

OFFICE OF SPECIAL MASTERS

(Filed: May 31, 2006)

No. 05-721V

PUBLISHED

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KRISTA LAUDER, by THOMAS COOK,))	
As Administrator of the Estate of))	
KRISTA LAUDER,))	
))	
Petitioner,))	Show Cause Order; Timeliness of
))	Vaccine Petition; Subsequently
))	Filed Complaint in Pennsylvania
v.))	State Court is Factually Related to
))	Earlier Filed Praecipe; Pending
))	Civil Action at Time Vaccine
SECRETARY OF THE DEPARTMENT OF))	Petition Filed
HEALTH AND HUMAN SERVICES,))	
))	
Respondent.))	
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Elaine Whitfield, Whitfield, Sharp, Sharp & Sharp, Marblehead, MA, for petitioner.

Lynn E. Ricciardella, U.S. Department of Justice, Washington, DC, for respondent.

DECISION¹

On July 5, 2005, petitioner, Thomas Cook, as administrator of the estate of Krista Lauder (Krista), filed a petition pursuant to the National Vaccine Injury Compensation

¹Vaccine Rule 18(b) states that all of the decisions of the special masters will be made available to the public unless the decisions contain trade secrets or commercial or financial information that is privileged or confidential, or the decisions contain medical or similar information the disclosure of which clearly would constitute an unwarranted invasion of privacy. Within 14 days after the filing of a decision or substantive order with the Clerk of the Court, a party may identify and move for the redaction of privileged or confidential information before the document's public disclosure.

Program² (the Act or the Program). The petition alleges that Krista sustained an encephalopathy as a result of the DTaP,³ IPV,⁴ Hib,⁵ and Prevnar⁶ vaccinations administered to her on January 3, 2003. Petition (Petn.) at 1, 4. The petition also alleges that Krista died as a result of her encephalopathy on January 16, 2003. *Id.* at 5, 6.

On July 13, 2005, the court issued an Order to Show Cause for Lack of Jurisdiction directing petitioner “to show cause why this petition should not be dismissed as untimely filed pursuant to 42 U.S.C. § 300aa-16(a)(3).” Section 300aa-16(a)(3) requires the filing of a petition no later than 24 months from the date of the alleged vaccine-related death, and petitioner filed this case nearly 30 months after the date of Krista’s death.

The parties have filed responsive briefing to the Show Cause Order, and the matter is now ripe for decision.

I. Procedural History

To avoid dismissal of his petition for lack of jurisdiction, petitioner filed on November 16, 2005 his Response to Show Cause Why This Case Should Not Be

² The National Vaccine Injury Compensation Program is set forth in Part 2 of the National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755, codified as amended, 42 U.S.C. § 300aa-10-§ 300aa-34 (2000 & West Supp. 2002) (Vaccine Act or the Act). All citations in this decision to individual sections of the Vaccine Act are to 42 U.S.C. § 300aa.

³ The DTaP vaccine is “a combination of diphtheria toxoid, tetanus toxoid, and pertussis vaccine; administered intramuscularly for simultaneous immunization against diphtheria, tetanus, and pertussis.” Dorland’s Illustrated Medical Dictionary 1998 (30th ed. 2003).

⁴ The IPV vaccine is “a suspension of formalin-inactivated poliovirus . . . administered intramuscularly or subcutaneously for immunization against poliomyelitis.” Dorland’s Illustrated Medical Dictionary, *supra* note 3, at 2000.

⁵ The haemophilus influenzae type b vaccine protects against infection by the haemophilus influenzae type b bacterium. Dorland’s Illustrated Medical Dictionary, *supra* note 3, at 1999.

⁶ Prevnar is a brand name for “a preparation of pneumococcal heptavalent conjugate vaccine,” which protects against infection by the Streptococcus pneumoniae bacteria. Dorland’s Illustrated Medical Dictionary, *supra* note 3, at 1505, 1999.

Dismissed Because the Vaccine Court Does Not Have Jurisdiction.⁷ With his Response, petitioner filed two Praecipes for Writ of Summons in Civil Action that he filed on January 7, 2005 and January 10, 2005, respectively, in the Court of Common Pleas of Allegheny County, Pennsylvania.

On December 16, 2005, respondent filed its Reply to Petitioner's Response to Order to Show Cause (R. Reply to Show Cause). On January 4, 2006, the court granted petitioner's December 29, 2005 Motion for Enlargement of Time in which to respond to respondent's December 16, 2005 Reply. On January 17, 2006, petitioner filed his Reply Brief Arguing Why This Case Should not be Dismissed, or in the Alternative, Should be Dismissed Without Prejudice (P. Reply Brief), with exhibits 1-3.

On February 8, 2006, this case was reassigned to the undersigned.

On February 9, 2006, respondent filed its Response to Petitioner's Reply Brief (R. Response Brief). On February 16, 2006, the court granted petitioner's oral motion for an extension of time to file a Response Brief to respondent's February 9, 2006 Brief. On February 24, 2006, petitioner filed his Surreply (P. Surreply), with accompanying exhibits 1-9.

