



March 7, 2024

OPINION  
OF  
RAÚL TORREZ  
Attorney General

Opinion No. 2024-05

By: Ellen Venegas  
Assistant Solicitor General

To: The Honorable Michael Padilla, Majority Whip  
New Mexico State Senate

The Honorable Pete Campos  
New Mexico State Senate

In Re: Opinion Request – Noneconomic Damages for Nuisance and Trespass

Question: Under New Mexico law, are non-economic damages (including but not limited to annoyance, discomfort, inconvenience, invasion of another’s interest in the private use and enjoyment of the land) available/compensable under the legal concepts of trespass, private nuisance, and public nuisance?

Answer: As discussed in more detail below, noneconomic damages are available to compensate nuisance and trespass plaintiffs for annoyance, discomfort, and inconvenience.

#### Analysis

Noneconomic damages compensate for nonmonetary losses. “Noneconomic damages include pain and suffering, future pain and discomfort, disfigurement, loss of enjoyment of life, mental anguish, and loss of consortium.” *Morga v. FedEx Ground Package Sys., Inc.*, 2022-NMSC-013, ¶ 28, 512 P.3d 774 (internal quotation marks and citation omitted). Noneconomic damages are widely understood to be a type of compensatory, or actual, damages.

#### Trespass and Private Nuisance

“A trespass is a direct infringement of another’s right of possession.” *Padilla v. Lawrence*, 1984-NMCA-064, ¶ 26, 101 N.M. 556, 685 P.2d 964. “The gist of an action of trespass to real property

is in tort for the alleged injury to the right of possession.” *Pacheco v. Martinez*, 1981-NMCA-116, ¶ 14, 97 N.M. 37, 636 P.2d 308.

“Private nuisance is akin to trespass: it is an in personam action for tortious interference with one’s use and enjoyment of land. However, in nuisance actions, the interference is non-trespassory.” *Kaywal, Inc. v. Avangrid Renewables, LLC*, 2021-NMCA-037, ¶ 42, 495 P.3d 550. Thus, a private nuisance is “a non-trespassory invasion of another’s interest in the private use and enjoyment of land.” *Padilla*, 1984-NMCA-064, ¶ 9.

Noneconomic damages are available in private nuisance actions in New Mexico. Specifically, plaintiffs in private nuisance actions may seek damages to compensate for annoyance, discomfort, and inconvenience. *See Padilla*, 1984-NMCA-064, ¶ 16; *see also* 58 Am. Jur. 2d Nuisances § 218 (“[I]n addition to injury to property, a plaintiff may recover damages for deprivation of the comfortable enjoyment of the plaintiff’s property and the inconvenience and discomfort the plaintiff has suffered.”); *Peacock v. Guss*, No. A-1-CA-37939, mem. op. ¶ 7 (N.M. Ct. App. Dec. 7, 2020) (non-precedential).

In a nuisance claim, these damages are characterized as “special damages,” and they are distinct from damages to compensate for diminution in property value. *See Padilla*, 1984-NMCA-064, ¶ 16 (“A complaining party need not demonstrate diminution in value as a prerequisite to recovery for annoyance and inconvenience.” (citing *Aguayo v. Village of Chama*, 1969-NMSC-005, 79 N.M. 729, 449 P.2d 331). “It is for the trier of the facts to determine the amount of damages, in view of the discomfort or annoyance to which the plaintiffs have been subjected.” *Aguayo*, 1969-NMSC-005, ¶ 8 (citations omitted).

Concerning trespass, “[e]very unauthorized entry upon the land of another is a trespass which entitles the owner to a verdict for some damages.” *North v. Pub. Serv. Co. of New Mexico*, 1980-NMCA-031, ¶ 4, 94 N.M. 246, 608 P.2d 1128. Not all trespasses will result in actual damages; “[i]ndeed, nominal damages are available in actions for trespass.” *Holcomb v. Rodriguez*, 2016-NMCA-075, ¶ 12, 387 P.3d 286.

New Mexico courts have not expressly opined on the availability of noneconomic damages in a trespass action.<sup>1</sup> Nevertheless, given the similarity of trespass and private nuisance, both of which seek to remedy invasions of property rights, we believe the noneconomic damages permitted in nuisance suits would also be available in some trespass actions. *See, e.g., Christian v. Atl. Richfield Co.*, 2015 MT 255, ¶ 46, 358 P.3d 131; *see also* Restatement (Second) of Torts § 929(1)(c) Harm to Land from Past Invasions (Am. L. Inst. 1979); 7 American Law of Torts § 23:37 (“Damages available on a trespass claim may include not only diminution of market value, costs of restoration,

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<sup>1</sup> The common law trespass discussed herein is not limited based on any available statutory trespass remedies. *See* NMSA 1978, § 30-14-1.1(D) (1983) (providing for “damages in an amount equal to double the amount of the appraised value of the damage of the property injured or destroyed”). “Rather than limiting or abolishing a right that existed under the common law, Section 30-14-1.1(D) provides an additional remedy in certain statutorily defined circumstances. Those circumstances are not necessarily as expansive as the full reach of the common law.” *Hartman v. Texaco Inc.*, 1997-NMCA-032, ¶ 15, 123 N.M. 220, 937 P.2d 979.

and loss of use of the property but also discomfort and annoyance to the property owner as the occupant.”).

