

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT COURT

IN RE MCBRIDE FIRE CONSOLIDATED
LITIGATION.

No. D-202-CV-2022-02160

CONSOLIDATED CASES
D-202-CV-2022-04363
D-202-CV-2023-05127
D-202-CV-2023-02625
D-202-CV-2023-03712
D-202-CV-2023-06822

MEMORANDUM OPINION AND ORDER GRANTING
PLAINTIFFS' MOTION TO RECONSIDER ORDERS GRANTING SUMMARY
JUDGMENT AS TO PRIVATE NUISANCE AND TRESPASS, AND NONECONOMIC
DAMAGES BASED ON THOSE CLAIMS

This matter is before the Court upon Plaintiffs' Motion to Reconsider Orders Granting Summary Judgment as to Private Nuisance and Trespass, and Noneconomic Damages Based on those Claims, which was filed on March 10, 2025 (the "Motion"). The Court has reviewed the Motion, along with the response, joinders, and reply. The Court also held a hearing on the Motion on June 5, 2025. Being fully advised in these consolidated matters, the Court finds that the Motion should be **GRANTED**.

Some brief background will help frame the issues. On January 21, 2025, this Court entered its "Order on Multiple Motions." In that order, the Court made four rulings, among several others, that are the subject of Plaintiffs' Motion here:

- (1) The Court dismissed Plaintiffs' private nuisance claims, concluding that nuisance requires an "intangible" (i.e., non-physical) invasion of the use and enjoyment of real property, which is absent here. *See* Order on Multiple Motions at ¶ 6.
- (2) The Court also dismissed Plaintiffs' trespass claims, concluding that New Mexico only recognizes the tort of "intentional" trespass. *Id.* The Court concluded that Plaintiffs'

facts only support their claim that Defendants acted negligently such that Plaintiffs' evidence was insufficient to support a claim of intentional trespass. *Id.*

(3) As alternative rulings, the Court concluded that both the private nuisance and trespass claims were duplicative of Plaintiffs' negligence claims and should be dismissed for that reason as well. *Id.*

(4) Finally, because Plaintiffs' nuisance and trespass claims were the only basis for Plaintiffs' requests for "emotional distress" damages, the Court also dismissed Plaintiffs' claims for those damages. *Id.* at ¶ 11.

Plaintiffs' Motion argues that all of these rulings were in error. Having reviewed the applicable law, this Court agrees. As the Court explains: (1) Plaintiffs' claims for private nuisance may rest upon "physical" invasions to real property such as smoke, soot, ash, and flames; (2) on the facts presented by Plaintiffs at summary judgment, their claims for negligent trespass are allowed under New Mexico law; (3) Plaintiffs' negligence, nuisance, and trespass claims may not be duplicative for any particular Plaintiff if they have different elements of proof and allow different damages; and (4) Plaintiffs' claims for certain "emotional distress" damages are allowed to proceed under both private nuisance and negligent trespass theories.

I. The Motion asks the Court to reconsider an interlocutory order.

Before turning to the merits of the Motion, the Court briefly addresses the law applicable to Plaintiffs' request for reconsideration. The Order on Multiple Motions was an interlocutory order. Thus, it may be reconsidered by the trial court at any time prior to entry of a final judgment. *See, e.g., Melnick v. State Farm Mut. Auto. Ins. Co.*, 1988-NMSC-012, ¶ 5, 106 N.M. 726 ("[T]he trial court may revise or rescind an interlocutory order at any time before entry of a judgment that concludes the litigation."). Plaintiffs' Motion is timely made.

II. Plaintiffs’ claim for private nuisance is reinstated under controlling New Mexico authority and under persuasive federal authority.

In the Order on Multiple Motions, this Court concluded that private nuisance claims must rest upon “intangible” (i.e., non-physical) invasions of the use and enjoyment of real property. Order on Multiple Motions at ¶ 6 (relying upon *Kaywal, Inc. v. Avangrid Renewables*, 2021-NMCA-037, ¶ 44, 495 P.3d 550). The court then found that “Plaintiffs’ nuisance claims do not concern intangible, yet concrete, invasions of their use and enjoyment of their real properties.” *Id.* Thus, Plaintiffs’ private nuisance claims were dismissed. *Id.* **The Court is now convinced that its previous conclusion was wrong under established law.**

