 286 (M.D. Pa. 2004) [**40] (equitably tolling FTCA's statute of limitations in medical malpractice case where combination of Pennsylvania's minors' tolling statute and difficulty of ascertaining federal status of defendants resulted in extraordinary circumstances precluding plaintiff from timely filing her claim). **10**

Here, though York Health's website indicated that it received federal, state, local, and charitable funding, it did not provide notice to Santos that York Health and its employees were federal employees covered by the FTCA. And the Government has not identified, at least to us, any publicly available sources of information from which Santos could have learned this critical fact or, even if the information had been available, what circumstances should have led her to inquire into York Health's federal status for purposes of the FTCA. We reiterate that Santos correctly identified the allegedly negligent healthcare providers, determined that they were employees of York Health, and performed a public-records search on York Health. Santos's counsel also [**41] visited the clinic's facilities, corresponded with the clinic, and reviewed her medical records. But these inquiries did not reveal that the apparently private York Health and its employees had been deemed to be federal employees subject to the FTCA. And while Santos conceded that "the clinic did nothing to affirmatively mislead her as to its federal status," *Santos*, 523 F. Supp. 2d at 443, such affirmative misconduct is not required to find that she exercised due diligence sufficient for equitable tolling to apply. *See, e.g., Valdez*, 518 F.3d at 183. In considering all of the circumstances of this case, we have concluded that it satisfies the second of the three possible bases for concluding that there should be equitable tolling that we have set forth, for Santos "in some extraordinary way has been prevented from asserting . . . her rights." *Hedges*, 404 F.3d at 751.

We reach our conclusion applying equitable tolling with great caution, keeping in mind that we neither should expand nor contract the United States' waiver of its sovereign immunity, *Kubrick*, 444 U.S. at 117-18, 100 S.Ct. at 357, and that equitable tolling is an extraordinary remedy that we rarely apply. *Hedges*, 404 F.3d at 751. [**42] Here, however, inasmuch as the United States partially has waived its sovereign immunity under the FTCA, it would be inequitable to allow it to avoid potential liability by reason of a limitations provision whose applicability a reasonably diligent claimant did not discover.

V. CONCLUSION

We make one final observation about the inequity of the Government's position that should be apparent to all. The only reason that Santos has been barred from bringing her action is that at the time of her injury she was a minor, so her counsel understandably believed that the Pennsylvania statutory tolling rule protecting minors applied **[*204]** in her case. Moreover, though there can be tolling under state law for reasons other than a plaintiff's minority, it is nevertheless likely that a plaintiff invoking such statutory tolling will be a minor relying on her minority. Thus, the Government is contending for a result likely to prejudice the weakest and most vulnerable members of our society who surely are compelled to rely on others for the assertion of their rights, particularly when she is of tender years as was Santos when her cause of action accrued. There is no escape from the reality that the statute [**43] of limitations trap to which the court referred in *Valdez* is a perfect vehicle to ensnare children. In this regard we pose the following rhetorical question: can any rational person believe that Santos, who was six years old when her claim accrued at that time had any personal knowledge of malpractice actions and the FTCA? **11** Furthermore, we have no doubt at all that if Santos had been 18 years old on December 22, 2002, when her cause of action accrued she would have brought her claim in the state court within two years of that date so that the Westfall Act would have saved it. We believe that in reaching our conclusion we are acting consistently with congressional intent, as we do not think that Congress in the circumstances here would want to bar Santos from an opportunity to prove her claim.

Because of the extraordinary facts in this case centering on Santos's reasonable diligence and the federal involvement that was oblique at best, we conclude that the equitable tolling doctrine applies here to toll the FTCA's statute [**44] of limitations until Santos learned after filing her claim in state court that the state-court defendants had been deemed federal employees. Santos's claim is thus timely under 28 U.S.C. § 2401(b). We accordingly will reverse the order of the District Court entered November 30, 2007, granting summary judgment to the United States, and will remand the case to the District Court for further proceedings consistent with this opinion.

Dissent by: O'Neill

Dissent

O'Neill, J., dissenting:

I respectfully dissent.

I agree with the majority's statement of the facts and characterization of the issues before us. The first disputed issue, whether in any circumstance there can be equitable tolling of the FTCA's limitations period, is complicated and has created a significant circuit split.

