

12-3713

To Be Argued By:
LAUREN M. NASH

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 12-3713

CHRISTOPHER PHILLIPS, Administrator for
the Estate of KAREN CATO,

Plaintiff-Appellant,

-vs-

GENERATIONS FAMILY HEALTH CENTER,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE DEFENDANT-APPELLEE

DAVID B. FEIN
*United States Attorney
District of Connecticut*

LAUREN M. NASH
DAVID C. NELSON
SANDRA S. GLOVER (*of counsel*)
Assistant United States Attorneys

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Statement of Jurisdiction

The district court (Vanessa L. Bryant, J.) had subject matter jurisdiction over this civil case pursuant to 28 U.S.C. § 1331. This case was removed to district court under 28 U.S.C. § 1442(a)(1); 28 U.S.C. § 2679(d)(2); and 42 U.S.C. § 233(c). Appendix 1, 6 (“A__”). The district court entered a final judgment dismissing all of the plaintiff’s claims on August 20, 2012. A4. On September 7, 2012, the plaintiff filed a timely notice of appeal pursuant to Fed. R. App. P. 4(a). A5. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

Statement of Issues Presented for Review

In this case under the Federal Tort Claims Act (“FTCA”), the district court dismissed the malpractice action against the defendant, a federally-funded community health center, because the plaintiff failed to file an administrative tort claim prior to filing suit.

A. Whether the district court properly found that the malpractice claim accrued no later than April 27, 2009, the date on which the plaintiff contacted a lawyer about pursuing the claim.

B. Whether the plaintiff’s claim was “commenced” when the plaintiff filed a motion to extend the time for filing suit in state court such that the claim would qualify as timely under the savings clause of 28 U.S.C. § 2679(d)(5).

C. Whether the FTCA’s jurisdictional requirement in 28 U.S.C. § 2401(b) that an administrative claim be presented within two years or be “forever barred” is nevertheless subject to equitable tolling, and if so, whether the district court acted within its discretion in declining to equitably toll the limitations period here because the claim was not diligently pursued.

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BRIEF FOR THE DEFENDANT-APPELLEE

Preliminary Statement

Karen Cato was a patient at Generations Family Health Center from 1999 until early 2009. She died on April 6, 2009 from metastatic colon cancer. On June 30, 2011, over two years after Cato's death, Christopher Phillips (Cato's brother and the administrator of her estate) filed a medical malpractice suit in state court against

Generations. The defendant removed this case to federal court because Generations and its employees were acting within the scope of their federal employment as employees of the Public Health Service at the time of the alleged malpractice. The district court subsequently dismissed the case for lack of subject matter jurisdiction because the plaintiff had not filed an administrative claim within two years of the date on which the claim accrued as required by the Federal Tort Claims Act.

On appeal, Phillips raises three arguments to challenge the dismissal of his suit. First, he argues that his claim did not accrue until July 2009; the facts show, however, that the claim accrued no later than April 27, 2009, when Phillips contacted an attorney to discuss a potential medical malpractice claim. Second, Phillips argues that his claim was filed within two years of accrual because he filed a motion to extend the statute of limitations in state court. According to Phillips, this filing allowed him to invoke the “savings clause” in 28 U.S.C. § 2679(d)(5). This claim fails because under federal law, the filing of the motion to extend time did not commence the action. Finally, Phillips argues that the statute of limitations was equitably tolled and thus his claim should be deemed timely filed. There is no basis for applying equitable tolling to FTCA claims such as Phillips, however, and in any event, he cannot

establish the rigid requirements for invocation of that rule. The district court's judgment should be affirmed.

Statement of the Case

This is a civil appeal from a final judgment granting a motion to dismiss by the United States District Court for the District of Connecticut (Vanessa L. Bryant, J.).

On June 30, 2011, Christopher Phillips filed a complaint in Connecticut Superior Court alleging medical malpractice against Generations Family Health Center. A8-15. Phillips alleged that Generations failed to diagnosis and treat Cato's cancer. A11-15. On November 10, 2011, the defendant removed the action to the United States District Court for the District of Connecticut, noting that the United States had certified that the defendant and its employees were acting within the scope of their federal employment at the time Phillips' claim arose, *see* 42 U.S.C. § 233(c) and 28 U.S.C. § 2679(d), and further, that the claims were removable under 28 U.S.C. § 1442(a)(1) as civil actions brought in state court against the United States. A1-2, A6-7.

The defendant moved to dismiss for lack of subject matter jurisdiction, and the district court granted the defendant's motion on August 17, 2012. A4. Judgment entered in favor of the defendant on August 20, 2012. A4. Phillips

timely appealed this decision on September 7, 2012. A5, A70.

**Statement of Facts and Proceedings
Relevant to this Appeal**

A. Federally supported health centers

This case arises from medical care provided to Cato at a federally funded community health center. Under Section 330 of the Public Health Service Act (the “PHSA”), codified at 42 U.S.C. § 254b, the federal government provides grant funding to community health centers. These centers serve “population[s] that [are] medically underserved . . . by providing, either through the staff and supporting resources of the center or through contracts or cooperative arrangements . . . required primary health services” and “additional health services . . . necessary for the adequate support of the [required] primary health services” *See* 42 U.S.C. § 254b(a)(1).

Congress extended medical malpractice coverage to federally funded community health centers through the enactment of the Federally Supported Health Centers Assistance Act of 1992 and 1995 (the “Health Centers Act”), codified at 42 U.S.C. § 233(g)-(n). Under this statute, the United States may “deem” community health centers receiving grant funds under Section 330 of the PHSA and their employees to be “employees” of the federal government and therefore covered by the FTCA

for purposes of medical malpractice claims. *See* 42 U.S.C. § 233(g)(1)(A). A suit alleging medical malpractice claims against a community health center or its employees who are “deemed” to be federal employees is, therefore, properly brought against the United States under the FTCA. *See* 28 U.S.C. § 2679.

B. Cato’s diagnosis and death, and the estate’s activities before filing suit¹

Karen Cato received medical care from Generations, a federally funded community health center, and several of its medical practitioners from October 1999 through January 2009. A10. Sometime in late 2008 or early 2009, Cato was diagnosed with advanced colon cancer. A29.

In January 2009, Cato met with Gerhardt M. Nielsen, a lawyer with the law firm of Pegalis & Erikson, LLC (“Pegalis”), regarding her diagnosis. A29. Attorney Nielsen told Cato that “only after a review of her medical records by an expert would it be possible to advise if there was any reason to suspect that a physician did anything harmful to her” and that “in cases involving young people like her, it was very unlikely that any negligence of a doctor would

¹ The following facts are drawn from the complaint and the affidavits filed in opposition to the government’s motion to dismiss for lack of subject matter jurisdiction.

have contributed to her injury because, in general, the standard of care for [a] patient her age did not require routine colon cancer screening.” A30. Nielsen requested Cato’s medical records from Generations and two other of Cato’s health care providers within a week of his meeting with Cato. A30. He told Cato that once the records were received he would have them reviewed by a medical expert. A30.

Cato died on April 6, 2009 from metastatic colon cancer. A9. Pegalis received some of Cato’s medical records that same month. A31.

Following Cato’s death, her brother, Dr. Christopher Phillips, M.D., called Nielsen and informed him of her passing, and further said that Cato’s son, Zane Deshong, would be in touch with Nielsen. A30. (Phillips knew that Cato had spoken with lawyers at Pegalis prior to her death. A24.) Although neither Nielsen nor Phillips gave the exact date of this phone call, Nielsen stated that he was unable to review the medical records he received on April 27, 2009 as he “had no authority from any source to look at them as they were protected medical records.” A31. Based on this statement, the district court determined that April 27, 2009 was the date on which Phillips told Nielsen that Cato had died. A48.

