

SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

In re: McBride Fire Consolidated Litigation | **No. D-202-CV-2022-02160**

Hon. Joshua A. Allison

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

**Plaintiffs' Reply in Support of Motion to Reconsider Orders Granting Summary Judgment
as to Nuisance and Trespass, and Noneconomic Damages Based on those Claims**

I. Introduction

According to the New Mexico Supreme Court, “[t]he general theory of damages is to make the injured party whole.”¹ Further, the High Court has acknowledged the importance of noneconomic damages, which account “for severe harm that results even absent pecuniary loss.”² Consistent with those aims, the District of New Mexico – applying “state law with the objective of obtaining the result that would be reached in state court” – held in *Dolan v. FEMA* that wildfire victims may recover all flavors of noneconomic damages for both nuisance and trespass because a wildfire constitutes both torts and each carries noneconomic damages.³

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¹ *Hood v. Fulkerson*, 1985-NMSC-048, ¶ 12, 102 N.M. 677, 680.

² *Morga v. FedEx Ground Package System, Inc.*, 2022-NMSC-013, ¶ 27.

³ ___ F.Supp.3d. ___ (D.N.M. Dec. 17, 2024) 2024WL 5145808, *22-27.

The district court's holding is unambiguous, as reflected in the opinion's section headings:

- **THE PLAINTIFFS CAN RECOVER NONECONOMIC DAMAGES FOR PRIVATE NUISANCE BECAUSE THE [] FIRE IS AN INVASION OF THE USE AND ENJOYMENT OF PROPERTY.**⁴
- **The [] Fire is a Nuisance under New Mexico State Law.**⁵
- **New Mexico State Law Allows Recovery of Noneconomic Damages Under Private Nuisance.**⁶
- **THE PLAINTIFFS CAN RECOVER NONECONOMIC DAMAGES FOR TRESPASS, BECAUSE THE [] FIRE DESTROYED THE PLAINTIFFS' PROPERTY.**⁷
- **The Court Predicts That the Supreme Court of New Mexico Would Adopt the Restatement's Definition of Trespass and the Restatement's Elements of Trespass.**⁸
- **The [] Fire is a Trespass Under New Mexico State Law.**⁹
- **Noneconomic Damages are Recoverable for Trespass Claims under New Mexico State Law.**¹⁰

PNM nonetheless urges this Court to ignore *Dolan*¹¹ and to deny Plaintiffs the same opportunity to be made whole that the *Dolan* court afforded victims of the Hermit's Peak/Calf Canyon Fires.¹² That is, PNM invites this Court to create a double standard for fire victims in

⁴ *Id.* at *22.

⁵ *Id.*

⁶ *Id.* at *23.

⁷ *Id.* at *25.

⁸ *Id.*

⁹ *Id.* at *26.

¹⁰ *Id.* at *27.

¹¹ PNM accuses Plaintiffs of “insinuat[ing]” that *Dolan* is “controlling law.” The company apparently forgets that Plaintiffs stated quite plainly in their motion to continue the February 10, 2025 trial that “[w]hile [Dolan] is not binding on this Court, it is persuasive authority,” and that undersigned counsel made the same acknowledgment at the February 3 status conference.

¹² The company also chides Plaintiffs for not bringing *Dolan* – which was published twelve days *after* Plaintiffs filed their opposition to PNM's motion for summary judgment – to the Court's attention before the Court issued its ruling. And while it is true that Plaintiffs did not do so, PNM neglects to point out that the company itself could have addressed *Dolan* in its reply brief but chose not to.

this state, which would impede further settlements and would likely have to be resolved by the state Supreme Court. This Court should decline that invitation.

II. The very cases relied upon by PNM demonstrate that nuisance and trespass are not mutually exclusive remedies and that nuisance claims are not precluded where a negligence claim is also available.

A. A “non-trespassory” invasion does not mean a “non-physical invasion”; no New Mexico case holds that a nuisance claim is limited to non-physical invasions of property.

