

**Schwartz v Mulhall**

2005 NY Slip Op 30511(U)

April 24, 2005

Sup Ct, NY County

Docket Number: 117004/07

Judge: Alice Schlesinger

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

**ALICE SCHLESINGER**

PRESENT: \_\_\_\_\_  
Justice

PART **IA** PART 16

Index Number : 117004/2007  
SCHWARTZ, NATALIO M.D.  
vs.  
MULHALL, JOHN M.D.  
SEQUENCE NUMBER : 010  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

**FILED**

APR 27 2012

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ No(s). \_\_\_\_\_  
NEW YORK  
Answering Affidavits — Exhibits \_\_\_\_\_ COUNTY CLERK'S OFFICE No(s). \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is by defendants for summary judgment is denied in accordance with the accompanying memorandum decision, as to defendant John Mulhall, M.D. with the exception of certain claims delineated in the decision. However, the motion for summary judgment is granted as to defendant New York Presbyterian Hospital and all claims are severed and dismissed as against that defendant.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: APR 24 2012

*Alice Schlesinger*  
\_\_\_\_\_  
**ALICE SCHLESINGER**, J.S.C.

1. CHECK ONE: .....  CASE DISPOSED .....  NON-FINAL DISPOSITION  
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER  
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER  
 DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

-----X  
NATALIO SCHWARTZ, M.D., and LUZ-PEREZ  
SCHWARTZ,

Plaintiffs,

Index No. 117004/07  
Motion Seq. No.010

-against-

JOHN MULHALL, M.D., NEW YORK PRESBYTERIAN  
HOSPITAL and MENTOR CORPORATION,

Defendants.

**FILED**

APR 27 2012

-----X  
SCHLESINGER, J.:

NEW YORK  
COUNTY CLERK'S OFFICE

Before this Court is a motion for summary judgment by the two remaining defendants in this medical malpractice action, Dr. John Mulhall and New York Presbyterian Hospital. There had been a third defendant, Mentor Corporation, the manufacturer of the penile implant surgically placed by Dr. Mulhall in the plaintiff Natalio Schwartz on July 18, 2005. I had granted Mentor's motion for summary judgment on April 12, 2011.

In the instant motion, despite the fact that Dr. Mulhall, a urologist with a specialty in male infertility, had treated Dr. Schwartz non-surgically for a period of time before the July surgery, it is only the events of the surgery and its aftermath (the device was explanted on October 31, 2005) that constitute claims of malpractice here. Further, after reading the moving papers which consist of the entire medical and surgical records, depositions, and a forty-seven paragraph affidavit from defendant Dr. Mulhall, and the opposing papers which include an affirmation from an unnamed board certified urologist, it is clear that there are only two claims still extant and those claims only speak to Dr. Mulhall. They are the defendant's alleged failure to timely recognize an infection in and around the implant and

his alleged failure to remove that implant months earlier. In other words, Dr.<sup>1</sup> Schwartz argues he was subjected to extreme amounts of pain from some time in mid-August 2005, when he believes the infection began, through the end of October 2005.

I found this a very difficult matter to decide and a frustrating one. I believe the reason for this is that the principal parties to the controversy, John Mulhall and Natalio Schwartz, have very little actual recollection of the precise events that occurred and when. In a case, such as this where the complaint is that the defendant should have taken certain actions earlier, here recognizing an infection and removing the offending implant, the timeline is very important.

So while Dr. Mulhall gives a very detailed statement of the surgical and medical services he provided to Dr. Schwartz, he has no independent recollection of any of those services. I am not critical of such a lapse because the events happened over six years ago and memory is simply what it is, but it is clear by a reading of his sworn deposition testimony that he has no memory of the post-surgical events. Rather, his testimony and his lengthy affidavit rely on the notations in his records and his custom and practice.

