In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 11-749V

(Filed: April 24, 2012)

N. H. by and through JESSICA NICOLE CASTANEDA, as Parent and Natural Guardian,	)	PUBLISHED
Petitioner,	)	Motion to Dismiss; Human Papillomavirus Vaccine; Alleged In Utero Injury
v.	)	
SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,	)	
Respondent.	)	

Diana Stadelnikas, Maglio, Christopher & Toale, Sarasota, FL

Tara Kilfoyle, United States Department of Justice, Washington, DC

RULING AND ORDER ON RESPONDENT'S MOTION TO DISMISS[1]

CAMPBELL-SMITH, Chief Special Master.

Pending before the undersigned is respondent's motion to dismiss. Respondent argues that Nikolas did not "receive" a vaccine within the meaning of the Vaccine Act because he was in utero when the vaccination at issue was administered to his mother.

I. Factual History

[1] Because this ruling contains a reasoned explanation for the undersigned's action in this case, the undersigned intends to post this decision on the United States Court of Federal Claims' website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction "of any information furnished by that party: (1) that is a trade secret or commercial or financial in substance and is privileged or confidential; or (2) that includes medical files or similar files, the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b). Otherwise, "the entire" decision will be available to the public. Id.

On June 1, 2009, petitioner, Jessica Castaneda, received the third and final administration of the Gardasil vaccine series.[2] Pet'r's Ex. 1. She was in her first trimester of pregnancy. At that time, she did not know she was expecting. See Petition (Pet.) filed November 8, 2011, at 2. Petitioner's pregnancy was otherwise unremarkable. Pet'r's Response to Respondent's Motion to Dismiss (Pet'r's Resp.) at 2.

Petitioner's son, Nikolas, was born by caesarean section, on January 4, 2010, with a condition known as VACTERL association. Petition (Pet.) filed November 8, 2011 at 3. The condition is a non-random association of birth defects affecting multiple parts of the body, including the trachea, esophagus, anus, and spinal cord.[3]

The day after his birth, Nikolas had the first of many surgeries to separate his trachea and esophagus, repair a fistula, insert a loop colostomy,[4] and place a percutaneous endoscopic gastrostomy.[5] Pet. at 3. In the following months, Nikolas had two additional surgeries; the first, to repair a tracheoesophageal fistula, and the second, to mend a tethered spinal cord. Id.

II. Procedural History

On November 8, 2011, petitioner filed this claim under the National Vaccine Injury Compensation Program ("the Program"),[6] on behalf of Nikolas, alleging that his

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[2] Gardasil is the brand name for the human papillomavirus (HPV) vaccine. See http://www.gardasil.com (last visited on April 13, 2012).

[3] "The term VACTERL is an acronym with each letter representing the first letter of one of the more common findings seen in affected individuals: (V) = vertebral abnormalities; (A) = anal atresia; (C) = cardiac (heart) defects; (T) = tracheal anomalies including tracheoesophageal (TE) fistula; (E) = esophageal atresia; (R) = renal (kidney) and radial (thumb side of hand) abnormalities; and (L) = other limb abnormalities." The condition does not usually affect intelligence. The cause of VACTERL association is unknown. Vacterl Association, Genetic & Rare Diseases Information Center (GARD), http://rarediseases.info.nih.gov/GARD/Condition/5443/VACTERL_association.aspx (last visited on March 26, 2012).

[4] A colostomy is a surgically created opening between the colon and the surface of the body. Dorland's Illustrated Medical Dictionary 388 (32nd ed. 2012).

[5] A gastrostomy is a surgically-created artificial opening into the stomach. Dorland's at 766.

[6] The Program comprises Part 2 of the National Childhood Vaccine Injury

birth defects and residual injuries were attributable to the human papillomavirus (HPV) vaccination she received during her pregnancy.

On December 28, 2011, respondent moved to dismiss the claim, arguing that under the plain meaning of the Vaccine Act, an unborn child cannot "receive" a vaccine. Resp't's Motion to Dismiss (Resp't's Motion).

Petitioner filed medical records in January 2012. Concurrently, petitioner filed a statement indicating that her effort to collect relevant records was complete.

To afford the parties an opportunity to fully address the issues raised in the motion to dismiss, the undersigned issued an Order on January 9, 2012, staying the filing deadline for respondent's Rule 4(c) Report.

