

January 28, 2002

OFFICE OF SPECIAL MASTERS

Richard B. Abell
Special Master

RE: Helms v. DHHS (No. 96-518V)
Statement on my Attorney's Conduct

Dear Special Master Abell,

I am writing this letter as a complaint against my attorney for the manner in which he handled my case. My attorney allowed and participated in several injustices regarding the above-referenced case. I will show the Court, using the attached exhibits, that Mr. McCarville:

1. Allowed my case to proceed with an expert witness who had been diagnosed with cancer, was undergoing chemotherapy, and died during the proceedings.
2. Failed to inform the Court of this situation, despite several requests on my part.
3. Allowed the Statute of Limitations to expire, while continually assuring me that this option was available to me.

Item #1 – Expert Witness Testimony

- The hearing was set for June 9, 1998, but had to be re-scheduled because it conflicted with Dr. DeFendini's chemotherapy treatment.
(See Exhibit 1)
- The government offered to settle the case prior to hearing. Mr. McCarville assured me that the settlement was due to the strength of our expert and the weakness of the report provided by the government's expert.
(see Exhibit 2)

- Before the hearing, I expressed my concern that we were proceeding with an expert who was terminally ill, especially since our case boiled down to “expert vs. expert” according to Mr. McCarville.
(See Exhibit 3)

During several telephone conversations, he told me and my husband the “Court would not allow us to bring on a new expert, that it was against The Vaccine Program rules”. He continually assured us regarding the strength of our case because, “the government had offered to settle at such an early stage of the proceedings”.

- Mr. McCarville should never have allowed Dr. DeFendini to testify as an expert witness.
 1. He was undergoing chemotherapy before the trial. (can be verified as reason for re-scheduling the hearing)
 2. During the trial he had to excuse himself several times to go to the bathroom.
 3. He was not even on the telephone to hear the complete testimony of the government’s witness.
 4. He died shortly after the trial and did not assist with the rebuttal. We were denied the expertise of our witness.

Dr. DeFendini’s serious illness and lack of preparation can be substantiated through review of the court transcripts.

5. During the hearing, Dr. DeFendini said, “Unfortunately, you know, as Mr. McCarville told you, you know, I have been seriously ill and I have been functioning on two cylinders, so I can’t – I can’t be as prepared for this as I would have liked to be”. (Exhibit 4 – Court Transcripts, page 83, line 24 and page 84, lines 1-3)
6. Dr. DeFendini was unable to review the additional literature that had been submitted by the government approximately one month prior to the hearing. When questioned about the literature during the hearing he said, “No, no I’m not going through this anymore, okay? I went through this once...” (Exhibit 5 – Court Transcripts, page 92, lines 9-10)
7. During the hearing, Dr. DeFendini was unable to even look at a medical report. Respondent asks the following, “Okay if you can look at our Exhibit C, page 228 – Dr. DeFendini interrupts and states: “I can’t do that, if you ask me to do that you would have to give me two hours to read the article very carefully, okay? (Exhibit 6, page 97, lines 9-13)

8. A few sentences later, Dr. DeFendini verbalizes his inability to prepare for the hearing. The Court says, "Now Dr. DeFendini, the trial is today, not next week or next month".

Dr. DeFendini replied, "You know we've discussed this before and I told you that I did not – I was not capable of going through all this last minute search of the literature and yellow penciling and so on and so forth".

(Exhibit 7, Court Transcripts, page 102, lines 2-8)

9. Dr. Defendini readily admits that he is ill during the hearing. "Not that I can think of right now but, you know, my head is beginning to spin".

(Exhibit 8, Court Transcripts, page 110, lines 11-12)

Kirk McCarville knew before the hearing that the case would be "expert against expert".

10. In a letter from Kirk McCarville, dated March 11, 1997, he states, "...this is really a battle between experts".

(Exhibit 9)

Kirk McCarville knew what would be required of our expert witness before the hearing, yet he chose to proceed with Dr. DeFendini who was seriously ill, and unable to read the reports submitted by the government approximately one month prior to the hearing.

11. In a letter to Dr. DeFendini, dated December 17, 1997, Kirk McCarville states, "...I anticipate the length of the hearing to be between 4-6 hours. It will be necessary for you to be available through the entire course of the hearing in order to listen to Dr. Rourke's testimony... and provide whatever rebuttal that would be appropriate".

(Exhibit 10)

Kirk McCarville knew the day after the trial that Dr. DeFendini's ability to assist with our brief was questionable at best.

12. In a letter to me, dated July 29, 1998, Kirk McCarville states, "If he is up to it, I'm sure he will provide assistance..." (rebuttal of Dr. Rourke's testimony).

(Exhibit 11)

Item # 2 - My attorney failed to inform the Court of the severity of Dr. DeFendini's illness and subsequent death during the proceedings, despite several requests on my part.

