

Reilly v Cohen

2012 NY Slip Op 32018(U)

August 2, 2012

Supreme Court, Suffolk County

Docket Number: 09-32

Judge: Jeffrey Arlen Spinner

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 21 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

MOTION DATE 12-21-11 (#002)

MOTION DATE 1-23-12 (#003)

MOTION DATE 3-7-12 (#004 & #005)

MOTION DATE 5-2-12 (#006)

ADJ. DATE 6-6-12

Mot. Seq. # 002 - MotD # 005 -MG

003 - MG #006 - MG

004 - MG

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MARJORIE J. REILLY and CARLOS G. REILLY,

Plaintiffs,

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- against -

FUREY, KERLEY, WALSH, MATERA
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Stony Brook Emergency Physicians

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THOMAS IMPERATO, M.D., KEVIN BRATT,
M.D., PECONIC EAR, NOSE, THROAT &
FACIAL PLASTIC SURGERY, P.C., STONY
BROOK EMERGENCY PHYSICIANS, P.C. and
CENTRAL SUFFOLK HOSPITAL d/b/a
PECONIC BAY MEDICAL CENTER, PAUL J.
DAVEY, M.D. and PAUL DAVEY, M.D., P.C.,

Defendants.

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Upon the following papers numbered 1 to 90 read on this motion and cross motions for summary judgment; Notice of Mot on/ Order to Show Cause and supporting papers (002) 1 - 26; Notice of Cross Motions and supporting papers (003) 27-42; (004) 43-55; (005) 56-69; (006) 70-81 (cross motion and opposition); Answering Affidavits and supporting papers___; Replying Affidavits and supporting papers 82-83; 84-86; 87-88; 89-90; Other ___; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that motion (002) by defendants, Kevin Bratt, M.D., Peconic Ear, Nose, Throat & Facial Plastic Surgery, P.C., Paul J. Davey, M.D., and Paul J. Davey, M.D., P.C., pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross claims asserted against them is granted with prejudice as to defendant Kevin Bratt, M.D, and is denied as to defendants Peconic Ear, Nose, Throat & Facial Plastic Surgery, P.C., Paul J. Davey, M.D., and Paul J. Davey, M.D., P.C.; and it is further

ORDERED that motion (003) by defendant, Peconic Bay Medical Center s/h/a Central Suffolk Hospital d/b/a Peconic Bay Medical Center, pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross claims asserted against it is granted with prejudice; and it is further

ORDERED that motion (004) by defendants, David Bryant Cohen, M.D. and Stony Brook Emergency Physicians, P.C., pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross claims asserted against them is granted with prejudice; and it is further

ORDERED that motion (005) by defendant, Michael Thomas Imperato, M.D., pursuant to CPLR 3212 for summary judgment dismissing the complaint and any cross claims asserted against him is granted with prejudice.

ORDERED that motion (006) by the plaintiffs, Marjorie L. Reilly and Carlos G. Reilly, pursuant to CPLR Article 16 to preclude the defendants from seeking apportionment of liability and contribution against any defendant for whom summary judgment has been granted, is granted and defendants Peconic Ear, Nose, Throat & Facial Plastic Surgery, P.C., Paul J. Davey, M.D., and Paul J. Davey, M.D., P.C. are hereby precluded from asserting apportionment of liability and contribution against those defendants who have been granted summary judgment.

By way of the amended summons and amended complaint, the plaintiff, Marjorie L. Reilly, has set forth causes of action for negligence premised upon the alleged medical malpractice of the defendants, lack of informed consent, a derivative claim on behalf of plaintiff's spouse Carlos G. Reilly, and a cause of action premised upon the negligent hiring and retention of staff and employees by defendant Central Suffolk Hospital d/b/a Peconic Bay Medical Center. This action is premised upon the alleged failure of the defendants to timely test, diagnose and treat Marjorie L. Reilly for Stevens Johnson Syndrome/Toxic Epidermal Necrosis, allegedly due to an allergic reaction to the antibiotic Avelox prescribed by Dr. Davey; failure to admit her to the intensive care or burn unit to properly treat and manage the skin blisters and syndrome; failure to properly administer IVIg; failure to administer appropriate medications; and the failure to properly formulate a differential diagnosis.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]; *Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d

851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must “show facts sufficient to require a trial of any issue of fact” (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]).

In support of motion (002), Kevin Bratt, M.D., Peconic Ear, Nose, Throat & Facial Plastic Surgery, P.C., Paul J. Davey, M.D., and Paul J. Davey, M.D., P.C., have submitted, inter alia, an attorney’s affirmation; a copy of the summons and complaint and amended summons and amended complaint, defendants’ answers, and plaintiffs’ verified bills of particulars; transcripts of the examinations before trial of Marjorie Reilly dated October 28, 2009; David Cohen, M.D. dated January 15, 2010, and Michael Imperato, M.D. dated March 26, 2010; the corrected transcripts of the examinations before trial of Paul Davey, M.D. dated June 10, 2011, Kevin Bratt, M.D. dated January 14, 2011; medical records from Peconic Ear, Nose, Throat & Facial Plastic Surgery, P.C.; Barth Pharmacy records; uncertified copy of the Peconic Bay Medical Center emergency department record; uncertified Peconic Bay Medical Center record dated December 20, 2007; and the affirmations of the defendants’ experts Jack M. Rosenberg, PHARM D, PhD., and Michael Setzen, M.D.

In support of motion (003), Peconic Bay Medical Center s/h/a Central Suffolk Hospital d/b/a Peconic Bay Medical Center, has submitted, inter alia, an attorney’s affirmation; the affirmation of John Rohe, M.D.; summons and complaint, amended summons and complaint, defendant’s answer with demands, plaintiffs’ verified bill of particulars; certified copies of the transcripts of the examinations before trial of Marjorie Reilly dated October 28, 2009, Carlos Reilly dated December 10, 2009, non-party witness Kathleen Bekiesz-Histand, LPN dated February 8, 2011, each with proof of mailing pursuant to CPLR 3116; signed and certified transcripts of the examinations before trial of David Cohen dated January 15, 2010, Michael Imperato dated March 26, 2010, Paul Davey dated June 10, 2010, Kevin Bratt dated January 14, 2011; and the uncertified copies of the plaintiff’s medical records.

In support of motion (004), David Cohen, M.D. and Stony Brook Emergency Physicians, P.C. have submitted, inter alia, an attorney’s affirmation; the affirmation of Joseph LaMantia, M.D.; summons and complaint, amended summons and complaint, defendant’s answer and demands, plaintiffs’ verified bill of particulars; the transcript of the examination before trial of David Cohen, M.D.; the certified copy of the Peconic Bay Medical Center dated December 19, 2007; and the physician’s affirmation of Jerome Shupack, M.D.

