

Zhao Long Zheng v Yu
2020 NY Slip Op 32614(U)
August 11, 2020
Supreme Court, Kings County
Docket Number: 514234/17
Judge: Marsha L. Steinhardt
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At an IAS Term, Part MMTRP of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 11th day of August, 2020.

P R E S E N T:

HON. MARSHA L. STEINHARDT,
Justice.

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ZHAO LONG ZHENG, AS ADMINISTRATOR OF THE ESTATE
OF RI XIN ZHENG, DECEASED,

Plaintiff,

- against -

Index No. 514234/17
Mot. Seq. No. 1

SUSAN YU, M.D., A/K/A SUZANNE YU, M.D.,
HUIHING TIN, M.D., JIANJUN LI, M.D., AND
JIANJUN LI GI MEDICAL, P.C.,

Defendants.

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The following e-filed papers read herein:

	<u>NYCEF Doc #</u>
Notice of Motion/Order to Show Cause/Petition/Cross Motion and Affidavits (Affirmations) Annexed_____	37-52
Opposing Affidavits (Affirmations)_____	53-59
Reply Affidavits (Affirmations)_____	63

Upon the foregoing papers, in this action by plaintiff Zhao Long Zheng (plaintiff), as administrator of the estate of Ri Xin Zheng (Mr. Zheng), against defendants Suzanne G. Yu, M.D., s/h/a Susan Yu, M.D., a/k/a Suzanne Yu, M.D. (Dr. Yu), Huihing Tin, M.D. (Dr. Tin), Jianjun Li, M.D. (Dr. Li), and Jianjun Li GI Medical, P.C. (GI Medical) to recover damages for medical malpractice and wrongful death, Dr. Li and GI Medical move, under motion sequence number one: (1) pursuant to CPLR 3212, for summary

judgment dismissing plaintiff's complaint as against Dr. Li and severing him from this action; and (2) pursuant to CPLR 3212, for partial summary judgment dismissing plaintiff's complaint as against GI Medical on all claims except GI Medical's vicarious liability for the alleged medical malpractice of Dr. Tin.

Facts and Procedural Background

On May 5, 2016, after being referred on April 26, 2016 by his primary care physician, Dr. Ailing Zhang, M.D. (Dr. Zhang),¹ Mr. Zheng, went to GI Medical, a professional corporation specializing in gastroenterology. Dr. Li, who is a gastroenterologist, is the principal and sole shareholder of GI Medical. On Mr. Zheng's May 5, 2016 visit to GI Medical, at which time he was 51 years old, he reported that he had epigastric pain and dyspepsia for several months which were not relieved by antacid medication. Mr. Zheng was examined and scheduled for an esophagogastroduodenoscopy (EGD), which is an "[e]ndoscopic examination of the esophagus, stomach, and duodenum usually performed using a fiberoptic instrument" (Stedman's Medical Dictionary [Note: online version, database updated Nov. 2014]). It is a form of endoscopy used to visualize the upper part of the gastrointestinal tract down to the duodenum. The EGD uses a camera in a gastroscope,² which is inserted into the mouth.

¹While Dr. Li and GI Medical's attorney, in her reply affirmation, claims that there is no evidence that Mr. Zheng was referred to Dr. Li and GI Medical by Dr. Zhang, the "History of Present Illness" section of GI Medical's certified records for Mr. Zheng specifically states that Mr. Zheng was referred to GI Medical by Dr. Zhang.

²A gastroscope is defined as "[a]n endoscope for inspecting the interior of the stomach"

On June 30, 2016, Mr. Zheng returned to GI Medical for the purpose of having the EGD. The EGD was performed by Dr. Tin, another gastroenterologist at GI Medical, who was employed by GI Medical. At that time, Mr. Zheng met, for the first time, Dr. Yu, an anesthesiologist, who was to provide the anesthesia for the EGD. Dr. Yu, as part of the EGD, administered propofol to Mr. Zheng. Propofol is a short-acting sedative drug which was the sole agent for the monitored anesthetic care. Dr. Yu administered a total of 100 mg of propofol to Mr. Zheng in three separate doses, commencing at 10:11 a.m.

Shortly after the introduction of the gastroscope by Dr. Tin and his visualization of Mr. Zheng's oropharynx, i.e., the part of the throat at the back of the mouth, Mr. Zheng started gasping for air, at which point the gastroscope was withdrawn and the EGD aborted. Dr. Li was immediately called into the procedure room. Dr. Li directed that 911 be called, and the call was received at 10:22 a.m.

