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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ARTHUR MARTINEZ and ALICE MARTINEZ, husband and wife, Plaintiffs/Appellants, v. TUCSON MEDICAL CENTER, Defendant/Appellee.	2 CA-CV 2010-0024 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20076658

Honorable Paul E. Tang, Judge

AFFIRMED

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H O W A R D, Chief Judge.

¶1 Alice and Arthur Martinez (collectively "Martinez") appeal from the trial court's grant of summary judgment in favor of appellee Tucson Medical Center (TMC). Martinez argues that the trial court erred in determining that he had not established a prima facie case of medical malpractice due to a lack of evidence on causation. For the reasons that follow, we affirm.

Factual and Procedural Background

¶2 We view the facts and reasonable inferences from those facts in the light most favorable to the party against whom summary judgment was granted. *Andrews v. Blake*, 205 Ariz. 236, ¶ 12, 69 P.3d 7, 11 (2003). Martinez was admitted to TMC in April 2006. While he was hospitalized, TMC staff performed several procedures on him, including the radial artery puncture for arterial blood gases (ABG) that is the focus of this action.

¶3 In November 2007, Martinez sued TMC, alleging that the hospital and its staff "were negligent in [his] care and treatment" by "fail[ing] to recognize [his] injury, delaying diagnosis[,] . . . increasing duration of hospitalization, and fail[ing] to provide necessary medication and hydration." Martinez further claimed he suffered serious bodily injury "as a direct and proximal result of [TMC's] negligence." Martinez later disclosed that he planned to call several expert witnesses to testify in support of his complaint, including Kathleen Walsh, as a standard of care expert, and Dr. John Pacanowski as, inter alia, a causation expert.

¶4 TMC filed a motion for summary judgment on Martinez's claim, contending that it was entitled to summary judgment because Martinez had failed to provide necessary expert testimony that any of its allegedly negligent acts were the cause of his injuries.[1] It noted in part that Pacanowski, Martinez's causation expert, had refused to offer any causation opinion. Martinez responded, however, that Pacanowski's testimony, as well as the testimony of another of Martinez's treating physicians, Dr. Matthew Holland, were sufficient to withstand summary judgment on the issue of causation. The trial court disagreed and granted TMC's motion. Martinez subsequently filed a motion for reconsideration, which the court denied. Martinez appeals from these rulings.

Summary Judgment

¶5 Martinez first argues that the trial court erred by granting summary judgment because Kathleen Walsh's testimony provided sufficient causation evidence to create a question of material fact. But, in his response in opposition to TMC's motion for summary judgment, Martinez had asserted instead that the testimony of Drs. Pacanowski and Holland provided the necessary evidence on causation.[2] "An argument or a theory not urged at the trial court level cannot be asserted for the first time on appeal to reverse

[1]TMC also filed a second motion for summary judgment, which it withdrew after the trial court granted its first motion.

[2]In his reply brief, Martinez asserts that Drs. Pacanowski and Holland also provided sufficient evidence of causation to withstand summary judgment, but we do not consider issues raised for the first time in a reply brief. *See Dawson v. Withycombe*, 216 Ariz. 84, ¶ 91, 163 P.3d 1034, 1061 (App. 2007).

the granting of a summary judgment." *Dillon-Malik, Inc. v. Wactor*, 151 Ariz. 452, 454, 728 P.2d 671, 673 (App. 1986). Thus, this argument is waived. Moreover, Walsh's amended affidavit, upon which Martinez now relies, was not before the trial court when it considered TMC's motion, so we cannot consider it here. *See Brookover v. Roberts Enters., Inc.*, 215 Ariz. 52, ¶ 8, 156 P.3d 1157, 1160 (App. 2007).

¶6 Martinez apparently further contends that the trial court erred because it "disregarded" and "ignored" evidence and arguments in his opposition to TMC's second motion for summary judgment. However, his opposition to the second motion for summary judgment was not filed until after the court took the first motion for summary judgment under advisement following oral argument. And Martinez does not meaningfully challenge on appeal the court's refusal to consolidate the two motions.[3] Because the court granted summary judgment based on TMC's first motion for summary judgment, it did not reach TMC's second motion. Thus, although Martinez renews these same arguments, they are waived on appeal. *See City of Tempe v. Fleming*, 168 Ariz. 454, 456, 815 P.2d 1, 3 (App. 1991) ("arguments not made at the trial court cannot be asserted on appeal"); *see also Trantor v. Fredrikson*, 179 Ariz. 299, 300, 878 P.2d 657,

[3]In his conclusion, Martinez adds that "this Honorable Court should reverse the earlier decision against consolidating the summary judgment motions," but he has provided insufficient argument to merit review on this issue. *See* Ariz. R. Civ. App. P. 13(a)(6) ("An argument . . . shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on.").

658 (1994) (purpose of requiring party to make specific objection in trial court is to give court an opportunity to rule before appellant claims error in this court).