Petitioner responded to the motion to dismiss on January 16, 2012. Petitioner contends that while in utero, Nikolas did receive the vaccine as required by Section 11(c)(1)(A) of the statute. § 11(c)(1)(A).

On January 26, 2012, respondent filed a reply brief. Resp't's Reply.

Briefing is now complete, and the matter is ripe for a ruling.

A. Respondent's Motion to Dismiss

Respondent argues that the plain language of the statute supports the motion to dismiss. Respondent argues further that if the statutory language is unclear, dismissal is still appropriate because consistent with the doctrine of sovereign immunity and the canons of statutory construction, the term "received" must be narrowly interpreted. Pointing to the Federal Circuit's prior adoption of a narrow interpretation of the term "received" in a vaccine case, respondent discounts--as non-binding--other authorities that have construed the term "received" to include injured claimants who were fetuses at the time of the vaccination. Each of respondent's arguments is presented in more detail below.

1. The Statutory Language

Section 11(c)(1)(A) of the Vaccine Act requires an affidavit and supporting documentation demonstrating that the person alleged to have suffered a vaccine-related injury also "received" a vaccine listed on the Vaccine Injury Table. § 11(c)(1)(A).

Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755, codified as amended, 42 U.S.C. §§ 300aa-10 et seq. (hereinafter "Vaccine Act" or "the Act"). Hereafter, individual section references will be to 42 U.S.C. § 300aa of the Act.

Respondent asserts that petitioner cannot establish that Nikolas "received" a listed vaccine because the HPV vaccine was not administered directly to him, a requirement--says respondent--compelled by the plain language of the Act. See Resp't's Mot. at 2.

Respondent contends that, except for the recovery allowed to those injured by secondary exposure to oral polio vaccines, the Vaccine Act restricts program compensation eligibility to those who were directly administered a vaccine. According to respondent, the polio vaccine exception shows clear statutory intent to exclude all other instances of indirect receipt. See Resp't's Mot. at 2. See Melton v. Sec'y of Health & Human Servs., 01-105V, 2002 WL 229781 at *2 (Fed. Cl. Spec. Mstr. Jan. 25, 2002)[7]; see also Gonzalez v. Dep't of Transp., 551 F.3d 1372, 1376-77 (Fed. Cir. 2009) ("This court must honor, especially in the context of a waiver of sovereign immunity, the principle of expressio unius est exclusio alterius."). Invoking the maxim that the expression of one thing is the exclusion of another, respondent argues that if Congress had intended the "receipt" of a vaccine to include injured parties who had neither ingested personally nor been injected directly with a vaccine, the oral polio cases exception would not have been necessary.

[7] Respondent repeatedly cites to the initially issued decision in Melton as support for her position. See Melton v. Sec'y of Health & Human Servs., 01-105V, 2002 WL 229781 at *2 (Fed. Cl. Spec. Mstr. Jan. 25, 2002), vacated, No. 01-105V, unpublished (Fed. Cl. July 3, 2002) remanded to 01-105V, unpublished (Fed. Cl. Spec. Mstr. Jan. 29, 2003). As the subsequent history indicates, however, that decision was vacated and remanded to allow petitioners to establish, as a threshold matter, that the in utero child did "receive" the vaccine in question and, if so demonstrated, to establish that the received vaccine caused the child's alleged injuries. See Melton v. Sec'y of Health and Human Servs., No. 01-105V, unpublished Decision filed July 3, 2002. Because petitioners in Melton ultimately were unable to support their claim, the petition was dismissed. Id.

"As a general rule, a vacated judgment and the underlying factual findings have no preclusive effect [because] the judgment is a legal nullity." Zeneca Ltd. v. Novopharm Ltd., 919 F. Supp. 193, 196 (D. Md). Accordingly, respondent's reliance on the underlying Melton decision, without reference to the subsequent case history, is puzzling to the undersigned and appears to be misplaced.

Moreover, as petitioner correctly points out, while decisions of other special masters and the court are not binding on the undersigned, they may provide persuasive guidance. When evaluating the persuasiveness of such a decision, however, any negative subsequent history should be considered.

