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IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

COURT OF APPEALS OF NEW MEXICO
FILED

LIVING CROSS AMBULANCE SERVICE, INC.,

JAN 13 2017

Plaintiff-Appellant/Cross-Appellee,



vs.

No. 35,298

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

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
REPLY BRIEF**

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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STATEMENT OF COMPLIANCE

I certify in accordance with Rule 12-213(G) NMRA that this brief is proportionately spaced and that the body of the brief contains 1857 words. This brief was prepared using Microsoft Word 2013.

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ARGUMENT

The answer brief largely avoids the arguments set forth in the Brief in Chief. To the limited extent that it addresses them, it is devoid of any authority to support its position and it fails to disprove Defendants' showing that the trial court's action in granting summary judgment for LCAS on the issue of the validity of fees charged for the provision of emergency dispatch services and declaring all fees for medical dispatch services invoiced to LCAS invalid was improper. For the reasons set forth in the Brief in Chief and this Reply Brief, the trial court's grant of summary judgment on the issue of the validity of fees charged to LCAS for the provision of emergency dispatch services should be reversed.

A. DEFENDANTS HAVE NOT WAIVED THE ISSUES RAISED IN THE DOCKETING STATEMENT AND ARGUED IN THE BRIEF IN CHIEF

The Answer Brief first attacks the Brief in Chief by asserting that Defendants' arguments pertaining to the sufficiency of the evidence supporting the district court's legal determination on the validity of fees are waived because the "VRECC [chose] to restrict its argument in its Brief-in-Chief to a collateral contention... [of] whether [VRECC has] the power to charge the dispatch fee. [AB 2-3]. This assertion appears to confuse the briefing on LCAS's direct appeal addressing the power to contract with the briefing on this cross appeal addressing the sufficiency of the evidence muddling two discrete issues that were independently decided by the lower court.

The substantial evidence argument, briefed in this cross appeal, assumes, as was stated in the district court's ruling, that Defendants have the power to enter into a contract to charge LCAS for the provision of emergency dispatch services and requests review of the question whether the record before the court concerning how those charges were established was sufficient for the district court to make a legal determination regarding the validity of those fees. **[BIC 10]**.

The Answer Brief also appears to attack Defendants' request to remand the case, stating that the request should be deemed abandoned and waived because Defendants failed to establish why the request is necessary. **[AB 3-4]**. This assertion is without merit. It is well established under our rules of procedure and our case law that where the appellate court determines evidence was not sufficient to support a legal determination on summary judgment the case is remanded "to allow the action to proceed to a trial of the disputed facts." *Great Western Constr. Co. v. N.C. Ribble Co.*, 1967-NMSC-085, ¶ 13, 77 N.M. 725, 427 P.2d 246.

B. THE DISTRICT COURT ERRED IN VOIDING ALL FEES OWED TO DEFENDANTS FOR THE PROVISION OF EMERGENCY DISPATCH SERVICES

After declining to reconsider its prior ruling that (1) the Anti-Donation Clause of the New Mexico Constitution prohibits Defendants from providing emergency dispatch services to LCAS without compensation; (2) Defendants have the power and authority to charge LCAS an appropriate amount in compensation for providing

emergency dispatch services, and (3) Defendants are obligated to continue provided emergency dispatch services to LCAS during the pendency of litigation, the district court *sua sponte* granted summary judgment on the issue of fees Defendants allegedly charged LCAS declaring all past fees invoiced to LCAS for the provision of emergency dispatch services “invalid and quashed.” [BIC 7-8]. This ruling rests on an unsupported legal conclusion that the fees were not properly established and moreover, orders an ongoing violation of the Anti-Donation Clause of the New Mexico Constitution. The Answer Brief is an effort to defend the district court’s untenable ruling. The effort is unpersuasive.

1. The record does not support the court’s legal determination that fees charged for emergency dispatch services were not properly established.

The legal conclusion that fees charged for emergency dispatch were not properly established and corresponding award of summary judgment to LCAS, first requires sufficiently developed material facts concerning the establishment of such fees. [BIC 10]. *Marquez v. Gomez*, 1991-NMCA-066, ¶ 12, 116 N.M. 626, 866 P.2d 354 (“An award of summary judgment is inappropriate when facts before the court are insufficiently developed...to determine the legal issues involved.”). As established in the Brief in Chief that prerequisite was not satisfied because the record before the court was devoid of *any* evidence pertaining to how such fees were

determined. **[BIC 10-11]**. The Answer Brief does not provide evidence establishing otherwise.

The Answer Brief asserts that Defendants failed to meet their burden to establish a sufficiency of the evidence claim because they “failed to set forth all of the pertinent evidence and failed to demonstrate why the evidence fails to support the finding.” This argument is unavailing, however, as the Answer Brief itself fails to support the argument by providing the “evidence” LCAS claims was omitted from the Brief in Chief. *See Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-045, ¶ 15, 137 N.M. 339, 110 P.3d 1076 (stating the court does not entertain arguments where party included no explanation of the argument and no facts that would allow the appellate court to evaluate the claim). Neither LCAS nor Defendants can point to any such evidence in the record for the simple reason that none exists.