After losing at the trial level, we proceeded through the appeal process. During this process, we repeatedly told Kirk McCarville that we felt the appeal should address the seriousness of Dr. DeFendini's illness and subsequent death – which denied us the use of our expert for rebuttal. Our attorney steadfastly refused to bring this information to the Court's attention.

- (Exhibit 12) On June 7, 2000, we sent Kirk McCarville a facsimile after speaking at length with Andrew Dodd, another attorney familiar with the program. His comments point out several mistakes our attorney had made and continued to make. This conversation can be verified with Andrew Dodd.
- (Exhibit 13) On June 12, 2000, we sent Kirk McCarville a facsimile after finding a recent Court of Appeals case where an issue was that the “death of a witness and failure of witnesses memories...Risk that fair trial is no longer possible”.
- (Exhibit 14) On June 21, 2000, we sent Kirk McCarville a facsimile regarding rulings in the recent Microsoft anti-trust case. We pointed out that it is within the discretion of the US Court of Appeals to review any facts it deems relevant. We also pointed out that, “In a case involving expert vs. expert, surely the death of one of those experts during the proceedings and/or questionable medical theories can be deemed relevant”.
- (Exhibit 15) Kirk McCarville's letter to us dated June 23, 2000. In the third paragraph, Kirk McCarville states....”I disagree with the concept that an appeal should focus on Dr. DeFendini's performance at trial.”

It is clear that Kirk McCarville did not want DeFendini's performance at trial brought up because the Court did not know of the seriousness of DeFendini's illness. Further, the Court was unaware that Dr. DeFendini had chemotherapy treatments just weeks prior to our trial and died before he could assist with our rebuttal. Our attorney apparently did not want to look bad in front of the court, for allowing our case to proceed with an expert who was largely incapacitated.

Item #3 - Statue of Limitations: My attorney, Kirk A. McCarville allowed my statue of limitations to expire. To my knowledge California death cases are governed by a one year statue of limitations (Section 377.60 – 377.62).

Zachary received his vaccinations the afternoon of 1/25/95

My son's death occurred on 1/27/95

Communications started with the firm of Kirk McCarville in September of 1995.

(Exhibit 16) Our retainer agreement was signed on November 28, 1995.

Our action was filed with the Court on August 19, 1996

Kirk McCarville lead both my husband and myself to believe that we still had the option to file a civil suit against the pharmaceutical company after we went through The Government Compensation Program. Not only was this verbalized to us numerous times, please reference the following supporting documents.

- (Exhibit 17) – An e-mail from Kirk McCarville dated, June 7, 2000. In paragraph 4 he states, “Second, you can choose to file a civil action against the manufacturer for damages in the proper forum in California.”
- (Exhibit 18) – A letter from Kirk McCarville dated, August 30, 2001. In paragraph 3 he states the following....”Since that process has been completed, you are now entitled to pursue a civil action should you desire to do so pursuant to Rule 12 or you can accept the Judgment...”

Law requires that we proceeded through the Program before bringing suit against the manufacturer of the vaccine that killed my son. We have been misled by our attorney for the past 6 years. I cannot begin to express the frustration that I feel – knowing that our options have been severely limited by the inadequacy of our attorney regarding the law. Didn't he have a professional responsibility to ensure that my rights would be protected?

SUMMARY

I have fought this battle for the past six years in hopes that justice would prevail. I am now faced with the fact that justice did not prevail and I will have to live with that great pain for the rest of my life. I trusted the system and my attorney just like my precious son, Zachary, trusted me. He lost his life and I lost his case because Kirk McCarville misled me: Not just once, not just twice, but several times. Through out the process my attorney led me to believe that the government was the one who did not care as they had their rules and regulations and they made NO exceptions to them. The documents I have supplied clearly indicate that my attorney, Kirk McCarville, was deficient in his duties as an officer of the Court:

1. Our attorney chose to proceed with an expert witness who was terminally ill. A reasonable, competent attorney would not have proceeded in this manner. Kirk McCarville did not care about the outcome of our case - only his fee, which he would earn regardless of the outcome of the case.

2. Despite repeated requests from me, Mr. McCarville failed to bring Dr. DeFendini's illness and subsequent death to the attention of the Court. Had the Court been aware of this, surely a new expert would have been allowed. Mr. McCarville refused to do this because he knew he would have been reprimanded for proceeding through the trial stage with an expert who was undergoing chemotherapy treatment. Did Mr. McCarville have the interest of his client at heart? No - he continued to cover up his inept handling of the case at the trial level. He constantly encouraged me to accept the court's ruling, so that the case would be over and he could collect his fees.
3. That he allowed my statute of limitations to expire is incontrovertible. During the entire 6-year period, he assured me that my statute of limitations was "tolled" through the Compensation Program. That would have been true if he had filed my case in a timely manner.