Respondent adds that the strict reading of the statute she seeks is supported by numerous Program decisions denying compensation to claimants who suffered alleged injuries but did not physically receive the administered vaccine. Melton, 2002 WL 229781 at *2 (a decision, later vacated, holding that the Vaccine Act "made no provision for fetuses and embryos"); Brausewetter v. Sec'y of Health & Human Servs., No. 99-278V, 1999 WL 562700 at *2-4 (Fed. Cl. Spec. Mstr. Jul. 16, 1999) (denying a claim for injury by a petitioner who received tetanus antibodies through a transfusion of blood from an individual who had received tetanus vaccinations[8]); Di Roma v. Sec'y of Health & Human Servs., No. 90-3277, 1993 WL 496981 at *2 (Cl. Ct. Spec. Master Nov. 18, 1993) (holding that the unambiguous language of the Vaccine Act "eliminates any possibility, and therefore reasonableness, of a claim for compensation for an in utero injury."); Van Houter v. Sec'y of Health & Human Servs., No. 90-1444V, 1991 WL 239056 at *2 (Cl. Ct. Spec. Master Oct. 30, 1991) (claim for an in utero injury where petitioner alleged that a rubella vaccine administered when she was twelve years old was defective and failed to protect her against the wild rubella virus she developed during her pregnancy twelve years later). Asserting that Nikolas did not "receive" the vaccine as Congressionally intended, respondent requests dismissal of the petition. Resp't's Mot. at 2.

2. The Vaccine Act's Waiver of Sovereign Immunity is Limited

Respondent insists that the terms of the Act "must be strictly and narrowly construed" because the Vaccine Act provides a limited waiver of the government's sovereign immunity. Id. at 3 (citing Markovich v. Sec'y of Health & Human Servs., 447 F.3d 1353, 1360 (Fed. Cir. 2007); see also Holihan v. Sec'y of Health & Human Servs., 45 Fed. Cl. 201, 207 (1999). It is well-established that a waiver of sovereign immunity "must be unequivocally expressed in statutory text" and will not be implied.[9] Lane v.

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[8] The special master in Brausewetter agreed with the court's broad interpretation of the term "received" afforded in Rooks v. Department of Health and Human Services, No. 93-689V, 1996 WL 55666 (Fed. Cl. Jan. 29, 1996) (reversing the underlying special master's decision that a fetus was not a vacinee and remanding for further factual development). In Brausewetter, the special master distinguished the factual circumstance of an indirect immunization through blood plasma from the direct receipt of a vaccine in utero.

[9] The undersigned notes that questions of sovereign immunity do not arise if congressional intent to waive such immunity is clear. The Vaccine Act is an express waiver by Congress of the United States' immunity from suit by "any person who has sustained a vaccine-related injury." § 11(b)(1)(A). "'Clear evidence of legislative intent prevails over other principles of statutory construction[.]'" Stotts v. Sec'y of Health & Human Servs., 23 Cl. Ct. 352, 364 (1991) (citing and quoting Neptune Mutual Ass'n, Ltd. of Bermuda v. United States, 862 F.2d 1546, 1549 (Fed. Cir. 1988)).

Pena, 518 U.S. 187, 192 (1996); M. Maropakis Carpentry, Inc. v. United States, 609 F.3d 1323, 1329 (Fed. Cir. 2010). Thus, under the sovereign immunity canon of statutory construction, if the language of a statute is ambiguous, any textual ambiguities should be resolved in favor of immunity. United States v. Nordic Village Inc., 503 U.S. 30, 34 (1992); Radioshack Corp. v. United States, 566 F.3d 1358, 1360 (Fed. Cir. 2009); Marathon Oil Co. v. United States, 374 F.3d 1123, 1127 (Fed. Cir. 2004). Respondent argues, to the extent the statutory term "received" is ambiguous, the government's sovereign immunity compels the more restrictive interpretation.

3. The Federal Circuit has Rejected a "Broad Interpretation of the Term "Received"

In further support of her position, respondent points to the Federal Circuit's earlier and explicit rejection of a "broad interpretation" of the term "received" under section 11(c)(1)(A). Beard v. Sec'y of Health & Human Servs., 43 F.3d 659, 662-63 (Fed. Cir. 1994). In Beard, petitioner contracted polio after her child received the inactivated, rather than the oral form, of the polio vaccine. Petitioner alleged that by rendering consent for her child's vaccination, she "received" the vaccine that caused her injury. Id. at 660, 662. The Federal Circuit disagreed. The appellate court found that the "clear direction" of the Vaccine Act allowed "only vaccinees and people who contract polio from recipients of the [oral form of polio vaccine] to benefit from the [Vaccine Injury] Table." Id. at 663. Respondent asserts that the Beard case provides strong support for narrowly interpreting the term "received," even though the underlying facts in Beard are readily distinguishable from those presented here.

