FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LINDA SISTO, a widow; TASHINA SISTO, an unmarried woman; TYRELL SISTO, an unmarried man; JEREMY SISTO, an unmarried man; KASHINA SISTO, an unmarried woman; LANNETTE SISTO, an unmarried woman; PURCELL SISTO, an unmarried man, *Plaintiffs-Appellants*, v. UNITED STATES OF AMERICA, *Defendant-Appellee.*	No. 20-16435 D.C. No. 2:20-cv-00202-ESW OPINION

Appeal from the United States District Court
for the District of Arizona
Eileen S. Willett, Magistrate Judge, Presiding

Argued and Submitted June 8, 2021
Seattle, Washington

Filed August 4, 2021

Before: William A. Fletcher, Paul J. Watford, and Daniel P. Collins, Circuit Judges.

Opinion by Judge W. Fletcher;
Concurrence by Judge Watford

SUMMARY[*]

Federal Tort Claim Act/Indian Self-Determination and Education Assistance Act

The panel affirmed the district court's dismissal of an action brought under the Federal Tort Claims Act alleging negligence by an emergency room physician who treated Tyrone Sisto at the San Carlos Apache Healthcare Corporation hospital and failed to diagnose Rocky Mountain Spotted Fever, which led to Sisto's death.

Plaintiffs alleged that Dr. Gross was an employee of the United States under the Federal Tort Claims Act ("FTCA") and the Indian Self-Determination and Education Assistance Act ("ISDEAA"), 25 U.S.C. § 5301 *et seq*. At the time of treatment, Dr. Gross was working at the SCAHC hospital pursuant to a contract between SCAHC and Tribal EM, PLLC ("T-EM") under which T-EM provided emergency room medical services at the SCAHC hospital. The district court found that Dr. Gross was an employee of an independent contractor, rather than a federal employee, and thus the United States had not waived sovereign immunity as to Plaintiffs' claim. The district court dismissed the suit for lack of subject matter jurisdiction.

[*] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

In affirming the district court, the panel noted that the contract between SCAHC and T-EM explicitly provided that the contract did not establish an employer/employee relationship between SCAHC and any T-EM Provider. Instead, the contract established an independent contractor relationship between SCAHC and T-EM, and an employer/employee relationship between T-EM and T-EM Providers. The contract listed Dr. Gross by name as a T-EM Provider, and the sample Letter of Acknowledgement attached to the contract expressly stated that T-EM Providers have no employment relationship with SCAHC. The panel therefore concluded that Dr. Gross was an employee of T-EM rather than SCAHC, and that the FTCA and § 5321(d) did not authorize a suit against the United States based on his alleged negligence.

Plaintiffs argued that Dr. Gross was an "individual who provides health care services pursuant to a personal services contract with a tribal organization" within the meaning of the ISDEAA § 5321(d) and that he was therefore "deemed" an employee of the Public Health Service under that provision. The panel saw nothing in the history leading to § 5321(d)'s addition to the ISDEAA, in the text of § 5321(d), or in any of the regulations, that Congress intended to expand liability under the FTCA in the manner for which Plaintiffs contend.

Plaintiffs argued that because SCAHC granted Dr. Gross hospital privileges to provide emergency room services at SCAHC, he was deemed a federal employee for purposes of the FTCA under 25 U.S.C. § 1680c(e)(1) and 25 C.F.R. § 900.199. The panel disagreed. Because hospital privileges were not issued to Dr. Gross on the condition that he provide services covered by the FTCA, neither 25 U.S.C.

§ 1680c(e)(1) nor 25 C.F.R. § 900.199 conferred FTCA coverage.

Finally, the panel concluded that SCAHC did not control Dr. Gross's actions in administering care to a degree or in a manner that rendered him an employee of the government when he treated Sisto.

Concurring, Judge Watford agreed with reluctance that dismissal was required. He wrote that the relevant regulation, 25 C.F.R. § 900.199, was confusingly written so that it appeared that the FTCA governed any claims the plaintiffs might assert against the doctor, but the regulation did not accurately reflect the requirements of the statutory provision it implemented. He urged that the regulation that misled the plaintiffs' lawyers into suing the United States for the doctor's negligence be amended so that future plaintiffs are not similarly led astray.