The overarching fact concerning whether Defendants properly exercised their admitted power to charge LCAS a fee is that this issue was never briefed by the parties either in the original summary judgment motions nor in LCAS’s Motion for Reconsideration. Thus, no evidentiary record was built around the methodology used in assessing the fees. The Answer Brief refers to the Statement of Undisputed Facts contained in its original Memorandum Brief in Support of its Motion for Summary Judgment **[AB 8]** but nothing in that statement establishes an evidentiary basis for how the fees actually **were** determined. **[RP 137-147]**.

Further, its attempt to rely on a purported statement by Defendants in their summary judgment pleadings that no issue of material fact existed is simply bogus. There were no issues of material fact as to the summary judgment motions filed but those motions were directed only to two questions, first, whether the Anti-Donation Clause required LCAS to pay a dispatch fee to VRECC and second, whether VRECC had the power to impose such a fee. Both of these issues were decided in Defendants' favor and were not reconsidered by the trial court. [RP 533 ¶¶ 2, 3]. This issue of how the fees were established simply was not briefed. Indeed, the trial court in ruling on the cross motions for summary judgment specifically noted that the issue of the "appropriate monetary amount" which VRECC can charge LCAS was not raised in such motions and was not being determined nor was the issue of the "retroactivity of financial liability." [RP 435].

Finally, the purported "evidence" relied on to support the trial court's determination that VRECC had failed to properly exercise its power to assess dispatch fees is not evidence at all instead consisting merely of (1) assertions by LCAS with no corresponding citation to the record; (2) mere assertions by counsel in briefs and oral argument, and (3) evidence related to VRECC's power to charge fees, an issue already decided in VRECC's favor and which is unrelated to the procedure as to how charges assessed to LCAS were established. The Answer Brief does not, and in fact cannot, overcome Defendants' showing that the ruling on

summary judgment at issue in this cross appeal was not sufficiently supported and must be reversed.

2. **Voiding all past fees invoiced to LCAS for emergency dispatch services but requiring Defendants to continue providing services to LCAS during the pendency of this litigation impermissibly orders an ongoing violation of the Anti-Donation Clause of the New Mexico Constitution.**

The district court properly determined that the provision of emergency dispatch services to a private ambulance carrier without charge violates the Anti-Donation Clause of the New Mexico Constitution, N.M. Const. art. IX, § 14. The legal outcome of this ruling is straight forward: the violation must be cured by either allowing the entity to cease providing the offending service OR requiring the receiver of services to provide compensation. Additionally, under either outcome LCAS is required to make restitution for the unconstitutional benefit it received by paying for the past services. **[BIC 13]**. *See also State ex. rel. Callaway v. Axtell*, 1964-NMSC-046, ¶¶ 13, 26, 74 N.M. 339, 393 P.2d 451. The district court, losing sight of these basic principles, fell into error by ordering service to continue AND invalidating all fees assessed to LCAS as compensation for that service *i.e.* provide a service without compensation- the very action the court also determined violated the constitution. The Answer Brief makes no attempt to directly address this argument or otherwise establish how the court's ruling could be sustained.

Instead LCAS endeavors to defend the district court's untenable ruling by arguing that providing emergency dispatch services does not in fact violate the Anti-Donation clause. [AB 10]. This argument is unpersuasive. It disregards the fact that a binding order was issued by the district court on this very issue stating that the action does violate the Anti-Donation clause and fails to explain why that order should not apply to this issue. LCAS appears to be operating under an unsupported assumption that because it has asked for review, the lower court's final order is not controlling. LCAS offers no support for this proposition. And, if fact it could not, as it is well-established that a final order is dispositive on an issue unless or until it is overturned by an appellate court.

LCAS also appears to argue that because the court order only invalidated fees that were improperly established, there is no ongoing constitutional violation because Defendants are free to "charge a dispatch fee and apply it prospectively so long as it meets the requirements of New Mexico law. This argument is equally unpersuasive as it overlooks the critical fact that Defendants are required by court order to continue providing the service without a current ability to charge for that service. Assuming that Defendants' authority to charge LCAS for services derives from Defendants' power to enter into contracts, the court's order to continue providing dispatch services to LCAS effectively eliminates LCAS incentive to enter into a contract or agree to pay fees for service, no matter how reasonable or "valid"

the fees may be. Until the court allows Defendants to cease providing services unless LCAS enters into contract, the court is ordering an ongoing violation of the Anti-Donation clause.

LCAS's remaining arguments appear to pertain to Defendants' authority to charge LCAS for the provision of emergency dispatch services and LCAS mischaracterization of the charges for those services as a "revenue enhancing tax." [AB 11-15]. These arguments are not relevant to the issue before the court on this cross appeal. To the extent they are relevant, LCAS fails to cite to any authority supporting the arguments thus deeming these arguments abandoned. *State v. Sandoval*, 1975-NMCA-096, ¶ 11, 88 N.M. 267, 539 P.2d 1029.

CONCLUSION

Defendants request that this Court reverse the district court with respect to its 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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CERTIFICATE OF SERVICE

I HEREBY certify that I sent a copy of this Reply Brief via email to the following counsel of record pursuant to Rule 12-307.2(B) NMRA on January 13, 2017:

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