In *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990), the Supreme Court held that non-jurisdictional statutes of limitations governing actions against the United States are subject to "the same rebuttable presumption of equitable tolling applicable to suits against private defendants." *Id.* at 96. The majority follows this Court's precedent in finding that the FTCA's statute of limitations is non-jurisdictional and that equitable [**45] tolling can apply. *See* *Hughes v. United States*, 263 F.3d 272, 278 (3d Cir. 2001).

However, as the majority notes, a substantial circuit split exists on whether the FTCA is jurisdictional and whether equitable tolling applies. **12** The Court of Appeals **[*205]** for the Ninth Circuit's decision in *Marley v. United States*, 548 F.3d 1286 (9th Cir. 2008), notes that the issue is further complicated by the Supreme Court's recent decision in *John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750, 169 L. Ed. 2d 591 (2008). **13** A definitive Supreme Court holding on this issue would eliminate the confusion and permit the law to be applied uniformly.

However, I find it unnecessary to address this issue because, regardless of whether the FTCA statute of limitations can be equitably tolled, Santos fails to show that equitable tolling is appropriate in this case. The majority would apply equitable tolling here because it believes that Santos and her attorney exercised due diligence and that she was precluded from discovering that her doctors and their employer were federal employees under the FTCA. It is on this ground that I dissent.

The Supreme Court permits

> equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights . . . . But the principles of equitable tolling described above do not extend to what is at best a garden variety claim [**49] of excusable neglect.

Irwin, 498 U.S. at 95-96 (footnotes omitted). Under *Irwin*, equitable **[*206]** tolling is available where a plaintiff has actively pursued judicial remedies but filed a defective pleading if plaintiff has exercised due diligence. *Id*. However, equitable tolling is an extraordinary remedy which should be extended only sparingly. *Hedges v. United States*, 404 F.3d 744, 751 (3d Cir. 2005), *citing* *Irwin*, 498 U.S. at 96. The burden is on the party claiming the benefit of the exception to the statute of limitations to show that he or she is entitled to it. *Irwin*, 498 U.S. at 96.

As the majority noted, we have found that equitable tolling is available in three circumstances. *Sch. Dist. of Allentown v. Marshall*, 657 F.2d 16, 19-20 (3d Cir. 1981). Santos does not allege that defendant actively misled her regarding the cause of action or that she raised the statutory claim in a timely fashion but in the wrong forum as she filed approximately five months after the FTCA statute of limitations had elapsed. Instead, plaintiff alleges that she is entitled to equitable tolling because she was prevented "in some extraordinary way" from asserting her rights because nothing put her on notice [**50] that she should inquire into whether York Health and her doctors were covered by the FTCA and the FTCA statute of limitations is eleven years shorter than the state statute of limitations. *Hedges v. United States*, 404 F.3d 744, 751 (3d Cir. 2005). The majority claims that, despite an otherwise diligent investigation including medical records requests, public records searches and conversations with York Health employees, nothing put Santos and her attorney on notice to inquire into whether York Health employees were deemed federal employees under the FTCA before filing her state law claim.

I disagree with the majority's holding that Santos exercised due diligence in ascertaining the federal status of her health care providers. She retained an attorney six months after her claim accrued and requested medical records immediately. While Santos and her attorney were clearly diligent in obtaining medical records and expert opinions, they did not exercise due diligence in inquiring into the effect of York Health's federal grants or federal qualifications. Santos and her attorney had two years to ask whether the hospital was private or federal while her attorney prepared her case. As other [**51] courts have held, for Santos and her attorney merely to assume that York Health was a private entity without making any inquiries to confirm this assumption constitutes a lack of due diligence. **14** I agree with our sister **[*207]** courts and the district courts that have addressed this issue that Santos' failure to inquire into her doctors' federal status constitutes "a garden variety claim of excusable neglect." *Irwin*, 498 U.S. at 95-96.