COUNSEL

David L. Abney (argued), Ahwatukee Legal Office P.C., Phoenix, Arizona, for Plaintiffs-Appellants.

Brock J. Heathcotte (argued), Assistant United States Attorney; Krissa M. Lanham, Appellate Division Chief; Michael Bailey, United States Attorney; United States Attorney's Office, Phoenix, Arizona; for Defendant-Appellee.

OPINION

W. FLETCHER, Circuit Judge:

Tyrone Sisto, a member of the San Carlos Apache Tribe, died after Dr. Rickey Gross, an emergency room physician at the San Carlos Apache Healthcare Corporation ("SCAHC") hospital, failed to diagnose Rocky Mountain Spotted Fever. Sisto's mother and his children ("Plaintiffs") filed suit against the United States under the Federal Tort Claims Act ("FTCA"). They claimed that Dr. Gross was an "employee of the United States" under the FTCA and the Indian Self-Determination and Education Assistance Act ("ISDEAA"), 25 U.S.C. § 5301 *et seq.*, and that he negligently failed to diagnose the disease that led to Sisto's death.

The district court found that Dr. Gross was an employee of an independent contractor, rather than a federal employee, and thus the United States had not waived sovereign immunity as to Plaintiffs' claim. It dismissed the suit for lack of subject matter jurisdiction. Plaintiffs timely appealed. We have jurisdiction under 28 U.S.C. § 1291 and affirm.

I. Background

SCAHC entered into a "self-determination contract" under the ISDEAA with the Indian Health Service ("IHS"), a federal agency within the Department of Health and Human Services, to provide health care to tribal members. In the terminology of the ISDEAA, SCAHC is an "Indian contractor." *See* 25 U.S.C. § 5321(d). Employees of Indian contractors are deemed federal employees for purposes of the FTCA. *Id.*

On August 4, 2017, Sisto went to the SCAHC hospital complaining of a headache, body aches, and a poor appetite. His symptoms had begun three days earlier. Dr. Gross was working in the emergency department of the hospital that day. After running several lab tests, Dr. Gross concluded Sisto was suffering from a viral infection. He ordered intravenous fluids as well as pain and nausea medication before discharging Sisto. Plaintiffs allege that Dr. Gross did not test Sisto for Rocky Mountain Spotted Fever or prescribe an antibiotic that would have treated the disease.

On August 8, 2017, Sisto was found dead in his home with a rash covering his body. There were ticks "all over the room" and one on his body. A post-mortem analysis of blood confirmed that Sisto died from Rocky Mountain Spotted Fever, a potentially fatal tick-borne disease that responds well to early antibiotic treatment.

Sisto's mother and his children brought suit against the United States under the FTCA, alleging negligence by Dr. Gross in failing to diagnose and treat Sisto appropriately at the SCAHC hospital. The government moved to dismiss the claim for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). It argued that Dr. Gross was an employee of an independent contractor rather than of SCAHC, and that the FTCA does not waive the United States' sovereign immunity for claims against employees of independent contractors.

At the time of treatment, Dr. Gross was working at the SCAHC hospital pursuant to a contract between SCAHC and Tribal EM, PLLC ("T-EM") under which T-EM provided emergency room medical services at the SCAHC hospital. The contract between SCAHC and T-EM provided:

> T-EM is and shall at all times be an independent contractor with respect to SCAHC in the performance of its obligations under this Agreement. Nothing in this Agreement shall be construed to create an employer/employee . . . relationship between SCAHC and T-EM [or] any T-EM Provider . . . .

¶ 4.1. T-EM agreed to be

> solely responsible for paying all expenses, including compensation, health and disability insurance, workers's compensation insurance, life insurance, professional liability insurance, retirement plan contributions, employee benefits, income taxes, FICA, FUTA, SDI and all other payroll, employment or other taxes and withholdings, with respect to T-EM Providers . . . .

Id. T-EM agreed to indemnify SCAHC for "negligent acts or omissions" of T-EM employees. ¶ 4.4(b).

The contract further provided that doctors "employed or otherwise engaged by or under contract with T-EM . . . to provide the Services . . . under this Agreement" are "T-EM Providers." Recitals, ¶ D. The contract listed Dr. Gross as a "T-EM Provider." Exhibit 2.5(a). A sample "Letter of Acknowledgement" was attached to the contract, to be signed by "T-EM Provider[s]." The letter provided, "I expressly . . . [a]cknowledge that I have no employment, independent contractor or other contractual relationship with SCAHC, that my right to practice at SCAHC as a T-EM Provider is derived

solely through my employment or contractual relationship with T-EM." Exhibit 2.5.

The district court granted the government's motion to dismiss, finding that Dr. Gross was an employee of T-EM rather than SCAHC. Plaintiffs timely appealed.

II. Standard of Review

"We review de novo a dismissal for lack of subject matter jurisdiction under the FTCA." *Edison v. United States*, 822 F.3d 510, 517 (9th Cir. 2016).

III. Discussion

A. The FTCA and the ISDEAA

The FTCA waives the sovereign immunity of the United States, allowing the United States to be sued for damages for injuries "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 1346(b)(1). "Employee of the government" is defined to include "officers or employees of any federal agency." *Id.* § 2671. "[T]he term 'Federal agency' . . . does not include any contractor with the United States." *Id.* "Courts have construed the independent contractor exception to protect the United States from vicarious liability for the negligent acts of its independent contractors." *Edison*, 822 F.3d at 518 (citation omitted).

The ISDEAA was enacted in 1975 to increase tribal participation in the management of programs and activities on reservations by authorizing tribes and tribal organizations to

enter into contracts, called "self-determination contracts," with either the Secretary of Health and Human Services or the Secretary of the Interior. 25 U.S.C. § 5304(i), (j). Under such contracts, the "Indian contractor" agrees to undertake responsibility "for the planning, conduct, and administration of programs or services that are otherwise provided to Indian Tribes and members of Indian Tribes pursuant to Federal law." *Id.* § 5304(j). In the case before us, SCAHC entered into such a contract with the Indian Health Service, a division of the Department of Health and Human Services.

Tribes were faced with substantial costs in carrying out their self-determination contracts. Among them were high costs for liability insurance, particularly medical malpractice insurance. Coverage Issues Under the Indian Self-Determination Act, 22 U.S. Op. O.L.C. 65, 68 (1998). These costs were a significant disincentive to tribes contemplating self-determination contracts for medical services. When the government provided health services directly to the tribes, malpractice claims were covered by the FTCA because the services were provided by federal employees. In 1987, in order to encourage tribes to enter into self-determination contracts for medical services, Congress amended the ISDEAA to provide that personal injury claims arising out of medical malpractice claims were covered by the FTCA. The current version of the 1987 amendment is codified in § 5321(d).

B. Section 5321(d)

Section 5321(d) is not an easy read. It is a single sentence of 336 words, punctuated by a colon after the first 253 words. Paring it down to its relevant text, § 5321(d) provides:

> For purposes of section 233 of Title 42, with respect to claims by any person . . . for personal injury, including death, resulting from the performance . . . of medical . . . functions . . . , *an Indian tribe, a tribal organization or Indian contractor carrying out a contract* . . . under section[] 5321 . . . of this title is deemed to be part of the Public Health Service in the Department of Health and Human Services while carrying out any such contract . . . and its employees (including those acting on behalf of the organization or contractor as provided in section 2671 of Title 28, and including *an individual who provides health care services pursuant to a personal services contract with a tribal organization* for the provision of services in any facility owned, operated, or constructed under the jurisdiction of the Indian Health Service) are deemed employees of the Service while acting within the scope of their employment in carrying out the contract . . . .

(Emphases added.)