4. The Decisions in Rooks and Burch are Not Binding

Respondent acknowledges that vaccine case law includes two published decisions, namely Burch and Rooks, that have recognized in utero claims under the Vaccine Act. See Burch v. Sec'y of Health & Human Servs., No. 99-946V, 2010 WL 1676767 (Fed. Cl. Spec. Mstr. Apr. 9. 2010) (holding that fetus "received" a measles, mumps, and rubella vaccine that was administered to mother)[10]; and Rooks v. Sec'y of Health & Human Servs., 35 Fed. Cl. 1 (Fed. Cl. 1996) (holding that: the Vaccine Act applied to injuries received in utero; and finding that the child should have been given an

[10] In his original ruling in Burch v. Sec'y of Health & Human Servs., the special master held that the Vaccine Act did not provide for in utero claims. Burch v. Sec'y of Health & Human Servs., No. 99-946V, 2001 WL 180129 (Fed. Cl. Spec. Mstr. Feb. 8, 2001). He subsequently reversed his earlier ruling reasoning that the United States Supreme Court's decision in Richlin Security Service Company v. Chertoff relieved him of the legal obligation to interpret ambiguous statutory provisions in favor of sovereign immunity. Burch, 2010 WL 16767676 at *7 citing Richlin Sec. Serv. Co. v. Chertoff, 553 U.S. 571, 576, 128 S. Ct. 2007, 2011, 170 L. Ed. 2d 960 (2008).

opportunity to prove entitlement to compensation, remanded to 2000 WL 816825 (Fed. Cl. Spec. Mstr. June 5, 2000) (holding that petitioner failed to prove vaccine-related causation between the received MMR vaccination and the infant's congenital defects and current condition). Respondent contends that the effect of these decisions is limited because the decisions are not binding on the undersigned. See Nance v. Sec'y of of Health & Human Servs., No. 06-730V, 2010 WL 3291896 at *8 (Fed. Cl. Spec. Mstr. July 30, 2010); Hanlon v. Sec'y of Health & Human Servs., 40 Fed. Cl. 625, 630 (1998) ("Special masters are neither bound by their own decisions nor by cases from the Court of Federal Claims, except, of course, in the same case on remand.").

Respondent notes that in both Burch and Rooks, the Vaccine Act's remedial nature was an important factor for finding that in utero claims are viable under the statute. See Burch, 2010 WL 1676767 at *6, *8; Rooks, 35 Fed. Cl. at *8-9. Respondent asserts that the Act is remedial only in the sense that it is intended to provide compensation "quickly, easily and with certainty and generosity" to those presenting covered claims. Cloer v. United States, 654 F.3d 1322, 1350 (Fed. Cir. 2011) (quoting H.R.Rep. No. 99–908, at 3 (1986), reprinted in 1986 U.S.C.C.A.N. 6344, 6344). Distinguishing the instant claim from statutorily covered ones, respondent explains that Congress is not obligated, and did not choose, to extend the coverage of the Act to all cases involving a vaccine-related injury. See Leuz v. Sec'y of Health & Human Servs., 63 Fed. Cl. 602, 608 (2005) (affirming the special master's dismissal of petitioner's case as untimely filed).[11]

B. Petitioner's Response

On January 16, 2012, petitioner filed her response to the dismissal motion, arguing that her son had received, in accordance with the requirements of section 11(c)(1)(A) of the Vaccine Act, the HPV vaccine administered during her pregnancy. In support of her position, petitioner cited to the vaccine cases, Rooks, Burch, and Melton, each of which allowed claims for in utero vaccine injuries to proceed. Pet'r's Resp. at 4 (citing Rooks, 35 Fed. Cl. 1 (reversing the special master's decision denying in utero claims and holding that a child in utero can "receive" the vaccine because what a pregnant mother ingests is also ingested by her unborn child); Burch, 2010 WL 1676767 (holding that an infant "receives" a vaccine administered to his mother during her pregnancy); Melton, No. 01-105V (Fed. Cl.) (unpublished opinion reversing a decision denying an in utero vaccine claim on the ground that an unborn child can receive a vaccine if it passes through the mother's system to the fetus)).