It is true that cases like *Kaywal*, cited above, and *Padilla v. Lawrence*, 1984-NMCA-064, 101 N.M. 556, appear to state that only non-physical, “intangible” intrusions upon the use and enjoyment of real property – such as noise and odor – may form the basis of a private nuisance claim. See *Kaywal*, 2021-NMCA-037, at ¶ 44 (“[N]uisance involves no physical intrusion upon the land of another . . .”); *Padilla*, 1984-NMCA-064, at ¶ 26 (“Where there is no physical invasion of property, as with intangible intrusions such as noise and odor, the cause of action is for nuisance rather than for trespass.”). Those cases seem to suggest that a claim for nuisance cannot lie as a stand-alone cause of action when the intrusion into another’s real property is a physical one, such as damage from a fire. Physical intrusions are typically the foundation of trespass claims.

Upon further consideration, however, this Court believes that it read *Padilla* and *Kaywal* too narrowly, and that neither *Padilla* nor *Kaywal* actually held that private nuisance claims may *only* be founded upon “intangible” intrusions upon real property. Rather, those authorities simply reiterated the rather unremarkable proposition that physical invasions upon real property may, and often do, form the basis of trespass claims and are not, generally, the bases for nuisance claims. See, e.g., *Padilla*, 1984-NMCA-064, at ¶ 26 (contrasting nuisance and trespass claims); *Kaywal*,

2021-NMCA-037, at ¶ 42 (comparing nuisance and trespass claims and stating that “[p]rivate nuisance is akin to trespass” because both are actions “for tortious interference with one’s use and enjoyment of land”).

Taking *Padilla* specifically, its discussion of the law of nuisance says nothing about limiting the bases for nuisance claims at all, let alone limiting them to only those intangible invasions upon the use and enjoyment of real property. Rather, *Padilla* broadly defined a private nuisance as a “non-trespassory invasion of another’s interest in the private use and enjoyment of land. It is a civil wrong based on a disturbance of rights in land.” *Padilla*, 1984-NMCA-064, at ¶ 9 (citations omitted). It went on to then state that the plaintiffs there were properly compensated under the law of nuisance, not trespass. **In short, *Padilla* did not limit nuisance claims as this Court previously concluded.**

As for *Kaywal*, it is a more complicated case that requires a bit more discussion. It is a venue opinion, and a thorough one at that. The Honorable Linda Vanzi wrote for a unanimous panel of our Court of Appeals and held that trespass and nuisance claims are transitory actions that are not required under our venue statute to be brought where the affected property is located. *See Kaywal*, 2021-NMCA-037, at ¶¶ 1 & 2.

In reaching that conclusion, the Court in *Kaywal* did state that “nuisance involves no physical intrusion upon the land of another” *Id.* at ¶ 44. But again, the court there did not limit private nuisance claims to **only** those “non-physical” intrusions. Rather, it alluded to these types of non-physical nuisance claims as part of its more-specific discussion of the venue statute; and that discussion focused specifically on whether a nuisance claim concerns an “interest in land” for purposes of that statute’s geographical restriction. *Id.* at ¶¶ 42 – 44.

This Court concluded that the ultimate holding in *Kaywal* centered on whether the claims there affected an interest in land under our venue statute, not on the necessary factual predicate of every private nuisance claim. Stated differently, *Kaywal* does not actually address whether physical intrusions upon real property may or may not form the basis of a nuisance claim, and this Court will not read it to reach that conclusion.

Most importantly, however, both *Padilla* and *Kaywal* cite to *Scott v. Jordan*, 1983-NMCA-022, 99 N.M. 567, to identify the elements of a legal claim for private nuisance. See *Padilla*, 1984-NMCA-064, at ¶ 9; *Kaywal*, 2021-NMCA-037, at ¶ 42. *Scott* set out the basic law for private nuisances and actually applied that law to the facts before it: where “noxious odors, flies, and dust . . . deprived [the plaintiffs] of the use and enjoyment of their property.” 1983-NMCA-022, at ¶ 3. *Scott*, therefore, is the most instructive and controlling case, and the Court turns to it briefly.

Scott informs us that “a private nuisance [is] a ‘nontrespassory invasion of another’s interest in the private use and enjoyment of land.’” 1983-NMCA-022, at ¶ 12 (quoting the Restatement (Second) of Torts § 821D (1979)) (the “Restatement”). The Restatement’s “general rule” as to what constitutes a private nuisance was also set out in *Scott* as follows:

General Rule. One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another’s interest in the private use and enjoyment of land, and the invasion is either

- (a) intentional and unreasonable, or
- (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.

