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## Inherently Incompatible: The Irreconcilable Tension Between Corporate Negligence Claims and the Federal Tort Claims Act

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**INHERENTLY INCOMPATIBLE: THE IRRECONCILABLE  
TENSION BETWEEN CORPORATE NEGLIGENCE CLAIMS  
AND THE FEDERAL TORT CLAIMS ACT**

*Veronica J. Finkelstein*

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A car crashes due to a negligently manufactured braking system, injuring the driver. Hackers breach a bank’s lax online security system, resulting in a customer’s identity being stolen. A hospital fails to conduct thorough backgrounds checks, resulting in hiring an unqualified physician who botches a patient’s surgery.

What do these seemingly different fact patterns have in common? All are examples of corporate negligence. In most cases, the driver, customer, and patient could file a civil lawsuit against the corporate entity—the manufacturer, the bank, or the hospital. But what if the corporate entity is federally funded, as may be the case in medical malpractice litigation? In those circumstances, the Federal Tort Claims Act (the “FTCA”) applies, barring a corporate negligence claim against the hospital.

As this article explains, the FTCA is premised on the theory of *respondeat superior*, a doctrine that holds an employer legally responsible for the tortious acts of an employee. The theory of corporate negligence, in contrast, is predicated on independent duties a corporate entity owes separate from any liability it has for the actions of its employees. Courts that permit corporate negligence claims to proceed under the FTCA frustrate the intentional balance struck by Congress. It is incumbent on counsel defending FTCA cases to more consistently and directly argue that such claims are invalid.

To illustrate why corporate negligence claims against federally funded hospitals are inherently incompatible with the FTCA, this article first explores the history of corporate negligence claims against hospitals. With that history in mind, the article then discusses the history, purpose, and statutory scheme of the FTCA. Finally, the article explains why corporate negligence claims are antithetical to the FTCA and why courts that permit these claims to proceed violate the delicate balance struck by Congress in the FTCA.

## I. THE HISTORY OF CORPORATE NEGLIGENCE CLAIMS AGAINST HOSPITALS

Although claims for corporate negligence can arise in any type of tort case, today these claims are commonly asserted in medical malpractice cases.<sup>1</sup> This was not always the case. For nearly a century, hospitals were immune from tort suit under the doctrine of charitable immunity.<sup>2</sup> Under this doctrine, a charitable organization is shielded from liability in tort.<sup>3</sup> Charitable immunity is justified by the belief that non-profit organizations benefit society at large and should therefore be protected from financial losses.<sup>4</sup> In other words, charitable organizations should spend their limited funds on their charitable mission and not on defending litigation.

In its early days, the practice of medicine was viewed as intrinsically altruistic and non-commercial.<sup>5</sup> By extension, hospitals were considered charitable institutions created to help the disadvantaged.<sup>6</sup> Shielding hospitals from suit meant hospital resources could be applied to caring for the poor.<sup>7</sup> New York was the first state to apply charitable immunity to bar a tort suit against a

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<sup>1</sup> See Arthur F. Southwick, *The Hospital as an Institution—Expanding Responsibilities Change Its Relationship with the Staff Physician*, 9 CAL. W. L. REV. 429, 429 (1973).

<sup>2</sup> Jeannie Pinkston, *Negligence: Strubhart v. Perry Memorial Hospital: Taming the Monster of Corporate Negligence or Creating an Unpredictable Form of Hospital Liability?*, 48 OKLA. L. REV. 797, 798 (1995).

<sup>3</sup> David H. Rutchik, *The Emerging Trend of Corporate Liability: Courts' Uneven Treatment of Hospital Standards Leaves Hospitals Uncertain and Exposed*, 47 VAND. L. REV. 535, 551-52 (1994).

<sup>4</sup> Ryan Montefusco, *Hospital Liability for the Right Reasons: A Non-Delegable Duty to Provide Support Services*, 42 SETON HALL L. REV. 1337, 1339 (2012).

<sup>5</sup> Lori B. Andrews, *Is There a Right to Clone? Constitutional Challenges to Bans on Human Cloning*, 11 HARV. J. L. & TECH. 643, 671 (1998).

<sup>6</sup> Timothy Stoltzfus Jost, *The Joint Commission on Accreditation of Hospitals: Private Regulation of Health Care and the Public Interest*, 24 B.C. L. REV. 835, 846 (1983) (discussing the divergent roles of hospitals over time).

<sup>7</sup> *Ponder v. Fulton-DeKalb Hosp. Auth.*, 353 S.E.2d 515 (Ga. 1987), *cert. denied*, 484 U.S. 863 (1987).

hospital in the landmark decision of *Schloendorff v. Society of New York Hospital*.<sup>8</sup> Other states quickly followed suit.<sup>9</sup>

Over time, our societal view of hospitals has evolved.<sup>10</sup> Hospitals began charging for services and treating both wealthy and indigent patients.<sup>11</sup> These changes eroded the justifications underlying charitable immunity. Forty years after deciding *Schloendorff*, New York reversed course in *Bing v. Thunig*, holding that a hospital could be vicariously liable for the acts of its employees.<sup>12</sup> Other states soon followed.<sup>13</sup>

Today, hospitals are viewed as sophisticated entities, which benefit society but which also function as profit-making enterprises.<sup>14</sup> A large percentage of hospitals, both privately and publicly owned, are profitable.<sup>15</sup> Medicine has become a significant commercial industry.<sup>16</sup>

The first major case endorsing the theory of corporate negligence in a medical malpractice context was the Illinois case of *Darling v. Charleston Community Hospital*.<sup>17</sup> In that case, a patient's fractured leg was improperly set in the emergency room, ultimately requiring a below-the-knee amputation after the fracture failed to properly heal.<sup>18</sup> Rather than blame the physician who set the fracture, the patient blamed the hospital for failure to ensure the nursing staff regularly monitored the leg once the physician had set the fracture.<sup>19</sup> In essence, rather than identifying a single individual who breached the standard of care the patient blamed the hospital for its systemic failure to provide adequate care.

