

**O'Donnell v Gupta**

2020 NY Slip Op 35137(U)

June 17, 2020

Supreme Court, Nassau County

Docket Number: Index No. 604108/18

Judge: James P. McCormack

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**SUPREME COURT - STATE OF NEW YORK  
TRIAL/IAS TERM, PART 18 NASSAU COUNTY**

**PRESENT:**

**Honorable James P. McCormack  
Justice of the Supreme Court**

**Index No.x**

**JEANNE MARIE O'DONNELL and SEAN  
O'DONNELL,**

**Index No.: 604108/18**

**Plaintiff(s) No.:**

**Motion Seq.: 001 & 002**

**Motion Submitted:**

**Motion Submitted: 2/27/2020**

**-against-**

**XXX  
RAHUL GUPTA, D.D.S., JOHN LEE,  
D.D.S., GRANGER & SAHASRA  
ENDODONTIC ASSOCIATES, PPLC and  
RODNEY RASTERGAR, D.D.S., PLLC,**

**XXX**

**Defendant(s).**

\_\_\_\_\_X

The following papers read on this motion:

Notices of Motion/Supporting Exhibits/Supporting Exhibits.....XX  
Affirmation in Opposition/Supporting Exhibits.....X  
Reply Affirmations.....XX

Defendants, Rahul Gupta, D.D.S. (Dr. Gupta) and Granger & Sahasra Endodontic Associates, PLLC (GSEA), move this court for an order (Motion Seq. 001), pursuant to CPLR 3212 granting them summary judgment dismissing the complaint and any cross claims against them. Defendants, John Lee, D.D.S. (Dr. Lee) and Rodney Rastegar,

D.D.S. (Dr. Rastegar) i/s/h/a Rodney Rastegar, D.D.S., PLLC, move this court for an order (Motion Seq. 002), granting them summary judgment and dismissing the complaint and any cross claims against them. Plaintiffs, Jeanne Marie O'Donnell (Jeanne) and Sean O'Donnell (Sean), oppose both motions.

Plaintiffs commenced this dental malpractice action by service of a summons and complaint dated March 28, 2018. Issue was joined by service of an answer by Dr. Lee dated April 30, 2018. Dr. Gupta interposed an answer that was undated but e-filed on May 3, 2018. GSEA served an answer that was undated but e-filed on May 3, 2018. Dr. Rastegar interposed an answer dated August 13, 2018. The case certified ready for trial on June 27, 2019 and a note of issue was filed on September 24, 2019.

Prior to November 24, 2015, Jeanne Marie had been diagnosed with irritable bowel syndrome (IBS) and had been on Zegrid, a protein pump inhibitor for eight years. On November 24, 2015, Jeanne Marie went to see Dr. Gupta due to pain she was having in a tooth. She had been referred to Dr. Gupta by her general dentist. After an examination and x-rays, Dr. Gupta noted that her pain was coming from tooth 19 which previously had a root canal. Dr. Gupta noted an infection in the location where she was feeling pain, and informed Jeanne Marie that her options were to re-do the root canal, or have the tooth extracted. If she chose to re-do the root canal, it was still possible an extraction would be necessary. Jeanne Marie chose to re-do the root canal in the hopes of saving the tooth. Dr. Gupta prescribed Clindamycin, an antibiotic, and Vicodin for pain. On November 27, 2015, Jeanne Marie returned to Dr. Gupta and, after she signed an

informed consent form, Dr. Gupta performed another root canal on tooth 19. After the procedure, Dr. Gupta advised Jeanne Marie to continue with the antibiotics, and the pain medication as needed.

Jeanne Marie returned to Dr. Gupta the next day, on an emergent basis, due to severe pain in tooth 19. Dr. Gupta removed the temporary filling and irrigated the tooth. The infection was still present, and Dr. Gupta again gave Jeanne Marie the option of continuing to re-do the root canal, or an extraction. Jeanne Marie still preferred the root canal. Dr. Gupta wrote a new prescription for Augmentin, an antibiotic, and Percoset for pain as needed. It is during this visit that the parties disagree on the facts. While Dr. Gupta and his dental assistant both state that Dr. Gupta told Jeanne Marie to discontinue the Clindamycin and start taking the Augmentin, Jeanne Marie states that she was never given that instruction. As a result, for the next three days, she took both the Clindamycin and Augmentin.

