

**Cheng Hao Zheng v Jianjun Li Gi Med. P.C.**

2023 NY Slip Op 30800(U)

March 15, 2023

Supreme Court, Kings County

Docket Number: Index No. 501459/2017

Judge: Devin P. Cohen

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**Supreme Court of the State of New York  
County of Kings**

**Index Number** 501459/2017  
**Seq.** 006

Part 91

**DECISION/ORDER**

CHENG HAO ZHENG, as administrator of the estate of  
SHI DONG ZHENG, deceased,

Recitation, as required by CPLR §2219 (a), of the papers  
considered in the review of this Motion

Plaintiff,

**Papers Numbered**

against

Notice of Motion and Affidavits Annexed . . . .	<u>1</u>
Order to Show Cause and Affidavits Annexed . . . .	<u>    </u>
Answering Affidavits . . . . .	<u>2</u>
Replying Affidavits . . . . .	<u>3</u>
Exhibits . . . . .	<u>    </u>
Other . . . . .	<u>    </u>

JIANJUN LI GI MEDICAL P.C., JIANJUN LI MD, A PLUS  
MEDICAL CARE P.C., LIN GONG MD, HUI WU NP,

Defendants.

JIANJUN LI MEDICAL P.C. ET AL

Third-Party Plaintiff,

against

HUI WU NP,

Third-Party Defendants.

Upon the foregoing papers, defendants A Plus Medical Care P.C.'s and Lin Gong MD's  
motion for summary judgment is decided as follows:

**Introduction**

The plaintiff-decedent Shi Dong Zheng commenced this action on January 24, 2017, for  
conscious pain and suffering, loss of enjoyment of life and wrongful death, allegedly arising  
from medical malpractice. The plaintiff passed away on March 23, 2018, and limited letters of  
administration were issued to Cheng Hao Zheng. The plaintiff's claims sound in medical  
malpractice, and the gravamen of these complaints is that Mr. Zheng's treating physicians failed

to monitor Mr. Zheng in the way medically necessary to diagnose his cancer before it became fatal.

### **Factual Background**

Shi Dong Zheng began treating with Dr. Lin Gong on November 12, 2011 for gastro-esophageal reflux (“GERD”) and epigastric pain. Upon Mr. Zheng’s visit with Dr. Gong on May 12, 2012, Dr. Gong referred Mr. Zheng to a gastroenterologist, Dr. Jianjun Li. On that same day, Mr. Zheng underwent an esophagogastroduodenoscopy (“EGD”), which led Dr. Li to diagnose Mr. Zheng with “mild gastritis [and] esophageal reflux.” On July 13, 2014, Dr. Gong’s office referred Mr. Zheng to Dr. Li for a screening colonoscopy. Mr. Zheng was seen at Dr. Li’s office pursuant to this referral on July 15, 2014 and diagnosed with “Epigastric pain; Constipation Unspec[ified]; Colon CA Screening; His[tory] of colonic polyps” and scheduled for “repeat EGD and colonoscopy.” The second EGD was done on July 26, 2014, with the report documenting an impression of “Mild gastritis; esophageal reflux; hiatus hernia, small; Cameron ulcer.” There was an italicized note in that report that read, “Note, recommend close to follow up the patient and rebiopsy to rule out high grade dysplasia.” Dr. Gong received the pathology report from Mr. Zheng’s July 26, 2014 tests after it was prepared on August 5, 2014 (Gong EBT at 38–39). Dr. Gong also agreed that high grade dysplasia is “the earliest possible stage of stomach cancer” (*id.* at 43).

Mr. Zheng appeared again at Dr. Li’s office on September 4, 2014 and was seen by Hui Wu, N.P., to discuss the results of Mr. Zheng’s tests. After this visit, it is undisputed that neither Dr. Li nor Hui Wu made any attempt to schedule a follow-up appointment with Mr. Zheng. The patient visited Dr. Gong eleven times between September 2014 and September 2016, each time with complaints of epigastric pain. On September 3, 2016, Mr. Zheng visited Dr. Gong and,

allegedly for the first time, also complained of loss-of-appetite. Dr. Gong referred the patient immediately to Dr. Li and the patient was seen the same day by Hui Wu, who ordered an emergency EGD. It is undisputed that the result of the EGD and pathology report was for adenocarcinoma, and that Mr. Zheng passed away from this condition on March 23, 2018.

