

**OFFICE OF SPECIAL MASTERS**

**No. 90-1009V**

**(Filed: October 29, 2010)**

**TO BE PUBLISHED<sup>1</sup>**

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MICHAEL DAN KENNEDY,<sup>2</sup>

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Motion for Relief from  
Judgment

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Petitioner,

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v.

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SECRETARY OF HEALTH AND  
HUMAN SERVICES,

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Respondent.

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*Andrew Downing*, Tulsa, Oklahoma, appeared for petitioner.

*Melonie McCall*, Department of Justice, Washington, D.C., appeared for respondent.

**RULING DENYING “MOTION FOR RELIEF FROM JUDGMENT”**

**HASTINGS, *Special Master***

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<sup>1</sup>Because I have designated this document to be published, this document will be made available to the public unless a party files, within fourteen days, an objection to the disclosure of any material in this decision that would constitute “medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy.” See 42 U.S.C. § 300aa-12(d)(4)(B) (2006); Vaccine Rule 18(b).

<sup>2</sup>There has been inconsistency in this case concerning the caption thereof. See discussion at page 2 and footnotes 4, 6, and 7 of this Ruling. I caption this ruling as I have above because, in the final analysis, the disabled person, Michael Dan Kennedy, is the true party in interest in this proceeding.

In this case under the National Vaccine Injury Compensation Program (hereafter "the Program"),<sup>3</sup> on August 24, 2009, a "Motion for Relief From Judgment" was filed. That motion seeks relief from the Decision filed in this case on July 13, 1992, and the Judgment filed on August 13, 1992. For the reasons set forth below, I hereby decline to provide any relief from judgment in this case.

## I

### BACKGROUND FACTS AND PROCEDURAL HISTORY

#### *A. The petition filed in 1990 and subsequent proceedings*

The petition in the above-captioned case was filed on September 17, 1990. The petition alleged that Michael Dan Kennedy (hereinafter "Michael"), who was born on October 3, 1972, was injured by a "DPT" inoculation (diphtheria, pertussis, tetanus) administered on December 4, 1972. The petition was filed *pro se* by Michael's parents, Danny A. Kennedy and Martha Elizabeth Kennedy, on Michael's behalf. The petition itself did not have a formal caption, and the clerk of this court captioned the case as "*Danny Kennedy v. Secretary of the Dept. of Health and Human Services*." However, the papers filed by the Kennedys, which were accepted and filed as the petition in this case, indicate that the petition was instigated and pursued by *both* of Michael's parents. Further, at a number of unrecorded telephonic status conferences held in the case, both Danny A. Kennedy and Martha Elizabeth Kennedy participated, and on most occasions Martha Kennedy participated by herself. Accordingly, in discussing the proceedings held in this case during 1990-92, I will generally refer to "the Kennedys" as pursuing the petition, even though Danny A. Kennedy alone was the nominal petitioner according to the caption.<sup>4</sup>

The petition alleged that Michael cried continually during the hour following his DPT vaccination on December 4, 1972, and that the next day his eyes crossed and he could not hold his head up. It further alleged that Michael experienced an assortment of maladies thereafter, and that in 1974 Michael was diagnosed as mentally retarded.

The petition did not include any expert medical opinion or documentary evidence to support the claim that Michael's medical and mental difficulties were associated temporally, or causally, with his DPT vaccination. On December 14, 1990, by way of an order issued by Chief Special Master Golkiewicz, this office notified the Kennedys that the petition did not comply with National Vaccine

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<sup>3</sup>The applicable statutory provisions defining the Program are found at 42 U.S.C. § 300aa-10 *et seq.* (2006 ed.). Hereinafter, all "§" references will be to 42 U.S.C. (2006 ed.).

<sup>4</sup>In retrospect, it would have been more accurate had the Clerk captioned the case as "*Danny A. Kennedy and Martha Elizabeth Kennedy, on behalf of their son, Michael Dan Kennedy v. Secretary of Health and Human Services*." However, the caption did not affect the way in which the case was handled.

