

# Medical Malpractice Experts Do Not Have To Devote A Majority Of Their Professional Time To The Practice Of The Medical Specialty At Issue To Qualify As Experts

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October 26, 2018 | by Einhorn Barbarito

In a published decision, *Sandra Nicholas et al. v. Hackensack University Medical Center et al.*, 456 N.J. Super. 110 (App. Div. 2018), the Appellate Division reversed the lower court's order granting Hackensack University Medical Center ("HUMC") summary judgment based on the lower court's erroneous determination that the plaintiffs' expert did not qualify as an expert witness under the Patients First Act. In *Nicholas*, the plaintiffs, Sandra Nicholas and Cory Leo, individually and as administrators ad prosequendum of the estate of their son, Santino Michael Leo, filed a wrongful death and survivorship medical malpractice complaint against HUMC and their son's treating physicians. While Santino Michael Leo was receiving treatment at HUMC's pediatric intensive care unit ("PICU"), he contracted an airborne infection and pneumonia, and died the following month. In support of the plaintiffs' allegations against the treating physicians, they filed an Affidavit of Merit from Dr. Howard Eigen. Throughout the course of litigation, Dr. Eigen authored three expert reports wherein he opined that the defendants deviated from the standard of care required of them and the deviations proximately caused the child's death. Dr. Eigen testified at his deposition that he was board certified in pediatrics and in the subspecialty of pediatric critical care, and was credentialed at a hospital to practice pediatric and pediatric critical care medicine. Dr. Eigen further testified that between 2006 and 2011, he devoted twenty-five percent of his time to direct patient care in the PICU.

Based on Dr. Eigen's testimony, the defendant physicians and HUMC filed motions for summary judgment arguing that Dr. Eigen was not qualified to testify as an expert under the Patients First Act because he did not devote the majority of his professional time to the clinical practice of pediatrics and pediatric critical care during the year preceding the alleged malpractice. The lower court agreed with the defendants and barred Dr. Eigen's standard of care and proximate cause testimony as to HUMC and the treating physicians. The lower court then granted the defendants' motions for summary judgment because by barring Dr. Eigen's testimony, the plaintiffs lacked the necessary expert

testimony to support their medical malpractice claim.

The plaintiffs appealed the lower court's decision to bar Dr. Eigen's testimony against HUMC and grant HUMC summary judgment. The Appellate Division held that Dr. Eigen satisfied the first requirement of the Patients First Act to qualify as an expert because he was board certified in pediatrics and pediatric critical care, and therefore, he practiced in the same specialty and subspecialty as the defendant physicians. The Court further ruled that Dr. Eigen satisfied the additional requirement to offer expert testimony because he was credentialed at a hospital to provide pediatric and pediatric critical care. Under the plain language of the Patients First Act, because Dr. Eigen was credentialed by a hospital to treat patients for the medical condition that was the basis for the claim, he was not required to devote a majority of his professional time to the practice of the same specialty in which the defendants were licensed. Accordingly, because Dr. Eigen was a qualified expert permitted to offer testimony as to the treating physicians and HUMC, the plaintiffs' complaint against HUMC was reinstated.