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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MARILYN BRYANT, individually)
and on behalf of VINCENT JAY) No. CIV 98-1495 PCT RCB
BRYANT; TOM BRYANT; JOSHUA)
HOMER BRYANT; SONNY BRYANT;) O R D E R
and TEANCUM BRYANT,)
Plaintiffs,)
Vs.)
THE UNITED STATES OF AMERICA;)
BARBARA FRANC,)
Defendants.)
_____)

Plaintiffs have brought a claim against the United States under the Federal Tort Claims Act ("FTCA") based on an incident that occurred October 9, 1997. On that date, Vincent Bryant entered the Northern Navajo Medical Center ("Medical Center"), a federal hospital operated by Indian Health Services ("IHS"), to have his wisdom teeth extracted; he suffered irreversible brain damage during the dental procedure. Plaintiffs base their FTCA claim on the alleged negligence of several individuals, including Barbara Franc.

1 Ms. Franc is a certified registered nurse anesthetist
2 ("CRNA"), and she administered the anesthesia during Vincent
3 Bryant's procedure.

4 Pending before the court are the parties' cross-motions
5 for partial summary judgment regarding Ms. Franc's status as
6 an employee of the federal government. Plaintiffs move for
7 summary judgment that she was an employee of the United States
8 on October 9, 1997, within the meaning of the FTCA. The
9 government, on the other hand, moves for summary judgment that
10 Ms. Franc was a contractor with the United States as defined
11 by the FTCA and that therefore the government has not waived
12 its sovereign immunity with respect to her alleged negligence.
13 Having carefully considered the arguments raised, the court
14 will now rule on the matter.

15 I. BACKGROUND

16 On October 9, 1997, Vincent Bryant entered the Medical
17 Center, located in Shiprock, New Mexico, to have his wisdom
18 teeth extracted. (Pls.' Statement of Facts ("PSOF") ¶ 1.)
19 The Medical Center is a federal hospital operated by IHS.
20 (Id. ¶ 2.) Barbara Franc, a certified registered nurse
21 anesthetist ("CRNA"), administered anesthesia to Vincent just
22 before the surgery and was assigned to monitor his breathing
23 and vital signs before and during the surgery. (Id. ¶ 3.)
24 Dr. N. Whitney James, an officer of the Commissioned Corps of
25 the United States Public Health Service ("PHS"), was the oral
26 surgeon in charge of Vincent's surgery. (Id. ¶ 4.) Vincent
27 suffered irreversible brain damage during the dental
28 procedure. (Id. ¶ 5.)

1 Ms. Franc executed a Professional Service Agreement with
2 Nationwide Medical Services, Inc. ("Nationwide") to serve as a
3 CRNA at various medical facilities, effective September 11,
4 1997. (Id. ¶ 6; Pls.' Ex. B, Professional Service Agreement.)
5 According to the Professional Service Agreement, Ms. Franc was
6 an independent contractor with Nationwide, and Nationwide had
7 no interest in her day-to-day operations of actual delivery of
8 individual patient care. (Pls.' Ex. B, Professional Service
9 Agreement.) Furthermore, Ms. Franc herself believed that she
10 was an independent contractor with Nationwide. (PSOF ¶ 10.)

11 On February 1, 1996, PHS, represented by the Navajo Area
12 IHS, and Nationwide executed a Basic Ordering Agreement
13 ("BOA"). (Id. ¶ 12.) The BOA provided that Nationwide would
14 supply CRNAs to medical facilities under the jurisdiction of
15 the Navajo Area IHS. (Id. ¶ 13.) It also provided that
16 Nationwide was an independent contractor of the United States.
17 (Id. ¶ 14.) On September 11, 1997, the Medical Center issued
18 an Order for Supplies or Services under the BOA, securing the
19 provision of CRNA services by Ms. Franc. (Id. ¶ 15.)

20 During her service at the Medical Center, Ms. Franc was
21 one of three CRNAs in the anesthesia department, along with
22 Hank Beckerhoff and James Stackhouse. (Id. ¶ 16.) Mr.
23 Beckerhoff was the chief CRNA of the anesthesia department and
24 was responsible for scheduling the on-duty and on-call shifts
25 of the three CRNAs. (Id. ¶¶ 19-20.) Ms. Franc was the only
26 contract worker in the anesthesia department during her
27 service at the Medical Center. (Id. ¶ 18.)

28 II. STANDARD OF REVIEW

1 To grant summary judgment, the court must determine that
2 in the record before it there exists "no genuine issue as to
3 any material fact" and, thus, "that the moving party is
4 entitled to judgment as a matter of law." Fed. R. Civ. P.
5 56(c). In determining whether to grant summary judgment, the
6 court will view the facts and inferences from these facts in
7 the light most favorable to the nonmoving party. Matsushita
8 Elec. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct.
9 1348, 1356 (1986).

10 The mere existence of some alleged factual dispute
11 between the parties will not defeat an otherwise properly
12 supported motion for summary judgment; the requirement is that
13 there be no genuine issue of material fact. Anderson v.
14 Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S. Ct. 2505,
15 2510 (1986). A material fact is any factual dispute that
16 might affect the outcome of the case under the governing
17 substantive law. Id. at 248, 106 S. Ct. at 2510. A factual
18 dispute is genuine if the evidence is such that a reasonable
19 trier of fact could resolve the dispute in favor of the
20 nonmoving party. Id. A party opposing a motion for summary
21 judgment cannot rest upon mere allegations or denials in the
22 pleadings or papers, but instead must set forth specific facts
23 demonstrating a genuine issue for trial. See id. at 250, 106
24 S. Ct. at 2511. Finally, if the nonmoving party's evidence is
25 merely colorable or is not significantly probative, a court
26 may grant summary judgment. See, e.g., California
27 Architectural Build. Prods., Inc. v. Franciscan Ceramics, 818
28 F.2d 1466, 1468 (9th Cir. 1987).

1 III. DISCUSSION

2 Both parties have moved for summary judgment on the issue
3 of whether on the date of the incident in question Ms. Franc
4 was an employee of the federal government or merely an
5 independent contractor.¹ The answer to this question is
6 determinative of whether the United States is liable under the
7 FTCA for the alleged negligence of Ms. Franc.

8 A. The FTCA's Independent Contractor Exception

9 The FTCA contains a limited waiver of the federal
10 government's sovereign immunity, permitting individuals to sue
11 the United States "for injury or loss of property, or personal
12 injury or death caused by the negligent or wrongful act or
13 omission of any employee of the Government while acting within
14 the scope of his office or employment." 28 U.S.C. §
15 1346(b)(1); see Carrillo v. United States, 5 F.3d 1302, 1304
16 (9th Cir. 1993). The FTCA defines the phrase "employee of the
17 government" to include "officers and employees of any federal
18 agency." 28 U.S.C. § 2671. The Act, however, expressly
19 provides that independent contractors do not constitute
20 federal agencies or employees. See id.; United States v.
21 Orleans, 425 U.S. 807, 814, 96 S. Ct. 1971, 1976 (1976);
22 Carrillo, 5 F.3d at 1304. This exception to the United
23 States' waiver of sovereign immunity is known as the
24 independent contractor exception. See Orleans, 425 U.S. at
25

26 ¹ Under Fed. R. Civ. P. 56(d), the court can grant
27 summary adjudication on such a specific issue because it will
28 narrow the issues remaining for trial. See Fed. R. Civ. P.
56(d); First Nat'l Ins. Co. v. F.D.I.C., 977 F. Supp. 1051,
1055 (S.D. Cal. 1997).

1 814, 96 S. Ct. at 1976; Robb v. United States, 80 F.3d 884,
2 887 (4th Cir. 1996). Although state law governs the United
3 States' substantive duties under the FTCA, a person's status
4 as a contractor or an employee of the federal government is
5 determined under federal law. Robb v. United States, 80 F.3d
6 884, 887 (4th Cir. 1996); Leone v. United States, 910 F.2d 46,
7 49 (2d Cir. 1990); see Logue v. United States, 412 U.S. 521,
8 528, 93 S. Ct. 2215, 2220 (1973).

9 Since the Supreme Court's decisions in Logue and Orleans,
10 courts have consistently held that the critical factor in
11 distinguishing an employee of the federal government from an
12 independent contractor is the federal government's authority
13 to control and supervise the individual's "detailed physical
14 performance." See Orleans, 425 U.S. at 814, 96 S. Ct. at
15 1976; Logue, 412 U.S. at 528, 93 S. Ct. at 2219; Linkous v.
16 United States, 142 F.3d 271, 275 (5th Cir. 1998); Robb, 80
17 F.3d at 887-88; Carrillo, 5 F.3d at 1304; Lilly v. Fieldstone,
18 876 F.2d 857, 858 (10th Cir. 1989). If the government
19 supervises the day-to-day operations of the individual, she is
20 considered a federal employee for purposes of the FTCA. See
21 Orleans, 425 U.S. at 815, 96 S. Ct. at 1976; Carrillo, 5 F.3d
22 at 1304; Lilly, 876 F.2d at 858. The mere fact that an
23 individual must comply with federal standards and regulations,
24 however, does not make her a federal employee under the FTCA.
25 See Orleans, 425 U.S. at 815, 96 S. Ct. at 1976; Carrillo, 5
26 F.3d at 1304.

