

COPY

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

LIVING CROSS AMBULANCE SERVICE, INC.,

Plaintiff-Appellant/Cross-Appellee,

vs.

No. 35,298

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

COURT OF APPEALS OF NEW MEXICO
FILED

NOV 10 2015



Defendant-Appellees/Cross-Appellant,

and

BOARD OF COUNTY COMMISSIONERS
OF VALENCIA COUNTY,

Defendants.

**CROSS-APPELLANTS VALENCIA COUNTY REGIONAL EMERGENCY
COMMUNICATIONS CENTER AND VILLAGE OF LOS LUNAS
BRIEF IN CHIEF**

CROSS APPEAL FROM THE THIRTEENTH JUDICIAL DISTRICT COURT

The Honorable James L. Sanchez
Dist. Ct. No: D-1314-CV-2011-00512

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TABLE OF CONTENTS

Statement of Compliance ii

Table of Authorities..... iii

Summary of Proceedings..... 1

 I. Nature of the case..... 1

 II. Summary of Facts 2

 III. Course of Proceedings 4

 IV. Disposition Below..... 7

Argument 8

THE DISTRICT COURT ERRED BY GRANTING SUMMARY JUDGMENT FOR LCAS ON THE ISSUE OF THE VALIDITY OF FEES CHARGED FOR THE PROVISION OF EMERGENCY DISPATCH SERVICES WHEN THERE ARE UNRESOLVED FACTUAL ISSUES REGARDING HOW THE FEES WERE ESTABLISHED AND THE COURT’S RULING VIOLATES THE CONSTITUTION..... 8

 A. Standard of Review9

 B. The Record Does Not Support the District Court’s Determination That There Is No Factual Dispute Over How Fees For Emergency Dispatch Services Were Established 10

 C. Invalidating and Quashing Fees Owed To Defendants For the Provision of Emergency Medical Dispatch Services Violates the New Mexico Constitution 12

Conclusion..... 14

STATEMENT OF COMPLIANCE

Pursuant to Rule 12-213(G), undersigned counsel hereby certifies that this brief was prepared in fourteen-point, proportionally spaced typeface using Microsoft Word 2013, and that the body of the brief contains 2982 words

TABLE OF AUTHORITIES

Cases

<i>Akre v. Washburn</i> , 1979-NMSC-017, 92 N.M. 487, 590 P.2d 635	9
<i>C & H Const. & Paving Co., Inc. v. Citizens Bank</i> , 1979-NMCA-077, 93 N.M. 150, 597 P.2d 1190	11
<i>Coates v. Wal-Mart Stores, Inc.</i> , 1999-NMSC-013, 127 N.M. 47, 976 P.2d 999	9
<i>Gardner-Zemke Co. v. State</i> , 1990-NMSC-034, 109 N.M. 729, 790 P.2d 1010	10
<i>Marquez v. Gomez</i> , 1991-NMCA-066, 116 N.M. 626, 866 P.2d 354	9-10
<i>Muse v. Muse</i> , 2009-NMCA-003, 145 N.M. 451, 200 P.3d 104	11
<i>Phillips v. Allstate Ins. Co.</i> , 1979-NMCA-146, 93 N.M. 648, 603 P.2d 1105	11
<i>State ex. rel. Callaway v. Axtell</i> , 1964-NMSC-046, 74 N.M. 339, 393 P.2d 451	13
<i>State ex rel. Udall v. Pub. Employees Ret. Bd.</i> , 1995-NMSC-078, 120 N.M. 786, 907 P.2d 190	13

Constitution, Statutes

N.M. Const. art. IX, § 14	5, 12
New Mexico Enhanced 911 Act, NMSA 1978, §§ 63-9D-1 to -20 (1989, as amended through 2005)	2