On July 6, 2009, Nielsen received the promised phone call from Cato’s son, Zane Deshong. A31. Deshong told Nielsen that he was

on submarine duty in the United States Navy, and “specifically cautioned [Nielsen] that he would be very hard to contact because he would be on tour for months at a time.” A31. Nielsen told Deshong that he had met once with his mother but that his law firm did not have all of Cato’s medical records and had not reviewed what records they had obtained because Pegalis did not represent Deshong or his mother’s estate. A31. Nielsen further told Deshong that “if someone wanted to investigate whether there was medical negligence involved, an important step would be to have someone appointed as administrator of his mother’s estate so that someone could authorize [Pegalis] . . . to investigate.” A31. Deshong told Nielsen that he did not object to Pegalis reviewing the medical records. A31. Thereafter, Pegalis reviewed the records it had received as well as additional records which were obtained. A32.

Over the next “eight months, [Pegalis] attempted to work with [Deshong] to attend to legal details, including . . . the establishment of an estate, [but] this became impractical.” A32. In March of 2010, Deshong told Nielsen that he was sending his contact information to his uncle, Phillips, and that his uncle “would take care of the situation from that point forward” and would be in touch soon. A32. In July of 2010, Phillips contacted Nielsen and authorized Pegalis to review Cato’s medical records. A24-25, A32.

During that same discussion, Nielsen explained that the Law Offices of Vincent DeAngelo, a Connecticut law firm, would be working with Pegalis on the matter. A25, A33. Thereafter, Phillips was put in contact with Attorney DeAngelo's office to help him get appointed as the administrator of his sister's estate. A33. Phillips began working with Attorney DeAngelo in September 2010. A25.

In December 2010, Nielsen sent Cato's medical records—even though they were still incomplete—to Dr. Michael Apstein, an internist and gastroenterologist, for review. A34. Shortly thereafter, Dr. Apstein told Nielsen that while he had reviewed the available medical records, he would prefer to review the complete record of Cato's care at Lawrence & Memorial Hospital before giving his expert opinions. A34. According to Nielsen, Pegalis had not yet obtained all of the relevant medical records because of the delay in appointing an administrator of Cato's estate. A34.

On March 24, 2011, Dr. Phillips was appointed as administrator of Cato's estate by the Probate Court. A26, A36.

On or about March 31, 2011, Phillips filed a petition with the Connecticut Superior Court to extend the state statute of limitations for 90 days, as permitted by Conn. Gen. Stat. § 52-190a(b). A16, A36. The extension was sought "to allow reasonable inquiry into the grounds for

pursuing a legal action” against Generations, *inter alia*. A16. The petition provided that “[t]he Statute of Limitations has not yet run; the acts or omissions, which may give rise to a claim(s) occurred on or about April 6, 2009.” A17. The Connecticut Superior Court granted the petition on March 31, 2011. A17.

C. Phillips’ failure to file an administrative claim, as required by the Federal Tort Claims Act, before filing suit

Phillips did not file an administrative claim before filing suit against Generations because he did not know that he needed to do so. *See* A21, A38. Before filing suit, Nielsen (or Pegalis) reviewed Cato’s medical records from Generations, as well as information publicly available on the health center’s website. A35. In addition, Pegalis conducted a corporate search at the Connecticut Secretary of State’s Office. A36. According to Nielsen, this review “did not reveal anything which in any way indicated that Generations, or any of the doctors there, were federal ‘Public Health Service Employees’ or subject to the provisions of the Federal Tort Claims Act.” A35. Nielsen felt this conclusion was further supported because Cato was not a “service patient” or homeless, but rather had private health insurance. A35. Although the Generations website indicated that the health center received “Health Care to the Homeless (HCH) funding,” A35, a “Google”-based internet

search regarding HCH did not reveal any connection to federal funding. A35. Nielsen reasoned as follows:

If Generations was a federally-funded facility, the website not only did not reveal that fact but contained information which, if logically considered, effectively concealed that funding. In my discussions with Dr. Phillips, he assumed that Generations was affiliated with the William Backus Hospital, and not with the federal government. Everything about Generations suggested that it was a private, non-governmental, entity. It certainly held itself out that way. The Generations website affirmatively creates the impression that this is a private health care facility, not a branch of the federal Public Health Service.

A35. Nielsen stated that was not aware of any telephone number or website which could provide information about facilities covered by the FTCA. A35 n.1.

In short, no administrative tort claim was filed on behalf of Phillips before suit was filed because, according to Nielsen, “[t]here appeared to be no need to do so. The plaintiffs had no notice that Generations Family Health, Inc., which looks and functions like a private health facility, was in fact “Public” under the meaning

of the law, and therefore no claim was filed.”
A38.

D. Phillips’ suit and the motion to dismiss

On June 11, 2011, Phillips filed a complaint in Connecticut Superior Court alleging that Cato died as a result of medical malpractice caused by practitioners at Generations. A9. According to the state court complaint, Cato was under the medical care of Generations in Norwich, Connecticut, and received care from Generations medical practitioners on several occasions from October 1999 through January 2009. A9-10.

Phillips alleged that Generations failed to timely diagnose Cato’s colon cancer by failing to perform screening tests at office visits from September 17, 2007 until December 11, 2008, resulting in a delay in the diagnosis of the cancer. A11-13. Phillips also alleged that Generations failed to properly treat Cato’s cancer once it was diagnosed, resulting in her premature death. A11-13.

The United States, on behalf of Generations, removed this action to the United States District Court for the District of Connecticut on November 10, 2011 under 28 U.S.C. §§ 1442(a)(1), 28 U.S.C. § 2679(d)(2), and 42 U.S.C. § 233(c). A1, A6. This removal was accompanied by a Certification of Scope of Employment, certifying that Generations Family Health Center, and its employees, were acting

within the scope of federal employment as employees of the Public Health Service at the time of the incident out of which Phillips's claim arose. A6, A19.

Following removal, the United States, on behalf of Generations, moved to dismiss the complaint for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure. A2, A20. In support of this motion, the government explained that Generations Family Health Center was first deemed eligible for FTCA malpractice coverage effective July 1, 1996, and that its coverage continued without interruption since that time. A22. The government further argued that the court lacked subject matter jurisdiction over Phillips' claim because he failed to exhaust his administrative remedies by filing an administrative claim against Generations as required by the FTCA. A21.

E. The district court grants the defendant's motion to dismiss

By a ruling dated August 17, 2012, the district court granted Generations' motion to dismiss. A4, A45. As the court noted, Phillips conceded that he failed to file an administrative claim, but argued that the court should dismiss the case without prejudice to leave to file an administrative claim under the "savings clause" of the FTCA or under the doctrine of equitable

tolling. A45. The court rejected all of Phillips' arguments.

First, the district court addressed Phillips' "savings clause" argument. The savings clause of the FTCA provides that when an FTCA action is dismissed for failure to exhaust administrative remedies, the plaintiff may file an administrative claim, within 60 days of the dismissal of the suit, and have that claim deemed timely if the administrative claim would have been timely if it were filed on the date the FTCA action was "commenced." 28 U.S.C. § 2679(d)(5). Phillips argued that he fell within this savings clause because his March 31, 2011 petition to extend the statute of limitations "commenced" his civil action against Generations within the two-year limit for filing an administrative claim. A53. The court rejected this argument, concluding that the March 31 petition did not commence Phillips' civil action as a matter of federal law. A54. Further, the court found that a review of Connecticut law and the March 31 petition, on its own terms, did not commence the action against Generations. A54-55.