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<sup>8</sup> 105 N.E. 92 (N.Y. 1914).

<sup>9</sup> *Hail v. Roberts*, 543 F. Supp. 493 (W.D. Va. 1982); *George v. Jefferson Hosp. Ass'n*, 987 S.W.2d 710, 714 (Ark. 1999); *Thompson v. Druid City Hosp. Bd.*, 184 So. 2d 825 (Ala. 1966); *Thompson v. Mercy Hosp.*, 483 A.2d 706 (Me. 1984).

<sup>10</sup> *See, e.g., Haynes v. Presbyterian Hosp.*, 45 N.W.2d 151 (Iowa 1950).

<sup>11</sup> Craig W. Dallan, *Understanding Judicial Review of Hospitals' Physician Credentialing and Peer Review Decisions*, 73 TEMP. L. REV. 597, 601 (2000).

<sup>12</sup> 143 N.E.2d 3 (N.Y. 1957).

<sup>13</sup> *See, e.g., President & Dir. of Georgetown Coll. v. Hughes*, 130 F.2d 810 (D.C. Cir. 1942); *Gable v. Salvation Army*, 100 P.2d 244 (Okla. 1940).

<sup>14</sup> Susan Ward, *Corporate Negligence Actions Against Hospitals—Can The Plaintiff Prove A Case?*, 59 WASH. L. REV. 913, 916 (Sept. 1984).

<sup>15</sup> ILL. BUS. L.J., *Grey Area Anatomy: Tax Exemptions for Nonprofit Hospitals*, 8 ILL. BUS. L.J. 59, 59 (2009).

<sup>16</sup> Donald L. Bartlett & James B. Steele, *CRITICAL CONDITION: HOW HEALTH CARE IN AMERICA BECAME BIG BUSINESS AND BAD MEDICINE* 76 (2006).

<sup>17</sup> 211 N.E.2d 253 (Ill. 1965).

<sup>18</sup> *Id.* at 256.

<sup>19</sup> *Id.*

The Illinois Supreme Court endorsed this theory, agreeing that the inadequate care leading to the amputation was a failure by the hospital, not any single hospital employee.<sup>20</sup> As the court noted, the patient did not go to the emergency room to see a specific physician acting independently but rather for a combined package of care overseen by the hospital.<sup>21</sup> Because the hospital promised the patient comprehensive care, the hospital was responsible for ensuring that care was provided. In endorsing the patient's theory of negligence, the *Darling* court became the first to recognize corporate negligence in a medical malpractice case, holding that a hospital has an independent duty to supervise its staff.<sup>22</sup>

Other courts soon followed. The next major case was *Purcell v. Zimbleman*, decided by the Supreme Court of Arizona.<sup>23</sup> After his physician botched a botched colon surgery, the patient discovered that the hospital had continued to employ the physician even after two prior adverse surgical outcomes.<sup>24</sup> The patient blamed the hospital for employing a physician it knew to be negligent.

Although the hospital tried to factually shift blame by arguing that it was not directly responsible for hiring and firing decisions, the *Purcell* Court rejected this defense.<sup>25</sup> The *Purcell* Court reasoned that the hospital had an independent duty to patients to ensure there was no negligence in the hiring or firing of hospital staff.<sup>26</sup>

Perhaps the most sweeping recognition of corporate duties appeared in *Thompson v. Nason Hospital*.<sup>27</sup> After a serious motor vehicle accident, the patient in *Thompson* was transported to the emergency department of Nason Hospital.<sup>28</sup> In the emergency room, she was treated by a general practitioner.<sup>29</sup> Despite being warned that the patient was taking blood thinners for a cardiac condition, and despite noting evidence of neurological impacts, the general practitioner failed to timely diagnose a massive brain bleed.<sup>30</sup> Despite

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<sup>20</sup> *Id.* at 267.

<sup>21</sup> *See id.*

<sup>22</sup> Mitchell J. Nathanson, *Hospital Corporate Negligence: Enforcing the Hospital's Role of Administrator*,

28 TORT & INS. L.J. 575, 575 (1993).

<sup>23</sup> *Purcell v. Zimbleman*, 500 P.2d 335 (Ariz. App.1972).

<sup>24</sup> *Id.* at 341.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> 591 A.2d 703 (Pa. 1991).

<sup>28</sup> *Id.* at 704.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 705.

recognizing the possibility of cardiac complications, the general practitioner also failed to consult with a cardiologist.<sup>31</sup>

By the time her brain bleed was discovered and the patient received specialist care, she had experienced permanent brain damage.<sup>32</sup> She filed suit, alleging, inter alia, a corporate negligence claim against Nason Hospital.<sup>33</sup> According to the complaint, Nason Hospital should have had better policies in place to require a cardiac consultation for emergency department patients on blood thinners.<sup>34</sup> She alleged that Nason Hospital breached its corporate duty of care by failing to implement and enforce proper policies and procedures.<sup>35</sup>

The Pennsylvania Supreme Court agreed that such a duty existed, recognized a duty flowing from the hospital to the patient, irrespective of any *respondeat superior* liability for the actions of physicians in the hospital.<sup>36</sup> As the *Thompson* court noted:

[c]orporate negligence is a doctrine under which the hospital is liable if it fails to uphold the proper standard of care owed the patient, which is to ensure the patient's safety and well-being while at the hospital. This theory of liability creates a nondelegable duty which the hospital owes directly to a patient.<sup>37</sup>

The *Thompson* Court then identified four duties owed by any hospital to its patients: a duty to use reasonable care in the maintenance of safe and adequate facilities and equipment; a duty to select and retain only competent physicians; a duty to oversee all persons who practice medicine in the hospital; and a duty to formulate, adopt, and enforce adequate and appropriate rules, policies, and procedures to ensure quality care for the patients.<sup>38</sup>

Since the *Thompson* case was decided, courts across the country have recognized a variety of corporate duties owed to patients by hospitals including the duty to: select and retain only competent physicians;<sup>39</sup> oversee the care

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 707.

