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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 04/05/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

JOSEPH GARCIA, individually,) No. 1 CA-CV 11-0360
)
Plaintiff/Appellant,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
BRUCE WHITBECK, D.C. and JANE) Rule 28, Arizona Rules of
DOE WHITBECK, husband and wife;) Civil Appellate Procedure)
WHITBECK CHIROPRACTIC CLINIC,)
P.C., a professional corporation,)
)
Defendants/Appellees.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CV2009-018884

The Honorable Emmet J. Ronan, Judge

AFFIRMED

Gutierrez Law Firm, P.C. Phoenix
By Francisco X. Gutierrez
And
Knapp & Roberts, P.C. Scottsdale
By David L. Abney
Co-counsel for Plaintiff/Appellant

G. David DeLozier, P.C. Cave Creek
By G. David DeLozier
Attorney for Defendants/Appellees

S W A N N, Judge

¶1 A chiropractor recorded a health care provider lien after providing post-accident care to a patient and receiving a negotiated payment from the patient's health insurer. The patient brought a declaratory judgment action challenging the lien. First, plaintiff sought a declaration that the lien had never been perfected because a blank concerning the date of mailing was not filled in. Second, he sought a declaration that the chiropractor was not entitled to any money above the amount he was paid by the patient's health insurer. The trial court granted summary judgment in favor of the chiropractor for the full amount of the lien. Because we conclude that the lien was properly perfected according to the requirements of A.R.S. § 33-932, and that the chiropractor was entitled to assert a lien for the unpaid remainder of his customary charges, we affirm.

*FACTS AND PROCEDURAL HISTORY*¹

¶2 Dr. Bruce Whitbeck began treating Joseph Garcia in January 2006, for injuries Garcia sustained in an automobile accident that occurred in December 2005. On February 13, 2006, Dr. Whitbeck recorded with the Maricopa County Recorder a "Notice and Claim of Health Care Provider Lien" which noted that Garcia's care was ongoing. Dr. Whitbeck continued treating

¹ We view the evidence in the light most favorable to the party against whom summary judgment was entered and resolve all inferences from the evidence in that party's favor. *Prince v. City of Apache Junction*, 185 Ariz. 43, 45, 912 P.2d 47, 49 (App. 1996).

Garcia until April 28, 2006. Garcia's health insurer, Blue Cross Blue Shield ("BCBS"), paid \$1,841.60 of Dr. Whitbeck's \$6,155 bill for Garcia's post-collision treatment.

¶3 Garcia later sued the person who caused the crash and obtained a settlement in March 2009. In the litigation with the at-fault party from the crash, Garcia deposed Dr. Whitbeck and submitted Dr. Whitbeck's bill of \$6,155 as a measure of damages in both his demand letter to the tort defendant's insurance carrier and in his April 2008 Rule 26.1 disclosure statement.

¶4 After Dr. Whitbeck learned about the settlement, he contacted the tortfeasor's insurer about the recorded lien and "was informed that [the] money was sent to Garcia to satisfy the lien." On March 18, 2009, Garcia sent a letter to Dr. Whitbeck offering to pay Dr. Whitbeck \$1,000 to satisfy the balance owed. Dr. Whitbeck responded on April 8, 2009, that he would only release the lien if Garcia satisfied the full amount of the balance owed.

¶5 On June 15, 2009, Garcia filed a declaratory judgment action requesting that the court declare the lien invalid and unenforceable against his settlement and against him personally. Dr. Whitbeck moved to dismiss and sought Rule 11 sanctions. Garcia cross-moved for summary judgment -- the court denied both motions. Ultimately, Dr. Whitbeck filed a motion for summary judgment, which the trial court granted on February 9, 2011.

Garcia timely appeals. We have jurisdiction under A.R.S. § 12-2101(A)(1).

DISCUSSION

I. THE LIEN WAS PROPERLY PERFECTED.

¶6 Perfection of a health care provider lien is a prerequisite to enforcement. *Blankenbaker v. Jonovich*, 205 Ariz. 383, 384, ¶ 1, 71 P.3d 910, 911 (2003). Under A.R.S. § 33-932(A), to properly perfect a health care provider lien, the health care provider must record with the County Recorder a verified statement that includes the following:

1. The name and address of the patient as they appear on the records of the health care provider.
2. The name and location of the health care provider.
3. The name and address of the executive officer or agent of the health care provider, if any.
4. The dates or range of dates of services received by the patient from the health care provider.
5. The amount claimed due for health care.
6. For health care providers other than hospitals or ambulance services, to the best of the claimant's knowledge, the names and addresses of all persons, firms or corporations and their insurance carriers claimed by the injured person or the injured person's representative to be liable for damages arising from the injuries for which the person received health care.

¶17 Subsection (C) of A.R.S. § 33-932 requires that the provider mail the lien to the patient within five days after recording the lien and warns: "If a health care provider other than a hospital or ambulance service does not record the claim, lien or assignment as provided in this section, the claim, lien or assignment is invalid and may not be enforced by the cause of action provided in § 33-934."

¶18 Garcia asserts that the lien was not properly perfected, and that it is therefore invalid and unenforceable, because the blanks on the lien form for the date of mailing were not completed. A.R.S. § 33-932 requires only three things for perfection: a written verified statement containing the information in subsections (1) through (6); recordation of the written verified statement with the County Recorder; and mailing the lien to the appropriate parties. A notation verifying the date of mailing is not required by any section of the statute. Indeed, because mailing need not occur before recording, it would be illogical to require such information as a prerequisite to perfection. We hold that the trial court did not err in finding that the lien was properly perfected.