In support of motion (005), Michael Thomas Imperato, M.D. has submitted, inter alia, an attorney’s affirmation; amended summons and complaint, his answer, the transcripts of the examinations before trial of Marjorie Reilly dated October 28, 2009, David Cohen, M.D. dated January 15, 2010, and Michael Imperato, M.D. dated March 26, 2010; the certified record of Peconic Bay Medical Center; Stony Brook University Hospital record; and the physician’s affirmation of Jerome Shupack, M.D.

In motion (006), Marjorie Reilly and Carlos Reilly oppose the defendants motions and seek an order denying the within motions and precluding defendants who failed to oppose co-defendants’ motions from

seeking contribution or Article 16 apportionment as to any defendant against whom this action is dismissed. In support of this application, the plaintiffs have submitted, inter alia, an attorney's affirmation; plaintiffs' expert affirmation; records from Peconic Ear, Nose Throat & Facial Surgery P.C. as provided by defendant's counsel, Barth Pharmacy records; the transcript of the examination before trial of Marjorie Reilly, Peconic Bay Hospital medical records; and the transcripts of the examinations before trial of Kevin Bratt, M.D. dated January 14, 2010, Michael Imperato, M.D. dated March 26, 2010, Paul Davey, M.D. dated June 10, 2010, and David Cohen, M.D. dated January 15, 2010.

The requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage (*Holton v Sprain Brook Manor Nursing Home*, 253 AD2d 852, 678 NYS2d 503 [2d Dept 1998], *app denied* 92 NY2d 818, 685 NYS2d 420 [1999]). To prove a prima facie case of medical malpractice, a plaintiff must establish that defendant's negligence was a substantial factor in producing the alleged injury (*see Derdiarian v Felix Contracting Corp.*, 51 NY2d 308, 434 NYS2d 166 [1980]; *Prete v Rafla-Demetrious*, 224 AD2d 674, 638 NYS2d 700 [2d Dept 1996]). Except as to matters within the ordinary experience and knowledge of laymen, expert medical opinion is necessary to prove a deviation or departure from accepted standards of medical care and that such departure was a proximate cause of the plaintiff's injury (*see Fiore v Galung*, 64 NY2d 999, 489 NYS2d 47 [1985]; *Lyons v McCauley*, 252 AD2d 516, 517, 675 NYS2d 375 [2d Dept], *app denied* 92 NY2d 814, 681 NYS2d 475 [1998]; *Bloom v City of New York*, 202 AD2d 465, 465, 609 NYS2d 45 [2d Dept 1994]).

To rebut a prima facie showing of entitlement to an order granting summary judgment by the defendant, the plaintiff must demonstrate the existence of a triable issue of fact by submitting an expert's affidavit of merit attesting to a deviation or departure from accepted practice, and containing an opinion that the defendant's acts or omissions were a competent-producing cause of the injuries of the plaintiff (*see Lifshitz v Beth Israel Med. Ctr-Kings Highway Div.*, 7 AD3d 759, 776 NYS2d 907 [2d Dept 2004]; *Domaradzki v Glen Cove OB/GYN Assocs.*, 242 AD2d 282, 660 NYS2d 739 [2d Dept 1997]).

Marjorie Reilly testified to the extent that she first saw Dr. Bratt, an ENT (Ear, Nose & Throat) specialist, in August 2007 as she was experiencing sinus pressure and thought she might have a sinus infection. She generally experienced sinus infections two to three times a year and previously treated with her general physician, Dr. Lieberman, until 2006, then switched to Dr Spiegel, another general physician. She referred herself to Dr. Bratt. Upon presentation, she was examined by Dr. Bratt and prescribed Buta for headaches and sinus spray. Shortly thereafter, in September 2006, she saw Dr. Spiegel for stomach problems, H. pylori, for which she was treated for three weeks with medication. On November 20, 2006, she was prescribed Retin-A for her face for acne by Dr. Notaro, a dermatologist. On December 17, 2007, she saw Dr. Davey as Dr. Bratt was not available. She presented with a painful lump on the left side of her neck. Dr. Davey examined her and prescribed Avelox, once a day for 21 days, for any possible infection. Prior to this date, she was aware that she had an allergy to Penicillin. Ms. Reilly testified that she had the prescription filled and started taking it that same day, after she read the accompanying circular. About 5:00 or 6:00 p.m. that afternoon, she felt a generalized achiness. The following day, she took the second dose of Avelox, and later developed some shortness of breath, felt tired, and had generalized achiness.

Ms. Reilly continued that on December 19th, upon awakening in the morning, she found her lips were swollen and her eyes were bulging. She noticed a pink rash on her arms and stomach. She went to Peconic Bay Hospital emergency room where she was seen by Dr. Cohen and instructed to stop taking

Avelox. An intravenous was started and medications for the allergic reaction were administered. She was discharged with a prescription for what she believed was an antibiotic. The swelling of her eyes and lips improved, and the rash was lighter. The following morning, about 1:00 a.m. on December 20, 2007, she awoke with swelling of her lips and noticed her eyes were bulging again. This time, her face was swollen and red, and the rash was back with a vengeance. She was itchy and noticed two black dots on her tongue. She returned to Peconic Bay Medical Center emergency room where she was seen by Dr. Imperato. After examination, an intravenous was started and blood was drawn. Upon completion of the intravenous medications, she felt her face was still swollen, and she did not feel any better. While she was speaking with Dr. Imperato, she felt something inside her mouth. She stated Dr. Imperato told her the lining of her mouth was peeling. She stated he advised her that she could pull it out of her mouth and rinse, which she did. She then told him her tongue was black and that he advised her that the lining on her tongue was going to come off also. Dr. Imperato discharged her and told her he was making an appointment with Dr. Bratt for December 20, 2007 at 3:00 p.m. She testified that she thought she overheard him say that he had one of Dr. Bratt's patients who looked like she had Stevens Johnson Syndrome.

Mrs. Reilly testified that when she left Peconic Bay Hospital emergency room, she drove herself to Stony Brook University Hospital emergency room, whereupon she was advised that she had Stevens Johnson Syndrome. She testified that she was told that it was a severe allergic reaction to an antibiotic and that she was being admitted to the hospital. She was admitted to the intensive care, and transferred to the burn unit for second degree burns on her body. She testified that she was in and out of consciousness, and became conscious for a notable period of time for about a week and a half out of the five weeks and one day she was hospitalized. She was discharged from Stony Brook Hospital on January 25, 2008.

Carlos Reilly testified that when his wife was admitted to Stony Brook Hospital, he was advised that his wife's reaction was caused by Avelox. He was not told by anyone that his wife's treatment would have been different had the diagnosis of Stevens Johnson syndrome been made earlier, and no one criticized the care she received prior to coming to Stony Brook.