Id. (quoting Restatement (Second) of Torts § 822 (1979)). In short, a claim for private nuisance is nothing more than “a civil wrong based upon a disturbance of rights in land,” and may be rooted in negligent or reckless conduct. *Id.*

Based upon this statement of the law – which, again, was incorporated into *Padilla* and *Kaywal* – the *Scott* Court actually held that the following facts “clearly support[] the ruling of the trial court **and meet[] the criteria for establishing the existence of a private nuisance.**” *Id.* at ¶ 16 (emphasis added):

Evidence presented by plaintiffs indicated **that there was such dust, flies, and noxious odors emanating from defendant’s feedlots that they could not enjoy their home.** The record contains several photographic exhibits admitted into evidence showing heavy infestations of **flies swarming upon plaintiffs’ home**, and, which, according to the testimony of plaintiffs, originated from defendant’s cattle feeding pens nearby. Plaintiff Mr. Scott testified that the value of his property prior to the commencement of defendant’s cattle feeding operations was approximately \$130,000.00 to \$140,000.00 and that after defendant’s expanded cattle feeding operations began the value of plaintiffs’ property declined to \$65,000.00.

Id. at ¶ 15 (emphasis added).

Thus, *Scott* actually considered what constitutes a private nuisance and held that “flies swarming upon [the] plaintiffs’ home” and dust invading the plaintiffs’ home were valid bases for the plaintiffs’ private nuisance claims. Those invasions – flies and dust – are not “intangible” invasions upon real property. To the contrary, they are tangible, physical invasions upon the use and enjoyment of the plaintiffs’ home. This Court therefore erred in concluding that physical invasions into the use and enjoyment of real property could not support a private nuisance claim.

This analysis of *Padilla*, *Kaywal*, and *Scott* is sufficient to reinstate Plaintiffs’ private nuisance claims. However, the Court cannot conclude its analysis without mentioning that any discussion of what is a “physical” versus a “non-physical” intrusion upon land is a largely existential question. For example, the Court in *Kaywal* alluded to non-physical intrusions upon land in the context of “dangerous voltages and currents to be induced into Plaintiff’s fence causing risk of serious injury or death to people, livestock and game.” *Kaywal*, 2021-NMCA-037, at ¶ 42 (quoting the plaintiff’s allegations). Anyone who has ever received an electric shock will tell you

that the jolt they received was indeed a physical one that was quite tangible – as in, something they very much perceived by touch. Similarly, the physical properties of odors create their smell, and noises are actually sound waves that physically interact with our ear drums to make it possible for some of us to hear them. This Court is therefore left with a question as to what exactly constitutes a “non-physical” invasion upon real property.

In other words, the better evaluation as to what may constitute a private nuisance is simply whether someone wrongly (whether, intentionally, negligently, or recklessly) disturbed another’s use and enjoyment of their land. *See Scott v. Jordan*, 1983-NMCA-022, at ¶ 12; *Padilla*, 1984-NMCA-064, ¶ 9 (stating that private nuisance may be intentional or unintentional). When viewed in this context, it is clear that Plaintiffs have demonstrated sufficient facts here to proceed on their private nuisance claims.

Lastly, the Court observes that this same conclusion was reached recently in the United States District Court for the District of New Mexico in a wildfire case, albeit under a slightly different analysis.¹ *See Dolan v. FEMA*, 760 F.Supp.3d 1200, 1241-43 (D.N.M. 2024) (Browning, J.). In *Dolan*, the federal district court concluded that the Hermit’s Peak/Calf Canyon Fire constituted a private nuisance under New Mexico law. *See id.* at 1241 (“First, the Court concludes that the Hermit’s Peak/Calf Canyon Fire constitutes a nuisance under New Mexico State law,