I have struggled to put closure to the death of my son, Zachary, and I am still unable to do so. Now, I'm here at the end of the day, and realize that my own attorney has been largely responsible for the injustice. Where do I turn now?

I do not begrudge the Court for it's ruling – clearly their responsibility is to adjudicate the facts presented to them. My only hope is that the Court sees fit to make sure that these same injustices do not happen to someone else.

PETITIONERS REQUEST FOR RELIEF

No. 1

I will not be filing a complaint with the Arizona or California Bar Associations. I hereby request that Special Master Abel address Kirk McCarville's professional misconduct in his fee decision.

During the proceedings, my attorney displayed a lack of reasonable, professional judgment by utilizing an expert witness who was undergoing chemotherapy treatment for a terminal illness. Additionally, he exhibited a blatant disregard for protecting the rights and serving the best interests of his client.

No. 2

I request that the Fee Decision of the Special Master be made public, thereby promulgating the manifest injustice that has taken place. I hope and pray that a mother who has lost their child, does not have to endure what I've been through for the past 7 years.

No. 3

I request that the fees submitted for payment by Mr. McCarville be reduced and/or rejected. His conduct regarding: (a) selection and use of our expert witness, (b) his lack of preparation, and (c) requirement that I pay additional costs up-front; are most-

assuredly financially-motivated. Additionally, his negligence in allowing my statute of limitations to expire, has pre-empted my filing suit against the vaccine manufacturer.

There can be no justification for compensating an attorney who has:

1. Displayed extremely poor professional judgment - (use of Dr. DeFendini as an expert witness).
2. Misrepresented actual conditions to the Court and his client - (steadfast refusal to bring Dr. DeFendini's illness and death to the attention of the Court).
3. Violated his clients legal rights - (allowing my statute of limitations to expire).

No. 4

Lastly, I hereby request a new trial within the Program. I'm not certain whether or not this is within the Court's discretion, but it is evident from the documents I have submitted, that I was not given a fair trial - due to my attorney's conduct and the death of our expert witness. Anyone would agree that the circumstances surrounding my case are extraordinary.

Respectfully,



Michelle Helms-Gaddie (pro-per)

✓ cc: Kirk McCarville via fax 2/15/02

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KMccarvill@aol.com

June 4, 1998

Michelle Helms

RE: Helms v. DHHS

Dear Michelle:

The purpose of this letter is to confirm that the entitlement hearing has been rescheduled for July 28, 1998.

As before, the hearing will take place in my office. It will be necessary to meet with you on July 27, 1998 to discuss the specifics of the hearing.

As developments occur, I will notify you accordingly.

Sincerely yours,



Kirk A. McCarville

KAM/lr

Exhibit 2

KIRK A. McCARVILLE, P.C.

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June 5, 1997

Michelle Helms

RE: Settlement Offer from United States

Dear Michelle:

I am writing to inform you that I have received a settlement offer from Mark Rogers, the attorney for the Department of Human and Health Services in the amount of Fifty Thousand Dollars (\$50,000) to settle your claim under the National Vaccine Injury Compensation Act.

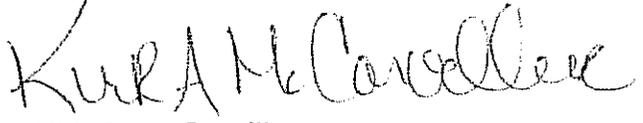
Frankly, I did not expect to receive an offer this early in the proceedings. As you know from my last letter I have only received the Government's Expert's Report and have not had an opportunity to discuss it with Dr. DeFendini.

Obviously, the Government is concerned about the strength of their case. I suspect that concern stems from the weakness of their expert's report.

There is no time limit set for acceptance of the Government's Offer. I would however like to respond to them prior to the June 23 status conference. Consequently, I am in the process of contacting Dr. DeFendini so that I may get his input on the report. I will contact you in advance of the June 23 hearing.

In the interim if you have any questions, please do not hesitate to contact me.

Sincerely yours,



Kirk A. McCarville

KAM/lr

June 9, 1998

Kirk McCarville
2400 E. Arizona Biltmore Circle # 1430
Phoenix, Arizona 85016

Dear Kirk,

In a recent conversation with Kim 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. He stated that the compensation program would not allow us to bring in another expert witness. This doesn't seem right. How could the government expect a man to testify under these conditions? You told us from the beginning that what our case boiled down to was expert vs. expert.

I told Kim how my father died of cancer at the age of 47. He too had to undergo chemotherapy treatments and he died within one month of his second treatment. He became frail and couldn't even stand up on his own. His doctor had him taking liquid morphine. That's how much pain he was in. Not only did my father deteriorate physically but mentally as well.

Although my heart goes out to Dr. DeFendini I can't express to you how much this concerns me.

