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 REPLY TO VRECC AND LOS LUNAS' ANSWER BRIEF

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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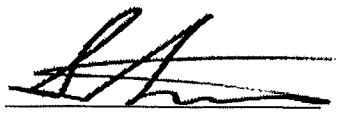
Rule 12-213(G) NMRA Statement of Compliance

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 **3,579** words according to Microsoft Word 2016's word-count function.



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I. ARGUMENTS

In its Answer Brief, VRECC wrongly conflates the District Court decision denying LCAS' Motion to Reconsider with the basis for LCAS's appeal. However, as shown below, LCAS's appeal stems only from the Final Order of the District Court.

With regard to its Anti-Donation Clause (ADC) arguments, VRECC conveniently disregards significant legal facts in its Answer Brief. It disregards that VRECC has a legal duty to dispatch to ambulance providers. It also ignores the fact that the provision of E-911 dispatch service is a government function for which VRECC as the designated PSAP in Valencia County, receives public funds, specifically in order to accomplish its purpose of providing dispatch service to emergency responders.

A. LCAS's Appeal Arises from the District Court's Final Orders, Not from the Court's Denial of LCAS's Motion.

VRECC begins its Answer Brief with the misstatement that LCAS's appeal "pertains to the Court's November, 2015 Order denying LCAS's motion to reconsider..." [VRECC, AB, 9].[1] LCAS, however, does not, and need not, appeal the District Court's failure to reconsider the first order of summary judgment. LCAS

1 The VRECC and the Village of Los Lunas will be referred to collectively as "VRECC." References to VRECC's Answer Brief will be cited as "VRECC, AB, *page no.*"

has appropriately appealed only the District Court's final orders. The fact and reason that the District Court declined to reconsider its prior orders is not significant to this appeal. VRECC futilely attempts, in undertaking this misleading approach, to leave the misimpression that LCAS did not appeal a final order.

LCAS appealed directly both from the first order of summary judgment that the District Court declined to reconsider and from the second order of which both are appealable final orders. VRECC's argument is simply frivolous and plainly wrong. See Final Order of District Court [RP, 548, ¶6]; See LCAS' Notice of Appeal and its Docketing Statement, Statement of the Issues [RP, 536 and 568-569 respectively].

B. VRECC's Contention that "An Allocation of Something of Value" is the Test Under the Anti-Donation Clause Is Erroneous and Contrary to Law.

Misinterpreting the seminal case of *Village of Deming v. Hosdreg Co.*, 1956-NMSC-111, in their Answer Brief, VRECC contends that dispatching is a violation of the ADC simply because dispatching is an "allocation of something of value" to LCAS, and therefore LCAS must pay for it [VRECC, AB, 13-14]. VRECC's conclusory argument totally ignores the limiting and informative context in which these words were used in *Village of Deming.* Specifically, VRECC ignores the Supreme Court's focus on the character of the alleged donation and the requirement that the focus must remain on the alleged donation and not be shifted to the incidental

benefit resulting from the alleged donation. VRECC's theory significantly deviates from the correct focus of ADC analysis under New Mexico law. Misconstruing both the seminal case and the developed law, VRECC then also ignores the most significant facts in the case at hand---that dispatching is VRECC's legal duty and its primary, if not sole, purpose.

Under VRECC's interpretation of an ADC violation, any transaction in which government services might have an incidental benefit for private enterprise--would violate the ADC. It is worth noting at the outset that, in some form or sense, literally all government services result in "allocations of something of value," benefiting private parties, including the general public. VRECC's interpretation of an unconstitutional donation would significantly alter decades of consistent jurisprudence and the entire system of provision of governmental services, significantly expanding the holdings of *Village of Deming v. Hosdreg Co.*, 1956-NMSC-111, and *City of Clovis v. Southwestern Pub. Serv. Co.*, 1945-NMSC-030, two of the seminal New Mexico cases addressing the application of the ADC. As shown below, and in more detail in LCAS's Brief-in-Chief [BIC, 24-37], the ADC requires a different and much more probing assessment of the alleged donation.