On March 6, 2006, the undersigned conducted a telephonic status conference. During this conference, the undersigned asked the parties to brief the issue of whether petitioner could establish as a matter of Pennsylvania law that the subsequently filed complaint related back to the earlier filed praecipe that petitioner's counsel asserts is related to the pending Vaccine Act petition. On March 30, 2006, petitioner filed⁸ his Motion for Alternative Relief in the Form of an Extension of Time in Which to Clarify the Record in the Pennsylvania Courts (P. Motion)⁹ and Petitioner's Brief on "Relation

⁷ On November 17, 2005, petitioner submitted an "Amended/Corrected Version" of his Response. The only correction is the substitution of a new document for "Exhibit 1" and a correction of the date of that document. See Petitioner's Response to Show Cause Why This Case Should Not Be Dismissed Because the Vaccine Court Does Not Have Jurisdiction (P. Resp. to Show Cause).

⁸ Petitioner faxed this filing to the court and respondent on March 27, 2006.

⁹ Petitioner moved for an extension of time within which to file his briefing for the purpose of: (1) "[m]ov[ing] to consolidate the praecipe with Docket Number GD-05-0387 with the vaccine-related case with a Docket Number of GD-05-30281; (2) [m]ov[ing] to re-open the case(s) for the purpose of consolidation; and (3) [m]ov[ing] to dismiss the consolidated matter in

Back” of the Facts Within a Complaint to the Filing of a Pennsylvania Praecipe for a Writ of Summons (P. Relation Back Brief).

On March 30, 2006, respondent filed, and faxed to the court and petitioner, Respondent’s Reply to Petitioner’s Brief on the Issue of “Relation Back” Under Pennsylvania Law (R. Relation Back Brief).

On March 30, 2006, the undersigned conducted a status conference to discuss: (1) the parties’ briefing in response to the court’s Show Cause Order of July 13, 2005; and (2) the “relation back” issue addressed in the parties’ most recently filed briefs. The parties agreed that, based on the factual record developed in this case, a decision applying the court’s reasoning in Joseph v. Secretary of HHS, 29 Fed. Cl. 796 (1993) to the facts of this case would be appropriate. The court agrees.¹⁰

II. The Parties’ Arguments

The Vaccine Act requires the filing of a petition alleging a vaccine-related death no later than 24 months from the date of death. 42 U.S.C. § 300aa-16(a)(3). Petitioner filed this Vaccine Act petition on July 5, 2005, more than 24 months after the death of Krista Lauder, on January 16, 2003.

Petitioner argues that under 42 U.S.C. § 300aa-11(a)(2)(B), jurisdiction is proper despite the fact that his Vaccine Act petition was filed more than 24 months after Krista’s death because he had a timely filed civil action pending when he filed his Vaccine petition. P. Resp. to Show Cause, at 2. Section 11(a)(2)(B) provides:

favor of Vaccine Court jurisdiction.” P. Motion at 1-2. Petitioner attached draft pleadings to the motion, identified as exhibits 1, 2, and 3, for filing with the Pennsylvania state court to “establish as a matter of law that the praecipe for a writ of summons [filed on January 10, 2005] was, in fact, the same case as the vaccine-related Complaint that was filed in Pennsylvania state court on November 17, 2005.” Id. at 2; see id. Exs. 1-3. Petitioner, of course, may seek relief in Pennsylvania state court that would “[c]larify the [r]ecord.” However, based on the resolution of the issues presented here, the undersigned DENIES petitioner’s motion for an extension of time which effectively is a motion for a stay of this proceeding pending the proposed clarification of the state court record.

¹⁰ While the parties have raised several alternative theories in this matter, the undersigned will focus on the dispositive issue concerning the applicability of the Joseph decision to this case.

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 section 300aa-16 of this title, be considered the date the petition was filed if the petition was filed within one year of the date of dismissal of the civil action.

42 U.S.C. § 300aa-11(a)(2)(B) (emphasis added). A civil action which is barred under subparagraph (A) is defined as “a civil action for damages . . . against a vaccine administrator or manufacturer. . . for damages arising from a vaccine-related injury or death. . . .” 42 U.S.C. § 300aa-11(a)(2)(A).

Petitioner argues that his Vaccine petition need not be dismissed while there exists a pending civil action. See Petitioner’s Counsel’s Letter of April 3, 2006, at 4.¹¹ Petitioner observes that “[a]lthough 300aa-11(5)(B) does not specify that the remedy in [the] face of pending civil actions is to require the special master to ‘dismiss the pending Vaccine Petition,’ there appears to be no provision preventing this from being done by a special master.” Id.

Alternatively, petitioner contends that his Vaccine Act claim may proceed if he moves for the dismissal of the state court action and then re-files this petition in accordance with § 300aa-11(a)(2)(B), which affords a Vaccine Act petitioner, for statute of limitations purposes, the filing date of the dismissed civil action provided that the petitioner files the Vaccine Act petition within one year of the dismissal of the civil action. P. Resp. to Show Cause, at 2, 4-5

For petitioner’s Vaccine petition to be timely, petitioner must have filed the petition no later than 24 months after Krista’s death on January 16, 2003. To establish the timeliness of this petition, petitioner explains that he filed an action in Pennsylvania state court on January 7, 2005 and another action on January 10, 2005. P. Resp. to Show Cause at 2-3. Under Pennsylvania’s “unique procedural system,” he filed each action by “Praecipe for Writ of Summons in a Civil Action.”¹² Id. at 3. It is petitioner’s position that filing a praecipe in Pennsylvania state court effects the filing of a civil action

¹¹ The undersigned filed this correspondence by leave of the court on May 4, 2006 and deems the correspondence to be supplemental briefing.