The statutory references in the text just quoted are as follows: Section 233 of Title 42 authorizes civil actions for damages against the United States Public Health Service. Section 5321 of Title 25, part of the ISDEAA, authorizes the Secretary of Interior or Secretary of Health and Human Services to enter into "self-determination contracts" with Indian tribes or tribal entities, under which the tribe or tribal entity undertakes to perform functions that would otherwise be performed by the federal government; § 5321(d), whose

relevant text is quoted above, provides that certain persons acting under such contracts may be sued under the FTCA. Section 2671 of Title 28 is a section of the FTCA. Quoted above, it defines the term "Federal agency" for purposes of the FTCA, authorizing damage suits in tort against employees of federal agencies; as noted above, § 2671 specifically provides that the term "does not include any contractor with the United States."

In the normal operation of the FTCA, federal employees are covered for acts or omissions occurring in the scope of their employment. However, when an independent contractor with the United States performs a function for the government, that independent contractor (as well as its employees) are not covered. 28 U.S.C. § 2671. Section 5321(d) changes the normal operation of the FTCA, providing that Indian contractors and their employees are deemed to be employees of the United States Public Health Service, thus making the FTCA applicable to suits against them arising out of the medical services provided.

C. Application to this Case

In the case before us, SCAHC has entered into a self-determination contract with the Indian Health Service to provide health services to the San Carlos Apache Tribe. It is clear that employees of SCAHC are covered by the FTCA. The question is whether an employee of an entity that has contracted with SCAHC to provide health services to SCAHC as an independent contractor is also covered by the FTCA. As we read § 5321(d), the answer is "no."

The parties agree that, under 25 U.S.C. § 5321(d) of the ISDEAA, SCAHC is part of the United States Public Health

Service for purposes of the FTCA and that, subject to exceptions not relevant here, injuries caused by the negligence of SCAHC employees while acting within the scope of their employment are covered by the FTCA. The district court held that Dr. Gross was not an employee of SCAHC, but rather an employee of T-EM, an independent contractor. The court concluded that the FTCA and § 5321(d) do not waive the United States' sovereign immunity with respect to claims based on the negligence of employees of independent contractors providing health care pursuant to a self-determination contract under the ISDEAA.

We agree with the district court. The contract between SCAHC and T-EM, whose relevant language we quote above, explicitly provides that the contract does not establish an employer/employee relationship between SCAHC and any "T-EM Provider." Instead, the contract establishes an independent contractor relationship between SCAHC and T-EM, and an employer/employee relationship between T-EM and T-EM Providers. The contract lists Dr. Gross by name as a T-EM Provider, and the sample "Letter of Acknowledgement" attached to the contract "expressly" states that T-EM Providers "have no employment . . . relationship with SCAHC." We therefore conclude that Dr. Gross was an employee of T-EM rather than SCAHC, and that the FTCA and § 5321(d) do not authorize a suit against the United States based on his alleged negligence.

D. Plaintiffs' Arguments

Plaintiffs make several arguments against our conclusion. We address them in turn.

1. “Pursuant to a Personal Services Contract”

Plaintiffs argue that Dr. Gross was “an individual who provides health care services pursuant to a personal services contract with a tribal organization” within the meaning of § 5321(d) and that he is therefore “deemed” an employee of the Public Health Service under that provision. We disagree with Plaintiffs’ broad reading of § 5321(d).

As we read § 5321(d), in order to be “an individual who provides health care services pursuant to a personal services contract with a tribal organization,” the individual must himself or herself have entered into a personal services contract with an Indian tribe, tribal organization, or Indian contractor. It is not enough for the individual to have entered into a personal services contract with an entity that has entered into an agreement as an independent contractor with an Indian tribe, tribal organization, or Indian contractor.

We are reinforced in this reading by regulations promulgated by the Bureau of Indian Affairs and the Indian Health Service that seek to explain the scope of FTCA coverage under § 5321(d). *See* 25 C.F.R. § 900.180 *et seq*. While the regulations are not a model of clarity, they support our conclusion that a “personal services contract” within the meaning of § 5321(d) refers to a contract between an Indian contractor and an individual providing personal services pursuant to that contract, and not to a contract between an independent subcontractor such as T-EM and an individual.

The regulations pretty clearly indicate that a “personal services contract” to which § 5321(d) refers is a contract

between an Indian contractor and the person providing the services. Section 900.186 provides:

> **Is it necessary for a self-determination contract to include any clauses about Federal Tort Claims Act coverage?**
>
> No, it is optional. At the request of Indian tribes and tribal organizations, self-determination contracts shall include the following clause[] to clarify the scope of FTCA coverage:
>
> . . .
>
>> For purposes of Federal Tort Claims Act coverage, the contractor and its employees (including *individuals performing personal services contracts with the contractor* to provide health care services) are deemed to be employees of the Federal government while performing work under this contract.

Id. § 900.186(a) (emphasis added). Under the clarifying language, "individuals performing personal services contracts with the contractor" are deemed federal employees. As we read this language, individuals cannot "perform[] personal services contracts with the contractor" if they are not parties to a contract with the contractor. Thus, individuals performing work under a contract with a subcontractor, rather than with the Indian contractor, are not deemed federal employees based on the personal services they provide.

Elsewhere, the regulations provide that "[s]ubcontractors or subgrantees providing services to [an Indian] contractor or grantee are generally not covered" by the FTCA. 25 C.F.R. § 900.189. Section 900.189 recognizes an exception for "personal services contracts under [1] § 900.193 (for § 900.183(b)(1)) or [2] § 900.183(b) (for § 900.190)." *Id.* (bracketed numbers added). None of these sections contradict the language in § 900.186(a) indicating that a "personal services contract" refers to a contract between an Indian contractor and an individual providing personal services.

First, § 900.193 provides:

> **Does FTCA coverage extend to individuals who provide health care services under a personal services contract providing services in a facility that is owned, operated, or constructed under the jurisdiction of the IHS?**
>
> Yes. The coverage extends to *individual* personal service contractors providing health care services in such a facility . . . .

(Emphasis added.) Section 900.183(b)(1), in turn, provides:

> (b) What claims may not be pursued under FTCA?
>
> > (1) Except as provided in § 900.181(a)(1) and § 900.189, claims against contractors arising out of the performance of

> subcontracts with a self-determination contractor[.]

Section 900.181(a)(1), referenced in § 900.183(b)(1), does not exist, but may refer to § 900.181(1) which includes certain subcontractors in California (not relevant here) in the definition of an Indian contractor. Section 900.189, quoted above, provides that subcontractors are generally not covered by the FTCA unless they are Indian contractors or operating pursuant to personal services contracts.

Second, § 900.183(b) specifies four types of claims that "may not be pursued" under the FTCA. The first claim is specified in subsection (b)(1), quoted in the preceding paragraph. The other claims are (b)(2), for on-the-job injuries covered by "workmen's compensation"; (b)(3), for breach of contract; and (b)(4), for claims arising out of activities outside of an employee's scope of employment. Section 900.190 does not mention personal services contracts.

We see nothing in the history leading to § 5321(d)'s addition to the ISDEAA, in the text of § 5321(d), or in any of the regulations that leads us to believe that Congress intended to expand liability under the FTCA in the manner for which Plaintiffs contend. Because Dr. Gross had only a contract with T-EM, he was not "an individual who provide[d] health care services pursuant to a personal services contract with a tribal organization." He was thus not deemed an employee of the Public Health Service under § 5321(d).

2. Staff Privileges

Plaintiffs argue that because SCAHC granted Dr. Gross hospital privileges to provide emergency room services at

SCAHC, he is deemed a federal employee for purposes of the FTCA under 25 U.S.C. § 1680c(e)(1) and 25 C.F.R. § 900.199. We disagree. These provisions extend FTCA coverage to individuals who are designated as employees for purposes of the FTCA as part of the privileging process and are issued privileges on the condition that the practitioner provide services covered by the FTCA. They do not independently confer FTCA coverage to all health care providers who have been granted hospital privileges.

Section 1680c(e)(1) provides that hospital privileges in facilities like SCAHC may be extended to non-Indian Health Service practitioners who provide certain services. It continues:

> Such non-Service health care practitioners may, as part of the privileging process, be designated as employees of the Federal Government for purposes of section 1346(b) and chapter 171 of Title 28 (relating to Federal tort claims) only with respect to acts or omissions which occur in the course of providing services to eligible individuals as a part of the conditions under which such hospital privileges are extended.