Dr. Davey testified that he is board certified in otolaryngology. He certified his office records maintained in the form of an electronic record and testified about the computer system by which the records were maintained. He joined Peconic Ear, Nose, Throat & Facial Plastic Surgery P.C. in January 2007, and is a shareholder in the corporation. Dr. Davey continued that when a patient presents to the office, an initiation form is completed, accessible to the physicians that see the patient on subsequent visits at the different facilities, as the computers in those offices are networked. Ms. Reilly's record indicated that she had no known allergies on December 17, 2007, which is a default into the computer unless it is changed. He testified that he would have known that she had allergies to Penicillin as he would have asked her if she had any allergies.

He continued that when Ms. Reilly was seen on December 17, 2007 for two enlarged lymph nodes and sinusitis, it was entered into the computer that she had a Penicillin allergy. However, that entry would not show up until the next visit because the computer does not automatically correct on that particular visit. Dr. Davey testified that if the patient told him she was allergic to Penicillin, he would nevertheless have given a prescription for Avelox (quinolome), because, in 2007, it was acceptable that if a patient is allergic to Penicillin, Avelox can be prescribed. When questioned as to "where there's a handwritten history from the patient of an allergy to Penicillin, is it contrary to good medical practice to prescribe a Penicillin-based antibiotic....," he responded, "Yes." He testified that he ordered fluconazole on December 17, 2007 for Ms.

Reilly, it is because she advised him that she gets a vaginal yeast infection when she goes on general antibiotics. He advises patients that if they have an unusual reaction to a medication, to stop it.

Dr. Davey stated that Kathleen Histan is a nurse employed in his practice, and according to the office chart, she spoke to him about Marjorie Reilly. He continued that there apparently was a conversation with Kathleen Histan on December 18, 2007 when they discussed changing Ms. Reilly's antibiotic to Augmentin as Ms. Reilly had been seen in the emergency room. There was an addendum on the chart dated December 19, 2006, at 9:59 a.m. indicating that a medication was prescribed or changed for Ms. Reilly. He stated that this was done by telephone as Ms. Reilly had not been seen in the office that day. He wrote a prescription that day, as reflected on the chart, for Augmentin, a penicillin-based antibiotic. Kathleen Histan would have called the pharmacy with the prescription. Nurse Histan did not indicate in the chart that Ms. Reilly had a reaction to Avelox. He continued that when Ms. Reilly called and reported her symptoms, she was told to stop taking Avelox due to her indeterminate symptoms. He prescribed the Augmentin to replace Avelox for the sinus infection some time between December 17, 2007 and the day that nurse Histan entered the addendum note on December 19, 2007. He stopped the Avelox as a precautionary because he thought she could be having a reaction to it. However, the prescription for Augmentin was not filled by the pharmacy due to Ms. Reilly's allergy to Penicillin. Therefore, he prescribed Bactrim for her on December 19, 2007. Dr. Davey testified that reactions to Avelox could include flu-like symptoms or anaphylactic reaction characterized by swelling, breathing problems, or asthma. Dr. Davey stated that any antibiotic can probably be implicated in Stevens Johnson Syndrome and TENS (Toxic Epidermal Necrolysis Syndrome), some more likely than others. He continued that the appearance of either Stevens Johnson Syndrome or TENS was a known complication associated with Avelox in 2007. The appearance of any type of reaction to a newly prescribed drug is something that acts as red flag to him as a physician.

Kathleen Bekiesz-Histan, L.P.N. testified to the extent that she is a licensed in New York State as a practical nurse and has been employed by Peconic Ear, Nose & Throat since 2004. She worked out of their various offices and worked with Dr. Davey. She was familiar with the MISYS computer system for maintaining patient charts and used it at their various offices for taking patient histories, documenting phone calls, and scheduling appointments. When she takes a call from a patient, she writes down the complaint and discusses it with the doctor. After she is advised what to do, she then types it into the MISYS computer system, usually at the time. She was not authorized to prescribe medication, but was authorized to call in medications to the pharmacy. If the patient had an allergy to anything, and the patient wrote it in the history, it would be entered into the computer. She did not recall Marjorie Reilly. With regard to the note of December 19, 2007, which she entered into the computer on Marjorie Reilly's office chart, she indicated that "Patient called, having flu-like symptoms since on the medication Avelox. Also just got over H. pyloric two to three weeks ago. Meds changed to Augmentin 875 mg. bid for three weeks. Electronically signed by KH on Wednesday December 19, 2007." Nurse Histan testified that she spoke to Ms. Reilly between 8:00 a.m. and 9:59 a.m. on December 19, 2007, but did not recall that she mentioned she was in the emergency room at the time. If she did, she would have documented it. She then spoke with Dr. Davey and changed the medication, as ordered by him, and called the prescription into the pharmacy. She had the custom and practice of checking the patient's chart to determine if the patient was allergic to any medication. She further testified that Avelox was a routinely prescribed medication at the office for sinus and throat infections.

David Bryant Cohen, M.D. testified to the extent he is licensed to practice medicine in New York and has been board certified in emergency medicine since 2002. In 2007, he was employed by Stony Brook Emergency Physicians, P.C., and, in that capacity, worked in the emergency rooms at Stony Brook University Hospital and Peconic Bay Medical Center (Central Suffolk Hospital). Prior to December 2007, he might have attended lectures during his residency program which covered the topic of Stevens Johnson Syndrome, but he did not recall. He continued that the core curriculum in emergency medicine covers the diagnoses and treatment of allergic reactions. Treatment would depend upon the severity of the reaction, whether it was mild, moderate, severe, or anaphylactic. He stated that a mild reaction would be something as benign as urticaria (hives), or systemic symptoms for which antihistamines would suffice, followed by observation. A moderate reaction might involve angioedema and urticaria, which would be treated with antihistamines, followed by steroids. Alpha and beta antagonists would be considered, depending upon the severity of the reaction. The patient would also be observed. A severe reaction would include all the foregoing symptoms, plus some alterations in vital signs, respiratory compromise, and multiple organ system involvement. Treatment would involve antihistamines, steroids, possible alpha and beta antagonists, stabilization of the airway, IV fluids, and hypotensive pressors, such as Dopamine.

