



**ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY**



**ROBERT BAKER v. UNIVERSITY
PHYSICIANS HEALTHCARE
CV-12-0102-PR**

PARTIES:

Petitioners: Petitions for Review were filed by:

(1) Robert Baker (on behalf of himself and all those entitled to recover for the death of Tara Baker); and

(2) University Physicians Healthcare, Brenda J. Wittman, M.D., and Arizona Board of Regents (doing business as University of Arizona College of Medicine) (collectively “appellees” or “UPH”).

Respondents: Baker and UPH both responded to the petitions.

Amicus Curiae: Arizona Association for Justice/Arizona Trial Lawyers Association; Steven and Mary Louise Hardy; Mutual Insurance Company of Arizona; and Arizona Medical Association

FACTS:

After being released from her hospitalization for blood clots, seventeen-year-old Tara Baker consulted Dr. Brenda Wittman. Tara later died from other blood clots as a result of alleged malpractice. Wittman, an employee of University Physicians Healthcare, is certified by the American Board of Pediatrics in the specialty of pediatrics, with a subspecialty in pediatric hematology/oncology.

Robert Baker filed a wrongful death suit against the appellees, claiming that Wittman breached the standard of care, resulting in Tara’s death. As required in Arizona medical malpractice cases, he filed a disclosure statement identifying Dr. Robert Brouillard as the testifying expert. Brouillard is certified by the American Board of Internal Medicine as a specialist in internal medicine, with subspecialties in oncology and hematology.

Appellees moved for summary judgment, arguing that, since Brouillard was not board certified in the same “specialty” as Wittman, he failed to qualify as an expert under A.R.S. § 12-2604. Baker responded that Brouillard was qualified under the statute, but, if the court determined he was not, then the statute was unconstitutional.

The trial court granted the motion, concluding that Brouillard was not a qualified expert under the statute. It recognized that Brouillard “would, no doubt, have been qualified in the past to testify as to the standard of care at issue in this case leaving any differences between his and

Dr. Wittman’s backgrounds to cross examination, [but] the Arizona Supreme Court has held that A.R.S. § 12-2604 provides substantive requirements, *see Seisinger* [*v. Siebel*, 220 Ariz. 85, 95 ¶¶ 38, 203 P.3d 483, 494 (2009)], and thus it must be satisfied before Dr. Brouillard is allowed to take the stand in the first instance.” It also rejected Baker’s “host” of constitutional challenges, stating there was no principled way to distinguish this case from *Governale v. Lieberman*, 226 Ariz. 443, 250 P.3d 220 (App. 2011). It entered final judgment pursuant to Rule 54(b), Arizona Rules of Civil Procedure, and Baker filed a timely appeal.

The court of appeals agreed with the trial court that Baker’s expert was not qualified to testify about the applicable standard of care relevant to Wittman’s professional conduct. Because it found that pediatrics is a different board certified “specialty” than internal medicine, the appeals court held that Brouillard was not board certified in the same specialty as Wittman under § 12-2604(A) (1). The appeals court found no conflict between its decision and that of Division One in *Awsienko v. Cohen*, 227 Ariz. 256 ¶¶ 9, 257 P.3d 175, 177 (App. 2011). Then, the appeals court considered and upheld the constitutional validity of the statute, citing *Governale*. Ultimately, it vacated the judgment and sent the case back to the trial court, giving Baker the opportunity to present an expert witness in compliance with the court’s opinion. Judge Eckerstrom agreed with the result but filed a special concurrence.

ISSUES:

Baker’s Petition for Review:

1. Does § 12-2604 violate article 18, section 6 of the Arizona Constitution by abrogating Baker’s common-law negligence claim?
2. Does § 12-2604 deny Baker the equal protection of the laws, access to the courts, the benefits of the separation-of-powers doctrine, and the protection of the ban against special laws, in violation of the state and federal constitutions?
3. Was Baker’s expert witness qualified under the statute?

UPH’s Petition for Review:

Did the Court of Appeals err in holding that a physician who is board certified only in general pediatrics would be qualified to testify against Dr. Wittman, who is board certified in her ‘claimed specialty’ in pediatrics and in pediatric hematology/oncology, where the Court of Appeals interprets the word ‘specialist,’ as used in A.R.S. § 12-2604, to refer to only one of the twenty-four specialty boards established by [the American Board of Medical Specialization], thereby rendering the Legislature’s use of ‘claimed specialty’ in the statute meaningless?

STATUTORY PROVISIONS:

A.R.S. § 12-2604 governs expert witness qualifications for medical malpractice actions. Subsection (A)(1) provides (with emphasis supplied):

A. In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in this state or another state and the person meets the following criteria:

1. If the party against whom or on whose behalf the testimony is offered is or claims to be a specialist, specializes at the time of the occurrence that is the basis for the action in the same specialty or claimed specialty as the party against whom or on whose behalf the testimony is offered. ***If the party against whom or on whose behalf the testimony is offered is or claims to be a specialist who is board certified, the expert witness shall be a specialist who is board certified in that specialty or claimed specialty.***

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