

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

Z.B., by his mother and next friend,)
TARA KILMER,)
)
Plaintiff)
)
v.)
)
AMMONOOSUC COMMUNITY)
HEALTH SERVICES, INC., et al.,)
)
Defendants)

Civ. No. 03-540 (NH)
Civ. No. 04-34-P-S (ME)

**MEMORANDUM DECISION ON MOTION TO SUBSTITUTE AND RECOMMENDED
DECISION ON MOTION TO DISMISS**

The United States, a named defendant in this action, has moved to substitute itself for one of the other named defendants, Ammonoosuc Community Health Services, Inc. (“Ammonoosuc”), and to dismiss Counts I through III of the amended complaint for lack of subject matter jurisdiction. After the motions were filed, the plaintiff filed a notice of voluntary dismissal of the claims against the United States contained in Count III of the amended complaint pursuant to Fed. R. Civ. P. 41(a), Plaintiff’s Notice of Voluntary Dismissal of Contract Claims Against the United States, etc. (Docket No. 21), and since Count III is asserted only against the United States, First Amended Complaint (Docket No. 2) at 9-10, that count is no longer before the court. The plaintiff’s response to the motion to dismiss states that this notice also applies “to the extent Count II . . . assert[s] a contract claim against the United States,” Plaintiff’s Objection to Motion to Dismiss (Docket No. 22) at 2, but Count II of the amended complaint cannot reasonably be read to assert such a claim on its face and the notice of dismissal does not refer to Count II at all. I

accordingly will not consider the plaintiff to have voluntarily dismissed any portion of Count II. Because consideration of the motion to dismiss depends in part upon the disposition of the motion to substitute, I address the latter motion first.

I. Motion to Substitute

The applicable statute provides, in relevant part, that in actions brought pursuant to 28 U.S.C. §§ 1346(b)¹ and 2672,

[u]pon 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 . . . 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.

28 U.S.C. § 2679(d)(1). The Attorney General has delegated his certification authority under this statute to the United States attorneys. 28 C.F.R. § 15.3(a). The United States Attorney for the District of New Hampshire has provided such a certification in this case. Certificate of United States Attorney (Exhibit E to Motion to Substitute the United States for Ammonoosuc Community Health Services, Inc. as Defendant (“Motion to Substitute”) (Docket No. 5)).

This certification is provisional and subject to judicial review. *Aversa v. United States*, 99 F.3d 1200, 1208 (1st Cir. 1996). The scope of the defendant’s employment is to be determined under the law of the state in which the alleged tortious conduct occurred. *Kelly v. United States*, 924 F.2d 355, 357 (1st

¹ The amended complaint alleges no basis for jurisdiction in this court other than “diversity of citizenship and amount in controversy,” Amended Complaint ¶ 6, a reference to 28 U.S.C. § 1332(a). It also alleges that the plaintiff’s claims are not subject to the Federal Tort Claims Act. *Id.* ¶ 9. However, to the extent that the action should properly be brought against the United States, 28 U.S.C. § 1346(b) provides jurisdiction in this court for tort claims such as those set forth in the amended complaint and 28 U.S.C. § 2672 provides an administrative procedure for disposition of such claims. The remedy provided by these statutes is exclusive when the claim arises from the performance of medical, surgical, dental or related functions. 42 U.S.C. § 233(a).

Cir. 1991). When the plaintiff objects to a motion to substitute based on such a certification, the burden is on the plaintiff to establish that the individual defendant was not acting within the scope of its employment at the relevant time. *Schrob v. Catterson*, 967 F.2d 929, 936 (3d Cir. 1992); *Brown v. Armstrong*, 949 F.2d 1007, 1012 (8th Cir. 1991).

The United States relies on 42 U.S.C. § 233(g)(4), Memorandum in Support of Motion to Substitute, etc. (“Defendants’ Substitution Memorandum”) (attached to Motion to Substitute) at 4, which provides that a public or non-profit private entity receiving federal funds under 42 U.S.C. § 254b is covered by the exclusivity provisions of section 233(a). The secretary of the Department of Health and Human Services has deemed Ammonoosuc to be a public health service employee under this statute, Declaration of Norrine Williams, Executive Director (“Williams Decl.”) (Exh. A to Motion to Substitute) ¶ 3. This determination is “final and binding upon the Secretary and the Attorney General and other parties to any civil action or proceeding.” 42 U.S.C. § 233(g)(1)(F). If a “deemed” facility is sued for damages for personal injury arising out of its provision of services to patients within the “deemed” activities, section 233(a) provides the exclusive means to obtain relief. If the United States attorney’s certification that the facility or its employees were acting within the scope of the “deeming” is upheld, then the United States is to be substituted for the named defendant. 28 U.S.C. § 2679(d)(2).