Sincerely,



Michelle Helms-Gaddie

DEFENDINI - CROSS

1 Q Okay, and this may be the same question you've
2 already been asked just a different way. Can you cite any
3 peer reviewed literature which accepts the proposition that
4 the vaccine has a toxin in it?

5 A I'm sorry, the last part again, that accepts
6 what?

7 Q That accepts that the pertussis vaccine as
8 opposed to the pertussis live bacteria, the pertussis
9 vaccine --

10 A Well, it's impossible to separate the two because
11 once you have the pertussis bacillus it has the capability
12 of elaborating the toxin.

13 Q Okay. Could you cite in any of the literature
14 that's been filed to date any support in a peer reviewed
15 piece of literature that supports that proposition that
16 killed pertussis bacteria that's contained in the vaccine
17 produces a toxin?

18 A I cannot site you chapter and verse. I do
19 remember that there was a paper written in which the
20 pertussis toxin was shown to be elaborated in time after the
21 inoculum was initially administered. This was -- I'm pretty
22 sure it was one of the English papers that I was citing and
23 it was rather a long paper.

24 Unfortunately, you know, as Mr. McCarville has

DeFENDINI - CROSS

1 told you, you know, I have been seriously ill and I have
2 been functioning on two cylinders, so I can't -- I can't be
3 as prepared for this as I would have liked to be.

4 Q Are you positive that the article you're talking
5 about was describing the vaccine as opposed to the live
6 virus?

7 A No. No, no, I'm sorry. I cannot make that
8 distinction for sure.

9 Q Dr. DeFendini are you board certified in
10 pathology?

11 A No. I'm an not board certified in anything. I
12 am board qualified in clinical neurology and in
13 neuropathology.

14 Q Have you ever sat for a board?

15 A No, I have never presented myself for board.

16 Q Would you describe yourself as a pediatric
17 pathologist?

18 A Better than most and I'll tell you why. During
19 the 20 years that I was the neuropathologist at
20 Presbyterian, once a month there was a meeting of the
21 pediatric neurology group which was particularly at that
22 time a particularly distinguished group of pediatric
23 neurologists.

24 It was a four-hour marathon Wednesday evening

DeFENDINI - CROSS

1 Q Okay. Would you agree with me that according to
2 the literature there's no specific set of neuropathologic
3 changes which define a pertussis vaccine encephalopathy?

4 A Oh, I'd hate to answer that without reviewing the
5 literature. I would be inclined to agree with you, but I
6 can't commit myself without reviewing the literature
7 carefully.

8 Q Okay. Do you have the literature with you?

9 A No, no, I'm not going to go through this any
10 more, okay? I went through this once and --

11 Q Well, let me read some portions and you just
12 indicate whether you agree or disagree, okay? I'm looking
13 at Respondent's Exhibit D, page 459. This is a consensus
14 statement of an ad hoc committee of the Child Neurology
15 Society and it says;

16 "There are no specific" --

17 A Whose committee was that Menkes or --

18 Q No, this is the Child Neurology Society.

19 THE COURT: What year is that?

20 MR. ROGERS: 1991.

21 THE WITNESS: Who were the members of the
22 committee?

23 MR. ROGERS: I don't think they're listed, but
24 let me read what they say.

DeFENDINI - CROSS

1 Q Okay. If DPT vaccine caused a syndrome as is
2 suggested here of no clinical -- no substantial clinical
3 findings for a period of 25, 28 hours, and then a death in
4 which there are findings of edema, if DPT caused such a
5 syndrome, one would expect reported cases, wouldn't one?

6 A I don't know. I can't answer that question.

7 Q Okay, are you aware of any reported cases?

8 A No, I can't answer that question.

9 Q Okay. If you could look at our Exhibit C, page
10 228 --

11 A I can't do that. I can't do that. If you ask me
12 to do that, you have to give me two hours to read the
13 article very carefully, okay? I'm not going to answer to a
14 quotation of several lines or something like that.

15 Q Okay. Well, I have to ask the questions. You
16 can refuse to answer them.

17 A Well, okay, well, I can't give you an answer.

18 Q Okay, well, let me try. Okay, this is on page
19 228 and it's under -- the title of the article is "Sudden
20 Infant Death Syndrome, Overview of Recent Research
21 Developments from a Pediatric Pathologist's Perspective."

22 A Published where?

23 Q Department of Pathology, University of Miami,
24 School of Medicine. Oh, it's in Pediatrician, Journal of

DeFENDINI - CROSS

1 A Your Exhibit F.

2 THE COURT: Now, Dr. DeFendini, the trial is
3 today, not next week or next month.

4 THE WITNESS: All right, well, no, well, I can't.
5 You know, we've discussed this before and I told you that I
6 did not -- I was not capable of going through all of this
7 last minute search of the literature and yellow pencilling
8 and so on and so forth.