Santos argues that she was never informed of York Health's FTCA coverage. However, employees protected by the FTCA have no duty to disclose their federal legal status. *Gould*, 905 F.2d at 745. Santos concedes that she was not affirmatively misled by York Health or the government - Santos simply made no inquiry into York Health's status while receiving treatment nor during the two years that followed when an administrative FTCA claim could have been timely filed. Santos' attorney conceded that he did not confirm his assumption that York Health and its employees were private entities. To toll the FTCA statute of limitations because plaintiff is ignorant of defendant's federal status, plaintiff "must at the very least show that the information could not have been found by a timely diligent inquiry. . . ." *Motley*, 295 F.3d at 824, *citing* *Gonzalez*, 284 F.3d at 291. Here, as in *Motley*, Santos [**54] had two years after discovering the alleged negligence to learn of the Public Health Service Act, 42 U.S.C. § 5201 et seq., (the Act) as amended by the Federally Supported Health Centers Assistance Act of 1992, Pub. L. No. 102-501, 106 Stat. 3268 (1992), for which York Health had been deemed eligible since October 7, 1993, and to inquire into its possible application to her claim. The "failure to do so was a mistake of law that does not entitle [Santos] to equitable tolling." *Id., citing* *Kubrick*, 444 U.S. at 123-24. "[H]owever harsh it may seem, the law is clear that, absent active concealment, a plaintiff's ignorance of a person's status as a federal employee does not excuse plaintiff's failure to file a timely administrative claim." *Kelly v. Total Health Care, Inc*., 2000 WL 151280, at *1 (D. Md. Jan. 28, 2000), *aff'd* 3 Fed. Appx. 15 (4th Cir. 2000).

The majority attempts to distinguish factually-similar cases cited by the government that place the burden on plaintiffs to investigate defendants' legal status. The majority notes that Santos' attorney identified the doctors and their employer as defendants but did not have cause to discover their status as federal employees while, in [**55] the other cases, the plaintiffs failed to inquire into the identity of the defendants' employer. The majority argues that these cases did not apply equitable tolling because the plaintiffs "failed to perform reasonable investigations that would have demonstrated that the defendants had been deemed federal employees covered by the FTCA." I do not agree that these cases are distinguishable on the basis that the plaintiffs failed to inquire about the doctors' employer. 15 Instead, **[*208]** these cases do not apply equitable tolling for the same reason it is not applicable here: the plaintiffs failed to inquire into the defendant's federal status regardless of whether they correctly identified the defendants' employer.

In *Gonzalez*, a child's mother consulted an attorney four months after the doctors' allegedly tortious conduct and filed a claim shortly after the FTCA's limitations period expired. *Gonzalez*, 284 F.3d at 285-86. The plaintiff claimed that she was "blamelessly ignorant" and could not discover the defendants' legal status. *Id*. at 291. The Court of Appeals for the First Circuit held that the plaintiff could not show due diligence justifying equitable tolling because she presented no evidence that she or her attorneys inquired as to defendants' federal status. *Id*. The Court found that the plaintiff had two years to ascertain the defendants' legal status and that to assume state jurisdiction without confirmation was a lack of due diligence. *Id*. at 291-92. Like Gonzalez, Santos and her attorney failed to inquire into defendants' legal status or confirm their assumption that state law applied. The majority cites the case as finding that "there was no evidence that the plaintiff made any inquiry whatsoever into the employment of the defendants." However, the Court [**57] found "no evidence ha[d] been presented that [plaintiff] or her attorneys made any inquiry whatsoever as to the status of the defendants as federal employees." The majority suggests that a "simple investigation" by Gonzales would have revealed the doctors' federal status but that it was impossible for Santos to discover that York Health was a federal employee. It is difficult to see how this could be. If Gonzales had discovered that her doctors worked for a different hospital, General Lawrence Family Health Center, then Gonzales would still have to learn the hospital's legal status - a step that the majority believes Santos was precluded from discovering although she knew her doctors' employer. Thus, like Gonzales, Santos and her attorney could easily have learned the legal status of her doctors.

In *Ingram*, a 15-year-old mother's attorney started investigating six days after the doctors' allegedly tortious conduct during her child's birth, requested medical records within months and filed a claim within two and a half years. *Ingram*, 443 F.3d at 958. The plaintiff argued that she had no reason to suspect that her baby was delivered by a federal employee at the private hospital and that [**58] medical records made no such indication. *Id*. at 964. The Court of Appeals for the Eighth Circuit declined to apply equitable tolling because Ingram was unaware that her doctor was a federal employee when she knew her doctor's identity and there was no indication that the doctor or the United States attempted to conceal his federal employee status. *Id*. Santos and her attorney similarly received medical records that did not put her on notice of defendants' federal status though she knew the identity of her doctors and their employer. The *Ingram* Court relied not on Ingram's failure to inquire into her doctors' employer but on her failure to inquire into her doctor's legal status. That Santos identified her doctors' employer does not distinguish *Ingram* or *Gonzalez* and extinguish her obligation to inquire into her doctors' legal status.

