

OFFICE OF SPECIAL MASTERS

No. 05-599V

January 20, 2006

Not for Publication

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KIM JOHNSTON, \*

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Petitioner, \*

\*

v. \*

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SECRETARY OF THE DEPARTMENT OF \*

HEALTH AND HUMAN SERVICES, \*

\*

Respondent. \*

\*

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Ronald C. Homer, Boston, MA, for petitioner.

Mark C. Raby, Washington, DC, for respondent.

**MILLMAN, Special Master**

**DECISION**<sup>1</sup>

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<sup>1</sup> Because this decision contains a reasoned explanation for the special master's action in this case, the special master intends to post this decision on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). 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.

Petitioner filed a petition on June 6, 2005, under the National Childhood Vaccine Injury Act, 42 U.S.C. § 300aa-10 et seq., on her own behalf, alleging that tetanus toxoid vaccine caused her various injuries.

The medical records filed in this case refer to the civil action of Kim Johnston v. Russell Roby, MD, No. GN303336 (Dist. Ct. Travis Cty, TX, 261<sup>st</sup> Judicial District). On December 2, 2005, the undersigned ordered petitioner to file the papers concerning her civil lawsuit. On January 18, 2006, petitioner filed exhibit 22, which are the papers concerning the civil suit she filed against Dr. Roby, the vaccine administrator. Page 4 of that exhibit notes that petitioner settled with Dr. Roby for \$190,000.00 and court costs not to exceed \$1,311.00. P. Ex. 22, p. 4.

Section 300aa-11(a)(2)(A) does not permit someone to bring a civil action for damages in an amount greater than \$1,000 against a vaccine administrator in a State or Federal Court, with certain exceptions not relevant here. Section 11(a)(7) states that if a civil action against a vaccine administrator is brought and settled, the plaintiff may not bring a petition here for such injury.

### **FACTS**

Petitioner was born on July 19, 1964 and received numerous small doses of tetanus toxoid vaccine from Dr. Russell Roby which allegedly made her ill.

### **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).

A vaccinee who settles a civil suit against the vaccine administrator may not bring a petition for recovery of damages for her vaccine injuries under the Vaccine Act. Wiggins v. Secretary of HHS, 898 F.2d 1572 (Fed. Cir. 1990); Snowdon v. Secretary of HHS, 27 Fed. Cl. 434 (1993).

Because the undersigned does not have subject matter jurisdiction in this case, petitioner is not entitled to recover attorney's fees and costs. Martin v. Secretary of HHS, 62 F.3d 1403 (Fed. Cir. 1995).

This petition is dismissed for failure to follow the requirements enunciated under §11(a). Petitioner may not avail herself of the Vaccine Act remedies.

### **CONCLUSION**

This petition is dismissed with prejudice. In the absence of a motion for review filed pursuant to RCFC Appendix B, the clerk of the court is directed to enter judgment in accordance herewith.<sup>2</sup>

**IT IS SO ORDERED.**

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DATE

\_\_\_\_\_  
Laura D. Millman  
Special Master

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<sup>2</sup> Pursuant to Vaccine Rule 11(a), entry of judgment can be expedited by each party's filing a notice renouncing the right to seek review.