On December 1, 2015, Jeanne Marie returned to Dr. Gupta for a scheduled visit. Because tooth 19 was no longer in pain, Dr. Gupta irrigated the area and replaced the temporary filling. However, Jeanne Marie was now reporting pain in the area of tooth 18. Dr. Gupta noted a potentially cracked tooth, and referred Jeanne Marie to Dr. Sashsi, her general dentist, for an evaluation of tooth 18. Dr. Shashi examined Jeanne Marie that same day, and referred her back to Dr. Gupta for a root canal of tooth 18. Jeanne Marie returned to Dr. Gupta on December 2, 2015. The pain in tooth 18 was severe. Dr. Gupta

offered Jeanne Marie the option of having a root canal in tooth 18, or having it extracted. Jeanne Marie chose the root canal, and after signing an informed consent form, Dr. Gupta commenced with the root canal of tooth 18.

Jeanne Marie returned to Dr. Gupta on December 4, 2015, and reported that the pain in tooth 18 had subsided but she still felt pain in tooth 19. Dr. Gupta irrigated tooth 19 and put in a temporary filling. At that point Dr. Gupta contacted her general dentist, this time speaking with Dr. Gambella, and the decision was reached to refer Jeanne Marie to Progressive Oral Therapy for an examination.

Jeanne Marie went to Progressive Oral Therapy that day and was seen by Dr. Lee. Based upon his examination, Dr. Lee recommended that tooth 19 be extracted. After Jeanne Marie signed an informed consent form, Dr. Lee performed the procedure. On December 9, 2015, Jeanne Marie returned to Dr. Lee complaining of pain in tooth 18. Dr. Lee recommended that tooth 18 be extracted, and after Jeanne Marie signed an informed consent form, Dr. Lee performed the procedure. After the extraction of tooth 18, Dr. Lee prescribed Amoxicillin for Jeanne Marie.

On December 16, 2015, Jeanne Marie returned to Dr. Lee for a follow-up visit and reported that she was no longer in pain. Dr. Lee performed an examination and noted that the extraction sites were healing well. Jeanne Marie would return to Progressive Oral Therapy on February 20, 2016 and see Dr. Panagos. She was not in pain but felt

something sharp in the extraction site. Dr. Panagos performed an examination, saw that the extractions sites were healing well, and removed a small, bony spicule

On December 18, 2015, Jeanne Marie started suffering from bouts of diarrhea. She went to see her general practitioner, Dr. Barbara Keber, and, on December 21, 2015, it was determined that Jeanne Marie had a Clostridium Difficile infection, more generally known as C-diff. Dr. Keber prescribed Flagyl, which worked for a while, but the diarrhea returned on January 22, 2016. Dr. Anthony Celifaco then prescribed Vancomycin, a stronger antibiotic. Two rounds of Vancomycin did not work, and on March 29, 2016, Jeanne Marie underwent a coloscopy and fecal microbiome transfer.

In her complaint and in the bill of particulars, Jeanne Marie alleges the defendants all deviated from good and accepted dental practice by causing her to contract C-diff, failing to get informed consent from her, and failing to properly treat her for her dental issues on teeth 18 and 19. All Defendants now move for summary judgment, arguing there were no departures.

It is well established that a party moving for summary judgment must make a *prima facie* showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issue of fact (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). Once the moving party has made a *prima facie* showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form which establishes the existence of a material issue of fact (*Zuckerman*

*v City of New York*, 49 NY2d 557 [1980]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). A defendant seeking summary judgment bears the burden of establishing its *prima facie* entitlement to judgment as a matter of law by affirmatively demonstrating the merit of its defense, rather than merely by pointing out gaps in the plaintiff's case (*Alizio v Feldman*, 82 AD3d 804 [2d Dept 2011]; *Nationwide Prop. Cas. v Nestor*, 6 AD3d 409, 410 [2d Dept 2004]). Where the moving party fails to make a *prima facie* showing, the motion must be denied regardless of the sufficiency of the opposing party's papers (*Lee v Second Ave. Vil. Partners*, 100 AD3d 601 [2d Dept 2012], citing *Winegrad v New York Univ. Med. Center*, *supra*, at p. 852). The motion court is required to accept the opponents' contentions as true and resolve all inferences in the manner most favorable to opponents (*Giraldo v Twins Ambulettes Serv., Inc.*, 96 AD3d 903 [2d Dept 2012]). Further, "[t]he courts function on a motion for summary judgment is 'to determine whether material factual issues exist, not to resolve such issues (citations omitted)'" (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010], quoting *Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]).