Answering the principal question of what the term "donation" and the phrase "the giving of aid to private enterprise" means in the ADC, the Court in *Village of Deming*, 1956-NMSC-111, first looked to dictionary definitions for the answer. Id.

at ¶¶ 33-34. The Court found expansive definitions in the dictionary and determined that the term "giving of aid" means a "gift," a "gratuitous transfer of property..." Id. at ¶35. The Court found that, based on its previous rulings a narrow, "somewhat cautious interpretation" is warranted for determining what an unconstitutional donation is in the context of government alleged donations. Id. In proceeding with caution, the Court finally determined after reviewing the case law and in:

> "...[D]ealing with the term "donation," as found in this proviso of the Constitution, that the word has been applied in its ordinary sense and meaning, as a "gift," an allocation or appropriation of something of value, without consideration to a "person, association or public or private corporation." *Village of Deming*, 1956-NMSC-111, ¶36.

The Court provided further construction of the term "donation" in the context of the ADC stating that only where the alleged donation *"by reason of its nature and the circumstances surrounding it take on character as a donation in substance and effect,"* will it violate the ADC. Id. at ¶37. Accordingly, the focus of an ADC analysis is on the alleged donation, its character, and its purpose within the circumstances surrounding it. The focus has never been how the alleged donation might benefit private entities, as VRECC wrongly contends in its Answer Brief.

In a prior opinion, which LCAS urges may be a better exemplar for the present case, the Supreme Court, in *City of Clovis v. Southwestern Pub. Serv. Co.*, 1945-NMSC-030, in determining that the sale of utility properties to private enterprise did not violate the ADC, did not focus its analysis on the benefits that the City's sale of

the utility property transaction garnered for the buyer. There was no dispute that the interest free payment over the course of 24-years was an extremely favorable term that benefited the private buyer. Id at ¶ 4. The transaction in *City of Clovis* was clearly an "allocation of something of value," and under the simplistic and erroneous expansive interpretation of analysis urged here by VRECC, it should have been struck down. The *City of Clovis* Court, however, upheld the transaction and ruled that it did not violate the ADC. Id at ¶ 55. The Court dissected the transaction and the alleged donation to determine the nature, and context of the transaction. In doing so, the Court found that, although the terms of the sale were favorable to the buyer, the transaction did not result in the City pledging or lending its credit. Id at ¶¶21-22. The Court ruled that "[n]one of the contingencies which Article 9, Section 14 of the New Mexico Constitution was designed to prevent were here present." Id at ¶22.

Significantly for the present case, the *City of Clovis* Court determined that if the nature of the alleged donation is restricted to the activities and functions of government, it is not unconstitutional. The Court recognized that the principal purpose of the ADC is to prevent the government from "engaging directly or indirectly in commercial enterprises for profit." *City of Clovis*, 1945-NMSC-030, at ¶24. In doing so, the Court explained the policy rationale underpinning the ADC. It said:

> "The significance of the inhibition is found in the evil which it [the ADC] was intended to remedy." ...

....

"...the essence of which was to restrict the activities and functions of the state, county, and municipality to that of government, and forbid their engaging directly or indirectly in commercial enterprises for profit." *City of Clovis*, 1945-NMSC-030, at ¶23 and ¶24.

It is clear from both the *Village of Deming* and the *City of Clovis* opinions, that there is much more involved in assessing whether a transaction is a "donation" under the ADC than simply evaluating whether there is an "allocation of something of value" to private enterprise. These cases explain that it is the character and nature of the alleged donation that must be scrutinized, not the manner in which it benefits private enterprise. The purpose for the transaction, whether the activity accomplishes a government function, and whether the transaction creates a debt other than the cost of simply operating the required government service are principal considerations in the analysis. See also *Attorney General Opinion No.* 76-06, where the Attorney General opined that special education vouchers do not run afoul of the ADC specifically because:

"there is a ***legal obligation*** to provide an education for school age children, public money spent for education is not a gift. A legal obligation is consideration. See 17 Am. Jur.2d Contracts § 126." *N.M. Atty. Gen. Op.* 76-06. (Emphasis added).