¹² Under Pennsylvania law, “An action may be commenced by filing with the prothonotary: (1) a praecipe for a writ of summons, or (2) a complaint.” Pa. R.C.P. 1007.

“without alleging any underlying facts, stating any cause of action, or requesting any relief.” Id. (citing Joseph v. Secretary of HHS, 29 Fed. Cl. 796, 797 (1993)). Citing to Joseph, petitioner argues that the each of the praecipes he filed in Pennsylvania state court commenced a civil action as contemplated by § 300aa-11(a)(2)(B). Id. The Joseph court found, “[T]he special master properly concluded[] that filing a praecipe for writ of summons on December 18, 1989 in the Court of Common Pleas of Buck County, Pennsylvania initiated a civil action on that date.” Joseph, 29 Fed. Cl. at 799 (emphasis added). Therefore, petitioner contends, he had civil actions related to Krista’s death from her reaction to a vaccine pending in Pennsylvania state court prior to January 16, 2005, the date of expiration of the 24-month time period from the date of petitioner’s death on January 16, 2003. In accordance with 42 U.S.C. § 300aa-11(a)(2)(B), petitioner argues that he may file a Vaccine petition within one year of the date of dismissal of the civil action. P. Resp. to Show Cause at 4. Petitioner urges the court to take one of two actions to preserve petitioner’s right to file a Vaccine Act claim: (1) stay dismissal of the Vaccine petition until dismissal of the state court actions; or (2) dismiss the Vaccine petition without prejudice and order that the petition be filed again within one year of the dismissal of the state court actions. Id. at 4-5.

Respondent argues that § 300aa-11(a)(2)(B) does not assist petitioner in this case. First, respondent avers that if the filings in Pennsylvania state court do in fact constitute a “civil action” as construed in § 300aa-11(a)(2)(B), then petitioner must have dismissed the civil action and filed the Vaccine petition within one year of the date of dismissal of the civil action to receive the benefit of the civil action’s earlier filing date. R. Reply to Show Cause at 3. Respondent points out that petitioner has failed to submit any evidence that the civil action was dismissed, or that the Vaccine petition was filed within one year of its dismissal. Id. at 3-4.

Respondent also argues that petitioner’s state court action does not “fall within the purview of Section 11(a)(2)(B)” because petitioner’s state court action does not constitute a civil action for damages arising from a vaccine-related injury or death. R. Reply to Show Cause at 4. Respondent contends that the two praecipes filed by petitioner “indicate only that an unspecified action has been filed against named defendants under a theory of ‘Medical Professional Liability Action.’” Id. Respondent asserts that “[n]othing in either praecipe establishes that the state court actions are for damages for a vaccine-related injury or death.” Id. Respondent further asserts that “the civil court action must be against the vaccine administrator or manufacturer, and it is unclear whether the Pennsylvania action includes these defendants.” Id.

Respondent argues that the facts in this case are “remarkably similar” to those in Joseph. Id. at 4. In Joseph, petitioners, who alleged that their daughter died as a result of

a vaccination, filed a praecipe for writ of summons in Pennsylvania state court before filing their Vaccine Act petition. Id. (citing Joseph, 29 Fed. Cl. at 798). The praecipe, which named three vaccine manufacturers and a hospital as defendants, indicated only that petitioners had commenced an action against defendants and listed the names of the parties. Joseph, 29 Fed. Cl. at 798. The special master found that the praecipe constituted a civil action for damages for petitioners' daughter's alleged vaccine-related death and barred the Vaccine Act petition pursuant to section 11(a)(6) of the Vaccine Act.¹³ Id. at 798. The Court of Federal Claims reversed the special master's decision, holding that although the filing of the praecipe did constitute a civil action, it was not a civil action for damages for a vaccine-related death. Id. at 800-01. The court reasoned that it was impossible to determine the grounds for the state court suit based on the praecipe alone. Joseph, 29 Fed. Cl. at 799-800. Respondent argues that the Court of Federal Claims' reasoning for finding that the praecipe did not constitute a civil action for damages for a vaccine-related death applies equally to this case. R. Reply to Show Cause at 5-7.

In Petitioner's Reply Brief, petitioner argues that there are facts in this case that the court in Joseph did not possess. Petitioner asserts that unlike the fact finder in Joseph, the special master in this case will be able to find that the praecipe filed on January 10, 2005 in the Pennsylvania Court of Common Pleas did establish a civil action for damages for a vaccine-related death. P. Reply Brief at 2. In respondent's Response to Petitioner's Reply Brief, respondent contends that petitioner still has not addressed the Court of Federal Claims' holding in Joseph that a Pennsylvania state court praecipe, which lists only the names of the parties but provides no information about the nature of the factual allegations or asserted legal theories, does not constitute a civil action for damages for a vaccine-related death as intended by the Act. R. Reply Brief at 1.

