

STATE OF NEW MEXICO  
THIRTEENTH JUDICIAL DISTRICT  
COUNTY OF VALENCIA

SOCORRO ELECTRIC COOPERATIVE, INC.,

Plaintiff,

v.

CHARLENE WEST, et al.,

No. D1314-CV-2010-0849

Judge: Mitchell

Defendants,

And

CHARLES WAGNER, individually and  
on behalf of those similarly situated, et al.,  
Cross-Claim Plaintiff,

v.

SOCORRO ELECTRIC COOPERATIVE, INC.,  
et al.,

Cross-Claim Defendants.

**PLAINTIFF'S REPLY TO DEFENDANTS' RESPONSE TO MOTION TO  
RECONSIDER ORDER AWARDING ATTORNEY'S FEES**

Plaintiff Socorro Electric Cooperative, Inc. hereby brings this, its Reply to Defendants' Response to the Motion to Reconsider Order Awarding Attorney's Fees filed with the Court on or about November 21, 2011. The present Response was filed on November 28, 2011 by the Deschamps and Kortemeir Law Offices, P.C. In reply to the Deschamps Response, Plaintiff states as follows:

As a preliminary matter, Plaintiff's counsel would note that the Deschamps Response contains *no* actual statements or arguments of law. The only case cited in the Response, *In re*



*N.M. Indirect Purchasers*, 2007-NMCA-007, does not address *any* issue relevant to Plaintiff's Motion. The *Indirect Purchasers* decision discusses the standard of review for an appeal, not for a motion to reconsider. Yet, even if applicable, the Defendants have improperly cited the holding of the case. The paragraph relied on by Defendants actually establishes that "the question of whether the correct law has been applied and the district court's application of the law to the facts are reviewed *de novo*." *Id.* at ¶6. If, under a *de novo* standard, the appellate court first determines that the underlying law allows for the award of attorney's fees, only then will the court apply an abuse of discretion standard to any consideration of the actual amount awarded. *Id.* Thus, the only law cited or used to support any statement in Defendants' Response is *both* irrelevant and incorrect.

As to the remainder of Defendants' Response, the pleading is little more than unsupported supposition as to the future course of this litigation. Rather than addressing Plaintiff's substantive argument and request, Defendants' counsel implies that Plaintiff's attempt to comply with clearly established case law and the rules of civil procedure is somehow an improper "tactical decision."

- Defendants' counsel correctly notes that Plaintiff has not asked this Court to certify the Order Awarding Attorney's Fees for interlocutory appeal. This is because it is self-evident that the Order does not meet the requirements of §39-3-4(A), NMSA 2011. The Order does not involve a controlling question of law relevant to the substantive issues to be raised in the continuing litigation, nor would resolution of this issue "materially advance the ultimate termination of the litigation." *Id.* Thus, any attempt at interlocutory appeal would be an imprudent use of time and resources.

Plaintiff's current Motion is not part of any improper tactic to delay payment. Plaintiff is simply attempting to comply with the clearly established rules of civil and appellate procedure and New Mexico statute, which *require* that a final judgment or decision be entered before a party can seek appellate review of a decision of this nature. See, §39-3-2, NMSA 2011. Complying with rules and statutes is not some unsavory "tactic." It is the heart and soul of the litigation process.

Similarly, Defendants' counsel accuses Plaintiff of creating complexity and increasing the costs of the present litigation. This assertion is fundamentally incorrect. A simple review of the docket in this matter demonstrates that Plaintiff's counsel has attempted to mitigate the costs and complexity of the current suit by reducing the issues for dispute and by voluntarily dismissing as many potential Defendants as possible. The present Defendants are the only individuals who refused to allow a voluntary dismissal of the suit, who prolonged litigation through the use of judicial recusal, and who have attempted to bring a complex, multi-count class action lawsuit by way of a counter-claim to an otherwise simple declaratory judgment action.

• However, all of this discussion, and the totality of Defendants' Response, is ultimately irrelevant to the matter being presented to the Court. Plaintiff has made a simple, perfectly permissible request that this Court reconsider a discrete portion of the November 3<sup>rd</sup> Order Awarding Attorney's Fees. Defendants have not indicated that *any* of the statements of law contained in Plaintiff's Motion are incorrect. Defendants have tacitly conceded that the Order is currently non-appealable, and they apparently recognize that the Order is not a proper subject for interlocutory appeal.

Plaintiff has presented a clear statement of the problem created by the 30 day payment deadline. Plaintiff has no current right of appeal, and present payment of the award will serve as

sanction against Plaintiff that will be difficult to remedy once payment has been made. To counter the effects of such a sanction, and to preserve a meaningful right of appeal as to this issue, Plaintiff has proposed three simple solutions: completely eliminate the 30-day payment requirement; or, make the payment due 30 days from the entry of a final judgment in this matter; or, make the payment due to the registry of the Court, which will hold such funds until a final judgment is entered and all potential appeals have been resolved. Defendants have failed to demonstrate how these proposed modifications of the Court's Order will create *any* harm to Defendants or their counsel.

WHEREFORE, Plaintiff renews the request contained in the underlying Motion, and asks the Court to reconsider its November 3, 2011 Order Awarding Attorney's fees, and further asks that the Court strike that portion of the Order which requires payment of the award within 30 days. Alternatively, Plaintiff requests that the Order be altered so that the payment will be due 30 days from the entry of a final judgment on this matter. As a final alternative, Plaintiff asks that the Order be amended to allow for payment into the registry of the Court. Plaintiff asks that the Court reconsider and alter the Order in the manner which best serves the interests of justice and the integrity of the litigation and appeal process.

Respectfully submitted,

KENNEDY & HAN, P.C.

"Electronically Filed"  
/s/ Darin Foster, Attorney at Law  
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**CERTIFICATE OF SERVICE:**

I certify that a copy of this  
Response was served by the Court's  
electronic filing system to the following  
counsel of record on this 16th day of December, 2011.

s/s Darin Foster

Darin M. Foster

**ALL PARTIES ENTITLED TO NOTICE (D1314-CV-2010-0849)**

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