27 Several courts have considered the independent contractor
28 exception in relation to physicians who have contracted with

1 the United States to provide services. These courts have
2 unanimously held that such contract physicians are independent
3 contractors and not employees of the government. See, e.g.,
4 Linkous, 142 F.3d at 276-77; Robb, 80 F.3d at 893; Carrillo, 5
5 F.3d at 1305; Lilly, 876 F.2d at 859-60. The basic reasoning
6 behind these decisions is the government's lack of authority
7 to control the day-to-day operations of the physicians. See
8 Linkous, 142 F.3d at 276-77; Robb, 80 F.3d at 889; Carrillo, 5
9 F.3d at 1304-05; Lilly, 876 F.2d at 860.

10 Some courts have noted that because a physician must be
11 free to exercise his or her independent medical judgment when
12 rendering medical services, the government cannot possibly
13 control his or her day-to-day operations. See Broussard v.
14 United States, 989 F.2d 171, 174-76 (5th Cir. 1993); Lurch v.
15 United States, 719 F.2d 333, 337 (10th Cir. 1983). They have
16 in fact recognized that no professional required by a code of
17 ethics to exercise professional judgment could ever be
18 considered an employee of the federal government under an
19 absolute strict control test. See Broussard, 989 F.2d at 175.
20 At least one court has dealt with this dilemma by determining
21 that the control test is not to be strictly applied, but
22 rather the question of whether the government has control over
23 an individual's day-to-day operations is but one factor in the
24 determination, though the most critical factor. See id.
25 Another court has stated that in the case of such
26 professionals, a court must "determine whether other evidence
27 manifests an intent to make the professional an employee
28 subject to other forms of control which are permissible."

1 Lilly, 876 F.2d at 859. Finally, another court has stated
2 that if the government lacks the power to directly control an
3 individual's day-to-day operations, a court should look at
4 other factors in considering the individual's status as an
5 employee or independent contractor of the government. See
6 Linkous, 142 F.3d at 275-76.

7 Though several courts have considered the independent
8 contractor exception in relation to physicians, the case law
9 with regard to CRNAs is much more sparse. Only one published
10 decision discusses application of the independent contractor
11 exception for a CRNA who has contracted with the United States
12 to provide health care services. That decision comes from the
13 United States Court of Appeals for the Tenth Circuit. See
14 Bird v. United States, 949 F.2d 1079 (10th Cir. 1991).

15 In Bird, the plaintiff brought suit under the FTCA
16 alleging that negligence on the part of a CRNA, Bernard
17 Bullon, as an employee of the federal government caused the
18 death of his wife. Id. at 1080. The incident occurred at
19 W.W. Hastings Indian Hospital, a federally operated hospital
20 located in Oklahoma. The plaintiff's wife had died there
21 while undergoing a caesarian section performed by Dr. Wayne
22 Clairborne, M.D., a government employee. Id. at 1080, 1082.
23 Bullon was on duty and was the anesthetist assigned to that
24 procedure. Id. at 1082. The evidence showed that he failed
25 to follow the proper standard of care in checking the machine
26 used for the procedure and as a result did not discover a
27 misconnection in the breathing circuit. Id. at 1083. This
28 misconnection caused both of the patient's lungs to rupture,

1 which led to her death. Id.

2 Due to a shortage of anesthesiologists, the hospital had
3 obtained Bullon through the placement services of Jack
4 Grinovich & Associates, Inc. ("Grinovich"), as it had been
5 done on past occasions. Id. at 1080-81. The hospital paid
6 Grinovich a lump sum with the understanding that it would pay
7 Bullon. Id. at 1081. There was no written agreement between
8 the government and Grinovich except as reflected in
9 requisition forms for anesthesia services. However, there
10 were written recitations that the government would not be
11 responsible for the negligence of the "contractor"; that the
12 "vendor" would provide his own insurance; and that the
13 government would supply all necessary equipment. Id.

