

**IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

**LIVING CROSS AMBULANCE SERVICE, INC.,**

**Plaintiff-Appellant/Cross-Appellee**

v.

**No. 35,298**

**VALENCIA COUNTY REGIONAL  
EMERGENCY COMMUNICATIONS  
CENTER; VILLAGE OF LOS LUNAS,**

**COURT OF APPEALS OF NEW MEXICO  
ALBUQUERQUE  
FILED**

**OCT 27 2016**

**Defendants-Appellees/  
Cross-Appellants**

*Mark R. [Signature]*

and

**BOARD OF COUNTY COMMISSIONERS  
OF VALENCIA COUNTY,**

**Defendant-Appellee.**

---

**DEFENDANT-APPELLEE BOARD OF COUNTY COMMISSIONERS OF  
VALENCIA COUNTY'S ANSWER BRIEF**

---

CIVIL APPEAL FROM THE THIRTEENTH JUDICIAL DISTRICT COURT  
The Honorable James L. Sanchez  
Dist. Ct. No. D-1314-CV-2011-00512

WALLIN, HUSS & ASSOCIATES  
Brandon Huss  
Dennis K. Wallin  
8205 Spain Rd. NE, #211  
Albuquerque, NM 87109  
T: 505.832.6363  
F: 505.814.5805  
E: [bh@whmlawfirm.com](mailto:bh@whmlawfirm.com)

*Attorneys for the Board of County  
Commissioners of Valencia County*

## TABLE OF CONTENTS

Rule 12-213(G) NMRA Statement of Compliance .....	ii
Table of Authorities .....	iii
<b>I. SUMMARY OF PROCEEDINGS.....</b>	<b>1</b>
<b>A. Nature of the Case .....</b>	<b>1</b>
<b>B. Summary of Relevant Proceedings .....</b>	<b>2</b>
<b>II. ARGUMENT.....</b>	<b>2</b>
<b>A. The Provision of Emergency Dispatch Services to     a Private Corporation Violates the Anti-Donation     Clause of the New Mexico Constitution.....</b>	<b>3</b>
i. <u>The provision of emergency dispatch services is an allocation         of something of value to a private corporation.....</u>	4
ii. <u>The “sick and indigent” exception does not apply to         the provision of emergency medical dispatch services. ....</u>	9
iii. <u>Providing ambulance services is not “consideration” for         the provision of emergency medical dispatch services. ....</u>	10
<b>B. Defendants-Appellees Have the Power to Contract     with Private Corporations to Provide Dispatch Services     in Exchange for Compensation .....</b>	<b>10</b>
<b>III. CONCLUSION .....</b>	<b>12</b>

## **RULE 12-213(G) NMRA STATEMENT OF COMPLIANCE**

I hereby certify that Defendant-Appellee the Board of County Commissioners of Valencia County's Answer Brief was prepared using proportionally-spaced, 14-point Times New Roman typeface in Microsoft Word 2016 word processing program and that, pursuant to the limitations set forth in Rule 12-213(F)(3) NMRA, its body, including headings, footnotes, quotations, and all other text except the cover page, caption, table of contents, table of authorities, signature blocks, and certificate of service, contains 2,781 words according to Microsoft Word 2016's word count function.

/s/ Brandon Huss  
Brandon Huss

## TABLE OF AUTHORITIES

### Constitutional Provisions

N.M. Const. art. IX, § 14 (1971, as amended 2010)..... 2, 3

### Statutes

Joint Powers Agreements Act  
NMSA 1978, §§ 11-1-1 through -7 (1961, as amended, 2009)..... 1, 11

Enhanced 911 Act  
NMSA 1978, §§ 63-9D-1 through -11.1 (1989 as amended, 2005)..... 4, 5

NMSA 1978, § 3-18-1 (1972)..... 10, 11

NMSA 1978, § 4-37-2 (1975)..... 10

### Case Law

*Vill. of Deming v. Hosdreg Co.*,  
1956-NMSC-111, 62 N.M. 18 ..... 3, 5, 7, 8

*State ex rel. Sena v. Trujillo*,  
1942-NMSC-044, 46 N.M. 361 ..... 3, 4

*State ex rel. Mechem v. Hannah*,  
1957-NMSC-065, 63 N.M. 110 ..... 4, 6, 9, 10

*Hutcheson v. Atherton*,  
1940-NMSC-001, 44 N.M. 144 ..... 4, 10

*Harrington v. Atteberry*,  
1915-NMSC-058, 21 N.M. 50 ..... 4, 8, 10

*In re Adoption of Doe*,  
1984-NMSC-024, 100 N.M. 764 ..... 7, 8, 11

*State ex rel. State Park & Rec. Comm-n v. New Mexico State Auth.*,  
1966-NMSC-033, 76 N.M. 1 ..... 7

