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December 3, 2019

VIA ELECTRONIC FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor North
P.O. Box 3265
Harrisburg, PA 17105-3265

Re: Craig Bowes v. PPL Electric Utilities Corporation
Docket No. C-2018-3006101

Dear Secretary Chiavetta:

Enclosed for filing is the Motion in Limine of PPL Electric Utilities Corporation ("PPL Electric" or the "Company") to Prohibit the Complainant from Presenting any Expert Witnesses in the above-referenced proceeding.

Copies will be provided as indicated on the Certificate of Service.

Respectfully submitted,

Devin Ryan

DTR/dmc
Enclosures

cc: Honorable Elizabeth Barnes
Certificate of Service

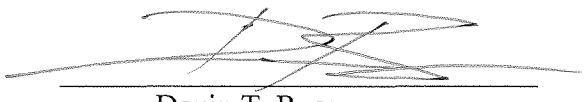
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served upon the following persons, in the manner indicated, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

VIA E-MAIL AND OVERNIGHT DELIVERY

Craig Bowes
1531 N. 19th Street
Allentown, PA 18104
craigabowes@aol.com

Date: December 3, 2019



Devin T. Ryan

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Craig Bowes,	:	
	:	
Complainant,	:	
	:	
v.	:	Docket No. C-2018-3006101
	:	
PPL Electric Utilities Corporation,	:	
	:	
Respondent.	:	

NOTICE TO PLEAD

YOU ARE HEREBY ADVISED THAT, PURSUANT TO 52 PA. CODE § 5.103(c), YOU MAY FILE A REPLY TO THE ENCLOSED MOTION WITHIN TWENTY (20) DAYS AFTER THE DATE OF SERVICE. YOUR REPLY SHOULD BE FILED WITH THE SECRETARY OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION, P.O. BOX 3265, HARRISBURG, PA 17105-3265. A COPY OF YOUR REPLY SHOULD ALSO BE SERVED ON THE UNDERSIGNED COUNSEL.

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Attorneys for PPL Electric Utilities Corporation

Date: December 3, 2019

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Craig Bowes,	:	
	:	
Complainant,	:	
	:	
v.	:	Docket No. C-2018-3006101
	:	
PPL Electric Utilities Corporation,	:	
	:	
Respondent.	:	

MOTION IN LIMINE OF
PPL ELECTRIC UTILITIES CORPORATION TO
PROHIBIT THE COMPLAINANT FROM PRESENTING
ANY EXPERT WITNESSES

TO ADMINISTRATIVE LAW JUDGE ELIZABETH H. BARNES:

PPL Electric Utilities Corporation ("PPL Electric" or the "Company") hereby files this Motion in Limine pursuant to the Pennsylvania Public Utility Commission's ("Commission") regulations at 52 Pa. Code § 5.103 and requests that Administrative Law Judge Elizabeth H. Barnes (the "ALJ") prohibit Craig Bowes ("Complainant") from presenting any expert witnesses to testify on his behalf because the Complainant failed to meet the deadlines for identifying his expert witnesses and to provide their written expert testimony and exhibits in sufficient time before the evidentiary hearing. Moreover, one of the persons whom the Complainant intends to present as an expert witness, Mr. Arthur Firstenberg, readily admits that he is simply an advocate against radio frequency ("RF") fields. Mr. Firstenberg is not a qualified expert who can offer an unbiased opinion. Therefore, PPL Electric respectfully requests that the instant Motion in Limine be granted and that the Complainant be prohibited from presenting any expert witnesses.

In support thereof, the Company states as follows:

I. BACKGROUND

1. PPL Electric is a public utility that provides electric distribution and provider of last resort services in Pennsylvania subject to the regulatory jurisdiction of the Commission. PPL Electric furnishes electric distribution, transmission, and provider of last resort electric supply services to approximately 1.4 million customers throughout its certificated service territory, which includes all or portions of 29 counties and encompasses approximately 10,000 square miles in eastern and central Pennsylvania.

2. On November 20, 2018, PPL Electric was served with the Formal Complaint filed by the Complainant challenging the planned installation of a new automated metering infrastructure ("AMI") meter at the Complainant's property.

3. On December 10, 2018, PPL Electric timely filed its Answer to the Complaint.

4. On December 21, 2018 a notice was issued scheduling a telephonic evidentiary hearing for July 8, 2019.

5. On January 4, 2019, the ALJ issued the Prehearing Order, which, among other things, directed the Complainant to serve any written expert testimony and exhibits on or before April 30, 2019.