25 U.S.C. § 1680c(e)(1).

Under § 1680c(e)(1), non-Service providers such as Dr. Gross may be designated as employees for purposes of the FTCA for care they provide to eligible individuals. *Id.* The statute clearly recognizes the possibility, however, that a provider may receive hospital privileges *without* being designated an employee for purposes of the FTCA, for it

provides that "[s]uch . . . practitioners *may*, as part of the privileging process, be designated as employees" to provide care to eligible individuals "as a part of the conditions under which such hospital privileges are extended." *Id.* (emphasis added). The statute does not support Plaintiffs' argument that providers issued privileges to care for eligible individuals are *necessarily* covered by the FTCA. *See Tsosie v. United States*, 452 F.3d 1161, 1167 (10th Cir. 2006) (stating that such an argument "presents a topsy-turvy reading of the statute").

Plaintiffs point to no evidence that SCAHC designated Dr. Gross an employee for purposes of the FTCA "as part of the privileging process . . . as a part of the conditions under which such [] privileges [were] extended." 25 U.S.C. § 1680c(e)(1). The contract between SCAHC and T-EM specified that T-EM would provide the listed medical services as an independent contractor; required T-EM to maintain its own liability insurance to provide coverage for T-EM and T-EM Providers; and required T-EM to indemnify SCAHC for damage judgments arising out of a negligent act or omission by a T-EM Provider. It comes as no surprise that SCAHC did not then also designate T-EM's employees as employees of SCAHC for purposes of the FTCA, thereby protecting itself from liability, for SCAHC was already protected from liability by the provisions in its contract with T-EM.

25 C.F.R. § 900.199, upon which Plaintiffs also rely, provides:

> **Does FTCA coverage extend to health care practitioners to whom staff privileges have been extended in contractor health care facilities operated under a**

> **self-determination contract on the condition that such practitioner provide health services to IHS beneficiaries covered by FTCA?**
>
> Yes, health care practitioners with staff privileges in a facility operated by a contractor are covered when they perform services to IHS beneficiaries. Such personnel are not covered when providing services to non-IHS beneficiaries.

Like § 1680c(e)(1), § 900.199 does not stand for the proposition that the issuance of hospital privileges alone provides FTCA coverage. Instead, § 900.199 clarifies that those practitioners to whom staff privileges have been extended "on the condition that [they] provide health services to IHS beneficiaries covered by FTCA" are covered only when performing services for IHS beneficiaries.

Plaintiffs point to the answer portion of § 900.199 when they contend that it extends FTCA coverage to practitioners like Dr. Gross who have been issued staff privileges. But the answer must be read in light of the question, which assumes privileges were issued "on the condition that [the] practitioner provide health services to IHS beneficiaries *covered by FTCA*." *Id.* (emphasis added). In light of the question, the answer clarifies that when privileges are issued on the condition that the practitioner provides services covered by the FTCA, such coverage exists only when they provide services to IHS beneficiaries.

Because hospital privileges were not issued to Dr. Gross on the condition that he provide services covered by the

FTCA, neither 25 U.S.C. § 1680c(e)(1) nor 25 C.F.R. § 900.199 confers FTCA coverage.

3. Control

In some circumstances, despite language to the contrary in a contract, a court may determine that a worker is an employee based on the degree of control exercised over the worker. *See*, *e.g.*, *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981 (9th Cir. 2014). Thus, in *Carrillo v. United States*, 5 F.3d 1302, 1304 (9th Cir. 1993), where the question was whether a doctor working for the Veteran's Administration was a federal employee under the FTCA, we examined the degree of control over the manner in which the doctor practiced medicine.

Plaintiffs argue that under the terms of the contract between SCAHC and T-EM, Dr. Gross "was part of an apparent employer-employee relationship and was, by reasonable inference, subject to the hospital's relatively continuous supervision and control." But Plaintiffs point to nothing that shows that SCAHC had actual "control over Dr. [Gross's] *practice of medicine*." *Id.* at 1305 (emphasis added). T-EM, rather than SCAHC, was responsible for supervising Dr. Gross's actions in diagnosing and treating patients. The contract provided that T-EM's professional services were to include "the evaluation, diagnosis, treatment, supervision, and management of . . . health complaints and crises . . . with respect to patients presenting to the Department." T-EM, through its Medical Director, was to "[p]rovide medical direction for the day-to-day operations of the Department." The contract further specified that "T-EM . . . shall ensure that T-EM Providers . . . satisfy [designated] performance standards."

Plaintiffs also argue that Dr. Gross was an employee of the government for purposes of the FTCA because he was a "person[] acting on behalf of a federal agency in an official capacity." 28 U.S.C. § 2671. But the Supreme Court applies the ordinary "control test" to this provision of § 2671 and does not consider a contractor "whose physical performance is not subject to governmental supervision . . . to be treated as 'acting on behalf of' a federal agency simply because they are performing tasks that would otherwise be performed by salaried employees of the Government." *See Logue v. United States*, 412 U.S. 521, 531–32 (1973).

We therefore conclude that SCAHC did not control Dr. Gross's actions in administering care to a degree or in a manner that rendered him an employee of the government when he treated Sisto.

Conclusion

Dr. Gross was not an "employee" of the United States under the FTCA and 25 U.S.C. § 5321(d) when he treated Tyrone Sisto. We therefore affirm the district court's order of dismissal. In so doing, we do not reach the merits of Plaintiffs' malpractice claims which remain to be resolved in the appropriate forum.

AFFIRMED.

WATFORD, Circuit Judge, concurring:

Like my colleagues, I vote to affirm the dismissal of the plaintiffs' suit, but I do so with some reluctance.

If the plaintiffs' allegations are true, Tyrone Sisto died tragically and unnecessarily, due to the negligence of a doctor working at Mr. Sisto's local tribal hospital. That hospital was operated by the San Carlos Apache Healthcare Corporation under a contract with the Indian Health Service (IHS), an arm of the federal government. Mr. Sisto's mother and children could have sued the doctor and his immediate employer, Tribal EM, in state court, but their lawyers thought they instead had to sue the United States under the Federal Tort Claims Act (FTCA).

One can certainly understand why the plaintiffs' lawyers came to that conclusion. A confusingly written regulation issued by the Departments of Interior and Health and Human Services states that "health care practitioners with staff privileges in a facility operated by a contractor are covered [by the FTCA] when they perform services to IHS beneficiaries." 25 C.F.R. § 900.199. The doctor who treated Mr. Sisto was of course a healthcare practitioner; he had in fact been granted staff privileges in a facility operated by an Indian contractor (namely, the San Carlos Apache Healthcare Corporation); and he had in fact been providing services to an IHS beneficiary (namely, Mr. Sisto). Under the terms of the regulation, then, it appeared as though the FTCA governed any claims the plaintiffs might assert against the doctor.

The problem is that the regulation as drafted does not accurately reflect the requirements of the statutory provision it implements. Section 1680c of Title 25 provides that

healthcare practitioners, like the doctor who treated Mr. Sisto, "may, as part of the privileging process, be designated as employees of the Federal Government for purposes of [the FTCA] only with respect to acts or omissions which occur in the course of providing services to eligible individuals as a part of the conditions under which such hospital privileges are extended." 25 U.S.C. § 1680c(e)(1). Not all of these requirements were met in this case. The doctor who treated Mr. Sisto was never designated as an employee of the federal government as part of the process under which he received hospital privileges from the San Carlos Apache Healthcare Corporation. As a result, the United States cannot be sued for the doctor's negligence under § 1680c(e)(1) or 25 C.F.R. § 900.199.

I hope it is not too late for the plaintiffs to pursue their claim for medical malpractice against the doctor and his employer in state court. One thing is clear, though. The regulation that misled the plaintiffs' lawyers into suing the United States for the doctor's negligence should be amended so that future plaintiffs are not similarly led astray.