

**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’ Motion to Reconsider Orders Granting Summary Judgment as to Private
Nuisance and Trespass, and Noneconomic Damages Based on those Claims¹**

I. Introduction

Plaintiffs are victims of the McBride Fire, which started after predicted high winds caused a defective pine tree to crash into a PNM powerline in Ruidoso. Plaintiffs allege that the fire was both a nuisance and a trespass, and that they may recover noneconomic damages under both theories of liability. Specifically, Plaintiffs allege that their properties were damaged by flames, smoke, soot, ash, and post-fire flooding, which constitute both a nuisance and a trespass under New Mexico law.

During the first wave of bellwether litigation, PNM moved for summary judgment as to both claims, as well as to emotional-distress damages based on those claims.² On January 21, 2025, this Court issued an “Order on Multiple Motions,” which granted PNM’s motions for summary judgment regarding Plaintiffs’ claims for nuisance and trespass. With respect to nuisance, the Court held that Plaintiffs’ claims “are without factual basis to proceed” because

¹ Defendants state that they are opposed to this motion. Plaintiffs do not move for reconsideration of their public-nuisance claim.

² PNM filed two separate motions – one for summary judgment as to both nuisance and trespass, and the other for summary judgment on emotional-distress damages based on nuisance and trespass. This motion seeks reconsideration of the Court’s January 21, 2025 orders regarding the viability of both claims, as well as noneconomic damages based on those claims.

they do not concern “*intangible . . . invasions of their use and enjoyment of their real properties*,” and that “private nuisance is not available when negligence will be presented to the jury.”³ Regarding trespass, the Court “agree[d] with PNM that there is no viable claim for negligent trespass in New Mexico” and that Plaintiffs were required to demonstrate that it was “PNM’s intention to cause the McBride Fire and to damage Plaintiffs’ properties.”⁴ The Court also held that – because nuisance and trespass were not viable theories of liability in this case – Plaintiffs cannot recover emotional-distress damages based on those claims.⁵

On December 17, 2024 – twelve days after Plaintiffs filed their opposition to PNM’s motion for summary judgment – the United States District Court for the District of New Mexico held in *Dolan v. FEMA* that “New Mexico State law allows [wildfire] victims . . . to recover noneconomic damages for nuisance [and] trespass . . . such as damages for emotional distress, discomfort, annoyance, and inconvenience.”⁶

At a status conference on February 3, 2025, this Court vacated the February 10, 2025 trial date and stated that its January 21 orders were not final for purposes of starting the clock for motions for reconsideration or for requesting interlocutory-appellate review. Consistent with Plaintiffs’ proposed scheduling order, this motion for reconsideration follows. Section III of this brief summarizes the District of New Mexico’s holding in *Dolan*. Sections IV and V address the arguments raised by PNM in their motions for summary judgment regarding nuisance and trespass, respectively.

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³ Order ¶ 6 (emphasis added).

⁴ *Id.*

⁵ *Id.* ¶ 11.

⁶ ___ F. Supp. 3d ___, 2024 WL 5145808, *1 (Dec. 17, 2024).

II. This Court enjoys “considerable discretion” in ruling on a motion for reconsideration.

The Court ruled that its January 21, 2025 orders were not final for purposes of Rule 1-059. It should therefore have unfettered discretion to grant this motion for reconsideration.⁷ Even if this motion is otherwise subject to that rule, however, this Court has considerable discretion to grant it.

As a threshold matter, the New Mexico Supreme Court has held that the pertinent New Mexico rules are based on their federal counterparts and that federal authority is persuasive:

Rule 1-059(E) and Rule 1-060(B) NMRA are taken from their corresponding [federal] counterparts. When our state court rules closely track the language of their federal counterparts, we have determined that federal construction of the federal rules is persuasive authority for the construction of New Mexico rules.⁸

And federal courts in New Mexico and the Tenth Circuit have noted that “[g]rounds warranting a motion to reconsider include [] an intervening change in the controlling law” and have held that a trial court “has considerable discretion in ruling on a motion to reconsider.”⁹

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⁷ See Rule 1-054(B) NMRA (a nonfinal order “may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties’ rights and liabilities”).

⁸ *Albuquerque Redi-Mix, Inc. v. Scottsdale Ins. Co.*, 2007-NMSC-051, ¶ 9, 142 N.M. 527, 530 (alteration in original) (quotation and citation omitted).

⁹ *Lujan v. City of Santa Fe*, 122 F. Supp. 3d 1215, 1231 (D.N.M. 2015) (quoting *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000) and citing *Phelps v. Hamilton*, 122 F.3d 1309, 1324 (10th Cir. 1997)).

