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SHORT FORM ORDER

INDEX No. 09-49092
CAL. No. 12-01603MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 1-14-13
ADJ. DATE 1-17-13
Mot. Seq. # 001 - MG
002 - MG

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LAURA STOSS, An Infant by her Mother and Natural Guardian, CHRISTINA STOSS,

Plaintiffs,

- against -

TULIKA NARAIN, M.D., S.V. PEDIATRICS P.C., JOANNA TUTRONE, P.A., CARLOS JUAN RIVERA, M.D., RICHARD JOSEPH SCRIVEN, M.D. and CORAM HEALTH CARE,

Defendant.

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Upon the following papers numbered 1 to 41 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (001)1-18; (002) 19-36; 40-41 ; Notice of Cross Motion and supporting papers__; Answering Affidavits and supporting papers ___; Replying Affidavits and supporting papers __; Other 37-39 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (001) by defendant, Coram Healthcare Corporation of Greater New York s/h/a Coram Health Care, pursuant to CPLR 3212 for summary judgment dismissing the complaint as asserted against it is granted, and the complaint and any cross claims asserted against it are dismissed; and it is further

ORDERED that motion (002) by defendant, Richard Joseph Scriven, M.D., pursuant to CPLR 3212 for summary judgment dismissing the complaint as asserted against him is granted, and the complaint and any cross claims asserted against him are dismissed.

In this medical malpractice action, Christina Stoss, as the mother and natural guardian of Laura Stoss, seeks damages for the infant plaintiff based upon the alleged negligent departures from the standard of care for treatment rendered to the infant plaintiff from June 2, 2008 through July 8, 2008. It is alleged that the defendants negligently diagnosed the infant plaintiff's condition; failed to order appropriate testing; failed to timely and appropriately diagnose appendicitis causing the infant to develop massive abdominal peritonitis; failed to timely and appropriately monitor Gentimycin peak and trough levels causing the infant to sustain partial hearing loss due to vestibular toxicity and injury to the 8th cranial nerve; abdominal adhesions, and increased risk of infertility, among other alleged injuries.

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]).

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). 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,*** 221 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 Galang***, 64 NY2d 999, 489 NYS2d 47 [1985]; ***Lyons v McCauley,*** 252 AD2d 516, 517, 675 NYS2d 375 [2d Dept 1998], *app denied* 92 NY2d 814, 681 NYS2d 475; ***Bloom v City of New York,*** 202 AD2d 465, 465, 609 NYS2d 45 [2d Dept 1994]).

Coram Healthcare Corporation of Greater New York s/h/a Coram Health Care (Coram) seeks summary judgment dismissing the complaint. In support of motion (001), defendant Coram has submitted, inter alia, an attorney's affirmation; the expert affirmation of Richard Blum, M.D.; copies of the summons and complaint, its answer, and plaintiff's verified bill of particulars; various disclosure; uncertified copy of

the records of SV Pediatrics, Stony Brook University Hospital, Coram Home Infusion record; unsigned and uncertified transcripts of the examinations before trial Richard Scriven, M.D. dated November 4, 2011 and Christina Stoss dated October 5, 2010, which are not in admissible form (*see* ***Martinez v 123-16 Liberty Ave. Realty Corp.***, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]; ***McDonald v Maus***, 38 AD3d 727, 832 NYS2d 291 [2d Dept 2007]; ***Pina v Flik Intl. Corp.***, 25 AD3d 772, 808 NYS2d 752 [2d Dept 2006]); unsigned but certified transcript of the examination before trial of Laura Rose Stoss dated December 20, 2010 which is considered (***Ashif v Won Ok Lee,*** 57 AD3d 700, 868 NYS2d 906 [2d Dept 2008]). A signed and certified transcript of the examination before trial of defendant Scriven contained in the record is considered. Medical records are required to be submitted in admissible form which requires that they be certified pursuant to CPLR 3212 and 4518 (***Friends of Animals v Associated Fur Mfrs.,*** *supra*). The plaintiffs do not oppose this application and do not object to the uncertified medical records.