In this case, as in *City of Clovis*, it is evident that the alleged donation (dispatch service) is restricted to "the activities and functions...of government." *City of Clovis*, at ¶24. There is no dispute that dispatching is a government function and,

as shown below, dispatching to emergency responders including to certificated ambulance providers is a legal responsibility of VRECC which is itself a government entity. Dispatch service to emergency responders, like LCAS, does not create a debt other than the cost of simply operating the required government service for which it receives public funding.

i. E-911 Dispatching is a Function and a Legal Duty of Government.

Applying the law articulated above to the facts of this case, it is evident when one examines the nature of dispatch service, as an alleged "donation," dispatching is not in substance or in form a "gift of something of value without consideration." The New Mexico Legislature has created a number of laws designed to create funding for PSAPs. In doing so, it has designated E-911 dispatching as the exclusive role of government. Both dispatch to ambulances and the provision of emergency services to the public are undeniably in fulfillment of a government duty required and recognized by law. Although thoroughly briefed in LCAS's Brief-in-Chief, because VRECC completely ignored the complex regulatory framework under which VRECC operates, including required operations neither required of LCAS nor possible for LCAS to implement, it is briefly reiterated here.

Under the E-911 Act:

> It is the purpose of the Enhanced 911 Act [63-9D-1 through 63-9D-11.1 NMSA 1978] to further the public interest and protect the

> safety, health and welfare of the people of New Mexico by enabling the development, installation and operation of enhanced 911 emergency reporting systems to be operated under shared state and local governmental management and control. NMSA, 1993, § 63-9D-2(B). (Emphasis added).

In addition, an enhanced operating reporting system:

> "means a landline or wireless system consisting of network switching equipment, database, mapping and on-premises equipment that uses the single three-digit number 911 for reporting police, fire, medical or other emergency situations, thereby enabling a caller to reach a public safety answering point to report emergencies by dialing 911...[.]" NMSA, 1993, § 63-9D-3(J).

Furthermore, under the E-911 Act, PSAPS operate enhanced 911 systems, systems which include the consolidation of various government databases, "including automatic number identification...equipment necessary to obtain and process locational maps." (Definition of "enhanced 911 systems," NMSA, 1993, § 63-9D-3(K). LCAS has no access to these systems except through the VRECC. Moreover, in the context of E-911 requirements for delivering dispatch services, under NMAC, E-911 Requirement rule §10.6.2.8 states:

> "the responsibility and authority for delivering emergency medical services...generally rests with the state, counties, and municipalities. This is true even when supplemental services are performed by others, such as private ambulance companies..."

Finally, under the Emergency Medical Services Fund Act (EMS Fund Act), NMSA, 1978 §§ 24-10A-1 to 24-10A-10, VRECC receives partial grant funding, in part, specifically for its provision of dispatch services to ambulance providers. The EMS

Fund Act's purpose is to "make money available to municipalities and counties for use in the establishment and enhancement of local emergency services" for equipment and training for, among other things, dispatch services. See NMSA, 1978 § 24-10A-1. See also NMSA, 1978 § 24-10A-4.1(E). The formula for the public funding is distributed to local governments based on demographic criteria and on "the number of runs of each local recipient eligible to participate in the distribution." NMSA 1978, 24-10A-2.1(C). LCAS does not receive such funds, but under NMSA 1978, § 24-10A-2.1(E), ambulance services are expressly recognized as "local recipients" which are factored into the funding formula for VRECC's funding. Thus, VRECC receives legislatively determined appropriate public funds to dispatch to ambulance providers, including each dispatch to LCAS.

There can be no reasonable dispute that dispatching to emergency responders, including to LCAS, is the primary of the intended purposes of VRECC's existence as a PSAP. Similarly, it is clear that dispatching is an activity that local governments are required and responsible to perform. Private emergency responders, such as LCAS, are expressly contemplated in the chain of emergency medical providers to whom VRECC is required to provide dispatch service. The financial responsibility to fund VRECC still expressly rests with government to pay all its operating costs. The E-911 Act, in § 63-9D-4, demonstrates the intent that operating costs of PSAPS be paid between local governments through Joint Power Agreements.

ii. ***Dispatching to LCAS is in Fulfillment and Consideration of VRECC's Legal Duty.***

VRECC contends that LCAS did not develop in its Brief-in-Chief how the provision of private ambulance service is legal consideration. To avoid needless repetition, LCAS respectfully refers the Court to LCAS's Brief-in-Chief, pages 35-38, for a detailed discussion on the benefits that local governments receive from the provision of private certificated ambulance services.