Dr. Cohen testified that he had no independent recollection of Marjorie Reilly. The emergency room records indicate that she arrived in the emergency room at Peconic Bay Medical Center on December 19, 2007 at 8:07 a.m. It was his custom and practice to review the triage note and nursing assessment written by the triage nurse. The relevant triage note indicated that Ms. Reilly presented with a skin rash/abscess. At 9:00 a.m., he wrote a note indicating that she was a thirty nine year old female with swollen lips, red rash, itching of her face and trunk since last night, with no chest pain, shortness of breath, or difficulty swallowing. She had started Avelox (antibiotic-a third generation Quinolone) for a swollen cervical lymph node. He noted that she was allergic to Penicillin. Dr. Cohen testified that because she had urticaria and angioedema, he determined she was having a moderate allergic reaction. He suspected that it was a reaction to Avelox because her symptoms started after she started taking it. He noted that she had a swollen left anterior cervical lymph node. There was no abnormality noted on her tongue. He wrote orders for Solu-Medrol 125 mg. (to reduce inflammatory mediator release), Benadryl 50 mg (to block the effect of histamine at target tissues), and Pepcid 20 mg. (to block the effect of histamine at target tissues), which were administered to her intravenously.

Dr. Cohen testified that thereafter, the rash and swelling around her face decreased, as noted in the record. He wrote a discharge note at 10:15 a.m. Given the swollen node with tenderness, he prescribed Clindamycin (an antibiotic), and discontinued the Avelox. He described to her the allergic reactions and the different events which she could develop, and he recommended that she follow up with her private medical doctor. At 11:30 a.m., the nurse's note indicated that "[p]atient feels better, requesting discharge, Dr. Cohen aware." Ms. Reilly was thereafter discharged from the emergency room. He did not consider that she was suffering from Stevens Johnson Syndrome.

Michael Imperato, M.D. testified to the extent that he is licensed to practice medicine in New York and is board certified in both internal and emergency medicine. In 2007, he was employed by Stony Brook University, Department of Emergency Medicine, as an attending physician in the emergency room at Peconic Bay Medical Center. On December 20, 2007, at about 3:00 a.m., Marjorie Reilly presented to the emergency room at Peconic Bay Medical Center complaining of a rash and swollen lips for two days, and with a sore throat and swollen lymph gland on the left side of her neck for four days. She advised Dr. Imperato that she had seen Dr. Braat and was prescribed Avelox, and further apprised him of her prior visit

to the emergency department the day before. He reviewed her vital signs. She stated she had tingling of the fingers on both hands. He stated that she appeared non-toxic and in no acute distress. He noted a red rash involving her entire face (confluence of red macules); swollen, cracked lips; petechiae on her palate; question of a small black spot on tongue; and sloughing of epithelium (superficial lining) on the top of her mouth. He determined that she had no fever, chills, blurred vision, double vision, or pain in her eyes, or shortness of breath or wheezing.

Dr. Imperato continued that hives can come and go for several weeks with an allergic reaction, and that the cracked lips could take days to heal. Because some of these findings can be found in causes other than an allergic reaction, he ordered a mono spot test for mononucleosis and considered a viral infection. He ordered Benadryl, Solu Medrol, and Pepcid, which were administered intravenously. He did not expect an immediate response to the Solu Medrol to suppress inflammation as it generally takes hours to have an effect. His diagnosis was that of allergic reaction, but he had differential diagnoses of infection or viral infection as well. He did not consider Stevens Johnson Syndrome. He instructed her to discontinue both the Avelox and Clindamycin as he felt that it could have been Clindamycin which was making her condition worse. He spoke with Dr. Bratt at about 6:20 a.m. and advised Ms. Reilly to follow with Dr. Bratt and her regular medical doctor. He did not recall any of his conversation with Dr. Bratt. Ms. Reilly was discharged about 8:00 a.m. His shift ended in the emergency room at 7:00 a.m. He testified that there was nothing on the record to indicate that Ms. Reilly was taking Augmentin.

Kevin Bratt, M.D. testified to the extent that he treated Marjorie Reilly once in his office on September 27, 2007 for complaints of recurring headaches/pressure which correlated with recent weather changes. Upon examination he found no signs of infection and did not diagnose her with sinusitis. On December 20, 2007, he received a call from Peconic Bay Medical Center emergency room from Dr. Imperato indicating that she was in the emergency room. He continued that Dr. Imperato advised him that he thought she was having an allergic reaction to an antibiotic which was prescribed by another physician, and that he was calling to arrange for follow up in his office. Dr. Imperato indicated that this was her second visit to the emergency room and advised him of her symptoms, including a couple of minor dark areas in her mouth, but nothing of significance. He thought the dark areas were unrelated to the allergic reaction to Avelox. He testified that he was not asked to come into the emergency room. Dr. Bratt stated that Ms. Reilly had taken a second dose of Avelox, which has a 24 hour duration of action, so it was going to be with her for a while. He did not think Avelox was capable of causing Stevens Johnson Syndrome. He did not speak with her on the telephone. When he spoke with Dr. Imperato, he did not give thought to the possibility of Stevens Johnson syndrome as it is an incredibly rare condition, and there was nothing explained that was extraordinary in any way. He learned that she had Stevens Johnson Syndrome as she lived in the same small town, and it was all over the local Facebooks and e-mails, as well as word of mouth, about doctors using dangerous drugs to treat sinus infections.

Turning to motion (002), defendants Kevin Bratt, M.D., Peconic Ear, Nose, Throat & Facial Plastic Surgery, P.C., Paul Davey, M.D. and Paul Davey, M.D., P.C. have submitted the affirmations of their experts, pharmacologist Jack M. Rosenberg and otolaryngologist, Michael Setzen, M.D.

Jack M. Rosenberg, Pharm, D., Ph.D., affirms that he is a pharmacist licensed in New York, New Jersey, and Florida, and has a Ph.D. in pharmacology. He submits his affirmation on behalf of the defendants, Kevin Bratt, M.D., Peconic Ear, Nose, Throat & Facial Plastic Surgery, P.C., Paul Davey, M.D. and Paul Davey, M.D., P.C. It is noted that this out-of-state affirmation was notarized in New Jersey and

will be considered as an affidavit pursuant to CPLR 2109. It is pharmacist Rosenberg's opinion with a reasonable degree of pharmacological certainty that Dr. Davey's prescription of Avelox for twenty one days on December 17, 2007 was appropriate and proper treatment for the plaintiff's complaints of pain and swelling on the left side of her neck. Moreover, he stated, she was advised to return to the doctor's office at the end of ten days, or unless she otherwise felt worse.

Pharmacist Rosenberg continued that Avelox, a Quinolone antibiotic capable of stopping the growth of bacteria, is used to treat a number of bacterial infections. Its most common side effects are nausea, diarrhea, dizziness, lightheadedness, headache, weakness, or trouble sleeping. He stated that there were no specific contraindications for the plaintiff's use of Avelox, as other than pregnancy, the only other possible contraindication to its use would have been a history of allergic reaction to this class of drugs. Based upon a review of the plaintiff's records, there is nothing to suggest from the plaintiff's medical history that she would experience an allergic reaction to its use. Avelox would be a drug of choice and logical to prescribe if there is a history of Penicillin allergy.