<sup>38</sup> *Id.*

<sup>39</sup> *Strubhart v. Perry Memorial Hosp. Trust Auth.*, 903 P.2d 263, 266 (Okla. 1995); *Johnson v. Misericordia Community Hospital*, 301 N.W.2d 156 (Wis. 1981).

provided;<sup>40</sup> properly credential staff;<sup>41</sup> and effectively train staff.<sup>42</sup> Today every jurisdiction recognizes some form of corporate liability against hospitals by patients.<sup>43</sup>

At the time corporate negligence was first being recognized as a state law tort theory applicable to medical malpractice cases, a federal statute known as the FTCA had already been in existence for several decades. Because most medical malpractice cases are litigated outside the context of the FTCA, often in state court, a robust body of caselaw developed to support corporate negligence as a theory against hospitals without regard for the implications of the FTCA. Yet the FTCA has implications in the medical malpractice realm because some medical malpractice claims arise from care provided in federally funded hospitals. In these cases, the FTCA applies. The FTCA can drastically alter the landscape of a medical malpractice case.

## II. THE HISTORY, PURPOSE, AND STATUTORY SCHEME OF THE FTCA

Prior to enactment of the FTCA, the United States could not be sued in tort. Sovereign immunity foreclosed various tort suits. This included medical malpractice suits arising from care provided in federally run or federally funded hospitals.

The sovereign immunity doctrine provides that the government cannot be sued without its consent. The doctrine originated from the British common law. Because the King was presumed to be perfect and could not err, he similarly could not be sued without his consent.

In the United States, the doctrine of sovereign immunity applies analogously to state and federal governments as though they were the King. These governmental entities cannot be sued without consent, and consent often takes the form of a statutory waiver of sovereign immunity. The FTCA is one such waiver.<sup>44</sup> Applying the FTCA, a patient may sue the United States in tort for medical malpractice occurring in a federally run or federally funded hospital.

The case prompting passage of the FTCA, however, was not a medical malpractice case. On July 28, 1945, a B-25 Mitchell bomber flew into the

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<sup>40</sup> Johnson v. St. Bernard Hosp., 399 N.E.2d 198 (Ill. App. 1979).

<sup>41</sup> Larson v. Wasemiller, 738 N.W.2d 300 (Minn. 2007); Strubhart, 903 P.2d at 276.

<sup>42</sup> Thompson, 591 A.2d at 708.

<sup>43</sup> Cassandra P. Priestley, *Hospital Liability for the Negligence of Independent Contractors: A Summary of Trends*, 50 J. MO. BAR 263, 263 (1994).

<sup>44</sup> United States v. Nordic Vill., Inc., 503 U.S. 30, 34 (1992).

Empire State Building resulting in the deaths of 14 people, including 11 office workers and three crew members.<sup>45</sup> Eight months after the crash, the federal government offered money to families of the victims.<sup>46</sup> Some accepted, but others refused, instead petitioning Congress for the right to sue the federal government in court.<sup>47</sup> At the time, such a petition was necessary because no statutory waiver of sovereign immunity allowed suit in tort.<sup>48</sup>

Although the crash was not the initial catalyst for the FTCA, which had been pending in Congress for more than two decades, the multitude of petitions by the family of the victims was a factor that finally led to the passage of the FTCA.<sup>49</sup> In 1946, Congress enacted the FTCA, partially waiving sovereign immunity to allow certain tort suits against the United States.<sup>50</sup>

Congress was deliberate in its language, narrowly waiving sovereign immunity. Rather than permit any tort suit, Congress permitted only suits based on a theory of *respondeat superior*.<sup>51</sup> Under section 1346(b) of the FTCA, with some exceptions, the United States may be held liable in tort for the actions of “any employee of the Government while acting within the scope of his office or employment” in “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.”<sup>52</sup> The United States waives its sovereign immunity only for claims meeting this definition.<sup>53</sup>

Therefore, if a private person under similar circumstances would not be liable to the plaintiff for the alleged conduct, a court does not have jurisdiction to adjudicate an FTCA claim.<sup>54</sup> If state law would permit suit against an actual or deemed federal employee, the FTCA will instead permit suit against the United States substituted for that individual. The United States must certify that

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<sup>45</sup> Mark C. Niles, *Nothing But Mischief: The Federal Tort Claims Act and the Scope of Discretionary Immunity*, 54 ADMIN. L. REV. 1275, 1279 (2002).

<sup>46</sup> *Id.*

<sup>47</sup> Paul Figley, *In Defense of Feres: An Unfairly Maligned Opinion*, 60 AM. UNIV. L. REV. 393, 397-403 (2010).

<sup>48</sup> *Id.*

<sup>49</sup> *Dalehite v. United States*, 346 U.S. 15, 24 (1953).

<sup>50</sup> Title VI of the Legislative Reorganization Act of 1946, Pub. L. No. 79-601, 60 Stat. 812 (codified at 28 U.S.C. §§ 1346(b), 2671 to 2680).

<sup>51</sup> James E. Pfander and Neil Aggarwal, *Bivens, The Judgment Bar, and The Perils of Dynamic Textualism*, 8 UNIV. ST. THOMAS L. J. 417, 424-28 (2011).

<sup>52</sup> 28 U.S.C. § 1346(b).

