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7
8 IN THE UNITED STATES COURT OF FEDERAL CLAIMS
9
10 OFFICE OF THE SPECIAL MASTERS

11 MICHELLE D. HELMS, as Parent)
12 and Legal Representative of) No. 96-518V
13 ZACHARY DAVID LEE HELMS, deceased,)
14)
15 Petitioner,)
16)
17 v.)
18)
19 SECRETARY OF THE DEPARTMENT OF) (Special Master Abell)
20 HEALTH AND HUMAN SERVICES,)
21)
22 Respondent.)
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29 RESPONSE TO PETITIONER'S STATEMENT ON ATTORNEY CONDUCT

30 Kirk A. McCarville (hereinafter "McCarville") hereby responds to Petitioner's Letter of
31 Complaint filed with the Court on January 31, 2002, as follows.

32 I. OVERVIEW

33 The Petitioner has filed a Complaint with the Court in which she makes several claims
34 regarding the representation provided by McCarville. Petitioner seeks to have the Court reduce
35 or reject the Fee Application of McCarville. In essence, she claims that McCarville's conduct
36 was improper in regards to the use of an expert witness. As will be seen below, her
37 representations are without merit and should not effect this Court's decision regarding the Fee
38 Application now pending before the Court.

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II. PROCEDURAL POSTURE OF CASE

1. The Petition in this matter was filed on August 19, 1996.
2. On November 18, 1996, Respondent filed her Report requesting that Petitioner's claim for vaccine compensation be denied and the Petition be dismissed.
3. On December 15, 1997, the Court issued an Order scheduling a full entitlement hearing to be conducted on March 18, 1998.
4. On March 6, 1998, at the request of the Respondent, the Court entered an Order resetting the evidentiary hearing for June 9, 1998. The reason that the hearing was rescheduled was because government's counsel raised certain issues pertaining to the Petitioner's Affidavit and the government needed additional time to retain a clinician.
5. On June 3, 1998, the Court, at the request of the Petitioner, entered an Order resetting the evidentiary hearing for July 28, 1998. The reason that the hearing was rescheduled was because Petitioner's expert, Dr. DeFendini, was undergoing chemotherapy treatment and the June 9th date presented a conflict with those treatments.
6. On July 28, 1998, the evidentiary hearing was held in Phoenix, Arizona. At the conclusion of the evidentiary hearing, the Court ordered that post hearing briefs be submitted to the Court.
7. On July 1, 1999, the Special Master entered his Decision finding that the Petitioner was not entitled to compensation.
8. On July 30, 1999, Petitioner filed her Motion for Review to the Claims Court.
9. On December 7, 1999, Oral Argument was held before the Honorable Francis M. Allegra, on Petitioner's Motion for Review of the Special Master's Decision.
10. On December 10, 1999, Judge Allegra entered a Order Vacating the Special

1 Master's Entitlement Decision dated July 1, 1999 and remanded the matter to the Office of
2 Special Masters for further proceedings consistent with Judge Allegra's December 10, 1999,
3 Order.

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5 11. On January 28, 2000, Special Master Abell entered his entitlement decision on
6 remand again finding that the Petitioner was not entitled to compensation.

7 12. On March 15, 2000, Petitioner filed her Amended Motion for Review of the
8 Special Master's Remanded Decision.

9 13. On May 26, 2000, Judge Allegra entered a unpublished decision denying the
10 Motion for Review of the Special Master's Decision. As a result, a Judgment was entered by
11 the Court dismissing the Petition.

12 14. On July 19, 2000, Petitioner filed an Appeal to the United States Court of Appeals
13 for the Federal Circuit.

14 15. After oral argument, on May 29, 2001, the United States Court of Appeals for
15 the Federal Circuit affirmed the decision of the Court of Federal Claims denying compensation.

16 16. Thereafter, the Petitioner, acting pro-per, submitted a Petition for Rehearing
17 which was denied by the Court on August 6, 2001.

18 17. On August 13, 2001, the United States Court of Appeals for the Federal Circuit
19 issued its Judgment.

20 18. On November 30, 2001, McCarville filed his Application for Fees and Costs and
21 a Petition for reimbursement of costs advanced directly by Petitioner.

