

OFFICE OF SPECIAL MASTERS

No. 96-655V

(Filed: September 25, 1997)

NICKOLAS FRANCIS DeLOUIS, NEXT *
FRIEND AND GRAND PARENT OF *
AMANDA RACHEL INGEBRETSON, *
A MINOR, *

Petitioners, *

vs. * PUBLISHED

SECRETARY OF THE DEPARTMENT *
OF HEALTH AND HUMAN SERVICES, *

Respondent. *

DISMISSAL ORDER

This order is issued in response to respondent's motion to dismiss, which was filed pursuant to rule 4(b) on 17 March 1997. Petitioner filed a response to that motion on 29 April 1997. At the request of the court, respondent filed a reply on 27 June 1997. The court permitted petitioner to file a final response on 14 July 1997. The issues at bar are purely procedural. As such, the ultimate question is whether the court has jurisdiction to hear this case on the merits.

I. FACTS

On 10 January 1990, Amanda Rachel Ingebretson (Amanda) was administered a measles-mumps-rubella (MMR) vaccination. P.Ex. 5 at 9. On 15 January 1990, Amanda was admitted by her pediatrician, Dr. G. Scott Cuming, IV, to Southwest Texas Methodist Hospital for management of gastroenteritis and asthma. P.Ex. 10 at 9. During the evening of that admission Amanda went into a prolonged grand mal

seizure. *Id.* Dr. Cuming assisted in her emergency care. Amanda has suffered from profound neurological deficits ever since 15 January 1990.

On 11 July 1991 Amanda's parents, Tammy L. and Daryl J. Ingebretson filed a civil action against Southwest Texas Methodist Hospital and Dr. G. Scott Cuming, IV., in the District Court of Bexar County, in the State of Texas. The claim alleged that:

[Paragraph 4.01] Dr. Cuming failed to exercise the ordinary care that a reasonable pediatric specialist would have exercised under the same or similar circumstances, particularly in the following regards: failing to respond to Amanda's seizure in a timely fashion; failing to administer appropriate anti-convulsants, in appropriate doses, in a timely manner; failing to take appropriate action to bring Amanda's seizures under control and maintain an appropriate level of oxygenation in the patient, including, failing to timely repeat medications, failing to obtain timely blood gases and failing to timely intubate Amanda.

[Paragraph 4.02] Dr. Cuming, as Amanda's admitting and primary care physician, undertook a non-delegable responsibility to Amanda and her parents to provide Amanda with medical care in compliance with the highest standards and traditions of the pediatric specialty. Above all, he undertook a fiduciary relationship with Amanda's parent to be vigilant in the care of their daughter. It is believed Dr. Cuming shirked these responsibilities and duties. The above acts and omissions of Dr. Cuming were heedless and reckless, demonstrating an actual conscious disregard for the safety and welfare of Amanda Ingebretson.

P.Ex. 37 at 3. The MMR vaccination of 10 January 1990 is not mentioned in this original claim. There is no allegation of a causal relationship between the MMR vaccination and Amanda's seizures in this original claim.

On 14 July 1992, the plaintiffs in the Texas claim filed their first amended petition. Amanda Ingebretson was joined as a plaintiff, with her parents serving in a representative capacity for her, and Dr. John Raymond Seals was joined as a defendant by this amended petition. P.Ex. 40 at 1. Nowhere in this amended petition is the MMR vaccination of 10 January 1990 mentioned. Nowhere in this amended petition is a causal relationship between the MMR vaccination and Amanda's seizures alleged.

The plaintiffs in the Texas claim subsequently filed four more amended petitions. Two more defendants were added to the suit but the allegations remained basically the same. Once again, there were no allegations that the MMR vaccination of 10 January 1990 was causally related to Amanda's injuries.