(Stedman's Medical Dictionary [Note: online version, database updated Nov. 2014]).

When Dr. Li came into the room, he became aware that Mr. Zheng's oxygen saturation level was very low. Dr. Li performed chest compressions on Mr. Zheng. No medication, such as epinephrine, was administered to Mr. Zheng. No automated external defibrillator (AED)³ was used on Mr. Zheng.

After the ambulance arrived at the scene at 10:27 a.m., the emergency medical technicians (the EMTs) found Mr. Zheng to be in cardiac arrest. The Ambulance Call Report contained the entry that "MD states that facility has no AED." The EMTs began cardiopulmonary resuscitation (CPR) and applied an AED. At 10:54 a.m., Mr. Zheng was taken to NYU Lutheran Hospital and arrived there at 10:59 a.m. with CPR in progress. The certified records of NYU Lutheran Hospital, in the emergency department history note, stated that "per EMS there was no AED on premises." CPR continued to be performed in the emergency department at NYU Lutheran Hospital. Two rounds of epinephrine were given to Mr. Zheng. A bedside sonogram indicated that there was no cardiac activity, and the monitor did not show any heart rhythm. Mr. Zheng was pronounced dead at 11:11 a.m. The cause of death listed in the autopsy report was cardiac arrest.

On July 24, 2017, plaintiff, who is Mr. Zheng's son and the administrator of his estate, filed the instant action. Dr. Tin filed his answer on August 15, 2017. Dr. Li and GI

³ An AED is defined as "a device available to trained first-responder personnel or laypeople; can provide electrical countershock to a victim with the appropriate dysrhythmia without requiring the user's making a decision" (Stedman's Medical Dictionary [Note: online version, database updated Nov. 2014]).

Medical filed their answer on September 14, 2017. Dr. Yu filed her answer on January 11, 2018.

Discovery has been completed, including the depositions of Dr. Li, Dr. Yu, and Dr. Tin, and the parties have exchanged of all documents. On November 5, 2019, plaintiff filed his note of issue. On January 6, 2020, Dr. Li and GI Medical filed their instant motion for summary judgment.

Discussion

“The essential elements of a cause of action to recover damages for medical malpractice are a deviation or departure from accepted medical practice and evidence that such departure was a proximate cause of injury [or death]” (*Harris v St. Joseph’s Med. Ctr.*, 128 AD3d 1010, 1012 [2d Dept 2015]; *see also Poter v Adams*, 104 AD3d 925, 926 [2d Dept 2013]; *Hayden v Gordon*, 91 AD3d 819, 820 [2d Dept 2012]; *Guzzi v Gewirtz*, 82 AD3d 838, 838 [2d Dept 2011]). “Proximate cause is established where the defendant’s conduct was a ‘substantial factor’ in bringing about the injury [or death]” (*King v St. Barnabas Hosp.*, 87 AD3d 238, 245 [1st Dept 2011]; *see also Stewart v New York City Health & Hosps. Corp.*, 207 AD2d 703, 704 [1st Dept 1994], *lv denied* 85 NY2d 809 [1995]).

In an action sounding in medical malpractice, a defendant moving for summary judgment has the initial burden of making “‘a prima facie showing either that there was no departure from accepted medical practice, or that any departure was not a proximate cause of the patient’s injuries [or death]’” (*Stucchio v Bikvan*, 155 AD3d 666, 667 [2d Dept

2017], quoting *Matos v Khan*, 119 AD3d 909, 910 [2d Dept 2014]; *see also Guctas v Pessolano*, 132 AD3d 632, 633 [2d Dept 2015]; *Poter*, 104 AD3d at 926; *Salvia v St. Catherine of Sienna Med. Ctr.*, 84 AD3d 1053, 1053-1054 [2d Dept 2011]; *Heller v Weinberg*, 77 AD3d 622, 622-623 [2d Dept 2010], *lv denied* 16 NY3d 707 [2011]). “The failure to make such [a] prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers” (*Stiso v Berlin*, 176 AD3d 888, 889 [2d Dept 2019]; *see also Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