Injury Compensation Program requirements, because the petition lacked the evidentiary and jurisdictional proof needed to establish a claim as required by § 300aa-11(c). That order gave the Kennedys 60 days to provide the requisite documentation. The Kennedys responded to that order with evidentiary filings dated February 4, 1991, and May 16, 1991; those documents consisted of the prenatal records of Martha Elizabeth Kennedy, affidavits of Martha Kennedy and a family friend, and a letter from the physician who administered the DPT inoculation to Michael.

The petition was assigned to my docket on April 11, 1991. On July 18, 1991, respondent filed a Report and Motion to Dismiss, asserting that the Kennedys had failed to offer a preponderance of evidence to demonstrate either that Michael sustained an injury within the Vaccine Injury Table (“Table Injury”) (see § 300aa-14(a)), or that his conditions were in fact caused by the DPT vaccination that he received in 1972.

On July 24, 1991, a telephonic status conference was held, in order to discuss the merits of the case, with both Danny and Martha Kennedy participating. (See my Order filed on September 5, 1991.) At the conference, the petition’s evidentiary deficiencies were discussed. Specifically, at that status conference, the undersigned reviewed with the Kennedys the necessary steps to be taken in proceedings under the Program. The Kennedys were instructed that no Program award could be obtained unless they could offer evidence in the form of an expert opinion by a qualified medical doctor who was willing to opine either that Michael’s problems were associated with an encephalopathy or seizure disorder or shock collapse manifested within 72 hours after Michael was vaccinated (*i.e.*, a “Table Injury”), or, in the alternative, that Michael’s problems were “caused-in-fact” by the DPT inoculation. Furthermore, I advised the Kennedys of their right to be represented by counsel in Program proceedings, and explained that pursuant to § 300aa-15(e)(1), the Vaccine Program might pay their attorney fees and costs even if Michael’s condition was not found to qualify for a Program award.

During that conference on July 24, 1991, as further described in an Order filed on September 5, 1991, I gave the Kennedys until September 23, 1991, to supply the court with a letter or report of a qualified medical expert containing an opinion in support of their compensation claim. Later, at the request of the Kennedys, proceedings were suspended for an additional 30 days, by my Order filed on September 26, 1991. The Kennedys filed a report of Dr. Boellner on October 22, 1991. However, at a subsequent status conference, and by my Order dated November 14, 1991, the Kennedys were advised that this report did not support the claim, and they were given an additional 30 days to supply supporting evidence. The Kennedys then requested an additional 60-day suspension, which was granted by an order filed on January 15, 1992.

The Kennedys filed a report of Dr. Wisdom, on February 26, 1992. They were then advised, however, that this report also did not demonstrate entitlement to a Program award, and were given another 45 days to file a supporting opinion, by an order filed on March 5, 1992. The Kennedys

subsequently filed a letter on April 22, 1992, signed by Martha Elizabeth Kennedy, stating that they would be unable to obtain the medical opinion required.<sup>5</sup>

***B. My “Decision” filed on July 13, 1992, and “Judgment” filed on August 13, 1992***

As explained above, the Kennedys in April of 1992 filed a letter acknowledging that they were unable to obtain an expert opinion supporting their claim. Accordingly, on July 13, 1992, I filed my Decision denying their claim. In that Decision, I set forth the procedural history of the case, followed by an analysis of each of the three statements of physicians that had been supplied by the Kennedys. I explained why each of the three physician statements failed to opine either that Michael manifested an injury falling with the Vaccine Injury Table (see § 300aa14(a)), or that any of his conditions were vaccine-caused. (See pp. 5-6.) I concluded that, though the story of Michael Dan Kennedy is tragic, the Kennedys had not supplied evidence supporting a Program award, so that I had no choice but to dismiss the petition.

After I filed my Decision on July 13, 1992, the Kennedys did not file a motion for review of that Decision, so that a Judgment denying the claim was entered by the clerk of this court on August 13, 1992.<sup>6</sup>

***C. The Motion for Relief from Judgment***

More than 17 years after the judgment was entered, the instant “Motion for Relief from Judgment” (hereinafter “Motion”) was filed by attorney Andrew Downing on August 24, 2009.<sup>7</sup> The Motion argues that the case was erroneously handled by this court in 1990-92, and that, for that reason, the case should be reopened at this time. Specifically, counsel argues that this court erred in failing to appoint a “guardian ad litem” for Michael after he turned age 18 on October 3, 1990,

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<sup>5</sup>Another copy of the same letter, signed by Martha Kennedy, was filed on April 27, 1992.