" 'In order to establish the liability of a physician for medical malpractice, a plaintiff must prove that the physician deviated or departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries' " (*DiGeronimo v Fuchs*, 101 AD3d 933, 935 [2d Dept 2012], quoting *Stukas v Streiter*, 83 AD3d 18, 23 [2d Dept 2011]; *see also, Klein v Argoff*, 101 AD3d 1090 [2d

Dept 2012]). Therefore, “[i]n an action sounding in medical malpractice, a defendant physician moving for summary judgment must establish, *prima facie*, **either** that there was no departure from accepted medical practice, **or** that any departure was not a proximate cause of the plaintiff’s injuries (emphasis added)” (*LeMaire v Kunchman*, 102 AD3d 659 [2d Dept 2013], citing *Faicco v Golub*, 91 AD3d 817, 818 [2d Dept 2012]; *Stukas v Streiter*, *supra* at p. 24; *see also*, *Klein v Argoff*, *supra*; *DiGeronimo v Fuchs*, *supra*). “ ‘In order to sustain this burden, the defendant must address and rebut any specific allegations of malpractice set forth in the plaintiff’s [complaint and] bill of particulars (citations omitted)’ ” (*Bendel v Rajpal*, 101 AD3d 662, 663 [2d Dept 2012], quoting *Wall v Flushing Hosp. Med. Ctr.*, 78 AD3d 1043, 1045 [2d Dept 2010]).

“Conclusory statements set forth in an affirmation of a medical expert which do not refute or address the specific allegations of negligence made by the plaintiff in his or her complaint and bill of particulars are insufficient to make a *prima facie* showing that a defendant physician is entitled to judgment as a matter of law (citations omitted)” (*Bendel v Rajpal*, *supra*, at p. 663).

Once a defendant physician has made the requisite showing, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact with respect to the issues on which the defendant met the *prima facie* burden (*LeMaire v Kunchman*, *supra*, at p. 659 [citation omitted]). “ ‘[G]eneral allegations that are conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice

are insufficient to defeat a defendant's motion for summary judgment (citations omitted)' ” (*Bendel v Rajpal, supra*, at p. 189, quoting *Bezerman v Bailine*, 95 AD3d 1153, 1154 [2d Dept 2012]).

Furthermore, “ ‘[i]n a [medical] malpractice action, where causation is often a difficult issue, a plaintiff need do no more than offer sufficient evidence from which a reasonable person might conclude that it was more probable than not’ that the defendant’s deviation was a substantial factor in causing the injury (citations omitted)” (*Goldberg v Horowitz*, 73 AD3d 691, 694 [2d Dept 2010], quoting *Johnson v Jamaica Hosp. Med. Ctr.*, 21 AD3d 881 [2d Dept 2005]; *see also, Holton v Sprain Brook Manor Nursing Home*, 253 AD2d 852 [2d Dept 1998], *lv denied*, 92 NY2d 818 [1999]). “A plaintiff’s evidence of proximate cause may be found legally sufficient even if his or her expert is unable to quantify the extent to which the defendant’s act or omission decreased the plaintiff’s chance of a better outcome or increased the injury, ‘as long as evidence is presented from which the jury may infer that the defendant’s conduct diminished the plaintiff’s chance of a better outcome or increased [the] injury (citations omitted)’ ” (*Goldberg v Horowitz, supra*, at p. 694, quoting *Alicea v Ligouri*, 54 AD3d 784 [2<sup>nd</sup> Dept 2008] [internal quotation marks omitted]).

**DR GUPTA AND GSEA's MOTION FOR  
SUMMARY JUDGMENT (MOTION SEQ. 001)**

In support of their motion, Dr. Gupta and GSEA submit, *inter alia*, the expert affirmations of Howard I. Blum D.D.S. and Richard Fried, M.D. Dr. Blum has been a licensed dentist since 1960, and, among other credentials, has been a Diplomate of the American Board of Endodontics since 1973, as well as a Diplomate of the American Board of Forensic Dentistry, Forensic Examiners and Disability Analysis. Dr. Fried has been practicing medicine as an infection disease specialist for 45 years, and is Board Certified in Infectious Disease and Internal Medicine.