The plaintiff contends both that Ammonoosuc’s “deemed” status does not extend to the activities that gave rise to his claim and that, in the alternative, section 233 is unconstitutional as applied to him in this case. Memorandum in Support of Plaintiff’s Objection to Motion to Substitute, etc. (“Plaintiff’s Substitution Opposition”) (Docket No. 25) at 2. He first argues that the United States attorney’s certification is insufficient because it “makes only a scope of employment certification” and omits the required certifications that Ammonoosuc is covered by section 233 for this claim and that the acts or omissions giving rise to the

claim were within the scope of the project, *id.* at 6, citing Policy Information Notice 99-08 of the Bureau of Public Health Care. He asserts that each specific allegation in his complaint must receive separate consideration by the court with respect to the scope of the project. *Id.* at 7. However, the sole authority cited for this assertion, *Lyons v. Brown*, 158 F.3d 605, 608-09 (1st Cir. 1998), imposes no such requirement. In that case, the First Circuit upheld a certification by the United States attorney which, unlike the certification here, provided that some of the claims alleged in the complaint were within the named defendant's scope of employment while others were not. 158 F.3d at 607, 609. The amended complaint in this case cannot reasonably be read to allege a single claim supported by numerous "divergent" acts, as was the case in *Lyons*. *Id.* at 608. The plaintiff cites no authority for his necessarily-implied contention that an internal policy document of a federal agency has the force of law with respect to statutory certification, and I am not inclined to endow it with such status on the basis of the showing made. The certification is sufficient under section 233.

The plaintiff next asserts that his claims do not arise from the performance of medical or related functions and therefore are not subject to section 233. Plaintiff's Substitution Opposition at 8-11. He states that "at the time of the incidents in question" his mother had transferred his medical care from Ammonoosuc to physicians "not affiliated with" Ammonoosuc. *Id.* at 9. Thus, he contends, the home visits provided by Ammonoosuc after December 1997, which apparently give rise to his claims, were "not related to medical care," *id.*, as required by section 233. The United States responds that the plaintiff's mother was a patient of Ammonoosuc and the plaintiff's allegations arise out of the provision of medical and related services by its home visiting staff. Reply Memorandum in Support of Motion to Substitute, etc. ("Substitution Reply") (Docket No. 31) at 3-5. It is not necessary to reach the plaintiff's argument that the individual Ammonoosuc employees who provided the home visits were not qualified under New Hampshire

law to “give medical advice or perform medical examinations,” Plaintiff’s Substitution Opposition at 9-10, or that his claims are distinguishable from a claim for medical malpractice, *id.* at 10, because the home visiting services were related to the medical care provided to the plaintiff’s mother and were provided only because of the existence of the plaintiff. The plaintiff does not dispute that the home visiting services at issue were provided by a nurse or nurses. *Id.* at 9. Under New Hampshire law, a registered nurse is required to report suspected abuse or neglect of a child. N.H. Rev. Stat. Ann. § 169-C:29. The amended complaint alleges, *inter alia*, that Ammonoosuc failed to report promptly the “potentially serious injury or illness” inflicted on the plaintiff by his father. Amended Complaint ¶¶ 17-20. To the extent that the negligence alleged in the amended complaint arises out of the failure to comply with the statute, that negligence is “related to” the provision of medical services because the duty to report arises out of the employees’ status as medical professionals. *See Teresa T. v. Ragaglia*, 154 F.Supp.2d 290, 300 (D. Conn. 2001). Nothing in the language of section 233 requires that the damages claimed result from events related only to the performance of medical functions for the named plaintiff.