<sup>53</sup> *F.D.I.C. v. Meyer*, 510 U.S. 471, 477 (1994) (citing 28 U.S.C. § 1346(b)).

<sup>54</sup> *See United States v. Olson*, 546 U.S. 43, 44 (2005).



the employee was acting within the scope of employment, but if the employee was—the United States becomes liable for the employee’s acts and omissions.

The Supreme Court has recognized that the government’s liability under the FTCA is predicated on *respondeat superior*. The Court has observed that where the United States certifies in response to an FTCA claim that an employee was acting within the scope of employment, “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.”<sup>55</sup> Noting that the plain text of the FTCA tracks precisely the vicarious liability scheme of *respondeat superior* liability, the Court concluded that the FTCA creates a remedial scheme under which the United States would be liable as an employer in like circumstances.<sup>56</sup>

As originally enacted, the FTCA did not preclude suit against individual government employees.<sup>57</sup> In 1988, Congress enacted the Federal Employees Liability Reform and Tort Compensation Act, which makes claims against the United States under the FTCA the exclusive remedy for torts committed by federal employees acting within the scope of their employment.<sup>58</sup> The Congressional intent motivating this legislation was “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.”<sup>59</sup> The purpose was not to permit suit against the United States for any tort, but rather to allow limited tort suits while protecting Federal employees.

Today, one major upshot of the FTCA is that no actual or deemed federal employee acting in the scope of his or her employment may be sued personally. The only proper defendant under the FTCA is the United States.<sup>60</sup> In enacting the FTCA, Congress intentionally shielded federal officers and employees from personal liability for torts committed within the scope of their employment.<sup>61</sup> As a result, an individual physician, facility, or federal agency is generally immune

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<sup>55</sup> *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 427 (1995) (citing Restatement (Second) of Agency § 219 (1958)) (emphasis added).

<sup>56</sup> *Laird v. Nelms*, 406 U.S. 797, 801 (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 . . .”).

<sup>57</sup> See *Smith v. United States*, 507 U.S. 197, 215 n.15 (1993) (Stevens, J., dissenting).

<sup>58</sup> 28 U.S.C. § 2679(b)(1).

<sup>59</sup> See *Smith*, 507 U.S. at 215 n.15.

<sup>60</sup> *Id.*

<sup>61</sup> 28 U.S.C. at §§ 1346(b)(1), 2679(a).

from liability for medical malpractice.<sup>62</sup> The only proper defendant in such a suit is the United States.

Importantly, this immunity is not vitiated by the fact that the FTCA leaves the plaintiff with no option to sue. Even if an exception to the FTCA bars suit against the United States, the plaintiff cannot instead sue a federal employee in tort.<sup>63</sup> If a patient experiences medical malpractice but an exception to the FTCA prevents the patient from suing the United States, the patient cannot instead sue the physician. As long as the physician acted within the scope of employment, the physician is immune from suit.

The FTCA does not create a new federal cause of action against the United States. Instead, the FTCA waives sovereign immunity for certain types of claims that are already recognized under state tort law.<sup>64</sup> Therefore, for a malpractice case, the law of the state where the malpractice is alleged to have occurred will govern what claims may be available. If state law provides for a cause of action and no FTCA exception to the waiver of sovereign immunity applies, generally the United States can be sued.

As a general matter, a patient injured by medical malpractice may sue physicians or hospitals for damages under tort law. There are thousands of hospitals across the country, many operated by corporations or non-profit entities. Where alleged malpractice occurs in a privately owned hospital or medical facility, applicable state law usually permits the patient to sue the physician as well as the hospital.

However, some hospitals are not privately operated. Some are directly operated by the federal government, including those operated by the United States Department of Veterans Affairs, the United States Department of Defense, and the United States Department of Health and Human Services (“HHS”).

These are not the only facilities where medical malpractice claims may be governed by the FTCA. In addition to those facilities directly operated by the federal government, there are hundreds of Federally Qualified Health Centers (“FQHCs”). FQHCs are community-based facilities that provide primary care services in underserved areas. Under the Public Health Service Act, these

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<sup>62</sup> *Id.*; see also *Continental Cablevision v. United States Postal Serv.*, 945 F.2d 1434, 1440 (8th Cir. 1991); *Evans v. United States Veterans Admin. Hosp.*, 391 F.2d 261, 262 (2d Cir. 1968) (per curiam), *cert. denied*, 393 U.S. 1040 (1969).

<sup>63</sup> *Id.*

<sup>64</sup> 28 U.S.C. § 1346(b)(1).

FQHCs may apply for federal grant money.<sup>65</sup> In 1992, Congress amended the Public Health Service Act by passing the Federally Supported Health Centers Assistance Act.<sup>66</sup> Under the amended act, these FQHCs receiving financial support from the federal government can apply to HHS to be covered by the FTCA.<sup>67</sup> If HHS agrees, the FTCA applies to medical malpractice claims arising from the acts and omissions of FQHC staff.

There are over a thousand FQHCs across the country.<sup>68</sup> These facilities go by different names, many of which provide no suggestion as to any federal funding.<sup>69</sup> Patients receiving care may not even realize the facility is federally funded. Physicians employed by these FQHCs may have admitting privileges at private hospitals and may see FQHC patients in those hospitals.

This means that a patient alleging medical malpractice claims is generally barred from suing the physician if that physician is either a federal employee or a deemed federal employee.<sup>70</sup> Where the physician works for a federally owned facility, that physician is often an actual federal employee.<sup>71</sup> When the physician works for a FQHC, the physician is often employed by the facility itself. Although the facility may receive federal funding, the facility is not operated by the federal government. In this instance, the United States may consider the physician to be a “deemed employee.”<sup>72</sup> Where the physician is either an actual or deemed federal employee acting within the scope of employment, the United States is the proper defendant and the lawsuit must be filed in federal court rather than state court.<sup>73</sup>

There are several major exceptions to the FTCA’s waiver of sovereign immunity.<sup>74</sup> Many would not apply in a medical malpractice setting, but one

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<sup>65</sup> 42 U.S.C. § 254b(e).