*Humana of N.M., Inc. v. Board of County Comm'rs,*  
1978-NMSC-036, 92 N.M. 34 ..... 9

*Talbott v. Roswell Hosp. Corp.,*  
2005-NMCA-109, 138 N.M. 189 ..... 11

## I. SUMMARY OF PROCEEDINGS

### A. Nature of the Case

This case involves a dispute between plaintiff-appellant Living Cross Ambulance Service, Inc. (“LCAS”), a for-profit corporation, and defendant-appellee/cross-appellant Valencia County Regional Emergency Communications Center (the “VRECC”), an agency created under the Joint Powers Agreements Act, NMSA 1978, §§ 11-1-1 through -7 (1961, as amended, 2009). Since 2006, the VRECC provided LCAS with emergency medical dispatch services. These services were in excess of and in addition to routing of emergency calls, which the VRECC was otherwise required to do. The VRECC has made repeated demand for payment in exchange for the provision of these services beginning in 2006. In 2008, the VRECC informed LCAS that they would discontinue dispatch services, and begin to directly route calls to LCAS, unless LCAS entered into a contract with the VRECC and agreed to pay a fee based on its proportionate utilization of emergency dispatch services. LCAS filed the action below seeking, *inter alia*, a declaration that the VRECC did not have the power to charge any fee for emergency medical dispatch services, and that the provision of these services was constitutional. [RP 1]. The District Court found that the VRECC did have the power to charge an appropriate amount of compensation for the provision of emergency medical dispatch services, and that providing those services without consideration was a

“donation” in violation of the Article IX, Section 14 of the New Mexico Constitution (the “anti-donation clause”). [RP 434, 533]. Defendant-appellee the Board of County Commissioners of Valencia County (the “County”) and defendant-appellee/cross-appellant the Village of Los Lunas (“Los Lunas”) are parties to the VRECC whose respective delegated powers under New Mexico law are disputed in this appeal.<sup>1</sup>

### **B. Summary of Relevant Proceedings**

On February 9, 2012, LCAS filed a motion for summary judgment and memorandum brief in support. [RP 133, 169]. In its motion and memorandum brief, LCAS asked the trial court to determine that the anti-donation clause did not act as a bar to the VRECC providing emergency medical dispatch services without consideration [RP 152], and that the VRECC did not have the power to charge any amount whatsoever for the provision of these services [RP 156]. The VRECC and Los Lunas filed a consolidated response and cross-motion for summary judgment, and a memorandum in support, asking the court to determine that the VRECC had the power to charge LCAS for emergency medical dispatch services, and that failing to do so violated the anti-donation clause. [RP 322, 332]. The County filed its consolidated response and cross-motion and memorandum in support, joining the

---

<sup>1</sup> Los Lunas and the VRECC have cross-appealed portions of the District Court’s Final Order related to the imposition of “retroactive” fees for LCAS’s use of emergency medical dispatch services. The County takes no position on that cross-appeal.

VRECC's and Los Lunas' response and cross-motion and raising additional arguments in support. [RP 364, 373]. After hearing on all of these motions, the court denied LCAS's motion and partially granted defendants-appellees' motions, finding that the VRECC has the power to collect fees in connection with its provision of emergency medical dispatch services, and that the provision of such services without consideration violated the anti-donation clause. [RP 435]. LCAS filed a motion to reconsider the court's order, which was denied as to the issues on appeal. [RP 542, 543].

## **II. ARGUMENT**

### **A. The Provision of Emergency Dispatch Services to a Private Corporation Violates the Anti-Donation Clause of the New Mexico Constitution**

Article IX, Section 14 of the New Mexico Constitution provides:

“Neither the state, nor any county, school district, or municipality . . . shall directly or indirectly . . . make any donation to or in aid of any person, association or public or private corporation . . . ; provided, nothing herein shall be construed to prohibit the state or any county or municipality from making provision for the care and maintenance of sick and indigent persons.”