Dr. Blum explains that C-diff bacteria are found throughout the environment, including in human feces and food products. Medications such as antibiotics or protein pump inhibitors can suppress healthy bacteria in the stomach which allows the C-diff spores to flourish. C-diff symptoms tend to appear within 5-10 days of antibiotic use, but can appear in as little as one day, or as long as two months later.

Dr. Blum opines both that Dr. Gupta did not depart from good and accepted dental practice, but that it is also impossible to determine what was the cause of Jeanne Marie's C-diff. Regarding Dr. Gupta, during the first visit, on November 24, 2015, his examination of Jeanne Marie was appropriate, as were the options with which he presented her. Prescribing Clindamycin was within the standard of care due to the fact

that the infection in tooth 19 was likely long-standing in light of the fact that the tooth had a prior root canal.

When Jeanne Marie returned to Dr. Gupta on November 28, 2015, complaining of pain, Dr. Gupta performed an examination and determined that infection was still present. According to Dr. Blum, it was therefore appropriate for Dr. Gupta to change the antibiotic to Augmentin, as it appeared the infection did not respond to the Clindamycin. While Dr. Blum found, based upon the records and deposition transcripts, that Dr. Gupta did advise Jeanne Marie to stop the Clindamycin and start taking the Augmentin, even if he did not, this would not have been a departure from the standard of care. Dr. Blum states that there are no clinical studies that indicate that taking two antibiotics at the same time increase the risk of contracting C-diff. While it is not commonly done, there is no contraindication in prescribing two antibiotics at the same time. Regardless, Dr. Blum notes that even one dose of properly prescribed antibiotics can cause C-diff. Further, it is just as likely that Jeanne Marie's C-diff was caused by her protein pump inhibitor, or by an interaction with a child at the school in which she worked. As a result, whether or not Dr. Gupta directed Jeanne Marie to stop taking the Clindamycin, it is impossible to determine whether taking two antibiotics caused her C-diff, as opposed to any other factor discussed.

Dr. Blum opines that Dr. Gupta's actions during the December 1, 2015 and December 2, 2015 visits were all within the standard of care. On December 1, Jeanne Marie returned and indicated that tooth 19 felt better but she was experiencing pain in

tooth 18. Dr. Gupta took x-rays, noted a potential crack, and referred her back to her general dentist for an examination. Her general dentist referred her back to Dr Gupta for a root canal on tooth 18. As with tooth 19, Dr. Gupta discussed a root canal versus an extraction, an explained that even if a root canal was performed, an extraction may still ne necessary. Jeanne Marie chose a root canal, and she signed an informed consent form. Dr. Blum opines there were no departures in these procedures.

According to Dr. Blum, on December 4, 2015, when Jeanne Marie returned to Dr. Gupta stating that tooth 18 felt fine but tooth 19 was hurting again, it was appropriate for Dr. Gupta to discuss the matter with her general dentist, and to refer her Progressive Oral Therapy. According to Dr. Blum:

27. In summary, I found all of the care and treatment rendered by Dr. Gupta to Ms. O'Donnell to be within the standard of care. His recordkeeping was appropriate, proper histories were taken along with verbal and written consents obtained. All of the dental work performed by Dr. Gupta was reasonable and appropriate and within the standard of care.

28. Turning to the administration of the antibiotics, it was reasonable and appropriate and within the standard of care for Dr. Gupta to prescribe Clindamycin to Ms. O'Donnell on the November 24, 2015 visit. Clindamycin is an FDA approved antibiotic and is very commonly used to treat dental infections. Because Ms. O'Donnell presented with a periapical pathology which was an infection at tooth #19, and further, that the tooth had previously been treated with a root canal, Clindamycin was an appropriate antibiotic under this clinical presentation.

Dr. Fried, the infectious disease specialist, echoes many of Dr. Blum's statements

on C-diff, but in greater detail:

6. Clostridium Difficile, often called C-difficile or C-diff is bacteria that was first discovered in 1935. It is classified as an anaerobic bacterium because it thrives in the absence of oxygen. C-difficile passes through a life cycle in which the actively dividing bacteria transform themselves into spores. Spores are inert and metabolically inactive. While they are inactive, they do not cause active disease. Typically, spores are transmitted via hands, utensils, food and then swallowed. The spores can come to life in a person's gastrointestinal tract but normally, the healthy bacteria keep C-difficile from flourishing and illness does not develop. If the healthy bacteria have been suppressed, C-difficile can get the upper hand. It then produces toxins which injure the lining of the colon producing diarrhea and inflammation.

7. Studies have shown that a C-difficile infection can appear for many reasons. Often the reason is unknown. The majority of infections occur in hospitals or long-term care facilities, typically, after a patient receives long-term antibiotics, however, any antibiotic use can cause a C-difficile infection. It is more commonly caused by broad spectrum antibiotics. In addition, because stomach acid helps fight off C-difficile infection, powerful anti-ulcer medications in the protein pump inhibitor family may also increase a patient's vulnerability.

8. With regard to C-difficile symptoms as a result of taking antibiotics, they occur within five to ten days after starting a course of antibiotics, but may occur as soon as the first day or up to two months later. The signs and symptoms of C-difficile diarrhea are watery diarrhea and abdominal cramping and tenderness. Studies have shown, approximately 5-10% of the population carries C-difficile spores in their intestines but are asymptomatic.

Dr. Fried opines that it was within the standard of care for Dr. Gupta to initially prescribe Clindamycin for the infection Jeanne Marie had at tooth 19. It is common for Clindamycin to be used to treat dental infections, and is an FDA approved medicine that is also on the World Health Organization's list of essential medicines. Clindamycin has many potential side effects, with a C-diff infection being one, but even one dose of any antibiotic can cause a C-diff infection. Therefore, even assuming one suffers from a C-diff infection caused by Clindamycin, that is not evidence of negligence or malpractice.

When Dr. Gupta next prescribed Augmentin, it was within the standard of care:

...the switching of the medications was reasonable and appropriate under the circumstances. Augmentin is an antibiotic which contains a combination of Amoxicillin and Clavulanate Potassium, Augmentin is used to treat a variety of infections caused by bacteria. Augmentin was a reasonable and appropriate antibiotic for Dr. Gupta to select for Ms. O'Donnell when she did not respond to the Clindamycin. It is a combination of a Penicillin class antibacterial and a beta-lactamase inhibitor. Given the fact that Ms. O'Donnell's infection did not respond well to the Clindamycin, Augmentin was a reasonable and appropriate alternative.

Like Dr. Blum, Dr. Fried states that even if Dr. Gupta failed to tell Jeanne Marie to stop taking the Clindamycin, there are no clinical studies indicating that taking two antibiotics at the same time increase the risk for C-diff. To the contrary, any allegation that taking the two antibiotics at the same time caused the C-diff infection would be based upon conjecture. In summary, Dr. Fried found both that Dr. Gupta's care was appropriate, and that it is impossible to tell what caused Jeanne Marie's C-diff. It could

have been caused by a single dose of antibiotics, or it could have been related to Jeanne Marie's history of gastrointestinal issues and long term use of a protein pump inhibitor.

Based upon the expert affirmations of Dr. Blum and Dr. Fried, together with Dr. Gupta's medical records including the informed consent forms, the court finds that Dr. Gupta and GSEA have established entitlement to summary judgment as a matter of law. The burden shifts to Jeanne Marie to raise a material issue of fact requiring a trial of the action.

In opposition, Jeanne Marie relies upon, *inter alia*, the redacted affirmation of her expert, an internist Board Certified in Internal Medicine and Emergency Medicine. The expert first takes issue with Dr. Gupta prescribing Clindamycin at all since Jeanne Marie did not exhibit signs of infection such as fever, lymphadenopathy or malaise. Next, the expert agrees with Jeanne Marie that Dr. Gupta prescribed Augmentin without telling her to stop taking the Clindamycin. As a result, she took the two antibiotics at the same time for three days. The expert notes that Jeanne Marie had taken Augmentin previously without incident, and had been on the protein pump inhibitor since 2007 without negative side effects.

According to the expert, Dr. Gupta should not have prescribed Clindamycin initially because Jeanne Marie's tooth infection was not severe enough to warrant it. If an antibiotic was necessary, it should have been penicillin or Amoxicillin. Further, Dr.

Gupta departed from good and accepted dental practice in not directing Jeanne Marie to stop taking the Clindamycin when she started taking the Augemntin:

Taking these two antibiotics simultaneously does not offer any additional benefit when compared to taking them individually in these kinds of infections generally. However, the risks of taking these two antibiotics simultaneously include acute renal failure, antibiotic resistance, and other serious reactions, including C. Diff. Thus, it was not the standard of care in 2015 to have a patient take these two antibiotics simultaneously. To be sure, even Dr. Gupta admits this in his own deposition.

The expert claims that it is “well known” in the medical community that Clindamycin carries the highest risk of C-diff, and therefore he opines that taking the Clindamycin and Augmentin together was a substantial factor in causing Jeanne Marie’s C-diff infection. Further, “multiple studies” show that taking multiple antibiotics increases the risk of C-diff.

Finally, the expert opines:

16. Notably, though amoxicillin, Augmentin, and Zegerid may cause C. Diff infection, I opine to a reasonable degree of medical certainty that is not what happened in Ms. O'Donnell's case. To be sure, prior to November 2015, Ms. O'Donnell had taken Amoxicillin and Augmentin with no adverse reaction. Further, she had been taking Zegerid since 2007 without any resulting abdominal symptoms.

Initially, the court finds Jeanne Marie’s expert not qualified to opine on dental-related departures. No foundation was laid to establish his/her ability to question dental

procedures, nor did the expert state he/she had made any efforts to familiarize herself/himself with proper dental procedure. (*Simpson v. Edghill*, 169 AD3d 737 [2d Dept 2019]). While the court finds the expert's opinion can be heard regarding the issue surrounding the medication and contracting of C-diff, the court finds the affirmation does not raise an issue of fact.

On the one hand, the expert agrees with Defendants' experts that C-diff can be caused by many different things, including a single dose of prophylactic antibiotics. Yet then the expert opines, without basis, that it was the taking of Clindomycin and Augmentin at the same time that caused the infection. This opinion is conclusory and speculative. It was the expert's burden to establish that it was "more probable than not" that Dr. Gupta's actions were a substantial factor in causing the C-diff infection. The expert, however, is only able to opine that it is one of many possible explanations, but cannot assert that it is more probable than any of the other factors. Put another way, if the expert can only opine that taking two antibiotics simultaneously is just as likely as taking an antibiotic one time to cause C-diff, then it cannot be said that taking the two antibiotics simultaneously was the proximate cause of the infection. (*See Bernstein v. City of New York*, 69 NY2d 1020 [1987]; *Liyange v. Amann*, 128 AD3d 645 [2d Dept 2015]).

Further, the fact that Jeanne Marie has previously taken Augmentin, and the protein pump inhibitor for many years without incident is neither proof that her infection

was not caused by them, nor does it equate to the double dosage of antibiotics causing the infection.

Finally, the expert renders no opinion on informed consent, and is therefore unable to raise an issue of fact indicating there was a lack of informed consent.

**DR. LEE AND DR. RASTERGAR'S MOTION FOR  
SUMMARY JUDGMENT (MOTION SEQ. 002)**

In support of their motion. Dr. Lee and Dr. Rastergar submit, *inter alia*, the expert affirmation of Jay P. Goldsmith, D.M.D. Dr. Goldsmith has been licensed to practice dentistry, and has been a practicing dentist since 1969. He specializes in, and is Board Certified in Oral and Maxillofacial Surgery. In his practice, he has extracted thousands of teeth, as well as performing other kinds of oral surgery, and regularly prescribes antibiotics.

Based upon the signed informed consent forms, Dr. Goldsmith opines that Jeanne Marie was properly informed of the risks of having teeth 18 and 19 extracted. According to the records, both procedures went smoothly and Jeanne Marie tolerated them well. Regarding Dr. Lee prescribing Amoxicillin, after extracting tooth 18, Dr. Goldsmith opined:

The prescription of Amoxicillin 500 mg for a course of five days by DR. LEE on December 9, 2015, following the extraction of tooth #18 was entirely appropriate and proper and in accordance with good and accepted practice. Firstly, DR. LEE was aware of the antibiotics previously prescribed by DR. GUPTA, as evidenced by DR. LEE'S directive to the

plaintiff following the first extraction to continue the antibiotics given by DR. GUPTA. It is irrelevant that the plaintiff had previously taken the antibiotics Clindamycin and Augmentin, as pursuant to her own testimony she had been off of antibiotics at least a few days prior to December 9, 2015 (it was likely 4 or 5 days that plaintiff was off of antibiotics, if she took the medication as prescribed by DR. GUPTA). Contrary to plaintiffs' claims, the prescription of Amoxicillin by DR. LEE was not "adjuvant" antibiotic treatment, as she was only prescribed one antibiotic at that time. Furthermore, there were no contraindications to DR. LEE'S prescription of antibiotics, as DR. LEE had taken an appropriate history each visit and no history of diarrhea was reported by the plaintiff.