<sup>6</sup>For some unknown reason, although my Decision and all of the formal filings in the case had been captioned “*Danny Kennedy v. Secretary*,” the clerk of this court captioned the Judgment as “*Michael Dan Kennedy v. Secretary*.”

<sup>7</sup>When the instant Motion for Relief from Judgment was filed on August 24, 2009, the attorney who filed that motion continued to use the “*Danny Kennedy v. Secretary*” caption. By mistake, one Order issued by my office on January 5, 2010, stated the petitioner as “Michael Dan Kennedy” rather than “Danny Kennedy,” but otherwise the parties and I have retained the original formal caption of “*Danny Kennedy v. Secretary*.”

Again, however, I recognize, as previously noted, that the petition was originally pursued in 1990-92 by *both* parents on Michael’s behalf. Further, the instant Motion for Relief from Judgment was filed by an attorney who purports to represent Michael Dan Kennedy rather than either parent. Accordingly, I have chosen to caption this Ruling as “*Michael Dan Kennedy v. Secretary of Health and Human Services*,” to reflect the real party in interest.

and in permitting Danny Kennedy to proceed as the “petitioner.” The Motion also seems to assert that Danny Kennedy did not competently represent the interests of his son, Michael, and that such inadequate representation was the reason that the petition was unsuccessful.

#### ***D. Proceedings in 2009 - 2010***

After the “Motion for Relief from Judgment” was filed on August 24, 2009, the respondent filed a “Response” (“Response”) thereto on November 3, 2009. A “Reply” (“Reply”) was filed by attorney Downing on November 10, 2009.

The “Motion” and “Reply” filed by attorney Downing, however, were problematic. For one thing, although he captioned the documents as “*Danny Kennedy v. Secretary*,” attorney Downing did not make it clear *exactly whom* he purported to represent--Danny A. Kennedy, Michael Dan Kennedy, or someone else. In the same vein, if he represented Michael Dan Kennedy, an incompetent person, Mr. Downing did not explain who specifically had *authorized* Mr. Downing to file the documents on Michael’s behalf.

Further, the documents filed by Mr. Downing seemed to imply that he had some sort of *evidence* indicating that Michael Dan Kennedy in fact was injured by his DPT inoculation of December 4, 1972 (such as an expert opinion). However, no such evidence was filed with the 2009 documents.

Accordingly, after reviewing the documents filed by Mr. Downing, I concluded that, while it might arguably be appropriate to simply deny the motion, I would instead have my staff contact Mr. Downing, set up a telephonic status conference, and let him explain who he purported to represent, and how he proposed to proceed. The process of actually scheduling such a conference, however, proved to be surprisingly difficult, due primarily to the extreme unresponsiveness of Mr. Downing’s office. That is, on a number of occasions a staff attorney in our office telephoned Mr. Downing’s office in an attempt to set up such a telephonic conference, but failed to receive a return phone call from Mr. Downing’s staff. After several such unsuccessful attempts by phone, on May 12, 2010, I issued a written Order to Mr. Downing instructing him to telephone our staff attorney. Mr. Downing did not do so until July 29, 2010.

A telephonic status conference was finally scheduled for August 23, 2010, and was recorded and transcribed. (Hereinafter “Tr.”) Participating were attorney Michael Milmo on behalf of respondent; Ms. Melissa Kennedy, the sister of Michael Dan Kennedy; and attorney Andrew Downing. Mr. Downing and Melissa Kennedy explained that Michael Dan Kennedy, now 37 years of age, is still severely mentally disabled and unable to represent his own interests. (Tr. at 3.) Michael’s father, Danny A. Kennedy, is now estranged from his family, his whereabouts unknown. (Tr. at 4.) Michael’s mother, Martha Elizabeth Kennedy, on the other hand, although elderly, still participates in caring for Michael, as does his sister, Melissa Kennedy. (Tr. at 5.) Neither of Michael’s parents, nor his sister, nor Mr. Downing or anyone else, has been formally appointed as Michael’s guardian or legal representative. (Tr. at 3-5.)

Nevertheless, Mr. Downing stated during the conference that at this time he seeks to represent Michael's interests in the Program, and to obtain a Program award on Michael's behalf if possible. Mr. Downing and Ms. Melissa Kennedy confirmed that Mr. Downing has the authorization of Ms. Martha Elizabeth Kennedy, Michael's mother, to represent Michael's interests in this Program proceeding. Mr. Downing acknowledged that as of this time he has no expert willing to express an opinion that Michael's condition was vaccine-caused. Mr. Downing stated that if I granted the motion to reopen the case, he would then seek such an expert opinion.

In sum, at the conference, Mr. Downing renewed his request, that, for the reasons set forth in his Motion and Reply, I should grant relief from the judgment entered in this case on August 13, 1992.<sup>8</sup>

## II

### RULES PERTAINING TO MOTIONS SEEKING RELIEF FROM JUDGMENT

Vaccine Rule 36(a) provides that if a motion for relief from a judgment is filed, and the case had never previously been assigned to a judge of this court for review (as is true in this case), the motion is assigned to a special master for a ruling. Rule 36 also indicates that the special master is to evaluate the motion under the standards set forth in RCFC (Rules of the Court of Federal Claims) 59 or 60, as appropriate in the case. Here, the motion seeks relief under RCFC 60(b)(4) and 60(b)(6).

The relevant portions of RCFC 60(b) provide as follows:

**(b). Grounds for Relief from a Final Judgment, Order or Proceeding.** On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

\* \* \*

(4) the judgment is void;

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<sup>8</sup>I conclude that Mr. Downing is in good faith, generously attempting to represent the interests of the incompetent injured party, Michael Dan Kennedy, with the authorization of Michael's mother, Martha Elizabeth Kennedy. Thus, if Mr. Downing had been able to persuade me that there is adequate legal reason to reopen the 1990-92 proceeding, then at that time, I would have considered the issue of whether some person should be officially appointed as legal guardian of Michael under local law. In the circumstances here, however, since I see no legal justification for reopening the judgment, I see no need for expenses to be incurred establishing a legal guardianship of Michael for Program purposes.

(6) any other reason that justifies relief.

After carefully considering the arguments, I conclude that there has been no showing of grounds for relief under part (4), part (6), or any other part of RCFC 60(b), for the reasons set forth in the following Section III of this Ruling.

### III

#### MR. DOWNING'S ARGUMENTS FOR RELIEF FROM JUDGMENT

Michael Dan Kennedy was born on December 4, 1972. Thus, when the original petition was filed by Michael's parents on September 17, 1990, Michael was 17 years of age. Mr. Downing, in his motion filed in this case, focuses on the fact that a few weeks later, on December 4, 1990, Michael turned 18 years of age.<sup>9</sup> Mr. Downing argues that at that time, this court should have, *sua sponte*, appointed a *guardian ad litem* to represent Michael. Mr. Downing argues that all proceedings subsequent to December 4, 1990, should be considered null and void, because Michael was not properly represented in this court after that date.

After careful consideration, I cannot find merit in Mr. Downing's arguments. Though I continue to have great sympathy for Michael, and for his mother and sister who have tried valiantly to gain assistance for him through the Program, I can find no valid legal justification for reopening the judgment entered in this case in 1990.

***A. Mr. Downing's basic argument is directly contradictory to the plain language of the Vaccine Act.***

Initially, it is clear that Michael's parents acted validly in initially filing the petition on September 7, 1990. The Vaccine Act expressly states as follows:

[A]ny person who has sustained a vaccine-related injury [or] the legal representative of such person if such person is a minor or is disabled \* \* \* may \* \* \* file a petition for compensation under the Program. (§300aa-11(b)(1)(A).)