The plaintiff next argues that Ammonoosuc’s home visiting program was not a “grant-supported activity,” relying on 42 C.F.R. § 6.6(d). Plaintiff’s Substitution Opposition at 11-15. That regulation provides, in relevant part, that “[o]nly acts and omissions related to the grant-supported activity of entities are covered” by the Tort Claims Act. 42 C.F.R. § 6.6(d). There is no dispute that Ammonoosuc’s home visiting program was at least partially funded by the State of New Hampshire. *See* Attachment 3 to Williams Decl. at ACHS-3 (“An important new home visiting demonstration project will begin in the Spring of 1997 with State funding.”); Ammonoosuc Community Health Services, Inc.’s Response to Plaintiff’s First Set of Interrogatories, etc. (Attachment 4 to Plaintiff’s Substitution Opposition) at 4 (“The home visiting program . . . was funded through a state grant to Ammonoosuc Community Health Services, Inc.

specifically for the development of that home visiting program.”). The United States has submitted no evidence in support of its effort to limit its agreement to the statement that this program was “partially” funded by the state; the only evidence in the record is that it was fully funded by the state. The United States relies, Substitution Reply at 5-6, on an internal agency interpretation of 42 C.F.R. § 6.6(d) as providing coverage under the Federal Tort Claims Act to acts and omissions “related to activities within the scope of the approved Federal project, as defined in the health center’s grant application.” BPHC Policy Information Notice (“PIN”) 96-7 at IV.A (Attachment 1 to Exh. A, Supplemental Declaration of Susan Lewis (Exh. A to Ammonoosuc and United States’ Objection to Plaintiff’s Motion for Limited Discovery and Evidentiary Hearing (Docket No. 13))).

The plaintiff asserts that extending the immunity protections of section 233 “not only to ‘grant-supported activity’ but also to other activities which are not grant-supported . . . would contradict 42 C.F.R. § 6.6(d).” Plaintiff’s Substitution Opposition at 13. This argument ignores the fact that the regulation refers to acts and omissions *related to* grant-supported activity, not to grant-supported activity alone. On its face, the language of the regulation cannot reasonably be interpreted to be as limited as the plaintiff assumes. I agree with the plaintiff, *id.* at 14-15, that the mere listing by Ammonoosuc of every program and activity that it undertakes in its relevant grant application under the heading “scope of the project” does not thereby render each such program and activity related to grant-supported activity, but the inquiry does not stop there.

The United States argues that this court must defer to the agency’s interpretation of 42 U.S.C. § 6.6(d) under *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). Substitution Reply at 5-9. In that case, the Supreme Court held that in interpreting a regulation, a court “must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt.” 325 U.S. at 413-

14. In such circumstances, the administrative interpretation “becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.” *Id.* at 414. The plaintiff responds that *Bowles* does not apply because section 6.6(d) is not ambiguous. Plaintiff’s Surreply Memorandum to Reply Memorandum in Support of Motion to Substitute, etc. (“Substitution Surreply”) (Docket No. 39) at 2-7. However, the plaintiff’s argument focuses solely on the term “grant-supported activity.” *Id.* For the purposes of the present case, it is the term “related to” in the regulation that is crucial. If Ammonoosuc’s home visiting program is “related to” activity that is supported by the federal grant at issue, nothing further is required. Assuming *arguendo* that “grant-supported activity” can only mean activity that is directly paid for by federal grant funds, as the plaintiff contends, the home visiting program may still conceivably be related to such activity.

If the term “related to” in 42 C.F.R. § 6.6(d) is ambiguous,² the agency’s interpretation set forth in PIN 96-7 is neither plainly erroneous nor inconsistent with the regulation. *See also Regions Hosp. v. Shalala*, 522 U.S. 448, 460 (1998) (if plaintiff’s construction of ambiguous regulation not inevitable one, court will examine reasonableness of agency’s interpretation). The home visiting program is “within the scope of” the activity that is to be federally funded under the relevant application. *See Ammonoosuc Community Health Services Community Health Center Budget Period Renewal Application* (Attachment 3 to Williams Decl.) at ACHS-3 (“The ACHS health plan places particular emphasis on: infant and child health and development The Network will provide case-managed perinatal services Family practice medical care will continue to be the centerpiece of a comprehensive array of services including: . . . Family Support services (e.g. counseling, social services advocacy, home visiting, parent-child playgroups.”)