Petitioner contends that the issue presented in this dismissal motion is a factual question requiring a proper medical understanding. See Rooks, 35 Fed. Cl. at *9 (characterizing the question of whether the vaccine adversely affected the unborn child as

[11] Because the case was dismissed on timeliness grounds, there was no record development to determine whether there was, in fact, a vaccine-related injury.

a "fact issue to be determined by the special master"). Petitioner explains that just as a developing fetus "receives" nutritional support through the maternal-fetal exchange, a fetus also experiences the same systemic environmental exposures as his mother. For this reason, petitioner asserts, her son received the HPV vaccine administered during her pregnancy.

Relying on the rulings in Rooks and Burch, petitioner asserts that respondent's motion is not only premature but is inappropriate in a circumstance such as this one, which involves a factual dispute. Petitioner adds that a motion to dismiss must be based on a principle of law supported by either undisputed facts, facts that cannot reasonably be disputed, or facts that are found by the court during a hearing. See, e.g., Cozic v. Sec'y of Health & Human Servs., 2009 WL 1285841 (Fed. Cl. Spec. Mstr. May 08, 2009) (a petition is appropriately dismissed when it is filed indisputably out of time; the court cannot proceed to consideration of the merits). See also Holtzman v. Sec'y of Health & Human Servs., 2008 WL 4489619 (Fed. Cl. 2008) (When considering a motion to dismiss, the court must accept the allegations in the petition as true and, "must construe such facts in the light most favorable to the nonmoving party"). Petitioner allows that a motion to dismiss would be appropriate in circumstances involving legal issues only.

Citing Rooks, petitioner argues that "there is nothing fair, expeditious, generous nor efficient" about a narrow interpretation of the word "received" in the Vaccine Act that effectively would reject the claim of a child who was injured while in utero as a result of a vaccination administered to his mother. Rooks, 35 Fed. Cl. at *8.

C. Respondent's Reply

On January 26, 2012, respondent filed a reply defending her motion as ripe for ruling.

Respondent contends that petitioner misunderstands the relevant standard for evaluating a motion to dismiss. For purposes of a motion to dismiss, the court must "must accept as true the allegations in the [petition] and must construe such facts in the light most favorable to the nonmoving party." Hunter v. Sec'y of Health & Human Servs., 07-717V, 2010 WL 1783545 at *6 (Fed. Cl. Spec. Mstr. Apr. 12, 2010); see also Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); Reynolds v. Army & Air Force Exch. Serv., 846 F.2d 746, 747 (Fed. Cir. 1988). To decide the motion to dismiss, respondent argues, the undersigned need not require from petitioner either fact or expert testimony supporting a finding that the HPV vaccine received by petitioner passed into her son's system during her pregnancy.[12] Rather, respondent asserts, the legal question to be

[12] Respondent notes that if the undersigned denies her motion to dismiss, to recover under the Act, petitioner would not simply need to submit evidence that the HPV vaccine passed into Nikolas's system while he was in utero. Petitioner also would need

answered is whether a vaccine received by a pregnant mother but alleged to have injured her fetus is a cognizable claim under the Vaccine Act.

Respondent has moved for dismissal without citing the provision of the court's rules on which she is relying. Absent a clarifying citation from respondent, the undersigned construes the motion to rest on the ground that petitioner has failed to state a claim upon which relief could be granted under Rule 12(b)(6).[13] See Rules of the United States Court of Federal Claims (RCFC) 12(b)(6).

III. Discussion

A. Legal Standard for a Motion To Dismiss Under Rule 12(b)(6)

The purpose of Rule 12(b)(6) "is to allow the court to eliminate actions that are fatally flawed in their legal premises and destined to fail, and thus to spare litigants the burdens of unnecessary pretrial and trial activity." Advanced Cardiovascular Sys., Inc. v. SciMed Life Sys., Inc., 988 F.2d 1157, 1160 (Fed. Cir. 1993). Respondent's motion necessarily implies that petitioner's pleading does not "state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 547 (2007).