A good example of this is a notation in Dr. Mulhall's records for Dr. Schwartz's visit of August 23, an important date vis-a-vis these claims. This part in the chart was marked plaintiff's Exhibit 6 on page 60 of the defendant's deposition. Dr. Mulhall was asked if he prepared the notes for that day (he did) and to read them (he did). Part of what was read was "Strep B positive and an arrow that goes to the word penicillin". The defendant was then asked whether "Following this visit did you prescribe any medication to Dr. Schwartz?" (p 61). He answered: "To be honest with you, I'm not certain that I did prescribe any

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<sup>1</sup>The plaintiff is himself a medical doctor, in the specialty of anesthesia and pain management.

medication". And then, "Do you have any recollection of why you wrote 'penicillin'?" He responded, "I do have a recollection, and the recollection was that the patient said, you know, that pen VK, penicillin VK, is good for that and I would like to go on penicillin. I have no recollection if I actually wrote the prescription". Finally, he was asked, "What was your response to when he said that he would like to go on penicillin?" and the answer, "I don't have an independent recollection of it, but I'll tell you what my response would be today, which I believe would be the same then, ..."

It is at ¶31 in the defendant's affidavit supporting his motion that he begins discussing Dr. Schwartz's post-operative care. In ¶35, he talks about the August 23 visit and refers to the deposition portion read above. He says:

As I discussed at my deposition, I do not have a recollection as to whether I wrote a prescription for the patient for Penicillin that day. That said, it was my opinion that the patient had a skin contaminant and a hematoma. There was no evidence, based upon my evaluation, of any significant skin changes in his scrotum or features I believe were consistent with an implant infection. As such, the patient did not need antibiotics.

Dr. Mulhall did refer in his affidavit to what I believe is a significant circumstance regarding which, again, no one seems to recall the details. That is the August 16, 2005, visit by the plaintiff to a private doctor in Pennsylvania, Dr. Tribhuvan Kumar Pendurthi. This non-party physician was deposed in this action on June 15, 2011 in Easton, Pennsylvania. The transcript of his EBT is contained in its entirety in the plaintiff's opposition papers as Exhibit B. Dr. Pendurthi, a surgical oncologist, had worked with Dr. Schwartz in the operating room on a number of occasions. On August 16, 2005, he had

in fact seen Dr. Schwartz as a patient and made a chart for him which he brought to the deposition.

First, with regard to this visit, he was asked by defense counsel if he had any independent recollection of it and he did. He said the plaintiff had told him about the penile implant and that "he was worried about the operating site, the way it was looking" (pp 21-22). That was all that he recalled without referring to his chart.

He then explained that pursuant to Dr. Schwartz's complaints of a painful operative site, he examined the site and made a diagram which he described. He ended that description with "And it looks like I'm marking this heavily, meaning that there is induration, redness. I'm concerned about an infection there" (pp 24-25). The induration, described as "thickness of the skin that is kind of diffused" (p 26, l 20-21), and redness were on the inside of the thigh where the operative site was.

Dr. Pendurthi then testified that he prescribed a type of penicillin, pen VK, for Dr. Schwartz (p 29). Also, there was drainage from which he took a culture. At the visit, this doctor had arrived at a diagnosis of "infected prosthesis" (p 29, l 12-13). He then stated that it looked liked "cellulitis" and "I was suspecting it from streptococcus mutans. I chose very specific antibiotic, pen VK. And I think that's what it came back as. Yes." (p 30).

He thinks or remembers that he advised the plaintiff to go back to his doctor. The report of the culture is dated August 19, 2005. When asked how he was able to come up with the diagnosis three days earlier, he answered, "That's my training" (p 31, l 19). Dr. Pendurthi then proceeded to give more details about the infection that he diagnosed that day. First, he further defined it as "streptococcal cellulitis" (p 32, l 18). Then, upon inquiry from defense counsel, he opined that "his prosthesis got infected" (p 43, l 22-23).

Why did he believe this? "From the looks of it". "What do you mean by the looks of it?" "The cellulitis and the fluid around the prosthesis." (P 44, l 3-7). When asked to elaborate on this point, he testified as follows (p 45, l 1-7):

There was fluid that was draining from his incision. There was redness around it. And his prosthesis is occupying a fraction of the cavity that I drew there. So all this together indicates that he has an infected prosthesis.

Counsel attempted to obtain more clarity on the nature of the fluid, and the witness said the following (l 18-24 and l 1 on pp 45-46):

Yeah, because the drainage does not cause cellulitis the way it is and the spreading cellulitis is what makes somebody think. As I told you, that to be very specific in diagnosis, you have to have an impressive finding; and I was here, in this case, that there was a streptococcal infection.

He then acknowledged that it was possible that the type of culture when it grew out to be Strep B could be consistent with a skin containment. Also, via his diagram, the doctor described what he believed was spreading redness.

Finally, on the important issue of what was communicated to Dr. Schwartz and ultimately to Dr. Mulhall, Dr. Pendurthi stated that he had seen the plaintiff "a few days or a week later to check how he is doing, if he followed up with his doctor; but I do not remember the specifics" (p 37). But this was not documented in his chart; it was his recollection. As to whether Dr. Schwartz did that, the following exchange occurred. "You only recall that you asked him if he followed up with his doctor?" "Right." "Do you know if he did?" "I think he said he did" (p 38, l 9-14). But he could not recall the details. He then explained why it was important for the main doctor, here the surgeon, to have this

information "so that they will have a better idea of how to handle them" (p 39, l 4-6). He was absolutely clear that he had had no personal contact with Dr. Mulhall, by any means.

As to the inability to remember the details of the post-surgical period, Dr. Schwartz might even surpass Dr. Mulhall on that score. Countless times in his testimony, he says he does not recall. However, with regard to the continuing, worsening and seriousness of the pain he experienced in the period after the surgery, he does remember. He relates numerous calls he made to Dr. Mulhall to relate the degree of pain he was feeling and for the most part not being able to talk to him because of the latter's unavailability. He most often would talk to residents whose names he did not know.

He did remember, however, the first visit he made to the defendant's office after the surgery. He recalls showing Dr. Mulhall his scrotum, which had become swollen. He testified that Dr. Mulhall became "concerned" and that he wanted to drain the fluid from the scrotum (p 471). But he is not sure that was on the first day. It seems, based on the records, that the tapping of the fluid probably occurred during the second visit on August 1, 2005, not July 26, 2005.

Dr. Schwartz found it difficult to recall each visit and the events of each, but he did testify that he "kept calling, saying there is a problem" (p 477, l 78). And the problem seems to have been the pain. For example, on page 483 he states: "I don't remember the first visit or the second. I remember I had quite a bit of pain."

Dr. Schwartz relates that the defendant told him that there was no infection and thus no need for antibiotics, but then later he said "well let's try antibiotics" (p 488). "At one point in time we started the antibiotics" (p 488). Regarding the drainage, he does not recall exactly when that began, but it manifested itself by yellowish fluid leaking out from a place



close to the incision (p 442). Nevertheless he states that "my pain was quite severe. I wasn't feeling right" (p 488, l 16-18).

He did have a low grade fever at about the time the drainage started, as confirmed by the defendant's chart. However, it is the level of pain that the plaintiff experienced and the time that he experienced that pain which are critical issues here because the basic dispute between the parties concerns at what point there was evidence that a serious, non-skin contaminant infection had developed in the implant. The plaintiff's position is that this happened in August and never resolved itself from a pain perspective until the explantation on October 31, 2005. But it is Dr. Mulhall's belief that in August his patient had a resolving hematoma and that when he cultured the drainage which grew back to be Strep B, he thought this was simply a skin contaminant that required no antibiotic therapy or removal of the device. Further, while the defendant acknowledges that in October the device was infected and had to be removed, he believes that was not the situation until that month.

These two accounts were discussed at the plaintiff's deposition where he was read a portion of the hospital chart reviewing his post-July course and was asked whether he was in agreement with it. Of course it was the defendant who wrote the entry in the chart. That entry read as follows at pages 526-27.

His initial post-operative phase was complicated by a small but very well-circumscribed anterior scrotal hematoma. Aspiration of this grew out only scant beta-hemolytic strep, for which he was treated with penicillin. This settled this process down entirely, and approximately four weeks later he had a recurrent very scant amount of drainage, which again grew out beta-hemolytic strep.

The patient was complaining of chronic pain both in his penis and scrotum. We talked about the use of an MRI for the assessment of infection, despite the fact that the patient had no fevers or chills, no skin changes, and no frank purulent drainage from his wound. His pain improved somewhat. But at a point two and-a-half months after surgery<sup>2</sup>, the patient became dissatisfied or disillusioned with his penile implant and requested to have the device removed

The plaintiff, at his deposition was then asked if that was “an accurate and fair representation” of his post-surgical care with Dr. Mulhall. Dr. Schwartz asked to see the statement. He then responded. In relevant part, he said that the scrotal hematoma was quite large. He said there were three cultures showing the same bacteria which was different than “the scant beta-hemolytic strip”. He did not agree that it settled down the process entirely because it stopped draining for a few days. He agreed that he complained of chronic pain in the penis and scrotum. He agreed that he had fever and a little bit of chills early, not later. He did not agree that he did not have frank purulent drainage (pp. 528-529).

As to when Dr. Schwartz wanted the implant removed, there is also a difference in their recollection. On page 523, Dr. Schwartz was asked when he decided he wanted the prosthesis removed. He answered, “I decided quite early. It’s just that he didn’t want to take it out, explant it” (l 17-19). He explained that as the patient, he was not the decision maker, Dr. Mulhall was. But he continued: “I told Dr. Mulhall I wanted the implant out quite early. I don’t remember if it was a month later, but somewhere in that range. He said ... there’s no infection, there’s a contaminant. ‘I want to save this one’. “I remember he used

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<sup>2</sup>That would take it to October 2005.

those words" (l 24-25 on p 523 and l 2-6 on p 524).

And why did Dr. Schwartz want it removed? Because his pain was "unbearable". He told Nurse Pat that and "that it was very, very painful, that I could not stand it" (p 509).

Further in describing what he told Pat, he testified (p 503):

A. I remember – actually I remember crying one day in front of her, that my pain was unbearable, and I couldn't stand it anymore, and I wanted the thing out.

Q. Do you remember what month it was?

A. I started three or four weeks after the implantation.

Q. When, in relation to the group B strep, did the pain develop?

A. I had pain all along. It just got worse and I started seeing myself getting downhill. I had a low grade fever, I fatigued very easily. I looked terrible at the time... I looked drained and I remember I was very, very concerned because I could not sit for more than a few minutes, and I was sick.

So are the defendants Dr. John Mulhall and New York Presbyterian Hospital entitled to the relief they seek? Certainly the Hospital is, as Dr. Mulhall makes it clear that he was the plaintiff's private treating physician who made all the relevant decisions and performed the surgery and exclusively treated Dr. Schwartz. Also, the plaintiff does not contest any of this. Further, as to many of the claims asserted in the Bill of Particulars against the doctor, such as failing to heed plaintiff's condition pre-operatively, failing to perform proper pre-operative tests and procedures, implanting an unsafe medical device, failing to perform the implantation in a careful way, failing to ensure that the device was in a sterile condition

prior to implantation and failing to obtain informed consent, those claims are all dismissed since plaintiff challenges none of these and defendant makes out a prima facie case as to each of them.

But Dr. Mulhall is not entitled to the requested relief as to the claim that he failed to promptly, in August 2005, recognize that the implant was infected and remove it, causing Dr. Schwartz a great deal of unnecessary suffering until its removal at the end of October. While the defendant doctor attests to his appropriate responses to the clinical picture his patient displayed, that is merely his opinion based on his chart entries. He obviously believed then, and continues to hold this belief, that the August problem was merely a resolving hematoma and a superficial infection. But another physician at about this same time believed otherwise. Of course, I am referring to Dr. Pendurthi.

Defense counsel is simply wrong in his analysis of the opposition papers and the urologist's opinion contained therein. He accuses the plaintiff and his expert of providing no foundation for the claim that Dr. Schwartz had an infected device in August 2005. But this is not so. The Board Certified urologist, who opines that the defendant did depart from good and accepted medical practice, appropriately points to the deposition transcript of Dr. Pendurthi. This physician, a non-party who had worked on occasion with Dr. Schwartz, was not shown to have any bias. He clearly and emphatically testified that he diagnosed an infected implant on August 16, 2005, confirmed by a culture three days later. He believes he communicated this fact to the patient and he did prescribe penicillin for him. This infection is documented in his chart. Therefore, a jury could certainly find, contrary to what Dr. Mulhall believed, that in August 2005 the site was seriously infected and the device should have been removed then.

The fact that all the testifying doctors, Mulhall, Schwartz and Pendurthi, acknowledged the possibility that Strep B could be merely a skin contaminant, does not prove that was the case. That is the same kind of speculation that defense counsel accuses the plaintiff of indulging in. Dr. Pendurthi elaborated on why he believed this was an infected implant and even drew a contemporaneous diagram to show it.

Further, defense counsel also is wrong when he suggests that the expert's reliance on plaintiff's continuous complaints of pain had no basis in the record. These complaints may not have been documented in the defendant's chart, but that certainly is not conclusive. Dr. Schwartz may not remember with clarity precisely when certain visits occurred or events happened, but he certainly testified clearly that he was in great pain which he continually complained of beginning in August 2005 until the device was removed. In this regard, as referred to earlier, he testified that he called repeatedly and spoke mainly with residents and nurses about the pain. If these calls were not documented, it is unfortunate, but a trier of fact may still believe the calls occurred.

It is true that defense counsel selects certain entries in the chart in an attempt to portray the post-surgery course as relatively benign. But it must be kept in mind that the individual entries, written by the defendant, were written by him when he believed his patient was progressing well. He wanted to "save" the implant. Therefore, it is understandable that he wished to minimize the complaints which he probably believed were not significant signs. But despite these entries, it does come across that for the majority of time after the July surgery, Dr. Schwartz was miserable with pain.

Finally, the fact that the cultures grown after the explant were different than ones found in August, while perhaps relevant, is certainly not dispositive that a serious infection was not present in August 2005.

Therefore, I find that under all these circumstances, there are certainly factual differences, each finding support in the records, that compel this action to go forward. Therefore, except for those claims dismissed and all claims against the hospital, summary judgment relief is denied.

Accordingly, it is hereby

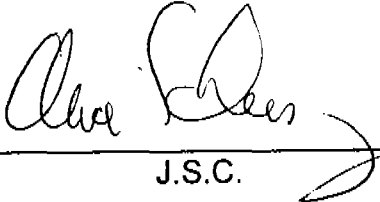
ORDERED that the motion for summary judgment by defendant New York Presbyterian Hospital is granted and the Clerk is directed to sever and dismiss all claims against that defendant; and it is further

ORDERED that the motion for summary judgment against defendant John Mulhall, M.D. is denied, except for the particular claims delineated herein; and it is further

ORDERED that counsel shall appear for a pre-trial conference on May 23, 2012 at 9:30 a.m. prepared to select a trial date.

Dated: April 24, 2012

APR 24 2012

  
\_\_\_\_\_  
J.S.C.  
**ALICE SCHLESINGER**

**FILED**

APR 27 2012

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