It is only when “a defendant has made such a [prima facie] showing [that] the burden shifts to the plaintiff to ‘submit evidentiary facts or materials to rebut the prima facie showing by the defendant’” and to establish the existence of triable issues of fact (*Harris*, 128 AD3d at 1012, quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also Stukas v Streiter*, 83 AD3d 18, 25-26 [2d Dept 2011]). “Once the defendant has made such a showing, the plaintiff, in opposition, must submit evidentiary facts or materials to rebut the defendant’s prima facie showing, but only as to those elements on which the defendant met the prima facie burden” (*Keesler v Small*, 140 AD3d 1021, 1023 [2d Dept 2016]; *see also Poter*, 104 AD3d at 926; *Stukas*, 83 AD3d at 23-24).

In support of their motion, Dr. Li and GI Medical have not submitted any medical expert’s affirmation. They assert that they are not moving for summary judgment on the ground that there are no triable issues of fact. They contend that Dr. Li is entitled to summary judgment on the ground that he was not involved in Mr. Zheng’s medical care until “after the event at issue.” They further contend that since Dr. Li is entitled to

summary judgment, GI Medical cannot be held vicariously liable for Dr. Li's alleged medical malpractice.

Dr. Li and GI Medical argue that Dr. Li owed no duty of care to Mr. Zheng. Dr. Li bases this claimed lack of any duty on his contention that he did not provide any relevant medical care to Mr. Zheng because he played no role in performing the EGD itself. While Mr. Zheng came to Dr. Li's office for treatment, Dr. Li argues that he was not Mr. Zheng's physician, that there was no physician-patient relationship between him and Mr. Zheng, and that he did not undertake any role in treating Mr. Zheng. He claims that all he did was chest compressions, and that his chest compressions were not negligently performed.

Dr. Li and GI Medical, in claiming that Dr. Li only rendered treatment to Mr. Zheng "after the event at issue," point to the fact that Dr. Tin testified, at his deposition, that Dr. Li was not in the room during the EGD (Dr. Tin's deposition tr at 24-25). They also point to Dr. Yu's deposition testimony that Dr. Li was not involved in Mr. Zheng's care until he was called into the procedure room after Mr. Zheng began gasping for air (Dr. Yu's deposition tr at 72-73). In addition, they note that Dr. Li testified, at his deposition, that he was not involved in the EGD or the administration of anesthesia to Mr. Zheng, and that when Dr. Li came into the procedure room, Mr. Zheng had already stopped breathing (Dr. Li's deposition tr at 25-26). Dr. Li and GI Medical contend that the gravamen of plaintiff's claim is that the medical care during the EGD and the anesthesia care did not meet the requisite standard of care. They argue that since Dr. Li

did not provide the medical care during the EGD or the anesthesia care and did not begin providing medical care to Mr. Zheng until after he was already unconscious, he is entitled to summary judgment dismissing all claims by plaintiff relating to the medical care provided to Mr. Zheng.

Dr. Li and GI Medical's argument must be rejected. Dr. Li had a duty of care towards Mr. Zheng with respect to his acts that occurred following the administration of the anesthesia and the ceasing of the EGD (*see Cregan v Sachs*, 65 AD3d 101, 110 [1st Dept 2009]). It is undisputed that Dr. Li was immediately called into the procedure room and became integrally involved in the steps and the activity taking place during this period of time. The care rendered during this time was critical to Mr. Zheng's survival. Dr. Li confronted Mr. Zheng's breathing disruption and was responsible for his own acts and omissions with respect to the medical care that he rendered while Mr. Zheng's vital signs were at issue. At that time, Mr. Zheng was alive and had a pulse (Dr. Yu's deposition tr at 74).

Contrary to Dr. Li and GI Medical's arguments, plaintiff's claims are not limited to the alleged medical malpractice in performing the EGD and administering the anesthesia. Rather, plaintiff alleges, in his bill of particulars, among other things, that Dr. Li failed to intercede in a timely and skillful way to restore an open airway and ventilatory dynamics and failed to prevent Mr. Zheng's cardiac arrest, leading to Mr. Zheng's death, and that these events occurred during the time period encompassing when Dr. Li came into the procedure room. Plaintiff's bill of particulars also emphasizes the absence of an AED and

the fact that an AED was not used in Dr. Li's resuscitation efforts. In addition, Dr. Li was questioned, during his deposition, about his lack of use of an AED on Mr. Zheng (Dr. Li's deposition tr at 16, 59-60).