¹ The “slightly different analysis” is that the federal court was making an “*Erie* guess” as to what the New Mexico Supreme Court would conclude and is not obligated to follow decisions from our Court of Appeals. *See, e.g., Dolan*, 760 F.Supp.3d at 1230 (“If the [federal district] Court finds only an opinion from the Court of Appeals of New Mexico, while certainly the Court may and will consider the Court of Appeals’ decision in making its determination, **the Court is not bound by the Court of Appeals’ decision in the same way that it would be bound by a Supreme Court decision.**” (emphasis added, alterations and quotation marks omitted)). In contrast, this trial court is not permitted to make such a guess and must, under principles of vertical stare decisis, follow the law as it is set out in precedent by the Court of Appeals. *See, e.g., State v. Mares*, 2024-NMSC-002, ¶ 30, 543 P.3d 1198 (“It is axiomatic that our justice system requires strict adherence to vertical stare decisis, which is the principle that lower courts are bound by the precedent of reviewing courts.”).

because it is an invasion into the Plaintiffs’ property that is unintentional, reckless, and abnormally dangerous activity.”). *Dolan* is very persuasive authority in this regard.

In sum, New Mexico has recognized private nuisances as viable legal claims when the defendants have caused intentional or unintentional physical intrusions upon plaintiffs’ real property, thereby disturbing the plaintiffs’ use and enjoyment of that property. *See generally Scott*, 1983-NMCA-022. The federal district court has reached the same conclusion. *See generally Dolan*, 760 F.Supp.3d 1200. Thus, this Court erred in concluding in the Order on Multiple Motions that private nuisances were restricted to “non-physical” invasions upon real property.

III. Plaintiffs’ negligent trespass claims are valid under New Mexico law.

The issue raised in the Motion concerning Plaintiffs’ trespass claims is relatively straightforward: does New Mexico law restrict trespass claims to only those founded upon intentional conduct? The Court previously agreed with Defendants that intentional conduct was required. *See Order on Multiple Motions at ¶ 6*. The Court reached this conclusion because our law seems to suggest as much. *See, e.g., North v. Public Service Co. of New Mexico*, 1980-NMCA-031, ¶ 4, 94 N.M. 246 (citing to the Restatement (Second) of Torts, Section 158 (1965), which is for “intentional intrusions on land”); *Holcomb v. Rodriguez*, 2016-NMCA-075, ¶ 12, 387 P.3d 286 (citing to Section 163 of the Restatement (Second) of Torts, which is for “intended intrusions causing no harm”).

However, the parties agree that no New Mexico authority has specifically answered the question as to whether a negligent trespass claim is allowed. Nonetheless, Plaintiffs argue that the law of New Mexico implicitly recognizes such a claim. Defendants respond that “it is for the New Mexico appellate courts – not a treatise, a New Mexico federal district court, or even a New Mexico district court judge – to determine whether or not this case of action should be adopted in

New Mexico.” Response filed April 15, 2025, at 13. The Court disagrees with Defendants for a few reasons.

First, no New Mexico appellate court has rejected a negligent trespass claim as a stand-alone cause of action. The issue has been presented twice to our Court of Appeals, but it has not been squarely decided. *See North*, 1980-NMCA-031, at ¶ 2 and ¶ 4 (reversing the trial court’s dismissal of the plaintiff’s claim that “defendant negligently or intentionally entered onto plaintiff’s land unlawfully and without authority” but relying only upon the law supporting intentional trespass in doing so); *Pfleiderer v. City of Albuquerque*, 1965-NMSC-048, ¶¶ 9 – 11, 75 N.M. 154 (not reaching the defendant’s objection to the jury instruction that allowed a claim for negligent trespass because that issue was not preserved for review). Neither case actually ruled upon this issue, and this Court is not offending the principles of vertical stare decisis by deciding it in the first instance.

Second, our trespass cases rely upon the Restatement (Second) of Torts (the “Restatement”). *See, e.g., North*, 1980-NMCA-031, at ¶ 4; *Holcomb v. Rodriguez*, 2016-NMCA-075, at ¶ 12. In New Mexico, the Restatement is non-binding, “persuasive authority entitled to great weight” *Morris v. Giant Four Corners, Inc.*, 2021-NMSC-028, ¶ 24, 498 P.3d 238. *See also id.* at ¶ 14 (identifying the Restatement at issue there as the Restatement (Second) of Torts).

Section 165 of the Restatement expressly provides for the claim of negligent or reckless trespass. *See Restatement*, § 165 (1965) (“One who recklessly or negligently, or as a result of an abnormally dangerous activity, enters land in the possession of another or causes a thing or third person so to enter is subject to liability to the possessor if, but only if, his presence or the presence of the thing or the third person upon the land causes harm to the land, to the possessor, or to a thing or a third person in whose security the possessor has a legally protected interest.”).