Second, the district court took up Phillips' argument that the claim in this case did not accrue until the middle of July of 2009, when Cato's son first called Cato's attorney. A56. In contrast, Generations argued that the claim accrued by April 6, 2009 (the date of Cato's

death), because Cato’s family knew that she had consulted with an attorney about a medical malpractice claim. A56.

Citing Second Circuit law, the district court applied the “diligence-discovery rule.” A56. The district court stated that “a claim will accrue when the plaintiff knows, or should know, enough of the critical facts of injury and causation to protect himself by seeking legal advice.” A57 (quoting *Kronisch v. United States*, 150 F.3d 112,121 (2d Cir. 1998)). Applying this standard, the district court found that the claim accrued at the latest by April 27, 2009. A57-58. By this date—the date that Phillips contacted Nielsen “to inform him of [Cato’s] death and apprise him that [Cato’s] son, Mr. Deshong, would be in touch to discuss [Cato’s] potential claim,”—the “critical facts’ of [Cato’s] injury were readily discernible” A57-58. In particular, the court found as follows:

It is clear then that by April 27, 2009 both Dr. Phillips and Mr. Deshong were aware that the Decedent had consulted with Pegalis regarding a potential medical malpractice claim prior to her death and therefore they both had reason to suspect that Decedent’s injury was iatrogenic (that is, caused by her doctor) as of that date. Moreover it is clear that Mr. Deshong was seeking Pegalis’s legal advice on April 27, 2009 when Dr. Phillips informed Attorney

Nielsen that Mr. Deshong would contact him about his mother's potential malpractice claim. The fact that Mr. Deshong only got in touch with Pegalis several months later on July 6, 2009 to formally follow up on his mother's potential claim is not dispositive because by April 27, 2009 Mr. [Deshong] was aware of his mother's prior consultation in which she suspected she had suffered an iatrogenic injury and had agreed that he would follow up with Attorney Nielsen. Therefore by April 27, 2009, both Dr. Phillips and Mr. Deshong knew or should have known enough of the critical facts of the Decedent's injury and causation to protect themselves by seeking legal advice.

A58 (footnote omitted). Moreover, as the court explained, even though the parties had not provided the actual date of the conversation between Phillips and Nielsen, the court found that the conversation occurred on April 27, 2009, based on Nielsen's statement that he could not review medical records on that date because he had been told of Cato's death and had no authority to look at the records at that time. A57-58 n.2.

After concluding that Phillips' claim accrued on April 27, 2009, the district court rejected Phillips' claim that the claim did not accrue until July of 2009: "[I]t is clear that by April 27, 2009

Mr. Deshong was sufficiently alerted to the appropriateness of seeking legal advice when his uncle, Dr. Phillips, called Attorney Nielsen and informed him that Mr. Deshong would be in touch regarding his mother's potential claim. July 6, 2009 is really the date when Mr. Deshong finally decided to take action and not the date when he was sufficiently alerted to the appropriateness of seeking legal advice." A59. Because April 27, 2009 was over two years before June 30, 2011 (the date the complaint was filed), the complaint was untimely. A60.

Finally, the district court addressed Phillips' argument that his claim should be saved by the doctrine of equitable tolling. A60. According to Phillips, equitable tolling saved his claim because he and his attorneys acted diligently in pursuing the claim and, despite their efforts, were unaware that Generations was covered by the FTCA. A60. The district court explained that whether equitable tolling was available in this case was an open question, citing *A.Q.C. v. United States*, 656 F.3d 135, 144 n.6 (2d Cir. 2011), but determined that it did not need to resolve the question because the facts of this case did not warrant the application of the doctrine. A61.

In reaching the conclusion that equitable tolling was not warranted, the district court relied on the Second Circuit's decision in *A.Q.C.* and rejected Phillips' suggestion that it should

rely on the Third Circuit case of *Santos v. United States*, 559 F.3d 189, 190 (3d Cir. 2009). A62-63. The district court found that the facts of this case were very similar to *A.Q.C.* For example, the district court noted that, “[i]n the present case, Pegalis, like Fitzgerald & Fitzgerald [the firm in *A.Q.C.*], advertises itself as ‘[r]ecognized by the legal community as a Top Tier medical malpractice firm’ and therefore should have known to investigate the federal nature of a potential defendant as part of its standard due diligence.” A64. The district court also found that Phillips’ attorneys could have “easily discovered Generations’s federal status by either calling a government-sponsored toll-free number or entering ‘Generations Family Health Center’ into the Health Resources and Services Administration’s website.” A64-65.

In addition to finding that Phillips’ attorneys failed to exercise diligence in their investigation of Generations, the district court also found that Cato’s family failed to exercise diligence in pursuit of her claim. A66. The district court found that Deshong failed to contact Nielsen for three months and it took almost one year for Phillips to be placed in charge of Cato’s estate. A67. In other words, “[i]t was only after July 2010 that the Decedent’s family began in earnest to pursue the claim and attend to the Decedent’s estate which was well over a year after the Decedent’s death.” A67.

Because it was undisputed that Phillips did not exhaust his administrative remedies and because the district court rejected Phillips' arguments that would have allowed him to alternatively satisfy or evade that requirement, the district court dismissed the complaint without leave to file an administrative claim. A68.

Summary of Argument

Phillips was required to exhaust his administrative remedies before filing a suit under the FTCA against a federally-funded community health center. Phillips concedes that he did not file an administrative claim, and thus the district court properly dismissed his complaint. Phillips' attempts to get around this conclusion all fail.

A. The savings clause of the FTCA does not help Phillips because his claim accrued more than two years prior to the filing of his state court complaint. Under the "discovery-diligence" rule, the claim accrued in April 2009, when Phillips contacted Nielsen to inform him of Cato's death and explain that Cato's son would be in touch regarding a potential medical malpractice claim. At that time, Phillips was aware of the critical facts of Cato's injury such that he was aware of the need to protect himself by seeking legal counsel.

B. Similarly, Phillips' argument that he filed his complaint within two years of its accrual fails because he did not file his complaint until June 30, 2011. Although he filed a state court petition in March 2011 to extend the statute of limitations by 90 days, that petition, as a matter of law, did not "commence" his case.

C. Finally, Phillips is not entitled to the protection of equitable tolling because that doctrine does not apply to medical malpractice claims brought under the FTCA. But even if equitable tolling were available in this case, it would fail on the facts because Phillips and his attorneys did not act diligently.

Argument

I. The district court properly dismissed Phillips' complaint because he failed to exhaust his administrative remedies and no exceptions excused his failure.

A. Relevant facts

The facts pertinent to consideration of this issue are set forth in the "Statement of Facts" above.

B. Governing law and standard of review

1. The standard of review

This Court reviews an appeal of a dismissal for lack of subject matter jurisdiction under

Federal Rule of Civil Procedure 12(b)(1) in two parts: the district court's factual findings are reviewed for clear error and the district court's legal conclusions are reviewed *de novo*. *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000) (“[W]e review factual findings for clear error and legal conclusions *de novo*.”) (quoting *Close v. New York*, 125 F.3d 31, 35 (2d Cir. 1997)). “Under the deferential clear error standard, [the Second Circuit] will not upset a factual finding unless [it is] left with the definite and firm conviction that a mistake has been committed.” *Mota v. Rivera Castillo*, 692 F.3d 108, 114 (2d Cir. 2012) (internal quotations and citations omitted); *see also Bessemer Trust Co., N.A. v. Branin*, 618 F.3d 76, 85 (2d Cir. 2010).