Pharmacist Rosenberg set forth that the plaintiff experienced a rare, unpredictable, and unforeseeable type III allergic reaction to Avelox, wherein the patient develops either Stevens Johnson Syndrome or Toxic Epidermal Necrolysis (TENS). The plaintiff's subsequent complaint of flu-like symptoms was nonspecific and would not have alerted Dr. Davey that she was beginning to experience an adverse reaction to Avelox, especially due to the rare, unpredictable, and unforeseeable adverse reaction. Pharmacist Rosenberg continued that plaintiff's claim that Dr. Davey was negligent in prescribing Augmentin is a "red herring" because she never filled the prescription for Augmentin and never ingested it.

As to Dr. Kevin Bratt, Pharmacist Rosenberg set forth that Dr. Imperato called him at 6:20 a.m. on December 20, 2007 to advise that the plaintiff was exhibiting signs and symptoms of an adverse reaction to Avelox, and to make arrangements for her to see Dr. Bratt that morning. However, on her own volition, the plaintiff immediately drove herself to Stony Brook University Hospital emergency room where she was diagnosed with Stevens Johnson Syndrome, and admitted to the hospital until her discharge on January 21, 2008. He continued that there was no delay between the time of the conversation between Dr. Imperato and Dr. Bratt, and her subsequent evaluation and admission to Stony Brook University Hospital, where she was properly treated for her condition.

Michael Setzen, M.D. affirms that he is licensed to practice medicine in New York and is board certified in otolaryngology with a subspecialty in otolaryngology/facial plastic surgery. He submitted his affirmation on behalf of defendants Kevin Bratt, M.D., Peconic Ear, Nose, Throat & Facial Plastic Surgery, P.C. and Paul Davey, M.D. and Paul Davey, M.D., P.C. It is Dr. Setzen's opinion with a reasonable degree of medical certainty that the aforementioned defendants did not depart from good and accepted medical practice in their care and treatment of the plaintiff, nor were any of their actions the proximate cause of her injuries.

Dr. Setzen opined that Dr. Davey took an appropriate history, performed an appropriate examination, concluding that she had swelling, mass, or a lump in the head or neck, unspecified sinusitis (chronic), and sialadenitis (inflammation of the salivary glands), for which he prescribed Avelox 400 mg., daily for three weeks, with a follow up in the office in ten days. He opined that Avelox is an appropriate choice of medication given the plaintiff's history of Penicillin allergy, and given there were no specific contraindications in prescribing it. When the plaintiff called the office complaining of flu-like symptoms

since starting Avelox, Dr. Davey appropriately discontinued the Avelox and prescribed Augmentin. He continued that although Dr. Davey prescribed Augmentin, which can cause an allergic reaction in individuals allergic to Penicillin based antibiotics, there is no causal connection between Dr. Davey prescribing Augmentin and any injury to the plaintiff because the prescription was never filled and the drug was never ingested by the plaintiff. He additionally opined that when the plaintiff complained of flu-like symptoms, Dr. Davey did not depart from good and accepted standards of medical care in failing to consider these symptoms as a heralding sign of an extremely rare and adverse reaction to Avelox, namely, Stevens Johnson Syndrome.

Dr. Setzen further opined that Dr. Kevin Bratt did not depart from good and accepted medical practice in his care and treatment of the plaintiff, nor were any of his actions the proximate cause of her injuries, as Dr. Bratt had no personal contact with her from December 19th through 20th, 2007. Rather, his involvement was limited to a telephone call which he received at 6:20 a.m. on December 20, 2007 from the emergency room physician at Peconic Bay, Dr. Imperato, advising him that she was having an allergic reaction to an antibiotic prescribed by another physician, and that he was treating the reaction. Dr. Bratt instructed Dr. Imperato to have the plaintiff come to his office that morning. However, the plaintiff, upon discharge from the emergency room, took herself to Stony Brook Hospital where she arrived at approximately 9:00 a.m. on December 20, 2007, and was admitted for inpatient treatment upon being diagnosed with Stevens Johnson Syndrome. Thus, opined Dr. Setzen, there was no significant delay in the management and treatment from when Dr. Bratt was contacted, and the plaintiff was admitted to Stony Brook University Hospital; that Dr. Bratt did not depart from good and accepted medical practice in his care and treatment of the plaintiff; and none of his alleged departures proximately cause the plaintiff's injuries.

Based upon a review of the evidentiary submissions and the expert testimony by Pharmacist Rosenberg and Dr. Setzen, the moving defendants in motion (002), Kevin Braat, M.D., Peconic Ear, Nose, Throat & Facial Plastic Surgery, P.C., Paul J. Davey, M.D., and Paul J. Davey, M.D., P.C., have established prima facie entitlement to summary judgment dismissing the complaint on the bases that they did not depart from good and accepted standards of care and treatment and did not proximately cause the plaintiff's injuries.

In motion (003), defendant Peconic Bay Medical Center has submitted the affirmation of its expert, John Rohe, M.D.

John Rohe, M.D. affirmed that he is a physician licensed to practice medicine in New York, and that he is board certified in emergency medicine with an additional bachelor of science in Pharmacy. He set forth the records and materials which he reviewed and opined with a reasonable degree of medical certainty that the employees and staff at Peconic Bay Medical Center did not depart from accepted standards of medical practice in the care and treatment of the plaintiff. Dr. Rohe set forth the plaintiff's clinical presentations to the emergency room at Peconic Bay Medical Center, and the care and treatment provided by the hospital nursing staff and employees. He opined that at all times that the nurses and hospital personnel appropriately followed orders and directives of the treating physicians during the emergency room visits, and that the care and treatment they provided was not the proximate cause of the plaintiff's injuries.

Dr. Rohe continued that with regard to Dr. Cohen and Dr. Imperato, that the care and treatment they provided was reasonable and in accordance with the standards of emergency medicine, and that such care and treatment was not the proximate cause of the injuries claimed by the plaintiff.

Dr. Rohe stated that although the plaintiff alleged that there was a failure by defendant hospital to promulgate certain rules and regulations, including rules regarding treatment of skin rashes/abscesses, reviewing blood test results, and obtaining consultations, it is his opinion that determination regarding the broad sweeping and general topics of reviewing blood test results, obtaining consultations, and treating rashes or abscesses, are matters of clinical judgment to be evaluated on a case by case basis by the clinician. He continued that it is not the standard of care for a hospital to regulate or promulgate rules regarding the treatment of skin rashes, the review of test results, or whether a consultation is required, and thus, the hospital's purported failure to provide any such written rules or regulation is not a cause or contributing factor to any of the plaintiff's claimed injuries.

It is determined that Peconic Bay Medical Center has sufficiently established prima facie entitlement to summary judgment dismissing the complaint.