9 BY MR. ROGERS:

10 Q Well, let me put it in more layman's terms if you
11 will.

12 A Yes.

13 Q The problem here, and this is going to be a long
14 question, but the problem here is that we have a child that
15 appears very normal, is put to bed and is found dead in the
16 morning.

17 A Right.

18 Q There's a lot of DPT literature that describes
19 the DPT encephalopathy as one including inconsolable crying
20 and screaming and an acutely ill child. What I'm asking you
21 for is literature support for the proposition that it can
22 also occur without all of these symptoms, that it can be
23 asymptomatic.

24 And I'm going on without letting you answer but

DeFENDINI - CROSS

1 A Yes.

2 Q Are you familiar with the SIDS studies that have
3 shown a significantly increased rate of SIDS in children who
4 have been placed face down?

5 A Yes, I'm familiar with that.

6 Q Okay. And I may have asked this before and if I
7 did I apologize. Are you familiar with any literature
8 associating DPT to edematous findings on autopsy?

9 A I'm sorry, that associate --

10 Q DPT edema found on autopsy.

11 A Not that I can think of right now but, you know,
12 my head is beginning to spin.

13 MR. ROGERS: Okay, well, I very much apologize
14 for the searching nature of my questions and I appreciate
15 your patience with me and I have no further questions.
16 Thank you, sir.

17 THE COURT: Mr. McCarville?

18 MR. MCCARVILLE: Thank you, Your Honor. Your
19 Honor, just for the record and I realize that this is
20 probably abundantly clear to the Court, I have two points
21 that I want to make on the record.

22 Number one, Dr. DeFendini has submitted a total
23 of 11 articles in support of his position and those are
24 contained in Exhibit 17.

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March 11, 1997

Michelle Helms

Dear Michelle:

Enclosed herein is Dr. DeFendini's report to the court expressing his opinion as to the cause of Zachary's death.

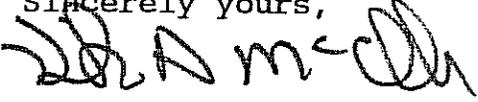
You will see that it is a very strong report. You will see that he opines that Zachary's death was caused by an acute toxic encephalopathy. He goes on to conclude that the encephalopathy was caused by the immunization.

Frankly, I am very encouraged by the strength of Dr. DeFendini's findings.

The next step in the case is that the Government will locate an expert who undoubtedly will disagree with Dr. DeFendini. Once that has occurred, the Special Master will set this matter for hearing.

As I have said from the beginning, this is really a battle between experts. I am hopeful that the hearing will take place this year.

Please contact Kim or I if you have any questions.

Sincerely yours,


Kirk A. McCarville

KAM/lr
Enc.

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December 17, 1997

Dr. Richard DeFendini
320 Central Park West
New York, NY 10025

RE: Helms v. Secretary, Department of Health and Human Services

Dear Dr. DeFendini:

The purpose of this correspondence is to inform you that the entitlement hearing regarding the above referenced is set for March 18, 1998.

Your testimony will be taken telephonically and I anticipate the length of the hearing to be between 4 - 6 hours. It will be necessary to have you available through the entire course of the hearing in order to listen to Dr. Roarke's testimony and provide whatever rebuttal that would be appropriate.

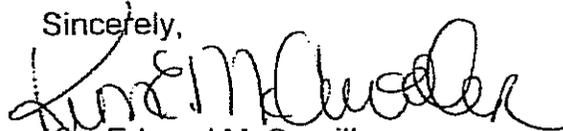
Prior to the hearing, it will be necessary for you, Kirk and I to discuss not only the elements of your testimony, but also to prepare for Dr. Roarke's cross examination.

The Government has requested that you provide copies of all of the literature that you have referred to in your previous reports. I am asking that you forward those materials to me as soon as possible.

Finally, enclosed herein is a payment for the most recent invoice which you have submitted.

Obviously, should you have any questions regarding this matter, please do not hesitate to contact me.

Sincerely,



Kim Edward McCarville
Investigator/Paralegal

KEM/lr

Enc.

cc: Michelle Helms

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July 29, 1998

KIRK A. McCARVILLE

Michelle Helms

Dear Michael and Michelle:

I am writing to follow up on our discussion regarding the status of this matter.

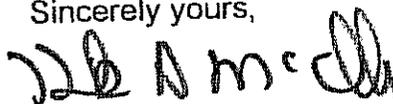
First, as you know, the court has ordered briefs to be filed with our first brief due on September 28, 1998.

After giving this matter further thought, I believe that the briefs will be extremely important because I do not feel that as of this date the special master is leaning in either direction in terms of making a decision.

I have written to Dr. DeFendini and requested his assistance in helping us analyze Dr. Rorke's testimony. If he is up to it I am sure that he will provide that assistance. I believe that the major thrust of our situation ought to be to find publications that support our position and undermine theirs. I have asked Dr. DeFendini to give particular consideration to two matters. First, the likelihood that Zachary suffered suffocation over a long period of time and secondly the medical literature regarding significant brain edema over such a short period of time.