Under *Village of Deming v. Hosdreg Co.*, 1956-NMSC-111, if there is some form of consideration in exchange, an alleged donation is not a donation. As shown in LCAS's briefing, including in Section I.A.i above, the County is required to provide medical services to the public, and VRECC is legally obligated to provide dispatch services to certificated ambulance providers. Because dispatch service to emergency responders is a legal obligation and function of VRECC, dispatching to LCAS is in fulfillment and consideration of VRECC's legal duty and cannot be a "donation" in violation of the ADC. See *N.M. Atty. Gen. Op. No.* 76-06.

iii. ***As a Publicly Funded Agency Designed to Carry Out a Public Dispatch Service VRECC Cannot Sell its Service.***

VRECC essentially asserts that "dispatching" is a service it can sell to emergency responders if those emergency responders are private companies. VRECC further contends that dispatching is "aid" to LCAS and it has a legal right

(a right for which there is no statutory support) to use its public funding to earn revenue. In support of this argument, VRECC asserts that by providing dispatch services to LCAS it is relieving LCAS of an obligation that LCAS would otherwise have to meet.

In addition to the fact that dispatch to emergency responders, including to ambulance providers, is VRECC's precise legal duty, and the reason why it exists and is publicly funded, LCAS cannot legally operate its own dispatch center or receive forwarded E-911 calls from VRECC. Under NMAC, E-911 Rule, § 10.6.2.11(D)3, "[o]nly incorporated municipalities, counties, state police or native American tribes or pueblos, public safety agencies or their authorized agents may receive 911 calls." See LCAS's Reply to Valencia County's Answer Brief, pages 6-8, for a detailed argument regarding this issue.

VRECC is clearly publicly funded by the taxpayers of New Mexico. VRECC seems not to comprehend that VRECC is not a private enterprise and is not intended to profit from its public funding and service. There is no statutory support for their theory that it can sell its dispatch services when private emergency responders are in the chain of dispatch. VRECC's sole purpose is precisely to provide *all* emergency providers better, more efficient, and faster E-911 communication services for the benefit of the public. VRECC's funding is contingent on its provision of these services. Emergency dispatch is VRECC's primary, if not sole function, and it's the

primary, if not sole, reason for its existence. Its employees are trained with public funds to accomplish its dispatch function. It is undisputed that PSAPS, like VRECC, provide a *public* service that has a single overriding purpose "to further the public interest and protect the safety, health and welfare of the people of New Mexico." E-911 Act, NMSA, 1999, § 63-9D-2(B).

iv. VRECC Distorts the "Sick and Indigent Persons" Exception of the ADC by Citing to an Inapplicable Case and an Erroneous Analysis.

In its Answer Brief, VRECC cites to *State ex rel. Mechem v. Hannah*, 1957-NMSC-065, erroneously asserting that it is the controlling case for the "sick and indigent persons" exception under the ADC. *Hannah* had nothing to do with that exception. *Hannah* concerned a State appropriation to pay the State's share of emergency feed certificates issued to livestock owners for the purchase of hay. The New Mexico Supreme Court ruled that the direct subsidy in the form of a direct payment for the ordinary operating obligations to the livestock industry violated the ADC, N.M. Const. art. 9 § 14(A). VRECC's reliance on *Hannah*, and specifically its contention that the subsidy program struck down in *Hannah* "was not exempted under the exception for 'sick and indigent" is erroneous because *Hannah* did not make such a finding based on the "sick and indigent persons" exception [VRECC, AB, 19].