Section 821D of the Restatement, Second, of Torts states that “[a] private nuisance is a nontrespassory invasion of another’s interest in the private use and enjoyment of land.” Absent any authority, PNM equates “nontrespassory” with “non-physical” and leaps to announce a rule of law that does not exist: that nuisance and trespass are “mutually exclusive” remedies and that a nuisance claim sounds only where there has been a “non-physical” invasion of property.¹³

There is *no* New Mexico case that so holds. In fact, the *only* case referring to “non-physical” invasions in the nuisance context is *Kaywal, Inc. v. Avangrid Renewables, LLC.*, a *venue* case where the Court of Appeals considered *only* two issues: “(1) whether the object of Plaintiff’s suit is ‘lands or any interest in lands’ for purposes of New Mexico’s venue statute . . . and (2) whether the district court abused its discretion in failing to join . . . indispensable parties, and/or by failing to dismiss the complaint on the basis of their non-joinder.”¹⁴

In the context of that esoteric analysis, the court first correctly observed that “nuisance actions are non-trespassory,”¹⁵ before later commenting that “nuisance involves no physical intrusion upon the land of another.”¹⁶ The latter comment is – at best – dictum. It is also erroneous, because no New Mexico case has ever held that “non-trespassory” means “non-physical” (i.e., that nuisance claims are limited to non-physical invasions of property). Indeed,

¹³ PNM Motion for Summary Judgment re Trespass and Nuisance at 2, 4-5; *see also* PNM Opposition to Motion for Reconsideration at 1-2.

¹⁴ 2021-NMCA-037, ¶ 13.

¹⁵ *Id.* ¶ 42.

¹⁶ *Id.* ¶ 44.

the case relied upon by the *Kaywal* court for the non-controversial proposition that nuisance requires a non-trespassory interference with the use and enjoyment of one's land, *Scott v. Jordan*, involved a physical invasion of dust and "heavy infestations of flies swarming upon plaintiffs' home, and, which, according to the testimony of plaintiffs, originated from defendant's cattle feeding pens nearby."¹⁷ And tellingly, *Kaywal* cites no authority for the proposition that "non-trespassory" is synonymous with "non-physical." That stands to reason, because no such authority exists.

PNM's non-physical-invasion argument also cannot survive a plain reading of the Restatement, which makes it abundantly clear that the term "nontrespassory" was intended to distinguish private nuisance as a separate tort – not to restrict nuisance to non-physical invasions of property. In the first place, if the framers of the Restatement had meant to restrict nuisance claims to non-physical invasions, they could easily have said so by defining a nuisance as a "non-physical invasion" rather than as a "nontrespassory invasion." And the framers obviously did not have that intention because the comments clearly state that nuisance and trespass are distinct claims and that a plaintiff in a proper case may bring *both*.

First, the Restatement specifically identifies harm to one's property as a basis for a private-nuisance claim:

[I]nterests in the use and enjoyment of land . . . continue to be the interests that are protected by actions for private nuisance. When there is an invasion of these interests, *the plaintiff may recover not only for harm arising from acts that affect the land itself and the comfortable enjoyment of it, but also for harm to members of his family and to his chattels.* . . .¹⁸

The phrase "interest in the use and enjoyment of land" is used in the Restatement in a broad sense. It comprehends not only the interests that a person may have in the actual present use of land for residential, agricultural, commercial, industrial and other purposes, *but also his interests in having the present use value of the land unimpaired by changes in its physical condition. Thus the destruction of trees on vacant land is as much an invasion of the owner's interest in its use and enjoyment as is the destruction of crops or flowers that he is growing on the land for his present use.* . . .¹⁹

¹⁷ 1983-NMCA-022, ¶ 15, 99 N.M. 567, 570.

¹⁸ Restatement (Second) of Torts ¶ 821(D) cmt. a (1979) (emphasis added).

¹⁹ *Id.* at cmt. b (emphasis added).

A plaintiff may recover for nuisance, then, when his property has been destroyed, or its physical condition has changed for the worse. And it should go without saying that such damages are almost always the result of a physical invasion.