For your information, I have enclosed two lists. Each reflects the literature that has been submitted to the court to date. I am in the process of doing our search for additional information which will help us if in fact there is such literature. I will get back to you to the extent that I feel that we can incorporate you in to the research.

Sincerely yours,



Kirk A. McCarville

KAM/lr

Enc.

June 7, 2000

Kirk,

We have spoken with Andrew Dodd, a well-known attorney who has experience within the Vaccine Compensation Program as well as against pharmaceutical companies. In fact, he was the first attorney Michelle ever talked to, but at the time was only accepting cases where the death certificate stated that the most probable cause of death was vaccine-related.

His comments are as follows:

1. In the state of California, if our case had not been filed within one year the statute of limitations would have expired. Clearly this did not happen, as there were several months of discussion between us before you decided to take the case.
2. Had we met our requirements under the statute of limitations, we would have to reject the governments ruling. If we accepted their decision there could be no suit against the pharmaceutical company.
3. He was adamant that we should file an appeal to the Federal Circuit Court based on the following:
 - In a case such as this (expert vs. expert), the fact that Dr. DeFindini contracted a terminal illness and was undergoing chemotherapy during the trial is an extremely strong basis for appeal. In a case placing expert against expert, we were denied the benefit of ours.
 - Additionally, the fact that he died shortly thereafter, denied us his expertise in our rebuttal to Special Master Abel. Had he been alive, the "new" evidence (Purkinje cells) and Dr. Rourke's inconsistencies would have been brought to light.
 - During our appeal to Judge Allegro, we should have emphasized DeFindini's illness and its effect on his testimony, as well as our having to prepare the rebuttal without our expert witness who knew most about the case.
 - Further, in our appeal to Judge Allegro we should have requested that it be remanded back to Special Master Abel for review in light of the new evidence we uncovered (Purkinje cells and/or inconsistencies in Dr. Rourke's testimony).

In summary, he confirmed what we have thought and discussed for quite some time. Namely, that Dr. Defindini's illness pre-empted his effectiveness at the trial, thereby creating a bias with Special Master Abel who deferred to Dr. Rourke based on her credentials. Medical evidence became secondary. His death placed us "on our own" to rebut a medical expert's testimony without a medical expert.

In conclusion, we feel that justice has not been served. We did not lose the case based on a better medical theory proffered by the government – that would have been easier to accept. Instead, we lost the case because our expert was dying and could not support his theory. What better grounds for appeal?

WE WISH TO PROCEED WITH THE APPEAL.

Michael and Michelle Gaddie



Facsimile

Date: June 12, 2000
Attention: Kirk McCarville
Company:
Fax Number: 602.468.2404
From: Michael K. Gaddie

Archstone Communities
217 Technology Drive
Suite 210
Irvine, CA 92618
Tel: (949) 789-1500
Fax: (949) 453-9293
www.archstonecommunities.com

Number of Pages (including this cover): 2

I used a search engine from the Stanford Law School web site and it cited the following Court of Appeals case (1996).

Issues included death of a witness and failure of witnesses' memories ... Risk that fair trial is no longer possible.

I didn't have access to the actual case so I don't know whether it's relevant. Just wanted to pass it on...

A handwritten signature in cursive script that reads "Michael Gaddie".

Michael K. Gaddie

Practice and procedure - Want of prosecution - Inordinate and inexcusable delay - Prejudice - Death of witness and failure of witnesses' memories - Risk that fair trial of the action no longer possible.

**Leyburd Nominees Pty Ltd and Burdett Engineering Vic Pty Ltd v. Coates
Brown & Co. (a firm) No. 8311/94**
Date of judgment: 12.09.95
Coram: Winneke P., Ormiston and Charles JJ.A.

FACSIMILE

To: Kirk McCarville
(602) 468-2404

From: Michael Gaddie

Date: June 21, 2000

Pages: 2

Attached is an article from the most recent edition of Newsweek regarding the Microsoft case.

As you know, Microsoft is contesting Judge Penfield Jackson's ruling as "sweeping, conclusory assertions".

Microsoft wants the case to be heard in the US Court of Appeals because there is a much better chance this court will consider issues regarding fact-finding.

The government is trying to send the case directly to the Supreme Court because they know that there the emphasis will be on how the law was applied.

It does indicate that there is discretion within the US Court of Appeals to review any facts it deems relevant.

In a case involving expert vs. expert, surely the death of one of those experts during the proceedings and/or questionable medical theories can be deemed relevant.

I look forward to speaking with you at your earliest convenience.