Thus, Michael's parents were appropriate petitioners on behalf of Michael, if they were appropriate "legal representatives." And again turning to the Act for a definition, the Act specifies that the phrase "legal representative" means "a parent *or* an individual who qualifies as a legal guardian under State law." (§300aa-33(2), emphasis added.) This definition indicates that under the Vaccine

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<sup>9</sup>Michael lives in Oklahoma. Oklahoma statutory law provides the following definition. "Minors, except as otherwise provided by law, are persons under (18) years of age." OKLA. STAT. ANN. tit. 15, §13 (1972). Thus, as Mr. Downing asserts, apparently on Michael's 18<sup>th</sup> birthday he did attain the ordinary "age of majority" in Oklahoma.

Act, a “parent” of an injured child *automatically* qualifies as a “legal representative,” who is legally authorized to file a petition under the Vaccine Act.

Therefore, it is undoubted, as Mr. Downing does not dispute, that the Kennedys at least initially were proper petitioners, eligible to act on Michael’s behalf by *filing* the petition in the first place.

This specific provision of the Vaccine Act, that a “parent” is automatically eligible to file a petition on his or her child’s behalf, also contradicts the heart of Mr. Downing’s argument. Citing to a number of legal opinions that have nothing to do with the Vaccine Act, Mr. Downing makes the point that in some areas of the law, while a competent adult may act *pro se* in a court on his *own* behalf, only an attorney is eligible to represent a *minor* or *incompetent* person. (Motion at pp. 5-8.) But in the context of the Vaccine Act, that legal principle, which may apply in other areas of the law, plainly is *not applicable*. To the contrary, the provisions of the Vaccine Act described above *specify* that a “parent” may file a Vaccine Act petition on his child’s behalf, even if that parent is not an attorney. (§§ 300aa-11(b)(1)(a); 300aa-33(2).) Thus, under the Vaccine Act it is quite clear that a “parent” may represent the interests of his minor child, without regard to whether that parent is an attorney.<sup>10</sup> And the Vaccine Act does *not* specify that to so represent his child’s interests, a non-attorney parent must retain an attorney to assist in the prosecution of the case. While many parents do secure counsel to assist them in Vaccine Act proceedings, it is also true that many parents proceed *pro se* without an attorney. In the 22-year history of the Vaccine Act, it has never been held (or even previously argued, as far as I am aware) that parents who are not attorneys are therefore automatically legally disqualified from validly representing their minor child’s interests.

Moreover, I see no reason to conclude that the legal analysis in this regard would automatically change when a child reaches the age of majority during the course of a Program proceeding. As noted above, the statute states that a “legal representative” of a “disabled” person may file a Vaccine Act petition on the disabled person’s behalf (§300aa-11(b)(1)(A)), and that a “legal representative” includes a “parent” (§300aa-33(2)). Thus, the statute on its face, allows a parent of even an adult to *initially file* a Vaccine Act petition on the adult child’s behalf, if that adult child is “disabled” (obviously meaning *mentally disabled* in this context.).

In sum, the statute plainly allows a parent who is *not* an attorney to file and prosecute a Vaccine Act claim on behalf of his minor child, and also seems to authorize a non-attorney parent of a mentally disabled adult to *file* a Vaccine Act petition on behalf of the disabled adult child. It is logical, then, to conclude that the Kennedys, who despite their non-attorney status undisputedly *filed* a proper petition on behalf of Michael when he was less than 18 years of age, were still authorized, as his *parents*, to continue to serve as his “legal representatives” when he turned 18 and became a mentally disabled adult. (§300aa-33(2).)

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<sup>10</sup>I also note that Vaccine Rule 14(a) specifically affirms that, in Vaccine Act cases, “[an] individual who is not an attorney may represent oneself or a member of one’s immediate family.”

Thus, the basic thrust of Mr. Downing's argument, that Michael's parents were *legally unauthorized* to continue to act as his legal representative in Vaccine Act proceeding, once he turned 18 years of age, is clearly contradicted by the statutory language itself.

***B. Mr. Downing's argument concerning allegedly incompetent representation***

Mr. Downing's second argument seems to be an implication that this court's 1992 judgment should be set aside because Michael's parents acted *incompetently* in representing Michael's interests in their efforts during the 1990-92 period. This argument, however, is not persuasive either.