This Court reviews a district court's finding that equitable tolling was inappropriate for abuse of discretion. *See A.Q.C.*, 656 F.3d at 144.

2. The law governing a motion to dismiss for lack of subject matter jurisdiction

The plaintiff bears the burden of establishing by a preponderance of the evidence that subject matter jurisdiction exists. *Lunney v. United States*, 319 F.3d 550, 554 (2d Cir. 2003) (citing *Makarova*, 201 F.3d at 113); *Malik v. Meissner*, 82 F.3d 560, 562 (2d Cir. 1996)). “[T]hat showing is not made by drawing from the pleadings inferences favorable to the party asserting it.”

Shipping Financial Serv. Corp. v. Drakos, 140 F.3d 129, 131 (2d Cir. 1998). Rather, “[i]t is the affirmative burden of the party invoking [federal subject matter] jurisdiction . . . to proffer the necessary factual predicate—not simply an allegation in a complaint—to support jurisdiction.” *London v. Polishook*, 189 F.3d 196, 199 (2d Cir. 1999). “[I]n adjudicating a motion to dismiss for lack of subject-matter jurisdiction, a district court may resolve disputed factual issues by reference to evidence outside the pleadings, including affidavits.” *State Employees Bargaining Agent Coalition v. Rowland*, 494 F.3d 71, 77 n.4 (2d Cir. 2007).

To establish subject matter jurisdiction in a suit against the United States of America or its agencies, the plaintiff must show that the federal government has waived its sovereign immunity. “Sovereign immunity is a jurisdictional bar, and a waiver of sovereign immunity is to be construed strictly and limited to its express terms.” *Lunney*, 319 F.3d at 554 (citing *Dep’t of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999) & *Up State Fed. Credit Union v. Walker*, 198 F.3d 372, 374 (2d Cir. 1999)). In the absence of such a waiver, “sovereign immunity shields the Federal Government and its agencies from suit.” *Id.* (quoting *Dorking Genetics v. United States*, 76 F.3d 1261, 1263 (2d Cir. 1996)). Dismissal is mandatory if the district court lacks subject

matter jurisdiction. *Manway Const. Co. v. Housing Authority of the City of Hartford*, 711 F.2d 501, 503 (2d Cir. 1983).

3. The administrative exhaustion requirement of the FTCA

“The FTCA waives the United States’s sovereign immunity for certain classes of torts claims and provides that the federal district courts shall have exclusive jurisdiction over damages claims against the United States for injury or loss of property, or for personal injury or death” *Celestine v. Mount Vernon Neighborhood Health Ctr.*, 403 F.3d 76, 80 (2d Cir. 2005). However, “[t]he FTCA requires that a claimant exhaust all administrative remedies before filing a complaint in federal district court. This requirement is jurisdictional and cannot be waived.” *Id.* at 82.

To exhaust administrative remedies, a FTCA claimant must “presen[t] the claim to the appropriate Federal agency.” 28 U.S.C. § 2675(a). In pertinent part, section 2675 provides as follows:

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.

28 U.S.C. § 2675(a). Moreover, the claim must be presented to the agency in writing. Title 28, section 2401(b) provides 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” After the claim has been presented to the agency and it is “finally denied by the agency in writing,” or if the agency has failed “to make final disposition of a claim within six months” after it was filed, a claimant may bring an FTCA action against the United States. 28 U.S.C. § 2675(a). Any action commenced prior to exhausting administrative remedies must be dismissed. *Celestine*, 403 F.3d at 82.

The FTCA contains a savings clause that allows for the late filing of an administrative claim under certain circumstances when a plaintiff files a timely suit in state court. In particular, 28 U.S.C. § 2679(d)(5) provides that when an FTCA action is dismissed for failure to exhaust administrative remedies, the plaintiff may file an administrative claim, within 60 days of the dismissal of the suit, and have that claim

deemed timely if the administrative claim would have been timely if it were filed on the date the FTCA action was “commenced”:

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.

28 U.S.C. 2679(d)(5).

4. The Health Centers Act

Cato, the decedent in this case, received treatment at Generations, which is a community health center. Under the Health Centers Act, 42 U.S.C. § 233(g)-(n), the Department of Health and Human Services (“HHS”) may deem a community health center to be a Public Health Service Facility whose employees are entitled to malpractice coverage under the FTCA. 42 U.S.C. § 233(g). Once a community health center has been deemed eligible for FTCA coverage under the Health Centers Act, practitioners providing medical care during the period of eligibility are

deemed to be federal employees. 42 U.S.C. § 233(g). As federal employees, they are covered by the FTCA if the Attorney General or his designee certifies that they were acting within the scope of their employment at the time of the incident. 28 U.S.C. § 2679(d)(1). After certification, the United States shall be substituted as the sole defendant. *Id.*

C. Discussion

1. The district court properly determined that Phillips' malpractice claim accrued on April 27, 2009.²

Under applicable law Phillips was required to file a tort claim with HHS within two years of the accrual of his claim. The district court concluded that Phillips' claim accrued on April 27, 2009. This finding was fully supported by the record and governing law.

As noted above, “[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. § 2401(b). In order to determine when a claim accrues under the FTCA, a court must look to federal law. *See A.Q.C.*, 656 F.3d at 139 (noting that “[f]ederal law determines the

² This point responds to the third argument in Phillips' brief.

date that an FTCA claim accrues” (citing *Syms v. Olin Corp.*, 408 F.3d 95, 107 (2d Cir. 2005) and *Tyminski v. United States*, 481 F.2d 257, 262–63 (3d Cir. 1973))).

Under federal law, the general rule for medical malpractice claims is that the tort claim accrues at the time of injury. *A.Q.C.*, 656 F.3d at 139. When, however, “a plaintiff ‘would reasonably have had difficulty discerning the fact or cause of injury at the time it was inflicted, the so-called “diligence-discovery rule of accrual” applies.” *Id.* at 139-40 (quoting *Kronisch v. United States*, 150 F.3d at 121. Under this rule, a “plaintiff need not know each and every relevant fact of his injury or even that the injury implicates a cognizable legal claim. Rather, a claim will accrue when the plaintiff knows, or should know, enough of the critical facts of injury and causation to protect himself by seeking legal advice.” *Kronisch*, 150 F.3d at 121 (quoting *Guccione v. United States*, 670 F. Supp. 527, 536 (S.D.N.Y. 1987)). As this Court recently explained:

Once an injured party (or in this case her guardian) knows enough to warrant consultation with counsel, and acts with diligence . . . to undertake such consultation, conscientious counsel will have ample time to protect the client’s interest by investigating the case and

determining whether, when, where, and against whom to bring suit.

A.Q.C., 656 F.3d at 140.