Addressing respondent's assertions in its reply brief, petitioner provided case law and additional facts in support of his argument that the contents of the Complaint filed in

¹³ Section 11(a)(6) states:

If a 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, such person may not file a petition under subsection (b) of this section for such injury or death.

42 U.S.C. § 300aa-11(a)(6). Although this particular statutory provision is not at issue in this case, the court's reasoning in Joseph is instructive here.

Pennsylvania state court do relate back to the praecipe.¹⁴ See P. Relation Back Brief at 1-11. Respondent avers that the case law cited by petitioner in support of his argument is misplaced. R. Relation Back Brief at 1-4. Respondent also challenges petitioner’s contention that the subsequently filed complaint relates back factually to the earlier filed praecipis. Id. at 4-6.

III. Discussion

In Joseph v. Secretary of HHS, 29 Fed. Cl. 796 (1993), the Court of Federal Claims determined that “[a] writ of summons is merely a preliminary filing which informs a defendant that an action has been initiated against him. It is not a pleading and states nothing on its face about the nature of the claim. . . . A writ of summons requires no response on the part of the defendant and allows the plaintiff to either proceed with a formal complaint or decline to pursue the action.” R. Reply to Show Cause at 5 (quoting Joseph, 29 Fed. Cl. at 799). The court reasoned, “Based on the minimal information contained in the praecipe and writ of summons, no decisionmaker could rationally conclude that the civil action commenced by the petitioners was an action for damages for a vaccine-related death.” Joseph, 29 Fed. Cl. at 799-800. In Joseph, the court noted that the hospital named as defendant in the writ was not the administrator of the vaccine, but instead was the hospital where the injured child was taken for treatment. Id. at 800. Because the praecipe contained no factual allegations or legal theories, the court found that “it [was] impossible to determine what type of claim was contemplated by petitioners against the defendant hospital.” Id. Moreover, in the absence of factual allegations or legal theories in the praecipe against the manufacturers, “it is pure speculation and conjecture to suggest that petitioners’ state court action was an action for 1) damages, 2) for a vaccine-related death as required by section 11(a)(6) of the Vaccine Act.” Id. (emphasis in original).

Each praecipe filed in the Pennsylvania state court is a one-page document that merely identifies petitioner as the plaintiff and lists the names of the defendants. Id. (citing P. Response to Show Cause, Exhibits 1 and 2). In this case, each filed praecipe

¹⁴ In response to the undersigned’s Order of March 7, 2006, requesting briefing on the issue of whether petitioner can establish as a matter of Pennsylvania law that the subsequently filed complaint related back to the earlier filed praecipe that petitioner asserts is related to the pending Vaccine Act petition, petitioner cites Pennsylvania case law that is factually distinguishable from this case. Because the unique factual circumstances in this case are sufficient to decide the “relation back” issue addressed in Joseph, see discussion, infra, at 9, the undersigned does not address the cited state case law which does not appear to resolve the issue presented here.

refers only to a civil action entitled “Medical Professional Liability Action.” Id. Respondent contends that, as discussed in Joseph, there is no information from which the court can determine whether the state court action is for damages related to Krista’s alleged vaccine-related death because there are no factual allegations or legal theories presented in the two praecipes. R. Reply to Show Cause at 6-7. Respondent points out that the praecipes do not state that the cause of action sounds in negligence, and do not indicate that the vaccination occurred, that the vaccination injured Krista, or that there is a causal relationship between Krista’s death and the administration of a vaccine. Id. Citing Joseph, respondent argues that “[al]though the Vaccine Act petition contains factual allegations of a vaccine-related death, the petition [in this court] is not sufficient to determine the [nature of the civil] actions that petitioner has against the defendants named in the praecipes.” Id. (citing Joseph, 29 Fed. Cl. at 800 (“This court finds as a matter of law that the additional information available to the special master is simply insufficient to determine the nature of petitioners’ state court action. There is no indication regarding any possible actions or remedies that petitioner might have pursued against the named defendants.”)). Accordingly, respondent asserts that petitioner’s argument that this Vaccine petition is timely lacks merit. R. Reply to Show Cause at 7. Contending that petitioner has provided no information in the praecipes that can cure the jurisdictional defect, respondent argues that this time-barred petition must be dismissed for lack of jurisdiction. Id. at 7-8.

In support of his position, petitioner also relies on the Joseph decision. The court in Joseph stated that “the special master properly concluded[] that filing a praecipe for a writ of summons on December 18, 1989 in the Court of Common Pleas of Bucks County, Pennsylvania initiated a civil action on that date.” P. Reply Brief at 1 (quoting Joseph, 29 Fed. Cl. at 799 (emphasis added)). The court determined, however, that “the special master arbitrarily concluded without adequate foundation or rationality that petitioners’ indeterminate state court action was, in fact, a civil action for damages for a vaccine-related death.” P. Reply Brief at 2 (citing Joseph, 29 Fed. Cl. at 800). Petitioner contends that the Joseph decision does not, as a matter of law, preclude a fact finder from considering whether a praecipe filed in Pennsylvania state court is an action for damages for a vaccine-related injury or death. P. Reply Brief at 1-2. Rather, petitioner reasons, the Joseph decision affords petitioner the opportunity to establish as a matter of fact that a praecipe initiated a civil action for a vaccine-related incident. P. Reply Brief at 2 (citing Joseph, 29 Fed. Cl. at 800). Petitioner argues that in this case, petitioner can provide the special master with crucial facts that the special master in Joseph did not possess. P. Reply Brief at 2.

