

No. 42276-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MARIE DOCTER and the law firm of BRIGGS & BRIGGS

Appellants,

v.

UNITED FINANCIAL CASUALTY COMPANY,

Respondent.

CORRECTED APPELLANTS' OPENING BRIEF

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ORIGINAL

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TABLE OF CONTENTS

I. INTRODUCTION.....	- 1 -
II. ASSIGNMENT OF ERROR	- 2 -
A. Assignment of Error:	- 2 -
B. Issues Pertaining to Assignments of Error:	- 3 -
III. STATEMENT OF THE CASE.....	- 3 -
A. Mr. Coleman settled his claim against Progressive Insurance insureds.	- 3 -
B. Lincoln Hospital’s defective notice of lien claim.....	- 6 -
C. Lincoln Hospital did not give Progressive Insurance, nor Ms. Doctor, a copy of the defective lien notice before the settlement funds were disbursed.....	- 7 -
D. Lincoln sued Progressive Insurance in Arizona and Progressive Insurance paid to settle the claim.....	- 9 -
IV. ARGUMENT.....	- 9 -
A. There was never a lien by Lincoln Hospital.....	- 10 -
B. Even if a lien had existed, it was a question of fact whether Ms. Doctor knew about the non-existent lien....	- 13 -
C. The trial court erred in entering judgment for \$67,500.	- 14 -
D. The trial court erred in finding a breach of the covenant of good faith and fair dealings.....	- 15 -
CONCLUSION	- 16 -

TABLE OF AUTHORITIES

Badgett v. Security State Bank, 116 Wn.2d 563, 569, 807
P.2d 356 (1991).-15-

LaBombard v. Samaritan Health System, 195 Ariz. 543, 991
P.2d 246 (1998).....-14-

*Nationwide Mut. Ins. Co. v. Arizona Health Care Cost
Containment Sys.*, 166 Ariz. 514, 517, 803 P.2d 925, 928
(App. 1990).-12-

I.
INTRODUCTION

On October 8, 2008, James Coleman settled a claim against Sweet Meats and others for \$497,000. A memorandum of agreement was executed by the parties documenting the scope of that agreement. Marie Docter, Mr. Coleman's attorney, agreed to do the following as part of the consideration of the settlement agreement: "plaintiff's counsel agrees that all known liens or subrogation claims will be satisfied or otherwise resolved out of settlement proceeds and prior to disbursement to the plaintiff."

As of October 8, 2008, there was only one lien. Marie Docter directed that settlement funds pay that lien.

As of October 8, 2008, the John C. Lincoln Hospital in Arizona was asserting a claim for unpaid medical bills in the amount of \$84,704.44. While Lincoln Hospital attempted to perfect its claim by filing lien documents, it failed to follow the correct procedures and a lien was never perfected. Ms. Docter knew about the Lincoln Hospital claim for \$84,704.44. Mr. Coleman directed her to not pay that bill.

Progressive United Financial Casualty Company, the insurer for Sweet Meats, filed suit against Ms. Docter claiming she breached the settlement agreement by not paying a known lien. By way of summary

judgment, the trial court entered judgment in favor of Progressive Insurance.

The trial court erred. The record before the trial court demonstrated that Lincoln Hospital never had a lien for unpaid medical bills. Accordingly, Ms. Docter requests this Court to reverse the trial court and direct the trial court to enter judgment in favor of Ms. Docter¹.

II. ASSIGNMENT OF ERROR

A. Assignment of Error:

1. The trial court, in its order of June 3, 2011, erred in denying Ms. Docter's motion for reconsideration.
2. The trial court erred in ruling, as a matter of law, that Ms. Docter breached the settlement agreement.
3. The trial court erred in finding, as a matter of law, that Lincoln Hospital had a lien.
4. The trial court erred in ruling that there was not a factual dispute as to whether Ms. Docter knew about a lien (which, as a matter of law, did not exist).
5. The trial court erred in entering judgment in favor of Progressive Insurance in the amount of \$67,500.
6. The trial court erred in ruling, as a matter of law, that Ms. Docter and Briggs & Briggs breached the covenant of good faith and fair dealing.

¹ Ms. Docter was employed by the Briggs & Briggs law firm and the law firm was also named as a defendant. This appeal is brought on behalf of both Ms. Docter and Briggs & Briggs. This Court's rulings as to Ms. Docter should also be applied to Briggs & Briggs.