Moreover, instead of following our sister courts in these factually-similar cases, the majority attempts to distinguish them and relies on the decision of the Court of Appeals **[*209]** for the Second Circuit in *Valdez* to support its proposition that Santos was precluded from discovering York Health's federal status. However, the discussion cited is dicta. The *Valdez* [**59] Court remanded the case on the issue of when the action accrued and the discussion cited by the majority began by noting that *Valdez* "involve[d] a special circumstance that *may* warrant equitable tolling" and concluded by stating that it was unnecessary to determine whether due diligence justified equitable tolling because it was remanding on the issue of accrual. *See Valdez*, 518 F.3d at 183, 185, emphasis added.

Under the majority's standard, for a plaintiff to identify her doctors and her doctors' employer but not to ask about their federal status because general diligence did not put her on notice to inquire is sufficient to justify equitable tolling. The majority believes that Santos' and her attorney's assumption was "far from [] baseless" when York Health looked like a private clinic, that its employees do not resemble traditional federal employees and that nothing revealed in general diligence "gave [Santos' attorney] a clue" that York Health and its employees were federal employees. However, plaintiffs have an affirmative duty to investigate defendant's legal status; defendants do not have a duty to disclose their identity as federally-protected employees. *Gould,* 905 F.2d at 745. [**60] The majority believes that Santos was precluded from discovering that York Health was a federal employee because neither York Health nor any "publically-available sources" provided notice of federal status and that even if the information were available no circumstances should have led her to inquire. The source that prompts the inquiry is not the facts; it is the law itself. 16

The information was not "undiscoverable" or even difficult to discover - the plaintiff need only know the law and ask. The only obstacle in learning of the defendant's federal status stemmed from ignorance of the applicable statutes, case law and literature in this area, 17 not from determining whether the Act applied. Santos has presented no evidence that an inquiry into her doctors' and York Health's legal status would not have discovered it.

[*210] The majority suggests that this situation presents an "odd scenario" wherein a plaintiff must rely on her adversary to provide accurate information, that York Health is under no legal obligation to respond truthfully to Santos' inquiry into its legal status and that York Health employees may not be aware of their federal status. However, if Santos had exercised diligence by making the inquiry and York Health had misrepresented its legal status, equitable tolling likely would have been appropriate because Santos could claim that she was misled. *Irwin,* 498 U.S. at 95-96. Also, Santos need not have relied on York Health's statement of its legal status. If Santos or her attorney had been aware of the Public Health Service Act, they could have looked up the clinic on a Department of Health and Human Services website that lists clinics under the Act: http://www.bphc.hrsa.gov/. This website was available for this purpose no later than January [**63] 2003, almost two years before the FTCA statute of limitations ran in this case. *See* Griffith, *Medical Malpractice Litigation, supra,* at 37, describing procedures for determining whether a health center is covered by the Act and referencing the website. The majority excuses Santos and her attorney of the duty to inquire as to potential defendants' legal status if nothing puts them on notice to inquire while Congress has imposed no duty to disclose on federal employees covered by the FTCA. If plaintiffs need not ask and defendants need not tell, then the burden lies with neither party and equitable tolling is provided as a benefit to those who do not learn the law regardless of how much general diligence is done in the case.

Santos is in this situation because she and her attorney believed that she had additional time to file under the Pennsylvania Minor's Tolling Statute. 18 We agree with the majority that a plaintiff's minority status cannot toll the FTCA's statute of limitations because the knowledge of the injury and the correct party to sue is imputed to the parents. 19 Thus, children in states with minority tolling statutes are in an identical position to adults in states with longer [**64] statutes of limitations for torts **[*211]** than that provided by the FTCA 20 and I have looked to those cases for guidance. Courts have not extended equitable tolling for adults in states that have longer statutes of limitations for tort claims than the FTCA's limitations period. *See e.g., Gonzalez,* 284 F.3d at 291-92, holding that plaintiff who incorrectly believed that the Massachusetts' three-year statute of limitations applied had not exercised due diligence where plaintiff failed to inquire into employment status of her doctor, who made no attempt to conceal his federal employee status; *Kelly*, 2000 WL 151280, *1 (D. Md. 2000), holding that plaintiff who filed within the Maryland statute of limitations had not exercised due diligence where defendant had not actively concealed federal status though it did not publicize that defendants were deemed to be federal employees.