The Restatement then distinguishes private nuisance from trespass:

A trespass is an invasion of the interest in the exclusive possession of land, as by entry upon it. A nuisance is an interference with the interest in the private use and enjoyment of the land and does not require interference [w]ith the possession. . . . Trespass and private nuisance are alike in that each is a field of tort liability rather than a single type of tortious conduct. In each, liability may arise from an intentional or an unintentional invasion. For an intentional trespass, there is liability without harm; for a private nuisance, there is no liability without significant harm. In trespass an intentional invasion of the plaintiff's possession is of itself a tort, and liability follows unless the defendant can show a privilege. In private nuisance an intentional interference with the plaintiff's use or enjoyment is not of itself a tort, and unreasonableness of the interference is necessary for liability. . . .²⁰

In other words, a trespass claim requires a physical invasion of property, with or without harm. A nuisance claim may result from a physical invasion of property or some other interference with the use and enjoyment of the land, but the harm must be significant, and the interference must be unreasonable.²¹

Finally, the Restatement explicitly states that the two claims are *not* mutually exclusive:

There may, however, be some overlapping of the causes of action for trespass and private nuisance. *An invasion of the possession of land normally involves some degree of interference with its use and enjoyment and this is true particularly when some harm is inflicted upon the land itself. . . .* If the interference with the use and enjoyment of the land is a significant one, sufficient in itself to amount to a private nuisance, *the fact that it arises out of or is accompanied by a trespass will not prevent recovery for the nuisance, and the action may be maintained upon either basis as the plaintiff elects or both. . . .*

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²⁰ *Id.* at cmt. d. (emphasis added).

²¹ See also *In re Tutu Wells Contamination Litigation*, 909 F.Supp. 991, 996 (D. Virgin Is. 1995) (“In addition to the Restatement, the more well-reasoned, recent . . . opinions addressing nuisance claims suggest that interference with one’s use or enjoyment of his land may, but need not, arise from a physical harm or invasion to that land.”); accord *Adkins v. Thomas Solvent Co.*, 487 N.W.2d 715, 720 (Mich. 1992) (“There are countless ways to interfere with the use and enjoyment of land including interference with the physical condition of the land itself . . .”).

The two actions, trespass and private nuisance, are thus not entirely exclusive or inconsistent, and *in a proper case in which the elements of both actions are fully present, the plaintiff may have his choice of one or the other, or may proceed upon both.*²²

The Restatement expressly acknowledges, then, that both claims may be viable where, as here, “some harm is inflicted upon the land itself.”

The other cases cited by PNM are consistent with the Restatement. That is, they identify a nuisance claim as “non-trespassory” but do not equate “non-trespassory” with “non-physical.” *Padilla v. Lawrence*, for example, does not hold that nuisance claims are limited to non-physical invasions of property; it merely notes that “[w]here there is no physical invasion . . . the cause of action is for nuisance rather than for trespass.”²³

Schwartzman, Inc. v. Atchison, Topeka & Santa Fe Ry. Co., meanwhile, is particularly instructive because in that case, the district court – relying on *Padilla* – engaged in a discussion of “[t]he theoretical differences between trespass and nuisance,” noting that “nuisance liability arises *merely* by virtue of activity which falls short of tangible, concrete invasion.”²⁴ The court also observed that “actual physical invasion . . . is a requisite only of [a] trespass claim,” and that “nuisance does not *require* physical invasion of possession, but only interference with use and enjoyment.”²⁵ Nowhere during this theoretical discourse did the *Schwartzman* court even hint that nuisance claims are limited to non-physical invasions or that the two claims are mutually exclusive. Indeed, the court denied the defendant’s summary judgment motions as to both claims.²⁶ And PNM fails to explain how the court could have denied summary judgment as to both, if the two are, in fact, mutually exclusive, as the company insists.

Remarkably, PNM cites to *Dolan* in support of its argument that “non-trespassory” means “non-physical,” noting that “[e]ven *Dolan* . . . cites with approval the Restatement’s definition of ‘private nuisance as a ‘*non-trespassory* invasion of another’s interest in the private

²² *Id.* at cmt. e (emphasis added).

²³ 1984-NMCA-064, ¶ 26, 101 N.M. 556, 563.

²⁴ 857 F.Supp. 838, 844 (D.N.M. 1994) (emphasis added).

²⁵ *Id.* at 845 (emphasis added).

²⁶ *Id.* at 851.

use and enjoyment of land.’”²⁷ Indeed it does. And there could hardly be a more straightforward repudiation of the company’s argument here than *Dolan*, where the court first identifies a private nuisance as a “non-trespassory” invasion and then finds that wildfire victims are entitled to recover for private nuisance based on the fire’s physical invasion and destruction of their property.²⁸

B. Private-nuisance claims are not precluded simply because a negligence claim is also available.

PNM’s fallback argument here is that the Court of Appeals held in *McNeill v. Burlington Resources Oil & Gas Co.*,²⁹ that private nuisance is unavailable to plaintiffs who have also brought a claim for negligence. As an initial matter, *McNeill* is an oil-and-gas case. And although PNM quotes the Supreme Court’s subsequent opinion stating that it was applying a standard “faithful to the fundamentals of oil and gas *and tort law*,”³⁰ the High Court did not grant certiorari to address this issue. Rather, it stated quite clearly that it did so “to review the proper measure of damages for negligent injury to a surface estate by a mineral lessee and to consider whether [a trust] has standing.”³¹

Moreover, the Court of Appeals in *McNeill* merely concluded that a trial court “did not err” when it precluded a private-nuisance claim from going to a jury where the plaintiff was permitted to present both negligence and trespass theories of liability and “the damages available to the Plaintiffs [was] the same.”³² That tepid affirmance falls short of establishing a bright-line rule requiring summary judgment on private-nuisance claims where a complaint also alleges

²⁷ Opposition to Motion for Reconsideration at 6-7 (emphasis in original) (quoting *Dolan*, 2024 WL 5145808 at *22 (quoting Restatement (Second) of Torts § 821D (1979))).

²⁸ 2024WL 5145808 at *22-23.

²⁹ 2007-NMCA-024, 141 N.M. 212.

³⁰ Opposition at to Motion for Reconsideration at 10 (emphasis in original) (quoting *McNeill v. Burlington Resources Oil & Gas Co.*, 2008-NMSC-022, ¶ 27, 143 N.M. 740, 747).

³¹ *McNeill*, 2008-NMSC-022, ¶ 12.

³² 2007-NMCA-024, ¶ 40.

negligence. And once more, the potential remedies here are definitely not the same, because private nuisance carries noneconomic damages, while negligence does not.³³

PNM's interpretation of *McNeill* is also wholly inconsistent with both *Schwartzman* and *Dolan*. Once again, in *Schwartzman*, where negligence was alleged in the complaint,³⁴ the District of New Mexico, interpreting state law, denied motions for summary judgment with respect to both nuisance and trespass.³⁵ And in *Dolan*, of course, the District of New Mexico held that wildfire victims can recover noneconomic damages for nuisance and trespass, as well as other compensatory and general damages.³⁶

Finally, PNM surprisingly doubles down on its argument that other jurisdictions – including California – are in accord, alleging that Plaintiffs “fail to cite a single out of state case permitting both a private nuisance and negligence cause of action based on the same facts to proceed to trial.”³⁷ That is simply not true. As detailed in Plaintiffs' motion, there is no rule in California precluding plaintiffs from claiming both negligence and private nuisance, and fire victims routinely allege negligence, private nuisance, and trespass in their complaints.

The construction-defect case cited by PNM, *El Escorial Owners' Ass'n v. DLC Plastering, Inc.*,³⁸ was expressly disavowed by another California Court of Appeal case, *Lynch v. Peter & Associates etc.*, which noted that “[e]ven if the nuisance claim relies on the same facts . . . it does not mean the claims are identical or duplicative.”³⁹ And Plaintiffs did, in point of fact, cite a case where plaintiffs brought both claims. In *Hensley v. San Diego Gas & Electric Co.*, the wildfire-victim plaintiffs alleged, among other things, negligence, nuisance, and trespass in the

³³ Notwithstanding the plain language of the opinion, PNM contends that the damages available were *not* the same. Even if the company is correct, the court stated that the damages were the same, and that understanding undeniably influenced its decision to affirm the trial court.

³⁴ 857 F.Supp. at 840.

³⁵ *Id.* at 851.

³⁶ See 2024 WL 5145808 at *28-32.

³⁷ Opposition to Motion for Reconsideration at 10-11.

³⁸ 154 Cal.App.4th 1337 (Cal. Ct. App. 2007).