Moreover, plaintiff's CPLR 3101 (d) expert witness exchange states that plaintiff's medical expert will testify that defendants, among other things, departed from good and accepted medical practice in the following ways:

“ . . . in failing to intercede in a timely and skillful way to restore an open airway and ventilatory dynamics; in failing to execute intubation procedures in a timely and skillful way; in failing to administer cardiopulmonary resuscitation in a timely and skillful way; in failing to expeditiously, skillfully and timely perform a jaw lift or jaw thrust maneuver; in failing to expeditiously, skillfully and timely administer advanced airway management procedures to restore an open airway in the patient; in proceeding with the administration of propofol in the absence of an automatic external defibrillator (AED); in failing to appreciate the evolution of and progression of cardiac injury to cardiac arrest; in failing to utilize an automated external defibrillator (AED) in a timely and appropriate manner, if one were, in fact, available; in failing to administer epinephrine in a timely manner; [and] in failing to use the larynx mask airway (LMA) in a proper manner . . . ”

Dr. Li and GI Medical have not refuted these allegations by an expert affirmation.

Dr. Li and GI Medical, in their reply, argue that Dr. Li did not contribute to Mr. Zheng's death. However, Dr. Li and GI Medical have failed to provide any expert opinion supporting such contention and have not satisfied their initial burden of making a prima facie showing either that there was no departure from accepted medical practice by Dr. Li, or that any departure by him was not a proximate cause of or substantial contributing factor to Mr. Zheng's death (*see King*, 87 AD3d at 245). Dr. Li and GI Medical also

claim that Mr. Zheng was already in cardiac arrest when Dr. Li came into the procedure room. This is contrary to Dr. Yu's deposition testimony that Mr. Zheng was not yet in cardiac arrest at that time (Dr. Yu's deposition tr at 75). There is no showing by Dr. Li that Mr. Zheng already had no chance of survival at the time that Dr. Li entered the procedure room.

A malpractice claim may be based upon negligent resuscitation efforts which contribute to a patient's death (*see King*, 87 AD3d at 246). "If the proof is ambivalent as to the question of whether the deceased would have died regardless of the malpractice, a pure factual issue is raised . . . and such an issue can only be resolved by a jury determination of whether the malpractice proximately deprived the deceased of that substantial possibility" (*id.* at 245, quoting *Mortensen v Memorial Hosp.*, 105 AD2d 151, 157 [1st Dept 1984]). Dr. Li and GI Medical have failed to eliminate any factual issue in this respect, and, therefore, it was not incumbent upon plaintiff to submit an affirmation by his medical expert in opposition to Dr. Li and GI Medical's motion.

Dr. Li argues that plaintiff is attempting to raise a new theory of liability against him for the first time in opposition to this summary judgment motion. Dr. Li states that this "new" theory of liability was set forth in plaintiff's expert disclosure, dated October 11, 2019, prior to the filing of this summary judgment motion on January 6, 2020, but states that this "new" theory of liability could not be readily discerned from plaintiff's bill of particulars. This argument is rejected. Plaintiff's theory of liability against Dr. Li is not a new theory and can be readily discerned from plaintiff's bill of particulars. In any

event, plaintiff's claim regarding the lack of use of an AED was anticipated and addressed by Dr. Li and GI Medical in their motion for summary judgment. Under these circumstances, a jury should be permitted to determine whether Dr. Li's acts or omissions with respect to Mr. Zheng constituted medical malpractice (*see Mackauer v Parikh*, 148 AD3d 873, 878 [2d Dept 2017]).

Dr. Li and GI Medical additionally argue that plaintiff's claim that they were actively negligent due to their failure to have an AED available cannot be used to oppose their motion for summary judgment. Dr. Li and GI Medical contend that even if it were their responsibility to have an AED available, Dr. Li, Dr. Yu, and Dr. Tin all testified, at their depositions, that there was an AED available (Dr. Li's deposition tr at 12-13; Dr. Yu's deposition tr at 48-49, 52; Dr. Tin's deposition tr at 23, 43).