As there is no case law in this Court involving a similarly-situated minor, I look to precedential law governing similarly-sympathetic plaintiffs. In *McNeil v. U.S.,* 508 U.S. 106, 113 S. Ct. 1980, 124 L. Ed. 2d 21 (1993), the Supreme Court held that a pro se litigant's claim was properly dismissed because he failed to heed clear statutory text to wait until his administrative proceedings terminated before instituting an action in federal court under the FTCA. *Id.* at 113. The Court noted that it has never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel. *Id*. How can we allow an attorney's mistake of law to justify equitable tolling if precedent does not allow a pro se litigant's claim to proceed when it involves a mistake of law? Moreover, this Court [**67] has declined to extend equitable tolling to pro se litigants finding a lack of due diligence for failure to discover the proper causes of actions before the statute of limitations expired. *See e.g., Hedges,* 404 F.3d at 752-53, *citing McNeil,* 508 U.S. at 113; *United States v. Sosa,* 364 F.3d 507, 512 (4th Cir. 2004), stating that a pro se plaintiff's "misconception about the operation of the statute of limitations" was "neither extraordinary nor a circumstance external to his control" sufficient to warrant equitable tolling; *see also* Huertas v. City of Philadelphia, 188 Fed. Appx. 136, 138 (3d Cir. 2006), holding that a plaintiff's "ignorance, inexperience and pro se status" do not equitably toll the statute of limitations in a personal injury case. The *Hedges* Court also held that the plaintiff's "mental incompetence, even rising to the level of insanity, did not toll a federal statute of limitations for claims against the Government" separately and in combination with the plaintiff's pro se status. *Hedges*, 404 F.3d at 753, *citing* Barren v. United States, 839 F.2d 987 (3d Cir. 1988), denying equitable tolling for mental incompetence in a FTCA claim. It is inconsistent and, indeed, incomprehensible [**68] to extend equitable tolling to a child whose parent was aware of her injury and immediately employed an attorney experienced in medical malpractice when we do not extend it to mentally-incompetent and pro se litigants because of their mistakes of law.

As this Court has previously noted, "[p]rocedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants." *Hedges*, 404 F.3d at 754. "In the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best **[*212]** guarantee of evenhanded administration of the law." *Id.* at 753, *citing* *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 152, 104 S. Ct. 1723, 80 L. Ed. 2d 196 (1984). While statutes of limitations can work a substantial hardship on plaintiffs and may harshly impact innocent parties by making it impossible to enforce otherwise valid claims, we must apply the law as written. "As the Supreme Court has instructed, it is clearly the prerogative of Congress, not the judiciary, to reform the terms and scope of waiver of sovereign immunity beyond that which Congress intended." *Gould*, 905 F.2d at 747, *citing* *U.S. v. Kubrick*, 444 U.S. 111, 117-19, 100 S. Ct. 352, 62 L. Ed. 2d 259 (1979). [**69] In fact, Congress amended the FTCA in 1988 to provide statutory tolling of its statute of limitations for timely claims brought erroneously in state court rather than before the appropriate federal agency. 28 U.S.C. § 2679(d)(5). This provision protects the claims of plaintiffs unaware of defendants' federal status in states with statutes of limitations for tort claims of two years or less. Thus, any remaining "traps" within the FTCA's statute of limitations for minors in states with minor's tolling statutes or adults in states with tort statutes of limitations longer than two years are for Congress, not this Court, to correct. *See* Bourne, *A Day Late*, discussing methods by which Congress could address this issue. To hold otherwise would effectively rewrite the two year statute of limitations of 2401(b) to allow the state statute of limitations or a state minor's tolling statute to apply whenever a plaintiff is unaware of a defendant's federal status.