II. NO ISSUE OF MATERIAL FACT EXISTS REGARDING THE VALIDITY OR ENFORCEABILITY OF THE LIEN.

¶19 A.R.S. § 33-934 provides that a health care provider lien extends to any amount that "has been or is to be collected

by the injured person." (Emphasis added); see also *Blankenbaker*, 205 Ariz. at 388, ¶ 20, 71 P.3d at 915. "Thus, as long as the lien has been properly recorded, the 'person, firm or corporation liable for damages by reason of judgment, settlement or compromise' can be pursued for the charges, even if the liable person has already transferred funds to the injured person in derogation of the lien." *Blankenbaker*, 205 Ariz. at 388, ¶ 20, 71 P.3d at 915 (quoting A.R.S. § 33-934).

¶10 Garcia asserts that the superior court erred in finding that Dr. Whitbeck's full \$6,155 bill reflects customary² charges for the care Garcia received and that Dr. Whitbeck is entitled to maintain his lien. He argues in essence that Dr. Whitbeck was not entitled to the lien because the BCBS-Whitbeck contract and Arizona case law prohibit collection directly from him. This argument misses the point.

¶11 Both A.R.S. § 33-931 and Dr. Whitbeck's contract with BCBS permit the lien. Preliminarily, Garcia misconstrues the language of ¶ 9.03 of the BCBS-Whitbeck contract -- while the language prohibits Dr. Whitbeck from seeking to collect amounts other than the "Subscriber Responsibility" from Garcia, it does not prohibit Whitbeck from asserting a lien against any tort recovery by Garcia for amounts not paid by BCBS. Indeed, ¶ 9.08

² Garcia asserts in his reply brief that his argument is not that Dr. Whitbeck's fees were unreasonable, but rather that the fees are not "conjunctively both reasonable and customary."

of the same contract makes clear that Whitbeck expressly retained the right to recover from other sources -- such as liability insurance or other insurance coverages -- "the difference between primary and secondary payments and billed charges." And ¶ 9.08 expressly recognizes § 33-931 as the statutory basis for Whitbeck's right to recover the balance through a health care provider lien.

¶12 Garcia further asserts "significant control over any reimbursement rights" because ¶ 9.08 concludes that "[a]ny billing or recovery from these other sources shall be resolved by Provider and Subscriber" and his unwillingness to "resolve" the valid lien vitiates Dr. Whitbeck's right to assert the lien. The plain language of the contract does not support the notion that Garcia possesses the unilateral power to defeat the right of a health care provider to place a lien on a patient's tort recovery. We reject this argument.

¶13 Garcia further argues that the trial court's ruling contradicted the terms of A.R.S. § 33-934 and *Blankenbaker* because the ruling declared the lien valid and enforceable against Garcia himself. Garcia misreads the court's order. The precise language of the ruling is that Dr. Whitbeck has a "valid lien against *any tort recovery that may have been obtained by plaintiff.*" (Emphasis added.) The court's finding properly

states that the lien is against the tort recovery, not against Garcia as the patient.³

¶14 *Blankenbaker* makes clear that §§ 33-931 and 33-932 do not address the requirements for enforcement or against whom a lien may be enforced. 205 Ariz. at 386, ¶ 14, 71 P.3d at 913. The "against whom" question is answered by § 33-934, which states that the lien is enforceable "by action against the person, firm, or corporation liable for damages." The part of the "against whom" question that is relevant to this litigation has already been answered definitively and repeatedly -- Dr. Whitbeck acknowledged in the trial court, in the briefs on appeal, and in oral argument that the lien is not enforceable against Garcia personally. Dr. Whitbeck has not used, nor could he use, the enforcement mechanism of § 33-934 against Garcia personally. But Dr. Whitbeck's acknowledgement of existing law neither invalidates the lien nor does it make it unenforceable against the tort recovery.

¶15 Finally, we note that Garcia contended during the tort case that Dr. Whitbeck's full \$6,155 bill represented the reasonable and customary charges for the services he received, and failed to offer any evidence to support his later contention

³ Because the underlying action was not brought by Dr. Whitbeck under A.R.S. § 33-934, the propriety of the manner in which Dr. Whitbeck can enforce the lien against the tort recovery was not before the trial court and is therefore not before us in this appeal.

that the billed amount was *not* reasonable and customary. Nor did he offer any evidence to rebut Dr. Whitbeck's assertion that the entirety of the charges were reasonable and customary. Garcia's assertion that Dr. Whitbeck's acceptance of a lower amount from BCBS is evidence that the billed amount was not reasonable and customary lacks merit. Accordingly, the trial court properly concluded that no issues of material fact existed as to the validity and enforceability of the lien.

III. ATTORNEY'S FEES

A. Fees Award in the Trial Court

¶16 Garcia raised for the first time in oral argument the propriety of the trial court's grant of attorney's fees to Dr. Whitbeck. Because the issue was not properly raised in the briefs, we do not address it in this appeal. See ARCAP 13(a)(6); *Schabel v. Deer Valley Unified Sch. Dist. No. 97*, 186 Ariz. 161, 167, 920 P.2d 41, 47 (App. 1996) (failing to raise an issue on appeal constitutes waiver).

B. Attorney's Fees and Costs on Appeal

¶17 As the prevailing party on appeal, we grant Dr. Whitbeck's request for costs upon compliance with ARCAP 21(c). Though Dr. Whitbeck has also requested attorney's fees on appeal, he did not assert a statutory or contractual basis for that request, and we therefore deny it. See *Roubos v. Miller*, 214 Ariz. 416, 420, ¶ 21, 153 P.3d 1045, 1049 (2007).

CONCLUSION

¶18 For the reasons above, we affirm the grant of summary judgment in favor of Dr. Whitbeck.

/s/

PETER B. SWANN, Presiding Judge

CONCURRING:

/s/

MICHAEL J. BROWN, Judge

/s/

JON W. THOMPSON, Judge