Turning to motion (004), David Cohen, M.D. and Stony Brook Emergency Physicians, P.C. have submitted the affirmation of their experts, Joseph Lamantia, M.D. and Jerome Shupack, M.D.

Joseph Lamantia, M.D. has affirmed that he is a physician duly licensed to practice medicine in New York and is board certified in emergency medicine and internal medicine. He set forth his experience and training and the records and materials which he reviewed. He opined with a reasonable degree of medical certainty that the care and treatment rendered by David Cohen, M.D. was at all times within the confines of good and accepted medical practice and did not proximately cause the injuries claimed by the plaintiff.

Dr. Lamantia set forth that there are differing degrees of allergic reactions; some of which present in stages along a relatively consistent continuum. On the mild side, a patient may develop hives or other skin rash, next, they may develop angioedema or swelling. A more serious reaction can include the aforementioned, along with sloughing of, or other involvement of, the mucous membranes. Anaphylaxis is an often life-threatening, severe, and sudden allergic reaction. He opined, the when the plaintiff presented to the emergency room at Peconic Bay on December 19, 2007, she complained of urticaria (hives) and angioedema (swelling of her face and lips), however, there was no sloughing or other significant involvement of her mucous membranes, and she did not present with any symptoms of anaphylactic nature.

Dr. Lamantia continued that the plaintiff was diagnosed with Stevens Johnson Syndrome at Stony Brook Hospital on December 20, 2007. He stated that this syndrome is a rare, serious reaction of the skin and mucous membranes to a medication or to an infection. It often begins with flu-like symptoms, followed by a rash that spreads and blisters, eventually causing the top layer of skin to die and shed or slough. The treatment for this syndrome focuses on eliminating the underlying cause, controlling the symptoms, and minimizing complications. It is Dr. Lamantia's opinion that the plaintiff did not present with symptoms which would have warranted consideration of Stevens Johnson Syndrome on the morning of December 19, 2007.

Dr. Lamantia set forth the care and treatment provided by Dr. Cohen to the plaintiff when she presented to Peconic Bay Medical Center on December 19, 2007. He opined that Dr. Cohen took a full and accurate history, including ascertaining that her symptoms had begun the prior evening, and that she had recently begun taking Avelox, prescribed by Dr. Davey, for swollen nodes in her neck. Dr. Cohen immediately started the plaintiff on a course of IV Solu Medrol to reduce inflammation, and IV Benadryl and Pepcid to block the effect of histamine at target tissues. Dr. Lamantia opined that this treatment was appropriate for a patient presenting with this history and presenting symptoms. This treatment was followed with good response wherein a uniform decrease in the rash and swelling of her face and lips was noted. The plaintiff also testified that she felt better after this treatment. Thereafter, detailed discharge instructions were provided to the plaintiff, who was advised to follow up with her private attending physician, or to return to the emergency room if her symptoms worsened. On the early morning of December 20, 2007, the plaintiff returned to the emergency room at Peconic Bay Medical Center, as her symptoms worsened.

Dr. Lamantia concluded that there was no medical evidence present during the emergency room visit by the plaintiff on December 19, 2007 to warrant a diagnosis of Steven Johnson Syndrome at the time by Dr. Cohen. Aside from generalized achiness, there were no flu-like symptoms; she was afebrile; she was not nauseous or vomiting; and there was no mucous membrane involvement. The treatment provided by Dr. Cohen did not cause, hasten, or worsen the later diagnosed Stevens Johnson Syndrome. It was at all times within the confines of good and accepted medical practice, and was not the proximate cause of the injuries claimed by the plaintiff.

In support of motion (005), defendant Michael Imperato, M.D. has submitted the affirmation of his expert physician, Jerome Shupack, M.D.

Jerome Shupack, M.D. affirmed that he is a physician licensed to practice medicine in New York and that he is a board certified dermatologist. He set forth his education and work experience, and opined with a reasonable degree of medical certainty that there is nothing that Dr. Cohen or Dr. Imperato did or failed to do which caused any of the injuries claimed by the plaintiff. Regarding Dr. Cohen and Dr. Imperato, it is Dr. Shupack's opinion that the treatment received by the plaintiff, and her ultimate outcome, would not change regardless of the actions taken by Dr. Cohen or Dr. Imperato.

Dr. Shupack continued that on December 16, 2007, the plaintiff developed a painful swollen lump on the left side of her neck. She presented to Dr. Davey on December 17, 2006 for evaluation. She was examined, the findings were noted, and she was prescribed Avelox, once a day for a twenty-one day course of treatment. The plaintiff had never taken Avelox before, but she did have a history of allergy to Penicillin. Upon filling the prescription, the plaintiff was provided with literature from the manufacturer, which literature the plaintiff read prior to taking the medication. There was nothing in the literature which caught the plaintiff's attention, and she drank fluids as recommended. The first dose of Avelox was taken at noon on December 17, 2007. At about 6:00 p.m., she felt mildly achy. She worked on December 18, 2007, and took her second dose of Avelox at noon. By 2:00 p.m., she felt achy and developed shortness of breath and generalized weakness. Her eyes began to bother her, but she remained at work and her symptoms did not worsen.

At about 8:00 a.m. on December 19, 2007, the plaintiff drove herself to the emergency room at Peconic Bay Medical Center as her eyes were bulging and her lips and eyelids were swollen. She also had a

light pink rash. Dr. Shupack set forth the care and treatment provided by Dr. Cohen and noted his findings. Dr. Cohen discontinued the Avelox and ordered Solu Medrol, Benadryl and Pepcid via intravenous administration for the primary diagnosis of allergic reaction. Her secondary diagnosis was adenitis. She was advised upon discharge from the emergency room to follow up with her primary doctor, and was provided prescriptions for Benadryl every six hours and Pepcid twice daily while the rash persisted, Prednisone to be taken for four days, and Clindamycin. The plaintiff had her prescriptions filled but did not follow up with her medical doctors.

On December 20, 2007, early in the morning, the plaintiff returned to the emergency room at Peconic Bay Medical Center where she was seen by Dr. Imperato, who obtained her history, examined her, and ordered the same treatment as previously ordered by Dr. Cohen. Dr. Imperato called Dr. Bratt from the emergency room. The plaintiff reported that she had sloughing during this visit. After she stabilized, she was discharged with instructions. From Peconic Bay Medical Center, the plaintiff drove herself to Stony Brook University where she was admitted for treatment upon being diagnosed with Stevens Johnson Syndrome. Examination by Dr. Thosani revealed injected ocular conjunctiva, sloughing of the oral mucosa with areas of gingiva, white plaque and vermillion on the tongue, with areas of sloughing. There were erythematous non-scaling blanchable papules extending to the bilateral arms and thighs. Her chest and back were slightly dusky and erythematous. Pathology of a frozen section was consistent with Stevens Johnson Syndrome. Dr. Thosani noted that if this was indeed Stevens Johnson Syndrome, that it was an early presentation and that IVIg would be started only after checking IgA to ensure no anaphylaxis response. She thought the white coating on the tongue could represent thrush rather than sloughing. Dr. Shupack summarized the additional care and treatment provided to the plaintiff during her hospitalization at Stony Brook.