The applicable New Mexico case that deals with the "sick and indigent

persons" exception is *Humana of N.M., Inc. v. Board of County Comm'rs*, 1978-NMSC-036, which LCAS fully briefed in its Brief-in-Chief, pages 33-35. See also LCAS' Memo. Brief for Sum. Jud. [RP, 152-154]. In *Humana*, the Supreme Court held that the constitutional "sick and indigent person" exception should be read broadly for a "contemporaneous construction" to satisfy legislative standards for provision of health and indigent care of New Mexicans. *Humana*, 1978-NMSC-036, ¶11. Certainly the provision of dispatch services by government, together with the provision of certificated ambulance services by LCAS, can be construed under *Humana* as "making provision for the care and maintenance of sick and indigent persons." This contemporaneous construction substantially achieves the intent of the ADC exception.

In addition, VRECC admitted that to carry out *its* legal duty, it serves "sick and indigent persons." [RP, 217-218]. In addition, LCAS primarily operates under the "Sick and Indigent persons" exception because it is required to do so under its NMPRC certificate. The fact that some of LCAS's patients may not be indigent is irrelevant. What is relevant, is that LCAS is required by law to, and does, carry *all* persons, regardless of their ability to pay—which necessarily includes the sick and indigent. NMAC, Motor Transp. Rule 18.3.14.8(A) [RP, 4, ¶12]. VRECC did not dispute that LCAS is legally certified and authorized by the NMPRC pursuant to the Ambulance Standards Act, NMSA 1978, §§ 65-6-1 to -6 (1999), precisely to

transport sick and injured persons within Valencia County to a place of treatment. VRECC admits that LCAS operates under the "sick and indigent persons" exception. [RP, 217-218]. Thus, the "sick and indigent persons" exception to the ADC allows VRECC to dispatch to LCAS without charge.

C. VRECC's Coercive Tactics to Collect an Unlawful Fee for Dispatch Service Should Not Be Confused with the Power to Contract.

LCAS cited to a large body of consistent New Mexico case law providing that VRECC must have statutory authority to impose the fee [LCAS's BIC, pages 12-18]. The asserted dispatch fee is similar to a tax to raise revenue, in that VRECC is attempting to set an arbitrary amount on each 911 call it dispatches to LCAS, so that it can build its revenue reserves. [RP, 269].

VRECC failed to address, in any manner, the issue raised in LCAS's Brief-in-Chief that VRECC does not have express or implied power to raise revenue by charging the dispatch fee. To avoid repetition, LCAS respectfully refers the Court to LCAS's Brief-in-Chief, pages 12-18. Without express statutory authority to raise revenue in this manner, the revenue enhancing fee is plainly unlawful, regardless of its power to contract.

Rather than respond to LCAS's contention that VRECC does not have the power to charge the fee, however, VRECC attempts to create the misimpression that its power to contract is a source of power to charge the dispatch fee. VRECC seems

to suggest that its power to contract allows it to coerce LCAS into involuntarily paying the otherwise unlawful dispatch fee. VRECC's power to contract must not be confused with its lack of statutory authority to charge a fee for dispatch. Voluntarily entering into a contract is distinguishable from coercing involuntary payment for a public service (dispatch) which the governmental entity is required to perform, by holding that service as ransom.

Entering into a contract presupposes that there is mutual assent between the parties to the contract and that there is a bargained for exchange of mutual consideration. VRECC has never offered consideration for a contract. Instead it is using its publicly funded PSAP as the leverage, threatening to terminate its dispatch service to LCAS if the fee is not paid. [RP, 275 (*Letter from VRECC threatening to cut of dispatch service if the fee is not paid)*]. Governmental contracts coerced through the threat to withhold required services are unlawful. *Bettini v. City of Las Cruces,* 1971-NMSC-054, 82 N.M. 633,635,485 P.2d 967,969 (1971) (holding that a municipal utility cannot withhold services in order to coerce payment from a successor in interest when not expressly allowed to do so under the governing statute). This Court should reject VRECC's continued insistence that its power to contract equates to power to impose an involuntary dispatch fee to raise revenue.

Respectfully Submitted,

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CERTIFICATE OF SERVICE:

I HEREBY certify, that pursuant to Rule 12-307.2(B), NMRA, on November 29, 2016, I sent a copy of this Pleading to the following counsel of record, via email:

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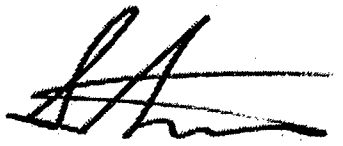

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