On 28 December 1995, plaintiffs filed a motion to substitute Nickolas Francis DeLouis (Amanda's grandfather) for Tammy and Daryl Ingebretson as next friend of Amanda. P.Ex. 42 at 1. The motion stated that Tammy and Daryl Ingebretson would continue as plaintiffs in their individual capacities. *Id.* That motion was granted on the same day. P.Ex. 47. Essentially the plaintiffs split into two different parties: (1) Tammy and Daryl Ingebretson (the parents) and (2) Nickolas Francis DeLouis as representative of Amanda.

Also on 28 December 1995, plaintiff Nickolas Francis DeLouis filed his "first supplemental petition." This supplemental petition alleged the following:

Plaintiffs would add paragraph 4.02A to read as follows:

[Paragraph 4.02A] Alternatively, G. Scott Cuming, IV, M.D. was negligent, and fell below the standard of care of similar physicians under the same circumstances, in administering the mumps, measles,

rubella (MMR) vaccination to Amanda Ingebretson on January 10, 1990, in light of her physical circumstances at that time.

P.Ex. 41 at 1. This allegation, the first involving the MMR vaccination of 10 January 1990, was only included in the petition of Nickolas Francis DeLouis. Plaintiffs Tammy and Daryl Ingebretson did not amend their separate complaint with this allegation.

Concurrently on 28 December 1995, plaintiff Nickolas Francis DeLouis moved to dismiss all his claims against Dr. Cuming. P.Ex. 43. That motion was granted by order of the Texas State court on the same day. *Id.* at 5. Petitioner now claims that plaintiffs Tammy and Daryl Ingebretson also intended to dismiss all claims against Dr. Cuming on 28 December 1995, but due to clerical error, that dismissal was never recorded. On 1 May 1997 an order nunc pro tunc was issued, from the Texas State court, dismissing the claims of Tammy and Daryl Ingebretson against Dr. Cuming as of 28 December 1995.

On 15 October 1996 petitioner Nickolas Francis DeLouis, in his capacity as representative of Amanda Ingebretson, filed a petition for compensation under the National Childhood Vaccine Injury Compensation Act of 1986 (Vaccine Act or Act).⁽¹⁾ Petitioner alleged that, as the result of her 10 January 1990 MMR vaccination, Amanda suffered a Table encephalopathy and residual seizure disorder with permanent neurological injuries as sequelae.

II. STATUTORY FRAMEWORK

Section 11(a)(2)(A) of the Vaccine Act states as follows:

No person may bring a civil action for damages in an amount greater than \$1,000 or in an unspecified amount against a vaccine administrator or manufacturer in a State or Federal Court for damages arising from a vaccine-related injury or death associated with the administration of a vaccine after the effective date of this subpart, and no such court may award damages in an amount greater than \$1,000 in a civil action for damages for such a vaccine-related injury or death, unless a petition has been filed, in accordance with section [16 of the Vaccine Act], for compensation under the Program for such injury or death and --

- (i)(I) the United States Court of Federal Claims has issued a judgment under [§12] on such petition, and
- (II) such person elects under [§21(a)] to file such an action, or
- (ii) such person elects to withdraw such petition under [§21(b)] or such petition is considered withdrawn under such section.

Section 11(a)(2)(B) states as follows:

If a civil action which is barred under subparagraph (A) is filed in a State or Federal court, the court shall dismiss the action. If a petition is filed under this section with respect to the injury or death for which such civil action was brought, the date such dismissed action was filed shall, for purposes of the limitations of actions prescribed by [§16 of the Vaccine Act], be considered the date the petition was filed if the petition was filed within one year of the date of the dismissal of the civil action.