"In ruling on a 12(b)(6) motion to dismiss, the court must accept as true the complaint's undisputed factual allegations and should construe them in a light most favorable to the plaintiff." Cambridge v. United States, 558 F.3d 1331, 1335 (Fed. Cir. 2009). To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." See Bell Atl. Corp. v. Twombly, 550 U.S. at 570; see also Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citations omitted). Factual allegations are plausible if they suggest and are not "merely consistent with" a showing of entitlement. Bank of Guam v. United States, 578 F.3d 1318, 1326 (Fed. Cir. 2009) ("[t]he factual allegations must be enough to raise a right to relief above the speculative level") (citations omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the

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to prove by a preponderance of the evidence that the HPV vaccination was the cause-in-fact of Nikolas's injuries. See Walther v. Sec'y of Health & Human Servs., 485 F.3d 1146, 1149 (Fed. Cir. 2007); Veryzer v. Sec'y of Health & Human Servs., 100 Fed. Cl. 344, 352 (Fed. Cl. 2011).

[13] Vaccine Rule 1 affords special masters broad authority to employ procedures consistent with the Vaccine Rules and the Act. See Vaccine Rule 1(b). The Rules of the Court of Federal Claims may be applied to Program cases "to the extent that they are consistent with the Vaccine Rules." See Vaccine Rule 1(c).

reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. at 678.

B. The Term "Received"

The Vaccine Act allows "any person who has sustained a vaccine-related injury" to file a petition for compensation if the injured person can also demonstrate that he "received" the vaccine. § 11(b)(1)(A)-(c)(1)(A). According to the American Heritage Dictionary, the term "received" means "to take or acquire," "get," "experience," "to have inflicted or imposed," "to . . . intercept the impact of," or "to take in." Am. Heritage Dict., 1508 (3rd ed. 1996).

In the instant case, petitioner has alleged that "[Nikolas'] injuries from VACTERL association are causally related to the Gardasil vaccination that was administered . . . during her pregnancy." Pet'rs' Ex. 1 at 2. Petitioner further alleged that "the injuries complained of were in-fact caused by the vaccination received." Id.

Here, accepting as true for purposes of the motion to dismiss that the vaccine administered to petitioner also reached Nikolas' system while he was in utero, the undersigned must determine whether the very definition of term "received" contemplates a finding that petitioner's son either "got," "experienced," or "took in"--as a fetus--the HPV vaccine administered to his mother and thus, satisfied the statutory requirement that he is the vaccine recipient. The undersigned concludes that it does.

As the Federal Circuit stated in Zatuchni, the doctrine of sovereign immunity does not "require us to ignore what we see as the plain reading of [the statute], and to do so in the absence of any statutory guidance supporting that reinterpretation." See Zatuchni v. Sec'y of Health & Human Servs., 516 F.3d 1312, 1323 (Fed. Cir. 2008). The undersigned is further satisfied that the statutory language at issue here and the policy considerations recently expressed by the Federal Circuit in Cloer support this approach. See Richlin Sec. Serv. Co. v. Chertoff, 553 U.S. 571, 589 (2008) (the Supreme Court's holding that "[t]he sovereign immunity canon is just that--a canon of [statutory] construction. It is a tool for interpreting the law, and we have never held that it displaces the other traditional tools of statutory construction"). See also Cloer v. United States, --- F.3d ---, 2012 WL 1202044, at *3 (Fed. Cir. April 11, 2012) ("Remedial legislation like the Vaccine Act should be construed in a manner that effectuates its underlying spirit and purpose)."

The factual allegations in the petition are sufficient, if accepted as true, to suggest that Nikolas "received," that is "got," "experienced," or "took in," while in utero, the administered HPV vaccine. Accordingly, petitioner properly falls within the group of identified persons who may sue in a representative capacity for compensation under the

Vaccine Act.[14] As pleaded, the petition survives the motion to dismiss. Accordingly, respondent's Motion to Dismiss is **DENIED.**

The burden now rests with petitioner to show, by a preponderance of the evidence, that: (1) the administered vaccine proceeded through petitioner's system into Nikolas's system while he was in utero, and (2) the received vaccine caused Nikolas's injuries.

By no later than June 18, 2012, petitioner shall file a supportive expert report addressing the above issues.

Any questions regarding this Order shall be directed to my law clerk, Camille Collett, at (202) 357-6343.

IT IS SO ORDERED.

s/Patricia E. Campbell-Smith
Patricia E. Campbell-Smith
Chief Special Master

[14] The Act limits the number of claims that can be filed for a vaccine-related injury. Here, petitioner has satisfied that requirement because she does not allege a personal injury, but asserts, as a legal representative, a claim for her injured son.