22 19. On December 7, 2001, Respondent filed her Response agreeing to the request for
23 fees and costs made by McCarville without objection and objecting to a portion of the costs for
24 which Petitioner sought reimbursement.
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1 **III. RESPONSE TO CLAIMS SET FORTH IN PETITIONER'S COMPLAINT**

2 The Petitioner's complaints can be summarized as (1) improper selection and use of an
3 expert witness; (2) failure to inform the Court of expert's health condition; and (3) statute of
4 limitations.¹

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6 **A. DR. RICHARD DEFENDINI**

7 **1. DeFendini - Expert**

- 8 • Dr. DeFendini was referred to McCarville by an attorney who used Dr.
9 DeFendini as an expert in a Court proceeding. Dr. DeFendini was
10 interviewed by McCarville and agreed to review the case. After further
11 consultation, Dr. DeFendini was retained to represent the Petitioner in
12 this matter.
- 13 • During the course of his involvement in the case, Dr. DeFendini's work
14 consisted of reviewing and analyzing the medical records, slides, medical
15 literature, autopsy report and Respondent's expert's reports.
- 16 • Dr. DeFendini submitted his first report on or about February 27, 1997
17 and a second report in October of 1997, after reviewing the Respondent's
18 expert's report.
- 19 • At the evidentiary hearing in July, 1998, without objection from the
20 Respondent, Dr. DeFendini was admitted as an expert by the Court. (See
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25 McCarville does not believe that the allegations regarding the statute of limitations are germane to the Court's
26 analysis of the Fee Application. Nevertheless, McCarville brings to the Court's attention certain material
27 information which was omitted by the Petitioner. Specifically, McCarville was retained by the Petitioner on
28 November 28, 1995, solely for the purpose of preparing and submitting a Petition to the United States Court of
Federal Claims in regards to the National Vaccine Injury Compensation Program. (See Petitioner's Exhibit 16).
Prior to retaining McCarville, Petitioner had retained the California law firm of Ravis & Dominguez to represent
her in any State Court proceeding.

1 transcript of proceedings, page 53, lines 13 - 24; page 54, lines 1 and 2).

2 2. DeFendini - Cancer

- 3 • In May, 1998, Dr. DeFendini contacted McCarville to inform him that he
4 had begun chemotherapy treatment. Dr. DeFendini asked for the June 9,
5 1998 hearing to be rescheduled to accommodate his chemotherapy
6 schedule. He indicated that he would be done with chemotherapy by
7 early July and wanted to continue his involvement in the case. At no
8 time, prior to May of 1998, did Dr. DeFendini indicate that he was ill or
9 in any way incapable of completing his involvement in the case. At no
10 time prior to or after this disclosure, did Dr. DeFendini state or indicate
11 in any way that he was unwilling or incapable of completing his
12 responsibilities in this matter. In fact, Dr. DeFendini and McCarville
13 discussed his testimony through lengthy telephonic conversations which
14 took place as late as July 16th and July 23, 1998. Both conferences taking
15 place within days of the hearing in this matter.

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19 Much has been written regarding Dr. DeFendini's testimony at the hearing. The
20 Petitioner's position on Dr. DeFendini's testimony, as well as that of the Respondent, the Special
21 Master and the Appellate Courts are now all part of the record in this matter. In light of his
22 extensive knowledge of the case, preparation, and willingness and ability to proceed, the use of
23 Dr. DeFendini as Plaintiff's expert was a reasonable and prudent decision. The outcome of the
24 case does not change the foregoing.

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26 3. Notification to the Court of Dr. DeFendini's Health Condition

- 27 • Petitioner's Complaint also states that McCarville failed to inform the
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Court of Dr. DeFendini's illness.² Nothing could be further from the truth. The very reason that the June 9, 1998, evidentiary hearing was rescheduled was as a result of a telephonic status conference that McCarville had with the Court and Respondent's counsel wherein McCarville reported to the Court that Dr. DeFendini was undergoing chemotherapy treatment and that his chemotherapy schedule created a conflict if the hearing were to take place on June 9, 1998. The Court granted the Petitioner's request to continue the hearing and moved it to July 28, 1998, so that Dr. DeFendini could complete his chemotherapy treatment. Petitioner's Exhibit 3 clearly indicates that this information had been shared with the Petitioner and that she was aware that the hearing had been continued and the reason for the continuance was Dr. DeFendini's chemotherapy treatment. Petitioner's Exhibit 3 reads in part:

"In a recent conversation with Kim³, he told me that Dr. DeFendini had cancer and had to undergo chemotherapy treatments. He said that you spoke with the government's attorney and requested a continuance because June 9, 1998 coincided with one of his chemotherapy treatments."