² *See, e.g., Doe v. Group Hospitalization & Med. Servs.*, 3 F.3d 80, 89 (4th Cir. 1993) (scope of “related to” ambiguous); (continued on next page)

It is at least equally possible that the term is not ambiguous, however. I have no trouble reaching the conclusion that the home visiting program is “related to” Ammonoosuc’s federally-funded activities, as that term is commonly understood, because the expressed purposes of the program and of the federally-funded activities are so similar. *See id.* Accordingly, I conclude that the plaintiff has failed to carry his burden to overturn the United States attorney’s certification.

This conclusion makes it necessary to consider the plaintiff’s argument that 42 U.S.C. § 233 is unconstitutional. Plaintiff’s Substitution Opposition at 16-25. Specifically, the plaintiff contends that section 233 violates the Tenth and Fifth Amendments on its face and the Fifth Amendment as applied to him. *Id.* at 19-25.

With respect to the Tenth Amendment, the plaintiff essentially contends that section 233 impermissibly obliterates the constitutional distinction between national and local authority. *Id.* at 21. This argument about section 233 was squarely rejected in *Ragaglia* for reasons that I find persuasive. 154 F.Supp.2d at 300. In this circuit,

a Tenth Amendment attack on a federal statute cannot succeed without three ingredients: (1) the statute must regulate the States as States, (2) it must concern attributes of state sovereignty, and (3) it must be of such a nature that compliance with it would impair a state’s ability to structure integral operations in areas of traditional governmental functions.

United States v. Bongiorno, 106 F.3d 1027, 1033 (1st Cir. 1997) (citations and internal quotation marks omitted). Section 233 cannot reasonably be read to regulate the states as states. Nothing further is required to reject the plaintiff’s Tenth Amendment argument.

United States v. Giorgi, 840 F.2d 1022, 1028 (1st Cir. 1988) (“related to” facially ambiguous); *Charles of the Ritz Group Ltd. v. Quality King Distribs., Inc.*, 832 F.2d 1317, 1324 (2d Cir. 1987) (phrase “not related to” is ambiguous).

The plaintiff next asserts that section 233 violates the Fifth Amendment on its face because it violates the equal protection clause by creating a classification that is not rationally related to a legitimate governmental interest. Plaintiff's Substitution Opposition at 23-24. The plaintiff's argument on this point is sketchy at best. Assuming *arguendo* this it is sufficiently set forth to be entitled to judicial consideration, the argument fails. The plaintiff has made no attempt to identify the classification assertedly created on the face of section 233, and none is readily apparent. A classification based on claims arising out of medical and related functions within the scope of a funded project, the only classification which the statute can reasonably be construed to create, is not a suspect classification, *Mills v. Maine*, 118 F.3d 37, 47 (1st Cir. 1997) (suspect class is class of persons characterized by unpopular trait or affiliation that would reflect special likelihood of bias against them by majority), and is rationally related to the goal of saving nonprofit providers of such care the cost of malpractice insurance, *see* 138 Cong. Rec. S17862-01. *See Kittery Motorcycle, Inc. v. Rowe*, 320 F.3d 42, 47 (1st Cir. 2003) ; *see also DiPippa v. United States*, 687 F.2d 14, 19-20 (3d Cir. 1982) (similar provision of Swine Flu Act does not violate equal protection clause).

The plaintiff's first as-applied constitutional challenge is based on an assertion that section 233 violates the due process clause of the Fifth Amendment because it deprives him of a state-law cause of action without notice that a shorter statute of limitations applies and without tolling provisions applicable to minors and disabled individuals that are available under state law. Plaintiff's Substitution Opposition at 23.

However,

[w]here the legislature enacts general legislation eliminating statutory rights or otherwise adjusting the benefits and burdens of economic life, in the absence of any substantive constitutional infirmity, the legislative determination provides all the process that is due.

Hoffman v. City of Warwick, 909 F.2d 608, 619-20 (1st Cir. 1990) (citation and internal quotation marks omitted). The plaintiff has made no showing that there is any substantive constitutional infirmity in the statute as applied to him. “There is no fundamental right to particular state-law tort claims.” *Hammond v. United States*, 786 F.2d 8, 13 (1st Cir. 1986). *See also Salmon v. Schwartz*, 948 F.2d 1131, 1142-43 (10th Cir. 1991).