Dr. Li and GI Medical acknowledge that there are notes to the contrary in the Ambulance Call Report and the NYU Lutheran Hospital medical records. They argue, however, that these notes are inadmissible hearsay. In arguing that these notes are hearsay, they claim that an AED was not germane to Mr. Zheng's treatment. They further claim that the Ambulance Call Report was hearsay because the EMT who wrote the statement in the Ambulance Call Report did not have firsthand knowledge as to whether an AED was available, and that the entry in the NYU Lutheran Hospital medical records was hearsay because it stated that "per EMS there was no AED on the premises."

In opposition, plaintiff argues that the deposition testimony by Dr. Li, Dr. Yu, and Dr. Tin is self-serving, and that the Ambulance Call Report is admissible as a certified

business record and as an admission against interest. Plaintiff also points to the fact that he sought disclosure, in his post-deposition discovery demand, of the serial number of the AED, and Dr. Li's attorneys responded that Dr. Li and GI Medical "are not in possession of the serial number of the AED device that was present in the procedure room on June 30, 2016," without any explanation as to why they did not have this information.

It is well established that a hearsay entry in an ambulance call report or a hospital record "is admissible under the business records exception to the hearsay rule if the entry is germane to the diagnosis or treatment of the patient" (*Berkovits v Chaaya*, 138 AD3d 1050, 1051 [2d Dept 2016]; *see also Robles v Polytemp, Inc.*, 127 AD3d 1052, 1054 [2d Dept 2015]; *Berrios v 735 Ave. of the Ams., LLC*, 103 AD3d 472, 472-473 [1st Dept 2013]; *Kamolov v BIA Group, LLC*, 79 AD3d 1101, 1101 [2d Dept 2010]; *Rodriguez v Piccone*, 5 AD3d 757, 758 [2d Dept 2004]). Furthermore, "if the entry is inconsistent with a position taken by a party at trial, it is admissible as an admission by that party, even if it is not germane to diagnosis or treatment, as long as there is "evidence connecting the party to the entry"" (*Berkovits*, 138 AD3d at 1051-1052, quoting *Robles*, 127 AD3d at 1054, quoting *Coker v Bakkal Foods, Inc.*, 52 AD3d 765, 766 [2d Dept 2008], *lv denied* 11 NY3d 708 [2008]; *see also Kamolov*, 79 AD3d at 1102; *Berrios v TEG Mgt. Corp.*, 35 AD3d 775, 776 [2d Dept 2006]).

The Ambulance Call Report provides, on its face, that it is certified as "a true copy of an original Fire Dept. record, kept in the normal course of business." The NYU Lutheran Hospital medical records also provide that they are certified as made in the

regular course of business. They would, therefore, both be admissible under the business records exception to the hearsay rule if their contents relate to diagnosis and treatment and they do not otherwise constitute hearsay (*see Berkovits*, 138 AD3d at 1051). It cannot be said that the issue of whether an AED had been used was not germane to Mr. Zheng's treatment. Furthermore, while Dr. Li and GI Medical also claim that the M.D. who was stated to have told the EMT that there was no AED is not identified, there were only three doctors present at the scene, and the name of the EMT who wrote the Ambulance Call Report is identified as Michael Hy, by his signature. Thus, if Michael Hy testifies at the trial of this action, he could potentially provide evidence connecting Dr. Li to the entry, which is inconsistent with Dr. Li's position that there was an available AED, and could constitute an admission by Dr. Li.

Moreover, while it is unclear at this juncture as to whether the notes at issue may ultimately be admissible at trial (*see Christopher v St. Vincent's Hosp. & Med. Ctr.*, 121 AD2d 303, 305-306 [1st Dept 1986], *appeal granted, rearg denied* 123 AD2d 274 [1986], *appeal dismissed* 69 NY2d 707 [1986]), a "hearsay statement may be relied upon to defeat summary judgment where . . . it is not the only evidence submitted in opposition to the motion" (*Uncyk v Cedarhurst Prop. Mgt., LLC*, 137 AD3d 610, 611 [1st Dept 2016]; *see also Pena v Penny Lane Realty Inc.*, 129 AD3d 441, 442 [1st Dept 2015]; *Rugova v Davis*, 112 AD3d 404, 404 [1st Dept 2013]). Here, these notes are not the only evidence submitted and relied upon by plaintiff. Rather, as discussed above, plaintiff has raised other triable issues of fact as to Dr. Li's own alleged medical malpractice, including the

