

LEGAL MEMORANDUM

From: H. Vern Payne
Former Chief Justice, Supreme Court of New Mexico

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Date: 11/19/22

Re: Availability of noneconomic damages under New Mexico Law

INTRODUCTION

This memo explores whether victims of the Calf Canyon and Hermit Peak Fire may assert claims for nuisance, trespass, or emotional distress, and if so, whether non-economic damages are available for such claims under New Mexico law.

A brief outline of my background is as follows. I am an attorney duly licensed to practice in the State of New Mexico. I was first licensed to practice in New Mexico in 1962. In addition to practicing law of over four decades, I have also served as a judicial officer in the state of New Mexico. I began as a New Mexico District Court Judge and ended my judicial career as Chief Justice of the New Mexico Supreme Court. Currently, I maintain a private practice and am Of Counsel to the law firm of Singleton Schreiber, LLP.

I have been asked to give my opinion as to the availability of non-economic damages under New Mexico law under causes of action for negligence, trespass and nuisance in a situation such as the Hermit's Peak/Calf Canyon Fires.

As set forth below, controlling New Mexico law clearly permits recovery of non-economic damages by a plaintiff when a fire damages the plaintiff's real or personal property as occurred in the Hermit's Peak/Calf Canyon Fires.

Additionally, while the law is not settled, I also believe that if a New Mexico appellate court were to consider the issue, the Court would permit a plaintiff in the zone of danger caused by the Hermit's Peak/Calf Canyon Fires to recover emotional distress damages for the fear they experienced while within the zone of danger.

DISCUSSION

1. Nuisance

1.1 Elements of a nuisance claim

New Mexico recognizes two types of nuisance: public and private.¹ Private nuisance is the more appropriate claim here.

Private nuisance has been described as “a non-trespassory invasion of another’s interest in the private use and enjoyment of land.”² It is “a civil wrong based on a disturbance of rights in land.”³ Thus, 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.”⁴

To successfully assert a claim for private nuisance, the plaintiff must show the defendant’s “conduct [was] a legal cause of an invasion” of the plaintiff’s “interest in the private use and enjoyment of land.”⁵ The plaintiff must also establish that the invasion was either: [1] “intentional and unreasonable,” or [2] “unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.”⁶

For the intentional-and-unreasonable requirement, “an intentional invasion is unreasonable if the gravity of the harm outweighs the utility of the actor’s conduct, or if the harm is serious and the financial burden of compensating for the harm would not make continuing the conduct unfeasible.”⁷

Although a private nuisance affects the enjoyment of some private right not common to the public, a nuisance may be both public and private, or mixed, where a considerable number of people suffer in the interference with their use and enjoyment of land.”⁸ A wildfire likely qualifies a private or mixed public/private nuisance, and is therefore actionable either way, at least for those who suffer damage to their real or personal property.⁹

¹ *Titus v. City of Albuquerque*, 252 P.3d 780, 786 (N.M. Ct. App. 2011).

² *Padilla*, 685 P.2d at 967 (internal citations omitted).

³ *Id.* at 967.

⁴ *Id.* at 971.

⁵ *Scott v. Jordan*, 661 P.2d 59, 62 (N.M. Ct. App. 1983) (citation omitted).

⁶ *Id.*

⁷ *Padilla v. Lawrence*, 685 P.2d 964, 968 (N.M. Ct. App. 1984) (internal citation omitted).

⁸ *City of Sunland Park v. Harris News, Inc.*, 124 P.3d 566, 577 (N.M. Ct. App. 2005) (cleaned up and citations omitted).