Petitioner explains that there were two Pennsylvania state court actions filed in the form of a Praecipe for Writ of Summons. See P. Reply Brief at 2. The first praecipe,

filed on January 7, 2005, was a medical malpractice case premised upon non-vaccine-related theories of liability. See id. Petitioner asserts that it is the second praecipe, filed on January 10, 2005, to which the subsequently filed Complaint relates factually. See id. On November 17, 2005, one day prior to the expiration of the Pennsylvania praecipes, Krista Lauder's father filed a detailed Complaint in the Pennsylvania Court of Common Pleas. Id. The Complaint is captioned Robert Lauder v. Pediatric Alliance, PC, et al., Court of Common Pleas Docket No. GD-05-30281, and also names Edward Ketyer, M.D., and Wendy Bacdayan, M.D., as defendants. P. Reply Brief at 2 (citing Exhibit 2, Certified Complaint). Krista's medical records and the attestations in the affidavit of Krista's father, Robert Lauder, establish that Dr. Ketyer and Pediatric Alliance are the "administrators" of the vaccine. P. Reply Brief at 2 (citing Exhibit 3, Affidavit of Robert Lauder). The Complaint includes the following specific allegations against Pediatric Alliance, Wendy Bacdayan, M.D., and Edward Ketyer, M.D: (1) "failing to exercise reasonable care and judgment in evaluating Plaintiff's decedent's medical history;" and (2) "vaccinating a sick child." P. Reply Brief, Ex. 2 (Plaintiff's Complaint in Civil Action at 9). The Complaint also includes an allegation that, "[a]s a direct and proximate result of the aforesaid negligence of these Defendants, Plaintiff's decedent sustained continued intracranial bleeding, encephalopathy and died." Id. Petitioner contends that "[g]iven these facts, the ambiguity which was admittedly present in the Joseph case has been removed and, with it, the force of the Respondent's arguments." P. Reply Brief at 3. Because Joseph established that the filing of a praecipe was sufficient to initiate a civil action, petitioner asserts that the pertinent praecipe filed on January 10, 2005 can be shown to be a civil action against the "administrator" of the vaccine for a vaccine-related injury, specifically, death. Id.

Respondent points out that the November 17, 2005 Complaint bears a different docket number than either of the two praecipes filed on January 7, 2005 and January 10, 2005. R. Response Brief at 1-2. Respondent argues in the Show Cause briefing that the Complaint does not apply to either praecipe and that petitioner has not offered support for the argument that the Complaint demonstrates that either of the filed praecipes initiated a civil action for damages for a vaccine-related death. Id. at 2.

Petitioner explains in the subsequent Relation Back briefing that when Krista's father, Robert Lauder, filed the November 17, 2005 Complaint as a pro se litigant, he failed to alert the clerk of the Pennsylvania court that a Praecipe for a Writ of Summons had been previously filed by Mr. Lauder's former counsel, Philip Ignelzi. P. Relation Back Brief at 7 (citing Exhibit 1, Affidavit of Robert Lauder). Accordingly, the clerk did not realize that the Complaint was a continuation of the Praecipe for a Writ of Summons with the docket number GD-05-0387, and the clerk assigned the Complaint a new docket number of GD-05-30281. Id.

Mr. Ignelzi, Mr. Lauder's prior counsel, attests in his Affidavit of March 24, 2006 that he commenced an action on behalf of Krista's estate by filing two praecipes, with numbers GD-05-000837 and GD-05-000679 respectively, in the Court of Common Pleas for Allegheny County on January 10, 2005. P. Relation Back Brief, Affidavit of Philip A. Ignelzi, Ex. 10. Mr. Ignelzi states that during the pre-Complaint investigation of Krista's death, questions arose concerning whether Krista should have received certain vaccines. Id. Mr. Ignelzi explains that he filed the Praecipe for Writ of Summons, docket number GD-05-000837, to commence an action against Pediatric Alliance, Wendy Bacdayan, M.D., and Edward Ketyer, M.D., as administrators of the vaccines. Id. Mr. Ignelzi reports that during May of 2005, he moved for and was granted a stay of proceedings by the Pennsylvania court so that the Estate's vaccine case could be timely filed. Id. Mr. Ignelzi attests that his firm withdrew from representing Krista's Estate, but he understands that Mr. Lauder filed a pro se Complaint on behalf of the Estate on November 17, 2005. Id. Mr. Ignelzi states:

I have reviewed the Complaint filed by Mr. Lauder. It approximates the form and content of the Complaint that I would have filed under Docket Number GD-05-00837 in the Pennsylvania courts had my firm remained involved in this case. . . . I can state with certainty that the Complaint filed by Mr. Lauder on November 17, 2005 is the same matter as was contemplated when I commenced the Pennsylvania action under Docket Number GD-05-000837.