failure to use the AED if one were present. Thus, admissibility of the Ambulance Call Report and the NYU Lutheran Hospital medical records are unnecessary to defeat Dr. Li and GI Medical's summary judgment motion. Consequently, Dr. Li is not entitled to summary judgment dismissing plaintiff's complaint as against him with respect to his own alleged medical malpractice. GI Medical, therefore, is also not entitled to summary judgment dismissing plaintiff's complaint as against it insofar as it may be held vicariously liable for Dr. Li's alleged medical malpractice. Dr. Li and GI Medical, in their motion, further contend that neither of them may be held vicariously liable for any medical malpractice by Dr. Yu. In support of this contention, they assert that Dr. Yu was an independent contractor and not an employee of either of them. Dr. Li testified, at his deposition, that Dr. Yu was an independent contractor of GI Medical (Dr. Li's deposition tr at 18). Dr. Yu similarly testified, at her deposition, that she was an independent contractor, and not an employee of GI Medical, since 2006 (Dr. Yu's deposition tr at 19, 21). Dr. Yu explained that she first had a written agreement with GI Medical for the first three years and then she and Dr. Li decided that they did not need one (*id.* at 20). Dr. Yu also testified that she was paid by the patient's insurance company directly on a per case basis (*id.* at 21-22). Dr. Li and GI Medical additionally assert that even if Dr. Yu was employed by them, they had no reason to believe that Dr. Yu was not qualified to undertake the medical care for Mr. Zheng because Dr. Yu was a licensed anesthesiologist who had been performing anesthesia services at GI Medical for 10 years before Mr. Zheng's death without incident.

Plaintiff, in opposition, acknowledges that both Dr. Yu and Dr. Li denied that Dr. Yu was an employee of GI Medical, but argues that this is not dispositive of the issue of the relationship between Dr. Yu and GI Medical or the issue of GI Medical's vicarious liability for the alleged malpractice of Dr. Yu. Plaintiff notes that the written agreement regarding the relationship between Dr. Yu and GI Medical was never produced despite a discovery demand for it following Dr. Yu's deposition, and that GI Medical responded that it was unaware of and not in possession of any such written agreement. Plaintiff asserts that the failure to produce this written agreement may raise a question of fact as to the relationship between GI Medical and Dr. Yu and the degree of actual control exercised by GI Medical over Dr. Yu (*see Gunther v Staten Is. Hosp.*, 226 AD2d 427, 428 [2d Dept 1996]). Plaintiff also notes that Dr. Yu testified, at her deposition, that she performed an average of 20 cases per day or at least 10 to 15 cases per day of EGD procedures at GI Medical, and that since 2006, she performed maybe over 10,000 EGD procedures at GI Medical (Dr. Yu's deposition tr at 23-24). Plaintiff additionally notes that GI Medical immediately terminated Dr. Yu's services by a letter dated June 30, 2016, the same day that Mr. Zheng died, which gave notice to Dr. Yu that because of the events that occurred relating to Mr. Zheng, she was being directed to no longer go to GI Medical's office until the conclusion of an investigation concerning the incident.

It is undisputed that Mr. Zheng never sought out the services of Dr. Yu or asked her to be his anesthesiologist, and that Mr. Zheng was never referred to Dr. Yu for treatment. Rather, Mr. Zheng went to GI Medical for treatment. Mr. Zheng first met Dr. Yu on the

date of the procedure, and she told him that she would be giving him sedation for the procedure (Dr. Yu's deposition tr at 33). Mr. Zheng was not given a choice of what anesthesiologist to use, but was provided with Dr. Yu by GI Medical. There is no evidence that Mr. Zheng was informed that Dr. Yu was an independent contractor. While Mr. Zheng signed a consent form, entitled "Consent to Administration of Anesthesia," in which Mr. Zheng authorized Dr. Yu to administer anesthesia for the EGD procedure, he additionally signed a consent form, on GI Medical's letterhead, entitled "Consent to Operation, Anesthetic, Special Procedures or Treatment," in which he consented, among other things, to the administration of "local and regional anesthesia." This consent form was dated June 30, 2016 at 9:32 a.m., which was the identical date and time shown on the "Consent to Administration of Anesthesia" form, indicating that the two consent forms were executed by Mr. Zheng simultaneously.

"Although a hospital or other medical facility is liable for the negligence or malpractice of its employees . . . , that rule does not apply when the treatment is provided by an independent physician, as when the physician is retained by the patient himself [or herself]" (*Hill v St. Clare's Hosp.*, 67 NY2d 72, 79 [1986]). Thus, a medical facility will generally "not be held liable for the acts of an anesthesiologist who was not an employee . . . , but was one of a group of independent contractors" (*Keesler v Small*, 140 AD3d 1021, 1022 [2d Dept 2016]; *see also Hill*, 67 NY2d at 79).

"However, vicarious liability for the medical malpractice of an independent physician may be imposed under a theory of apparent or ostensible agency" (*Keesler*, 140

AD3d at 1022; *see also Hill*, 67 NY2d at 80-81; *King v Mitchell*, 31 AD3d 958, 959 [3d Dept 2006]). “In order to create such apparent agency, there must be words or conduct of the principal, communicated to a third party, which give rise to the appearance and belief that the agent possesses the authority to act on behalf of the principal” (*Keesler*, 140 AD3d at 1022, quoting *Dragotta v Southampton Hosp.*, 39 AD3d 697, 698 [2d Dept 2007]; *see also King*, 31 AD3d at 959; *Searle v Cayuga Med. Ctr. at Ithaca*, 28 AD3d 834, 836 [3d Dept 2006]). “The third party must reasonably rely on the appearance of authority, based on some misleading words or conduct by the principal, not the agent” (*Keesler*, 140 AD3d at 1022, quoting *Dragotta*, 39 AD3d at 698). “Moreover, the third party must accept the services of the agent in reliance upon the perceived relationship between the agent and the principal, and not in reliance on the agent’s skill” (*Keesler*, 140 AD3d at 1022 [internal quotation marks omitted]; *see also Loaiza v Lam*, 107 AD3d 951, 952 [2d Dept 2013]).

“There are two elements to such a claim of apparent or ostensible agency” (*Keesler*, 140 AD3d at 1022 [internal quotation marks omitted]). “To establish the ‘holding out’ element, the misleading words or conduct must be attributable to the principal” (*Dragotta*, 39 AD3d at 698-699). “To establish the ‘reliance’ element, the third party must accept the agent’s services and submit to the agent’s care in reliance on the belief that the agent was an employee of the principal” (*id.*; *see also Keesler*, 140 AD3d at 1022). “In the context of a medical malpractice action against a hospital [or other medical facility], the patient must have reasonably believed that the physicians treating him or her

were provided by the hospital [or other medical facility] or acted on the hospital's [or other medical facility's] behalf" (*Keesler*, 140 AD3d at 1022; *see also Sosnoff v Jackman*, 45 AD3d 568, 571 [2d Dept 2007], *lv dismissed* 10 NY3d 885 [2008]; *Gunther*, 226 AD2d at 428).

Here, Dr. Yu worked in the office of GI Medical, used its equipment and facilities, and, as previously noted, was not hired by Mr. Zheng and never met Mr. Zheng until the day of the EGD procedure. In addition, as discussed above, one of the consent forms, which referred to anesthesia, was on GI Medical's letterhead, and Dr. Yu provided numerous anesthesia services to GI Medical. GI Medical does not claim that it had any other anesthesiologist. Thus, there are triable issues of fact as to whether GI Medical held Dr. Yu out as its agent.

Moreover, Mr. Zheng accepted Dr. Yu's services not in reliance upon Dr. Yu's skill or competence, but in reliance upon the fact that her services, whatever in fact her relationship was with GI Medical, were offered by GI Medical (*see Hill*, 67 NY2d at 82). Additionally, since "patients generally view their anesthesia services to be a part of the princip[al] treatment sought," Mr. Zheng may have reasonably believed that Dr. Yu was acting on behalf of GI Medical (*Bernard v Goldweber*, 34 Misc 3d 1223[A], 2012 NY Slip Op 50214[U], *8 [Sup Ct, NY County 2012], *rearg denied* 2012 WL 10043417 [Sup Ct, NY County 2012]; *see also Duncan v Mount St. Mary's Hosp. of Niagara Falls*, 176 Misc 2d 201, 204-205 [Sup Ct, Erie County 1998]). Thus, there are material triable issues of fact as to whether Mr. Zheng reasonably believed that Dr. Yu, who had been provided

by GI Medical, was ostensibly acting as its agent in administering the anesthesia and providing care to him (*see Hill*, 67 NY2d at 80; *Keesler*, 140 AD3d at 1022; *Contreras v Adeyemi*, 102 AD3d 720, 722 [2d Dept 2013]; *Schacherbauer v Univ. Assoc. in Obstetrics & Gynecology, P.C.*, 56 AD3d 751, 752 [2d Dept 2008]; *Dragotta*, 39 AD3d at 699). Therefore, Dr. Li and GI Medical's motion, insofar as it seeks summary judgment dismissing plaintiff's claim that GI Medical may be held vicariously liable for the alleged malpractice of Dr. Yu, must be denied.