⁹ New Mexico recognizes both statutory and common-law public-nuisance claims, but a private individual may not recover damages on a statutory public-nuisance claim. *See Schwartzman, Inc., v. Atchison, T. & S.F. Ry.*, 857 F. Supp. 838, 851 (D.N.M. 1994) (citing N.M. Stat. § 30-8-8). A plaintiff may recover damages for a common-law public nuisance if he proves a special injury. *See New Mexico v. Gen. Elec. Co.*, 335 F. Supp. 2d 1185, 1239–41 (D.N.M. 2004). An

1.2 Noneconomic damages for a nuisance claim.

Noneconomic damages are recoverable for a nuisance claim for “annoyance, discomfort, and inconvenience.”¹⁰ Notably, a plaintiff need not prove economic damages (e.g., a diminution in property value) to recover damages for “annoyance, discomfort, and inconvenience.”¹¹

2. Trespass

2.1. Elements of a trespass claim

In New Mexico, the “gist of an action of trespass to real property is in tort for the alleged injury to the right of possession.”¹² New Mexico law recognizes statutory and common-law trespass claims; here the latter applies.¹³

To establish a claim for common-law trespass, the plaintiff must prove “the defendant entered the plaintiff’s land without authorization, remains on the land, or fails to remove from the land a thing which the defendant has a duty to remove.”¹⁴ “[P]roof of damage,” however, “is not an element of trespass.”

A defendant commits common-law trespass in New Mexico by redirecting a foreign substance onto the plaintiff’s property.¹⁵ For example, in *Holcomb*, a defendant who re-routed a wash onto the plaintiff’s property was liable for trespass.¹⁶ Under this reasoning a wildfire that spreads onto a plaintiff’s property would also constitute a trespass.¹⁷

individual suffers a special injury when he is physically injured, his land or chattels are physically harmed, or he suffers some other pecuniary loss. *Id.*; Restatement (Second) of Torts § 821C, cmts. d, h (1979).

¹⁰ *Padilla*, 685 P.2d at 969 (“A plaintiff in a private nuisance action may seek compensation for interference with personal comfort”).

¹¹ *Id.*

¹² *McNeill v. Rice Eng’g & Operating, Inc.*, 229 P.3d 489, 492 (N.M. 2010) (cleaned up and citation omitted).

¹³ None of the three sections in New Mexico’s trespass statute describe plausible fact patterns in a wildfire case. *See* N.M. Stat. § 30-14-1.1(A)–(C).

¹⁴ *Holcomb v. Rodriguez*, 387 P.3d 286, 291 (N.M. Ct. App. 2016) (citing Restatement (Second) of Torts § 158 (1965)).

¹⁵ *See Holcomb*, 387 P.3d at 292–95.

¹⁶ *Id.*

¹⁷ As mentioned above, the difference between common-law trespass and nuisance depends on the nature of the intrusion. “A trespass is a direct infringement of another’s right of possession.” *Padilla*, 685 P.2d at 971. “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.” *Id.* This dividing line, of course, can be difficult to parse. As an example, “[t]he entrance onto the property of blowing particulate matter . . . is not actionable as trespass in the absence of a finding that the matter settled upon and damaged plaintiffs’ property.” *Id.* Otherwise, it is a nuisance. *Id.*; *see also Schwartzman, Inc., v. Atchison, T. & S.F. Ry.*, 857 F. Supp. 838, 844 (D.N.M. 1994) (discussing distinction between trespass and nuisance). Other states to consider

2.2. Noneconomic damages for trespass

Although a plaintiff may recover damages for “annoyance, discomfort, and inconvenience” caused by a private nuisance,¹⁸ there is no New Mexico authority expressly allowing similar damages on trespass claims.

That said, many jurisdictions allow damages for annoyance, discomfort, and distress proximately caused by a trespass.¹⁹ Some of these distinguish between those damages and emotional distress, while others appear to conflate the two.²⁰ New Mexico would likely strictly limit recovery to “annoyance, discomfort, and distress” and not allow true emotional-distress damages.²¹

3. Emotional distress

3.1. Elements of an emotional-distress claim

New Mexico recognizes claims for both negligent and intentional infliction of emotional distress; the latter is the more likely claim here.

Negligent infliction of emotional distress (“NIED”) has been described as “an extremely narrow tort” that only applies when “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*.”²² Thus, only fire victims who witnessed a spouse or close family member being physically burned (or suffocating from smoke inhalation) have a claim for negligent infliction of emotional distress.

As for intentional infliction of emotional distress (“IIED”), New Mexico recognizes both first-party claims and third-party claims.²³ A first-party claim arises when the

this question have held that negligently set fires constitute the tort of trespass. *See, e.g., Elton v. Anheuser-Busch Beverage Group, Inc.* (1996) 50 Cal.App.4th 1303.

¹⁸ *Padilla*, 685 P.2d at 969.

¹⁹ *See* 87 C.J.S. trespass § 114 n. 15 (collecting cases).

²⁰ *Compare Hawley v. Mowatt*, 160 P.3d 421, 426 (Colo. App. 2007) (“Damages available on a trespass claim can include . . . discomfort and annoyance to the property owner as the occupant. However, annoyance and discomfort damages generally do not include recovery for ‘pure’ emotional distress.”) *with Hensley v. San Diego Gas & Elec. Co.*, 7 Cal. App. 5th 1337, 1348–49 (2017) (“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.” (italics added)).

²¹ *See Castillo*, 195 P.3d at 879 (explaining that where the plaintiff has not been physically injured, does not allege intentional misconduct on the part of the city, or satisfy the elements of bystander recovery, he or she will not be permitted to recover emotional distress damages from property damage alone).

²² *Baldonado v. El Paso Nat. Gas Co.*, 176 P.3d 286, 293 (N.M. Ct. App. 2006) (emphasis in the original).

²³ *Baldonado v. El Paso Nat. Gas Co.*, 176 P.3d 277, 283 (N.M. 2007).

defendant's tortious conduct is directed at the plaintiff.²⁴ A third-party claim arises when the defendant's tortious conduct was directed at a third party, and the plaintiff suffers severe emotional distress from observing the harmful effect on the third party.²⁵ For the same reason that a wildfire victim is unlikely to have an NIED claim, a wildfire victim is more likely to have a first-party claim IIED claim.

For a first-party IIED claim, the plaintiff must prove that the defendant through "extreme and outrageous conduct intentionally or recklessly cause[d] [the plaintiff] severe emotional distress[.]"²⁶ If that standard is met, the plaintiff can recover for "emotional distress" even if he or she has not suffered any bodily harm.²⁷

Typically, these claims "arise from a preexisting relationship between the plaintiff and the defendant," such as an "employer-employee relationship," or "where one party has an obligation to the other that is regulated by the State."²⁸ But no New Mexico authority has held that a special relationship is a prerequisite to a first-party IIED claim.²⁹ Moreover, the New Mexico Supreme Court quoted with approval an Arizona case which held that the relationship between the parties is merely a "factor to consider" in determining whether conduct is outrageous,³⁰ albeit an "important factor."³¹

Baldonado provides a roadmap for how individuals affected by the fire could try to make out a first-party claim. In *Baldonado*, a natural gas pipeline ruptured, causing a giant fireball in a campground and killing 12 people.³² Several volunteer firefighters responded to the fire.³³ They did not "assist in putting out the fire," nor did they suffer "any physical injuries from the fire or explosion."³⁴ Still, they "suffered extreme emotional distress in witnessing the severe injuries suffered by

²⁴ *Id.*

²⁵ A third-party claim for intentional infliction of emotional distress is similar to a claim for negligent infliction of emotional distress. However, if a defendant intentionally or recklessly causes severe emotional distress to a member of the plaintiff's family in the presence of the plaintiff, the family member need not be physically injured or die for a plaintiff to recover, in contrast to a claim for negligent infliction of emotional distress. *Id.* (quoting Restatement (Second) of Torts § 46.) Further, if the defendant intentionally or recklessly causes severe emotional distress to someone who is not a member of the plaintiff's family in the plaintiff's presence, the plaintiff may recover for severe emotional distress if the third party is also physically injured. *Id.* (quoting Restatement (Second) of Torts § 46).

²⁶ *Id.* (quoting Restatement (Second) of Torts § 46).

²⁷ Restatement (Second) of Torts § 46, cmt. k.

²⁸ *Baldonado*, 176 P.3d at 283.

²⁹ *See id.*

³⁰ *Id.* at 284 (quoting *Lucchesi v. Frederic N. Stimmell, M.D., Ltd.*, 7716 P.2d 1022, 1027 (Ariz. Ct. App. 1985)).

³¹ *Id.* (quoting *Rockhill v. Pollard*, 485 P.2d 28, 31 (Or. 1971)).

³² *Id.* at 279.

³³ *Id.*

³⁴ *Id.*

the victims when [they] assisted them after the explosion.”³⁵ The firefighters sued the gas company responsible for the explosion for intentional infliction of emotional distress.³⁶

The New Mexico Supreme Court held that the firefighters had properly alleged a first-party claim.³⁷ The court first held that firefighters and the natural-gas company had a “special relationship” because a federal regulation required natural-gas companies to work with fire officials.³⁸ In light of that relationship, the court held that the natural gas company’s conduct was sufficiently “extreme and outrageous conduct.”³⁹ In support, the court noted that the natural-gas company “failed to take the steps necessary to ensure the safety of the pipeline,” even though it “had been cited for past safety violations, and had experienced at least two previous pipeline explosions, one of which involved severe burns.”⁴⁰ The company “also knew, or should have known, that this area of pipeline suffered from the same problems that resulted in the explosions in other pipelines nearby.”⁴¹ This knowledge of risk, and the natural-gas company’s failure to “share any of this information with Plaintiffs,” meant its conduct cleared the “extreme and outrageous” hurdle.⁴²

With that issue resolved, the court then held that the plaintiffs had properly alleged the final two elements of the claim. First, given “[t]he prior explosions with injuries, and Defendant’s failure to remedy the problems with its pipelines,” the firefighters had properly pleaded “recklessness.”⁴³ Second, the fire fighters had properly alleged “their mental distress [was] extreme and severe.”⁴⁴

In light of *Baldonado*, wildfire victims may be able to allege a first-party IIED claim by showing the defendant’s conduct was reckless and outrageous enough to warrant liability.

3.2. Noneconomic damages for NIED and IIED claims.

Plaintiffs who prevail on a claim for negligent or intentional infliction of emotional distress are entitled to recover for physical pain, nervousness, grief, anxiety, worry[,] and shock.”⁴⁵

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 282–85.

³⁸ *Id.* at 284–85 (citing 49 C.F.R. § 192.615(a)(8)).

³⁹ *Id.* at 285.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 285–86.

⁴⁴ *Id.* at 286.

⁴⁵ *Castillo*, 195 P.3d at 875; *Higgins*, 552 P.2d at 1229.

3.3. A New Mexico appellate court that considered the issue today likely would allow emotional distress damages for individuals in the zone of danger

A New Mexico Court likely would allow emotional distress damages to the victims of the fires because of the negligence of the government in failing to follow its own regulations after a similar disaster with fires that ravaged the Los Alamos area. (See Section 2.2, above). There is a strong argument that the government had a special relationship with the plaintiffs who for centuries had lived on and from the land in Northern New Mexico, particularly in light of the fact that the federal government has for decades assumed a role of responsibility for the control of the forests. Here, it neglected that special relationship, ignored its own regulations, and caused much emotional distress.

The non-economic damage issue has been hotly contested throughout the U.S. for decades and it appears to me that the law has, during my lifetime, continuously evolved to allow the victims of such catastrophic events to recover the emotional distress damages they so obviously incurred.

CONCLUSION

The individuals affected by the Hermit's Peak and Calf Canyon Fires are entitled to assert claims for nuisance and trespass based on the damage done to their property. Under controlling New Mexico authority, they are clearly entitled to recover non-economic damages under nuisance, and they are likely entitled to recover them under trespass as well.

Further, based on the federal government's negligence and the existence of a special relationship between the government (particularly the Forest Service) and the victims of the fire, I believe they would be able to assert a claim for intentional infliction of emotional distress. Accordingly, those individuals who were within the fires' zone of danger and had a reasonable, objective fear of death or serious bodily injury should be able to recover non-economic, emotional distress damages as well.