OFFICE OF SPECIAL MASTERS
No. 05-81V
January 6, 2006
To Be Published

APRIL SPATES, Individually, and as the Representative of the "UNBORN CHILD" BABY JOHN/JANE DOE,	*
Petitioner,	*
v.	*
SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,	*
Respondent.	*

ORDER TO SHOW CAUSE[1]

Petitioner filed a petition dated January 10, 2005, under the National Childhood Vaccine Injury Act, 42 U.S.C. § 300aa-10 et seq., alleging that she suffered injuries and her fetus suffered death after petitioner received MMR vaccine on January 7, 1994. Petition, at ¶¶ 2, 5, 6, and 7. She asks inter alia for a death award on behalf of her fetus, and damages for her own injuries

[1] Vaccine Rule 18(b) states that all decisions of the special masters will be made available to the public unless they contain trade secrets or commercial or financial information that is privileged and confidential, or medical or similar information whose disclosure would clearly be an unwarranted invasion of privacy. When such a decision or designated substantive order is filed, petitioner has 14 days to identify and move to delete such information prior to the document's disclosure. If the special master, upon review, agrees that the identified material fits within the banned categories listed above, the special master shall delete such material from public access.

("[P]etitioner requests compensation ... for Petitioner individually and for the death of her unborn child...." Page 1 of the Petition.)

The National Childhood Vaccine Injury Act requires that petitioner be "the legal representative of any person who died as the result of the administration of a vaccine set forth in the Vaccine Injury Table...." 42 U.S.C. § 300aa-11(b)(1)(A). Assuming arguendo that petitioner's fetus is a person, and that petitioner's fetus died as a result of the administration of MMR vaccine (both of which assumptions would be contested if this allegation went forward), petitioner has not shown that, under New York State law, she has representative capacity to sue for death damages on behalf of her fetus, and she cannot show that she has this capacity because, under New York State law, a lawsuit for death damages for a fetus is non-cognizable.

In LaPage v. DiCostanzo, 194 A.D.2d 977, 978, 599 N.Y.S.2d 190 (3d Dep't), leave to appeal denied, 82 N.Y.S.2d 149, 632 N.E.2d 459 (1993), the court affirmed the granting of summary judgment on behalf of defendants who were sued for wrongful death damages upon delivering a dead fetus, stating that:

> the law in New York is that no wrongful death cause of action exists on behalf of a stillborn fetus (see, Endresz v Friedberg, 24 NY2d 478, 482-487; see also, Tebbutt v Virostek, 65 NY2d 931, 933; Raymond v Bartsch, 84 AD2d 60, lv denied 56 NY2d 508). While plaintiffs raise several interesting arguments in support of their claim that the law should be changed, this Court has stated before that reconsideration of the law established in Endresz v Friedberg (supra) "must be addressed to the Legislature or the Court of Appeals" (Raymond v Bartsch, supra, at 62). Accordingly, we cannot conclude that the wrongful death cause of action was inappropriately dismissed (see, Indilicato v Bellevue Maternity Hosp., 108 AD2d 997).

The dismissal on summary judgment below was affirmed without costs.

Petitioner shall show cause why that part of her petition seeking death damages on behalf of her fetus shall not be dismissed by the February 3, 2006 status conference.

DISCUSSION

The United States is sovereign and no one may sue it without the sovereign's waiver of immunity. United States v. Sherwood, 312 U.S. 584, 586 (1941). When Congress waives sovereign immunity, courts strictly construe that waiver. Library of Congress v. Shaw, 478 U.S. 310 (1986); Edgar v. Secretary of HHS, 29 Fed. Cl. 339, 345 (1993); McGowan v. Secretary of HHS, 31 Fed. Cl. 734, 740 (1994); Patton v. Secretary of HHS, 28 Fed. Cl. 532, 535 (1993); Jessup v. Secretary of HHS, 26 Cl. Ct. 350, 352-53 (1992) (implied expansion of waiver of sovereign immunity was beyond the authority of the court). A court may not expand on the waiver of sovereign immunity explicitly stated in the statute. Broughton Lumber Co. v. Yeutter, 939 F.2d 1547, 1550 (Fed. Cir. 1991).

The Vaccine Act requires in a death case that the petitioner be the legal representative of any person who died from a vaccination. Since petitioner lives in New York State, the law of New York State governs who has representative capacity to sue on behalf of a dead person. That law states that a wrongful death suit on behalf of a fetus is non-cognizable and must be dismissed. Therefore, since petitioner has no representative capacity to sue on behalf of her dead fetus in New York State, she does not have representative capacity to sue for death damages for her fetus under the Vaccine Program. Whether or not petitioner is the legal representative of her dead fetus under the Vaccine Act requires proof that petitioner has not provided and cannot provide. Because she has failed to satisfy the requirements of §11(b)(1)(A) of the Vaccine Act,

petitioner may not bring a petition for compensation for death damages on behalf of her fetus under the Vaccine Program.

Petitioner's counsel is reminded that attorney's fees and costs are recoverable only upon a showing of reasonableness and good faith. 42 U.S.C. § 300aa-15(e)(1). The cognizability of that part of petitioner's petition in which she holds herself out to be her fetus's legal representative seeking death damages on behalf of her fetus is a matter of simple legal research.

Petitioner is ORDERED TO SHOW CAUSE by February 3, 2006 why the death damages part of her petition shall not be dismissed.

IT IS SO ORDERED.

_____ _____

DATE Laura D. Millman
Special Master