While plaintiff does not state that he seeks to hold Dr. Li vicariously liable for the alleged malpractice of Dr. Yu, Dr. Li seeks dismissal of such a claim to the extent that plaintiff's complaint can be construed as asserting same. The fact that a physician is a shareholder or employee of a professional service corporation does not render him or her vicariously liable for the medical malpractice of an anesthesiologist where the anesthesiologist is neither an employee of the physician nor an independent contractor that had an apparent or ostensible agency relationship with the physician (*see Business Corporation Law* § 1505 [a]; *Hill*, 67 NY2d at 79-80; *Yaniv v Taub*, 256 AD2d 273, 275-276 [1st Dept 1998]; *Polokoff v Palmer*, 190 AD2d 897, 898 [3d Dept 1993]; *Paciello v Patel*, 83 AD2d 73, 77 [2d Dept 1981]). Thus, since Dr. Yu was not employed by Dr. Li, was not under Dr. Li's supervision or control, and there was no apparent or ostensible agency relationship between Dr. Yu and Dr. Li, summary judgment dismissing plaintiff's complaint, insofar as Dr. Li and GI Medical's motion seeks dismissal of such a claim as against Dr. Li, should be granted (*see CPLR* 3212 [b]).

With respect to Dr. Tin, “[u]nder the doctrine of respondeat superior, a corporation, including a professional services corporation, is liable for a tort committed by its employee” (*Yaniv*, 256 AD2d at 274; *see also Connell v Hayden*, 83 AD2d 30, 46 [2d Dept 1981]). Dr. Li and GI Medical concede that Dr. Tin was an employee of GI Medical and that GI Medical can, therefore, be held vicariously liable for any medical malpractice by Dr. Tin. Thus, Dr. Li and GI Medical do not seek summary judgment dismissing plaintiff’s claims insofar as they assert that GI Medical is vicariously liable for the alleged medical malpractice of Dr. Tin.

Dr. Li and GI Medical assert, however, that Dr. Tin was not employed by Dr. Li and that Dr. Li, therefore, cannot be held vicariously liable for any medical malpractice by Dr. Tin. Plaintiff, in response, does not argue that Dr. Li directly controlled or supervised Dr. Tin or that Dr. Li is vicariously liable for Dr. Tin’s alleged medical malpractice. As contended by Dr. Li, while he is GI Medical’s sole shareholder, he cannot be held vicariously liable for any medical malpractice by Dr. Tin since the shareholder of a professional corporation is not vicariously liable for the acts of a physician, who is employed by the professional corporation, where the shareholder did not directly supervise or control such physician (*see Hill*, 67 NY2d at 79-80; *Yaniv*, 256 AD2d at 274-276; *Polokoff*, 190 AD2d at 898; *Paciello*, 83 AD2d at 77). Therefore, Dr. Li and GI Medical’s motion, insofar as it seeks summary judgment dismissing plaintiff’s claims that Dr. Li is vicariously liable for the alleged medical malpractice of Dr. Tin, must be granted (*see CPLR 3212 [b]*).

Conclusion

Accordingly, Dr. Li and GI Medical’s motion for summary judgment: (1) is granted solely insofar as plaintiff’s claims may be construed as seeking to hold Dr. Li vicariously liable for the alleged medical malpractice of Dr. Yu and Dr. Tin; and (2) is denied insofar as plaintiff seeks to hold Dr. Li individually liable for his own alleged medical malpractice, and insofar as plaintiff seeks to hold GI Medical vicariously liable for the alleged medical malpractice of Dr. Yu.⁴

This constitutes the decision and order of the court.

E N T E R,



J. S. C.

⁴As noted above, Dr. Li and GI Medical’s motion does not seek summary judgment dismissing plaintiff’s claims insofar as they seek to hold GI Medical vicariously liable for the alleged medical malpractice of Dr. Tin.