Finally, the plaintiff contends that section 233, in concert with 28 U.S.C. § 2401(b),³ violates the equal protection clause as applied to him because it “singles out tort claimants for a shortened two-year statute of limitations with *no* tolling for disability, while allowing a six-year statute of limitations *plus* tolling during legal disability for ‘every (other) civil action.’” Plaintiff’s Substitution Opposition at 24 (emphasis in original). He contends that heightened scrutiny must be applied when the classification involves people with mental disabilities.⁴ *Id.* at 23. The latter contention is incorrect. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 442 (1985) (mental retardation not a quasi-suspect classification calling for standard of review stricter than that normally applied to economic and social legislation). *See also Tennessee v. Lane*, 124 S.Ct. 1978, 1988 (2004) (classifications based on disability require application only of rational relationship test). In any event, neither section 233 nor section 2401(b) can reasonably be read to create a classification based on disability, so no consideration of the rational relationship test is required in this regard. To the extent that the plaintiff’s challenge can be construed to challenge the statute of limitations independent of the alleged classification based on disability, an equal-protection challenge to section 2401(b) was rejected in *Montalvo v. Graham*, 390 F. Supp. 533, 534 (E.D. Wis. 1975), and I

³ This statute establishes a six-year limitations period for civil actions against the United States and requires presentation of a tort claim against the United States to the appropriate federal agency within two years after the claim accrues. 28 U.S.C. § 2401.

⁴ The plaintiff alleges that he is mentally incompetent. Amended Complaint ¶ 11.

agree with that court that the United States may limit its waiver of sovereign immunity in the manner set forth in that statute. Requiring tort claims to be presented sooner than other civil claims is rationally related to a government interest in prompt resolution of such claims. *See generally Cadieux v. International Tel. & Tel. Corp.*, 593 F.2d 142, 145 (1st Cir. 1979).

II. Motion to Dismiss

A. Applicable Legal Standard

The United States contends that this court lacks subject-matter jurisdiction over the plaintiff's remaining claims. Memorandum in Support of United States' Motion to Dismiss, etc. ("Motion to Dismiss") (attached to Docket No. 4) at 2. This argument invokes Fed. R. Civ. P. 12(b)(1). When a defendant moves to dismiss pursuant to Rule 12(b)(1), the plaintiff has the burden of demonstrating that the court has jurisdiction. *Lundquist v. Precision Valley Aviation, Inc.*, 946 F.2d 8, 10 (1st Cir. 1991); *Lord v. Casco Bay Weekly, Inc.*, 789 F. Supp. 32, 33 (D. Me. 1992). The court does not draw inferences favorable to the pleader. *Hogdon v. United States*, 919 F. Supp. 37, 38 (D. Me. 1996). For the purposes of a motion to dismiss under Rule 12(b)(1) only, the moving party may use affidavits and other matter to support the motion. The plaintiff may establish the actual existence of subject-matter jurisdiction through extra-pleading material. 5A C. Wright & A. Miller, *Federal Practice and Procedure* § 1350 at 213 (2d ed. 1990); see *Hawes v. Club Ecuestre el Comandante*, 598 F.2d 698, 699 (1st Cir. 1979) (question of jurisdiction decided on basis of answers to interrogatories, deposition statements and an affidavit).

B. Analysis

Count I of the amended complaint sounds in tort and Count II alleges breach of contract. Amended Complaint ¶¶ 15-24. The United States asserts that the plaintiff failed to file an administrative claim with the Department of Health and Human Services within two years of the accrual of his cause of action as required by the statute of limitations included in the Federal Tort Claims Act ("FTCA"), thereby depriving this court of jurisdiction over his tort claim, and that the plaintiff's contract claim is barred by the exclusivity provision of 42 U.S.C. § 233. Motion to Dismiss at 6, 19.

1. *The Tort Claim.* The plaintiff alleges that he received injuries at the hands of his father before and on April 10, 1998 and that Ammonoosuc failed to prevent these injuries through negligence and breach of unspecified contractual duties of which he was a third-party beneficiary. Amended Complaint ¶¶ 17-20, 22-24. He also asserts that he filed an administrative claim with the Department of Health and Human Services on January 24, 2002. *Id.* ¶ 9.

The FTCA provides, in relevant part, 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. Because the FTCA is a waiver of sovereign immunity, it is strictly construed.

Normally, a tort claim accrues at the time of injury. In *United States v. Kubrick*, 444 U.S. 111 . . . (1979), the Supreme Court created a discovery rule exception for FTCA claims involving medical malpractice. The Court held that such claims accrue when a plaintiff knows of both the existence and the cause of his injury. The Court determined that accrual does not await the point at which a plaintiff also knows that the acts inflicting the injury may constitute medical malpractice. Distinguishing between ignorance of the facts (of injury or its cause) and ignorance of legal rights, the Court reasoned that a claimant, once armed with knowledge of the fact of injury and the identity of the parties that caused the injury, is no longer at the mercy of the government. At that point, claimants can go to others, such as doctors or lawyers, who will tell them if they are victims of malpractice. The same is not necessarily true of plaintiffs who are ignorant of the facts, particularly when the government may be in possession or control of the necessary information.

This court has extended this discovery rule to FTCA claims outside the medical malpractice context. Most circuits also apply a discovery rule to wrongful death actions.

Under the discovery rule, a claim accrues when the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the factual basis for the cause of action. The test for whether a plaintiff should have discovered the necessary facts is an objective one. We look first to whether sufficient facts were available to provoke a reasonable person in the plaintiff's circumstances to inquire or investigate further. . . . Once a duty to inquire is established, the plaintiff is charged with the knowledge of what he or she would have uncovered through a reasonably diligent investigation. The next question is whether the plaintiff, if armed with the results of that investigation, would know enough to

permit a reasonable person to believe that she had been injured and that there is a causal connection between the government and her injury. Definitive knowledge is not necessary. This inquiry is highly fact- and case-specific, as are the pertinent questions to ask.

McIntyre v. United States, 367 F.3d 38, 51-52 (1st Cir. 2004) (citations and internal punctuation omitted). The parties skirmish in their written submissions over the question whether the cause of action alleged in Count I of the amended complaint is one for medical malpractice, but the appropriate characterization of that claim is irrelevant to resolution of the motion to dismiss. The plaintiff contends that the discovery rule applies to his claim. Plaintiff's Memorandum in Support of Objection to United States' Motion to Dismiss, etc. ("Plaintiff's Dismissal Opposition") (Docket No. 23) at 4-5. Even when that rule is applied to the facts of this case, the United States is entitled to dismissal.

The plaintiff's specific position is that his mother, who brought this action on his behalf, "did not know, and in the exercise of reasonable diligence could not have known that ACHS [Ammonoosuc] was a deemed Federal employee because neither she nor her lawyers had reason to suspect that ACHS might be a Federal employee" *Id.* at 5-6.⁵ "[I]n the medical malpractice context, . . . one need not know of a governmental causal connection for a claim to accrue under the FCTA." *Skwira v. United States*, 344 F.3d 64, 77 (1st Cir. 2003). This gloss on the discovery rule has not yet been extended by the First Circuit beyond medical malpractice cases. However, even assuming that this interpretation would not be extended to tort claims alleging breach of a duty to monitor a plaintiff for evidence of intentional injury, to provide educational services, to properly train and supervise employees, to report abuse and neglect and to exercise

⁵ The plaintiff contends that knowledge that Ammonoosuc's home visiting program, through which the services at issue in this proceeding were provided, was funded in part or in full by the federal government would not have given his mother or his lawyers reason to suspect that Ammonoosuc was a federal employee because its day-to-day operations were not supervised by the federal government. Plaintiff's Dismissal Opposition at 8-9. However, that is not the applicable legal test involved in this case, where Ammonoosuc was deemed a federal employee by operation of statute.

reasonable care for a plaintiff's safety, Amended Complaint ¶ 17, the First Circuit's analysis of the discovery rule in *Skwira and Gonzalez v. United States*, 284 F.3d 281 (1st Cir. 2002), another medical malpractice case, is instructive for evaluation of the plaintiff's specific claim. "[I]n order to toll the statute of limitations pursuant to the discovery rule, the factual basis for the cause of action must have been inherently unknowable at the time of injury." *Gonzalez*, 284 F.3d at 288-89 (citation and internal quotation marks omitted). A fact is "inherently unknowable" if it is "incapable of detection by the wronged party through the exercise of reasonable diligence." *Id.* at 289 (citation omitted).

The plaintiff takes the position that Ammonoosuc's status as a deemed federal employee was "inherently unknowable" under the circumstances of this case. Plaintiff's Dismissal Opposition at 13-17. He contends that Ammonoosuc concealed its deemed status by failing to inform the public and the people it served of that specific status, asserting that it had a duty to do so. *Id.* at 10-11, 13-14.⁶ However, the applicable legal burden is whether the plaintiff had a duty to inquire under the circumstances, not whether the defendant had a duty to disclose. *Cragin v. United States*, 684 F. Supp. 746, 755 (D. Me. 1988). If the plaintiff's admitted failure, and that of his attorneys, to make any inquiry about the possibility that Ammonoosuc might be a deemed federal employee falls below an objectively reasonable standard under the circumstances, the discovery rule does not protect the plaintiff's otherwise admittedly untimely filing of his administrative claim. *Id.* In this case, the plaintiff's mother, who is acting in this litigation as his next friend, was informed that Ammonoosuc's home visiting program was partially funded by the federal government. Williams Decl. ¶ 5 & Attachment 5. This was sufficient information to trigger a duty on the part of the plaintiff or his attorneys to investigate whether Ammonoosuc might be a federal employee. *See*

⁶ Much of the case law cited by the plaintiff in support of this assertion, Plaintiff's Dismissal Opposition at 14-15, is based (continued on next page)

Geo. Knight & Co. v. Watson Wyatt & Co., 170 F.3d 210, 213 (1st Cir. 1999). The plaintiff contends that, had he investigated as a result of the statement that the home visiting program was partially federally funded, he would only have found that the program was in fact totally state funded. Plaintiff's Dismissal Opposition at 8. The plaintiff apparently would not have discovered such a fact, because the funds provided to Ammonoosuc by the state for the home visiting program were in fact federal funds, Supplemental Declaration of Norrine Williams, etc. (Exh. B to Reply Memorandum in Support of United States' Motion to Dismiss (Docket No. 32)) ¶ 11 & Attachment G. In any event, the existence of federal funding is not the end of the reasonable inquiry to be made. The object of the inquiry would be to determine whether it was possible that Ammonoosuc could be considered a federal employee, for any reason. I find persuasive the following reasoning of the Eighth Circuit in a case that rejects the argument made here by the plaintiff:

In this case, plaintiffs argue that [they were] "lulled into a false sense of security" because [the defendant] is a private not-for-profit corporation . . . and [they were] never informed of its FTCA coverage. But plaintiffs were not affirmatively misled by [the defendant] or the government — they simply made no inquiry into [the defendant's] status while [one of the plaintiffs] was receiving prenatal care, or during the two-year period after [the accrual date] when an administrative FTCA claim could have been timely filed. The statute of limitations under the FTCA does not wait until a plaintiff is aware that an alleged tort-feasor is a federal employee. To toll the statute because of a plaintiff's ignorance of the defendant's federal employee status, plaintiff must at the very least show that the information *could not* have been found by a timely diligent inquiry. Here, plaintiffs had ample time after learning of [their injury] to find the Federally Supported Health Centers Assistance Act of 1992 and to inquire into its possible application to their claim. Their failure to do so was a mistake of law that does not entitle them to equitable tolling.

on or follows the decision in *Kelly v. United States*, 568 F.2d 259 (2d Cir. 1978), the reasoning of which was "effectively overruled by the 1988 amendments to the FTCA," *Nin v. Liao*, 2003 WL 21018816 (S.D. N.Y. May 5, 2003), at *4.

Motley v. United States, 295 F.3d 820, 824 (8th Cir. 2002) (emphasis in original; citations and internal punctuation omitted). Here, the plaintiff has not shown that he could not have discovered Ammonoosuc's federal employee status by a diligent inquiry.

The plaintiff also contends that he is entitled to equitable tolling of the statute of limitations because Ammonoosuc "deliberately conceal[ed]" its deemed status. Plaintiff's Dismissal Opposition at 16. Assuming *arguendo* that equitable tolling is even available in FTCA cases, *see McIntyre*, 367 F.3d at 61 & n.8, to the extent that this argument differs from the plaintiff's contention that he was not required to investigate the possible existence of Ammonoosuc's deemed status, it is foreclosed by *Motley*. In addition, the plaintiff has made no showing of deliberate concealment by Ammonoosuc; he merely characterizes Ammonoosuc's failure to include a statement of such status on all of its brochures, consent forms and other public documents as deliberate concealment, a characterization that is not justified under the circumstances. As the First Circuit said in *Skwira*, when the plaintiff knows the identity of the alleged tortfeasor, "[a]bsent extraordinary circumstances" the FTCA statute of limitations is not tolled until the plaintiff is aware of the legal status of the alleged tortfeasor. 344 F.3d at 76. The plaintiff asserts that the existence of section 233 is in itself such an extraordinary circumstance, Plaintiff's Dismissal Opposition at 17, but that argument would eviscerate section 233, because the FTCA statute of limitations, of which section 233 was designed to take advantage, could never be applied through section 233.

The plaintiff's final argument is that the FTCA statute of limitations should be tolled because he was incapacitated by the government's negligence. *Id.* at 17-18. Even if this theory were applicable in this case, the fact is that the plaintiff at the time the action was filed was six years old, Amended Complaint ¶ 2, and the action could only have been brought on his behalf by a parent or next friend in any event. His mother, who brought this action on his behalf, does not allege that she was in any way incapacitated by the

defendant's negligence. Under these circumstances, the facts that the plaintiff is a minor or that he alleges incompetence caused by the defendant cannot serve to toll the statute of limitations. *McCall v. United States*, 310 F.3d 984, 986-87 (7th Cir. 2002) (distinguishing 2 of 4 cases cited by plaintiff in this case, Plaintiff's Dismissal Opposition at 18). The two cases cited by the plaintiff that are not distinguished in *McCall* are also distinguishable. In *Washington v. United States*, 769 F.2d 1436 (9th Cir. 1985), the court determined that the administrative claim was filed within two years after the cause of action accrued and specifically stated that its decision did not rest on tolling of the FCTA statute of limitations. *Id.* at 1439. In *Lieberknecht v. Bridgestone/Firestone, Inc.*, 980 F. Supp. 300, 308 (N.D. Iowa 1997), the court was construing Iowa law, not the FTCA. The First Circuit has held that "it is well established that state . . . tolling rules do not affect the two-year statute of limitations applicable to federal claims" under the FTCA. *Vega-Velez v. United States*, 800 F.2d 288, 290 (1st Cir. 1986). The plaintiff has not cited any federal tolling rule for incapacitated minors.

2. *The Contract Claim.* Count II of the amended complaint alleges that the plaintiff is the third-party beneficiary of unspecified contractual obligations between Ammonoosuc and others that were breached by Ammonoosuc. Amended Complaint ¶¶ 21-24. The United States contends that it is entitled to dismissal of this claim because the only remedy authorized for the plaintiff's claims is provided by section 233, which is by its terms an exclusive tort remedy and that the contract claim is only a disguised tort claim. Motion to Dismiss at 19-20, 21-23. The plaintiff does not respond to this portion of the United States' motion, although in his formal objection to the motion to dismiss he states that he "agrees that to the extent Count II . . . assert[s] a contract claim against the United States, th[at] contract claim[] [is] subject to the exclusive jurisdiction of the U.S. Court of Federal Claims." Plaintiff's Objection to Motion to Dismiss at 2. This would appear to be an admission that the defendant, if the motion to substitute is granted, is entitled to

dismissal of Count II. Under these circumstances, the motion to dismiss the contract claim set forth in Count II should be granted.

The motion should also be granted on the merits. The language of 42 U.S.C. § 233(a) does make the tort remedy exclusive under the circumstances of this case. *See also Bembenista v. United States*, 866 F.2d 493, 496 (D.C. Cir. 1989) (contract claim that essentially repeats tort claim sounds in tort).

III. Conclusion

For the foregoing reasons, I grant the motion of the United States to substitute itself for Ammonoosuc and recommend that the motion of the United States to dismiss be **GRANTED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 13th day of July, 2004.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

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V.

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