By Petitioner's own admission, McCarville made her, the Court and Respondent's counsel aware of Dr. DeFendini's medical condition. The record contains other evidence that Dr. DeFendini's condition was made

² Pages 1 and 4, Petitioner's Complaint.

³ Kim McCarville is Kirk McCarville's paralegal.

1 known to the Special Master and the Court of Federal Claims.⁴

2 B. PETITIONER'S REQUEST FOR REDUCTION OR ELIMINATION OF
3 MCCARVILLE'S FEES

4 McCarville has been counsel in a significant number of vaccine cases processed through
5 the Office of the Special Masters. In a prior fee decision, Chief Special Master Golkiewicz
6 commented as follows:

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8 "The Court comments that it is open to adjusting Mr. Kirk McCarville's hourly
9 rate in future cases, with the appropriate substantiation, as the Court sees his
10 efforts to be of high quality...(emphasis added). *McGinn v. DHHS*, Case No.
11 94-36V (Fed. Cl. Sp. Mastr., 12-17-97).

12 The government in this case has had an opportunity to inspect McCarville's Fee
13 Application and has reported to the Court that it had no objection to the Fee Application as
14 submitted.

14 IV. SUMMARY

15 Dr. DeFendini was qualified to testify as an expert in this matter without objection by
16 the Respondent and as acknowledged by the Court.

17 The Court was well aware that Dr. DeFendini was undergoing chemotherapy for cancer
18 and that his chemotherapy schedule conflicted with the hearing date of June 9, 1998. For that
19 reason, the Court granted Petitioner's request for a continuance resetting the hearing to July 28,
20 1998.

21 For a period in excess of one year, Dr. DeFendini prepared to testify in this matter. His
22 work consisted of reviewing and analyzing the medical records, autopsy report, slides, witness
23 statements, medical literature and the reports of the Respondent's experts. McCarville and Dr.
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28 See footnote 3 of Judge Allegra's Opinion filed December 10, 1999.


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1 DeFendini worked closely and regularly during this period of time to prepare and present the
2 Petitioner's case in chief. At no time during the course of this preparation, including after he
3 had disclosed that he was undergoing chemotherapy treatment, did Dr. DeFendini ever indicate
4 either expressly or through his conduct that he was incapable or unwilling of proceeding in this
5 matter. In fact, during the week immediately prior to the hearing, McCarville had two lengthy
6 telephone conferences with Dr. DeFendini to finalize his preparation for the hearing. What took
7 place at the hearing is a matter of historical fact and of course, has been the subject of multiple
8 appeals. However, the fact that the Petitioner did not prevail is not conclusive or even indicative
9 that McCarville's use of Dr. DeFendini was improper.
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12 Petitioner has challenged the competence and integrity of the undersigned. There is no
13 basis for an attack upon either as evidenced by the record in this matter. Plaintiff's Fee
14 Application as submitted and supported by Respondent should be granted in accordance with the
15 Rules of the United States Vaccine Act.
16

17 Dated this 26th day of February, 2002.

18 KIRK A. MCCARVILLE, P.C.

19
20 By 
21 Kirk A. McCarville
22 2400 E. Arizona Biltmore Cir., #1430
23 Phoenix, Arizona 85016
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CERTIFICATE OF SERVICE

I hereby certify that the original and two copies of the above Response, were mailed via Federal Express on this 25th day of February, 2002, to:

Clerk
United States Court of Federal Claims
717 Madison Place, N.W.
Washington, D.C. 20005

and one true and correct copy was served, Federal Express upon:

Special Master Richard B. Abell
U.S. Court of Federal Claims
717 Madison Place NW
Washington, D.C. 20005

and one true and correct copy was served, US Mail upon:

Mark Rogers
U.S. Department of Justice
Torts Branch, Civil Division
1425 New York Ave., NW
Washington, D.C. 20005

Michelle Helms

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