Applying these principles here, the district court properly concluded that the “critical facts” of Cato’s injury “were readily discernible at the latest by April 27, 2009,” the date when Phillips contacted Attorney Nielsen to inform him that Cato had died and to advise him that Cato’s son would be in touch to discuss the potential claim. A57-58. The court reasoned:

It is clear then that by April 27, 2009 both Dr. Phillips and Mr. Deshong were aware that the Decedent had consulted with Pegalis regarding a potential medical malpractice claim prior to her death and therefore they both had reason to suspect that Decedent’s injury was iatrogenic (that is, caused by her doctor) as of that date. Moreover it is clear that Mr. Deshong was seeking Pegalis’s legal advice on April 27, 2009 when Dr. Phillips informed Attorney Nielsen that Mr. Deshong would contact him about his mother’s potential malpractice claim. The fact that Mr. Deshong only got in touch with Pegalis several months later on July 6, 2009 to formally follow up on his mother’s potential claim is not dispositive because by April 27, 2009 Mr. Deshong was aware of his mother’s prior consultation in which

she suspected she had suffered an iatrogenic injury and had agreed that he would follow up with Attorney Nielsen. Therefore by April 27, 2009, both Dr. Phillips and Mr. Deshong knew or should have known enough of the critical facts of the Decedent's injury and causation to protect themselves by seeking legal advice.

A57-58.

In so reasoning, the district court rejected Phillips' argument that his claim accrued on July 6, 2009, A59, an argument he reprises in his opening brief. Pl. Br. at 43-48. As the district court noted—following the reasoning of *A.Q.C.*—“July 6, 2009 is really the date when Mr. Deshong finally decided to take action and not the date when he was sufficiently alerted to the appropriateness of seeking legal advice.” A59. *See A.Q.C.*, 656 F.3d at 141. Applying the diligence-discovery rule, the court concluded:

Here, by April 26, 2009 it is clear that both Dr. Phillips and Mr. Deshong were aware that the Decedent had consulted Pegalis because she suspected that the injury suffered related in some way to the medical treatment she had received. Therefore the Decedent's actions in consulting Pegalis put Dr. Phillips and Mr. Deshong on notice that the Decedent might have suffered a potentially iatrogenic injury. Therefore as of April 27,

2009, Dr. Phillips and Mr. Deshong were aware of the need to inquire further to protect their rights. As the Second Circuit explained in *A.Q.C.*, from that point onward, Dr. Phillips, Mr. Deshong, and Pegalis “had ample time to investigate the case and determine whether, against whom, and in what forum to bring a malpractice action.”

A59-60.

The district court’s reasoning was sound. The record demonstrates that as of April 27, 2009, Phillips and Nielsen were aware that there was a potential claim requiring further inquiry; they knew that Cato had suspected that her treatment at Generations had been improper; and they knew that she had contacted counsel in this regard. Under the deferential “clear error” standard, this Court should “not upset a factual finding unless [it is] left with the definite and firm conviction that a mistake has been committed.” *Mota*, 692 F.3d at 114 (citation omitted). There is nothing in the record to support a rejection of these factual findings by the district court. Accordingly, these findings should be upheld. And on these facts, Phillips had reason to know enough facts of Cato’s injury, and the cause of that injury, to protect himself by seeking legal advice. In short, the claim accrued by April 27, 2009.

Phillips complains that in finding that his claim accrued on April 27, 2009, the district court “apparently constru[ed] the evidence in a light *least favorable to the plaintiff*.” Pl. Br. at 45. But it was Phillips’ affirmative burden to establish jurisdiction, *see* Part I.B.2., *supra*, and in making a finding of fact necessary to support jurisdiction the district court was not required to “draw[] from the pleadings inferences favorable to the party asserting [jurisdiction].” *Drakos*, 140 F.3d at 131.

And in any event, Phillips’ real complaint is not with the court’s factual findings. Most of the court’s factual findings—that Phillips contacted Nielsen after Cato’s death and that he told Nielsen that Deshong would be in contact with him—were taken directly from Nielsen’s affidavit, and thus Phillips can hardly claim that they are clearly erroneous. To be sure, the court inferred that Phillips’ conversation with Nielsen occurred no later than April 27, 2009, but again, that date came directly from Nielsen’s affidavit. *See* A31, A48, A57-58 n.2. To the extent that the court had to draw inferences from the affidavit to “find” that the conversation occurred no later than that date, it is only because Phillips did not submit sufficient facts to support his assertion of subject matter jurisdiction. Phillips’ problem, in other words, is not with the court’s factual findings.

Phillips' real complaint, rather, is with the application of the law to the facts. He would prefer that his claim not accrue until July 2009 when Deshong contacted Nielsen, but that argument fails under the diligence-discovery rule. Under that rule, Phillips' claim accrued as soon as he had sufficient knowledge of the facts about Cato's injury and the cause of that injury to seek legal counsel—not when he decided to take action on that knowledge. The fact that Deshong did not take action for several months after he had knowledge of the relevant “critical facts” does not extend the accrual date of his claim. *See A.Q.C.*, 656 F.3d at 141.

2. The “savings clause” in 28 U.S.C. §2679(d)(5) does not save Phillips' complaint because his action was not “commenced” within two years of the accrual of his claim.³

It is undisputed that at the time that Phillips filed his state court action in this case, he had not submitted an administrative tort claim to HHS.⁴ A21, A38. While a plaintiff who

³ This point responds to the first argument in Phillips' brief.

⁴ As noted in his brief, Phillips did file a tort claim with HHS concerning this matter, but only after the removal of this case to federal court. *See* Pl. Br. at 19; *see also* A4 (docket entry #34).

commences a state suit within two years of the accrual of his claim may be protected by the savings clause of 28 U.S.C. § 2679(d)(5), Phillips cannot avail himself of this provision. Therefore, the district court properly dismissed his complaint for lack of subject matter jurisdiction.

Section 2679(d)(5) provides that:

[w]henver 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.

The district court concluded that Phillips' claim was not made timely by virtue of this savings clause. In particular, the court rejected Phillips' argument that for purposes of this provision, his state court action was "commenced" when he filed the petition to extend the state statute of limitations on March 31, 2011. A53-55. The court correctly concluded that the provision of Connecticut law which permits a filing to extend

a statute of limitations does not qualify as commencement of an action under the FTCA. A54.

Phillips argues that his action was “commenced” in state court on March 31, 2011, when he filed a petition with the Clerk of the Connecticut Superior Court for an automatic extension of the statute of limitations pursuant to Connecticut General Statutes § 52-190a(b). Pl. Br. at 25. This argument is without merit. Although a petition granted under this state statute may extend the limitations period under Connecticut law, it does not apply in this case under the FTCA, and in any event, does not “commence” an action.

As the district court properly noted, federal law governs “as the FTCA’s two year limitations period is one relating to a timing requirement under federal law and not a state statute of limitations.” A54. And under federal law a civil “action is commenced by filing a complaint with the court.” *Id.*; *see also* Rule 3, Fed. R. Civ. P. There is no support for the proposition that Rule 3 was intended to affect state limitations periods. A54 (quoting *Walker v. Armco Steel Corp.*, 446 U.S. 740, 751 (1980): “[Rule 3] governs the date from which various timing requirements of the Federal Rules begin to run, but does not affect state statutes of limitations.”). Applying federal law, then, Phillips’ action was not commenced with the

filing of a petition to extend a state limitations period. A9, A54.

And even under Connecticut law, the filing of a petition to extend the statute of limitations does not commence an action in state court. Conn. Gen. Stat. § 52-190a(b) provides:

Upon petition to the clerk of the court where the civil action will be filed to recover damages resulting from personal injury or wrongful death, an automatic ninety-day extension of the statute of limitations shall be granted to allow the reasonable inquiry required by subsection (a) of this section. This period shall be in addition to other tolling periods.