³⁹ 104 Cal.App.5th 1181, 1198 (Cal. Ct. App. 2024).

complaint.⁴⁰ The parties disputed whether noneconomic damages were available under nuisance and trespass and accordingly entered into a stipulated judgment.⁴¹ The Court of Appeal then held that noneconomic damages were available under both nuisance and trespass, “even where the trespass or nuisance involves solely property damage.”⁴²

III. PNM cites no New Mexico case holding that negligent and reckless trespass are not valid claims, or that a plaintiff may not bring both a negligence and a trespass claim based on the same facts; this Court should accordingly follow *Dolan*.

Notwithstanding the fact that PNM claims that *Dolan* contradicts “binding New Mexico authority,”⁴³ the company fails to cite a single New Mexico case holding that only intentional trespass claims are recognized in this state. It instead cites to a federal case from Pennsylvania where a district court concluded that “[t]here is not a sufficient indication that Pennsylvania courts, if confronted with the question today, would allow plaintiffs to state a cause of action based on either [reckless or negligent trespass].”⁴⁴ The salient distinction here, of course, is that the federal district court in *this* state – relying upon the Restatement, as well as *Padilla* and *North v. Public Service Co. of New Mexico*⁴⁵ – has explicitly held to the contrary: “[T]he Court predicts that the Supreme Court of New Mexico *would* adopt the Restatement’s definition and elements of trespass and also follow the Court of Appeals of New Mexico. . . .”⁴⁶ And once again, the New Mexico Supreme Court has observed that the state’s courts “have [] been very willing to adopt the view of the Restatement . . . to assist in our development of new tort areas.”⁴⁷

PNM’s alternative argument here is a reprise of its contention that a plaintiff may not maintain both a negligence and a nuisance claim based on the same facts – simply substituting “trespass” for “nuisance.” The notion apparently underlying both arguments is that a plaintiff

⁴⁰ 7 Cal.App.5th 1337, 1340.

⁴¹ *Id.* at 1341.

⁴² *Id.* at 1349.

⁴³ Opposition to Motion for Reconsideration at 13.

⁴⁴ *In re One Meridian Plaza Fire Litigation*, 820 F.Supp. 1460, 1483 (E.D. Penn. 1993).

⁴⁵ 1980-NMCA-031, ¶ 4, 94 N.M. 246.

⁴⁶ *Dolan*, 2024 WL 5145808 at *26 (emphasis added).

⁴⁷ *Schmitz v. Smentowski*, 1990-NMSC-002, ¶ 49, 109 N.M. 386, 396.

may not bring claims based on the same facts because they are “duplicative.”⁴⁸ Once more, the company relies upon no New Mexico authority in support⁴⁹ yet purports to be “baffl[ed]” by Plaintiffs’ observation that the argument is inconsistent with *Dolan*, *Schwartzman*, and the Restatement.⁵⁰ Plaintiffs will accordingly restate the obvious. The *Dolan* court unambiguously held that fire victims may recover noneconomic damages for both private nuisance and trespass, as well as otherwise available compensatory damages. The *Schwartzman* court denied motions for summary judgment as to both nuisance and trespass where negligence was also alleged. And the Restatement says that a plaintiff may bring both nuisance and trespass claims where the facts support both; nowhere does it suggest that those claims may not be viable where a plaintiff has also alleged negligence.

IV. Conclusion

The district court’s opinion in *Dolan* is consistent with both the Restatement and New Mexico law, which generally follows the Restatement with the aim of making victims whole. There is no “binding” contrary authority and this Court should avoid creating two standards of justice for wildfire victims in this state. Plaintiffs respectfully request that this Court grant their motion for reconsideration.

Dated: April 30, 2025

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⁴⁸ See Opposition to Motion for Reconsideration at 13. Even if this were the law, the appropriate remedy would not be summary judgment. Rather, Plaintiffs should be permitted to elect a theory at trial. See Restatement (Second) of Torts § 821D cmt. e (1979).

⁴⁹ PNM’s interpretation is also inconsistent with New Mexico’s rule precluding double recovery “[w]here there are different theories of recovery . . . but the relief requested was the same.” *Hood*, 1985-NMSC-048, ¶ 12.

⁵⁰ Opposition to Motion for Reconsideration at 14.