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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | [customerservice@law360.com](mailto:customerservice@law360.com)

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## Feds Must Face Suit Over Diabetic's Death At IHS Hospital

By Y. Peter Kang

Law360 (October 15, 2018, 8:01 PM EDT) -- A Nebraska federal judge has allowed a suit to move forward accusing an Indian Health Service hospital of causing the death of a diabetic patient by misdiagnosing her condition, saying the patient's estate properly exhausted its administrative remedies under the Federal Tort Claims Act.

U.S. District Judge Laurie Smith Camp ruled on Thursday that the federal government must face a suit brought by estate administrator Samone T. Parker accusing Winnebago Hospital, a part of the Great Plains Area Indian Health Service, and others of misdiagnosing Tonya Drapeau with "anxiety hyperventilation" after she went to the hospital's emergency room complaining of difficulty breathing.

Medical staff discharged Drapeau without conducting any tests regarding the diabetic patient's blood sugar, and she returned later that day in critical condition and was diagnosed with diabetic ketoacidosis, or blood toxicity caused by extremely high blood sugar, and died two days later, according to court documents.

The government had asserted that Parker failed to give it proper notice of a claim of negligent hiring as required by the FTCA, therefore failing to exhaust her administrative remedies.

But Judge Camp said Parker's administrative claim included a copy of a newspaper article that detailed numerous alleged failures by Winnebago Hospital that resulted in the deaths of Drapeau and other patients.

"Based on the content of this article and Parker's clearly articulated negligent failure-to-diagnose claim, the court finds that Parker provided DHHS with 'a fair opportunity' to investigate and 'meaningfully consider, ascertain, adjust, determine, compromise, deny, or settle [Parker's] FTCA claim[s] [for negligent hiring, training, and supervision] prior to suit,'" the 13-page ruling states.

The government had also argued that an alleged failure to warn Drapeau that she might have diabetic ketoacidosis fails because such a claim must be based on product liability or a lack of informed consent. But Judge Camp disagreed, saying Parker makes a plausible claim of negligence by alleging that medical staff did not act as a reasonable person would under similar circumstances.

"Whether classified as a claim for negligent failure to warn, negligent failure to notify, or another negligent failure to diagnose, the facts alleged in support of Count II are a plausible basis upon which a finder of fact could make a finding of negligence," she wrote.

The judge also shot down the government's contention that the failure-to-warn claim is duplicative of Parker's primary claim of negligence. Judge Camp said the negligence claim is based on an initial failure to diagnose her diabetic ketoacidosis while the failure-to-warn claim is based on medical staff doing nothing after later learning that the patient had a history of diabetic ketoacidosis.

"A finder of fact could make a finding of negligence based on the facts alleged in Count I, Count II, both, or neither," she said. "As such, the court will not dismiss Count II of the amended complaint as duplicative at this stage of the litigation."

An attorney for the federal government declined to comment. An attorney for the estate did not immediately respond to a request for comment Monday.

Parker is represented by Michael F. Coyle, Jordan W. Adam and Katherine A. McNamara of Fraser Stryker PC and Tara DeCamp of DeCamp Law PC.

The federal government is represented by Timothy R. Hook of the U.S. Attorney's Office for the District of Nebraska.

The case is Samone T. Parker v. U.S. et al., case number 8:18-cv-00123, in the U.S. District Court for the District of Nebraska.

--Editing by Haylee Pearl.

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