In sum, if Santos and her attorney had considered the Public Health Service Act, the relevant case law and literature they would have known that York Health and Santos' doctors could be federal employees and that her cause of action could [**70] be governed by the FTCA. Their ignorance of the law and their failure to inquire into the possibility of its application are the only possible grounds for equitable tolling. As I previously noted, this is a "garden variety claim of excusable neglect" and not an example of due diligence that justifies equitable tolling. *Irwin*, 498 U.S. at 96. This is not one of the rare situations which justifies equitable tolling.

I would affirm the well-reasoned decision of the District Court.

Footnotes

* Honorable Thomas N. O'Neill, Jr., Senior United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

1 York Health later changed its name to Family First Health.

2 It should be understood that we are stating the facts as they appeared on the Government's motion for summary judgment most favorably to Santos, and thus our recitation of the facts will not bind the parties in the further proceedings that will ensue on the remand we are directing. Obviously, we are not making findings of fact with respect to the Government's possible liability for [**4] the alleged malpractice because on this appeal we are concerned only with the statute of limitations and tolling issues. We do observe, however, as did the District Court, that the historical facts in this case essentially are not disputed. *See* *Santos*, 523 F. Supp. 2d at 437.

3 42 U.S.C. § 233(g)(1) deems even a corporate entity entitled to the benefit of the tort protection of the Public Health Service Act and the FTCA to be an "employee of the Public Health Service."

4 In this stipulation, the Government waived the right to file a motion to dismiss based on the FTCA's statute of limitations but reserved the right to plead as an affirmative defense "any statute of limitations issues" and the right to file a motion to dismiss on other grounds. App. at 102-03.

5 At oral argument, the Government stated that *Zeleznik* is our most directly applicable precedent governing in this case.

6 At oral argument before us the Government also discussed *Whittlesey v. Cole*, 142 F.3d 340, 343 (6th Cir. 1998). In that case, the Court of Appeals for the Sixth Circuit considered whether the equitable discovery rule (governing claim accrual) and a state-law statutory tolling provision applied to the Tennessee statute of limitations where the defendant was not a federal employee subject to the FTCA. Neither the discovery rule nor Tennessee law is at issue here, and thus *Whittlesey* is not helpful to us.

7 Our quotation is from the archived website. *See* http://web.archive.org/web/20040505050805/http://www.yorkhealthcorp.com/index.html.

8 This [**35] phrase at most indicates that federal law could be applicable to specific situations such as determining eligibility for a provider to participate in Medicare and reimbursement rates under that program.

9 Lest it be thought that the Government was compelled as a matter of law to treat Santos as it did, we point out that in the somewhat comparable litigation involving the timeliness of a claim under the FTCA in *Bradley v. United States*, 856 F.2d 575, *vacated and remanded*, 490 U.S. 1002, 109 S. Ct. 1634, 104 L. Ed. 2d 150, *on remand*, 875 F.2d 65 (3d Cir. 1989) (per curiam), it took a very different approach than it does here.

10 While we reach the same result as the court in *Albright*, on which Santos heavily relies, we do so for somewhat different reasons as discussed here.

11 In posing this question we are aware that we have indicated that "we impute to their parents or guardian the knowledge of their injury." *Miller*, 463 F.3d at 274.

12 *See e.g.*, *Gonzalez v. United States*, 284 F.3d 281, 288 (1st Cir. 2002), noting that it "has repeatedly held that compliance with this statutory requirement is a jurisdictional prerequisite to suit that cannot be waived" (citations omitted); *but see de Casenave v. United States*, 991 F.2d 11, 13 n.2 (1st Cir. 1993), holding that "[i]n light of the Supreme Court's holding in *Irwin* . . . the district court's refusal to entertain plaintiffs' tolling argument [with respect to Section 2401(b)] was erroneous"; *Valdez ex rel. Donely v. United States*, 518 F.3d 173, 185 (2d Cir. 2008), [**46] declining to