B. Issues Pertaining to Assignments of Error:

1. Was there evidence in the record to support the trial court's denial of Ms. Docter's motion for reconsideration?
2. Was there evidence in record supporting the trial court's conclusion that, as a matter of law, Ms. Docter breached the settlement agreement?
3. Did the undisputed evidence before the trial court demonstrate that, as a matter of law, Lincoln Hospital did not have a lien?
4. Was it an issue of fact whether Ms. Docter knew about Lincoln Hospital's attempt to obtain a valid lien?
5. Was it a question of fact as to whether the \$67,500 that Progressive Insurance paid to Lincoln Hospital was an amount that was due and owing to Lincoln Hospital for customary hospital charges?
6. Does the Covenant of Good Faith and Fair Dealing impose new contractual duties upon the parties?

**III.
STATEMENT OF THE CASE**

A. Mr. Coleman settled his claim against Progressive Insurance insureds.

James Coleman was in an automobile accident on October 14, 2006 in Phoenix, Arizona. (CP 8.) He claimed that Sweet Meats, LLC, and Kelly Addy were liable for the accident. (*Id.*) The Progressive United Financial Casualty Insurance Company insured Sweet Meats, Addy, and Clemons. (CP 9.)

On October 6, 2006, the parties mediated the dispute. The dispute was resolved and a memorandum of settlement was executed.

The memorandum provided:

The parties agree to settle this case as follows:

1. Defendants will agree to pay plaintiff and attorney \$497,000. Defendants will pay for the mediation.
2. Plaintiff will execute a release of all claims and sign an indemnity and hold harmless agreement as to any and all medical expense, liens and/or subrogated claims; plaintiff's counsel agrees that all known liens or subrogation claims will be satisfied or otherwise resolved out of settlement proceeds and prior to disbursement to plaintiff;
3. The parties will work together to formalize this agreement with appropriate documentation;
4. A copy of this memorandum may be introduced into evidence in any proceeding to enforce this settlement (CR2(a)).

(CP 10.) Mr. Coleman, Ms. Docter, and a representative of the insurance company signed the agreement.

By letter dated October 10, 2008, Mr. Edwards, Progressive Insurance's representative, sent a formal release and hold harmless agreement to Ms. Docter. In his cover letter, he wrote the following:

This letter will confirm our conversation of October 6, 2008. Please find enclosed our Release, Hold Harmless Agreement and settlement draft in the above-referenced matter.

This is a gross settlement inclusive of all special and general damages. Special damages include, but are not limited to wage loss, outstanding bills, liens or subrogated interest. Any subrogated interest shall be handled by you, per the Mahler decision. You agree to satisfy and/or handle all of these special damage interests as part of our settlement agreement.

If you have any questions, or if you believe any of the above information is not in accordance with our agreement, please notify me immediately.

Please have your client execute the enclosed Release and Hold Harmless before negotiating the settlement drafts.

(CP 64.)

On October 20, 2008, Mr. Coleman executed the formal Full Release of All Claims and Demands together with the Hold Harmless Agreement. (CP 8-9.) On that same day, Debera Ellis had a telephone conversation with Progressive Insurance's representative, Don Edwards. (CP 28.) Mr. Edwards stated that Progressive was only aware of one lien: by DSHS. (CP 28.) As of October 20, 2008, Ms. Docter was aware of the bills being claimed by Lincoln Hospital.

Mr. Coleman had not authorized her to pay those bills from the settlement proceeds. (CP 28.)

Before Ms. Docter directed that the settlement proceeds be distributed, she only knew of one lien. (CP 28.) The lien was a subrogation claim by DSHS for medical benefits paid on behalf of Mr. Coleman. (CP 28.)

B. Lincoln Hospital's defective notice of lien claim.

On March 30, 2007, Lincoln Hospital filed with the Maricopa County Recorder a "Notice of Claim and Health Care Provider Lien." (CP 79.) This lien claim was defective for two reasons. First, it had an incorrect address for Mr. Coleman. Second, a copy was never mailed to Mr. Coleman.

Mr. Coleman filed a declaration attesting that his address at the time of the accident was 103-33 Rainey Creek Road, Glenoma WA, 98336. (CP 279.) The defective lien notice had a different address for Mr. Coleman. Mr. Coleman testified in his declaration that he never received any lien claim notice from the hospital – even a defective one. (CP 279.) These facts were never disputed before the trial court.

At the trial court level Progressive Insurance never contested that the lien was improperly executed.

- C. Lincoln Hospital did not give Progressive Insurance, nor Ms. Docter, a copy of the defective lien notice before the settlement funds were disbursed.**

For reasons unknown to the parties, Lincoln Hospital did not provide a copy of the defective lien claim notice to Mr. Coleman, Ms. Docter, or to Progressive Insurance prior to the settlement funds being disbursed. This was undisputed before the trial court.

In a letter dated October 14, 2008 from Richard Burnham, an attorney representing Lincoln Hospital, to Ms. Docter, Mr. Burnham refers to the hospital's "claim" but he did not refer to any lien rights:

Dr. Ms. Docter:

Given that the hospital has received no payment on this account from any source it cannot reduce the extent you requested nor is it compelled to reduce for attorney's fees and costs. ... Be advised that the hospital will accept the amount of \$67,500.00 as an accord and satisfaction, compromise and release by your client of any dispute as to the validity of the hospital's claim or the manner of assertion thereof.

Depending upon the circumstances of your settlement, the hospital may reduce further. If you would like me to reevaluate this please advise me of the particulars of your settlement and what other claims exist against it.

(CP 86.)

While Progressive Insurance is now apparently taking the position that it was aware of a lien by Lincoln Hospital before the funds were disbursed and relayed that information to Ms. Docter, it is undisputed that Progressive Insurance never had a copy of the defective lien notice before the funds were disbursed. (In addition, it is a disputed fact as to whether Progressive knew that Lincoln Hospital was asserting a lien, even a defective one, prior to disbursement. Debera Ellis, a paralegal with Ms. Docter's office submitted an affidavit where she testified that she spoke with Mr. Edwards from Progressive Insurance on October 20, 2008 and asked him if he knew of any liens other than the one from DSHS and he replied no - he knew about Lincoln's claimed medical bills but he had not received a lien from the hospital. CP 105-106.)

None of the documentation between the parties before the settlement funds were disbursed ever referred to an alleged lien by Lincoln Hospital - whether perfected or not.

Mr. Coleman directed Ms. Docter to see whether Lincoln Hospital would accept \$25,000 as payment for the hospital charges.

When the hospital refused, he directed her to not pay any amounts to the hospital. (CP 279.)²

D. Lincoln sued Progressive Insurance in Arizona and Progressive Insurance paid to settle the claim.

On September 8, 2009, Lincoln Hospital sued Progressive Insurance in Arizona State court. (CP 290.) In its complaint, it claimed that after filing its notice of lien claim, it perfected that claim. (CP 292.) It claimed it was owed \$84,704.44. (CP 293.) Progressive Insurance apparently never conducted even limited discovery to determine whether in fact the lien claim had been perfected. Progressive apparently never even asked Mr. Coleman if he had received a copy of the lien claim within five days of its filing. Instead, Progressive simply demanded that Ms. Docter pay the disputed amount. (CP 296.) When Ms. Docter refused to do so, Progressive paid the hospital \$67,500.00. Progressive then brought this suit against Ms. Docter and Mr. Coleman.

**IV.
ARGUMENT**

The Settlement Agreement to which Ms. Docter was a party required her to see to it that all “known liens” were paid from the

² Mr. Coleman felt that the treatment he received from the hospital was less than what he expected – according to Mr. Coleman, his broken leg was not properly aligned by the hospital and as a result, he has a permanent protrusion in his thigh. (CP 279.)

funds. While it was a disputed fact as to whether Ms. Docter knew about any attempted lien by Lincoln Hospital before she disbursed the funds, it was undisputed at the trial court level that no valid lien ever existed. Accordingly, the trial court erred when it found that Ms. Docter had breached the settlement agreement.

A. There was never a lien by Lincoln Hospital.

Under Arizona law, a healthcare provider may file a lien for the treatment it provided to an injured person against that person's claim for damages. ARS 33-931(A). However, in order to have a valid lien, certain procedures must be followed. Those procedures are set forth in ARS 33-932.

33-932. Perfecting lien; statement of claim; recording; effect

A. In order to perfect a lien granted by section 33-931, the executive officer, licensed health care provider or agent of a health care provider shall record, before or within thirty days after the patient has received any services relating to the injuries, except a hospital which shall record within thirty days after the patient is discharged, in the office of the recorder in the county in which the health care provider is located a verified statement in writing setting forth all of 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.

...

B. The verified statement shall also include the amount claimed due as of the date of recording of the claim or lien and a statement regarding whether the patient's treatment has been terminated or will be continued. Amounts incurred during the continued period are also subject to the lien.

C. The claimant shall also mail, by first class mail within five days after recording the claim or lien, a copy of the claim or lien to the injured person. ...If a hospital records such a claim or lien, the recording shall be notice to all persons, firms or corporations liable for damages, whether or not they are named in the claim or lien.

D. A hospital or ambulance service lien that is not recorded within the time prescribed by this section is effective against any settlement or judgment for damages if the lien is recorded thirty days before the settlement is agreed to or the judgment is paid except if the lien is recorded in a county where liens are accessible on the internet, the lien is effective if the lien is accessible on the internet thirty days or more before the settlement is agreed to or the judgment is paid. If the lien is not recorded or is not accessible on the internet as provided in this section, the lien is invalid and may not be enforced by the cause of action provided in section 33-934.

One requirement is that the name and address for the lien be the same as the name and address as it appears in the patient's records. ARS 33-932(A)(1). Here, the defective lien claim used the following as the address for Mr. Coleman: 13657 N. 20th Ln., Phoenix, AZ 85029. This does not match the correct address for Mr. Coleman: 103 33 Rainey Creek Rd., Glenoma, WA 98336.

A second requirement is that the notice be mailed to the patient. ARS 33-932(C). The notice was never mailed to Mr. Coleman. There was never any dispute as to the fact that that requirement was never met. Mr. Coleman testified that he never received notice of even the defective lien claim. Progressive Insurance never submitted any proof that Mr. Coleman was mailed a copy of the notice. When Mr. Gnepper, the attorney representing Lincoln Hospital, was questioned about whether any proof of mailing was ever filed, he responded that there was no proof of mailing – just the statement in the defective claim notice that notice was going to be mailed. (CP 171.)

Under Arizona law, in order to have a valid lien, the provisions for obtaining that lien must be strictly followed. *Nationwide Mut. Ins. Co. v. Arizona Health Care Cost Containment Sys.*, 166 Ariz. 514, 517,

803 P.2d 925, 928 (App. 1990). Here, there was no dispute that Lincoln Hospital's notice of lien claim was never perfected.

Both of these defective aspects of the lien were raised at the trial court level. Progressive Insurance never responded as to how a lien existed in light of these deficiencies.

Lincoln Hospital never had a lien. In order for the trial court to find in favor of Progressive Insurance, it had to find that a lien existed. As a matter of law, the trial court erred. As such, this matter should be reversed with direction for the trial court to enter judgment in favor of Ms. Docter.

B. Even if a lien had existed, it was a question of fact whether Ms. Docter knew about the non-existent lien.

As noted above, no lien existed. As such, this section is academic. However, it should be pointed out for the record that even if the trial court found that a lien existed, there was an issue of fact as to whether Ms. Docter knew about the lien. At the trial court level, she testified that the only known lien was one by DSHS. (CP 28.) She could only be in breach of the agreement if she failed to direct the payment of a known lien. Such a factual dispute would require a trial. It would be improper for a trial court to enter summary judgment when such an issue of fact existed.

C. The trial court erred in entering judgment for \$67,500.

Even if Lincoln Hospital had a lien (which it did not – at most, it had a notice of a lien claim that was defective on its face and further defective by not being perfected) the Hospital was only entitled to recover “customary charges for care and treatment.” ARS 33-931. Charges “billed” by a hospital may be different from “customary” charges. *LaBombard v. Samaritan Health System*, 195 Ariz. 543, 991 P.2d 246 (1998). Where a hospital accepts partial reimbursement from certain payors, the partial reimbursements may actually represent “customary” charges, thus limiting the amount allowed under the lien statute. *Id.*

Here, Progressive Insurance did not provide any evidence that what it paid to Lincoln Hospital were customary charges. Instead, it simply paid \$67,500. Even if there was a lien by Lincoln Hospital (which there was not) and Ms. Docter knew about the lien (she did not even know about the failed lien attempt) the breach would not authorize Progressive Insurance to pay more to Lincoln Hospital than it was otherwise entitled to. As such, the trial court erred in entering judgment in the amount of \$67,500.

D. The trial court erred in finding a breach of the covenant of good faith and fair dealings.

In its Reconsideration Order, the trial court, in denying the motion, stated that it “affirms its ruling that Defendant breached the covenant of good faith and fair dealing as well as the term of its settlement agreement with plaintiff in failing to resolve payment of the hospital bill owed to John C. Lincoln Hospital before disbursing funds to Defendant Coleman or otherwise hold the funds in trust or implead them into the court until the dispute regarding the hospital bill was resolved.” (CP 472-72.)

The trial court expanded the obligations owed by Ms. Docter under the settlement agreement. That was error.

The trial court was correct that every contract has an implied duty of good faith and fair dealing. However, the duty of good faith does not extend the obligations contained with the contract. *Badgett v. Security State Bank*, 116 Wn.2d 563, 569, 807 P.2d 356 (1991). The duty of good faith does not materially change the terms of the parties' contract. *Id.* The duty of good faith does not inject substantive terms into the parties' contract. *Id.* Instead, it only requires that the parties perform in good faith the obligations imposed by their agreement. *Id.* Accordingly, the duty arises only in connection with the terms agreed to by the parties. *Id.*

Here, Ms. Docter did not agree to pay attempted liens. She did not agree to pay unknown liens. She did not agree to pay claims for medical bills that were not reduced to a lien. Instead, she only agreed to see to it that known liens were paid prior to disbursement of settlement proceeds. As a matter of law, there was never a lien by Lincoln Hospital. As a matter of law, there was not a breach of the duty of good faith and fair dealing.

CONCLUSION

As a matter of law, Ms. Docter could only be liable for breach of the settlement agreement if there were no dispute that she failed to direct the settlement disbursement to pay a “known lien.”³ The record before the trial court was undisputed: Lincoln Hospital never followed the procedures to perfect a lien and, as a matter of law, no lien ever existed.

This dispute must be kept in context. The underlying defendants, through their insurer, settled the claim that Mr. Coleman had against them. The primary terms of the settlement were that Mr. Coleman would forever release all claims, known and unknown, and

³ Alternatively, if there were a subrogated interest, and Ms. Docter failed to direct payment to that subrogated interest, then, as a matter of law, Ms. Docter could be held to have breached the settlement agreement. However, this dispute does not involve a subrogated claim. Black’s Law Dictionary defines a “subrogated interest” as “the right of one who has paid an obligation which another should have paid to be indemnified by the other.” Lincoln Hospital did not have a subrogated claim; instead, it had a claim for medical expenses that was unpaid.

that he would hold the defendants, and Progressive Insurance, harmless and would defend them from any further claims. (CP 9.)

Ms. Docter, apparently for the consideration that her law firm be a co-payee on the settlement check, agreed to very limited obligations: she would see to it that all known liens or known subrogation claims would be satisfied or otherwise resolved out of the settlement proceeds and prior to disbursement to the plaintiff. (CP 10.) Ms. Docter did not agree that liens unknown to her would be paid from the disbursement funds. Ms. Docter did not agree to pay medical expenses that were claimed but not reduced to a lien. Ms. Docter did not agree to do anything other than the limited scope that was spelled-out in the settlement agreement.

Progressive Insurance, when faced with Lincoln Hospital's claim, did not perform the minimal due diligence that any party would take when faced with a lien claim: check to see whether a lien existed. If it had simply checked to ensure that the procedural requirements were met, as limited as they are, it would have soon discovered that Lincoln Hospital did not have a lien and that the Hospital's claim against it was without merit. Progressive Insurance neglected to perform that minimal due diligence. Instead, it paid \$67,500 of a \$84,704 claim and then sought to go after Ms. Docter.

As a matter of law, Lincoln Hospital never had a lien. As a matter of law, the trial court erred in finding that a lien existed. As a matter of law, the trial court's ruling should be reversed with directions that judgment be entered in favor of Ms. Docter and Briggs & Briggs.

Dated this 6 day of October, 2011.

Respectfully submitted,

GORDON THOMAS HONEYWELL LLP

By 
Salvador A. Mungia, WSBA No. 14807
Attorneys for Appellants

I, Gina A. Mitchell, declare that on October 7, 2011, I caused the following pleadings:

1. Corrected Appellants' Opening Brief

together with this Declaration of Service, to be served on counsel for Plaintiff as follows:

Douglas F. Foley, WSBA No. 13119	<input type="checkbox"/> Via ABC-Legal Messenger
Douglas Foley & Associates	<input checked="" type="checkbox"/> Via U.S. Mail
13115 NE 4 th Street, Suite 260	<input type="checkbox"/> Via Facsimile:
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(360) 883-0636 phone	Notification/LINX
doug.foley@dougfoleylaw.com	<input checked="" type="checkbox"/> Via Email

I declare under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.


Gina A. Mitchell, Legal Assistant
GORDON THOMAS HONEYWELL LLP

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