In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 06-0371V

Filed: 17 November 2008

* * * * * * * * * * * * * * * * * * *	*	
FRANCIA HIRMIZ and PETER HIRMIZ as best friends of their daughter, JESSICA HIRMIZ,	*	
Petitioners,	*	**PUBLISHED**[1]
v.	*	RCFC 12(e), Motion to Strike Pleading, *Res Ipsa Loquitur*, Burden-Shifting
SECRETARY OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	
* * * * * * * * * * * * * * * * * * *	*	

ORDER GRANTING IN PART, AND DENYING IN PART, RESPONDENT'S MOTION TO STRIKE PLEADING AS IMMATERIAL, IMPERTINENT OR SCANDALOUS

The Court convened a status conference in the above-captioned matter on 3 November 2008. The first item addressed was Respondent's motion to strike Petitioners' Prehearing Memorandum, pursuant to RCFC 12(e), for alleging or arguing material that was "immaterial, impertinent or scandalous." Petitioners had filed a prehearing memorandum, in prelude to the fact hearing convened in August of this year, arguing that Respondent, as subrogee for the vaccine manufacturer, held a duty to test for and warn of potential health hazards to population subsets that were particularly sensitive to the biologic effects of a vaccine, arguing further that the omission or abdication to do so amounted to (among other things) "criminal negligence," sufficient to justify a shifting of the primary burden of proof from Petitioners onto Respondent. Subsequent to Respondent's first propounding of the motion, Petitioners had filed an amended Prehearing

---

[1] This Order will be published and posted to the Court of Federal Claims website. Therefore, Petitioners are reminded that, pursuant to 42 U.S.C. § 300aa-12(d)(4) and Vaccine Rule 18(b), they have 14 days from the date of this Order within which to request redaction "of any information furnished by that party (1) that is trade secret or commercial or financial information and is privileged or confidential, or (2) that are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b). Otherwise, "the entire decision" may be made available to the public per the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002).

Memorandum, apparently seeking to correct some aspects which formed the basis of Respondent's objection (such as the reference to "criminal negligence"). Nevertheless, Respondent renewed the motion to strike to include that memorandum as well.

The Court agreed that the first permutation of Petitioners' Prehearing Memorandum, the original, unamended one filed on 7 August 2008, was impertinent and scandalous, and **ordered it stricken from the record in this case**. The line between zealous advocacy for one's client and offensive or abusive arguments may sometimes become blurred in the heat of litigation, but, as officers of the Court, attorneys must remember that one of their primary functions is to lift the underlying dispute to the plane of legal ratiocination, above spurious name-calling and distraction.

However, the Court **denied** Respondent's motion to strike the amended Prehearing Memorandum filed on 12 September 2008. In the Court's view, Petitioners corrected the patently impertinent and scandalous matter, while retaining the kernel of their legal arguments, even adding citations to persuasive case authority for support. As the decision addressed by the memorandum is not now before the Court, the Court makes no judgment on the legal merits of its contents. Yet the Court does note that the amended memorandum does form those arguments (whatever their ultimate merit) into an appropriate legal writing.

Some, if not several, of Petitioners' arguments that were raised in the first pleading and which were repeated in the amended pleading are arguably immaterial to the Court's analysis and resolution of this case, even if they did not rise to the standard of Respondent's motion to strike. In the amended memorandum, Petitioners formed those thoughts into legal arguments, and added case citations to add persuasive weight. Nevertheless, the Court's resolution of this case will almost certainly rise and fall on Petitioners' ability to prove to a preponderance: "(1) a medical theory causally connecting the vaccination and the injury; (2) a logical sequence of cause and effect showing that the vaccination was the reason for the injury; and (3) a showing of a proximate temporal relationship between vaccination and injury." *Althen v. Secretary of HHS*, 418 F.3d 1274, 1278 (Fed. Cir. 2005). The crux of this case remains whether the vaccine(s) alleged *can* and *did* cause the injury suffered.

The Court will leave Petitioners the ability to preserve those arguments raised in the memoranda, so that, especially in the event Petitioners do not prevail, those arguments will be preserved for the reviewing court(s). Nevertheless, the Court pauses to note of the alternative arguments raised in Petitioners' memoranda, that the attempt to impose a duty upon Respondent to determine whether a particular vaccine is harmful to a particular, identifiable subset of the population, and then to presume a breach of that duty based on the negligence doctrine of *res ipsa loquitur*, still does nothing to prove that the vaccine actually caused the injury suffered. Petitioners' argument appears to create and shift burdens that were not theirs in the first place within this Vaccine Program, and leaves untouched the only element of entitlement left to their burden of proof: causation. Petitioners' argument that Respondent had a duty to warn parties such as Petitioners (a duty presumed breached by rebuttable presumption) envisions the exercise of Respondent's proper duty as discovering and warning of the potential for harm, such that Petitioners would not have accepted the vaccine, which, Petitioners assume without proof, caused the biological insult leading

to injury. Petitioners' own arguments, if allowed to prevail, would not obviate their duty under the law to prove causation: i.e., both "causation in fact" and "proximate causation."

After the Court ruled on Respondent's motion, the discussion turned to the filing of additional records. Petitioners reported that they are filing the entirety of what they consider relevant medical records. Once they have, Respondent will review those filed to identify any missing records, and will pursue himself any missing records by *subpoena*.

By the next status conference, Petitioners **shall** file a status report on that recovery process, and Respondent **shall** present state a position regarding whether the record is complete.

Regarding whether the parties desired to depose Dr. Peera (Jessica's treating doctor and the administrator of the vaccine(s) alleged to have caused the injury claimed), the parties will first attempt more informal, less costly alternatives short of deposition to discover necessary information from her. If that does not avail, deposition may be warranted, an option which the Court authorized.

The next status conference is scheduled for **9 January 2009 at 11:30 AM (EST)**. Any obstacles encountered in the interim may be directed to my law clerk, Isaiah Kalinowski, Esq., at 202-357-6351.

IT IS SO ORDERED.

Richard B. Abell
Special Master