III. The pertinent facts of this case are indistinguishable from *Dolan*, where the District of New Mexico held that wildfire victims may recover noneconomic damages for both nuisance and trespass under New Mexico state law.

A. Background

The Hermit’s Peak/Calf Canyon Fire resulted from prescribed burns set by the U.S. Forest Service. The fires got out of control and “scorched over 340,000 acres of land in northeastern New Mexico, destroying over 900 structures, and forcing the evacuation of over 15,000 households” across three counties.¹⁰ The Hermit’s Peak Fire Assistance Act, administered by FEMA, was created by Congress to “compensate the victims of the [fire] for injuries resulting from the fire.”¹¹ The plaintiffs in *Dolan v. FEMA* – just like Plaintiffs here – suffered property damage from the fire and post-fire flooding, and sought to recover noneconomic damages for nuisance and trespass.¹²

In *Dolan*, the District of New Mexico¹³ considered “whether the Hermit’s Peak Fire Assistance Act allows victims of the [fire] to recover noneconomic damages for discomfort, annoyance, inconvenience, and emotional distress under New Mexico State law.”¹⁴ Before undertaking its state-law analysis, the court noted that it would apply “state law with the objective of obtaining the result that would be reached in state court,” and that where there is no controlling opinion from the New Mexico Supreme Court, a “district court must . . . predict how the Supreme Court of New Mexico would [rule].”¹⁵ The court also observed that “[i]t has long been the policy of [New Mexico] courts to follow in the footsteps of the Restatement of Torts, 2d.”¹⁶

¹⁰ *Dolan*, 2024 WL 5145808 at *1.

¹¹ *Id.* at *2.

¹² *Id.* at *1.

¹³ The Honorable James O. Browning, presiding.

¹⁴ *Id.* (citation omitted).

¹⁵ *Id.* at *16 (ellipsis and alteration in original) (quotation omitted).

¹⁶ *Id.* at *24 (quoting *Montanez v. Cass*, 1975-NMCA-142, ¶ 39, 89 N.M. 32, 38); see also *Schmitz v. Smentowski*, 1990-NMSC-002, ¶ 49, 109 N.M. 386, 393 (“We have also been very willing to adopt the view of the Restatement of Torts to assist in our development of new tort areas.”).

B. The *Dolan* court held that a wildfire constitutes “an invasion of the use and enjoyment of property” and that victims may recover for private nuisance where the defendant’s conduct was negligent or reckless.

The court in *Dolan* began its analysis with the elements of a private-nuisance claim, quoting the New Mexico Court of Appeals and the Restatement:

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 the 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.¹⁷

Addressing the threshold question – whether the conduct is a legal cause of an invasion of another’s interest in the use and enjoyment of land – the court noted that the fire “destroyed [] Plaintiffs’ property and most of their personal possessions” and “thus constitutes an invasion into the Plaintiffs’ land.”¹⁸ Because the fire was unintentional, the court then considered whether the invasion was “actionable under the rules controlling liability for negligent or reckless conduct,”¹⁹ and concluded that it was.²⁰

With respect to nuisance based on negligence, the court held that “the Forest Service’s conduct was negligent because the Forest Service has a duty to not damage people’s property and [it] breached that duty.”²¹ Likewise, PNM undeniably has a duty to not damage people’s

¹⁷ *Id.* at *22 (quoting *Scott v. Jordan*, 1983-NMCA-022, ¶ 12, 99 N.M. 567, 570 (citing Restatement (Second) of Torts § 822 (1979))).

¹⁸ *Id.*; see also *id.* (noting that flood damage also constitutes an invasion of property).

¹⁹ Because the fire was a prescribed burn that got out of control, the *Dolan* court also considered whether the invasion resulted from “abnormally dangerous conditions or activities.” *Id.* at *22-23. Plaintiffs here do not contend that PNM was engaged in an *abnormally* dangerous activity (e.g., blasting or prescribed burns). But the company is subject to an elevated standard of care because the maintenance of power lines is an “inherently dangerous activity.” See *id.*; see also *Torres v. El Paso Electric Co.*, 1999-NMSC-029, ¶ 36, 127 N.M. 729, 744 (“the business of distributing high voltage electricity [] is an inherently dangerous activity”), *overruled in part on other grounds by Herrera v. Quality Pontiac*, 2003-NMSC-018, 134 N.M. 43.

²⁰ *Id.* at *23.

²¹ *Id.*

property, and Plaintiffs allege that it negligently did so. That – alone – is sufficient for Plaintiffs’ nuisance claim to survive summary judgment.

The court then held that the Forest Service’s conduct was also reckless under New Mexico’s heightened standard for inherently dangerous activities, which states that “[w]hen there is a high risk of danger, conduct that breaches the duty of care is more likely to demonstrate recklessness.”²² Likewise, Plaintiffs here have also alleged that PNM’s conduct was reckless (e.g., by failing to regularly inspect the vegetation around its powerlines, insisting on maintaining dangerous recloser settings during fire season in Hazardous Fire Areas, and generally declining to follow its own Wildfire Mitigation Plan). And the company is subject to the same exacting standard for recklessness as the USFS in *Dolan* because the maintenance of powerlines is an “inherently dangerous activity.”²³ Nuisance based on recklessness is accordingly another viable claim for Plaintiffs.

C. The *Dolan* Court held that wildfire victims may recover noneconomic damages – including emotional-distress damages – for nuisance.

Before addressing the district court’s conclusion in *Dolan* that all flavors of noneconomic damages are available to wildfire victims with nuisance claims, it bears revisiting PNM’s position, which is that although noneconomic damages like “annoyance, discomfort, inconvenience, and interference with property” are available under a nuisance theory, emotional-distress damages are not.²⁴ In other words, PNM attempts to cabin off emotional distress from other types of noneconomic damages. Specifically, the company states that it “has already conceded that New Mexico law allows [for the former types] of noneconomic damages for

²² *Id.* (alteration in original) (quoting NMRA 13-1827).

²³ *Torres*, 1999-NMSC-029, ¶ 36; *see also id.* ¶ 29 (“Because the design, installation, and maintenance of the power pole and conductors in this case presented a peculiar risk or special danger in the absence of reasonable precautions, we conclude that this case involves an inherently dangerous activity.”).

²⁴ *See* PNM Reply in Support of Motion for Summary Judgment on Emotional Distress at 1, 3-4.

private nuisance claims,”²⁵ but insists that “emotional distress damages are not available for *any* of [Plaintiffs’] claims.”²⁶ The *Dolan* court had a different view.

Citing to decisions of the New Mexico courts and the Restatement, the court began its analysis with the observation that “property owners in a private nuisance action can recover damages for discomfort and annoyance.”²⁷ It then turned to the issue of emotional-distress damages and the authorities relied upon by PNM in this case: the Court of Appeals’ holding in *Castillo v. City of Las Vegas*²⁸ and an Opinion of the Attorney General of New Mexico interpreting *Castillo*. In *Castillo*, the Court of Appeals reversed a “jury’s award of emotional damages from a public sewer-system backup that damaged plaintiffs’ home,”²⁹ and the New Mexico Attorney General interpreted *Castillo* to portend that the state Supreme Court would probably not sustain the award of noneconomic damages for nuisance or trespass “based solely on emotional distress.”³⁰

The district court disagreed, finding the *Castillo* court’s analysis to be unsound and the Attorney General’s interpretation of *Castillo* to be unpersuasive:

The Court does not agree with the Attorney General of New Mexico’s Opinion which notes that it is “unlikely” that a noneconomic damage award for nuisance or trespass “would be permitted based solely on emotional distress.” . . . The Court thinks that the Supreme Court of New Mexico, consistent with its own holding in *Aguayo*, would conclude that plaintiffs may recover for any discomfort and annoyance resulting from the sewage backup, and that the determination of such noneconomic damages is for the fact finder. Furthermore, the Court of Appeals of New Mexico’s holding in *Castillo v. City of Las Vegas* is not persuasive because there, the court ultimately concludes that the economic damages award of \$30,000 adequately compensates the plaintiffs’ loss of property damage. The Court of Appeals, therefore, ignores that recovery for discomfort and annoyance can be “in addition to the harm to [the plaintiffs’] proprietary

²⁵ *Id.* at 4.

²⁶ *Id.* at 3 (emphasis in original).

²⁷ *Dolan*, 2024 WL 5145808 at *23-24 (citing *Aguayo v. Village of Chama*, 1969-NMSC-005, ¶ 7 79 N.M. 729, 731 and *Padilla v. Lawrence*, 1984-NMCA-064, 101 N.M. 556); see also *id.* at *24 (noting that noneconomic damages “for private nuisance is consistent with the Second Restatement of Torts § 929(1)”).

²⁸ 2008-NMCA-141, 145 N.M. 205.

²⁹ *Dolan*, 2024 WL 5145808 at *24.

³⁰ *Id.*

interests,” and that damages for discomfort or annoyance is “within the sound discretion of the trier of the facts.”³¹

The *Dolan* court then summarized its holding that New Mexico fire victims may recover all types of noneconomic damages for private nuisance:

Here, following the Restatement, the Supreme Court of New Mexico’s reasoning in *Aguayo*, and the Court of Appeals of New Mexico’s reasoning in *Padilla*, the Court concludes that noneconomic damages for pain and suffering, discomfort, annoyance, and inconvenience as a result of the [fire] can be recoverable under a private nuisance claim. . . . The Plaintiffs allege pain and suffering as a result of the damage to their property and possessions. . . . [T]hese noneconomic damages are recoverable in addition to the harm to the Plaintiffs’ proprietary interests. The Court concludes that the Plaintiffs can recover for noneconomic damages such as annoyance, discomfort, and inconvenience that result from the [fire] which constitutes a nuisance under New Mexico State law.³²

D. The *Dolan* court held that where a wildfire results from negligence or recklessness, its victims may recover noneconomic damages for trespass.

The court in *Dolan* began its analysis of trespass by defining the tort as an “unauthorized entry upon the land of another,” and predicting that the New Mexico Supreme Court will follow the holdings of the Court of Appeals, which are consistent with the Restatement:

The Court predicts that the Supreme Court of New Mexico would agree with the Court of Appeals of New Mexico’s characterization of trespass in *Padilla* and in *North v. Public Service Co. of New Mexico*, because they are consistent with the Restatement, and as stated previously, the New Mexico courts often look to the law as stated in the Restatement.³³

Significantly, the court also noted that the Restatement identifies *three* types of trespass: 1) intentional entries; 2) reckless or negligent entries; and 3) accidental entries.³⁴ Because the U.S. Forest Service – like PNM here – was obviously not trying to start a wildfire that would destroy the victims’ property, the court concluded that “Plaintiffs do not have a claim for

³¹ *Id.* (alteration in original) (quoting Restatement (Second) of Torts, § 929(1) and *Aguayo*, 1969-NMSC-005, ¶ 8, respectively).

³² *Id.* at *25; *see also id.* at *1 (identifying the issue presented as plaintiffs’ ability to “recover noneconomic damages for discomfort, annoyance, inconvenience, and emotional distress”).

³³ *Id.* at *26 (citing *Padilla*, 1984-NMCA-064, ¶ 26 and *North v. Public Service Co. of New Mexico*, 1980-NMCA-031, ¶ 4, 94 N.M. 246).

³⁴ *Id.* Presumably because the court concluded that the fire was both a negligent and reckless entry and therefore a trespass, it did not address what constitutes an accidental-entry trespass. *See id.* at *26-27.

intentional trespass.”³⁵ But the Court determined – just as it did regarding nuisance – that “because the Forest Service’s conduct is negligent and reckless . . . and because the [fire] physically invaded the Plaintiffs’ land, the [fire] is a trespass under New Mexico State law.”³⁶

The court then addressed the availability of noneconomic damages, predicting that “the Supreme Court of New Mexico would conclude that a plaintiff can recover noneconomic damages for discomfort, annoyance, and inconvenience under a trespass claim” because the “New Mexico State courts . . . consider trespass and nuisance within the same species of legal claims.”³⁷ The court also again relied upon the Restatement, which “explains that a trespasser’s liability ‘include[s] mental suffering of the possessor and the members of his household, and its physical consequences.’”³⁸ The district court thus concluded that New Mexico fire victims “can recover noneconomic damages for emotional pain and suffering under trespass.”³⁹

In short, *Dolan* squarely holds that New Mexico wildfire victims may recover all types of noneconomic damages for both nuisance and trespass that result from negligent or reckless conduct. Indeed, the court concluded that FEMA’s contrary determination was “arbitrary and capricious.”⁴⁰

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³⁵ *Id.* at *26,

³⁶ *Id.* at *27.

³⁷ *Id.*

³⁸ *Id.* (alteration in original) (quoting Restatement (Second) of Torts § 162 Reporter’s Notes).

³⁹ *Id.*

⁴⁰ *Id.* at *37.

IV. New Mexico authorities neither hold that nuisance and trespass are mutually exclusive nor that nuisance is unavailable to plaintiffs who also have other claims.

A. A physical invasion of property is an element of trespass but not nuisance; the two claims are not mutually exclusive, and Plaintiffs may recover under both theories.

PNM contends that nuisance claims are limited to non-physical invasions of property and repeatedly asserts that the two claims are therefore “mutually exclusive.”⁴¹ This argument is based on strained interpretations of New Mexico case law, is contrary to the Restatement, and cannot be reconciled with *Dolan*. And remarkably, PNM’s contention that the two claims are mutually exclusive is irreconcilable with one of the three cases the company relies upon to make this very argument.

As a threshold matter, no New Mexico case holds that nuisance and trespass are mutually exclusive. Rather, PNM cobbles its argument together from dictum in a venue case, *Kaywal, Inc. v. Avangrid Renewables, LLC*,⁴² and two cases where the plaintiffs had difficulty proving physical invasions of their property – *Padilla v. Lawrence* and *Schwartzman, Inc. v. Atchison, Topeka & Santa Fe Ry. Co.*⁴³

In *Kaywal*, the Court of Appeals denied a defendant’s motion to dismiss for improper venue, mentioning in passing that “nuisance involves no physical intrusion upon the land of another.”⁴⁴ This remark is hardly a pronouncement from the New Mexico courts that nuisance and trespass are mutually exclusive tort claims. And in *Padilla*, the plaintiffs were unable to establish that “blowing particulate matter” from a nearby plant had “settled upon and damaged” their property; the Court of Appeals accordingly held that “where there is no physical invasion of property . . . the cause of action is for nuisance rather than for trespass.”⁴⁵ Importantly, the *Padilla* court stopped well short of stating that nuisance claims are limited to non-physical invasions or that nuisance and trespass are mutually exclusive.

⁴¹ PNM Motion for Summary Judgment on Trespass and Nuisance Claims at 4-6.

⁴² 2021-NMCA-037.

⁴³ 857 F. Supp. 838 (D.N.M. 1994).

⁴⁴ 2021-NMCA-037, ¶ 43.

⁴⁵ 1984-NMCA-064, ¶ 26.

But it is *Schwartzman* that is particularly instructive here. In *Schwartzman*, the District of New Mexico considered a plaintiff's private-nuisance and trespass claims based on improperly disposed chemical waste that allegedly contaminated the plaintiff's groundwater.⁴⁶ Citing *Padilla*, the court first considered "[t]he theoretical differences between nuisance and trespass," noting that "trespass contemplates actual physical entry or invasion, whereas nuisance liability arises *merely* by virtue of activity which falls short of tangible, concrete invasion."⁴⁷

Significantly, at no point in this theoretical discussion does *Schwartzman* state that the two claims are mutually exclusive. Rather, while expressing concern about the plaintiff's quantum of proof that the chemical waste had, in fact, contaminated the plaintiff's groundwater, the court observed that an actual physical invasion is an element of only a trespass claim:

Due to Plaintiff's dearth of evidence demonstrating contamination of the groundwater directly underneath Plaintiff's property, Defendant contends Plaintiff's trespass and nuisance claims must fail. However, *actual physical invasion of the contamination is a requisite element only of Plaintiff's trespass claim*. As discussed, nuisance does not require physical invasion of possession, but only interference with use and enjoyment.⁴⁸

According to *Schwartzman*, then, the distinction between nuisance and trespass is that a physical invasion of property is an element of trespass, but not nuisance – *not* that nuisance is limited to non-physical invasions and that the two are mutually exclusive. And this interpretation of *Schwartzman* is the only one that can be squared with the court's ruling, because it went on to deny the defendant's summary-judgment motions as to *both claims*,⁴⁹ which is certainly not something it would have done if the claims were, in fact, mutually exclusive.

The Restatement is consistent with both *Schwartzman* and *Dolan*; it states that the two claims are neither mutually exclusive nor necessarily inconsistent:

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⁴⁶ 857 F. Supp. at 840.

⁴⁷ *Id.* at 844 (emphasis added).

⁴⁸ *Id.* at 845 (emphasis added).

⁴⁹ *Id.* at 847.

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 with 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. . . .

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.* Thus the flooding of the plaintiff's land, which is a trespass is also a nuisance if it is repeated or of long duration. . . .

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.⁵⁰

This is a proper case. Although PNM stretches to argue that the Restatement limits the availability of both claims to situations where the nuisance is continuing, the repeated-flooding example above merely illustrates one way that an “interference with the use and enjoyment of the land” can be “significant in itself to amount to a private nuisance.” The fire and flooding here constitute both nuisance and trespass. This Court should follow *Dolan*, *Schwartzman*, and the Restatement.

B. The New Mexico courts have *not* held that a plaintiff may not recover for nuisance where other forms of relief, like negligence, are also available.

Again relying upon an ambitious reading of nonrepresentative New Mexico caselaw, PNM avers that a plaintiff may not recover for private nuisance when he or she also has a negligence claim, because the nuisance claim is an “unnecessary redundancy.”⁵¹ In addition to being irreconcilable with *Dolan*, the company's argument is based exclusively on oil-and-gas cases, where noneconomic damages – which should be available to Plaintiffs here – were not in play, and the same measure of damages was accordingly available to the plaintiffs, with or without the nuisance claims.

⁵⁰ Restatement (Second) of Torts § 821D cmts. d & e (1979) (emphasis added).

⁵¹ PNM Reply re Nuisance and Trespass at 11.

The starting point is *Amoco Prod. Co. v. Carter Farms*, where the plaintiff did not actually plead private nuisance in the complaint, and the trial court granted a judgment notwithstanding the verdict with respect to damages that the jury attributed to private nuisance on the verdict form.⁵² After noting the plaintiff's failure to plead private nuisance, the Supreme Court "decline[d] to adopt private nuisance as theory of recovery for the diminution in the value" of the property in that case. The Court then went on to note that, in the limited context of oil-and-gas cases where surface owners claimed that mineral lessees had damaged their property, "state courts have rarely utilized a private nuisance theory *since recovery ordinarily can be based upon standard theories of negligence.*"⁵³

In *McNeill v. Burlington Res. Oil & Gas Co.*, another oil-and-gas case, the defendant moved for a directed verdict on private nuisance, arguing – presumably based on *Carter Farms* – that the state Supreme Court had "declined to adopt private nuisance as a theory of recovery," and the trial court granted the motion.⁵⁴ The Court of Appeals disagreed with the defendant and the trial court, finding that the Supreme Court had "declined to adopt the theory of private nuisance in *Carter Farms* because it was not pled by the plaintiffs."⁵⁵ The Court of Appeals instead affirmed the trial court because the plaintiff was able to present both negligence and trespass theories to the jury, and "even without the theory of private nuisance available, *the damages available to Plaintiffs are the same.*"⁵⁶

Here, in contrast, the damages available to Plaintiffs under negligence and nuisance are definitely not the same, because noneconomic damages for property damage are generally not

⁵² 1985-NMSC-071, ¶¶ 2 and 9, 103 N.M. 117, 118-19, *abrogated on other grounds by McNeill v. Burlington Res. Oil & Gas Co.*, 2008 NMSC-022, 143 N.M. 740.

⁵³ *Id.* ¶ 10 (emphasis added).

⁵⁴ 2007-NMCA-024, ¶ 6, 141 N.M. 212, 215, *abrogated on other grounds by McNeill*, 2008-NMSC-022.

⁵⁵ *Id.* ¶ 39.

⁵⁶ *Id.* ¶ 40 (emphasis added).

available for negligence in the absence of a physical injury,⁵⁷ but they are available for private nuisance.⁵⁸ Simply put, neither *Carter Farms* nor *McNeill* addresses the circumstances of this case, where Plaintiffs seek to recover noneconomic damages for the destruction of their homes and personal property, rather than strictly economic redress necessary to clean up defunct drilling sites.

It also bears mentioning that if the New Mexico courts had, in fact, adopted a rule precluding plaintiffs with negligence claims from also pursuing private-nuisance claims, that rule would be an extreme outlier. Indeed, the company's motion concedes as much, noting in a footnote only three cherry-picked decisions affirming the dismissal of "duplicative" negligence and nuisance claims from appellate courts in three other states.⁵⁹ In *Pepper v. JJ Welcome Const. Co.*, the appellate court, relying on a discrete Washington statute requiring courts to consolidate multiple claims based on identical facts, affirmed the dismissal of trespass and nuisance claims where there was also "insufficient evidence" for them to proceed.⁶⁰ Significantly, noneconomic damages were unavailable to the plaintiff under all three theories of liability, because the court addressed the dismissal of the noneconomic-damage claims separately.⁶¹ Similarly, in *Drake v. Village of Lima*, the Appellate Division of the Supreme Court of New York⁶² dismissed a private-nuisance claim that was "based on the same facts, alleges the same wrongs, and seeks the same damages as the[] negligence cause of action."⁶³

⁵⁷ See *Fernandez v. Walgreen Hastings Co.*, 1998-NMSC-039, ¶ 6, 126 N.M. 263, 266 (defining negligent infliction of emotional distress as "an extremely narrow tort that compensates a bystander who has suffered severe emotional shock as a result of witnessing a sudden, traumatic event that causes serious injury or death to a family member").

⁵⁸ See PNM Reply re Emotional Distress at 3 (conceding that noneconomic damages other than emotional distress are available for private nuisance); see also *Dolan*, 2024 WL 5145808 at *25 (holding that all types of noneconomic damages, including emotional distress, are available for private nuisance).

⁵⁹ See PNM Motion for Summary Judgment re Nuisance and Trespass at 8, n.5.

⁶⁰ 871 P.2d 601, 614 (Wash. Ct. App. 1994).

⁶¹ *Id.*

⁶² In New York, the "Supreme Court" refers to the trial courts. See <https://nycourts.gov/courts/index.shtml>.

⁶³ 221 A.D. 3d 1481, 1483 (N.Y. App. Div. 2023) (emphasis added).

But the California case in PNM’s footnote, *El Escorial Owner’s Ass’n. v. DLC Plastering, Inc.*,⁶⁴ warrants additional scrutiny, because the company’s suggestion that California fire victims cannot recover for both nuisance and negligence is misleading.⁶⁵

In *Escorial*, in the context of a construction-defect case, the appellate court noted that California’s definition of nuisance is “so broad that it could be . . . applied indiscriminately to everything,” and that the viability of a nuisance claim accordingly “depends on the facts of each case.”⁶⁶ The court then affirmed the trial court’s judgment that the plaintiff could not maintain a nuisance action, noting that the plaintiff had pleaded only “conclusory allegations [] not sufficient to state a cause of action” and that – just like the plaintiffs in *Carter Farms*, *McNeill*, *Pepper*, and *Drake* – the plaintiff “only sought *the same monetary relief*” that it sought for negligence.⁶⁷

The appellate court’s decision in *El Escorial* was thus narrowly circumscribed. Even so, the case was expressly disavowed by another California appellate court, which had “serious due process” concerns with its holding:

[O]ur discomfort with *El Escorial* is perhaps more fundamental. . . . With great respect to our distinguished colleagues in our sister court, we find this framework for analyzing the viability of a nuisance claim in the construction defect context a bit rigid. Nuisance is an entirely separate cause of action from negligence, and the analysis should focus on whether the plaintiff has alleged all necessary elements of the claim Even if the nuisance claim relies on the same facts . . . it does not mean the claims are identical or duplicative. Indeed, many pleadings allege numerous causes of action based on the same facts. This does not mean the causes of action are all the same. . . . We have serious due process concerns about granting summary judgment on such reasoning.⁶⁸

And most importantly, the California courts have repeatedly, unequivocally held that wildfire victims may recover noneconomic damages resulting from property damage under both nuisance and trespass – independently of their claims for negligence:

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

⁶⁵ See PNM Motion re Nuisance and Trespass at 8, n.5 (“Under this analysis . . . the nuisance claim would be subject to dismissal.”).

⁶⁶ *Id.* at 1348 (quotation omitted).

⁶⁷ *Id.* at 1349 (emphasis added).

⁶⁸ *Lynch v. Peter & Associates etc.*, 104 Cal.App.5th 1181, 1198 (Cal. Ct. App. 2024).

Negligence and breach of contract cases are inapposite where the torts of trespass and nuisance are involved. As we have summarized above, “precedent in the law of nuisance and trespass establishes quite clearly that emotional distress without physical injury is compensable.” Where the sole damage from a trespass or nuisance is to the property itself, emotional distress damages are not precluded.⁶⁹

PNM’s suggestion that California law precludes wildfire victims who have negligence claims from also recovering for nuisance is utterly specious.

In short, PNM cites no case from any jurisdiction holding that a plaintiff with a negligence claim is precluded from also bringing a private-nuisance claim, where the damages available under the two claims are different. Moreover, the company’s interpretation of *Carter Farms* and *McNeill* is completely irreconcilable with several New Mexico cases where plaintiffs were permitted to recover for, or at least present to the finder of fact, both nuisance and other theories of liability,⁷⁰ and it is at odds with the generally accepted proposition that a person who suffers an injury should have the opportunity to be made whole.⁷¹

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⁶⁹ *Hensley v. San Diego Gas & Electric Co.*, 7 Cal.App.5th 1337, 1356 (Cal. Ct. App. 2017) (quoting *Potter v. Firestone Tire & Rubber Co.*, 6 Cal.4th 965, 986 n.10 (Cal. 1993)); see also *id.* at 1340, 1348-49 (“Our high court and lower courts have long held that once a cause of action for trespass or nuisance is established, a landowner may recover for annoyance and discomfort, including emotional distress or mental anguish, proximately caused by the trespass or nuisance.”) (emphasis in original).

⁷⁰ See, e.g., *Dolan*, 2024 WL 5145808 at *22; *Padilla*, 1984-NMCA-064, ¶¶ 1-2 (negligence, trespass, and nuisance claims considered at court trial); *Schwartzman*, 857 F. Supp. at 841 (negligence claim not subject to motion for summary judgment), at 851 (denying summary judgment as to nuisance and trespass).

⁷¹ See *Hood v. Fulkerson*, 1985-NMSC-048, ¶ 12 102 N.M. 677, 680 (“The general theory of damages is to make the injured party whole.”); cf. also *Sunnyland Farms, Inc. v. Central New Mexico Elec. Co-op., Inc.*, 2013-NMSC-017, ¶ 47 (noting, in the context of the collateral-source rule, that New Mexico plaintiffs should be able to make a complete recovery but not to double recover unless there is a collateral source); accord *Hensley*, 7 Cal.App.5th at 1356 (“in a tort case, the measure of damages is the amount which will compensate for all the detriment proximately caused”) (quotation omitted)).

V. The New Mexico courts generally follow the Restatement, which recognizes trespass claims based on negligent or reckless conduct; trespass claims, like nuisance claims, are not precluded merely because other forms of relief are available.

With respect to trespass, PNM contends that the New Mexico courts have recognized only intentional trespass as a tort, and – recycling the same argument it made regarding nuisance – that trespass is not available to plaintiffs where other forms of relief are. Neither argument enjoys support in New Mexico law.

First, PNM’s claim that New Mexico recognizes only intentional trespass (i.e., that Plaintiffs may recover only if they can prove that PNM intended to burn their houses down) is based exclusively on a selective reading of a couple of cases where the New Mexico courts evaluated trespass claims without explicitly citing to the section of the Restatement that discusses trespass based on negligent or reckless conduct.⁷² This is of no moment.

PNM cites no case holding that either negligent trespass or reckless trespass is not recognized in this state. Moreover, the New Mexico Supreme Court has consistently “recognized that tort law is not static – it must expand to recognize changing circumstances that our evolving society brings to our attention,” and that the New Mexico courts “have also been very willing to adopt the view of the Restatement of Torts to assist in our development of new tort areas.”⁷³ Consistent with that willingness, the *Dolan* court had no trouble concluding that the High Court would embrace trespass liability based on “reckless or negligent entries on land” and that plaintiffs may recover noneconomic damages based on that trespass.⁷⁴

As its fallback argument, the company repackages the same contention it made with respect to nuisance: that the claim is precluded if any other form of relief (e.g., negligence) is available, this time relying exclusively upon authorities from Washington and Kentucky.⁷⁵ As noted above, Washington has a discrete statute that requires a court to consolidate multiple

⁷² See PNM Motion for Summary Judgment re Nuisance and Trespass at 11.

⁷³ *Schmitz v. Smentowski*, 1990-NMSC-002, ¶ 49, 109 N.M. 386, 396.

⁷⁴ *Dolan*, 2024 WL 5145808 at *27.

⁷⁵ See PNM Motion re Nuisance and Trespass at 12-14.

claims based on identical facts.⁷⁶ The unpublished Kentucky cases, meanwhile, address identical negligence and negligent-trespass claims, which are treated as one claim under Kentucky law.⁷⁷

Regardless, PNM cites no New Mexico authority in support of its argument, which – again – cannot be squared with the District of New Mexico’s holdings in *Dolan* and *Schwartzman*, the Restatement, or the law in virtually any other jurisdiction. Indeed, PNM’s argument here is even irreconcilable with *McNeill* (the case the company relies upon to make this identical argument with respect to nuisance), where the Court of Appeals explained that “other theories of liability, *including standard negligence and trespass*, were available to Plaintiffs.”⁷⁸

VI. Conclusion

The parties and this Court now have the benefit of the District of New Mexico’s thoroughly reasoned opinion, concluding that the state Supreme Court will likely follow the Restatement and permit wildfire victims to recover all varieties of noneconomic damages for both nuisance and trespass. Rather than creating a significant split of authority – denying victims of the McBride Fire the same degree of potential relief available to victims of the Hermit’s Peak/Calf Canyon fires – this Court should follow *Dolan* and grant this motion for reconsideration.