Thus, while Section 165 of the Restatement concerning negligent trespass claims has not been expressly adopted by our appellate courts, it is part of a body of tort law that our Supreme Court has suggested we would follow if it aligns with the development of our tort law more generally. *See Schmitz v. Smentowski*, 1990-NMSC-002, ¶ 49, 109 N.M. 386. (“We [our Supreme Court] have been very willing to adopt the view of the Restatement of Torts to assist our development of new tort areas.”). This Court follows our Supreme Court’s lead and likewise looks to the Restatement for guidance as persuasive authority entitled to great weight.

Third, the concept of a negligent trespass is, not surprisingly, rooted in principles of negligence. *See, e.g.*, Restatement § 165, cmt. b. (“[W]here the entry or remaining on the land, although tortious, is not intentional, the actor is only liable if harm of the sort stated in Comment c results **as a legal consequence** from his tortious conduct.” (emphasis added)). Negligent trespass, therefore, embraces the traditional concepts of duty and breach as legal consequences, meaning that Person “A” owes a duty of care to Person “B” to act reasonably when causing someone or something to enter Person B’s property so as to avoid damage to Person B and to Person B’s property.

Thus, the fundamental question for this Court when considering the validity of Plaintiffs’ negligent trespass claim is whether Defendants here owed such a duty to Plaintiffs on the facts in the record. Contrary to Defendants’ assertion that only a reviewing court may answer that question, this Court believes that it is obligated to answer it in the first instance. *See, e.g., Romero v. Giant Stop-N-Go of New Mexico, Inc.*, 2009-NMCA-059, ¶ 6, 146 N.M. 520, (“Whether a duty exists is a question of law for the courts to decide.”).

In New Mexico, Defendants owe Plaintiffs this duty unless they demonstrate that there are sufficient policy reasons to eliminate or limit their duty to refrain from negligently or recklessly

entering Plaintiffs' land (or causing something to enter that land) and causing Plaintiffs' to be damaged. *See Rodriguez v. Del Sol Shopping Ctr. Assocs., L.P.*, 2014-NMSC-014, ¶ 1, 326 P.3d 465 (requiring "courts to articulate specific policy reasons, unrelated to foreseeability considerations, if deciding that a defendant does not have a duty or that an existing duty should be limited").

The relevant question, then, is what principles – what statutes, case law, and general principles of law – would point to the conclusion that Defendants do **not** owe a duty to refrain from negligently or recklessly entering onto the land of another and thereby causing damage to the other person or to the other person's property. *See, e.g., Morris*, 2021-NMSC-028, at ¶ 28. The Court concludes that negligent trespass as set out in the Restatement is consistent with New Mexico law. Thus, the arguments by Defendants that they do not owe this duty in trespass are rejected.

In reaching this conclusion, this Court relies upon our Supreme Court's analogous analysis of duty as set out in *Morris*, 2021-NMSC-028. The issue in *Morris* was whether the established doctrine of negligent entrustment of chattel included the duty to refrain from the negligent entrustment of gasoline by commercial vendors to intoxicated drivers. *See* 2021-NMSC-028, at ¶ 27. In concluding that such a duty exists for "commercial gasoline vendors", *id.* at ¶ 47, our Supreme Court relied first upon the Restatement. *Id.* at ¶ 24 (concluding that "the application of negligent entrustment of chattel to the sale of gasoline is consistent with the Restatement and the weight of authority concluding the same.") The Supreme Court then undertook a *Rodriguez* analysis to determine if there were public policy principles that would suggest such a duty should be limited. *Id.* at ¶¶ 27 – 46.

Finding insufficient reasons to limit the duty, the Court concluded that “a commercial gasoline vendor owes to a third party using the roadway a duty of care to refrain from selling gasoline to a driver the vendor knows or has reason to know is intoxicated.” *Id.* at ¶ 47. This Court reaches a similar conclusion here with respect to negligent trespass under a similar analysis.

Fourth, this same conclusion was reached in the federal court’s recent decision concerning the Hermit’s Peak/Calf Canyon Fire. *See Dolan*, 760 F.Supp.3d at 1248 (concluding that the New Mexico Supreme Court would adopt Section 165 of the Restatement as part of New Mexico’s law on trespass to real property). Again, *Dolan* is persuasive authority.