In motion (002), Dr. Scriven seeks summary judgment dismissing the complaint asserted against him. In support of this application, he has submitted, inter alia, an attorney's affirmation; affirmation of Lorry Rubin, M.D.; summons and complaint, answer, and plaintiff's verified bill of particulars; signed and certified transcript of the examination before trial of Richard Scriven, M.D. dated November 4, 2011; unsigned but certified transcripts of the examinations before trial of Christina Stoss dated October 5, 2010, Lauren Stoss dated December 20, 2010 which are considered; the transcript of non-party Michael Ditkoff, M.D. which is unsigned and is not in admissible form (*see* ***Martinez v 123-16 Liberty Ave. Realty Corp.***, *supra*; ***McDonald v Maus***, *supra*; ***Pina v Flik Intl. Corp.***, *supra*; uncertified medical records from Stony Brook Hospital, Stony Brook Surgical Associates, Progressive Ear, Nose & Throat Associates, and Coram Home Infusion, which have not been objected to by plaintiff; and letter from Augustine Romano dated July 21, 2011.

Christina Stoss testified to the extent that she began taking her daughter, Laura, to S.V. Pediatrics in about 2004 through September 2008, where she was seen mostly by Dr. Rivera, or Dr. Narain. In April 2008, she took Laura to S.V. Pediatrics where she was seen by the physician's assistant, Joanna, for complaints of burning pain with urination. A urine test was done, and she was placed on antibiotics. On June 2, 2008, she took Laura to S.V. Pediatrics where she was again seen by Joanna for complaints of vomiting and lower abdominal stomach pain from the day before, and a low grade fever, for which Laura was diagnosed with a urinary tract infection/bladder infection and was treated with Omnicef to be taken for seven days. The following day when Laura was feeling worse, Mrs. Stoss spoke with Dr. Rivera and was advised to give the medication more time. Later that afternoon, she spoke with Dr. Rivera again and advised him that Laura's pain was worse and her temperature was 100. She was advised to call him in the morning if Laura did not feel better, and to continue with Advil for pain. On June 4th, Laura was having more severe pain, so Mrs. Stoss called Dr. Rivera's office, and was seen by Dr. Gerri who advised her that she felt Laura had appendicitis.

Mrs. Stoss testified that Laura was then seen at Stony Brook Hospital emergency room where she was diagnosed with appendicitis. Dr. Scriven performed the surgery late that night. After surgery, she was advised by Dr. Scriven and Dr. Rivera that the appendix had already ruptured prior to surgery. Laura remained hospitalized for eight days and received intravenous Gentamicin and Clindamycin via a PICC line in place in her left arm. These antibiotics were to be continued intravenously at home upon discharge. Mrs. Stoss received instructions for care of the PICC line and administration of the antibiotics provided by Coram Health Care Services. Coram personnel came periodically to check Laura and draw the Gentamicin peak and

trough blood levels. A week after Laura was discharged, she was seen by Dr. Scriven who gave instructions to continue the antibiotics. She described the course of events until Laura was last seen by Dr. Scriven in July 2008.

Mrs. Stoss continued that in August, 2008, Laura had been trying to exercise and had trouble focusing, was dizzy, and her heart was racing. She was seen by Dr. Rivera who recommended a pediatric cardiologist, Dr. Seifer, whom Laura saw in the end of September, and a neurologist, Dr. Sy-Kho, who she saw the first week of September. Laura noticed that whenever she moved, her vision bounced, making her feel dizzy. Dr. Seifert ordered a brain MRI and Holter monitoring which were normal. Dr. Sy-Kho found no reason for the problem. In November or December, 2008, she took Laura to see Dr. Ditkoff, an ENT doctor, who ordered an ENG to test the vestibular system. She was advised by Dr. Ditkoff that the hairs in the vestibular system that help with balance were damaged, and that it was caused by the Gentamicin, but he did not know if it was a temporary or permanent condition. He did not say that it was because Laura received too much or too little Gentamicin. She then testified that Dr. Ditoff stated that the high pitched hearing loss could be from the antibiotics, but he did not say that it was from the Gentamicin. After Laura first experienced dizziness, it stopped after a couple episodes, but she still experiences dizziness. Laura did not complain of any hearing loss at any time. Mrs. Stoss then continued that no one ever told her that Laura was at an increased risk for infertility or bowel obstruction, but Dr. Scriven told them that due to the surgery, that she was at risk for having abdominal adhesions.