Contrary to Phillips' assertions that "the filing of the Petition and granting of the order is a necessary allegation in the complaint," and that "[t]he action could not have been prosecuted at all . . . unless that first step [*i.e.*, the filing of the petition] was taken," Pl. Br. at 25, the petition was merely a request for an extension of time to file an action at a later time. A plain reading of this statute does not support the notion that a plaintiff *must* petition for extension in order to commence an action. Indeed, if a plaintiff had already completed his reasonable inquiry, he could file suit without filing a petition to extend the statute of limitations. *See, e.g., Fiore v. Schwartz*, 2007 WL 1892819 at *3 (Conn. Super. June 8, 2007) ("The filing of a petition to extend

the statute of limitations does not commence an action nor require that such an action be commenced. The petition merely secures an additional ninety days so that a person contemplating the filing of a medical malpractice action has sufficient time to comply with the good faith requirements established by statute.”). And a plain reading of Phillips’ petition confirms this understanding. As the district court noted, Phillips’ March 31, 2011 petition asked to extend the statute of limitations to allow inquiry into grounds for pursuing a legal action in the future. A16, A54-55.

In an attempt to bolster his arguments, Phillips notes that under New York law, an action can be commenced with a “bare summons with notice (a one page document) and yet the defendant need not be served with that summons or other suit papers for 120 days.” Pl. Br. at 25, n.6 (citing NY Civ. Prac. Law & Rules § 306-b). This comparison is inapposite. The cited statute expressly states that the action is commenced at the time of this initial filing. The Connecticut law at issue here, by contrast, makes no claim that the filing of a petition to extend a statute of limitations “commences” the civil action. Indeed, it expressly contemplates the *future* commencement of an action.

In sum, Phillips’ arguments in support of the timeliness of his action under the savings clause

must fail. In order to establish that the savings clause contained in section 2679(d)(5) applies, Phillips would have to show that his administrative claim would have been timely had it been filed on the date the underlying civil action was commenced. He cannot do that. The district court properly concluded that Phillips' claim accrued on April 27, 2009, and further that the filing of the petition to extend the statute of limitations did not "commence" his action. Thus, his complaint, filed June 30, 2011, was filed more than two years after accrual of the claim, and an FTCA administrative claim filed on that date would have been time barred under the applicable two-year statute of limitations. *See* 28 U.S.C. § 2401(b). Accordingly, Phillips' reliance on section 2679(d)(5) was misplaced and was properly rejected by the district court.

3. Equitable tolling does not save Phillips' claims.⁵

Phillips argues that his claims should be preserved by equitable tolling. Although it is an open question in this circuit, this Court should hold that equitable tolling is not available for claims under the FTCA. Even if equitable tolling is available, however, Phillips has failed to demonstrate that he would be entitled to its protections.

⁵ This point responds to the second argument in Phillips' brief.

a. Equitable tolling is not available under the FTCA because the FTCA's statute of limitations is jurisdictional in nature.

The Supreme Court has established that some statutes of limitations are jurisdictional in nature and cannot be tolled. In *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008), the Supreme Court explained that most statutes of limitations are designed to protect defendants against stale claims. These types of statutes of limitations must be raised as affirmative defenses, can be waived, and are subject to equitable tolling. *Id.* Some statutes of limitations, however, are different. As the Court explained:

Some statutes of limitations . . . seek not so much to protect a defendant's case-specific interest in timeliness as to achieve a broader system-related goal, such as facilitating the administration of claims, limiting the scope of a governmental waiver of sovereign immunity, or promoting judicial efficiency. The Court has often read the time limits of these statutes as more absolute, say as requiring a court to decide a timeliness question despite a waiver, or as forbidding a court to consider whether certain equitable considerations warrant extending a limitations period. As convenient

shorthand, the Court has sometimes referred to the time limits in such statutes as “jurisdictional.”

Id. at 133-34 (citations omitted). In *John R. Sand & Gravel Co.*, the Supreme Court held that the statute of limitations contained in 28 U.S.C. § 2501, which states that all claims involving the Court of Federal Claims must be filed within six years after the claim accrues, is a jurisdictional statute of limitations. *Id.* at 134-39.

Two years later, the Supreme Court applied a similar analysis in *Dolan v. United States*, 130 S. Ct. 2533, 2538 (2010). In that case, the Court reiterated the jurisdictional nature of some statutes of limitations, emphasizing that if a statute of limitations is jurisdictional, it is not subject to equitable tolling: “The expiration of a ‘jurisdictional’ deadline prevents the court from permitting or taking the action to which the statute attached the deadline. The prohibition is absolute. The parties cannot waive it, nor can a court extend that deadline for equitable reasons.” *Id.* The Court further provided a framework for analyzing whether a statute of limitations falls into the “jurisdictional” category:⁶ “[T]his Court has looked to statutory

⁶ Phillips cites *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 95-6 (1990) for the principle that there is a rebuttal presumption that equitable tolling exists. It is clear after *John R. Sand & Gravel Co.* and *Dolan*, that *Irwin* does not dictate the result in this case.

language, to the relevant context, and to what they reveal about the purposes that a time limit is designed to serve.” *Id.*

Applying these principles, the FTCA statute of limitations set forth at 28 U.S.C. § 2401(b) is jurisdictional and hence not subject to equitable tolling. Section 2401(b) provides as follows:

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 or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.”

(Emphasis added). First, the language of this provision—that claims are “forever barred” is particularly strong, suggesting a decision by Congress that there should be no exceptions to the limitation. Indeed, this phrase is even stronger than the language in 28 U.S.C. § 2501 that the Supreme Court found to be a

See Marley v. United States, 567 F.3d 1030, 1035 (9th Cir. 2009) (noting that *John R. Sand & Gravel Co.* rejected the rebuttable presumption of equitable tolling from *Irwin* when the Court’s prior cases had already established a rule for the statute at issue and holding that § 2401(b) is a jurisdictional statute of limitations).

jurisdictional statute in *John R. Sand & Gravel Co.*

Second, the limitation in § 2401(b) serves “broader system-related goal[s], such as facilitating the administration of claims [and] limiting the scope of a governmental waiver of sovereign immunity” See *John R. Sand & Gravel Co.*, 552 U.S. at 133 (citations omitted). In particular, § 2401(b) explicitly sets forth a system to administer tort claims against the government by requiring tort claims to be presented to the appropriate agency within two years. See *Marley v. United States*, 567 F.3d 1030, 1036 (9th Cir. 2009) (“The purpose of § 2401(b)’s six-month filing deadline fits squarely into *John R. Sand & Gravel’s* second category of statutes of limitations: Its purpose is ‘not so much to protect [the government’s] case-specific interest in timeliness as to achieve a broader system-related goal, such as facilitating the administration of claims.’”) (quoting *John R. Sand & Gravel*, 552 U.S. at 133)). In addition, § 2401(b) defines the scope of the government’s waiver of sovereign immunity by: (1) allowing tort claims to be presented and (2) stating that tort claims not presented in accordance with the timing rules set forth there are “forever barred.”

That the FTCA serves as a waiver of sovereign immunity is particularly important in this context. “The basic rule of federal sovereign immunity is that the United States cannot be

sued at all without the consent of Congress. A necessary corollary of this rule is that when Congress attaches conditions to legislation waiving the sovereign immunity of the United States, those conditions must be strictly observed, and exceptions thereto are not to be lightly implied.” *Block v. North Dakota*, 461 U.S. 273, 287 (1983). Indeed, in part because of these basic principles, this Court has previously held that § 2401(b) is jurisdictional in nature. See *Johnson v. Smithsonian Inst.*, 189 F.3d 180, 189-90 (2d Cir. 1999); *In re “Agent Orange” Prod. Liab. Litig.*, 818 F.2d 210, 214 (2d Cir. 1987); *Wyler v. United States*, 725 F.2d 156, 159 (2d Cir. 1983).