<sup>66</sup> 42 U.S.C. § 233(a)-(n).

<sup>67</sup> 42 U.S.C. at § 233(g)(1)(D).

<sup>68</sup> Transcript: Best Practices and Cost Controls: Improving Healthcare Access Through Innovation and Communication, 10 TENN. J. L. & POL’Y 108, 126 (Summer 2015).

<sup>69</sup> *Id.*

<sup>70</sup> 28 U.S.C. § 1346(b).

<sup>71</sup> *Grant v. UPMC Pinnacle Hosp.*, No. 1:20-CV-1988, 2021 U.S. Dist. LEXIS 73393, at 7 (M.D. Pa. Apr. 16, 2021) (“In order for the FTCA to trigger exclusive federal jurisdiction, the Government must certify that the defendant at issue is a federal employee who was working within the scope of their employment at the time they engaged in the alleged tortious conduct.”).

<sup>72</sup> 42 U.S.C. § 233(a).

<sup>73</sup> *Feaster v. Federal Bureau of Prisons*, 366 Fed. Appx. 322, 323 (3d Cir. 2010) (citing 28 U.S.C. §§ 2671, 1346(b)(1)).

<sup>74</sup> Inapplicable exceptions include, *inter alia*, claims related to tax collection, claims for certain intentional torts such as false arrest or malicious prosecution, and claims for lost mail. *See* 28 U.S.C. § 2680.

significant exception can apply. That exception is the discretionary function exception to the FTCA's waiver of sovereign immunity.

Under the discretionary function exception, no liability shall lie for "any claim . . . 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."<sup>75</sup>

A two-part test determines when the exception applies.<sup>76</sup> First, the act or omission at issue must involve an "element of judgment or choice."<sup>77</sup> Second, the judgment must involve social, economic, or political policy considerations rather than administrative housekeeping.<sup>78</sup>

The discretionary function exception reveals Congress's careful balance in enacting the FTCA. Congress recognized that certain governmental activities should be shielded from exposure to suit by private individuals.<sup>79</sup> Congress did not want courts to second guess legislative and administrative decisions grounded in social, economic, and political policy.<sup>80</sup> Congress was willing to allow the United States to be responsible for individual actions by individuals it controlled, but Congress did not intend for broader government decision-making to be subject to challenge in tort.

For this reason, the United States is not liable for discretionary policy-making decisions. Where medical malpractice is caused by these sorts of policy decisions, the United States may not be sued at all.<sup>81</sup>

In addition to these limitations, the FTCA also requires the exhaustion of administrative remedies.<sup>82</sup> No plaintiff may sue the United States in tort unless the plaintiff has first "presented the claim to the appropriate [f]ederal agency" whose employees are responsible for the plaintiff's alleged injury, and that agency has "finally denied" the plaintiff's claim.<sup>83</sup> The purpose of this exhaustion requirement is to allow the United States, through its agencies, the opportunity to settle disputes before engaging in costly litigation in court.

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<sup>75</sup> 28 U.S.C. § 2680(a).

<sup>76</sup> *United States v. Gaubert*, 499 U.S. 315, 322 (1991).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 322-23

<sup>79</sup> *United States v. Varig Airlines*, 467 U.S. 797, 814 (1984).

<sup>80</sup> *Gaubert*, 499 U.S. at 323; *Berkovitz v. United States*, 486 U.S. 531, 536-37 (1988).

<sup>81</sup> *Gaubert*, 499 U.S. at 324-25.

<sup>82</sup> 28 U.S.C. § 2675(b).

<sup>83</sup> 28 U.S.C. § 2675(a).

The content and timeliness of the administrative claim matters. With few exceptions, a plaintiff may not recover any damages in court that exceed those set forth in the administrative claim.<sup>84</sup> With limited exceptions, if the plaintiff fails to tender an administrative claim within two years, any tort claim in court is forever barred.<sup>85</sup>

As a result of these exceptions and limitations, medical malpractice suits arising from care in federally funded or federally run hospitals are different than those suits asserted against non-governmental hospitals. Nowhere is that more sharply evidenced than in the context of corporate negligence claims, which are permissible against non-governmental hospitals but barred against federally funded or federally run hospitals.

### III. WHY CORPORATE NEGLIGENCE CLAIMS ARE ANTITHETICAL TO THE FTCA

There are thousands of hospitals across the country, many privately owned and operated on a for-profit basis. Where alleged malpractice occurs in a privately owned hospital or medical facility, applicable state law usually permits the patient to sue not only the physician but also the hospital alleging corporate negligence. The same is not true for plaintiffs suing the United States. These plaintiffs must first identify a waiver of sovereign immunity for their claims.

There is no waiver for corporate negligence claims. The FTCA permits suit for tort claims arising out of the conduct of a government employee acting within the scope of his or her 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.”<sup>86</sup> In other words, the plaintiff must prove that a private individual, not an entity like a hospital, would be liable under applicable state law.<sup>87</sup> Only then will the United States substitute itself for the federal employee under a theory of *respondeat superior*. Medical malpractice claims against the United States must be grounded in the duty owed by an individual actor to the plaintiff.

Therein lies the fatal flaw in alleging corporate negligence claims against the United States under the FTCA. Corporate negligence claims flow from duties an entity (like a hospital) owes to a patient, not from duties owed by an individual (like a physician). The FTCA’s language is clear; the United States may only be

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<sup>84</sup> 28 U.S.C. § 2675(b).

<sup>85</sup> *McNeil v. United States*, 508 U.S. 106, 107-13 (1993).