Laura Stoss testified that after her surgery, while she was a patient at Stony Brook Hospital, she did not experience visual disturbances. In August 2008, about a month after she finished the antibiotics, she first noticed bouncing vision when she was trying to exercise at home. She testified that the bouncing vision and dizziness are the same. When she went to the amusement park in August 2008, she went on the roller coaster and just felt the normal kind of disorientation that everyone feels getting off the ride. In the fall of 2008, she went to Adventureland and was able to go on all the rides without experiencing dizziness or bouncing vision. She experienced no bouncing vision from the first time she experienced it when doing the exercise video a month after finishing the antibiotics until she saw Dr. Ditkoff. She testified that she told him that the dizziness occurs when she tries to exert herself. She stated that Dr. Ditkoff told her that the medication could have caused it. She was advised against running, and testified that she can do everything except running. She experiences no problem when driving a car. She further testified that she experiences bouncing vision every day when she is walking, but she has become used to it.

Richard Scriven, M.D. testified that he is employed by the State of New York as a full-time associate professor of surgery/faculty member/general pediatric surgeon, with clinical and educational responsibilities. He first saw Laura Stoss on June 4, 2008, in either the emergency room or holding area of the operating room after her initial CT scan was done, and after being advised by Dr. Rivera that she was being admitted for surgery for a perforated appendix. He stated that the infant plaintiff was scheduled for surgery at 10:00 p.m. on an emergency basis on June 4, 2008. It was his feeling that she would benefit from surgery shortly after the diagnosis was made. He planned a laparoscopic appendectomy with washout. As he proceeded with the laparoscopic exploration, he made the decision that it was unsafe to proceed by laparoscopy as he could not find the appendix. He then converted to an open procedure. Pus was noted in all four quadrants of the abdominal cavity. He found the appendix behind the mesentery of the right colon, which he stated made it more difficult to diagnose appendicitis than would a retrocecal or a normally placed appendix. The appendix

appeared perforated and necrotic (brown and like shoe leather instead of pink), and the mesentery was inflamed. He did not determine how long the appendix had been perforated.

Dr. Scriven noted pre-operatively that the infant plaintiff had a penicillin allergy which made it a lot more complicated as most of his options for antibiotics were no longer an option. He determined to administer Gentamicin and Clindamycin intravenously to cover the bacteria typically encountered with advanced appendicitis or perforated appendicitis. Dr. Scriven testified that Gentamicin had side effects so the serum drug levels, or peak and trough levels, of the Gentamicin had to be monitored. Once he gets a serum drug level, he can then modify the dose of the Gentamicin. Dr. Scriven testified that there is a therapeutic level and a toxic level. The serum trough level measures are obtained to ensure there is not going to be a toxic effect caused from the Gentamicin, and the peak level helps to determine the therapeutic efficiency. He testified that he did not have a custom or practice with regard to how often peak and trough levels of Gentamicin are to be obtained from a patient receiving Gentamicin, but he typically measures levels initially after the first day or so. Once they are on a standing level, it is measured weekly to ensure toxic levels of the drug are not being administered due to its side effects. He never was involved with a toxic event involving Gentamicin, but stated he was quite aware it could affect the kidneys and the hearing and middle ear function. Dr. Scriven continued that Clindamycin was also administered which does not require peak and trough levels.

Dr. Scriven stated that a PICC line was inserted due to the advanced degree of infection that he saw at the initial surgery, and the need for a lengthy course of antibiotics due to an anticipated post-op intra peritoneal infection. After the infant was discharged home, he saw the infant on June 20, 2008, and felt the Mom was doing well with the antibiotics and taking care of the wound. He testified that on June 19, 2008, a Gentamicin peak and trough level of 0.8 was obtained and reported, and that the peak level of 0.8 was normal. He then stated that the 0.8 level was below normal and that the trough level of 0.8 was below what is considered toxic. He then testified that it did not make sense to him that the peak and trough levels were the same. When asked what would cause the peak and trough levels to be the same, Dr. Scriven responded that if they are both drawn before the administration of the antibiotic, that the trough and peak levels would both be the same number. He continued that he had fairly good multiple data points of her peaks and troughs, and that the level was consistent with the trough, but they were labeling it as a peak. The peak was to be drawn thirty minutes after the administration of the antibiotic. He was stopping antibiotics in a few days, so he did not order repeat levels.