In short, although this Court has yet to expressly decide whether equitable tolling may be used to extend the limitations period in § 2401(b), see *A.Q.C.*, 656 F.3d at 144 n.6, for the reasons described above, equitable tolling should not be allowed. In particular, because § 2401(b) (a) addresses sovereign immunity, (b) sets forth a system for administering claims, and (c) contains language even stronger than § 2501, which has already been held to be jurisdictional, this Court should hold that § 2401(b) is a jurisdictional statute and that equitable tolling is not allowed. This result would be consistent with both Supreme Court precedent and this Court’s prior decisions. In addition, it would be consistent with the decisions of the Fifth and

Ninth Circuits. See *Alexander v. United States*, 646 F.3d 185, 190-91 (5th Cir. 2011) (per curiam) (equitable tolling not permitted); *Marley*, 567 F.3d at 1290 (same); but see *Santos v. United States*, 559 F.3d 189, 197 (3d Cir. 2009) (equitable tolling permitted under FTCA).

Phillips cites *Celestine*, 403 F.3d at 84, for the proposition that equitable tolling is available under the FTCA. This is incorrect, as *Celestine*—a case decided before *John R. Sand & Gravel*—held only that equitable tolling was not warranted under the facts of that case; it did not actually hold that equitable tolling was available under the FTCA. Thus, the *Celestine* Court did not reach the issue. See *A.Q.C.*, 656 F.3d at 144 n.6 (noting that whether equitable tolling applies was open question six years after *Celestine* was decided). Similarly, to the extent that Phillips relies on *Santos ex rel. Beato v. United States*, 559 F.3d 189, 194-96 (3d Cir. 2009), that reliance is misplaced. This Court had the benefit of *Santos* at the time it decided *A.Q.C.* and chose not to follow it then. This Court should follow its own jurisprudence, which has established that this Court considers § 2401(b) to be jurisdictional in nature.

b. Even if equitable tolling were available for claims under the FTCA, Phillips has failed to demonstrate that he diligently pursued his rights, and therefore, he is not entitled to its protection.

To obtain the benefit of equitable tolling, a plaintiff must prove two elements: “(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way.” *A.Q.C.*, 656 F.3d at 144 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). “Equitable tolling requires a party to pass with reasonable diligence through the period it seeks to have tolled.” *Johnson v. Nyack Hosp.*, 86 F.3d 8, 12 (2d Cir. 1996). Moreover, “[e]quitable tolling applies only in the rare and exceptional circumstance.” *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000) (per curiam) (internal quotation marks omitted); *see also A.Q.C.*, 656 F.3d at 144 (“Because statutes of limitations protect important social interests in certainty, accuracy, and repose, equitable tolling is considered a drastic remedy available only in rare and exceptional circumstances.”) (internal quotations and citations omitted). Ultimately, equitable tolling is available “only when the plaintiff satisfied the due diligence requirement necessary for her to take advantage of [that]

doctrine.” *A.Q.C.*, 656 F.3d at 146 (internal quotations omitted).

Phillips and Nielsen did not act diligently; therefore, they cannot take advantage of equitable tolling. In January of 2009, Attorney Nielsen had met Cato, discussed her medical situation and identified the treating doctors and facilities. A29. Indeed, Nielsen requested the medical records from Generations within a week of meeting Cato. A30. In April of 2009, Nielsen knew from the call from Phillips that Deshong, Cato’s son, would be calling to discuss the claim. A30. Further, by July of 2009, Deshong had contacted Nielsen. A31. By July of 2010, Phillips authorized Nielsen to review Cato’s records. A32. Prior to this, Nielsen had not reviewed the records. A30-31.

Although Nielsen did not review the records until July of 2010, there was no impediment to the firm exploring the status of Generations. As of January of 2009, Nielsen knew that Generations was a potential defendant. Thus, far from having a condensed time period to discover Generations’ federal status, Nielsen, on behalf of Cato and later Phillips, had approximately *28 months*—from January of 2009 until April 27, 2011, to discover Generations’ federal status. It was precisely counsel’s failure to act with reasonable diligence during this time period that led the district court to conclude that

Phillips had not satisfied the requirements for equitable tolling. A63-66.

Phillips' argument about equitable tolling turns the doctrine on its head. Instead of identifying his, or his counsel's diligence, taken during the 28 months, he complains that Generations did nothing to alert him of its status. The duty of diligence and the burden of proving it, however, are not on Generations, but on the plaintiff. *A.Q.C.*, 656 F.3d at 144 (litigant seeking equitable tolling bears burden). Nielsen's efforts to investigate Generations consisted of reviewing its website and having another law firm look at the Connecticut Department of State website. A34-36. Nielsen admits that the Generations website stated: "In addition, each site *uses various resources* to provide quality healthcare to homeless individuals." A35 (emphasis added). This fact alone should have suggested to Nielsen to investigate Generations' status.

Nevertheless, Nielsen did not follow up on this inquiry or take any other basic steps to investigate Generations. Neither Phillips nor Nielsen contacted Generations to ask whether, as a community health center, it received sufficient federal funding for it to be deemed a federal entity. In other words, although Nielsen claimed that "[e]verything about Generations *suggested* that it was a private, non-governmental, entity." A35 (emphasis added), at

no point did Nielsen state that he—or anyone else from one of the two law firms working on Cato’s case—contacted Generations directly to inquire about its status. Nor did Nielsen use the Health Resources and Services Administration website, which allows individuals to search for deemed facilities. See <http://bphc.hrsa.gov/ftca/healthcenters/ftcahcdee/medentitysearch.html> (last visited November 26, 2012). Nor (apparently) did Nielsen conduct any legal research relating to “Generations Family Health Center.” A quick search in standard and widely available computerized legal research databases would have revealed that Generations was deemed a federal facility subject to the FTCA. See, e.g., *Montanez v. Hartford Healthcare Corp.*, No. 3:03-cv-1202 (GLG), 2003 WL 22389355, *1 (D. Conn. Oct. 17, 2003) (“Generations receives federal funding from the United States Department of Health and Human Services (‘HHS’) and, pursuant to the [Health Centers Act], 42 U.S.C. § 233(g)-(n), at all times relevant hereto, HHS has deemed Generations to be an employee of the United States Public Health Service (‘PHS’) for purposes of the FTCA, 28 U.S.C. §§ 2671 - 2680.”).

Nielsen and his firms did not take these basic steps, despite the fact that Pegalis represents that it is a leading medical malpractice law firm. Its website, for example, boasts that the firm is “[r]ecognized by the legal community as a Top

Tier medical malpractice law firm on Long Island, New York State and Nationally. Winner of the highest medical malpractice verdicts of its time, as reported by the New York Jury Verdict Reporter: \$116 million in 1998 and \$114.8 million in 2001.” See <http://www.pegalisanderickson.com/index.html> (last visited November 26, 2012). Indeed, the firm’s phone number is (866) MED-MAL7. The obvious avenues for investigation ignored by Phillips and Nielsen—with the resources of a major medical malpractice law firm behind them—dwarf any efforts they took to determine Generations’ status.

