ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY

GREG SHEPHERD V. COSTCO WHOLESALE CORPORATION
CV-19-0144-PR
246 Ariz. 470 (App. 2019)

PARTIES:

Petitioner/Appellee: Costco Wholesale Corporation

Respondent/Appellant: Greg Shepherd

FACTS:

In January 2016, Shepherd's physician offered him a sample of erectile disfunction medication and sent an order to Costco's pharmacy for his usual prescription plus the E.D. medication. Costco informed Shepherd that his regular prescription and E.D. medication were ready for pickup. Shepherd told Costco he did not want the E.D. medication, and Costco acknowledged his cancellation request. A few weeks later Shepherd again called Costco to check on another refill for his regular prescription. A Costco employee told him the refill and the E.D. medication were ready for pickup. Shepherd again told Costco to cancel the E.D. medication.

The next day Shepherd called Costco to authorize his ex-wife, with whom he was exploring reconciliation, to pick up his prescription. Costco gave the ex-wife Shepherd's regular prescription and the E.D. medication. She did not accept or pay for the E.D. medication but told Shepherd that she joked with the Costco employee about him "not picking it up yet." She later told Shepherd's children and friends about the medication and ceased reconciliation efforts with him.

Shepherd complained to Costco headquarters and received a response that allegedly acknowledged that the disclosure of medical information to his ex-wife violated both the Health Insurance Portability and Accountability Act of 1966 ("HIPAA") and Costco's privacy policy. Shepherd then sued Costco based on Costco's "public disclosure of an embarrassing medication that [he] twice rejected," alleging negligence, breach of fiduciary duty, fraud, negligent misrepresentation, intentional infliction of emotional distress, intrusion upon seclusion, and public disclosure of private facts.

Costco moved to dismiss under Ariz. R. Civ. P. 12(b)(6), which the trial court granted in its entirety, finding (1) Costco was entitled to immunity from suit under A.R.S. § 12-2296,

(2) HIPAA preempted the claims, and (3) Shepherd failed to allege sufficient facts to support his claims. Shepherd appealed.

The court of appeals reversed and remanded for further proceedings on Shepherd's negligence and punitive damages claims but affirmed the dismissal of his other claims. The court concluded Costco was not entitled to dismissal based on A.R.S. § 12-2296 immunity, because Shepherd may be able to prove some set of facts showing Costco did not act in good faith.

The court additionally held that while HIPAA does not create an independent federal statutory private right of action, it also does not preempt or prohibit a private right of action for tortious disclosure of healthcare information, and HIPAA's requirements may inform the standard of care in a negligence action for wrongful disclosure of healthcare information.

Judge Thompson concurred except as to punitive damages and costs against Costco.

ISSUES:

1. Does A.R.S. § 12-2296 immunize Costco from plaintiff's negligence claim?

2. Does HIPAA inform the standard of care for negligent disclosure of medical information?

STATUTES:

A.R.S. § 12-2296 provides:

> A health care provider, contractor or clinical laboratory that acts in good faith under this article is not liable for damages in any civil action for the disclosure of medical records, payment records or clinical laboratory results or information contained in medical records, payment records or clinical laboratory results that is made pursuant to this article or as otherwise provided by law. The health care provider, contractor or clinical laboratory is presumed to have acted in good faith. The presumption may be rebutted by clear and convincing evidence.