



**ARIZONA SUPREME COURT  
ORAL ARGUMENT CASE SUMMARY**



**MARGARITA HENKE V. HOSPITAL  
DEVELOPMENT OF WEST PHOENIX, INC.  
CV-24-0259-PR**

**PARTIES:**

*Petitioner:* Margarita Henke, on her own behalf and on behalf of her and her husband's daughters and on behalf of her husband's parents (collectively, "Mrs. Henke")

*Respondents:* Hospital Development of West Phoenix, Inc. d/b/a Abrazo West Campus ("Abrazo") and Dr. Morium Chowdhury

**FACTS:**

In March 2017, Greg Henke ("Mr. Henke") went to an urgent care, where he was seen for body aches, chills, and a fever. The urgent care doctor was worried that Mr. Henke had endocarditis, which is a bacterial infection of the heart's inner lining and could be life-threatening. He told Mr. Henke to go to the Abrazo emergency room, which would be able to perform the needed tests to determine whether he had endocarditis. He also notified the Abrazo emergency room that Mr. Henke was on his way and that Abrazo should evaluate him for endocarditis.

Dr. Chowdhury examined Mr. Henke at the Abrazo emergency room. He diagnosed Mr. Henke with a virus and sent him home with instructions to follow up with his primary care doctor. He did not believe that Mr. Henke had endocarditis and did not order a blood culture or an echocardiogram, which would help detect the illness. Five days later, Mr. Henke died from "sepsis due to acute bacterial endocarditis."

Mrs. Henke sued Dr. Chowdhury and Abrazo (collectively, "Defendants") for wrongful death. To support her claim that Defendants negligently failed to provide reasonably prudent emergency medical care to Mr. Henke and that their negligence caused his death, Mrs. Henke disclosed two expert witnesses. One expert opined that Dr. Chowdhury's failure to evaluate Mr. Henke for endocarditis "was a cause of, or contributed to, Mr. Henke's death, in that it likely deprived him of a chance of survival." The other expert opined that, if Mr. Henke had been admitted to the hospital when he went to Abrazo, as he should have been, he would have been immediately treated for sepsis associated with endocarditis "and more likely than not, he would have survived."

After receiving the expert witness disclosures, Defendants moved for summary judgment, which allows a court to enter judgment in favor of the moving party if the undisputed facts establish that the moving party is entitled to prevail as a matter of law. Defendants based their motion on A.R.S. § 12-572, which requires a plaintiff to prove medical negligence by "clear and convincing evidence" if the claim arises from emergency medical treatment. They argued that Mrs. Henke's expert witness disclosures did not meet the "clear and convincing" evidentiary standard because the experts did not declare that Mr. Henke would have survived to a "high degree of medical probability" if Dr. Chowdhury had diagnosed him with endocarditis. Instead, they said merely that he "likely" would have survived. The trial court agreed with Defendants and granted their motion.

Mrs. Henke moved the court to reconsider its decision. She argued that the jury must decide whether all of the evidence establishes medical negligence by “clear and convincing evidence.” She also attached a supplemental expert declaration in which one of her experts stated that, because Mr. Henke was stable until just before his death, it was “highly probable” that Mr. Henke would have survived if he had undergone the standard endocarditis work-up at Abrazo and then been admitted for treatment. The trial court denied the motion for reconsideration, ruling (among other things) that it was too late to present new evidence.

The court of appeals affirmed. It held that the trial court correctly granted Defendants’ summary judgment motion because “clear and convincing evidence” requires a claim to be highly probable. Therefore, the causation experts “needed to opine to a high degree of medical probability that the alleged standard of care violations proximately caused the death.” The court of appeals also held that the trial court did not abuse its discretion in denying Mrs. Henke’s motion for reconsideration.

**ISSUES (as rephrased by the Arizona Supreme Court):**

1. Under A.R.S. § 12-563 and -572, does a medical malpractice claim fail as a matter of law where expert testimony establishes that the alleged negligence “likely” caused the complained of injury?
2. If so, did the trial court err in denying Plaintiffs’ motion for reconsideration?

**STATUTES:**

**§ 12-563. Necessary elements of proof.**

Both of the following shall be necessary elements of proof that injury resulted from the failure of a health care provider to follow the accepted standard of care:

1. The health care provider failed to exercise that degree of care, skill and learning expected of a reasonable, prudent health care provider in the profession or class to which he belongs within the state acting in the same or similar circumstances.
2. Such failure was a proximate cause of the injury.

**§ 12-572. Burden of proof for treatment in emergency departments or rendered by on-call providers.**

**A.** Unless the elements of proof contained in § 12-563 are established by clear and convincing evidence, a health professional as defined in § 32-3201 who provides or who is consulted to provide services to a patient of a licensed hospital in compliance with the emergency medical treatment and labor act (P.L. 99-272; 100 Stat. 164; 42 United States Code § 1395dd) or as a result of a disaster is not liable for any civil or other damages as a result of any act or omission.

**B.** Unless the elements of proof contained in § 12-563 are established by clear and convincing evidence regarding the acts or omissions of a licensed hospital or its agents and employees in cases that are covered by subsection A of this section, the hospital is not liable for any civil or other damages as a result of any act or omission.

*This Summary was prepared by the Arizona Supreme Court Staff Attorneys’ Office solely for*

*educational purposes. It should not be considered official commentary by the Court or any member thereof or part of any brief, memorandum, or other pleading filed in this case.*