Dr. Scriven testified that he saw the infant on June 27, 2008, noting that he stopped the antibiotics on June 25, 2008. He found her to be lethargic and with poor oral intake, so he sent her to the emergency room for a repeat CT scan, which indicated there was trace pelvic fluid with rim enhancement (two cm left pelvic abscess), indicating she still had an infection in her abdominal cavity, although improved. Therefore, antibiotics were restarted and everything which was being done was to be resumed. She was subsequently discharged home. Dr. Scriven testified that while he had been on vacation, Dr. Lee, his partner, saw Laura and admitted her for dehydration, vomiting and diarrhea. Dr. Lee stopped her antibiotics and removed her PICC line. On June 30, 2008, a trough level of 1.2 was reported, which he considered within the range of what is considered normal. He did not know the peak level. Dr. Scriven stated that he generally speaks with Coram Health personnel handling the antibiotics and PICC line, but did not recall any conversation as his nurse practitioner typically deals with any problems with getting the antibiotics or obtaining lab values if they

are not received, and he did not recall a problem with receiving the lab values. Dr. Scriven testified that he last saw the infant plaintiff on July 16, 2008.

Defendant Coram's expert, Richard Blum, M.D. affirms that he is licensed to practice medicine in New York State and is board certified in internal medicine with a subspecialty in clinical pharmacology. He set forth his education and training, but has not set forth his work experience since completing his residency in 1976. He stated that he is familiar with the applicable standards of care and practice pertaining to pharmacology and internal medicine, and administration of intravenous antibiotics, interpretation of laboratory studies, including peak and trough levels, and the roles and responsibilities of pharmacy companies providing home infusion services. It is Dr. Blum's opinion with a reasonable degree of medical certainty that Coram did not depart from accepted standards of medical care and practice, and did not commit any acts or omissions that were a substantial factor in causing the plaintiff's claimed injuries.

Dr. Blum stated that Laura Stoss, then a 15 year old plaintiff, was referred by the co-defendant pediatricians to Stony Brook University Hospital on June 4, 2008 with a diagnosis of ruptured appendix. Richard Scriven, M.D. performed an open appendectomy, and post-operatively, ordered the administration of Gentamicin and Clindamycin, antibiotics to cover the bacteria typically associated with a perforated appendix. On June 11, 2008, Coram Health Care Services, a provider of home infusion services and specialty pharmaceuticals, received a referral for giving IV home therapy to the plaintiff on June 12, 2008, via a PICC line which had been inserted into the infant plaintiff's left arm by Dr. Scriven for the purpose of administering such medication over a fourteen day period. The infant's mother, Christina Stoss, signed a consent form on behalf of her daughter for amino glycoside/Gentamicin therapy, which form indicated that Gentamicin use carries potential adverse effects which may be temporary or permanent, including, inter alia, hearing loss/muffled/plugged, ringing/buzzing/whistling in the ears, dizziness, feeling of fullness in the ears, problems with balance or walking, and nausea or vomiting. Dr. Scriven had ordered intravenous Gentamicin 80 mg. every eight hours via 5% Dextose to be infused at a rate of 100 m./hour for 30 minutes; and Clindamycin 600 mg. every eight hours via 5% Dextrose to be infused at a rate of 200ml/hour.

Dr. Blum stated that the role of Coram, as a pharmacy distributor and home infusion service, is to prepare medications, and for its nurses to perform in-house teaching to families regarding the administration of intravenous medication. It is the responsibility of the nurses to teach the family how to administer the medications as ordered by the treating physician. He continued that it is the prescribing physician's duty to review the laboratory results and make any necessary changes to the medication dosages or types of antibiotics prescribe. Dr. Blum stated that the nurses from Coram had no obligation to treat or examine the infant plaintiff.

Dr. Blum stated that the peak level measures therapeutic efficacy of the drug, and the trough level measures the level of toxicity of the blood, and that Dr. Scriven ordered peak and trough level tests on June 18, 2008 and a complete blood count on June 23, 2008. Dr. Blum stated that blood was drawn on June 19, 2008 to test the plaintiff's Gentamicin peak and trough levels, instead of on June 18, 2008. This, he stated, is "insignificant" and did not result in any injury to the infant. He continued that the lab then mistakenly tested the initial blood draw for Tobramycin and was informed of the error. A subsequent blood draw for Gentamicin was done. Dr. Blum continued that a nurse from Coram appropriately instructed plaintiffs as to when and how to give the medication, how to handle the IV bag, open the PICC line, and unscrew the tube.