Furthermore, although there were complications in this case that perhaps slowed Nielsen’s investigation of Cato’s injury, Nielsen’s ability to determine the status of Generations and the proper defendant were unaffected by the unavailability of Deshong, the status the estate, the right to review the medical records, or the need for additional records from Lawrence and Memorial Hospital. Writing a letter to Generations or searching for Generations in a legal database were steps that Nielsen could have accomplished in an afternoon. Nielsen could have taken these steps immediately after meeting with Cato in January of 2009. That any of these steps were not taken is evidence that Phillips and his attorney did not act with diligence.

The district court, whose conclusion on equitable tolling is reviewed for abuse of discretion, *A.Q.C.*, 656 F.3d at 144, reached the same conclusion. The district court noted that the attorneys at Pegalis held themselves out as medical malpractice specialists and that Nielsen could have discovered Generations' status by using the Health Resources and Services Administration website. A64-65. Based on these facts, the district court relied upon this Court's statement in *A.Q.C.*:

It is fundamental that a lawyer investigating a possible claim on behalf of a client needs to investigate not only whether a potential claim exists in the abstract, but also who would be the appropriate parties to sue, and what, if any, restrictions on the time and forum for bringing such a claim might exist. . . . It is hard to understand why any lawyer—let alone a lawyer at a firm specializing in medical malpractice with specific prior acquaintance with this issue—would not investigate the federal nature of potential defendants *as part of standard due diligence in every medical malpractice case*. Having neglected to take that simple step, the Firm cannot now argue that it diligently pursued this claim on *A.Q.C.*'s behalf.

656 F.3d at 145 (emphasis added). In *A.Q.C.*, the firm had 22 months to discover the federal nature of the defendant. *Id.* In this case, Nielsen and his firm had 28 months, from January of 2009 when he first met with Cato, until April 27, 2011, when the 2 years elapsed, to make this determination. The result in this case should be controlled by the decision in *A.Q.C.*

Phillips relies heavily on the Third Circuit's decision in *Santos* throughout his brief, but *Santos* is factually distinguishable. Notably, the plaintiff's counsel in *Santos* took several steps to investigate the status of the potential defendant: "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*." 599 F.3d at 191 (emphasis added). This was important to the Third Circuit. They emphasized it in the analysis:

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 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.

Id. at 200-01. Unlike the plaintiff's counsel in *Santos*, however, neither Phillips nor Nielsen took the logical and obvious step of contacting Generations or visiting it. Because they failed to do take these steps, *Santos* is factually inapposite.

Moreover, in *A.Q.C.*, this Court specifically rejected *Santos's* holding because there was publicly available information that would allow a plaintiff to determine if a healthcare provider was considered a federal employee. *A.Q.C.*, 656 F.3d at 146 n.7. In this case, as in *A.Q.C.*, the district court found that "Plaintiff's counsel could have easily discovered Generations's federal status by either calling a government-sponsored toll-free number or entering 'Generations Family Health Center' into the Health Resources and Services Administration's website." A64-65. As the district court noted, "[t]he fact the Generations indicated on its website that it 'uses various resources to provide quality healthcare to homeless individuals' . . . should have put a reasonably experienced advocate on alert that the defendant facility might be federally funded and subject to the FTCA." A66. In other words, in this case, as in *A.Q.C.*, there was information available to Nielsen to determine Generations' status. The district court's decision on this point, and its conclusion that *Santos* is factually inapplicable, was not abuse of discretion.

Based on *A.Q.C.* and the factual record, this Court should affirm the district court's finding that Phillips and Nielsen failed to demonstrate diligence. They had 28 months to investigate Generations, but the steps they took were neither comprehensive nor designed to ensure success. Nielsen and his firm hold themselves out to be medical malpractice experts and, as this Court has stated, investigating the potential federal nature of defendants is part of standard due diligence in a medical malpractice case. Thus, equitable tolling should not save Phillips' claims.

Conclusion

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: December 10, 2012

Respectfully submitted,

DAVID B. FEIN
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT



LAUREN M. NASH
ASSISTANT U.S. ATTORNEY



DAVID C. NELSON
ASSISTANT U.S. ATTORNEY

Sandra S. Glover
Assistant United States Attorney (of counsel)

**Federal Rule of Appellate Procedure
32(a)(7)(C) Certification**

This is to certify that the foregoing brief complies with the 14,000 word limitation of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 10,991 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.

A handwritten signature in black ink that reads "Lauren M. Nash". The signature is written in a cursive style with a large initial 'L'.

LAUREN M. NASH
ASSISTANT U.S. ATTORNEY

Addendum

28 U.S.C. § 2401.

**Time for commencing action against
United States**

(a) Except as provided by chapter 71 of title 41, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

(b) 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 or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

28 U.S.C. § 2501

Time for filing suit

Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

Every claim under section 1497 of this title shall be barred unless the petition thereon is filed within two years after the termination of the river and harbor improvements operations on which the claim is based.

A petition on the claim of a person under legal disability or beyond the seas at the time the claim accrues may be filed within three years after the disability ceases.

A suit for the fees of an officer of the United States shall not be filed until his account for such fees has been finally acted upon, unless the General Accounting Office [Government Accountability Office] fails to act within six months after receiving the account.

28 U.S.C. § 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.

28 U.S.C. § 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) 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.

Conn. Gen. Stat. § 52-190a

Prior reasonable inquiry and certificate of good faith required in negligence action against a health care provider. Ninety-day extension of statute of limitations.

(a) No civil action or apportionment complaint shall be filed to recover damages resulting from personal injury or wrongful death occurring on or after October 1, 1987, whether in tort or in contract, in which it is alleged that such injury or death resulted from the negligence of a health care provider, unless the attorney or party filing the action or apportionment complaint has made a reasonable inquiry as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant. The complaint, initial pleading or apportionment complaint shall contain a certificate of the attorney or party filing the action or apportionment complaint that such reasonable inquiry gave rise to a good faith belief that grounds exist for an action against each named defendant or for an apportionment complaint against each named apportionment defendant. To show the existence of such good faith, the claimant or the claimant's attorney, and any apportionment complainant or the apportionment complainant's attorney, shall obtain a written and signed opinion of a similar health care provider, as defined in section 52-

184c, which similar health care provider shall be selected pursuant to the provisions of said section, that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion. Such written opinion shall not be subject to discovery by any party except for questioning the validity of the certificate. The claimant or the claimant's attorney, and any apportionment complainant or apportionment complainant's attorney, shall retain the original written opinion and shall attach a copy of such written opinion, with the name and signature of the similar health care provider expunged, to such certificate. The similar health care provider who provides such written opinion shall not, without a showing of malice, be personally liable for any damages to the defendant health care provider by reason of having provided such written opinion. In addition to such written opinion, the court may consider other factors with regard to the existence of good faith. If the court determines, after the completion of discovery, that such certificate was not made in good faith and that no justiciable issue was presented against a health care provider that fully cooperated in providing informal discovery, the court upon motion or upon its own initiative shall impose upon the person who signed such certificate or a represented party, or both, an appropriate sanction which may include an order to pay to the other party or parties the amount of the

reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee. The court may also submit the matter to the appropriate authority for disciplinary review of the attorney if the claimant's attorney or the apportionment complainant's attorney submitted the certificate.

(b) Upon petition to the clerk of the court where the civil action will be filed to recover damages resulting from personal injury or wrongful death, an automatic ninety-day extension of the statute of limitations shall be granted to allow the reasonable inquiry required by subsection (a) of this section. This period shall be in addition to other tolling periods.

(c) The failure to obtain and file the written opinion required by subsection (a) of this section shall be grounds for the dismissal of the action.