For the purposes of the anti-donation clause, a ‘donation’ is “an allocation or appropriation of something of value without consideration to a ‘person association or public or private corporation.’” *Vill. of Deming v. Hosdreg Co.*, 1956-NMSC-111, ¶36, 62 N.M. 18. “The constitution makes no distinction as between ‘donations’, whether they be for a good cause or a questionable one[; i]t prohibits



them all.” *State ex rel. Sena v. Trujillo*, 1942-NMSC-044, ¶22, 46 N.M. 361. The anti-donation clause therefore prohibits the state, counties, and municipalities from donating to private individuals and corporations, even when those corporations are engaged in activities that undoubtedly inure to the public good. *See State ex rel. Mechem v. Hannah*, 1957-NMSC-065, ¶39, 63 N.M. 110 (holding unconstitutional an appropriation to pay for emergency feed certificates, which “no doubt . . . benefit[ed] the economy of the state”). The prohibition extends to donations to private corporations that have assumed duties of the state, municipalities, and counties. *See Hutcheson v. Atherton*, 1940-NMSC-001, ¶30, 44 N.M. 144 (holding bond issue to raise funds to be paid to a private corporation for the purpose of erecting public building violated anti-donation clause); *Harrington v. Atteberry*, 1915-NMSC-058, ¶5, 21 N.M. 50 (holding statute providing for payments to private corporations in aid of establishing county fairs violated anti-donation clause). The provision of emergency medical dispatch services to LCAS are prohibited donations under the anti-donation clause.

- i. The provision of emergency dispatch services is an allocation of something of value to a private corporation.

The VRECC is the public safety answering point (“PSAP”) for Valencia County for purposes of the Enhanced 911 Act, NMSA 1978, §§ 63-9D-1 through -11.1 (1989, as amended, 2005). [RP 333]. In discharging its duties as a PSAP, the VRECC has the option of either dispatching emergency response service calls or

directly routing those calls to the appropriate public or private safety agency (in this instance, LCAS). Enhanced 911 Act, § 63-9D-3(Q). [RP 333]. The emergency medical dispatch services provided by the VRECC include providing all of the information necessary to respond to calls [RP 367], ongoing communication during the response to calls, [RP 368], and tracking LCAS's units that have responded to calls [RP 368]. These services require round-the-clock staffing with multiple trained and certified dispatchers. [RP 203].

For the first time on appeal, LCAS argues that the provision of these emergency medical dispatch services by VRECC “does not conform to the traditional definition of a prohibited donation.” [BIC 38]. To determine whether these services fit the “traditional definition” of a donation, the Court must consider whether the emergency medical dispatch services provided by VRECC are “something of value” that are being “allocated” to LCAS. *Hosdreg*, 1956-NMSC-111, ¶36.

The undisputed facts demonstrate that LCAS receives a great deal of value from the dispatch services provided by the VRECC. LCAS is a for-profit corporation that is in the business of providing ambulance services. [BIC 8]. LCAS is subject to regulation by the New Mexico Public Regulatory Commission, which requires it to be responsive to medical emergencies throughout Valencia County. [BIC 9, 10]. The vast majority of LCAS's ambulance services are performed in connection with calls

dispatched through the VRECC. [RP 202]. LCAS would not be able to “provide rapid or efficient emergency ambulance service” without these services, and would be forced to provide “lower levels of emergency ambulance service.” [BIC 9]. These proceedings were occasioned by LCAS’s belief that it is an “intended beneficiary” of these services. [BIC 26]. LCAS asserts that losing these dispatch services would harm its business interests. [RP 205]. The emergency dispatch services allocated to LCAS by the VRECC confer a great value to LCAS that enhances the value and profitability of LCAS, a private corporation. This is precisely the type of donation prohibited by the anti-donation clause. *See Hannah, 1957-NMSC-065, ¶40.*

LCAS separately asserts that the provision of emergency dispatch services is not a “donation” because these services are “incidental” to the VRECC’s fulfillment of its legal duties. This assertion contains several errors. First, it is undisputed that the VRECC can discharge its legal duties under the Enhanced 911 Act by directly routing calls to LCAS. [RP 333]. Therefore, these services are not “incidental” under the plain meaning of that word because they are entirely supplementary to, not necessary for, the services that the VRECC is required to provide.

Second, LCAS states that “the term ‘incidental benefit’ is a legal term used in the analysis of an alleged donation, referring to whether the alleged donation is for that person’s sole benefit, or is simply incurred in the course of the fulfillment of a broader public program.” [BIC 26]. LCAS provides neither the Court nor the County

any authority for the propositions that “incidental benefit” is a “legal term” that requires the Court to determine whether a donation is made “directly” to, and for the “sole benefit” of, a private corporation or is “simply incurred” in the course of the fulfillment of a “broader public program.” LCAS having cited no authority for this proposition, the County assumes none exists. *See In re Adoption of Doe*, 1984-NMSC-024, ¶2, 100 N.M. 764 (“Issues raised in appellate briefs which are unsupported by cited authority will not be reviewed . . . on appeal.”).

Third, the cases cited by LCAS to support its extremely narrow reading of the anti-donation clause do not stand for the propositions cited. LCAS cites *State ex rel. State Park & Rec. Comm’n v. New Mexico State Auth.*, 1966-NMSC-033, 76 N.M. 1, for the proposition that, so long as a donation is “incidental to a broader public program or objective,” it does not run afoul of the anti-donation clause. No reference to this phrase or any analogue thereto occurs anywhere in *State Park & Rec.* That case held that a bond issue for the construction of a boat dock, which also granted a concession to operate that boat dock to a private party, was not a “donation” within the meaning of the anti-donation clause. *Id.*, ¶¶50-51. This was based on the fact that the transaction with the private party was not an “aid or benefit,” but rather the result of a contractual agreement for consideration. *Id.* *See also Hosdreg*, 1956-NMSC-111, ¶36. LCAS cites *Harrington*, 1915-NMSC-058, for the proposition a county’s “use of private entities for performance of a traditional public

function . . . is permissible.” [BIC 28]. *Harrington* stands for no such proposition. The Court, in *Harrington*, does distinguish between “public purpose or benefit” and “public governmental function,” but that distinction hinges entirely on the identity of the actor. *Harrington*, 1915-NMSC-058, ¶34 (noting that a private corporation *could not* exercise a public governmental function “because they are not the instrumentalities or agencies of the government endowed the power of their principal[]”). In fact, the distinction in *Harrington* explicitly forecloses the argument set forth by LCAS that they “stand in the shoes” of the state for the purposes of the anti-donation clause.

Third, LCAS asserts that, as a matter of law, there are only private ambulance companies operating in Valencia County. [BIC 30]. Although there are presently only private ambulance companies operating in Valencia County, that is not because other ambulance providers are forbidden from operating in Valencia County by law. LCAS cites no legal authority for the proposition that there is a legal mandate that only private ambulance companies can operate in Valencia County, and the County assumes none exists. *See In re Doe*, 1984-NMSC-024, ¶2.

- ii. The “sick and indigent” exception does not apply to the provision of emergency medical dispatch services.

LCAS argues that, if the provision of dispatch services is otherwise a donation prohibited by the anti-donation clause, it is still constitutional because it makes provision for the care and maintenance of sick and indigent persons. [BIC 33]. The logic of LCAS’s argument appears to be that, because it provides some unspecified amount of services to sick and indigent persons (for which they are otherwise compensated [BIC 34, RP 154]), any donation made to it is *per se* covered by the sick and indigent exception. This is contrary to our case law interpreting the sick and indigent language. In *Hannah*, the Court struck down an appropriation of funds to compensate ranchers, finding that the sick and indigent exception was not so broad as to allow a sweeping grant of funds to a group of people simply because some of the recipients could theoretically be indigent. *Hannah*, 1957-NMSC-065, ¶16. LCAS’s reliance on *Humana of N.M., Inc. v. Board of County Comm’rs*, 1978-NMSC-036, 92 N.M. 34, for the proposition that the sick and indigent exception “should be read broadly” is misplaced. *Humana* addressed the definition of “indigent,” and determined that it should be defined by a modern understanding of the term, such that “indigent persons” embraced a category larger than those who are “poor and without maintenance and subject to charity.” *Id.*, ¶8. *Humana* does not stand for the proposition that providing a service that may inure to the benefit of an unspecified number of sick and indigent persons passes constitutional muster, and

such a conclusion is not otherwise supported by our case law. *See Hannah*, 1957-NMSC-065, ¶39; *Hutcheson*, 1940-NMSC-001, ¶30; *Harrington*, 1915-NMSC-058, ¶5. To hold otherwise would render constitutional any donation to a private corporation that might benefit some number of sick and indigent persons. The sick and indigent exception would figuratively swallow the rule, rendering the anti-donation provision a practical nullity.

iii. Providing ambulance services is not “consideration” for the provision of emergency medical dispatch services

LCAS asserts that the very nature of its for-profit enterprise makes it immune to the anti-donation clause because the provision of ambulance services serves the public good. [BIC 35, 36]. As set forth above, the fact that a private corporation serves the public good as part of its business model does not render donations to that corporation constitutionally permissible. *See Hutcheson*, 1940-NMSC-001, ¶30; *Harrington*, 1915-NMSC-058, ¶5.

**B. Defendants-Appellees Have the Power to Contract with Private Corporations to Provide Dispatch Services in Exchange for Compensation**

Los Lunas has express statutory authority to enter into contracts, protect its property, and exercise other privileges of municipal corporations not inconsistent with New Mexico law. NMSA 1978, §§ 3-18-1(C), (E), (F) (1972). The County’s statutory authority is co-extensive with that of municipalities for the purposes of the issues on appeal. NMSA 1978, § 4-37-2 (1975). The VRECC is a joint powers entity,

and therefore has the authority to exercise any powers common to the entities that formed it. NMSA 1978, § 11-1-3 (1983).

The authority to enter into contracts necessarily implies the authority to exchange valuable consideration with other parties. *See Talbott v. Roswell Hosp. Corp.*, 2005-NMCA-109, ¶16, 138 N.M. 189 (“A valid contract must possess mutuality of obligation. Mutuality means both sides must provide consideration.”) (citation and internal quotation marks omitted). As set forth above, *supra* § II(A)(i), the VRECC is not legally required to provide emergency medical dispatch services to LCAS beyond call routing. Because the VRECC is not required to provide those services for free, and cannot donate them, it may contract with private parties to provide them in the absence of a statutory prohibition to the contrary. *See* NMSA 1978, §§ 3-18-1(C), (E), (F), and 11-1-3. LCAS provides no authority to support its conclusion that the VRECC is prohibited from contracting with it to provide these services, and the County has found none and presumes that none exists. *See In re Doe*, 1984-NMSC-024, ¶2.

Further, LCAS’s argument overlooks the fact that private entities do sometimes contract with government to exchange government services for entity service to indigent populations; however, those contracts are conducted via an arm’s length negotiation regarding the value of the indigent services to be provided and determination that the services rendered by the entity are equal to or greater than the



services provided by government. In other words, LCAS seems to argue that they unilaterally get to declare that government must provide them with services for free based on LCAS's belief that their purported service to indigent people somehow exceeds the value of the dispatch service. There is no basis for a holding that a governmental entity must enter into contract with a private entity under such circumstances, especially when the governmental entity is not convinced that the services provided to the indigent meet or exceed the value of services expected by the private entity.

### **III. CONCLUSION**

Defendant-Appellee the Board of County Commissioners of Valencia County respectfully requests that the Court affirm the decision on appeal and find that (1) the provision of emergency medical dispatch services to LCAS violates the anti-donation clause of the New Mexico Constitution, and (2) that the VRECC is authorized under state law to contract with private parties to exchange emergency medical dispatch services in exchange for appropriate compensation.

Respectfully Submitted,

WALLIN, HUSS & ASSOCIATES

/s/ Brandon Huss

By: Brandon Huss

8205 Spain Rd. NE, #211

Albuquerque, NM 87109

T: 505.832.6363

F: 505.814.5805

E: [bh@whmlawfirm.com](mailto:bh@whmlawfirm.com)

*Attorneys for the Board of County  
Commissioners of Valencia County*

## CERTIFICATE OF SERVICE

I HEREBY certify that I sent a copy of this Answer Brief via email to the following counsel of record pursuant to Rule 12-307.2(B) NMRA on October 27, 2016:

Laurence P. Guggino, Jr.  
[lgugginoatty@qwestoffice.net](mailto:lgugginoatty@qwestoffice.net)

Steven M. Chavez  
[steven@stevenchavezlawfirm.com](mailto:steven@stevenchavezlawfirm.com)

Joseph E. Earnest  
[jearnestlaw@earthlink.net](mailto:jearnestlaw@earthlink.net)

/s/ Brandon Huss  
Brandon Huss