Dr. Shupack opined that there was nothing which Dr. Cohen or Dr. Imperato did, or failed to do, which had any causal effect on the treatment the plaintiff received or on her outcome. He continued that when the plaintiff was seen by Dr. Cohen, she presented with an allergic reaction, which can be classified into a continuum of symptoms. Reactions usually start with erythema multiforma and may end there. If it continues, it becomes Stevens Johnson Syndrome with an expanding area of rash and mucosal involvement. If it does not end there, it may become Toxic Epidermal Necrolysis, with very extensive dermal and mucosal involvement, with the skin basically falling off in large sections, leaving raw flesh exposed. Dr. Shupack stated that once the allergic reaction process starts, it works its course regardless of intervention, and there is no way to determine which patient's reaction will end earlier and which may develop to Stevens Johnson Syndrome or progress to Toxic Epidermal Necrolysis. Dr. Shupack continued that the plaintiff's condition did not progress to Toxic Epidermal Necrolysis until after her admission to Stony Brook Hospital.

Dr. Shupack opined that when the plaintiff treated with Dr. Cohen, she had an allergic reaction which he properly treated with steroids and Benadryl, and there was nothing else to do at this time. When the plaintiff was seen by Dr. Imperato, her allergic reaction progressed based on its continued presence and greater physical involvement, which Dr. Imperato properly and timely treated. Dr. Shupack opined that additional forms of treatment for the plaintiff's symptoms at the time of her second discharge from Peconic Bay would not have been attempted until there was a notable change in her symptoms. He continued that further treatment was not provided by Stony Brook Hospital for many hours after her admission, during which time her condition was monitored while testing was done. The consulting dermatologist at Stony Brook determined that this appeared to be an early presentation of Stevens Johnson Syndrome. Dr. Shupack continued that once this allergic process starts, it works its course, regardless of intervention. The

only effective “treatment”, he opined, that can be provided is to minimize pain and maximize cleanliness to avoid infection of the skin as it becomes exposed as the reaction progresses to Toxic Epidermal Necrolysis. While it is alleged that Dr. Cohen and Dr. Imperato failed to administer IVIg, it is Dr. Shupack’s opinion that this is only given to patients whose allergic reactions are worse than what this patient’s were when she saw Dr. Cohen and Dr. Imperato. Further, he opined, that although IVIg is routinely given to patients with advanced allergic reactions, it has not been shown to alter a progressing allergic reaction. Dr. Shupack opined that when the plaintiff saw Dr. Cohen and Dr. Imperato, her reaction was going to progress regardless of intervention.

Based upon the foregoing, it is determined that David Cohen, M.D. and Stony Brook Emergency Physicians, P.C. and Michael Imperato, M.D., in motions (004) and (005), have established prima facie entitlement to summary judgment dismissing the complaint on the bases that they did not depart from good and accepted standards of medical practice and they did not proximately cause the plaintiff’s injuries

The plaintiff opposes motions (002), (003), (004), and (005) with the affirmation of her expert who is duly licensed to practice medicine in New York and is certified in internal medicine with experience in emergency medicine, trauma, and critical care. The plaintiff’s expert set forth his experience and the records reviewed, and renders opinions premised upon a reasonable degree of medical certainty. It is the plaintiff’s expert’s opinion that there is evidence of substandard care and departures from accepted medical practice on the part of the treating physicians which were the proximate cause of the catastrophic injuries sustained by the plaintiff.

As to Dr. Bratt, the plaintiff’s expert opined that when Dr. Bratt, on September 27, 2007, documented that the plaintiff had no known drug allergies, that this was a departure from accepted medical practice. However, the plaintiff has not set forth an opinion that this alleged departure was the proximate cause as to any injuries sustained by the plaintiff. The adduced testimonies and the experts have established that Avelox is not contraindicated when a plaintiff has a Penicillin based allergy. Thus, whether or not the plaintiff had a Penicillin allergy does not alter the outcome as she was not administered Penicillin. Thus, this alleged departure did not proximately cause the plaintiff’s injuries.

Accordingly, that part of motion (002) by Kevin Bratt, M.D. for summary judgment is granted and the complaint and any cross claims asserted against him are dismissed.

The plaintiff’s expert opines that Dr. Davey noted no allergies to medication and prescribed Avelox, which plaintiff’s expert considers to be a drug of last resort when other medications have failed to treat a confirmed bacterial infection. The plaintiff’s expert set forth that Dr. Davey did not confirm a bacterial infection with cultures, blood tests or imaging studies of the head or neck to determine the cause of the swollen lymph node in her neck. While the plaintiff’s expert has not established that Avelox was contraindicated in a patient with Penicillin allergy, or that he should have known that it would cause the plaintiff to experience an allergic reaction, the plaintiff’s expert has raised a factual issue concerning whether or not Dr. Davey departed from the standard of care by prescribing an antibiotic without first confirming a bacterial infection with cultures, blood tests, or imaging studies of the head or neck, to determine the cause of the swollen lymph node in the plaintiff’s neck. The defendant’s expert does not address this issue. Thus, there is a sufficient factual issue concerning whether or not Dr. Davey departed from the accepted standard of care in prescribing an antibiotic without first establishing that such treatment

was appropriate or indicated (*see Berkowitz v Kingsboro Medical Group*, 234 AD2d 327, 651 NYS2d 116 [2d Dept 1996]).

Accordingly, that part of motion (002) by Peconic Ear, Nose, Throat & Facial Plastic Surgery, P.C., Paul J. Davey, M.D., and Paul J. Davey, M.D., P.C. for summary judgment dismissing the complaint and any cross claims asserted against them is denied.

As to Dr. Cohen, the plaintiff's expert set forth the care and treatment provided by Dr. Cohen when he saw the plaintiff at Peconic Bay emergency room on December 19, 2007. It is the plaintiff's expert opinion that Dr. Cohen prematurely and negligently discharged the plaintiff from the emergency room as she required hospitalization for the administration of additional intravenous doses of antihistamine and corticosteroid treatment to eradicate her symptoms, and additional intravenous fluids to flush the Avelox out of her system and reverse the serious allergic reaction, based upon her improvement noted in the emergency room after treatment. However, the plaintiff's expert does not indicate this is the standard of care for an allergic reaction as the plaintiff first presented to the emergency department, or that Dr. Cohen knew, or should have known, that her reaction would worsen.