Id.

Ms. Sharp, petitioner's counsel, attests that "the praecipe with the number GD-05-0387 and the Complaint with the number GD-05030281 were both filed for the same reasons[:] the vaccine[-]related death of Krista Lauder." P. Relation Back Brief, Affidavit of Elaine Whitfield Sharp, Ex. 5. Ms. Sharp also provides correspondence demonstrating a connection between the Praecipe for Writ of Summons, GD-05-0837, and the litigation strategy of counsel to file a Vaccine Act petition. P. Relation Back Brief at 8-9. Specifically, there are two May 9, 2005 letters, which predate the filing of this Vaccine petition by 56 days, from Ms. Sharp to Mr. Ignelzi regarding the "Estate of Krista Katherine Lauder, Nos. GD-05-679 & DC05-837" that discuss Ms. Sharp's intention to file a petition under the Vaccine Injury Compensation Act. See P. Relation Back Brief, Exs. 3 & 4. In the first letter of May 9, 2005, Ms. Sharp states:

My intention is to: (1) draft a pro se petition for Mr. Lauder to file in order to preserve his rights under state tort law to sue various medical providers and health practitioners for medical malpractice, wrongful death regarding the

events leading up to the death of his three-month-old daughter, Krista; [and] (2) file a death claim under the Vaccine Injury Compensation Act for the statutory amount awarded for such cases.

P. Relation Back Brief, Ex. 3. Ms. Sharp notes, “When I file a federal vaccine petition[,] that will stay the SOL [statute of limitations in connection with the Pennsylvania state court action] for at least a year while the vaccine case is being litigated in the Court of Federal Claims.” *Id.* In a second letter dated May 9, 2005, Ms. Sharp writes, “I will fax the vaccine petition to you for you to present to Judge Wettick at the hearing on Friday. I am planning to FedEx the vaccine petition and supporting exhibits (mostly medical records at this point) to the Court of Federal Claims on Thursday.” P. Relation Back Brief, Ex. 4.

In a responsive letter regarding “Estate of Krista Katherine Lauder, Nos. GD-05-679 & GD-05-837,” dated May 10, 2005, Mr. Ignelzi writes to Ms. Sharp, “As we discussed, you intend to file a Federal Claim under the Vaccine Injury Compensation Act regarding the death of Krista. . . . I will represent and present to the Court your proof of filing of the Federal Claim and ask the [state] Court to stay any further action in the state malpractice claim.” P. Relation Back Brief, Ex. 2. Mr. Ignelzi further states, “I will represent and present to the Court your proof of filing of the Federal Claim and ask the Court to stay any further action in the state malpractice claim.” *Id.* In a letter, dated May 18, 2005, from Mr. Ignelzi to Ms. Sharp, having obtained a stay of the state court action during a hearing on Friday, May 13, 2005, Mr. Ignelzi writes, “Ms. Sharp, I hope the stay allows you to accomplish your ability to proceed with the vaccination claim.” P. Relation Back Brief, Ex. 8.

The additional facts provided in petitioner’s briefing and set forth here factually distinguish these circumstances from the circumstances in Joseph. In Joseph, the court found that the praecipe alone was insufficient to constitute a civil action for damages for a vaccine-related death. The court in Joseph determined “as a matter of law that the additional information available to the special master is simply insufficient to determine the nature of petitioners’ state court action. There is no indication regarding any possible actions or remedies that petitioner might have pursued against the named defendants.” Joseph, 29 Fed. Cl. at 800. This case differs from Joseph factually, however, due to the existence of additional evidence which links the praecipe filed on January 10, 2005 to the subsequently filed Complaint against the same defendant. Here, the Praecipe for Writ of Summons, GD-05-837, names Pediatric Alliance, P.C., Wendy Bacdayan, M.D., and Edward Ketyer, M.D., as defendants. The petition and medical records demonstrate that Pediatric Alliance was in fact the administrator of the vaccines Krista received on January 3, 2003. See Petn. at 4; P. Ex. 2 at 24. The subsequently filed Complaint contains

specific factual allegations that the named defendants breached their standard of care by, among other things, “vaccinating a sick child,” an act which ultimately led to Krista’s death. P. Reply Brief, Ex. 2 (Plaintiff’s Complaint in Civil Action at 9). The allegations contained in the Complaint, together with the affidavits of petitioner’s counsel and Mr. Lauder’s former counsel and the correspondence between counsel provide facts, which were lacking in Joseph, that establish that the claims against the defendants named in the earlier filed praecipe are vaccine-related. This evidence permits the undersigned to find that the praecipe filed on January 10, 2005 was more likely than not related factually to the subsequently filed Complaint for damages for Krista’s vaccine-related death.