determine whether to apply equitable tolling to the FTCA statute of limitations; *Hughes*, 263 F.3d at 278, holding that the FTCA's statute of limitations is non-jurisdictional and applying equitable tolling; *Gould v. U.S. Dep't of Health & Human Servs.*, 905 F.2d 738, 741 (4th Cir. 1990), finding that the FTCA statute of limitations is jurisdictional and unwaivable, so equitable tolling cannot be applied; *Johnson v. United States*, 460 F.3d 616, 619 (5th Cir. 2006), noting that it has not yet determined whether the FTCA is jurisdictional; *but see* *Perez v. United States*, 167 F.3d 913, 916-17 (5th Cir. 1999), holding that the FTCA statute of limitations may be subject to equitable tolling; *Glarner v. United States.*, 30 F.3d 697, 701 (6th Cir. 1994), holding that the FTCA statute of limitations is not jurisdictional and can be equitably tolled; *McCall ex rel. Estate of Bess v. United States*, 310 F.3d 984, 987 (7th Cir. 2002), treating the statute of limitations as an affirmative defense and applying equitable tolling; *T.L. ex rel. Ingram v. United States*, 443 F.3d 956, 961 (8th Cir. 2006), holding that "there is no inconsistency between viewing compliance with [**47] the statute of limitations as a jurisdictional prerequisite and applying the rule of equitable tolling" (citations omitted); *Marley v. United States*, 548 F.3d 1286, 1290 (9th Cir. 2008), noting that it has long held that the FTCA's statute of limitations is jurisdictional and thus equitable tolling may not be applied; *Trobaugh v. United States*, 35 Fed. Appx. 812, 815 (10th Cir. 2002), applying equitable tolling to the FTCA's statute of limitations; *but see* *Farlaino v. United States*, 108 F.3d 1388, at *4 [published in full-text format at 1997 U.S. App. LEXIS 5826, at *13] (10th Cir. 1997) (unpublished), noting that the FTCA limitations periods are jurisdictional and not subject to estoppel or waiver principles; *Torjagbo v. United States*, 285 Fed. Appx. 615, 618 (11th Cir. 2008), finding that the FTCA is jurisdictional but declining to determine whether equitable tolling applies; *Norman v. United States*, 373 U.S. App. D.C. 312, 467 F.3d 773, 776 (D.C. Cir. 2006), noting that it had not yet determined whether the FTCA's statute of limitations is jurisdictional.

13 The *Marley* Court noted that the Supreme Court held in *John R. Sand & Gravel* that the rebuttable presumption of *Irwin* is not the correct rule when past precedents analyzing the specific statute at issue are available. *Marley*, 548 F.3d at 1292-93, [**48] *citing* *John R. Sand & Gravel*, 128 S. Ct. at 755-56; *see also* *Belton v. United States*, 2008 U.S. Dist. LEXIS 68964, 2008 WL 2273272, at *9 (E.D. Wis. June 2, 2008).

14 *See e.g.*, *Ingram*, 443 F.3d at 964, holding that even if the plaintiff "had no reason to suspect" that the clinic was protected by the FTCA, "[t]he statute of limitations is not tolled, however, simply because a plaintiff is unaware that an alleged tortfeasor is a federal employee . . . . A plaintiff thus must inquire into the employment status of her doctor"; *Norman*, 467 F.3d at 775-76, declining to apply equitable remedies because defendants were not required to inform plaintiff of their federal status; *Gonzalez*, 284 F.3d at 291-92, holding that medical malpractice FTCA claim should not be equitably tolled despite the plaintiff's claim of "blameless ignorance" of federal status of her doctors; *Gould*, 905 F.2d at 745-46, holding that "blameless ignorance" [**52] is insufficient and that "[t]he burden is on plaintiffs to show that due diligence was exercised and that critical information, reasonable investigation notwithstanding, was undiscoverable; *Jones v. United States*, 2007 U.S. Dist. LEXIS 94022, 2007 WL 4557211, at *11-12 (M.D. Fla. Dec. 21, 2007), finding that the court could not apply equitable tolling to indigent single mother who failed to file her claim under the FTCA within the two year statute of limitations because she did not inquire as to the employment status of the doctors; *Schappacher v. United States*, 475 F. Supp.2d 749, 755-56 (S.D. Ohio 2007), holding that the statute of limitations should not be equitably tolled because of the plaintiffs' ignorance about doctor's federal status because they made no inquiry and there was no evidence that doctor affirmatively misled the plaintiff; *but see* *Valdez*, 518 F.3d at 183, noting in dicta that the government's decision not to require notice to patients of a doctor's federal status creates a potential statute of limitations trap in many states and that the government has taken advantage of this trap many times; *Albright v. Keystone Rural Health Center*, 320 F. Supp.2d 286 (M.D. Pa. 2004), finding that equitable [**53] tolling of the FTCA's statute of limitations was justified in a medical malpractice case where the combination of Pennsylvania Minor's Tolling statute and difficulty of ascertaining federal status of defendants resulted in extraordinary circumstances precluding plaintiff from timely filing her claim.