As explained above, I spoke with both of Michael's parents during a series of unrecorded telephonic status conferences during the pendency of their petition. I remember Mrs. Kennedy, in particular, as a competent person who seemed to understand the discussion during those conferences. Clearly, Mrs. Kennedy understood that she needed to present the opinion of a medical expert who could causally connect Michael's vaccination and his disability.

The record also confirms my own memory that the Kennedys sincerely tried to obtain such a medical expert opinion. As fully described in my Decision filed on July 13, 1992 (see pp. 5-6), the Kennedys contacted and consulted physicians in an attempt to find one who could supply an opinion supportive of a causal connection between Michael's disability and his vaccination. The Kennedys filed statements from three physicians. Unfortunately for the Kennedys, however, none of those three physicians opined that there was a *causal connection* between Michael's vaccination and his condition.

In sum, nothing in the record of this case, or in my memory of speaking with the Kennedys, supports the implication that the Kennedys acted incompetently in their efforts to obtain support for their Program claim on Michael's behalf. They made a strong effort, and did as well as any parent could be expected to do. They simply could not find a physician who could see a causal connection.

***C. Citations to Vaccine Act opinions***

Finally, Mr. Downing cites two Vaccine Act opinions in support of his contentions. I find, however, that they do not support his argument.

In *Mihal v. Secretary of HHS*, No. 90-724V, 1992 WL 110339 (Cl. Ct. Spec. Mstr. 1992) (cited in the Motion at 5), the injured vaccinee was a minor when the petition was filed by his mother, but turned 18 years of age while the petition was pending. In an opinion awarding a substantial amount of compensation, the special master commented in a footnote that it was "necessary for the petitioner to be appointed [the vaccinee's] guardian or conservator in order to receive an award on his behalf." (Fn. 3.) However, this example of the appointment of a vaccinee's mother as legal guardian does not support Mr. Downing's arguments here. Actually, it is routine in Vaccine Act cases that when a substantial sum is awarded to compensate a mentally-disabled vaccinee, the vaccinee's parent, parents, or someone else is formally appointed as a legal guardian

by a local probate court, to ensure that the award is under the ultimate supervision of a court. This is true *even if the injured vaccinee is still a minor*. The fact that this practice is routinely employed at the end of Vaccine Act cases involving substantial awards is not supportive of Mr. Downing's argument that *whenever* a vaccinee turns 18 during the course of a Vaccine Act case, the proceedings after that date are automatically null and void unless an *attorney* is appointed as the vaccinee's legal guardian.

The other opinion cited by Mr. Downing is *Stein v. Secretary of HHS*, No. 01-04V, 2009 WL 482287 (Fed. Cl. Spec. Mstr. Feb. 4, 2009) (see Reply at 2). In that case, a petition was filed when the injured vaccinee was a minor, and after the vaccinee reached the age of majority, the *vaccinee* became the petitioner of record. But in that case, while the vaccinee had a pain syndrome, there is no indication that he was mentally disabled. Because the vaccinee was not mentally disabled, it was logical for him to become the petitioner of record once he reached the age of majority. Thus, again the cited case is not similar to the situation here. The case is of no support for the extreme position advanced by Mr. Downing in this case, that when a disabled minor vaccinee reaches the age of majority, an *attorney* must be automatically appointed as legal guardian and be substituted for the parent as the "legal representative" of the vaccinee.

#### IV

### CONCLUSION

In short, the arguments made by Mr. Downing for relief from the Judgment entered in this case in 1992 are extremely weak. The arguments are contrary to the plain language of the Vaccine Act itself. If carried to their logical conclusion, these arguments would mean that a very large number of prior Vaccine Act cases would be subject to reopening.

Of course, I am extremely sympathetic to Michael and to his family. His family members have tried very hard to help him, and should be commended and admired for their efforts. But no matter how sympathetic the injured party and family, as a matter of law I cannot grant relief from judgment unless there is a valid legal basis for doing so. In this case, no such valid basis has been proposed.<sup>11</sup> Thus, I must deny the Motion for Relief from Judgment in this case.

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George L. Hastings, Jr.  
Special Master

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<sup>11</sup>Nor, it might be noted, has anyone *ever* produced any evidence tending to show that Michael's unfortunate condition was vaccine-caused.