SUMMARY OF PROCEEDINGS

I. Nature of the case

This matter was brought before the district court on Plaintiff Living Cross Ambulance Service Inc.'s ("LCAS") motion for reconsideration of the district court's grant of partial summary judgment that (1) the Anti-Donation Clause of the New Mexico Constitution prohibits Defendants¹ from providing emergency dispatch services to LCAS without compensation and (2) Defendants have authority to charge LCAS an appropriate amount in compensation for providing emergency dispatch services. The district court denied LCAS's request to reconsider the issues presented in LCAS's motion but *sua sponte* granted summary judgment on the validity of the fees Defendants allegedly charged for the provision of emergency dispatch services to LCAS. The district court found that those fees were not properly established and summarily invalidated all compensation that LCAS owed to Defendants. The issue presented for review on this cross appeal is whether the district court erred in granting summary judgment on the validity of those fees and whether the court's ruling to invalidate and quash all compensation owed to Defendants is in conformity with the constitution.

¹ Defendants herein are the Valencia County Regional Emergency Communications Center ("VRECC"), the Village of Los Lunas ("Los Lunas") and the Board of County Commissioners of Valencia County (the "County").

II. Summary of Facts

In June 2006, Valencia County (the “County”), the Village of Los Lunas (“Los Lunas”), City of Belen, and the Village of Bosque Farms entered into a joint powers agreement (“JPA”) to establish and provide a centralized Enhanced 911 communications system. [RP 224-232] The JPA established the Valencia County Regional Emergency Communication Center (“VRECC”) for purposes of exercising the powers conferred upon local governing bodies by the New Mexico Enhanced 911 Act, NMSA 1978 §§ 63-9D-1 to 20 (1989, as amended through 2005) (“E911 Act”). [RP 225]

LCAS is a private for-profit corporation certified as the emergency ambulance carrier for Valencia County by the New Mexico Public Regulation Commission (“PRC”). [RP 185 ¶¶ 3-4; 221] LCAS is not a member of the JPA. [RP 224]

In 2006, after the formation of the VRECC but prior to its operation, the Valencia County Fire Marshall approached LCAS to enter into a contract with Valencia County for the provision of dispatch services. [RP 378 ¶ 33] On December 13, 2006, the Valencia County Fire Marshall sent LCAS a document entitled “Calls for Service Ambulance Contract” with a statement of the fees that the County had incurred for providing emergency medical dispatch services to LCAS from 2003 to 2005 based on the population of the area served and number

of calls dispatched for LCAS. [RP 191 ¶ 23; 268-269; 378 ¶¶ 30-32] VRECC then took over as the dispatch provider for LCAS and sent a proposed dispatch agreement between VRECC and LCAS to counsel for LCAS. [RP 337 ¶ 7-338 ¶ 11; 275]

On May 8, 2008, nearly 17 months after the County first attempted to get LCAS to enter into a contract for dispatch services, and “some time” after VRECC sent a proposed dispatch agreement to LCAS, VRECC sent LCAS a letter stating that VRECC would cease providing dispatch services for Living Cross after June 4, 2008 and that Living Cross would be responsible for its own dispatch unless the parties came to an agreement and entered into a contract for the provision of emergency dispatch services. [RP 275] On May 16, 2008, LCAS sent a letter with an offer for agreement. [RP 277] On May 22, 2008, VRECC responded with a counter offer proposing a monthly payment of \$4,500 for dispatch services and a request for back payment of the monthly charge from July 1, 2007 to the date of contract. [RP 277-278] VRECC reiterated in its letter that it intended to cease providing service on June 4, 2008 unless LCAS and VRECC reached an agreement. [RP 277]

Instead of terminating the services, however, VRECC issued a request for proposal for ambulance carrier services in the Village of Los Lunas municipal limits (“RFP”). [RP 283 ¶ 20] In response to the RFP, LCAS filed a complaint and

application for temporary restraining order and request to enjoin VRECC from contracting for ambulance carrier services. [RP 280-293] The RFP subsequently expired and VRECC took no further action toward contracting with an alternate ambulance carrier.

III. Course of Proceedings

On April 21, 2011, LCAS filed a complaint in district court requesting declaration of the rights and obligations of the parties with regard to VRECC's claim for fees for providing emergency medical dispatch and permanently enjoining Defendants from asserting that LCAS legally owed Defendants any fee based on Defendants' provision of emergency medical dispatch. [RP 1-26] LCAS subsequently moved for summary judgment requesting declaration that (1) the Anti-Donation Clause does not prohibit the provision of emergency medical dispatch services; (2) Defendants lack governmental authority or power to impose a fee on or charge LCAS for provision of emergency medical dispatch services; (3) that LCAS owes no fee, charge or other amount based on Defendants' provision of emergency medical dispatch services to LCAS; and (4) Defendants must provide emergency medical dispatch services so long as LCAS is certified as an emergency ambulance service for Valencia County; and (5) enjoining Defendants from terminating the dispatch of emergency medical calls and information to LCAS. [RP 169-170]

VRECC filed a counter-motion for summary judgment requesting declaration that the Anti-Donation Clause prohibits the donation of dispatch service to LCAS and that VRECC has authority to enter to a contract and charge for the provision of dispatch service. [RP 332-335]

On September 27, 2012, following briefing and argument by counsel on the cross motions for summary judgment, the district court entered an order granting partial summary judgment for Defendants. [RP 434-436] The order stated “there were no issues of material fact as to the motions for summary judgment before the Court” and declared that (1) “the Anti Donation Clause of the New Mexico Constitution, N.M. Const. art. 9 § 14, prohibits the provision of emergency medical dispatch services by the Defendants to [LCAS] without appropriate compensation by LCAS to Defendants” and (2) “Defendants possess the power under state law to charge [LCAS] an appropriate amount in compensation for the provision of emergency medical dispatch services and to contract with [LCAS] to collect that amount.” [RP 435 ¶¶ 1, 3] However, the order required that during the pendency of the action and any appeal, Defendants could not discontinue providing medical emergency dispatch services to LCAS unless LCAS establishes its own medical emergency dispatch center. [RP 435 ¶ 4]. The district court made no determination on whether LCAS would be liable for fees incurred prior to or during the pendency of litigation. [RP 435 ¶ 5]

With respect to “the appropriate monetary amount which Defendants may charge” the order stated “[t]he issue ... and any legal and factual issues related to monetary amount were not raised in these motions for summary judgment and are not determined in this order.” **[RP 435 ¶ 5]**. The district court advised the parties to attempt to negotiate the proper fees and stated that if such negotiations are unsuccessful the parties could request a hearing and have the court make the determination. **[8-8-12 Tr. 68:9-13; 69:2-70:6; 71:7-19; 72:6-14]**. The court cautioned that if a resolution is not reached and the district court’s ruling is affirmed on appeal, that the “[district court’s] hands may be tied to applying this entirely retroactively.” **[8-8-12 Tr. 69:3-11]**

On June 2, 2015, LCAS filed a motion to the district court requesting reconsideration of the court’s declarations that (1) the Anti-Donation Clause prohibits the provision of 911 emergency medical dispatch services without appropriate consideration and (2) Defendants possess power under state law to impose a fee or charge for provision of 911 emergency medical dispatch services. LCAS did not provide any evidence related to the amount which Defendants may charge LCAS for emergency dispatch service or LCAS’s retroactive liability for those fees and did not challenge the court’s determination that those issues were not raised in the motions for summary judgment. **[RP 460-477]**

IV. Disposition Below

Following briefing by all parties and argument of counsel, the district court issued an oral decision stating:

I'm going to deny the motion to reconsider with respect to the order granting partial summary judgment...But I'm going to grant summary judgment in favor of [LCAS] on the issue that the government has no authority to charge the fee as of now or at any time since this complaint was filed or since they started charging the fee because the government didn't do it right. They didn't give public notice of their intent to charge a fee, allow for public input...I don't have anything before me to say that you did it right.

[9-30-15 Tr. 61:8-24] The Court further stated that it would not reconsider Defendants' obligation to continue providing services during the pendency of litigation. [9-30-15 Tr. 68:1-8]

I'm ruling as a matter of law that there's no authority shown to me for you to charge the fee that you want to charge. You get to charge it under [the order granting partial summary judgment], but you've not told me that you are charging the right charge, a fair charge, an authorized charge and so you have to appeal that too.

[9-30-15 Tr. 68:9-13]

The court subsequently issued a "final appealable order" declaring in relevant part the following:

¶ 1. [LCAS's] motion to reconsider the Court's prior ruling that the Anti-Donation Clause applies is denied.

¶ 2. [LCAS's] motion to reconsider the Court's prior ruling that the Defendants have the power under State law to charge a dispatch fee to Plaintiff is denied

¶ 3. [LCAS's] motion to reconsider the applicability of the retroactive fees is hereby granted

¶ 4. All past medical dispatch fees Defendants have invoiced [LCAS] for medical dispatch services are declared invalid and are quashed.

[RP 533-534]

LCAS filed notice of appeal challenging the district court's denial of its motion to reconsider. VRECC filed this cross appeal challenging the district court's grant of summary judgment in favor of LCAS on the issue of the validity of fees charged to LCAS for the provision of emergency dispatch services.

ARGUMENT

THE DISTRICT COURT ERRED BY GRANTING SUMMARY JUDGMENT FOR LCAS ON THE ISSUE OF THE VALIDITY OF FEES CHARGED FOR THE PROVISION OF EMERGENCY DISPATCH SERVICES WHEN THERE ARE UNRESOLVED FACTUAL ISSUES REGARDING HOW THE FEES WERE ESTABLISHED AND THE COURT'S RULING VIOLATES THE CONSTITUTION

Defendants challenge the district court's ruling that fees charged to LCAS for the provision of emergency dispatch services are invalid on the following grounds. First, Summary Judgment was improper because the evidence in the

record is insufficient to support the court's determination that there are no material facts in dispute and LCAS was entitled to judgment as a matter of law. Second, the district court's declaration quashing all past fees, including fees incurred during the pendency of this litigation and appeal, violates the Anti-Donation Clause of the New Mexico Constitution and the Court's duty to enforce the terms of the Constitution.

A. Standard of Review

An appellate court reviews a district court's ruling on a motion for summary judgment under a de novo standard of review, "while determining whether any genuine issues of material fact exist and whether the movant was entitled to judgment as a matter of law." *Coates v. Wal-Mart Stores, Inc.*, 1999-NMSC-013, ¶ 21, 127 N.M. 47, 976 P.2d 999. "Summary judgment can be granted only where the moving party is entitled to the judgment as a matter of law, upon clear and undisputed facts." *Akre v. Washburn*, 1979-NMSC-017, ¶ 6, 92 N.M. 487, 590 P.2d 635.

"Award of summary judgment is inappropriate when facts before court are insufficiently developed or where further factual resolution is necessary to determine legal issues involved." *Marquez v. Gomez*, 1991-NMCA-066, ¶ 12, 116 N.M. 626, 866 P.2d 354. "A summary judgment motion is not an opportunity to resolve factual issues, but should be employed to determine whether a factual

dispute exists. If genuine controversy as to the facts exists, a motion for summary judgment should be denied and the factual issues should proceed to trial.” *Gardner-Zemke Co. v. State*, 1990-NMSC-034, ¶ 11, 109 N.M. 729, 790 P.2d 1010.

B. The Record Does Not Support the District Court’s Determination That There Is No Factual Dispute Over How Fees For Emergency Dispatch Services Were Established

The scope of review only permits granting summary judgment if the facts before the court are sufficiently developed for the court to make a determination that there is no factual dispute and the moving party is entitled to judgment as a matter of law. *Marquez*, 1991-NMCA-066, ¶ 12. Here, that standard is not satisfied.

The district court granted summary judgment invalidating all fees invoiced to LCAS based on its finding that Defendants possess the power to charge fees for providing dispatch services but failed to show that the fees they were attempting to charge were properly established. In order to reach this result, the court necessarily would have determined that the material facts concerning the procedure for establishing fees assessed to LCAS for dispatch services were not in dispute. However, the court could not properly reach that determination because the record is devoid of evidence setting forth how the fees that Defendants is currently charging LCAS were established.

In fact, as stated above, the district court's unchallenged finding in its order on partial summary judgment was that "[t]he issue of appropriate monetary amount which Defendants may charge LCAS for the provision of emergency medical dispatch services and any legal or factual issues related to monetary amount were not raised in these motions for summary judgment." [RP 435 ¶ 5] The district court on reconsideration did not expressly overturn this finding or indicate that the finding was improper. And, LCAS did not proffer any additional evidence that would support overturning that finding.

All the district court had with respect to how the fees were established were the unsupported arguments of counsel in the brief and hearing on the motion for reconsideration. [9-30-15 Tr. 59:24-60:9] It is black letter law that "the mere assertions and arguments of counsel are not evidence." *Muse v. Muse*, 2009-NMCA-003, ¶ 51, 145 N.M. 451, 200 P.3d 104. *See also Phillips v. Allstate Ins. Co.*, 1979-NMCA-146, ¶ 11, 93 N.M. 648, 603 P.2d 1105("[A]rguments of counsel, no matter how erudite, are not evidence" for purpose of motion for summary judgment.); *C & H Const. & Paving Co., Inc. v. Citizens Bank*, 1979-NMCA-077. ¶ 33, 93 N.M. 150, 597 P.2d 1190 ("Mere assertions made by a movant seeking summary judgment are meaningless unless supported by affidavits "or by other admissible evidence.").

The district court's determination that the fees were not properly established requires further factual development. Thus, the district court erred in granting summary judgment on the issue of validity of fees charged to LCAS.

C. Invalidating and Quashing Fees Owed To Defendants For the Provision of Emergency Medical Dispatch Services Violates the New Mexico Constitution.

The district court's ruling quashing all fees no matter how they were established violates the anti-donation clause of the New Mexico constitution and the district court's obligation to enforce the terms of the Federal and State Constitutions.

There is no question that the district court concluded as a matter of law that the provision of emergency medical dispatch services by the Defendants to LCAS without appropriate compensation by LCAS to Defendants violates the Anti-Donation Clause of the New Mexico Constitution, N.M. Const. art. IX, § 14. Yet, pursuant to the court's November 2015 order, Defendants are required to continue providing emergency dispatch services to LCAS but are barred from collecting any compensation for the provision of those services. Thus, the order requires Defendants to continue providing emergency dispatch services without compensation- the very action the court determined violated the Anti-Donation Clause of the New Mexico constitution.

A court, as the body charged with upholding the constitution, is not permitted to ignore its own determination that an action violates a constitutional provision and proceed to order that the action, now a known violation of the constitution, continue. *See State ex rel. Udall v. Pub. Employees Ret. Bd.*, 1995-NMSC-078, ¶ 33, 120 N.M. 786, 907 P.2d 190 (“it is the role of [the] Court to enforce the dictates of the Constitution in order to further the intent of its provisions.”). The court instead has an obligation to take action to stop the violation, in this case by either permitting Defendants to stop providing emergency dispatch services or requiring that LCAS pay a fee for the provision of those services. The court cannot require Defendants to continue providing emergency dispatch services for free.

The ruling that fees owed to Defendants are invalid and quashed must be reversed and LCAS should be required to make restitution for the unconstitutional benefit it received by paying an appropriate amount for the services it received. *See State ex. rel. Callaway v. Axtell*, 1964-NMSC-046, ¶¶ 13, 26, 74 N.M. 339, 393 P.2d 451 (determining “public monies, paid under a mistake of law may be recovered.” [W]hether it was in cash or in kind makes no difference. It was still an outright donation made in violation of the constitution.”). Moreover, Defendants should be afforded the opportunity to collect the fees that the district court properly determined, as a matter of law, they have the power to charge LCAS for the


provision of emergency dispatch services and would have charged but for the district court's 2012 order requiring them to continue providing services without having a contract in place that obligates LCAS to pay for those services.

CONCLUSION

Defendants request that this Court reverse the district court with respect to its order granting summary judgment on the availability of fees and declaration that all past medical dispatch fees are invalid and quashed and remand to district court for further determination consistent with this order.

Respectfully submitted,

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I HEREBY certify that I sent a copy of this Brief in Chief via email to the following counsel of record pursuant to Rule 12-307.2(B) NMRA on November 10, 2016:

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