<sup>86</sup> 28 U.S.C. 1346(b)(1).

<sup>87</sup> *See Molzof v. United States*, 502 U.S. 301, 305 (1992).

sued where an individual person would be liable under state tort law. Thus, the United States will not be liable under the FTCA when a plaintiff's claim is based on state law that would only hold a hospital—and not an individual physician—liable.

Although the Supreme Court has yet to address this specific issue in the context of a medical malpractice claim, its reasoning in *Rayonier Incorporated v. United States* supports this conclusion.<sup>88</sup> In *Rayonier*, the plaintiff property owners sued the United States in tort after a controlled fire set by the United States Forest Service (the “Forest Service”) spread to and destroyed timber, buildings, and other property of the plaintiffs.<sup>89</sup> On motion by the United States, the district court had dismissed the case, finding that the United States was immune from suit.<sup>90</sup> The circuit court agreed, affirming the district court.<sup>91</sup>

On appeal, the Supreme Court reversed, holding that the FTCA makes the United States liable for the negligence of its employees “in the same manner and to the same extent as a private individual under like circumstances.”<sup>92</sup> The Supreme Court held that the United States could be sued under the FTCA for the actions of its Forest Service employees. The acts of its employees, themselves shielded from liability, could be imputed to the United States as the only proper defendant.

The *Rayonier* Court had based its holding on the FTCA’s language providing that the United States could be held liable for the act or omission of “any employee.”<sup>93</sup> Under this reading, the United States was only liable in *Rayonier* because the plaintiffs identified specific acts by individual Forest Service employees as the basis for negligence. The plaintiffs had not identified some larger duty owed by the Forest Service itself, rather the United States stood in for the individual Forest Service employees who would otherwise have been held liable individually.

Decades later, the Supreme Court reinforced the *Rayonier* decision in *United States v. Olson*.<sup>94</sup> The *Olson* Court considered the tort claims of miners who alleged they were injured due to negligence by Mine Safety and Health

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<sup>88</sup> *Rayonier Inc. v. United States*, 352 U.S. 315 (1957).

<sup>89</sup> *Id.* at 316-17.

<sup>90</sup> *Id.* at 317-18.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 318.

<sup>93</sup> *Daniels v. United States*, No. 20-3893, 2021 U.S. Dist. LEXIS 108492, at \*5 (E.D. Pa. June 1, 2021) (citing 28 U.S.C. § 1346(b)(1)) (emphasis added).

<sup>94</sup> *United States v. Olson*, 546 U.S. 43, 44 (2005).

Administration inspectors.<sup>95</sup> The *Olson* Court held that FTCA liability against the United States had to be grounded in acts or omissions that would give rise to liability if committed by a private person, not a state or municipal entity.<sup>96</sup> Even where acts were purely governmental in function, like the inspection of mines, FTCA liability still required the acts or omissions of an individual person, not the government writ large.

One circuit court has similarly analyzed the FTCA in detail and reached the a conclusion aligned with the Supreme Court’s reasoning in *Rayonier* and *Olson*. In *Adams v. United States*, the Ninth Circuit held that the United States could not be held liable under the FTCA for property damage arising from the acts of two corporations it hired to spray herbicide.<sup>97</sup>

In so holding, the *Adams* court engaged in a detailed statutory interpretation of the FTCA focusing on the fact that the FTCA allows the United States to substitute for its employees. The *Adams* court then analyzed whether an “employee” could be a corporate entity, concluding it could not.<sup>98</sup>

The *Adams* court first noted that section 2679(c), which describes FTCA coverage, refers to actions brought against “any employee of the Government or his estate . . . .”<sup>99</sup> The *Adams* court also noted that an individual can have an estate, but a corporation cannot.<sup>100</sup> As such, the term “employee” had to refer to an individual or else the reference to an employee’s estate was nonsensical.

The *Adams* court then analyzed section 2679(b)(2) of the FTCA.<sup>101</sup> This section excludes certain suits from FTCA coverage. There are specific circumstances where a government employee can be personally sued. In particular, a government employee can be sued where a statute so provides. In section 2679(b)(2) of the FTCA, Congress used the term “individual” when referring to these statutes, noting that immunity does not extend to a civil action “brought for a violation of a statute of the United States under which such action against an *individual* is otherwise authorized.”<sup>102</sup> The *Adams* court reasoned that

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 45.

<sup>97</sup> *Adams v. United States*, 420 F.3d 1049, 1050 (9th Cir. 2005).

<sup>98</sup> *Id.*

<sup>99</sup> 28 U.S.C. § 2679(c).

<sup>100</sup> *Adams*, 420 F.3d at 1053-54.

<sup>101</sup> 28 U.S.C. § 2679(b)(2)(B).

<sup>102</sup> *Id.*

the inclusion of the term “individual” here suggested that the FTCA generally applied to the acts and omissions of individuals, not corporate entities.<sup>103</sup>

Finally, the *Adams* court noted that Congress had provided a list of types of employees in the FTCA when defining the term “employee.” The definition of “employee of the government” is textually divided into two groups, but actually lists five categories of employees.<sup>104</sup> Each category, save the one referring to “persons acting on behalf of a federal agency,” explicitly refers to employees that can only be human beings, including “officers” or “members” of armed forces.<sup>105</sup> A corporation cannot be an officer or member of the armed forces. An individual can.

The *Adams* court extended the reasoning from *Rayonier*. In so doing, the *Adams* court providing specific textual support for the conclusion that because the FTCA is a *respondeat superior* scheme, it excludes claims for corporate negligence. To date, the *Adams* case has been cited sparingly in medical malpractice cases in an effort to dismiss corporate negligence claims.<sup>106</sup> Although most courts presented with a motion to dismiss corporate negligence claims agree that there claims are barred under the FTCA,<sup>107</sup> some courts allow them to proceed. Determining why is the key to ensuring Congress’s careful balance is properly respected.