The Act defines “vaccine-related injury or death” as “an illness, injury, condition or death associated with one or more of the vaccines set forth in the Vaccine Injury Table, except that the term does not include an illness, injury, condition or death associated with an adulterant or contaminant intentionally added to such a vaccine.” 42 U.S.C. § 300aa-33(5). Under Pennsylvania law, the filing of a praecipe is sufficient to commence a civil action. See Pa. R.C. P. 1007. In determining whether an injury alleged in a civil action is vaccine-related, the fact finder must consider “whether the injury alleged in the alternative proceeding flows out of the effects of the vaccine itself on the child.” Aull, 65 Fed. Cl. at 405. See also Amendola v. Secretary of HHS, 989 F.2d 1180, 1187 (Fed. Cir. 1993) (stating, “In the case before us, in which the alleged negligence was a judgment call about whether to administer the vaccine under the circumstances presented, and the injury resulted from the administration of the vaccine, we have no difficulty in concluding that any resulting injury from the vaccine is vaccine-related.”) (emphasis in original). In this case, the negligence alleged in the Pennsylvania state court action included the vaccination of a sick child which led to Krista’s death. See P. Reply Brief, Ex. 2 (Plaintiff’s Complaint in Civil Action at 9). The allegation that Krista’s death resulted from the administration of the vaccine, see Aull, 65 Fed. Cl. at 405, makes the claim in the Pennsylvania state court action a vaccine-related claim. The undersigned is persuaded that the facts here, as developed in this record, support a finding that the praecipe filed on January 10, 2005 under docket number GD-05-837 initiated a civil action against the vaccine administrators for a “vaccine-related” death.

The determination that the subsequently filed Complaint relates back factually to the earlier filed praecipe, however, is not a determination that the subsequently filed Complaint relates back legally to the earlier filed praecipe. Although the evidence supports a finding that the earlier filed praecipe and the subsequently filed Complaint are factually related, the record establishes that the praecipe filed on January 10, 2005 and the subsequently filed Complaint do not constitute the same civil action, but are two separate civil actions.

The Pennsylvania state court docket sheet reflects an October 4, 2005 dismissal of the praecipe filed on January 10, 2005 for failure to prosecute. R. Response Brief, Ex. 1 at 8 (unnumbered, sequential page of exhibit). However, as petitioner explains:

Case GD-05-0837 (Exhibit 1)[, initiated by the praecipe of interest in this case,] shows a dismissal date of 10/04/05. But Case GD-05-0679 (Exhibit 2)[, initiated by the other filed praecipe,] shows a later-entered order effectively consolidating the two cases. That “consolidation” occurred on 10/14/05 and was noted on the record of both cases, albeit on different dates (11/14/05 on GD-05-0679 (Exhibit 2) and 10/17/05 on GD-05-0837.) Hence, GD-05-0837 was given new life by the order in GD-05-0679. The judgment of dismissal took place on 11/21/05 (See, Exhibit 2).

Petitioner’s Counsel’s Letter of March 30, 2006, at 2.¹⁵ Mr. Lauder filed his Complaint in Pennsylvania state court on November 17, 2005, five days before the entry of the judgment of dismissal on 11/21/05. P. Ex. 2. Petitioner’s counsel asserts that because Mr. Lauder failed to alert the Clerk of the Pennsylvania court that the subsequently filed Complaint related back to the earlier filed praecipe, the Clerk of the Court assigned a new docket number to the Complaint. Accordingly, the pro se Complaint filed by Mr. Lauder did not continue the action commenced by the earlier filed praecipe. Instead, the subsequently filed Complaint initiated a new civil action.¹⁶

Respondent concedes in its own Relation Back briefing “that the subsequently filed complaint may indeed relate back factually to the earlier filed praecipes [but asserts] . . . that the complaint does not relate back legally [to the praecipes] because [the complaint] was filed after the praecipes had been dismissed.”¹⁷ R. Relation Back Brief at 5. Respondent urges the dismissal of petitioner’s petition, with prejudice, for lack of jurisdiction because “ as a matter of Pennsylvania law, the subsequently filed complaint

¹⁵ The undersigned filed this correspondence by leave of the court on April 4, 2006 and deems the correspondence to be supplemental briefing.

¹⁶ On March 30, 2006, the Pennsylvania state court also dismissed petitioner’s civil action based on the pro se Complaint that Krista Lauder’s father filed on November 17, 2005. See Petitioner’s Counsel’s Letter of April 3, 2003 at 3, 6.

¹⁷ Respondent’s argument is based on a review of the docket sheets for the Pennsylvania state court actions. Respondent filed its briefing on the same date that petitioner provided an explanation of the entries on the dockets sheets for the state court proceedings. Respondent has not challenged petitioner’s explanation.

does not ‘relate back’ legally to the originally filed praecipes.” Id. at 6. Petitioner, however, contends that the Complaint does relate back to the praecipe for jurisdictional purposes based on the demonstrated factual relationship between the earlier filed praecipe and the subsequently filed Complaint. P. Reply Brief at 3-4. Petitioner urges the court to dismiss this case without prejudice, so that petitioner may file a new Vaccine Act petition within one year of dismissal of the state court action. Id.

As presented by the parties, the issue for decision is whether the factual rather than a legal “relation back” of the subsequently filed Complaint in Pennsylvania state court to the earlier filed praecipe is sufficient for jurisdictional purposes under the Vaccine Act. The undersigned concludes that it is.