Section 11 of the Vaccine act sets forth various restrictions on the court's jurisdiction. Section 11(a)(2)(A), generally provides that a claim for a vaccine-related injury or death cannot be brought in a State or Federal District Court before the case has been processed through the Vaccine Program. For this proscription to apply, the claim must be for a "vaccine-related injury or death associated with the administration of a vaccine after" 15 November 1988. *Id.*

Section 11(a)(2)(B) provides an exception to the general statute of limitations prescribed by §16 of the Act.⁽²⁾ This tolling provision applies only to civil actions brought in violation of §11(a)(2)(A). To violate §11(a)(2)(A), and thus be able to take advantage of the tolling provision of §11(a)(2)(B),

- (1) a civil action must have been filed in State or Federal court;
- (2) the civil action must have been brought for damages arising from a vaccine-related injury or death associated with the administration of a Table vaccine;
- (3) the allegedly vaccine-related injury or death must have been associated with a Table vaccine administered after 15 November 1988; and,
- (4) the damages prayed for must have been in excess of \$1,000 or unspecified.

The tolling provision of §11(a)(2)(B) provides that the filing date of the civil action, which was barred by §11(a)(2)(A), will be deemed the filing date of the Vaccine Program petition, if:

- (1) the civil action was dismissed by the State or Federal Court; and,
- (2) a Vaccine petition was filed in the Court of Federal Claims within one year of the dismissal of the prohibited civil action.

III. DISCUSSION

The Vaccine Program petition in this matter was filed on 15 October 1996 -- more than 36 months after the first manifestation of the onset of Amanda's allegedly vaccine-related injuries. Normally, such a case would be dismissed as untimely filed. However, petitioner maintains that the tolling provision of §11(a)(2)(B) applies in this case, thereby deeming it to be timely filed. It is the application of §11(a)(2)(B) that forms the basis of this opinion.

To satisfy §11(a)(2)(B), petitioner must first satisfy §11(a)(2)(A). Upon a thorough review of the facts, exhibits and briefs of the parties, it is clear that petitioner has satisfied the above stated elements 1, 3 and 4 of the requirements of §11(a)(2)(A). The issue before the court involves element number 2 for §11(a)(2)(A) -- whether a "civil action," within the meaning of §11(a)(2)(A), was indeed brought for damages arising from a vaccine-related injury or death associated with the administration of a vaccine.

1.

Respondent argues that the lawsuit filed in the Texas State court was not a civil action within the meaning of §11(a)(2)(A) of the Act, thus the date of the filing of the Texas lawsuit may not be

considered the date of the filing of the Vaccine petition per §11(a)(2)(B). Respondent contends that the Texas lawsuit simply alleged negligence in the treatment of Amanda's seizures in the emergency room, and did not mention any causal relationship with the administration of the MMR vaccination. R's Mot. to Dismiss at 2-3. Respondent argues that, for the tolling provision of §11(a)(2)(B) to apply, the civil suit must have been brought against the vaccine administrator for negligence in that capacity, and that it is not enough to allege negligence in post-vaccinal care. *Id.* at 7. Petitioner disagrees with respondent's argument for specificity in pleading and contends that the Act merely requires that the civil action be filed against the vaccine administrator for damages arising from a vaccine-related injury. P's 1st reply at 7.

One crucial flaw in petitioner's argument lies in his definition of "vaccine-related injury." Petitioner argues that, because Amanda's injuries fit the definition for encephalopathy as written in the Vaccine Injury Table, they are by definition vaccine-related. Such faulty logic leaves open the possibility that any person sustaining an encephalopathy, regardless of identifiable etiology to the contrary, has sustained a vaccine-related injury. What if a person, who had not received a vaccine, ingested a toxic substance and suffered an encephalopathy? Would that person be considered to have a vaccine-related injury? Obviously not.

The injuries listed in the Vaccine Injury Table of §14(a) are not exclusively caused by vaccine administration. They are general neurological injuries that may have any number of causes. Thus, simply praying for damages as a result of an injury listed in the Vaccine Injury Table does not equate to alleging that the damages were caused by a vaccine-related injury. The civil suit must contain some allegation that the injury was caused by the administration of a vaccine listed in the Vaccine Injury Table. The Texas lawsuit filed in 1991 did not allege a claim against Dr. Cuming for a vaccine-related injury. It was a claim for negligence allegedly due to his provision of post-vaccinal care. Without an allegation that the vaccine was responsible for Amanda's injuries, the Texas lawsuit filed in 1991 cannot be considered a "civil action" for the purposes of §11(a)(2)(A) or, *a fortiori*, §11(a)(2)(B).

The dispute on this issue arises largely because Dr. Cuming was both the vaccine administrator and the treating physician at the emergency room. Had another doctor treated Amanda at the hospital, this dispute would be somewhat easier to resolve. In the original Texas lawsuit, petitioner clearly sued Dr. Cuming for his negligence in attempting to control Amanda's seizures. Petitioner did not sue him in his capacity as vaccine administrator. Contrary to petitioner's position, there is indeed a significant difference between negligence in administering a vaccine and negligence in treating a post-vaccinal injury. The two acts could have been done by different people, at different times, and could have resulted in different consequences. Although Dr. Cuming was named as a defendant in the Texas lawsuit, the allegations were based exclusively on his alleged negligence in treating Amanda's seizure condition in the hospital.

In *Salceda v. Secretary of HHS*, No. 90-1304V (Fed. Cl. Spec. Mstr. Apr. 6, 1994)(Dec. on remand) 1994 WL 139375 (aff'd, 33 Fed.Cl. 164 (1995); aff'd, 70 F3d 608 (Fed.Cir. 1995)), the special master held that the maintenance of a suit against a vaccine administrator for post-vaccinal negligence does not bar a petitioner from filing a petition in the Vaccine Program under §11(a)(5)(B).⁽³⁾ The specific issue in *Salceda* was whether the pending lawsuit against the vaccine administrator was a "civil action" as that phrase is used in §11(a)(5)(B). The special master distinguished actions filed for negligence in the administration of a vaccine from those filed for post-vaccinal negligence. The pending state lawsuit in that case alleged the latter, not the former. Had it alleged negligence in the administration of the vaccine, the case would have been dismissed for lack of jurisdiction as mandated by §11(a)(5)(B). Thus, the specificity in the pleadings was crucial. In *Salceda*, as in the case at bar, the difference between an allegation for vaccine-related negligence and post-vaccinal negligence was dispositive.⁽⁴⁾

The special master in *Salceda* specifically rejected the view that the nature of the civil suit is irrelevant while the simple identification of the defendant controls. *Salceda* at *3. The court spent considerable effort exposing the folly of an interpretation of the statutory phrase "civil action" that would include suits for solely post-vaccinal negligence. This court agrees with the learned special master that the Vaccine Act does not seek to shield vaccine administrators for their post-vaccinal negligence. *Salceda* at *3. Consistent with the decision in *Salceda*, this court finds that, for the purposes of §11(a)(2)(A) and (B), the phrase "civil action" does not include a lawsuit based solely upon post-vaccinal negligence, without any mention of a causal relationship between the injuries claimed and the administration of a Table vaccine. For a civil action against a vaccine administrator to be eligible for the tolling provision of §11(a)(2)(B), the suit must be brought for negligence due to the acts or omissions arising from the vaccine administration. The Texas lawsuit filed by Amanda's parents in 1991 did not satisfy this pleading requirement. Thus, it cannot, in and of itself, satisfy the tolling provision of §11(a)(2)(A) and (B).

2.

Petitioner argues that, even if the original 1991 Texas lawsuit is insufficient to invoke the tolling provision of §11(a)(2)(B), the supplemental petition filed in 1995, which did allege a relationship to the MMR vaccination, "relates back" to the original 1991 claim. Therefore, according to petitioner, the supplemental petition, by virtue of the relation back doctrine, is deemed to have been filed on the date the original petition was filed. Thus, the allegation that the MMR vaccination was responsible for Amanda's injuries is deemed to have been made in 1991.

Respondent argues that the relation back doctrine does not apply in this case. She argues that the allegation of negligence by Dr. Cuming in his emergency room care of Amanda was separate and distinct from his administration of the MMR. Respondent argues that to allow a petitioner to manipulate the pleadings "in order to slip in under the statute of limitations would negate the effect of requiring a specific deadline." R's Reply at 12.