These claims sometimes proceed because courts fail to consider all the ramifications of the FTCA. For example, in *Crenshaw v. United States*, the court denied a motion seeking dismissal of corporate negligence claims because the court reasoned that underlying Illinois law permitted such a claim.<sup>108</sup> This reasoning misses the point. Indeed, for a claim to proceed under the FTCA it must be viable under applicable state law. But that is not the end of the analysis. The claim must also be alleged against a person. That Illinois law recognizes

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<sup>103</sup> *Id.*

<sup>104</sup> See 28 U.S.C. § 2671 (officers or employees of federal agencies; members of the military or naval forces; members of the National Guard while engaged in training or duty; persons acting on behalf of a federal agency in an official capacity; and some officers or employees of a federal public defender organization).

<sup>105</sup> *Adams*, 420 F.3d at 1053-54.

<sup>106</sup> *Jones v. United States*, No. CV-20-02145-PHX-SMB, 2021 U.S. Dist. LEXIS 226859, 2021 WL 5505787, at \*4 (D. Ariz. Nov. 24, 2021); *Watchman-Moore v. United States*, No. CV-17-08187-PCT-BSB, 2018 U.S. Dist. LEXIS 63671, at \*20-21 (D. Ariz. Apr. 13, 2018); *Meier v. United States*, No. C 05-04404 WHA, 2006 U.S. Dist. LEXIS 93138, at \*9 (N.D. Cal. Dec. 22, 2006).

<sup>107</sup> *Meier v. United States*, 310 F. App’x 976, 979 (9th Cir. 2009); *Lewis v. Holbrook*, No. 08-3357, 2008 U.S. App. LEXIS 28426, at \*2 (6th Cir. Aug. 13, 2008); *Daniels v. United States*, 2021 U.S. Dist. LEXIS 108492 at \*5; *Meier v. United States*, No. C 05-04404 WHA, 2006 U.S. Dist. LEXIS 93138, at \*10-11 (N.D. Cal. Dec. 22, 2006).

<sup>108</sup> No. 17-2304, 2020 U.S. Dist. LEXIS 172922, at \*32-34 (C.D. Ill. Mar. 24, 2020).



corporate negligence claims is not sufficient. Illinois law must also recognize corporate negligence claims against individuals and the plaintiff's complaint must describe acts or omissions by an actual or deemed federal employee for whom the United States will be liable in *respondeat superior*.

In other cases, these claims proceed because defense counsel fails to press for dismissal on the basis that corporate negligence claims are barred under the FTCA. For example, in *Mennecke v. Saint Vincent Health Ctr.*, the district court concluded that Pennsylvania law embraced the theory of corporate liability and therefore such a theory was viable against a FQHC.<sup>109</sup> Counsel for the United States did not argue that such claims fell outside the scope of the FTCA's waiver, and the district court did not, therefore, consider this argument. The entire issue of sovereign immunity had been sidestepped because it was never raised in *Mennecke*.

Therein lies the primary problem. The FTCA creates numerous hurdles to a plaintiff asserting a medical malpractice case against the United States. Each of these hurdles can provide grounds for dismissal of a claim, and the incompatibility of corporate negligence claims under the FTCA often gets lost in the shuffle of raising other, more common grounds for dismissal.

Indeed, many FTCA malpractice claims are dismissed for failure to timely exhaust administrative remedies. Many plaintiffs fail to exhaust administrative remedies altogether. Rather than address the propriety of corporate negligence claims, motions to dismiss in these cases argue the broader failure to exhaust. When plaintiffs do exhaust administrative remedies, they often fail to include necessary facts to later support corporate negligence claims. Again, motions to dismiss in these cases are unlikely to litigate the nuances of corporate negligence claims, instead arguing that the government was not given notice and an opportunity to settle these claims relating to the hospital's action when the administrative claim only detailed the negligence of a physician.

Other FTCA malpractice claims, particularly those raising corporate negligence claims, are dismissed based on the discretionary function exception. Corporate negligence claims typically involve some degree of discretionary action based on social, economic, or political policy considerations. The sorts of acts and omissions that give rise to corporate negligence claims nearly always involve policy decisions.<sup>110</sup> The government's decisions in these instances

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<sup>109</sup> No. Civ. Ap. 98-50, 1998 WL 1753663, at \*6 (W.D. Pa. April 14, 2000).

<sup>110</sup> *Nurse v. United States*, 226 F.3d 996, 1001 (9th Cir. 2000) ("allegedly negligent and reckless employment, supervision and training" of government employees "fall squarely within the [FTCA] discretionary

require the balancing of numerous factors, such as budgetary constraints, patient needs, available staff, the available pool of qualified job candidates, and equipment availability. Federal courts across the country have found that the VA's actions in hiring, retaining, entrusting, training, supervising, and equipping its employees are precisely the kinds of decisions Congress intended to shield from liability with the discretionary function exception and are therefore immune from suit.<sup>111</sup>

Because other grounds to challenge a corporate negligence claim often exist under the FTCA, there is little incentive to vigorously litigate the very propriety of these claims. In many instances, corporate negligence claims will be dismissed for other reasons without any need to press this point. Yet it is a critical point to press—and it should be considered by courts faced with the assertion of corporate negligence claims in malpractice claims.