Our office is of the opinion that damages to compensate for annoyance, discomfort, and inconvenience would be warranted in cases of trespass when the nature of the trespass unreasonably infringes on a plaintiff’s occupancy and property rights, including possession, use, or enjoyment of the property. *Cf. Muckleroy v. Muckleroy*, 1972-NMSC-051, ¶ 5, 84 N.M. 14, 498 P.2d 1357 (“Broadly defined, property includes every interest a person may have in a thing that can be the subject of ownership, including the right to enjoy, use, freely possess and transfer that interest.”).

In addition, some jurisdictions allow trespass and private nuisance plaintiffs to seek compensation for emotional distress or mental anguish resulting from the tortious conduct. *See* 7 American Law of Torts § 23:37 (“There is some conflict in the cases concerning the recovery of damages for mental anguish resulting from a trespass.”); 58 Am. Jur. 2d Nuisances § 217 (“In some jurisdictions, even where the trespass or nuisance involves solely property damage, emotional distress or mental anguish damages proximately caused by a nuisance are recoverable.”).

New Mexico courts have not addressed the availability of emotional distress damages in nuisance or trespass actions. However, as a general matter, emotional distress damages are only allowed under limited circumstances in New Mexico. *Castillo v. City of Las Vegas*, 2008-NMCA-141, ¶¶ 21-22, 145 N.M. 205, 195 P.3d 870 (explaining that “compensation for emotional distress is permitted when a plaintiff establishes loss of consortium, intentional misconduct, defamation, or a physical injury” and concluding that “a plaintiff may not recover for emotional distress based solely on a claim for negligent damage to property”). Accordingly, under existing law, it is unlikely that a noneconomic damage award in a trespass or nuisance action would be permitted based solely on emotional distress or would otherwise be permitted to include damages for emotional distress.

#### Public Nuisance

“A public nuisance is one which adversely affects public health, welfare, or safety. A public nuisance affects the rights of citizens as part of the public and must affect a considerable number of people or an entire community or neighborhood.” *Padilla*, 1984-NMCA-064, ¶ 24 (citations omitted). New Mexico recognizes both common law and statutory public nuisance. *See City of Sunland Park v. Harris News, Inc.*, 2005-NMCA-128, ¶ 40, 138 N.M. 588, 124 P.3d 566; *see also* NMSA 1978, § 30-8-1 (1963) (setting forth offense of public nuisance). “[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.” *City of Sunland Park*, 2005-NMCA-128, ¶ 41 (internal quotation marks and citation omitted).

New Mexico state courts have not squarely addressed whether noneconomic damages are recoverable in public nuisance actions. Often, damages of any nature are not permitted in public nuisance actions. Notably, federal district courts have determined that New Mexico law does not permit compensatory damages for statutory public nuisance because abatement of the nuisance is the remedy prescribed by statute. *See New Mexico v. Gen. Elec. Co.*, 335 F. Supp. 2d 1185, 1242 (D.N.M. 2004); *Schwartzman, Inc. v. Atchison, Topeka & Santa Fe Ry. Co.*, 857 F. Supp. 838, 851 (D.N.M. 1994); *see also* NMSA 1978, § 30-8-8 (1963) (providing for “civil action to abate a public nuisance”). It is possible that an action based on common law, as opposed to statutory, public

nuisance would not be limited in such a manner. *Cf. Espinosa v. Roswell Tower, Inc.*, 1996-NMCA-006, ¶¶ 13-15, 121 N.M. 306, 910 P.2d 940 (noting that “[n]uisance law in our state has largely evolved in the context of injunctive relief[,]” discussing propriety of punitive damages in public nuisance actions, and upholding punitive damages award).

Notably, to recover any damages for public nuisance, a plaintiff would likely need to show that they “have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference.” *Gen. Elec. Co.*, 335 F. Supp. 2d at 1239 (quoting Restatement (Second) of Torts § 821C (1979)) (internal quotation marks omitted). Alternatively, damages, including noneconomic damages, may be appropriate in actions involving mixed nuisances.

#### Conclusion

It is the opinion of the New Mexico Department of Justice that noneconomic damages for annoyance, discomfort, and inconvenience are generally available to plaintiffs in nuisance and trespass actions and may be compensable under the circumstances described herein. “The purpose of compensatory damages is to make the injured party whole by compensating it for losses.” *Cent. Sec. & Alarm Co. v. Mehler*, 1996-NMCA-060, ¶ 11, 121 N.M. 840, 918 P.2d 1340; *see also Sanchez v. Clayton*, 1994-NMSC-064, ¶ 11, 117 N.M. 761, 877 P.2d 567 (describing compensatory damages as “the measure of a loss”). Depending on the nature of a particular invasion of property rights, noneconomic damages may be an important component of compensating injuries resulting from nuisance or trespass.

You have requested an opinion on this question presented to our office. The request and the opinion provided herein will be published on our website and made available to the general public. If you have any questions regarding this matter, or if our office may be of further assistance, please let us know.

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By:



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