Respectfully,



Michael Gaddie

KIRK A. McCARVILLE, P.C.
A PROFESSIONAL CORPORATION
ATTORNEY AT LAW

KIRK A. McCARVILLE

CERTIFIED SPECIALIST
TAX LAW

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(602) 468-1714
FAX (602) 468-2404
KMccarvill@aol.com

June 23, 2000

VIA FACSIMILE and US MAIL

RE: Zachary

Dear Michael and Michelle:

I am writing to provide to you my position on an appeal of Judge Allegra's decision and to give you your procedural options in light of that decision.

First, enclosed is a copy of the Judgment which was entered on May 26th. You will see from the footnote, that a Petition for Review to the Court of Appeals for the Federal Circuit must be filed within 60 days of May 26th. Therefore, I have calendared the Notice of Appeal to be filed no later than July 24th.

Next, as you know I have expressed reservations regarding the merits of an appeal. Nevertheless, I have done what I feel is appropriate to evaluate the strengths and weaknesses of an appeal and my willingness to participate in the appeal process. As I told Michael, my approach to evaluating whether or not an appeal should be taken is as follows. First, I have reviewed the trial transcripts and exhibits, the orders which have been entered by Judge Abel and Judge Allegra and have also been doing my own research. I disagree with the concept that an appeal should focus on Dr. Defendini's performance at trial. I don't believe that constitutes reversible error. I have previously shared with you the standard used by the United States Court of Appeals and the approach it takes reviewing the credibility decisions made by trial judges. In my opinion, together those two legal principals are formidable obstacles to any real chance of success on an appeal.

Rather, I have focused on the issues that we raised in our last brief with Judge Allegra. I think it is imperative that an appellant be consistent in his arguments throughout the appellate process.

I, of course, will file the Notice of Appeal for you if that is how you intend to proceed. However, I want to make it clear that I am not willing to make a commitment at this point in time that I will write the briefs and argue the case (if oral argument is granted). However, I am close to making my final decision on that matter. I have spoken to Elizabeth Seabury from Outsource

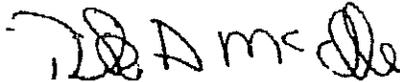
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KIRK A. MCCARVILLE, P.C.

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June 23, 2000

The Law. In addition, I have a phone conference with an attorney at Counsel Press, LLC. He and I are going to discuss the facts and the issues in the case. He and I are going to discuss the facts and issues of the case. I have worked with Counsel Press before on a vaccination case. Depending on what is needed, Counsel Press will do everything from the research, to writing the brief, or just assembling the brief. My phone appointment is with an attorney who apparently has some experience with appeals under the National Vaccine Act. I will be talking with him Monday, June 26th and I will report back to you after that meeting. Consequently, I will report back to you next week.

Sincerely,



Kirk A. McCarville

KAM/km
Enclosure

In the United States Court of Federal Claims

No. 96-518 V

FILED MAR 2 2000

**MICHELLE D. HELMS, AS PARENT
AND LEGAL REPRESENTATIVE OF
ZACHARY DAVID LEE HELMS, DECEASED,**

JUDGMENT

v.

**SECRETARY OF THE DEPT.
OF HEALTH AND HUMAN
SERVICES**

Pursuant to the court's Opinion, affirming the special master's Decision,

IT IS ORDERED AND ADJUDGED this date, pursuant to Appendix J ¶30, that the petition is dismissed. No costs.

Margaret M. Earnest
Clerk of Court

May 26, 2000

By: *Tilda T. Hester*

Deputy Clerk

NOTE: As to election, 90 days from this or the issuance of the appellate court's mandate, see Appendix J ¶33.

As to attorneys' fees and costs, within 21 days of the above election, see Appendix J ¶12.

As to petition for review, 60 days from this date, see Appendix J ¶32. Petition for review and filing fee of \$100.00 should be mailed to the following address: Clerk, U.S. Court of Appeals for the Federal Circuit, 717 Madison Place, NW, Washington, DC 20439.

KIRK A. McCARVILLE, P.C.

Exhibit 16

A PROFESSIONAL CORPORATION
ATTORNEY AT LAW

CERTIFIED SPECIALIST - TAX LAW

KIRK A. McCARVILLE

3404 WEST CHERYL DRIVE
SUITE A-250
PHOENIX, ARIZONA 85051

(602) 866-9566
FAX (602) 866-3799

November 28, 1995

Michelle Helms

RE: ^{Mr} Zachery Helms/National Vaccine Injury Compensation Program

Dear Ms. Helms:

By acknowledging below, this correspondence will confirm that it is your desire to retain the lawfirm of Kirk A. McCarville, P.C., (Firm) for the purposes of petitioning the United States Court of Federal Claims in regard to the National Vaccine Injury Compensation Program.

The Firm agrees to prepare and submit a petition on your behalf as guardian and legal representative of Zachery Helms (client) in regard to an alleged and suspected vaccine related death which occurred on January 27, 1995.