The first issue to address is whether the relation back doctrine, as applied in a particular state, can aid a petitioner in filing a petition within the parameters of the Vaccine Act. Specifically, can the relation back doctrine be used to deem an otherwise untimely filed amendment as timely filed for the purposes of §11(a)(2)(B)? A negative response to this question would stop the inquiry at that point. A positive response would require examination of the relevant state law to determine whether, in consideration of the facts in this case, the relation back doctrine can be applied in this matter.

In *Edinburg v. Secretary of HHS*, No. 90-1572, 1997 WL 74703 (Fed. Cl. Spec. Mstr. Jan. 31, 1997), the special master addressed an issue with regard to the relation back doctrine in the State of Illinois. In that case, a state civil action was filed in 1981 for an allegedly vaccine-related injury that occurred in 1979. In 1989, after the effective date of the Vaccine Act, the plaintiffs in that civil action amended their complaint to include two new defendants. These new defendants were vaccine manufacturers. At issue in *Edinburg* was whether the addition of the vaccine manufacturers was in violation of §11(a)(6).⁽⁵⁾ If the addition of the vaccine manufactures after November 15, 1988, constituted the bringing of a civil action, that would violate §11(a)(6) and the petition would be dismissed for lack of jurisdiction. The special master ruled that the addition of the new defendants was indeed the bringing of an action. Petitioners then attempted to argue that the relation back doctrine deemed the amended complaint to have been "commenced" on the filing date of the original lawsuit (1981). The special master ruled that the relation back doctrine in Illinois acts only to "save a cause of action from the tolling of the statute of limitations," and that it (the relation back doctrine) "has no effect on whether a civil action is

commenced for purposes of" Section 11(a)(6). *Edinburg*, at *3. The special master also concluded that, even assuming, *arguendo*, the relation back doctrine applied, the petitioner would not be able to use the doctrine for failure to meet its requirements. *Id.* at note 8.

Notwithstanding the obvious difference in statutory sections involved, the issues in *Edinburg* and in the instant case are disparate. In *Edinburg*, the petitioner attempted to use the relation back doctrine for a purpose not intended. The Illinois relation back doctrine does not address questions of when an action was commenced, as desired by the petitioner, but whether a subsequently filed cause of action will be barred by the statute of limitations. The special master ruled that the relation back doctrine could not be used to negate the obvious fact that a civil action was commenced by the petitioners after 15 November 1988 in violation of §11(a)(6). Thus, because the facts and applicable law are different, *Edinburg* does not prevent this court from exploring the use of the relation back doctrine in this case.

There is no precedent for the use of the relation back doctrine in conjunction with §11(a)(2)(B). However, if a question with regard to when a state civil action was filed arises in the context of §11(a)(2)(A) or (B), it is reasonable to look to the procedural rules of the particular state to determine the date of filing. If that state permits the relation back doctrine to deem an amended petition to be filed on the date of the underlying original civil action, the court would have no principled objection to recognizing that state rule.

To determine whether the relation back doctrine applies in this case, the court must look to Texas law. In the State of Texas, it is well settled that the amendment of a pleading is traditionally deemed to take effect as of the date of commencement of the original action. 50 Tex. Jur 3d, Limitation of Actions §141. According to Texas law:

If a filed pleading relates to a cause of action ... that is not subject to a plea of limitation when the pleading is filed, a subsequent amendment or supplement to the pleading that changes the facts or grounds of liability or defense is not subject to a plea of limitation unless the amendment or supplement is wholly based on a new, distinct, or different transaction or occurrence.

Tex. Civ. Prac. & Rem. Code Ann. §16.068 (West 1997).

The Supreme Court of Texas has stated that the test for the relation back doctrine is whether the cause of action alleged in the amended petition is wholly based upon and grows out of a new, distinct or different transaction and occurrence. *Leonard v. Texaco, Inc.*, 422 S.W.2d 160 (Tex. 1967).