Dr. Goldsmith opined that prescribing Amoxicillan was appropriate to fight the infection and to prevent any further infection, and that it is standard practice and procedure for a dentist to prescribe an antibiotic after an extraction. Signs and symptoms of a systemic infection are not necessary to prescribe an antibiotic after an extraction. Regardless, the pain Jeanne Marie was experiencing was potentially a sign of systemic infection. Prescribing an antibiotic was further supported by the fact that Dr. Gupta has noticed signs of infection in both teeth 18 and 19 previously, had cleaned them out and inserted medication directly onto the sight, yet Jeanne Maris continued to experience pain.

After the extractions, Dr. Goldmsith states that Dr. Lee provided proper discharge instructions, which included returning to the office of a follow-up, and to immediately stop taking the antibiotic if she developed diarrhea. If she did develop diarrhea, she was to call Dr. Lee.

Dr. Goldsmith opines there was no reason to refer Jeanne Marie to an infectious disease specialist. During her visits with Dr Lee, Jeanne Marie did not exhibit any signs that would have warranted such a referral. Jeanne Marie did not begin having diarrhea until two days after her last visit with Dr. Lee, and she contacted Dr. Keber at that point and not Dr. Lee. At no time during her interactions with Dr. Lee did Jeanne Marie complain of any gastrointestinal issues, such as diarrhea.

Like the other experts in this matter, Dr. Goldsmith explains that C-diff can be caused by many different things, including a single dose of an antibiotic. There is no evidence to suggest that the Amoxicillan was any more likely to have caused the C-diff than the antibiotics prescribed Dr. Gupta, or by her gastrointestinal problems, or by her occupation which involved interaction with multiple children. As a result, Dr. Goldsmith opines that Dr. Lee did not depart from good and accepted dental procedure, and nothing Dr. Lee did in his care for Jeanne Marie was the proximate cause of her contracting C-diff.

Based upon Dr. Goldsmith's affirmation and the other evidence submitted including the signed informed consent forms, the court finds that Dr. Lee and Dr. Rastegar have established entitlement to summary judgment as matter of law. The burden shifts to Jeanne Marie to raise a material issue of fact requiring a trial of the action.

In opposition, Jeanne Marie only offers the affirmation of counsel and other exhibits, but no expert affirmation. The redacted expert affirmation offered in opposition

to Dr. Gupta and GSEA's motion, *supra*, does not address Dr. Lee's actions. The other exhibits consist of medical records from Dr. Keber and Jeanne Marie's pharmacy records. None of these contradict the opinions of Dr. Goldsmith, nor do they raise an issue of fact.

Accordingly, it is hereby

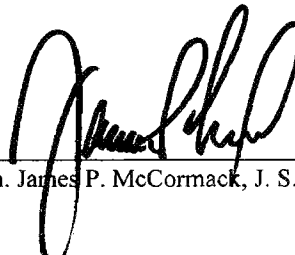
**ORDERED**, that Dr. Gupta and GSEA's motion for summary judgment (Motion Seq. 001) is GRANTED; and it is further

**ORDERED**, that Dr. Lee and Dr. Rastegar's motion for summary judgment (Motion Seq. 002) is GRANTED.

The complaint is dismissed.

This constitutes the Decision and Order of the Court.

Dated: June 17, 2020  
Mineola, N.Y.



Hon. James P. McCormack, J. S. C.

**ENTERED**

**Jul 27 2020**

NASSAU COUNTY  
COUNTY CLERK'S OFFICE

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1This decision was originally rendered on April 28, 2020, however it was uploaded onto the e-file site, during the Covid-19 precautions period, without a signature. This order is identical to the April 28, 2020 order except for signature and the date.