This correspondence further confirms that the Firm agrees to hold the client harmless as to liability of any fees and costs incurred by firm. Firm agrees to submit its fee application to the United States Court of Federal Claims for payment of those fees and costs.

Sincerely yours,



Kirk A. McCarville

KAM/lr

Agreed and Approved:



Michelle Helms

Michael Gaddie

From: <KMccarvill@aol.com>
To: <mgaddie@archstonemail.com>
Sent: Wednesday, June 07, 2000 10:34 AM
Subject: Re: FW: Zachary's case

Michael and Michelle Gaddie
8119 Capobelli
Aliso Viejo, CA 92656

RE: Helms v. Secretary DHHS

Dear Michael and Michelle:

In response to Michael's e-mail, I am writing to give you my thoughts on the status of this matter. First, a careful reading of Judge Allegra's decision, leads me to agree with Michael that there is little chance of success on appeal. Particularly, when you review the history of appeals from the Federal Circuit to the United States Court of Appeals in these type of cases. I believe the chances of reversal are remote.

Having said that, the remaining issue is how and if you should proceed forward. You have asked for my opinion on these matters and I will give it as follows. First, in every case, there comes a point in time where it is better to move on than to continue to pursue the matter. The effort becomes a false economy in terms of time, energy and emotion. I don't believe as I have said above, that there is any real chance of prevailing on an appeal and for that reason, I would consider that avenue closed.

In regards to a lawsuit against the pharmaceutical company, I can only offer you these thoughts. First, it is the type of case that is extremely expensive and time consuming. I am not telling you that you should or should not proceed against the pharmaceutical company, I can only tell you that historically, manufacturers of these vaccines strenuously defend themselves in this type of litigation.

In summary, there are three choices. First, you can choose to accept the Judgment entered by Judge Allegra. You would do so by filing an election with the Clerk of the Court. Second, you can choose to file a civil action against the manufacturer for damages in the proper forum in California. Finally, you can Petition for a Review of the Claims Court Judgment to the United States Court of Appeals for the Federal Circuit. I don't believe that the later should be pursued.

In regards to a lawsuit against the manufacturer of the vaccine, I would have to defer to those with more experience in that area. I do not know of anyone at the moment that I could recommend. If you want, I can do my best to try to locate somebody in California who has had some experience/success in this area.

I will call you so that we may discuss your thoughts after you have had an opportunity to review this letter.

Sincerely,

Kirk A. McCarville

KAM/km

pg. 2 Exhibit 17

Exhibit 18

KIRK A. McCARVILLE, P.C.

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August 30, 2001

Michael and Michelle Gaddie

RE: Helms v. DHHS

Dear Michael and Michelle:

I am in receipt of Michelle's e-mail stating that you are not going to file a Writ of Certiorari.

We will now go forward and file a Petition for Fees and Costs. Before we do so, we must first file an election to either accept the Judgment or to file a civil action for damages for Zachary's death. Specifically, Rule 12(a) of the Vaccine Rules reads as follows:

(a) General. When no motion for review of a decision pursuant to Vaccine Rule 10 is filed by either party pursuant to Vaccine Rule 23, petitioner shall, within 90 days after the entry of judgment, file with the clerk an election in writing either (1) to accept the judgment or (2) to file a civil action for damages for the alleged injury or death. Upon failure to file an election within the time prescribed, petitioner shall be deemed to have filed an election to accept the judgment.

Pursuant to the National Childhood Vaccine Injury Act ("Act"), we were required to first file the Petition for Compensation with the United States Court of Federal Claims to determine whether or not the case was compensable under the Act. Since that process has been completed, you are now entitled to pursue a civil action should you desire to do so pursuant to Rule 12 or you can accept the Judgment. The choice must be made within 90 days from the entry of Judgment which occurred on August 13, 2001. We can proceed with the filing of the Petition for Fees and Costs regardless of your decision. Please let me know whether or not you want me to file an election accepting the Judgment or stating your intent to file a civil action.

Once the election has been filed, we will go forward with submitting a Petition for fees, as well as reimbursement of our costs and the costs that you incurred.

In that regard, you previously provided to me a statement prepared earlier this year. That statement includes a list of expenses incurred as of that date. Please update and sign the Statement of Expenses (using the same format) as I suspect you have incurred additional costs. Also, please

KIRK A. MCCARVILLE, P.C.

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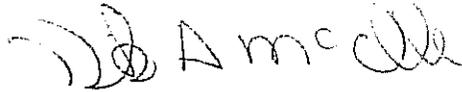
August 30, 2001

pg. 2 Exhibit 18

provide evidence of payment of the costs in the form of canceled checks, receipts, credit card statements, etc., so that we may include those in our Petition.

Please get back to me on the election issue.

Sincerely,

A handwritten signature in cursive script that reads "Kirk A. McCarville". The signature is written in dark ink and is positioned above the printed name.

Kirk A. McCarville

KAM/km
Enclosure