In *Harris v. Galveston County*, 799 S.W.2d 766 (Tex. App. -- Houston [14th Dist.] (1990)), the plaintiff brought a suit for injuries allegedly due to negligence in the performance of neck surgery. In her third amended petition, filed after the applicable statute of limitations had run, the plaintiff raised the new allegation of negligence during her post operative care by the alleged failure to provide an appropriate bed. The court in *Harris* held that the cause of action in the third amended petition did not relate back to the original petition as it was based on an entirely different transaction or occurrence. The court stated:

While the alleged failure to obtain a bed of the correct size for [the plaintiff] may have occurred close in time to the operation, and the bed made necessary by the operation, the cause of action for negligence in connection with the surgery and the cause of action for [the] alleged post-operative negligence for failure to provide an adequate bed are based upon separate, new and distinct transactions or occurrences.

Id. at 769. Therefore, the court ruled that the amended cause of action was barred by the statute of limitations.

The facts in *Harris* are analogous to the facts in the case at bar. The instances of alleged negligence happened within close temporal proximity. The resultant damages were indistinguishable. There was even a causal connection between the two occurrences. However, being negligent during an operation, and negligently providing the wrong post-operative care are completely separate situations. Likewise, giving a vaccination to a child, and then caring for the child five days later in the operating room are wholly different occurrences.

To paraphrase the learned judge in *Harris*, while the alleged failure to control Amanda's seizures may have occurred close in time to the MMR vaccination, and the seizures were allegedly due to the MMR vaccination, the cause of action for negligence in connection with Dr. Cuming's care in the emergency room and the cause of action for his negligence in administering the MMR vaccination are based upon separate, new and distinct transactions or occurrences. Thus the supplemental Texas petition filed in 1995 does not relate back to the filing of the original 1991 claim.

3.

Respondent raised additional issues as to whether the Texas civil suits were properly dismissed prior to the filing of the Vaccine Program petition. Because the court has made dispositive findings on other issues, the court need not address those additional issues.

IV. CONCLUSION

For the reasons stated herein, respondent's motion to dismiss is hereby GRANTED. The petition in this matter was untimely filed and petitioner does not qualify for the tolling provision of §11(a)(2)(B). Thus, this court does not have jurisdiction to hear this case. Accordingly, this petition is dismissed pursuant to Vaccine Rule 21(c).

In the absence of a motion for review filed pursuant to RCFC, Appendix J, the clerk is directed to enter judgment accordingly.

IT IS SO ORDERED.

Richard B. Abell

Special Master

1. The statutory provisions governing the Vaccine Act are found in 42 U.S.C.A. §§ 300aa-1 *et. seq.* (West 1991 & Supp. 1997). Hereinafter, all references will be to the relevant subsection of 42 U.S.C.A. § 300aa.

2. For injuries allegedly due to vaccines administered after 15 November 1988, a Vaccine Program petition must be filed within 36 months of the first symptom or manifestation of the onset of the injury. §16(a)(2).
3. Section 11(a)(5)(B) states: "If a plaintiff has pending a civil action for damages for a vaccine-related injury or death, such person may not file a petition [in the Vaccine Program] for such injury or death."
4. Petitioner in the case at bar incorrectly latches onto the special master's use of the phrase "user friendly" as justification for his argument. *Salceda* at *4. With that phrase, the court in *Salceda* was simply explaining the nature of the Vaccine Program versus traditional tort litigation. The court was noting that the statutory benefits afforded to petitioners are offset by the generally lower awards in the Vaccine Program. Contrary to what petitioner would have this court believe, the "user friendly" nature of the Vaccine Act was, emphatically, not the underlying rationale in *Salceda*.
5. Section 11(a)(6) prevents a person from filing a Vaccine Program petition if such person "brings a civil action after November 15, 1988 for damages for a vaccine-related injury or death associated with the administration of a vaccine before November 15, 1988...."