### Analysis

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). "To prevail on a motion for summary judgment dismissing a medical malpractice cause of action, a defendant must make a prima facie showing either that there was no departure from accepted community standards of medical practice, or that any departure was not a proximate cause of the plaintiff's injuries" (*Laughtman v Long Is. Jewish Val. Stream*, 192 AD3d 677, 677–78 [2d Dept 2021]). "Summary judgment may not be awarded in a medical malpractice action where the parties adduce conflicting opinions of medical experts. When experts offer conflicting opinions, a credibility question is presented requiring a jury's resolution" (*Shields v Baktidy*, 11 AD3d 671, 672 [2d Dept 2004] [internal citations omitted]).

In support of summary judgment, the defendant offers the affirmation of Dr. Vincent Garbitelli, a Board Certified internal medicine specialist. Dr. Garbitelli opines that Dr. Gong's course of treatment was medically appropriate in light of the patient's complaints of GERD, and that Dr. Gong's referral to Dr. Li was the appropriate course of action given the patient's condition (Garbitelli Aff. at ¶¶ 10–14). Dr. Garbitelli also contends that, across the eleven visits

that Mr. Zheng made to Dr. Gong's office between September 2014 and September 2016, Dr. Gong performed stomach palpitations and interviewed the patient, and at no time did the patient present with symptoms that would have indicated a pathology of cancer (*id.* at ¶ 29). In effect, Dr. Garbitelli's affirmation makes the case that the onus of "close follow-up" to monitor Mr. Zheng's symptoms "to rule out high grade dysplasia" fell on the practitioners who generated that note—Dr. Li and Hui Wu (*id.* at ¶¶ 27–28). Dr. Garbitelli contends that, after referring the patient, Dr. Gong was bound to defer to Dr. Li's direction for treatment with respect to Dr. Li's area of specialty (gastrointestinal medicine) (*id.* at ¶¶ 35, 45–46). In summary, Dr. Garbitelli re-emphasizes that Dr. Gong, as an internist, operated within the "good and accepted practices in the field of Internal Medicine" (*id.* at ¶ 48).

In opposition, the plaintiff presents an affidavit from an unidentified physician who is described to be Board Certified in internal medicine and in gastroenterology, along with a resume including several fellowships related to gastroenterology and gastrointestinal health (Plaintiff's Expert Aff. at ¶ 2). This physician opines that Dr. Gong breached a medically acceptable standard of care by failing to either refer Mr. Zheng back to Dr. Li or to perform a new EDG in light of the plaintiff's on-going symptoms in the two years between September 2014 and September 2016 (*id.* at ¶ 13). This opinion is based on the fact that Dr. Gong received the pathological report following the 2014 EDG and was thereby put on notice that Mr. Zheng's symptoms were potentially carcinomic (*id.* at ¶ 15). Plaintiff's expert contends that, once Dr. Gong received this report, his persistence in treating Mr. Zheng with substantially the same battery of theretofore inadequate treatments, and not directing a further EDG or contacting Mr. Zheng's specialist, breached the medically necessary standard of care (*id.* at 16).

The defendants also submit a reply affirmation from Dr. Garbitelli. Ordinarily, expert affirmations are improper on reply, as they are provided at a time when the plaintiff cannot respond without express leave of the court and, thereby, potentially “protract a procedure designed to expedite the disposition of civil cases where no issue of material fact is presented to justify a trial” (*Ritt by Ritt v Lenox Hill Hosp.*, 182 AD2d 560, 562 [1st Dept 1992] [internal citation omitted]). In any event, here, Dr. Garbitelli’s additional affirmation does not resolve any questions of fact—it merely reiterates the disagreement with the plaintiff’s expert about whether Dr. Gong bore the responsibility to further investigate the plaintiff’s symptoms in light of the previous referral to a GI specialist.

**Conclusion**

Therefore, in light of the conflicting affirmations submitted by competent medical specialists, the defendants’ motion for summary judgment (Seq. 006) is denied.

This constitutes the decision of the court.

March 15, 2023

**DATE**



**DEVIN P. COHEN**

Justice of the Supreme Court