For these reasons, the Court concludes that it erred in dismissing Plaintiffs’ trespass claims. New Mexico law supports those claims when they are based upon the alleged negligent and reckless conduct.

IV. Plaintiffs’ negligence, nuisance, and trespass claims may not duplicative if they have different elements of proof and allow different damages.

Having reconsidered Plaintiffs’ trespass and nuisance claims, the Court also agrees with Plaintiffs that they may present these claims to the jury. *See, e.g., McNeill v. Burlington Res. Oil & Gas Co.*, 2008-NMSC-022, ¶ 21, 143 N.M. 740 (“A party is entitled to have the jury instructed upon all correct legal theories of his case which are pleaded and supported by evidence, and a failure by the trial court to so instruct constitutes reversible error.”). This is because the elements of proof and possible damages may be different for any particular Plaintiff’s case for their specific negligence, nuisance, and trespass claims. Thus, nuisance and trespass shall not be dismissed as duplicative of Plaintiffs’ negligence claims.

However, any issues concerning duplication of claims or of damages may be raised by any party at an appropriate time later in this case. Any party seeking to raise these issues must show

the duplication of claims for relief and/or the duplication of elements of proof for each individual Plaintiff.

V. Plaintiffs' claims for emotional distress damages are reinstated.

In the Order on Multiple Motions, the Court dismissed Plaintiffs' claims for emotional distress because the legal bases for those claims – nuisance and trespass – had been dismissed. *See* Order on Multiple Motions at ¶ 11. Having reinstated Plaintiffs' private nuisance and trespass claims, the Court revisits this issue as well and concludes that Plaintiffs' claims for certain noneconomic (“emotional distress”) damages may proceed under either or both theories.

With their motion on this issue, Defendants sought dismissal of “Plaintiffs' claims for emotional distress, mental anguish, annoyance, discomfort, inconvenience, and any other species of emotional injury to their mental well-being” *See* PNM Defendants' Motion for Summary Judgment on Plaintiffs' Claims for Emotional Distress, filed November 14, 2024 (the “Emotional Distress MSJ”), at 5. *See also* December 20, 2024 Reply at 6.

In response, Plaintiffs argue that the law allows them to seek noneconomic damages for “annoyance, discomfort, inconvenience, and interference with their properties” under both their private nuisance and trespass claims. *See, e.g.*, Response at 9 (seeking these damages for nuisance) and at 10 (seeking “noneconomic damages for annoyance, discomfort, inconvenience, and interference with property” under their trespass claim). *See also id.* at 2 (“[A]ll Plaintiffs groups are seeking noneconomic damages for annoyance, discomfort, inconvenience, and interference with their properties.”).

The Court concludes that Plaintiffs' claims for noneconomic damages for annoyance, discomfort, inconvenience, and interference with their properties are allowed under New Mexico law for Plaintiffs' private nuisance claim. *See Aguayo v. Village of Chama*, 1969-NMSC-005, ¶¶ 7

– 8, 79 N.M. 729. *See also Padilla*, 1984-NMCA-064, at ¶ 16 (providing for the recovery of annoyance, discomfort, inconvenience, and interference with personal comfort as special damages in nuisance claims). This same conclusion was also recently reached by the federal district court. *See Dolan*, 760 F.Supp.3d at 1246 (concluding that “noneconomic damages for pain and suffering, discomfort, annoyance, and inconvenience as a result of the Hermit’s Peak/Calf Canyon Fire can be recoverable under a private nuisance claim”).

The Court further concludes that these same noneconomic damages are available under Plaintiffs’ trespass claims. As the federal district court explained in *Dolan*, New Mexico “consider[s] trespass and nuisance within the same species of legal claims[.]” *Id.* at 1249 (citing to *Kaywal*, 2021-NMCA-037, at ¶ 42). This Court also sees no reason to distinguish between the damages available for these two property torts when both are “in personam action[s] for tortious interference with one’s use and enjoyment of land.” “*Kaywal*, 2021-NMCA-037, at ¶ 42. Thus, the Court concludes that Plaintiffs’ claims for noneconomic damages for annoyance, discomfort, inconvenience, and interference with their properties are also allowed under New Mexico law for their trespass claim.