The failure to raise the argument is often an oversight. At the time defense counsel drafts a motion to dismiss, a failure to exhaust or other deficiency may seem to provide clear grounds for dismissal. But sometimes claims survive dismissal on other grounds. When that happens, there is a paucity of authority to rely upon because attorneys do not consistently raise and litigate the argument

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exception”); *Vickers v. United States*, 228 F.3d 944, 950 (9th Cir. 2000) (“decisions relating to the hiring, training, and supervision of employees usually involve policy judgments of the type Congress intended the discretionary function exception to shield.”); *Tonelli v. United States*, 60 F.3d 492, 496 (8th Cir. 1995) (permitting negligent hiring, supervision, and retention claims “would require . . . the type of judicial second-guessing that Congress intended to avoid.”); *Burkhart v. Wash. Metro. Area Transit Auth.*, 112 F.3d 1207, 1217 (D.C. Cir. 1997) (“the hiring, training, and supervision of [employees] are surely among those involving the exercise of political, social, or economic judgment.”); *Fang v. United States*, 140 F.3d 1238, 1243 (9th Cir. 1998) (government exercises a discretionary function when deciding the amount and quality of medical equipment it needs to maintain); *C.R.S. v. United States*, 11 F.3d 791, 797 (8th Cir. 1993) (decisions regarding which procedures to employ in a hospital are “susceptible to a balancing of social, economic, and political policy factors,” and “implicate[d] a host of complex policy issues, including the need to keep costs in check given the budget constraints under which government operates”)

<sup>111</sup> See, e.g., *Tolbert v. United States*, No. 17-10273, 2017 U.S. Dist. LEXIS 209939, at \*8 (E.D. Mich. Dec. 21, 2017) (dismissing claims implicating the VA's employment decisions as to hiring, firing, training, and supervising its staff under FTCA's discretionary function exemption because plaintiff “points to no specific regulations that would constrain the judgment exercised in making these decisions.”); *French v. United States*, 195 F. Supp. 3d 947, 954 (N.D. Ohio 2016) (allegations relating to VA's conduct in hiring, retaining, entrusting, training, and supervising medical center employees falls within discretionary function exception); *Neal v. United States*, Civil Action No. ELH-19-1033, 2019 U.S. Dist. LEXIS 206028, at \*30 (D. Md. Nov. 27, 2019) (the FTCA's discretionary function exception bars plaintiff's claims against VA medical center for negligent hiring, retention, and supervision of technician); *Smith v. United States*, No. 2:11-cv-00616, 2014 U.S. Dist. LEXIS 131922, at \*7-12 (S.D. Ohio Sep. 16, 2014) (dismissing FTCA claims relating to VA medical center's radiology system with prejudice under discretionary function exception; decisions regarding design, maintenance, and use of radiology system were susceptible policy analysis); *Cruz v. United States*, 684 F. Supp. 2d 217, 222-25 (D.P.R. 2010) (allegations of negligence arising from selection, design, and operation of VA medical center's computer system dismissed under discretionary function exception)

that corporate negligence claims are barred. Indeed, aside from a handful of reported district court decisions, caselaw addressing the viability of corporate negligence claims in medical malpractice cases asserted under the FTCA is scant. *Mennecke* is one example of a case where other grounds for dismissal were raised and rejected, leaving the United States defending a case Congress never intended the government to have to litigate.

The failure here is not one by Congress. There are instances where statutory language is ambiguous and requires amendment. This is not one of those instances. The FTCA's language is sufficiently clear. By its plain language, the FTCA is premised on the theory of *respondeat superior*. The theory of corporate negligence is antithetical to such a theory.

In other instances, a novel application of the law was unanticipated and has unexpected consequences. This is not one of those instances either. Courts have no difficulty concluding that the FTCA applies to medical malpractice cases. Corporate negligence claims against hospitals existed when the FTCA was enacted. Had Congress intended there to be liability for such claims, it would have utilized different language in the FTCA than that which it ultimately selected.

The failure here is one by counsel. Counsel should not be reticent to move for dismissal on the basis that corporate negligence claims are barred. Even if other arguments for dismissal fail, defense counsel should still be able to assert this argument.

Where claims fall outside the scope of the FTCA's waiver of sovereign immunity, a challenge to those claims is a challenge to subject matter jurisdiction. Such challenges can be raised any time by the litigants and also *sua sponte* by the court.<sup>112</sup>

Such a challenge requires careful review by the court. Judicial restraint requires federal courts to avoid liberal interpretation of any federal or state law that expand the government's waiver of sovereign immunity without Congressional approval.<sup>113</sup> A court entertaining a challenge to jurisdiction must start with the presumption that a cause lies outside the limited jurisdiction of the

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<sup>112</sup> Fed. R. Civ. Proc. 12(b)(1).

<sup>113</sup> See *U.S. Dep't of Energy v. Ohio*, 503 U.S. 607, 615 (1992).

federal courts.<sup>114</sup> This is a threshold issue.<sup>115</sup> It is the plaintiff, not the United States, who bears the burden of proving subject matter jurisdiction exists.<sup>116</sup>

The FTCA provides powerful arguments to defense counsel in medical malpractice cases. One such powerful argument is the argument that corporate negligence claims. Defense counsel should raise this argument whenever appropriate, should litigate it fully, and should not be reticent to file a serial motion to dismiss if necessary.

The increasing proliferation of corporate negligence claims in FTCA cases, and courts allowing these claims to proceed, is a simple product of the failure to vigorously defend the limited waiver of sovereign immunity in the FTCA. Any counsel defending an FTCA case must resist corporate negligence claims vigorously and then litigate any erroneous decisions on appeal.

Courts that allow corporate negligence claims to proceed against federally funded hospitals fail to uphold the careful balance struck by Congress when it enacted the FTCA. It is incumbent on counsel defending federally run and funded hospitals to hold the line on the FTCA's boundaries. Corporate negligence claims are inherently incompatible with the FTCA. Consistently raising this argument will give courts the opportunity to develop robust caselaw on this issue to fill the current paucity.

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<sup>114</sup> See *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

<sup>115</sup> See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998)

<sup>116</sup> See *Kokkonen*, 511 U.S. at 377; *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 182-83, 189 (1936).