

Navajo Resident Says Gov't Medical Center Botched Surgery

Share us on: By **Darcy Reddan**

Law360, New York (October 27, 2017, 6:29 PM EDT) -- A resident of the Navajo Indian Reservation has hit the federal government with a \$5 million suit in Arizona federal court, contending that a health care facility and doctors under its umbrella botched a surgery on her gallbladder, which triggered a prolonged hospital stay and numerous procedures to fix the damage.

Arizona resident Berdie Johnson said in a complaint filed Wednesday that she was experiencing epigastric pain and nausea when she was admitted to Tsehootsooi Medical Center, which is operated by the U.S. Department of Health and Human Services and Indian Health Service. But the facility later mishandled the excision of her gallbladder by failing to close up a hole created during surgery, which led to a four-month hospital stay, according to the complaint.

Johnson, who is bringing her claims under the Federal Torts Claims Act, was scheduled to undergo the excision procedure in December 2015, the complaint said. The surgery was performed by Dr. Moaz Waleed Albulfaraj and assisted by Dr. James Maurice Langevin, who were contracted by the federal government to work at the center.

However, upon beginning the surgery, the doctors allegedly had to cut Johnson's abdomen and conduct a more invasive procedure due to a lack of insufflation, a process that creates a route to administer drugs, the complaint said. Upon opening the abdomen, the doctors allegedly sealed the initial hole from the insufflation procedure, sealed a second hole that was also created by the surgery and removed the gallbladder.

On the fifth day after the operation, Johnson's bandages were saturated from bile that was leaking from an undetected third wound that was not sealed during the initial procedure, resulting in her being transferred to Rust Presbyterian Hospital in Albuquerque, New Mexico, to have the hole closed, according to the complaint.

The oversight by the contracted physicians led to Johnson needing more than four months of hospitalization at various locations and resulted in multiple wound revisions, clean out

surgeries, management of an open wound and numerous other forms of treatment, according to the complaint. She also developed sepsis which is the presence of harmful bacteria in tissue due to an infected wound.

Counsel for Johnson told Law360 on Friday that he has seen several cases similar to this at Native American health facilities and said Indian Health Service faces a number of hurdles in providing high quality health care, such as budget issues.

A representative for Tsehootsooi Medical Center did not immediately return a request for comment Friday.

Counsel information for the federal government was available at the time of publication.

Johnson is represented by Scott Eugene Borg of Barber & Borg LLC.

The case is Johnson v. United States of America et al., case number 3:17-cv-08218, in the U.S. District Court for the District of Arizona.

--Editing by Alyssa Miller.

Update: This article has been updated to include comment from Scott Eugene Borg.

Keweenaw Tribe Defends Claims In Tobacco Seizure Case

Share us on: By **Michael Phillis**

Law360, New York (October 27, 2017, 4:05 PM EDT) -- The Keweenaw Bay Indian Community asked a Michigan federal judge on Thursday to reject a bid by state officials to kill two claims over the seizure of a tribe-owned truck carrying tobacco products and the resulting prosecution, saying those allegations in a wider case over the state's tax power should stay intact.

The community responded to a bid to nix claims against a local prosecutor and detective stemming from the December 2015 seizure of a tribe-owned vehicle that contained 56 cases of cigarettes. The two members of the community who were in the vehicle were prosecuted for allegedly not paying the taxes on those cigarettes in violation of the Michigan Tobacco Products Tax Act, causing the tribe to claim the seizure and prosecution were outside of law enforcement's authority.

As a federally recognized tribe, the community is not subject to the TPTA, it said. Law enforcement knew this and acted anyway, the community alleges. So the only claims against state Assistant Attorney General Daniel C. Grano and Detective Timothy Sproull should remain despite arguments by state officials that they hold prosecutorial immunity and testimonial immunity, respectively.

The community brought the case against state officials saying the state wrongly denied hundreds of tax exemption and refund claims for taxes the tribe says it is not obligated to pay in the first place. The tribe also makes accusations over the seizure of the tobacco from the truck and the resulting criminal prosecutions against the two tribal members in state court.

"The state's law enforcement activity on the reservation — the surveillance and any other actions they may have taken — was unlawful, and no state official had jurisdiction to carry it out," the response filing said. "Grano cannot claim absolute immunity for his role in the unlawful investigations and other police activity on the community's reservation."

Police surveilled the tribe, and that's what led to the move by law enforcement to stop the

truck carrying the cigarettes, the Keweenaw allege. State law enforcement does not have the authority to carry out operations in Indian country, the response filing argued. That's true even if the offense "was committed off-reservation," which was the case for the truck stop, the community added.

The limits of Grano's immunity as a prosecutor are not boundless, the tribe argued. Grano participated in the investigation of the community without the authority to do so. And, the two tribal members in the vehicle, John Davis and Gerald Magnant, weren't required to obtain TPTA licenses, the response said.

"By commencing criminal prosecutions of Davis and Magnant even though the TPTA did not authorize such prosecutions, Grano acted outside the scope of his lawful authority and therefore cannot claim absolute immunity against claims arising from those prosecutions," the community's filings said.

Sproull should not be given a quick win either despite the fact that he gave testimony in a judicial hearing in the state case against David and Magnant. The state may allege that testimony exempts him from the claims under testimonial immunity, but it doesn't, the community said.

The community said Sproull was an investigator and is therefore not able to receive absolute immunity.

The defendants also have said the claims against Grano and Sproull should be dismissed or stayed in the wake of a June opinion that said the court would "abstain from issuing declaratory or injunctive relief against the enforcement of criminal liability for violations of the Tobacco Act."

But the community disagreed, asking that the abstention order be lifted.

And even if the abstention order isn't lifted, "the court need only abstain from issuing judgment; that does not mean that the discovery or other litigation activity should be curtailed," the response said.

In July, U.S. District Judge Paul L. Maloney **refused to reconsider** a decision eliminating some claims asserted by the community that challenged the state's authority to tax tribal

tobacco products. The judge in June dismissed allegations of violations of sovereign immunity and requests for injunctive relief based on the seizures of tobacco.

The tribe's complaint says that although Michigan previously agreed to allow members of the Keweenaw community to forgo paying 6 percent taxes on a wide variety of purchases, the parties have been unable to reach a new exemption agreement.

A representative for the community declined to comment. A representative for the state did not respond to a request for comment.

The tribe is represented by James K. Nichols, Skip Durocher and Mary J. Streitz of Dorsey & Whitney LLP.

Michigan is represented by state Attorney General Bill Schuette and Jaclyn Shoshana Levine and Kelly M. Drake with the AG's office.

The case is Keweenaw Bay Indian Community v. Nick A. Khouri, case number 2:16-cv-00121, in the U.S. District Court for the Western District of Michigan.

--Additional reporting by Bryan Koenig, Jimmy Hoover and Michael Macagnone. Editing by Jack Karp.