15 I note that *Norman* is distinguishable from this case because inquiry into the defendant's employer likely would have led to his federal status because the employer was the Environmental

Protection Agency. However, though the majority relies on *Norman* as instructive, the *Norman* Court gives no indication that the plaintiff's identification of the defendant's employer would have been sufficient to justify equitable tolling. *See* *Norman*, 467 F.3d at 776, holding that "[a]t a minimum, [**56] due diligence requires efforts to learn the employment status of the defendant" and that the plaintiff had not met that minimum.

16 Additionally, the majority suggests that if federal grants to an otherwise private hospital impose liability on the federal government for its medical malpractice then, by that same logic, no one would donate to non-profits because of the risk of liability for the non-profits' malpractice and the federal government would be liable for all entities to which it provides support. This is logically flawed as the circumstance which creates liability for the federal government in this case is the Public Health Service Act, not the financial support itself. For plaintiffs who know of the law, the existence of federal support is therefore sufficient notice that the Act could apply. In the present situation, it is not merely that York Health received federal support; it is that the United States waived its immunity [**61] and consented to be liable for the malpractice of those deemed federal employees under the Act if acting within the scope of their employment when a claim is timely filed.

17 Case law in other courts and academic literature published before the FTCA statute of limitations tolled in this case should have operated to put Santos and her experienced medical malpractice attorney on notice of the requirement to inquire into her doctors' legal status. *See e.g.,* *Motley*, 295 F.3d at 824; *Gonzalez*, 284 F.3d at 291; *Kelly*, 2000 WL 151280, at *1; Joseph P. Griffith Jr., *Medical Malpractice Litigation and Federally Funded Health Centers: A Primer on the Federally Supported Health Centers Assistance Act*, 14-JAN S.C. Lawyer 32, 37 (2003); Richard W. Bourne, *A [**62] Day Late, A Dollar Short: Opening a Governmental Snare Which Tricks Poor Victims Out of Medical Malpractice Claims*, 62 U. Pitt. L. Rev. 87 (2000). If Santos' counsel had read any of the cases or articles cited, he would have been aware of this problem.

18 The Pennsylvania Minors' Tolling Statute states:

> (i) If an individual entitled to bring a civil action is an unemancipated minor at the time the cause of action accrues, the period of minority shall not be deemed a portion of the time period within which the action must be commenced. Such person shall have the same time [**65] for commencing an action after attaining majority as is allowed to others by the provisions of this subchapter.
>
> (ii) As used in this paragraph, the term "minor" shall mean any individual who has not yet attained 18 years of age.

42 Pa. C.S.A. § 5533(b)(1)(i-ii).

19 *See e.g.,* *Ingram*, 443 F.3d 956, holding that even the status of mother of injured infant as a minor when daughter was born did not toll the two-year statute of limitations under the FTCA; *Wilson ex rel. Wilson v. Gunn*, 403 F.3d 524 (8th Cir. 2005), cert. denied, 546 U.S. 827, 126 S. Ct. 367, 163 L. Ed. 2d 74 (2005), holding that infancy does not ordinarily toll the FTCA statute of limitations because the parents or guardians of an infant plaintiff are under a duty to investigate an injury and its cause and to take legal action within the time prescribed; *McCall*, 310 F.3d 984, holding that neither minor's infancy nor mental incompetency, allegedly caused by United States, tolled FTCA administrative statute of limitations; *MacMillan v. United States*, 46 F.3d 377, 381 (5th Cir. 1995), holding that the limitations period is not tolled during minority of putative plaintiff because parent's knowledge of injuries is imputed to plaintiff; *Robbins v. United States*, 624 F.2d 971, 972 (10th Cir. 1980), [**66] same; *Mann v. United States*, 399 F.2d 672, 673 (9th Cir. 1968), holding that the time limitation is not tolled during a claimant's minority.

20 As the District 20 Court noted, "Fifteen states have statutes of limitations for medical malpractice claims that exceed the two year limit under the FTCA." *Santos v. United States*, 523 F. Supp.2d 435, 442 (M.D. Pa. 2007), collecting statutes.