The Court makes two final observations on Plaintiffs’ request for noneconomic damages. First, at times, Plaintiffs characterize these noneconomic damages as those for “emotional distress.” *See id.* at 6 (arguing that “the New Mexico Supreme Court has held that a plaintiff who suffers property damage may also recover noneconomic damages **for emotional distress**, inconvenience, and interference with their properties under their nuisance cause of action” (emphasis added)). Defendants also use this same language. *See Emotional Distress MSJ* at 5 (asking for the dismissal of Plaintiffs’ “emotional distress” claims, among others). This

characterization is not necessarily wrong, but it is too broad to be useful here. Thus, some clarification is required.

This Court views “emotional distress” damages as a category of damages that includes more specific types of damage, such as mental anguish, pain and suffering, and loss of enjoyment of life. These are the types of damages that are contemplated in cases like *Castillo v. City of Las Vegas*, 2008-NMCA-141, 145 N.M. 205. In *Castillo*, for example, the plaintiff sought damages for “mental anguish” for the damage caused to his home by two sewer backups and a related flood. *Id.* 2008-NMCA-141, at ¶ 21. The trial court allowed that claim to go to the jury, and the “jury awarded [the plaintiff] \$10,000 in emotional damages.” *Id.* Our Court of Appeals reversed that award, concluding that “a plaintiff may not recover **for emotional distress** based solely on a claim for negligent damage to property.” *Id.* (emphasis added).

Thus, it appears that *Castillo* prohibits any form of “emotional distress” damages in all property torts, but as explained above, that is not so. *Aguayo* and *Padilla* (both discussed above) expressly allow certain non-economic damages in nuisance claims, and the Court believes that those same damages are also available in trespass claims. To rely on *Castillo* to reach the contrary conclusion for all categories of “emotional” damages would be in error.

“Emotional distress” or “emotional” damages encompass a variety of noneconomic damages. Even under *Castillo*, the fundamental question to determine whether those damages are available under any particular claim is whether the plaintiff will be “adequately compensated by economic damages.” *See id.* at ¶ 28. As a result, this Court has attempted to tailor its ruling to respect the limitations set out in *Castillo*, as well as the damages allowed under *Aguayo* and *Padilla* even though the motion was framed as one to dismiss all “emotional distress” damages.

Second and finally, our Court of Appeals in *Castillo* explained when damages for emotional distress ***are available*** and concluded they are awardable in the following circumstances: (1) for claims of negligent infliction of emotional distress (bystander claims only); (2) for claims of intentional infliction of emotional distress; (3) as part of a loss of consortium claim; (4) and claims based upon intentional misconduct (i.e., willful, wanton, or malicious conduct that is more than mere negligence), defamation, or physical injury. *Castillo*, 2008-NMCA-141, at ¶ 22.

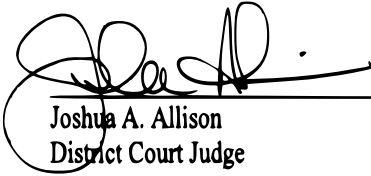
Plaintiffs point out that some of them have claims for personal injury from “smoke exposure.” See December 5, 2025 Response at 5. Under *Castillo*, Plaintiffs’ claims for “emotional distress” damages that accompany physical injuries should not have been dismissed and may also proceed.

VI. Conclusion: Reconsideration is warranted, and the Motion to Reconsider is granted.

For these reasons, it is therefore ORDERED as follows:

1. Plaintiffs’ Motion to Reconsider Orders Granting Summary Judgment as to Private Nuisance and Trespass, and Noneconomic Damages Based on those Claims is **GRANTED**.
2. Plaintiffs’ private nuisance claims are reinstated.
3. Plaintiffs’ trespass claims are reinstated.
4. Plaintiffs’ claims for noneconomic damages for annoyance, discomfort, inconvenience, and interference with their properties under their private nuisance claim are reinstated.
5. Plaintiffs’ claims for noneconomic damages for annoyance, discomfort, inconvenience, and interference with their properties under their trespass claim are reinstated.
6. Plaintiffs’ claims for emotional distress damages associated with physical injuries are reinstated.

IT IS SO ORDERED.



Joshua A. Allison
District Court Judge

This certifies that a true and correct copy of this Order was served upon counsel through Odyssey.



Mary B. Lovato
TCAA to Division XXIII