Dr. Blum concludes that the trough levels were at all times "normal" and well below toxic level of the medication in the bloodstream, confirming that the infant was clearing out the medication.

It is noted that the letter dated July 21, 2011 from Dr. Augustine Romano to Richard Liftman, M.D. indicates that the infant plaintiff was treated with Gentamicin in 2008 when she underwent an appendectomy. In a short time thereafter, she developed a phenomenon of visual bobbing when she runs. These symptoms do not occur while in any moving vehicles or with head turning. There is no double vision or loss of vision; she never has dizziness; there is no history of hearing loss. Under his impression, Dr. Romano indicates that this 18 year old patient has a history of visual disturbance (bobbing) when she is running. With her history, and with absent ankle reflexes, it is a concern that this may represent a vitamin deficiency such as B12 deficiency, and her mother does have a history of vitamin B12 deficiency. Dr. Romano continued to state that anatomically, it is hard to believe the symptoms are simply from vestibular dysfunction as she does not list to any one side, and she does not have any sort of symptoms derived from other motion or movement. Dr. Romano recommended a Lyme titre, B12 level, and consideration towards nerve conduction velocity studies of the lower extremities.

Lorry Rubin, M.D., expert for defendant Richard Scriven, M.D. set forth that he/she is licensed to practice medicine in New York and is certified in pediatrics and pediatric infectious disease. Dr. Rubin set forth his/her education and training, as well as professional work experience, and the materials and records reviewed. Dr. Rubin continued that Laura Stoss was approximately 15 years and 9 months of age on June 1, 2008, when she first began to experience abdominal pain and vomiting after eating breakfast. Dr. Rubin set forth her history, indicating Laura was seen at her pediatrician's office, on June 2, 2008, called the pediatrician's office on June 3, 2008 to report lack of improvement in her condition, and was seen on June 4, 2008 at her pediatrician's office, and referred to SBUH emergency room with a diagnosis of possible appendicitis. A CT scan was performed suggesting a perforated appendix. On the evening of June 4, 2008, Dr. Scriven performed an emergency appendectomy and drained pus from her abdomen. The appendix was perforated and necrotic. Antibiotics were ordered postoperatively to treat the advanced infection. Due to penicillin allergy, Laura was being placed on medication to treat a gram-negative organism, E Coli. The organism was susceptible to many antibiotics structurally related to penicillin, which could not be utilized. The organism was susceptible to Gentamicin, and Amikacin, another amino glycoside antibiotic with all the same potential side-effects is not preferred over Gentamicin. Dr. Rubin continued that the combination of Gentamicin and Clindamycin was entirely appropriate to treat the multiple species of bacteria typically present in such cases.

Dr. Rubin stated that Gentamicin is known to have potential side effects, particularly when dosing results in toxic blood levels. The most common side effects of Gentamicin toxicity are kidney injuries, and hearing loss, and less commonly, vestibular injury that can impair balance and vision, both related to injury to the inner ear, which injuries can result even in doses and resultant blood levels within the therapeutic ranges. Gentamicin was started on June 5, 2008 at 80 mg, and increased to 100 mg on June 7, 2008, for the duration of her inpatient treatment. Dr. Scriven ordered the Gentamicin blood levels to be monitored with peak and trough values being obtained, and explained the risks associated with the medication to Laura's parents. Dr. Rubin indicates that all Gentamycin levels obtain on June 7th, 8th, 9th and 10th were all below toxic values, and her kidney function levels were normal. On June 12, 2008, upon discharge from the hospital, Coram Health Care Services went over the possible side effects of the medication, including kidney

damage, hearing loss, and dizziness, and Mrs. Stoss signed consent to administer the medication to Laura. Coram also instructed the mother how to administer the medication intravenously, which she administered for thirteen days, every eight hours. The peak and trough levels were reported at 0.8, however, Dr. Scriven noted that it was highly unlikely that they would be the same, but there was no concern as the peak level correlates with the therapeutic level, not the toxicity level. The antibiotics were discontinued on June 25, 2008, however, a CT scan revealed evidence of an ongoing abdominal infection, so additional antibiotic therapy was resumed on June 27, 2008 for two weeks. On June 30, 2008, the tough level was 1.2, a value within normal limits. Renal function remained normal also. On July 8, 2008, due to nausea, fatigue, and vomiting, the infant plaintiff was admitted by Dr. Scriven's partner, Dr. Lee, SBUH for dehydration. In that an ultrasound revealed no evidence of an active abdominal infection, antibiotics were discontinued.

Dr. Rubin continued that between June 3, 2008 through July 2008, there is no evidence that the infant plaintiff suffered from kidney damage, hearing loss, or vestibular injury due to Gentamicin toxicity, or had peak or trough Gentamicin concentrations that exceeded the therapeutic range. Approximately one month after stopping the antibiotics, the infant plaintiff experienced an episode of dizziness and felt unsteady on her feet, and off balance, while performing an exercise regimen. Thereafter, she experienced bouncing vision when she ran around a track. This bouncing only occurred when she was in motion, walking or running. She was seen by Dr. Rivera, a neurologist, and a cardiologist, all whom examined her and obtained normal test results. She was seen by Dr. Ditkoff in September 2008 wherein a VNG and caloric eye test were performed by an audiologist who considered her findings consistent with vestibular dysfunction, to be confirmed with rotary chair testing, which was not done. During the 2008-2009 academic year, the infant plaintiff left classes early to negotiate the walk in the hallway, and engaged in only moderate gym activities, however, was able to play tennis and go on rides at an amusement park, and drive a car without experiencing visual disturbances. In July 2011, Laura consulted with a neurologist, Dr. Augustine Romano, who found it hard to believe that Laura's symptoms are simply from vestibular dysfunction. Due to the visual disturbance with running, and absent ankle reflexes, Dr. Romano was concerned that she had a vitamin deficiency, such as B12 deficiency, which her mother has.

Dr. Rubin opined that at all times Dr. Scriven rendered appropriate care and treatment to Laura; timely removed her ruptured appendix and drained pus from the abdomen, consistent with accepted medical practice, prescribed antibiotics to treat the infection with good control of the infection; that the choice and administration and dosage, and monitoring of Gentamicin and Clindamycin was reasonable and consistent with good and accepted medical practice, especially with a ruptured appendix and history of penicillin allergy; and the Gentamicin peak and trough levels indicated that she was not experiencing any toxic side effects during the administration of the Gentamicin. Dr. Rubin opined that vestibular injury is the least common type of consequence of Gentamicin toxicity, and is commonly associated with dizziness when upright, and difficulty in walking or making sudden movements. Dr. Rubin concluded that there is no evidence that the infant plaintiff suffered from a vestibular injury due to Gentamicin toxicity while under the care and treatment of Dr. Scriven.

Based upon the foregoing, it has been established prima facie that defendants Coram Health Care Services and Dr. Scriven are entitled to summary judgment dismissing the complaint and any cross claims asserted against them on the basis that at all times they did not depart from good and accepted standards of

care and treatment, that the Gentamicin peak and trough levels did not reveal a toxic level, and that there is nothing that the defendants did or did not do which proximately caused the infant's plaintiff's claimed injuries due to any departures from the standard of care. It has been established that Dr. Scriven timely performed the appropriate surgery on the infant plaintiff, correctly treated her infection, and properly monitored her Gentamicin peak and trough levels which at no time demonstrated toxic levels. There is nothing that he did or did not do which proximately caused the infant's claimed vestibular dysfunction or damage. It has been established that Coram Health Care Services obtained informed consent for the administration of the Gentamicin, properly instructed the infant's mother to administer the medication, and timely and appropriately monitored and obtained Gentamicin peak and trough blood levels. There is nothing that they did or did not do which proximately caused the vestibular dysfunction or damage and injuries claimed by the infant plaintiff.

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]). Here, the plaintiffs have not opposed this motion, have not objected to the admissibility of any of the evidentiary submissions, and have not produced an expert affirmation to raise a factual issue to preclude summary judgment from being granted to both moving defendants, Richard Scriven, M.D. and Coram Health Care Services.

Accordingly motions (001) and (002) by defendants Coram and Scriven for summary judgment dismissing the complaint as asserted against them are granted.

Dated: April 2, 2013

J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**