14 The Tenth Circuit concluded that CRNA Bullon was an
15 employee of the government and not an independent contractor
16 within the meaning of the FTCA. Id. at 1088. It noted that
17 it was not confronted "with the problem of applying control
18 rationale to physicians who under professional standards must
19 reserve to themselves free from outside control or supervision
20 full responsibility for professional decisions whether
21 employees or independent contractors." Id. at 1085. Contrary
22 to the situation presented by a physician, the court found:

23 Nurse Bullon was not a physician bound to exercise his
24 judgment independently of a government supervisor. He
25 was not only subject to the rules and regulations [of the
26 hospital] and, indeed, a statute placing him under the
27 control and supervision of physician employees of the
28 hospital, but he was under their actual control to the
29 extent they chose to exercise it.

30 Id. at 1086. The statute referred to by the Tenth Circuit was
31 an Oklahoma statute relating to CRNAs. The statute provided

1 that CRNAs administering anesthesia were to be "under the
2 supervision of and in the immediate presence of a physician
3 licensed to practice medicine," and that violation of this
4 rule was punishable as a misdemeanor. Id. at 1081.
5 Furthermore, the rules and regulations of the W.W. Hastings
6 Indian Hospital provided that anesthesia is "administered
7 under the supervision of the surgeon," and that "nurse
8 anesthetists are under the overall direction of the surgeon .
9 . . responsible for the patient's care." Id. at 1081-82.
10 These regulations also provided that in the event of a
11 disagreement between the surgeon and the anesthetist, the
12 licensed physician would make the final determination. Id. at
13 1081. The court further noted that all of the medical experts
14 generally agreed that CRNAs work under the direction of the
15 operating surgeon and that if a problem concerning anesthesia
16 arises, the surgeon's decisions and judgment prevail over the
17 decision of the CRNA. See id. at 1082. The court concluded
18 that a CRNA serving in a hospital in the circumstances under
19 which CRNA Bullon did, and under the license, supervision, and
20 control of a surgeon or physician anesthesiologist as an
21 integral part of a government operating team, is an employee
22 of the federal government for purposes of the FTCA. Id. at
23 1088. The court further held that the government disclaimer
24 of liability for the negligence of Bullon was "an ineffectual
25 provision as to one otherwise determined to be an employee."
26 Id. at 1087.

27 B. Was Franc an Employee or an Independent Contractor
28 of the Federal Government Within the Meaning of the
FTCA?

1 The issue presented to the court is whether Barbara Franc
2 was acting as an employee or as an independent contractor of
3 the federal government when she administered anesthesia to
4 Vincent Bryant. Both parties have raised several factors in
5 their briefs purportedly demonstrating that Franc was or was
6 not acting as an employee of the government. For instance,
7 Plaintiffs point out that Franc was paid hourly for her
8 services and not by project or job and that she maintained no
9 private office. The government, on the other hand, argues
10 that Franc and Nationwide, not the United States, was
11 responsible for maintaining liability insurance for her.
12 While these and other factors may be relevant in resolving the
13 independent contractor question, the critical factor in
14 distinguishing an employee from an independent contractor is
15 the federal government's authority to control and supervise
16 the individual's "detailed physical performance" and "day-to-
17 day operations." See Orleans, 425 U.S. at 814, 96 S. Ct. at
18 1976; Logue, 412 U.S. at 528, 93 S. Ct. at 2219; Linkous, 142
19 F.3d at 275; Robb, 80 F.3d at 887-88; Carrillo, 5 F.3d at
20 1304; Lilly, 876 F.2d at 858. Accordingly, the court will
21 begin by examining the United States' level of control over
22 Franc.

23 1. United States' Authority to Supervise and Control
24 the Day-to-Day Operations of Franc

25 Plaintiffs and the government dispute the level of
26 control the United States had over Franc's day-to-day
27 operations at the Medical Center. The government argues that
28

1 many of the facts relied upon by the Plaintiffs in this regard
2 only demonstrate "administrative supervision," which is
3 entirely different from supervision over Franc's day-to-day
4 operations in administering anesthesia. For instance,
5 Plaintiffs rely on the fact that the chief CRNA approved and
6 signed Franc's time records; that the chief CRNA scheduled her
7 on-duty and on-call shifts; that she dressed in a uniform
8 provided by the government; and that she could not select
9 which patients to treat. The government contends that the
10 Medical Center's control over administrative questions such as
11 scheduling and dress is irrelevant to the question of control
12 for purposes of the FTCA.

13 The court agrees with the government that in determining
14 the level of control in relation to the FTCA's independent
15 contractor exception, it is the government's control over
16 Franc's actual administration of anesthesia and not control
17 over "peripheral, administrative acts relating to such
18 activity" that is relevant. See Robb, 80 F.3d at 889 (citing
19 Wood v. United States, 671 F.2d 825, 832 (4th Cir. 1982)); see
20 also Carrillo, 5 F.3d at 1305 (emphasizing that while federal
21 hospital controlled contract physician's administrative duties
22 and the hours he would see patients, the hospital had no
23 control over his practice of medicine, i.e., his activity of
24 diagnosing and treating patients). Accordingly, the court
25 will focus on the Medical Center's authority to supervise
26 Franc's detailed physical performance in administering
27 anesthesia to patients on a daily basis.

28 The court next notes the government's reliance on

1 language in the BOA between Navajo Area IHS and Nationwide
2 that the BOA constituted a "nonpersonal services contract," as
3 defined in Federal Acquisition Regulation 37.101, "under which
4 the professional services rendered by the Contractor are
5 rendered in its capacity as an independent contractor." (See
6 Pls.' Ex. D, Basic Ordering Agreement, at 10.) The BOA goes
7 on to state as follows:

8 The Government may evaluate the quality of professional
9 and administrative services provided, but retains no
10 control over professional aspects of the services
11 rendered, including by example, the Contractor's
12 professional medical judgment, diagnosis, or specific
13 medical treatments. The Contractor shall be solely
14 liable for and expressly agrees to indemnify the
15 Government with respect to any liability producing acts
16 or omissions by it or by its employees or agents.

13 (Id.) The government argues that because of this language in
14 the BOA, the ultimate purchase order for CRNA services at the
15 Medical Center that led to Franc's rendering of services was
16 outside the parameters of an employer-employee relationship.
17 In contrast, Plaintiffs contend that the reliance on the
18 "nonpersonal services contract" language found in the BOA
19 constitutes an attempt by the government to convince the court
20 that it did not supervise or control Franc's day-to-day
21 operations because it says it did not, even though the
22 undisputed facts clearly demonstrate the presence of such
23 supervision and control.

24 The court does not find the language in the BOA
25 identifying the agreement to be a nonpersonal services
26 contract dispositive of the issue of control over Franc.
27 Though the BOA may provide some evidence of the government's
28 authority to supervise and control Franc's day-to-day

1 operations, the court finds that other circumstances can still
2 dictate a finding that Franc was an employee of the federal
3 government. If the policies and procedures of the Medical
4 Center and the Medical Center's actual relationship with Franc
5 demonstrate supervision and control over her day-to-day
6 operations as a CRNA, the court finds that she must still be
7 considered an employee of the government.

8 Accordingly, the issue before the court is whether the
9 Medical Center, through federal employees, had the authority
10 to control and supervise Franc's daily activities in
11 administering anesthesia. Plaintiffs claim that the
12 undisputed evidence demonstrates such authority on the part of
13 federal employees, particularly surgeons, working at the
14 hospital. Plaintiffs cite three general pieces of evidence in
15 support of this claim. First, they cite a New Mexico statute
16 governing the activities of CRNAs in the state. The statute
17 provides as follows:

18 Certified registered nurse anesthetists shall function
19 under the direction of and in collaboration with a
20 licensed physician, osteopathic physician, dentist, or
21 podiatrist licensed in New Mexico . . . in performing the
22 advanced practice of nurse anesthesia care. As used in
23 this subsection, "collaboration" means the process in
24 which a certified registered nurse anesthetist functions
25 jointly with a licensed physician, osteopathic physician,
26 dentist, or podiatrist licensed in New Mexico . . . to
27 deliver health care services within the scope of the
28 certified registered nurse anesthetist's expertise.
"Collaboration" includes systematic formal planning and
evaluation between the professionals involved in the
collaborative practice arrangements.

26 N.M. Stat. Ann. § 61-3-23.3(C). Plaintiffs argue that based
27 on this statute a CRNA may not function independently of the
28 operating surgeon.

1 Plaintiffs next cite two provisions contained in the
2 Medical Center's policy and procedure manual for the
3 anesthesia department. The first provision relates directly
4 to CRNAs and states as follows:

5 Qualified CRNAs who staff the Anesthesia Department shall
6 provide anesthesia care in collaboration with the Chief
7 of the Anesthesia Department. In his/her physical
8 absence, immediate clinical supervisory responsibility
9 for qualified CRNAs performing an anesthetic rests with
10 the surgeon or obstetrician responsible for the patient's
11 care.

12 (Pls.' Ex. F, Shiprock Service Unit Policy and Procedure, at
13 III.A.) The second provision generally prohibits any
14 operating/anesthesia team from consisting entirely of non-
15 physicians. (Id. at III.C.) According to Plaintiffs, these
16 two provisions demonstrate that the Medical Center requires a
17 physician to control and supervise CRNAs.

18 Finally, Plaintiffs argue that circumstances arising
19 during Vincent Bryant's surgery demonstrate Dr. James' control
20 over Franc. Specifically, Dr. James testified during his
21 deposition that twice during the surgery he instructed Franc
22 to give oxygen to Vincent, and both times Franc complied even
23 though she asserted that oxygen was not needed. (Pls.' Ex. A,
24 Depo. of N. Whitney James, D.D.S., at 96-97, 108-09.)

25 The government disputes the evidence cited by the
26 Plaintiffs and proffers evidence of its own in support of its
27 assertion that federal employees did not control or supervise
28 Franc's day-to-day operations as a nurse anesthetist. First,
the government offers the affidavit of Hank Beckerhoff, a CRNA
at the Medical Center, in support of an argument that to the

1 extent a CRNA is required to function at the direction of a
2 surgeon, this requirement means only that a CRNA cannot choose
3 his or her own patients and instead administers anesthesia to
4 a patient when directed by a surgeon. (Aff. of Werner "Hank"
5 Beckerhoff ¶ 16.) The government argues that while a surgeon
6 has control over the patient and surgery, he or she does not
7 have control over the detailed activities of the CRNA in
8 administering anesthesia. (See id.)

9 The government next asserts that despite the provisions
10 cited by the Plaintiffs, clinical supervision over CRNAs has
11 not been the practice or policy of the Medical Center. (See
12 id. ¶ 15.) Gordon R. Neufeld, M.D., the Chair of the
13 Department of Anesthesia at the Medical Center, attests that
14 the Medical Center does not require detailed and close
15 supervision of CRNAs. (Aff. of Gordon R. Neufeld, M.D., ¶ 7.)

16 The government next proffers evidence that CRNAs working
17 in the Medical Center are independent practitioners. (Aff. of
18 Beckerhoff ¶¶ 3, 7; Aff. of Neufeld ¶ 1.) In his affidavit,
19 Dr. Neufeld states that Franc was granted hospital privileges
20 by the Medical Center to function independently and to conduct
21 general and regional anesthesia as well as monitored
22 anesthesia care for uncomplicated surgeries in healthy
23 patients without consulting an M.D. anesthesiologist. (Aff.
24 of Neufeld ¶ 5.)

25 Finally, the government argues that like physicians,
26 CRNAs are bound by professional standards of care. (Aff. of
27 Beckerhoff ¶ 10.) According to the government, CRNAs exercise
28 independent medical judgment, and if a dispute arises between

1 a surgeon and a CRNA regarding the course of treatment to
2 follow, the CRNA can withdraw from the case in the absence of
3 emergency if in his or her professional judgment it is in the
4 best interests of the patient. (Aff. of Neufeld ¶¶ 8-9.)

5 Having considered the parties arguments and the evidence
6 of record, the court finds that no reasonable trier of fact
7 could reach any conclusion other than that federal employees,
8 particularly surgeons, supervised and controlled Franc's day-
9 to-day activities in administering anesthesia. The government
10 argues that the circumstances of this case are distinguishable
11 from those in Bird because the Oklahoma statute expressly
12 required CRNAs to function under the supervision of a
13 physician, while the New Mexico statute only requires CRNAs to
14 function under the direction of and in collaboration with the
15 operating surgeon. The court does not find a material
16 difference between one's authenticity to "supervise" and one's
17 authority to "direct". Each involves a level of control which
18 is dispositive here. Furthermore, the court finds two other
19 pieces of evidence which seal the dispositive character of the
20 question regarding the level of control exerted over Franc.

21 First, the written policy and procedure of the Medical
22 Center required either the chief anesthesiologist or the
23 operating surgeon to exercise immediate clinical supervision
24 over CRNAs, including Franc. In response to this provision,
25 the government only offers the affidavit of Mr. Beckerhoff, in
26 which he simply states that this was not the policy and
27 procedure of the Medical Center. The government argues that
28 Dr. Neufeld modified this policy when he became the chief of

1 the anesthesiology department, but it proffers no evidence as
2 to when or how Dr. Neufeld did so. In fact, in his affidavit
3 Dr. Neufeld himself appeared to concede the presence of some
4 clinical supervision over CRNAs. He only asserted that such
5 supervision "does not involve hands on, minute to minute, over
6 the shoulder micro management of the case." (Aff. of Neufeld
7 ¶ 7.) The evidence of record demonstrates that at the time of
8 the incident in question, the Medical Center had a written
9 policy requiring immediate clinical supervision over CRNAs.

10 Second, the evidence relating to the events of the
11 particular procedure in question demonstrate that Dr. James
12 exerted control over Franc's activities as a CRNA. Dr. James
13 testified that during the procedure he noted that the blood
14 coming out of Vincent Bryant's mouth looked darker than it
15 should have been. Accordingly, he told Franc that they needed
16 to oxygenate the patient. According to Dr. James, Franc
17 rebutted him by saying that Vincent was fine and that he
18 looked that way when he came in, but Dr. James told her again
19 in response that more oxygen was needed, and Franc thereafter
20 complied. (See Depo. of James at 96-97, 108-09.) This sort
21 of colloquy took place on two occasions during the procedure,
22 and both times Franc complied with Dr. James' instruction and
23 administered the oxygen.

24 The government argues that Dr. James' testimony merely
25 demonstrates requests on his part for Franc to perform an act
26 within her specialty, i.e., administering oxygen. The
27 government asserts that such requests and compliance on the
28 part of Franc only demonstrate Dr. James' control over the

1 common goal of a successful outcome and not the method and
2 manner of how Franc performed her activities as a CRNA.

3 However the government characterizes Dr. James'
4 instructions, the evidence clearly demonstrates that Dr. James
5 was in control of the activities of Franc during the surgical
6 procedure. Though Franc used her expertise as a CRNA in
7 administering the oxygen, she engaged in this activity only at
8 the express direction of Dr. James. It is precisely this type
9 of control over Franc's activities as a CRNA that demonstrates
10 her status as an employee of the federal government.

11 The government argues that like the physicians in
12 Carrillo, Robb, and other cases, Franc, as a CRNA, was
13 obligated to exercise her independent professional judgment
14 when engaging in her activities as a nurse anesthetist.
15 However, the evidence proffered by the government in this
16 regard demonstrates that a CRNA's ability to exercise his or
17 her professional judgment is limited:

18 The directions or requests of the operating physician or
19 surgeon would be accommodated by the anesthesia provider
20 (Anesthesiologist or CRNA) in so far as they are
21 compatible with the guidelines and standards of safe
22 anesthesia practice. If a conflict of opinion arose, the
23 anesthesia provider could either seek additional
24 anesthesia and/or medical consults in an attempt to
25 resolve the conflict, or, in the absence of an emergency
26 withdraw from the case.

23 (Aff. of Neufeld ¶ 8.) In other words, so long as the
24 directions of the surgeon comply with standards of safe
25 anesthesia practice, a CRNA is obligated to follow those
26 directions even if he or she disagrees. This standard
27 describes precisely the situation that occurred between Dr.
28 James and Ms. Franc during the surgical procedure in question.

1 Furthermore, even if the CRNA determines that the surgeon's
2 directions do not comply with safe anesthesia practice, he or
3 she can only withdraw from the case and cannot overturn the
4 surgeon's decision.

5 As in Bird, the undisputed evidence of record
6 demonstrates that CRNA Franc was subject to the supervision
7 and control of operating surgeons when engaging in her
8 activities as a nurse anesthetist. Unlike a physician, her
9 actions in administering anesthesia were subject to the
10 control of federal employees. Cf. Carrillo, 5 F.3d at 1305
11 (holding that a physician's actions in diagnosing and treating
12 patients were not subject to government control). In fact,
13 the events of the surgical procedure in question demonstrate
14 that Dr. James exercised such control over Ms. Franc.

15 2. Additional Factors Relating to Independent
16 Contractor Exception

17 In addition to disputing the level of government control
18 over Franc's activities as a nurse anesthetist, both parties
19 cite additional factors that purportedly support their
20 conclusions regarding Franc's employment status. Although
21 courts have agreed that the government's control over the
22 tortfeasor's day-to-day operations is the critical factor in
23 determining his or her status as an employee or independent
24 contractor, some courts have set forth additional factors
25 relevant to the determination. These factors include: (1)
26 whether or not the one employed is engaged in a distinct
27 occupation or business; (2) the kind of occupation; (3) the
28 skill required in that occupation; (4) whether the employer or

1 workman supplies the equipment and place of work; (5) length
2 of time for which the person is employed; (6) whether payment
3 is by the time or by the job; (7) whether the work is part of
4 the employer's regular business; (8) whether the parties
5 believe they are creating the relation of master and servant;
6 (9) whether the principal is in business; (10) who provides
7 liability insurance; (11) whether federal regulations prohibit
8 federal employees from performing such contracts; and (12)
9 whether the individual has the authority to subcontract to
10 others. See Linkous, 142 F.3d at 276; Will v. United States,
11 60 F.3d 656, 659 (9th Cir. 1995); Lilly, 876 F.2d at 859.

12 Plaintiffs argue that Franc was paid hourly for her
13 services and agreed to work for the Medical Center for two
14 months. They also rely on the fact that Franc maintained no
15 private office and treated no private patients and that she
16 only used equipment supplied by the Medical Center. The
17 government, on the other hand, argues that Franc and
18 Nationwide were responsible for maintaining professional
19 liability insurance for her.

20 The factors cited by the parties cut both ways, some
21 supporting the Plaintiffs' position and others supporting the
22 position of the government. To the extent the government
23 contends that Franc's duty to provide her own liability
24 insurance is itself dispositive of the independent contractor
25 issue, the case law it cites in support thereof belies any
26 such contention. The case law demonstrates only that the
27 identity of the purchaser of liability insurance is one factor
28 that courts may consider in determining an individual's status

1 as an independent contractor or employee. See Robb, 80 F.3d
2 at 894; Lurch, 719 F.2d at 338; Norton v. Murphy, 661 F.2d
3 882, 884 (10th Cir. 1981); Limo v. United States, 852 F. Supp.
4 50, 53 (D.D.C. 1994).

5 3. Conclusion

6 While other factors cited by the parties cut both ways,
7 the issue of control is the critical factor in analyzing the
8 independent contractor exception. See Carrillo, 5 F.3d at
9 1304. The undisputed evidence demonstrates that federal
10 employees, particularly surgeons working at the Medical
11 Center, had the authority to supervise the method and manner
12 of Franc's day-to-day activities as a nurse anesthetist.
13 Accordingly, the court finds that Plaintiffs are entitled to
14 partial summary judgment that Franc was acting as an employee
15 of the federal government within the meaning of the FTCA
16 during Vincent Bryant's surgical procedure. The government is
17 therefore liable under the FTCA for any negligence on Franc's
18 part during the procedure.

19 C. Government's Vicarious Liability for Franc's Actions

20 In the joint case management plan filed with the court,
21 the Plaintiffs asserted that the government is directly liable
22 for the negligence of Franc as her employer and cited Bird in
23 support thereof. Plaintiffs further asserted that even if
24 Franc is an independent contractor, the government is
25 vicariously liable for her negligence because Dr. James, as
26 the operating surgeon, is vicariously liable. The court's
27 discussion up to this point has dealt solely with the first
28 assertion, i.e., that Franc was an employee of the federal

1 government. In their motion for partial summary judgment,
2 Plaintiffs only moved for summary judgment on this issue. In
3 its response and cross-motion for partial summary judgment,
4 the government moved for partial summary judgment "for the
5 reason that Barbara Franc was a contractor or subcontractor of
6 an [sic] contractor with the United States, as defined by 28
7 U.S.C. § 2671 of the Federal Tort Claims Act (FTCA).
8 Therefore, the United States has not waived sovereign immunity
9 with respect to her alleged negligence." Though discussing
10 the issue in its cross-motion for partial summary judgment,
11 the government did not explicitly move for summary judgment on
12 the issue of vicarious liability. Plaintiffs noted as much in
13 their response to the government's cross-motion. In its reply
14 brief in support of its cross-motion for partial summary
15 judgment, however, the government explicitly requested summary
16 judgment on any claims of vicarious liability. The government
17 argues that Plaintiffs' exclusive remedy is against the United
18 States, and that the United States has only waived its
19 sovereign immunity for the negligent acts or omissions of
20 federal employees.

21 Plaintiffs' assertion of vicarious liability on the
22 government's part for the negligence of Franc is an
23 alternative theory of liability to their argument that she was
24 an employee of the federal government. Because the court has
25 already determined that Franc was an employee of the
26 government, it need not consider the alternative theory of
27 liability. Accordingly, the court need not consider the
28 government's motion for partial summary judgment on the

1 vicarious liability claims, nor whether the government
2 properly moved for summary judgment on this issue.

3 IT IS ORDERED granting Plaintiffs' Motion for Partial
4 Summary Judgment (regarding Barbara Franc's status as an
5 employee of the United States), filed June 9, 1999 (doc. 53).

6 IT IS FURTHER ORDERED denying Defendant's Motion for
7 Partial Summary Judgment, filed September 9, 1999 (doc. 85).

8 IT IS FURTHER ORDERED denying Defendant's Partial Motion
9 for Summary Judgment, filed October 25, 1999 (doc. 113).

10 DATED this _____ day of January, 2000.

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Robert C. Broomfield
United States District Judge

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16 Copies to counsel of record

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