The plaintiff's expert continued that it was a further departure to order Clindamycin when there was no evidence of any bacterial infection that required antibiotic treatment and she was already experiencing an adverse reaction to the Avelox. The plaintiff does not opine that this departure of ordering Clindamycin proximately caused injury to the plaintiff.

The plaintiff's expert set forth that on December 19, 2007, the timed entry into the plaintiff's medical record at Peconic Ear, Nose, Throat & Facial Plastic Surgery, P.C. indicates that while the plaintiff was in the emergency room, the office became aware of the plaintiff's "flu-like symptoms" after she took Avelox. Dr. Davey then called in an order for Augmentin and Diflucan to Barth's Pharmacy while the plaintiff was in the emergency room. However, the pharmacy did not fill the prescription for Augmentin as the plaintiff was allergic to Penicillin. The plaintiff's expert opined that it was a departure to prescribe Bactrim, however, Bactrim was not noted on the office record, and the pharmacy did not fill the prescription. Thus, although the plaintiff's expert has set forth that there was a departure from the standards of care by Dr. Davey in ordering Augmentin and Bactrim, he has not established proximate cause with regard to plaintiff's injuries, as the medications were never obtained or ingested by the plaintiff. He also opined that it was a departure to order the antifungal when there was no evidence to indicate a fungal or bacterial infection. However, the plaintiff's expert does not opine that this alleged departures was the proximate cause of any injury to the plaintiff.

The plaintiff's expert opined that on December 20, 2007, the plaintiff again presented to Peconic Bay emergency department and was seen by Dr. Imperato. He stated that despite the fact that the plaintiff's presenting symptoms of the rash, swollen cracked lips, petechia, and a dark spot on her tongue, with sloughing of the epithelium of her mouth, did not improve, Dr. Imperato did not order any additional intravenous doses of antihistamines or corticosteroids or arrange admission to the hospital for continued therapy. However, the adduced testimonies establish that Dr. Imperato ordered, and the plaintiff had been administered Solu Medrol, Benadryl, and Pepcid intravenously. The plaintiff had been previously given prescriptions for oral medications, Prednisone and Benadryl the day before by Dr. Cohen, with instructions to continue taking them.

The plaintiff's expert further opined that Dr. Imperato failed to consider that the initial adverse reaction to Avelox might have been exacerbated by subsequent prescriptions for Clindamycin and Diflucan. However, he does not opine that such exacerbation occurred or that it was the proximate cause of her continuing reaction.

The plaintiff's expert continued that Dr. Imperato failed to request a Dermatology consultation or another medical specialist to examine the plaintiff in the emergency room, and that he permitted the allergic reaction to continue and worsen. Here, the plaintiff's expert states in a conclusory manner that the plaintiff's condition was permitted to deteriorate into Stevens Johnson Syndrome, and further to TENS. He does not support this conclusory opinion with a medical explanation for progression of these conditions, or course of Stevens Johnson Syndrome or TENS, and he does not state a basis supporting that such conditions can be reversed. He does not reconcile that while such treatment was not administered at Stony Brook University Hospital for several hours after her presentation, that any delay by Dr. Imperato was the proximate cause of the progression of the syndrome. Although the evidentiary submissions establish that Stony Brook University Hospital did not immediately commence such treatment until hours later, the plaintiff's expert opined that such treatment should have been repeated by Dr. Imperato. The plaintiff's expert offers no basis for the opinion that it would have made a difference if such treatment was again started in the emergency room at Peconic Bay Medical Center, when it was not commenced until hours later at Stony Brook Hospital. Based upon the foregoing, it is determined that while the plaintiff's expert has set forth departures from the standard of care by Dr. Imperato, he has failed to establish that any of those departures were the proximate cause of the progression of the plaintiff's condition or the cause of her injuries, as his opinions relative thereto are conclusory and unsupported.

The plaintiff's expert has not offered an opinion with regard to the cause of action asserted against Peconic Bay Medical Center. Thus, he has failed to raise a factual issue to preclude summary judgment from being granted in its favor.

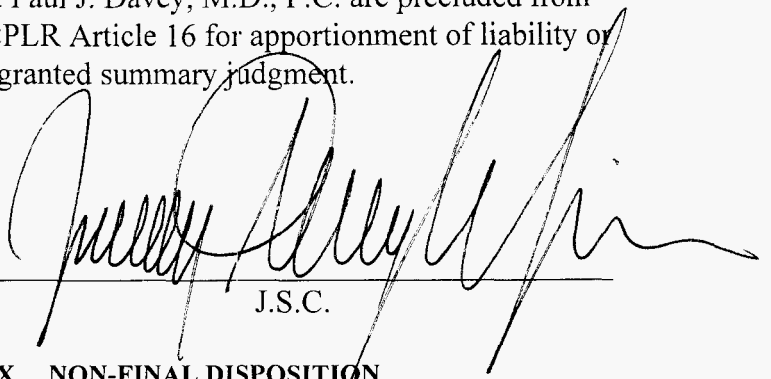
Accordingly, motions (002), (003), (004) and (005) are granted and the complaint and any cross claims asserted against defendants, Kevin Bratt, M.D., Michael Imperato, M.D., David Bryant Cohen, M.D., Stony Brook Emergency Physicians, and Peconic Bay Medical Center are dismissed with prejudice and severed from this action.

Turning to motion (006), the plaintiffs seek an order precluding the defendants from seeking apportionment of liability and contribution against any defendant for whom summary judgment has been granted. None of the defendants have submitted expert affirmations asserting liability against any co-defendant, thus, the limited liability protection afforded by Article 16 as to any other co-defendant at the time of trial is precluded (*see Dembitzer v Broadwall Management Corp*, 2005 NY Slip Op 50303U, 6 Misc 3d 1035A, 800 NYS2d 345, 2005 NY Misc LEXIS 420; citing *Hanna v Ford Motor Co.*, 252 AD2d 478, 479, 675 NYS2d 125 [2d Dept [1998]]). Here, it would be cold comfort to the defendants against whom summary judgment has been granted, and to the plaintiff, if the remaining defendants were permitted to assert the limited liability protection afforded by Article 16 against the defendants where the complaint and cross claims have been dismissed against them. Each defendant had the opportunity to present expert testimony against any co-defendant at this time of summary judgment, and have failed to do so. Thus, they are precluded from doing so at the time of trial.

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Accordingly, motion (006) by the plaintiffs is granted and defendants Peconic Ear, Nose, Throat & Facial Plastic Surgery, P.C., Paul J. Davey, M.D., and Paul J. Davey, M.D., P.C. are precluded from asserting the limited liability protection afforded by CPLR Article 16 for apportionment of liability or contribution against those defendants who have been granted summary judgment.

Dated: July 25, 2012



J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION