IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

LIVING CROSS AMBULANCE SERVICE, INC.,

Plaintiffs-Appellants/
Cross-Appellees

v.

No. 35,298

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

Defendants-Appellees/
Cross-Appellants,

and

BOARD OF COUNTY COMMISSIONERS OF VALENCIA COUNTY,

Defendants.

PLAINTIFFS'-APPELLANT'S-CROSS APPELLEE'S ANSWER BRIF TO VRECC AND LOS LUNAS' BRIEF-IN-CHIEF

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

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Rule 12-213(G) NMRA Statement of Compliance

I HEREBY CERTIFY that Plaintiffs'-Appellants' Reply to VRECC's and Los Lunas' 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 of 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 statement regarding certificate of service, contains **3,398** words according to Microsoft Word 2016's word-count function.

Steven M. Chavez

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I. ARGUMENTS

A. VRECC and Los Lunas Failed to Brief the Issues Raised in Their Docketing Statement, and Therefore, Under Rule 12-213(A)(4), the Issues Raised in Their Docketing Statement Should Be Considered Abandoned or Waived.

In their Brief-in-Chief, VRECC and Los Lunas fail to address, or brief the first two issues raised in their Docketing Statement.[1] VRECC raised the following three issues in its Docketing Statement:

> **"Issue One:** Whether the Court erred in determining that Joint Powers Agreement establishing the VRECC did not lawfully permit the VRECC to establish a fee for E911 dispatch services.
> ....
> **Issue Two:** Whether the Court erred in determining that the retroactive fees assessed by the VRECC against LCAS were not properly established and, as a consequence, erroneously determined that all past medical dispatch fees invoiced to LCAS were invalid.
> ....
> **Issue Three:** Alternatively [sic] if this Court determines that the Joint Powers Agreement does not permit the VRECC to set a E911 medical dispatch rate or that the VRECC improperly set the E911 medical dispatch rate, whether this matter should be remanded to the VRECC or the participating governmental entities to establish the retroactive E911 medical dispatch rate." [VRECC Docketing Statement, Pages 6-7].

[1] For simplicity, Los Lunas and VRECC will be referred to collectively as "VRECC."

LCAS respectfully suggests, and argues below, that the arguments initially raised in VRECC's Docketing Statement are essential underpinnings and considerations necessary to the new arguments made, and that they have dropped them, in an attempt to obscure the more basic arguments, precisely because they realize they cannot prevail on these more basic issues. VRECC's Brief-in-Chief also fails to set out the facts, arguments, and authorities relied on for those issues raised, as required by rule. VRECC raises only new and different issues in its Brief-in-Chief.

Although a central issue in its Docketing Statement, VRECC, in its Brief-in-Chief fails to frame any argument regarding the Joint Powers Agreement (JPA). Because VRECC failed in its Brief-in-Chief to brief the JPA issue – Issue #1 in its Docketing Statement, this Court should not consider it. The issue should be considered abandoned or waived under NMRA, 12-213(A)(4). *State v. Aragon*, 1990-NMCA-001, ¶ ¶ 2-5 (Issues raised in docketing statement but not briefed in brief-in-chief are deemed abandoned).

VRECC's Issue #2, in its Docketing Statement concerns the District Court's ruling that the retroactive dispatch fees were not properly established. Rather than put forth a meaningful argument to show that "the Court erred in determining that the retroactive fees assessed by the VRECC...were not properly established," as VRECC raised in Issue #2 of its Docketing Statement, VRECC now chooses to

restrict its argument in its Brief-in-Chief to a collateral contention that has nothing to do with the crux of the issue— whether they have the power to charge the dispatch fee. VRECC now uses the majority of its Brief-in-Chief to argue that there are unresolved material facts regarding the monetary amount of the dispatch fee. But as LCAS demonstrates in the following section of this Answer Brief: (1) VRECC conceded that there are no material disputed facts at issue; and (2) resolution of the appropriate monetary amount for the dispatch fee is secondary to the issue of governmental power and, hence, a moot collateral issue that was unnecessary for the District Court to reach or resolve. LCAS respectfully urges, therefore, that this Court deem the issue raised in Issue #2 of VRECC's Docketing Statement to be abandoned and waived under *State v. Aragon*, 1990-NMCA-001, ¶ ¶ 2-5 and under NMRA, 12-213(A)(4), and treat the issue of lack of governmental power as decided by the District Court against VRECC as established law of the case, not raised on appeal. This Court should only address VRECC's sufficiency of the evidence argument raised for the first time in its Brief-in-Chief.

With regard to Issue #3 as originally raised in VRECC's Docketing Statement, VRECC has not made clear why a remand is necessary, or what a remand might accomplish. The issue, and the request for remand, therefore, should similarly be considered abandoned and waived under NMRA, 12-213(A)(4), and the request for

remand should be considered legally insufficient. As shown below, because VRECC conceded that there are no material facts in dispute, there is no legitimate purpose or basis for a remand.

B. Standard of Review

To avoid needless repetition, LCAS stipulates that VRECC stated the correct standard of review in its Brief-in-Chief.

C. The District Court Invalidated the Dispatch Fees Because VRECC Conceded that the Local Governments Had Not Enacted any Legislation or Held any Public Hearings Regarding the Fee. It Was Also Undisputed that VRECC Has Not Been Delegated Authority to Charge the Fees.

VRECC's contentions, in the first issue in its cross Brief-in-Chief, that the District Court erred because there remain factual disputes on how the dispatch fees were established, are without merit. Under NMRA, 12-213(A)(4), VRECC's challenge to the sufficiency of the evidence supporting the District Court's decision must set forth the substance of *all* the pertinent evidence. VRECC must demonstrate why, the evidence fails to support the finding made. *Martinez v. Southwest Landfills, Inc.*, 1993-NMCA-020. VRECC failed to set forth all of the pertinent evidence, and it failed to demonstrate why the evidence fails to support the finding.

In its Brief-in-Chief, VRECC cited to only fragmented parts of the record proper to leave the misimpression that there are unresolved disputed facts regarding how the fees were established. Under New Mexico law, a party contending that findings of fact are not supported by substantial evidence must state the substance of *all* evidence bearing upon the proposition not merely selective parts of the record. *Rael v. Cisneros*, 1971-NMSC-073.

VRECC contends that because there was insufficient evidence in the record regarding the amount of the dispatch fee, the District Court's decision striking down the dispatch fee was erroneous. In support of its argument, VRECC cites to, and relies on, paragraph 5 of the Court's earlier, September 27, 2012, District Court Order of which was not a final order. The September 27, 2012 District Court order states in relevant part:

> "The issue of the appropriate monetary amount which Defendants may charge Plaintiff 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 and are not determined in this order. The Court has not ruled on the issue of retroactivity of financial liability" [RP, 435].

VRECC's argument lacks merit and is misleading in two different regards. First, the September 27, 2012 Order is not a final order, but an interim order addressing motions for summary judgment that expressly dealt only with the issue

of the Anti-Donation Clause, while reserving the remaining issues in the case. Indeed, the District Court certified the issue decided in the earlier order for interlocutory appeal, precisely because that earlier order decided only the one issue and was not a final order. The November 23, 2015, Order, on the other hand, was expressly made a "final order" and expressly determined the issue of fees [RP, 548]. It said:

> All the retroactive fees assessed by the Defendants against LCAS were not properly established; there were no local government public hearings, the opportunity to participate in the deliberative process was insufficient; and, the local government defendants did not lawfully delegate authority to the VRECC defendant to charge a fee [RP, 547-548, Finding No. 5].

In addition, despite VRECC's assertions to the contrary, the District Court expressly found, as shown in both orders, that there are no material facts in dispute with regard to either relevant aspect of the case [RP, 434 and 547]. VRECC conceded this fact in its pleadings [RP, 322]. Thus, there is no logic to support VRECC's insufficiency of the evidence argument, and it has no merit.

The second reason that VRECC's argument fails is just as fundamental–the *amount* of the dispatch fee became a moot secondary issue, once the District Court decided that the dispatch fees were not properly established under law. That is, once

the District Court determined that the dispatch fees were not established lawfully, the monetary amount of the dispatch fee was rendered an irrelevant issue.

In its Brief-in-Chief [VRECC, BIC 7], VRECC only cites a fragment of the Court's oral decision regarding the dispatch fees; citing only to the following paragraph:

> "But I'm going to grant summary judgment in favor of the plaintiff 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."

However, the District Court explained further:

> "They didn't give public notice of their intent to charge a fee, allow for public input, and let's have a decision as to what would be a reasonable fee, just, you know, a group of people sitting in a room saying, hey, we need to cover X dollars. I don't have anything before me to say that you did it right, that this is even a fair fee, and I think Mr. Chavez makes a good point on that [RP, Tr. III, 61:14-25].
> ....
> There is nothing to try if I rule as a matter of law they didn't do it right, then how can they charge" [RP, Tr. III, 62:23-25].
> ....
> "This is a final judgment. I think they haven't done it right, and therefore I'm granting summary judgment that they can't collect against you because they don't have -- not because the anti-donation clause doesn't apply" [RP, Tr. III, 63:3-7].

Thus, the District Court made clear that in determining that the fees were unlawfully established, that the reasonableness of the monetary amount is irrelevant and because VRECC admitted that no notice or public hearings were held to support

the dispatch fee, "there is nothing to try." In addition, it remains undisputed that the JPA is silent on charging ambulance providers any dispatch fee [See "JPA," RP, 224-231]. And it is additionally undisputed that no local government in Valencia County held any public hearings regarding the fees or took any action whatsoever to enact legislation or ordinance regarding the fees. VRECC's attorney admitted this fact during the Court's hearing [RP, Tr. III, 59-60].

LCAS reiterates that it is determinative that VRECC stipulated below, in its responsive pleading to LCAS' *Memorandum Brief for Summary Judgment*, that "[t]here are no genuine issues of material fact" in dispute [RP, 322]. VRECC took and pled this position below, in the context of LCAS's affirmative pleading in its list of undisputed facts in its Memorandum Brief supporting Summary Judgment, that no local government delegated authority to VRECC to raise revenue by charging the dispatch fee to ambulance providers [RP, 143, ¶ 28]. Because it was uncontested that the local governments did not hold any public hearings or delegate any authority to VRECC to charge the fees, it is irrelevant that the "appropriate monetary amount" was not resolved or developed by the parties. (Emphasis added).

It is an undisputed fact that in 2007, the VRECC Board decided to attempt to collect a fee or charge for dispatch services from LCAS, by first setting it and making demand for payment through an involuntary contract *outside* of the JPA [RP, 144,

¶30]. The District Court, in determining that the fees were not properly established, also relied on this undisputed fact that the fees were enacted by the unelected VRECC Board members, who had not been delegated authority by the local governments (in the JPA) to charge the fee to private ambulance providers [RP, 143, ¶ 28].

VRECC is a governmental entity seeking to impose a retrospective fee, not an individual who is not bound by lawful governmental restrictions, and VRECC is not here seeking recoupment of out-of-pocket payments. It was apparent to the District Court that it did not need to resolve the derivative contention, raised by LCAS below, that the monetary amount of the fee was arbitrary and capricious. Accordingly, the District Court's invalidation of the retrospective fees was well-supported by the evidence in the record, in the form of undisputed facts.

D. VRECC is Plainly Wrong in Its Contention that the District Court's Invalidation of the Dispatch Fees Charged by VRECC Violates the New Mexico Constitution.

In its Brief-in-Chief, VRECC argues that the District Court determined that the dispatch fee, "no matter how they were established," effectively prevents VRECC from ever charging fees for its service, and in doing so, the Court is violating the Anti-Donation Clause (ADC) [VRECC, BIC, 12].

VRECC does not state that this argument is an alternative conditional argument, but it is. The main premise of VRECC's argument is a controverted premise and an issue in this case, presented in LCAS's appeal—that VRECC must charge the fees to avoid violating the ADC. The application of the ADC to the facts of this case is the central and encompassing issue stated and briefed by all parties in LCAS' direct appeal to this Court. In addition, VRECC, in this issue in its cross appeal, not only presumes its success on the direct appeal, but presumes that this Court will construe the ADC in a manner that suits VRECC's argument here.[3] VRECC's presumption extends to the ability to charge both a retrospective fee without paying attention to, or meeting any of the well-established constitutional, statutory, due process, and equal protection requirements imposed on governmental fees and taxes, and also to the ability to establish and charge a prospective fee solely because of a violation of the ADC without out-of-pocket payment, despite lacking authority under New Mexico law to impose such a fee.

LCAS will attempt to respond here in a meaningful way to what it sees as a wholly illogical and misconstrued argument. In order to respond to this conditional

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[3] LCAS respectfully notes here and advises the Court that LCAS's Brief-in-Chief, in its direct appeal, squarely deals with the inapplicability of the ADC to dispatch services provided to ambulance providers [LCAS, BIC, 24-37].

argument, LCAS must assume solely for the sake of argument that VRECC were to prevail on the ADC argument briefed in the direct appeal, to the extent that provision of emergency dispatch services to ambulance services were found to violate the ADC. LCAS emphasizes that it vehemently opposes such construction of the ADC, and does not, by argument here, qualify in any manner its position and argument in the direct appeal.

VRECC's un-briefed premise here is that, assuming that dispatching to private ambulance providers without a fee is an unconstitutional donation under the ADC, VRECC can raise revenue with a tax, or charge for dispatching to private emergency ambulance providers without authority under law and in violation of other due process and equal protection provisions. VRECC suggest that the District Court's decision that the retrospectively assessed fees and the potential future fees on the state of the undisputed facts on which this appeal is based, were unlawfully enacted, cannot be reconciled with the District Court's decision that the ADC is applicable to dispatch service. Although an issue appealed by LCAS in its direct appeal, the District Court did not invalidate VRECC's potential power to charge a fee. The District Court invalidated only the fees which VRECC was attempting to collect because those fees were not properly established by the local governments [Final Order, 533, ¶5]. That decision has prospective effect, only to the extent that the

undisputed facts remain current – that is, so long as VRECC fails to comply with New Mexico law in properly establishing an appropriate fee under law. Thus, in invalidating and quashing the dispatch fees, the District Court did not find that VRECC cannot charge a dispatch fee and apply it prospectively, if it meets the requirements of New Mexico law in doing so.

However, the authority to charge the revenue enhancing dispatch fee is also a critical issue in the direct appeal in this case, which LCAS briefed in its Brief-in-Chief, pages 12-23. Again, the District Court did not prohibit VRECC from charging the fee—it struck down the fee that was charged because it was established without notice to LCAS or to the public, without any action taken by the local governments who operate the VRECC, and without authority delegated to the VRECC.

As already discussed several times above, VRECC conceded these facts to the District Court [RP, Tr. III, 59-60]. And it is undisputed that the JPA between the local governments, which establishes the VRECC, does not delegate the power to VRECC to tax private ambulance providers through the dispatch fee. A quick review of the JPA, which was an exhibit below and in the record here, clearly proves this point [JPA, RP, 223-232]. Although the JPA allows VRECC to charge a fee to the local governments, which is anticipated under the E-911 Act, NMSA 1978, § 63-

9D-4, the JPA is silent as to any other fees [id.]. See also LCAS' BIC, pages 20-23. The District Court relied on these undisputed facts in striking down the fees that VRECC attempted to collect from LCAS. [RP, 144, ¶30].

VRECC's extended presumption obscures its inherent illogical assumption that monetary relief is the same thing as charging a fee – that is, that the ability to charge a fee for an alleged ADC-prohibited service is equivalent legally and procedurally under the New Mexico Constitution to the ability to recover direct cash payments made without consideration to individuals. It is not. From their position, they then leap to the un-briefed assumption that they do not need to comply with the constitutional and statutory provisions to impose and collect a fee or tax. They do.

An illegal direct cash payment made by the government without consideration is an illegal and void transaction. Things such as mistaken or fraudulent tax refunds and benefit payments are commonly recovered in the amount paid. So long as properly prosecuted, such recovery violates no other constitutional or statutory protections, and neither would recoupment of the amount directly paid to a private person without consideration as the result of an ADC-repugnant direct payment distribution transaction.

Here, however, there is simply no direct-payment transaction to void or monetary distribution to recoup. Emergency dispatch service is a service that

VRECC is required under law to provide, and there is consideration for the service, all of which LCAS has extensively briefed in the direct appeal [LCAS BIC 20-23; and RB, 7-10].

In addition, as previously briefed at length by LCAS in its direct appeal, New Mexico law imposes several requirements on local governmental entities regarding the authority and implementation of fees and taxes on private citizens and commercial entities. These requirements fulfill the state and federal constitutional Due Process and Equal Protection requirements and protections relating to governmental fees and taxes [LCAS BIC 12-19].

The ADC is a governmental prohibition, not a local governmental enabling provision. Nothing in the ADC provisions authorize or enable a governmental entity to violate other constitutional and statutory provisions. Private persons may be entitled to monetary relief for some violations of some prohibitive constitutional provisions, depending upon the construction, history and legally construed intent of the framers with regard to the particular constitutional provision. Governments, however, impose and collect monies only through taxes and fees, and must proceed through appropriate governmental procedures designed to protect private persons. Nothing in the ADC, and no concept of constitutional law, authorizes a

governmental entity to otherwise illegally impose a fee or tax on a private entity for the entity's own alleged ADC violation.

In this manner, VRECC attempts to use its own alleged ADC violation not as a shield, but as a sword, to cut through all of the constitutional and statutory requirements and protections on imposition of a fee or tax, or compel a unilaterally and involuntary coerced contract, in order to impose a fee or tax without paying attention to, or complying with, those well-established and universally required protections. A governmental entity cannot claim to manufacture an ADC violation through operation of a governmentally required service, and then claim the state constitutional ADC overrides all other and more basic federal and state constitutional requirements and protections regarding fees, taxes or coerced contracts, or overrides the constitutional state statutes that appropriately implement these constitutional protections.

II. CONCLUSION

For all the foregoing reasons, LCAS respectfully urges that this Court deny all the requested relief sought by Appellees-Cross-Appellants.

Respectfully Submitted,

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CERTIFICATE OF SERVICE:

I HEREBY certify, that pursuant to Rule 12-307.2(B), NMRA, on December 19, 2016, I sent a copy of this Pleading to the following counsel of record, via email as indicated below:

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