Motion for Reconsideration

¶7 Martinez finally contends that the trial court erred by denying his motion for reconsideration. We review the denial of a motion for reconsideration for an abuse of discretion. *Tilley v. Delci*, 220 Ariz. 233, ¶ 16, 204 P.3d 1082, 1087 (App. 2009). Martinez's argument appears to be based on his assertion that sufficient evidence of causation existed to survive summary judgment.[4] The foundation for this assertion is Walsh's amended affidavit, which Martinez presented to the court with his motion. But absent a showing that the evidence could not have been discovered earlier with reasonable diligence, the court did not abuse its discretion by rejecting affidavits submitted after a decision on summary judgment. *See Phil W. Morris Co. v. Schwartz*, 138 Ariz. 90, 94, 673 P.2d 28, 32 (App. 1983). And Martinez does not make such a

[4]Martinez also alleges TMC engaged in misconduct but fails to cite any legal authority establishing why it is relevant to our review. Further he provides very limited and vague citations for his factual assertions, including one to a document that does not appear in the record on appeal and another that we cannot consider because, while in the record, it was not before the trial court when it considered the motion for summary judgment. Essentially, Martinez attempts to substitute unsupported and disparaging allegations for legal arguments. But we will not consider factual assertions that lack citations to the record. *State v. 1810 E. Second Ave.*, 193 Ariz. 1, n.2, 969 P.2d 166, 167 n.2 (App. 1997); *see also* Ariz. R. Civ. App. P. 13(a)(6) ("An argument . . . shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on."). Nor will we consider legal arguments not fully developed or lacking citations of authority. Ariz. R. Civ. App. P. 13(a)(6); *see Ness v. W. Sec. Life Ins. Co.*, 174 Ariz. 497, 503, 851 P.2d 122, 128 (App. 1992). Thus, any such argument is waived.

showing; he merely repeats his accusations that because of TMC's interference, certain evidence was not available before the court ruled on the motion. If Martinez believed that it was necessary to introduce new testimony from Walsh reacting to that deposition, he had ample time to request that the court delay the hearing pursuant to Rule 56(f), Ariz. R. Civ. P., but he did not. Furthermore, any alleged newly discovered information did not substantially change the nature of the purported negligent acts in a way that altered the required showing of causation. Consequently, the trial court did not abuse its discretion when it rejected Walsh's amended affidavit. Therefore, we cannot conclude the court abused its discretion by denying Martinez's motion for reconsideration of the grant of summary judgment.

Attorney Fees

¶8 TMC requests attorney fees incurred on appeal, claiming, inter alia, that Martinez's attorney has unreasonably violated the Rules of Civil Appellate Procedure. *See* Ariz. R. Civ. App. P. 25. Martinez did not meaningfully oppose this request in his reply brief.[5] Where an appeal is frivolous or a party has been guilty of an "unreasonable

[5]Martinez did, however, make his own request for attorney fees based upon alleged "misconduct" of TMC's counsel. He also claims, in his reply brief, that TMC admitted the alleged misconduct by failing to respond to his allegations in its answering brief. But Martinez's claims appear to be limited to instances occurring before the trial court granted summary judgment and do not involve claims of misconduct on appeal. And Martinez does not cite to any substantive basis for an award of attorney fees for misconduct allegedly occurring in the trial court, much less to a basis for an award of attorney fees for misconduct occurring on appeal. We therefore deny his request. *See Country Mut. Ins. Co. v. Fonk*, 198 Ariz. 167, ¶ 25, 7 P.3d 973, 978 (App. 2000) (fees on appeal denied when party fails to provide substantive basis for request); *cf.* Ariz. R. Civ. App. P. 13(a)(6) (argument shall contain "citations to the authorities, statutes, and part of

infraction" of the Rules of Civil Appellate Procedure, *see* Ariz. R. Civ. App. P. 25, we have discretion to award attorney fees, *see Ariz. Dep't of Revenue v. Gen. Motors Acceptance Corp.*, 188 Ariz. 441, 446, 937 P.2d 363, 368 (App. 1996).

¶9 As noted in this decision, Martinez's arguments were waived below and/or are frivolous. His briefs are also deficient and lack sufficient citations to the record and authority in support of the arguments. And, as TMC points out, Martinez's attorney was warned by this court in a previous memorandum decision that it would be appropriate for us to award attorney fees as a sanction if presented with such deficient briefs and frivolous arguments. *See Macias v. Carondelet St. Mary's, L.L.C.*, No. 2 CA-CV 2008-0122, ¶¶ 24-25 (memorandum decision filed Oct. 20, 2009). Given the substandard quality of Martinez's arguments and their failure to comply with the Rules of Civil Appellate Procedure, we conclude that Martinez's counsel should pay a portion of the attorney fees TMC incurred in connection with this appeal pursuant to Rule 25, as a sanction for committing unreasonable infractions of the Rules of Civil Appellate Procedure and for filing a frivolous appeal. *See also Evans v. Arthur*, 139 Ariz. 362, 364-65, 678 P.2d 943, 945-46 (1984) (imposing fees against counsel personally as sanction for frivolous appeal under Rule 25).

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the record relied on"); *Ritchie v. Krasner*, 221 Ariz. 288, ¶ 62, 211 P.3d 1272, 1289 (App. 2009) (failure to comply with Rule 13(a)(6) "can constitute abandonment and waiver of that claim").

Conclusion

¶10 We affirm the trial court's grant of summary judgment to TMC. We further order Martinez's counsel to pay a portion of TMC's attorney fees incurred on appeal upon TMC's compliance with Rule 21, Ariz. R. Civ. App. P.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Presiding Judge

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge