IN THE COURT OF APPEALS
STATE OF ARIZONA, DIVISION ONE

WALTER ANSLEY, et al., Plaintiffs/Appellees/ Cross-Appellants vs. BANNER HEALTH NETWORK, et al., Defendants/Appellants/ Cross-Appellees.	Court of Appeals – Division One No. 1 CA-CV 17-0075 Maricopa County Superior Court No. CV2012-007665

APPELLEES/CROSS-APPELLANTS' REPLY BRIEF ON CROSS-APPEAL

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1. The Hospitals failed to distinguish *Nahom v. Blue Cross and Blue Shield of Arizona*'s holding that insureds are third-party beneficiaries of participation agreements between health insurers (AHCCCS) and medical providers (the Hospitals)

The Hospitals fail to even address, let alone distinguish, *Nahom v. Blue Cross and Blue Shield of Arizona, Inc.*, 180 Ariz. 548, 885 P.2d 1113 (App. 1994)—cited in the Opening Brief on Cross-Appeal—which is fatal to every argument offered by the Hospitals.

Initially, the Hospitals argue AHCCCS members are not mentioned in the Provider Participation Agreements ("PPAs"). *See* Answering Brief on Cross-Appeal at p. 39. Yet, this Court has already dismissed that argument holding "although [the insureds] are not mentioned by name, as subscribers they are clearly third-party beneficiaries of the participation agreement." *See Nahom*, 180 Ariz. at 552. Accordingly, "it is sufficient for third-party status to show that the beneficiary is a *member* of a class of beneficiaries intended by the parties." *Id.*

The Hospitals also argue "the State of Arizona entered into the Provider Agreements for its own benefit . . . ." *See* Answering Brief on Cross-Appeal at p. 40. Thus, according to the Hospitals, the only benefit derived from the PPAs is incidental to the State's purpose in entering into the PPAs with the Hospitals. But,

this argument was also rejected in *Nahom*—concluding a third-party beneficiary does not need to be the *sole beneficiary* of the contract. *See Nahom*, 180 Ariz. at 552-53; *see also Smallwood v. Central Peninsula General Hosp*., 151 P.3d 319, 324 (Ak. 2006) ("We will recognize a third-party right to enforce a contract upon a showing that the parties intended that at least one purpose of the contract was to benefit the third-party."). Instead, to determine which party is the "primary beneficiary" ***of the particular term in the PPA***, the Court must look to the ***particular term sought to be enforced***, not the contract as a whole. *See id.* at 553.

Paragraph 15 of the PPAs provides:

> The [Hospitals] shall not bill, nor attempt to collect payment directly or through a collection agency from a person claiming to be AHCCCS eligible without first receiving verification from AHCCCS that the person was ineligible for AHCCCS on the date of service or that services provided were not AHCCCS covered services. The [Hospitals agree] to abide by Arizona Administrative Code R9-22-702 prohibiting the [Hospitals] from charging, collecting or attempting to collect payment from an AHCCCS eligible person.

See Answering Appendix 13, ¶ 15 of PPAs. Like in *Nahom*, the effect of the PPA is to preclude the Hospitals from looking to AHCCCS patients for payment; "a direct, not merely incidental, benefit" to AHCCCS patients because "the main thrust of [the] provision is to limit their expenses." *See Nahom*, at 553.

Similarly, the Hospitals agreed to comply with (1) all "federal, State and local laws, rules, **regulations**, standards and executive orders governing performance of duties under [the PPA]" or (2) "comply with all applicable Federal and State laws and **regulations**." *See* Answering Appendix 13, General Terms and Conditions, ¶ 6 of PPAs (emphasis added); Answering Appendix 14, Provider Agrees, ¶ 4 of PPAs (emphasis added). The Hospitals argue such "compliance with law" provisions are overly generic and that conferring third-party beneficiary status with respect "compliance with law" provisions in public contracts would vest the general public with standing to enforce any public contract. *See* Answering Brief on Cross-Appeal at 39-40. But, the Hospitals argument ignores that each provision must be construed individually to determine the primary purpose of the term sought to be enforced, rather than merely considering the "compliance with law" provision as a whole. *See Nahom,* at 553. Thus, the question becomes which State or Federal law or regulation is sought to be enforced under the "compliance with law" provision?

Here, the patients seek to enforce 42 C.F.R. § 447.15—participation in AHCCCS is limited to providers "who accept, as payment in full, the amounts paid by the agency . . . ." A regulation specifically incorporated into the PPAs by the "compliance with law" provision, and specifically agreed to by the Hospitals. Yet,

who is the "primary beneficiary" of 42 C.F.R. § 447.15? AHCCCS receives no benefit from it other than ensuring its providers comply with Federal law. While the Hospitals may receive a "marketing tool" and provide "financial incentive" for Medicaid patients to seek treatment at their facility, the benefits are secondary to the benefits received by AHCCCS patients, *i.e.*, limiting their expenses. *See Nahom*, 180 Ariz. at 553. As such, the AHCCCS patients are the "primary beneficiary" of the payment in full provision, and are third-party beneficiaries of the contract. *See id.* at 552-53; *see also Smallwood*, 151 P.3d at 325-26 (finding Medicaid patients are the intended beneficiaries of 42 C.F.R. § 447.15's payment in full provision) (quoting *Mallo v. Pub. Health Trust of Dade County, Fla.*, 88 F.Supp.2d 1376, 1385 (S.D.Fla. 2000) ("Thus . . . guaranteeing payment to the hospital is the 'quid' for which the hospital's no additional payment promise was in part the 'quo.'")).

2. Lien enforcement is collection from the patient, not the tortfeasor

In *Abbott v. Banner Health Network*, 236 Ariz. 436, 341 P.3d 478 (App. 2014), *rev'd on other grounds*, *Abbott v. Banner Health Network*, 239 Ariz. 409, 372 P.3d 933 (2016), this Court expressly held:

> Nor is enforcing liens for further payments from third-party recoveries obtained by AHCCCS patients somehow distinguishable from enforcing the liens against the patients themselves. No Arizona case provides that

> enforcement of such liens is permissible under state law, and even if it were, it would be preempted by federal law governing Medicaid reimbursement applicable through AHCCCS.

See id. at 444 ¶ 23. Despite this the Hospitals allege "Arizona law is well-settled that lien enforcement is collection from third-party tortfeasors, not from patients." *See* Answering Brief on Cross-Appeal at pp. 43-44. In support, the Hospitals cite to *LaBombard v. Samaritan Health System*, 195 Ariz. 543 (App. 1998) and *Andrews v. Samaritan Health System*, 201 Ariz. 379 (App. 2001). But, this Court also disposed of that argument as well in *Abbott. See Abbott*, 236 Ariz. at 444 n. 8 (distinguishing both *LaBombard* and *Andrews*). In an effort to avoid this Court's holding, the Hospitals claim the *Abbott* opinion was "reversed in its entirety, and it is thus neither authoritative nor persuasive." *See* Answering Brief on Cross-Appeal at p. 47. This is wrong.

Courts frequently cite reversed appellate opinions with the qualification that they were "reversed on other grounds." For example, in the last two years alone, Arizona appellate courts have used the "reversed on other grounds" qualification on multiple occasions. For example, in *State v. Veloz*, 236 Ariz. 532, 342 P.3d 1272 (App. 2015), this Court cited to the Arizona Supreme Court's opinion in *State v. Mincey*, 115 Ariz. 472, 566 P.2d 273 (1977) despite that the opinion **was reversed**

by the United States Supreme Court in *Mincey v. Arizona*, 437 U.S. 385, 98 S.Ct. 2408 (1978). *Veloz*, 236 Ariz. at 535 ¶ 7; *see also State v. Brown*, 2017 WL 2544832 (Ariz.App. June 13, 2017) (same); *State v. Lomeli*, 2015 WL 1394676 (Ariz.App. March 25, 2015) (same); *State v. Ortiz-Padilla*, 2015 WL 3451254 (Ariz.App. May 28, 2015) (same). The Arizona Supreme Court did the exact same thing as recent as July 2017. *See Soto v. Sacco*, 242 Ariz. 474, 482 ¶ 23, 398 P.3d 90, 98 (2017).

What is important in considering the reversed opinion is *what reasoning* and/or *holding was reversed*, rather than ignoring every portion of the opinion merely because the decision was overturned. *See* Michael D. Moberly, *This is Unprecedented: Examining the Impact of Vacated State Appellate Court Opinions*, 13 J. App. Prac. & Proc. 231, 251-52 (2012) (litigants may cite vacated or reversed opinions for issues the reversing court "did not call into question"). The Arizona Supreme Court *presumed, without deciding* the preemption conclusion was correct. *See Abbott*, 239 Ariz. at 411 ¶ 2. Then, the Arizona Supreme Court concluded the preemption issue was **unnecessary**—rather than incorrect—to resolve the issues in the appeal. *See id.* at 412-13 ¶ 10. The *Abbott* Supreme Court opinion never "called into question" the preemption ruling, and in fact noted the trial court ruled the same way. *See Abbott*, 239 Ariz. at 414 ¶ 17 n. 1.

3. Case law interpreting Federal law was incorporated into the PPAs

The Hospitals concede "a contract may, of course, specify that another jurisdiction's law applies . . . ." *See* Answering Brief of Cross-Appeal at p. 49. Then, the Hospitals claim the PPAs did not subject the Hospitals to Federal law and regulations essentially arguing "the parties to the Provider Agreements did not [agree to be subject to federal law]." *See id.* This is wrong.

The PPAs expressly provide:

> [The Hospitals] shall comply with all **federal**, State and local laws, **regulations**, standards and executive orders governing performance of duties under this Agreement, without limitation to those designated within this Agreement.

See Answering Appendix 13 (emphasis added). Accordingly, the PPAs expressly made the Hospitals subject to federal laws and regulations. And, the common law, including the "out-of-state cases" *interpreting* the federal laws and regulations, is also part of the agreement. *See Qwest Corp. v. City of Chandler*, 222 Ariz. 474, 485 ¶ 37, 217 P.3d 424, 435 (App. 2009) (common law affecting validity, construction and operation of contract is incorporated into contracts).

Admittedly, the Arizona Supreme Court held the apparent contradiction between (1) federal laws and regulations prohibiting collecting from the patients

after accepting payment from AHCCCS and (2) A.R.S. § 36-2903.01(G)(4)'s allowance of the practice precluded *finding the law was settled*, and therefore the subsequent settlement agreements with respect to the validity of the health care provider liens could not be voided. *See Abbott*, 239 Ariz. at 414 ¶ 17. In doing so, the Arizona Supreme Court observed, without deciding, "federal law may preempt state law in situations like these. . . ." *See id.* The Supreme Court did not, however, "give a thumbs-down" to using "out-of-state cases" to interpret federal law and regulations. Indeed, the Arizona Supreme Court acknowledged the "out-of-state cases" interpreting the federal prohibitions on balance billing are relevant to whether the Hospitals violated federal law when asserting the health care provider liens. *See id.* at 414 ¶ 16.

The trial court, and this Court, ultimately decided what the Arizona Supreme Court left unanswered: federal law preempted state law, and the federal prohibition on seeking additional payment after being paid by AHCCCS was prohibited. *See* Answering Appendix 12 at p. 7 (Under federal Medicaid law, AHCCCS has authority to go after third-party tortfeasors . . .; AHCCCS providers who bill AHCCCS do not."). Yet, the Hospitals argue "subsequent changes to the law do not retroactively alter the Provider Agreements and place the hospitals in breach." *See*

Answering Brief on Cross-Appeal at p. 42. But, the trial court's ruling "was not a subsequent change" regarding the federal prohibition on balance billing. In fact, the trial court cited numerous cases demonstrating courts have consistently held federal law prohibits the practice. *See* Answering Appendix 12 at pp. 3-5.

Ultimately, the Hospitals expressly agreed to abide by the prohibition against collecting from AHCCCS eligible patients and 42 C.F.R. § 447.15's payment in full mandate when they agreed to comply with all Federal laws and regulations. When they asserted health care provider liens after accepting payment from AHCCCS, the Hospitals breached the PPAs and the patients were entitled to summary judgment.

4. A.R.S. § 36-2903.01(G)(4) was not incorporated into the PPAs

Citing to *Andrews*, 201 Ariz. 379, *LaBombard*, 195 Ariz. 543, and *Samsel v. Allstate Ins. Co.*, 204 Ariz. 1 n.2 (2002), the Hospitals argue "[A.R.S. § 36-2903.01(G)(4)] was thus incorporated into the Provider Agreements by operation of law." *See* Answering Brief on Cross-Appeal at p. 42. But, none of those cases even suggested the statute was incorporated into the PPAs as a matter of law. Indeed, none of the cases even mentioned the individual PPAs between the providers and AHCCCS.

Similarly, the Hospitals citation to A.A.C. R9-22-1007 does not show the statute was incorporated into the PPA. The AHCCCS Manual requires medical providers to seek payments from "third-party payors" **prior** to billing and accepting payment from AHCCCS[1]. *See* Answering Appendix 4 at 0065; *see also* 42 C.F.R. § 433.139(b) (requiring providers to determine extent of third party liability before Medicaid will pay a claim). Thus, to the extent lien enforcement is collection from a "third party payor"—as argued by the Hospitals—they are **required** to record a notice of health care provider lien **before** billing AHCCCS. *See* 42 C.F.R. § 433.139(b). Thus, A.A.C. R9-22-1007 merely requires the Hospitals to coordinate third-party coverage with AHCCCS prior to billing AHCCCS; it does not, however, "envision" lien enforcement **after accepting payment from AHCCCS**. *See* 42 C.F.R. § 434.6(a)(9) (PPAs must include contract language requiring providers to

[1] Although the Hospitals repeatedly argue health care provider liens are "third-party payments", A.R.S. § 36-2903.01(G)(4) itself specifically excludes health care provider liens from "third-party payors." It provides: "A hospital may collect any unpaid portion of its bill from other third party payors **or in situations covered by [the health care provider lien statute]**." A.R.S. § 36-2903.01(G)(4) (emphasis added). By separating "third-party payors" from health care provider liens, the Arizona Legislature established the terms are not the same and that health care provider liens are separate and distinct from "third-party payors." *See Doty-Perez v. Doty-Perez*, 241 Ariz. 372, 376-77 ¶ 20, 388 P.3d 9 (App. 2016) (must give meaning to every word used in a statute); *State v. Eddington*, 228 Ariz. 361, 363 ¶ 9, 266 P.3d 1057 (2011) (construe statute so no term is **redundant** or meaningless).

comply with 42 C.F.R. § 433.135, *et seq*.); 42 C.F.R. § 433.137 (state plan must include procedure requiring providers and beneficiaries to cooperate in identifying and providing information to assist Medicaid agency in pursuing liable third parties). In fact, such a reading completely contradicts AHCCCS' payment in full requirement *irrespective of first- and third party coverages*. *See* Opening Brief, Appendix 5 at 2 (provider required to accept Capped Fee-for-Service schedule as payment in full regardless of third party liability).

Finally, the Hospitals completely ignore the discretionary language of A.R.S. § 36-2903.01(G)(4). When attempting to distinguish *State Farm Mut. Auto. Ins. Co. v. Lindsey*, 182 Ariz. 329, 897 P.2d 631 (1995), the Hospitals argue A.R.S. § 20-259.01(H) included an "opt-in" requirement that is absent from A.R.S. § 36-2903.01(G)(4). *See* Answering Brief on Cross-Appeal at p. 47-48. This is wrong.

A.R.S. § 20-259.01 provides, in pertinent part:

> If multiple policies or coverages purchased by one insured on different vehicles apply to an accident or claim, the insurer **may** limit the coverage so that only one policy or coverage, selected by the insured, shall be applicable to any one accident.

A.R.S. § 20-259.01(H). Contrary to the Hospitals' argument, the statute is completely bereft of any "opt-in" requirement. Instead, our Supreme Court noted

the legislature's use of the term "may"—rather than shall—made it so the statutory provision was not self-executing and precluded its incorporation into the contract. *See Lindsey*, 182 Ariz. at 331. The same is true of A.R.S. § 36-2903.01(G)(4)—because it also uses the term "may"—and the Hospitals were required to do *something* to incorporate A.R.S. § 36-2903.01(G)(4) into its PPAs. Yet, the entire Arizona Medicaid Plan is devoid of any reference to A.R.S. § 36-2903.01(G)(4), or even health care provider liens. Thus, the statute was not incorporated into the PPAs.

5. The Hospitals bargained away any lien enforcement rights ostensibly granted by A.R.S. § 36-2903.01(G)(4) when they agreed to comply with all Federal laws and regulations, including 42 C.F.R. § 447.15

Assuming *arguendo*, A.R.S. § 36-2903.01(G)(4) was incorporated into the PPAs—it was not—the Hospitals waived their right to assert health care provider liens after billing and accepting payment from AHCCCS.

In *Abbott*, 236 Ariz. 436, this Court expressly held:

> Equally important, even if there were a good faith dispute about the enforceability of the liens, the Hospitals cannot rely on such a theory because they expressly agreed in their Provider Participation Agreements that they would be bound by federal law, and they would 'abide by Arizona Administrative Code R9-22-702 prohibiting the Provider from charging, collecting, or attempting to collect payment from an AHCCCS eligible person.' Thus, the Hospitals effectively agreed that they would be bound by such a provision. Moreover, the Hospitals agreed that

> they would accept AHCCCS payment as payment in full for the services rendered. These Provider Participation Agreements trump any argument by the Hospitals that there was a good faith dispute about the legality of the liens such that an accord and satisfaction can be enforced.

See Abbott, 236 Ariz. at 446 ¶ 29. As such, this Court has already held the Hospitals agreed to waive any purported lien enforcement rights when they entered into the PPAs.

In defense, the Hospitals argue the PPAs are not freely-negotiated and are standard form agreements drafted by AHCCCS. *See* Answering Brief on Cross-Appeal at p. 45-46. Yet, the Hospitals fail to cite to any authority establishing the nature of the form agreement should preclude a finding of waiver. Therefore, its argument should be ignored. *See Polanco v. Indus. Comm'n of Ariz.*, 214 Ariz. 489 n.2, 154 P.3d 391, 393-94 (App. 2007) (failure to develop and support argument waives issues on appeal).

In addition, the Hospitals cite to *State ex rel. Romley v. Gaines*, 205 Ariz. 138 (App. 2003), arguing statutes supersede the terms of contracts. *See* Answering Brief on Cross-Appeal at pp. 45-46. But, *Romley* merely held the unremarkable: "[W]here a contract is **incompatible** with a statute, the statute governs." *See Romley*, 205 Ariz. at 142 ¶ 13. Yet, here the waiver is not incompatible with A.R.S. § 36-

2903.01(G)(4) because it is *discretionary*, not mandatory.

"If a contractual term is not specifically prohibited by legislation, courts will uphold the term unless an otherwise identifiable public policy clearly outweighs the interest in the term's enforcement." *CSA 13-101 Loop, LLC v. Loop 101, LLC*, 236 Ariz. 410, 411 ¶ 6, 341 P.3d 452, 453 (2014). Thus, statutory rights may be waived unless waiver of the right is expressly or impliedly prohibited by the plain language of the statute. *See Verma v. Stuhr*, 223 Ariz. 144, 157 ¶ 68, 221 P.3d 23, 36 (App. 2009). If the Legislature had wanted to preclude hospitals from bargaining away or "waiving" any purported lien enforcement rights under A.R.S. § 36-2903.01(G)(4), it could have used the term "shall be permitted" rather than "may." *See id.* at 153 ¶¶ 35-37 (noting shall is mandatory obligation). It did not, and therefore AHCCCS and the Hospitals were free to negotiate a waiver of any alleged lien enforcement rights conferred by the statute.

Next, the Hospitals argue—citing numerous out-of-state cases, but no Arizona cases—that a waiver cannot be found because the PPAs do not specifically mention precluding lien enforcement. *See* Answering Brief on Cross-Appeal at p. 46. Yet, Arizona law does not require such a specific reference; "it is sufficient if the language of waiver clearly conflicts with the right and thereby demonstrates the

beneficiary's intent to waive." *See Verma*, 223 Ariz. at 157 ¶ 69.

In Paragraph 15 of the PPAs, the Hospitals clearly agreed to forego collecting from AHCCCS patients. The Hospitals also clearly agreed to accept AHCCCS payment as "payment in full." Accordingly, the clear intention of the PPAs, in accordance with federal law, was to prohibit the Hospitals' from seeking payment after accepting payment from AHCCCS; a prohibition in clear conflict with the lien enforcement rights ostensibly granted by A.R.S. § 36-2903.01(G)(4). Thus, the Hospitals agree to waive their lien enforcement rights under A.R.S. § 36-2903.01(G)(4). *See United Behavioral Health v. Maricopa Integrated Health System*, 240 Ariz. 118, 124 ¶ 21, 377 P.3d 315, 321 (2016)[2].

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[2] The Hospitals attempt to distinguish *United*, 240 Ariz. 118, arguing the opinion did not quote the contract term, nor did it discuss waiver. Yet, the Hospitals fail to address how those issues change the holding that medical providers, including a hospital, can waive their right to seek payment in provider participation agreements.

Conclusion

Based on the foregoing, Cross-Appellees respectfully request this Court reverse the trial court's grant of summary judgment in favor of the Hospitals on the breach of contract claim, and remand for entry of judgment in favor of Cross-Appellees.

DATED this 30th day of August, 2017.

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