



# Nicholas v. Mynster, 64 A.3d 536 (N.J. 2013)

Topics Covered: Expert Witnesses, Professional Liability and Tort Reform

## **Outcome: Very Favorable**

### **Issue**

The issue in this case was whether a New Jersey statute, the Patients First Act, should bar a physician from testifying as an expert witness on the standard of care in a medical malpractice case against a physician with a different medical specialty than the expert's specialty.

### **AMA Interest**

The AMA believes that expert witnesses in medical liability suits should actively practice or have board certification in the same field as the defendant. The AMA also supports tort reform initiatives of state medical societies.

### **Case Summary**

Christopher Mynster, MD, who was board-certified in emergency medicine, treated Edward Nicholas for carbon monoxide poisoning at a hospital emergency room. He had Mr. Nicholas placed on 100% face mask oxygen and recommended that he be admitted to the hospital. He also prescribed Ativan to alleviate Mr. Nicholas's anxiety and muscle cramps. In addition, he asked Rehka Sehgal, MD, a board-certified family practitioner, to help assess Mr. Nicholas.

After discussing the case with Dr. Mynster and examining Mr. Nicholas's medical records and history, Dr. Sehgal determined that Mr. Nicholas was suffering from carbon monoxide poisoning with anxiety and hyperventilation. She ordered that he be admitted to the intensive care unit and be medicated with Ativan and Zofran. Notwithstanding this care, Mr. Nicholas suffered a brain seizure.

Mr. Nicholas and his wife sued Drs. Mynster and Sehgal for medical malpractice. They claimed that the defendants had failed to order appropriate tests, had failed to treat Mr. Nicholas promptly, and had failed to refer him to other facilities and/or specialists for necessary care. But for their negligence, according to the plaintiffs, he would not have suffered the seizure.

The plaintiffs proffered Lindell Weaver, MD, a Utah physician, as an expert on the relevant standard of care. Dr. Weaver is an expert in hyperbaric medicine and is board-certified in internal medicine, critical care medicine, and pulmonary diseases. However, he does not practice and is not board certified in emergency or family practice medicine. In his deposition, Dr. Weaver testified that he had not worked in an emergency room for the past 20 years and did not know how the average family practitioner would have treated Mr. Nicholas.

The defendants moved to prohibit Dr. Weaver's testimony, asserting that, because he is not board-certified in the defendants' specialties, the Patients First Act barred his testimony on the standard of care.

The Superior Court trial judge denied the motion, finding that Dr. Weaver's lack of board certification in emergency or family practice medicine might be a factor in determining his credibility but should not determine his competence. Likewise, the court held, his lack of knowledge of what a family physician would do in the plaintiff's case should not bar him absolutely from testifying against Dr. Sehgal but should only affect his credibility.

The defendants sought an interlocutory appeal to the Appellate Division, but it summarily denied that request. The defendants then appealed to the New Jersey Supreme Court, which reversed the trial court decision.

The case was remanded to the trial court, with a direction that Dr. Weaver be barred from testifying as an expert.

### **Litigation Center Involvement**

The Litigation Center, along with the Medical Society of New Jersey filed an *amicus* brief in the New Jersey Supreme Court in support of the defendant physicians. The brief argued that the Patients First Act requires that Dr. Weaver be barred from testifying as to the standard of care. His lack of board-certification in the defendants' specialties should affect his competence to testify and not merely his credibility.

Supreme Court of New Jersey brief