The Vaccine Act requires that a civil action against a vaccine administrator or manufacturer for damages arising from a vaccine-related injury or death that is filed in state or federal court be dismissed by that court. See §§ 300aa-11(a)(2)(A), 300aa-11(a)(2)(B). The Act provides that, for purposes of the limitations of actions, the date of filing of the dismissed civil action shall be considered the date that the Vaccine petition was filed if the Vaccine petition is filed within one year of the date of dismissal of the civil action. See § 300aa-11(a)(2)(B).

The Court of Federal Claim has recognized that a praecipe filed in Pennsylvania state court initiates a civil action. See Joseph, 29 Fed. Cl. at 799. In determining whether a praecipe initiates a civil action for a vaccine-related injury, the Court of Federal Claims also has recognized the difficulty in determining the nature of the civil action initiated by a praecipe due to the lack of specific information contained in a praecipe. Id. at 799-800. In Joseph, the court found: “[A]s a matter of law that the additional information available to the special master is simply insufficient to determine the nature of petitioners’ state court action. There is no indication regarding possible actions or remedies that petitioners might have pursued against the named defendants.” Id. at 800 (emphasis added).

In this case, however, the undersigned is persuaded that the additional information available--in particular, the subsequently filed Complaint together with the correspondence between petitioner’s counsel and Krista’s father’s former counsel and the affidavits of counsel--is sufficient to disclose the nature of the civil action contemplated by the earlier filed praecipe against the vaccine administrator. There is an indication in the correspondence between Mr. Lauder’s former counsel and petitioner’s counsel, which is dated after the filing of the January 10, 2005 praecipe but before the filing of the July 5, 2005 Vaccine petition, that the contemplated action initiated against Pediatric Alliance and Drs. Bacdayan and Ketyer was a negligence claim for the vaccine-related death of Krista. The subsequently filed Complaint contains factual allegations and legal theories

that provide information about the type of action considered when Mr. Lauder's former counsel, Mr. Ignelzi, filed the January 10, 2005 praecipe.

Respondent argues, "even if the subsequently filed Complaint, which does include factual allegations of a vaccine-related death, would provide sufficient evidence to conclude that the praecipis constituted 'civil actions,' as that term is used in the Act, this petition must be dismissed. . . ." R. Response at 1. Respondent reasons that "[t]he Act plainly prohibits the filing of a petition while a civil action is pending." *Id.* at 2.

It is true that the Vaccine Act prohibits the filing of a Vaccine Act petition when there exists a pending civil action for damages for a vaccine-related death or injury, and the court must dismiss the petition if filed. 42 U.S.C. § 300aa-11(a)(5)(B); see also *Carlson v. Secretary of HHS*, 23 Cl. Ct 788 (1991), aff'd, 968 F.2d 1227 (Fed. Cir. 1992) (cannot cure jurisdictional defect by belatedly dismissing a pending civil action after filing a Vaccine Act petition); *Flowers v. Secretary of HHS*, 49 F.3d 1558, 1562 (Fed. Cir. 1995) (petition dismissed as Court of Federal Claims lacked jurisdiction due to the pending civil action); *Aull v. Secretary of HHS*, 65 Fed. Cl. 400, 407 (2005) (Court of Federal Claims required to dismiss action under § 300aa-11(a)(5)(B) because petitioners had a pending state action for a vaccine-related death). Moreover, a civil action for damages against an administrator or manufacturer for a vaccine-related injury or death must be dismissed by the state or federal court if it is filed before the Court of Federal Claims has issued judgment on the Vaccine Act petition or the petitioner has elected to withdraw such petition. 42 U.S.C. § 300aa-11(a)(2)(B). However, pursuant to § 300aa-11(a)(2)(B), a Vaccine Act petitioner is afforded the benefit of the filing date of the dismissed civil action for statute of limitations purposes if the petition is filed within one year of the date of dismissal of the civil action. *Flowers*, 49 F.3d at 1562; *Aull*, 65 Fed. Cl. at 407.

The undersigned has determined that the praecipe filed on January 10, 2005 commenced a civil action against the vaccine administrator for damages for a vaccine-related death. Because petitioner had a civil action for damages for a vaccine-related death pending at the time this Vaccine Act petition was filed, this petition must be dismissed pursuant to § 300aa-11(a)(5)(B). *Aull*, 65 Fed. Cl. at 407 (petition dismissed without prejudice pursuant to § 300aa-11(a)(2)(B)). Under section 300aa-11(a)(2)(B), however, if petitioner files a Vaccine petition within one year of November 21, 2005, the date of dismissal of the civil action initiated by the January 10, 2005 praecipe, petitioner will be afforded the January 10, 2005 filing date for his Vaccine petition for purposes of the limitations of actions.

IV. CONCLUSION

Because petitioner had a pending civil action for damages for Krista Lauder's alleged vaccine-related death at the time he filed this petition, the undersigned must dismiss this petition without prejudice for lack of jurisdiction. The Clerk of the Court is directed to enter judgment dismissing the petition accordingly. The Clerk of the Court shall deliver this Decision to the parties by overnight mail delivery.

IT IS SO ORDERED.

Patricia E. Campbell-Smith
Special Master