6. The Complainant never served any written expert testimony and exhibits by the April 30, 2019 deadline.

7. On April 9, 2019, PPL Electric served Interrogatories and Requests for Production of Documents on the Complainant – Set I, Questions 1 through 7 ("PPL to Complainant Set I") via certified mail. Pursuant to the Commission's regulations, objections to

PPL to Complainant Set I were due on or before April 22, 2019, and responses were due on or before May 2, 2019.[1]

8. The Complainant never served any objections to PPL to Complainant Set I by April 22, 2019, and never served any responses by May 2, 2019.

9. On May 31, 2019, PPL Electric served its written direct testimony and exhibits in accordance with the Prehearing Order.

10. On July 2, 2019, the July 8, 2019 hearing was rescheduled for December 5, 2019.

11. On August 1, 2019, the ALJ issued the Second Prehearing Order, which, among other things, directed the Complainant to serve any written expert testimony and exhibits on or before October 1, 2019.

12. The Complainant never served any written expert testimony and exhibits by the October 1, 2019 deadline.

13. On October 17, 2019, PPL Electric filed a Motion to Compel responses to PPL to Complainant Set I.

14. On November 1, 2019, the ALJ issued an Order granting PPL Electric's Motion to Compel and directing the Complaint to provide full and complete responses by November 12, 2019.

15. Also on November 1, 2019, PPL Electric served its written direct testimony and exhibits in accordance with the Second Prehearing Order.

16. On November 13, 2019, the Complaint contacted PPL Electric's counsel and asked for an extension until November 14, 2019, to provide the responses to PPL to Complainant Set I. The Company agreed to that extension.

[1] Because the discovery requests were served by mail, three days were added to the prescribed due dates for answers and objections. *See* 52 Pa. Code § 1.56(b).

17. On November 14, 2019, the Complainant served his discovery responses by hand delivery at the offices of one of the Company's attorneys. These discovery responses and the exhibits attached thereto totaled over 2,500 pages.

18. In these materials, the Complainant, for the first time, identified three expert witnesses he intends to testify on his behalf, provided the subject matters of the experts' testimony, and provided the experts' proposed exhibits.

19. These purported expert witnesses are: (1) Mr. Arthur Firstenberg; (2) Dr. Stephanie McCarter; and (3) Dr. Liz Seymour. A true and correct copy of the Complainant's discovery response identifying these individuals is attached hereto as **Appendix A**.

II. MOTION IN LIMINE

A. THE COMPLAINANT SHOULD BE PROHIBITED FROM PRESENTING ANY EXPERT WITNESSES

20. PPL Electric respectfully requests that the ALJ grant the instant Motion in Limine and prohibit the Complainant from presenting any expert witnesses because the Complainant failed to meet the deadlines for identifying his expert witnesses and to provide their written expert testimony and exhibits in sufficient time before the evidentiary hearing.

21. The Formal Complaint raises several complex scientific and medical issues related to the planned installation of PPL Electric's new AMI meter on the Complainant's property, including alleged adverse safety and health effects of the new AMI meter.

22. Since January 4, 2019, when the first Prehearing Order was issued, the Complainant has been directed to serve any written expert testimony and exhibits on PPL Electric well in advance of the evidentiary hearing.

23. The deadline was originally April 30, 2019, per the Prehearing Order, and was subsequently changed to October 1, 2019, per the Second Prehearing Order.

24. Therefore, the Complainant has had ample notice and knowledge that if he intended to present any expert witnesses at the evidentiary hearing, he would need to serve the expert witnesses' testimony and exhibits by the established deadlines, which were well in advance of the evidentiary hearing and the due date for PPL Electric's written direct testimony.

25. However, the Complainant failed to serve any written expert testimony and exhibits by both the initial April 30, 2019 deadline and the subsequent October 1, 2019 deadline.

26. In fact, the first time that the Complainant identified any expert witnesses and provided their exhibits and the subject matters of their testimony was on November 14, 2019, when he delivered his discovery responses and proposed exhibits totaling over 2,500 pages.

27. In contrast, PPL Electric served its expert witnesses' written testimony and exhibits, as well as its lay witnesses' exhibits, by both the May 31, 2019, and November 1, 2019 deadlines.

28. The Company's expert testimony and exhibits address the complex scientific and medical issues raised by the Formal Complaint.

29. To preserve due process, it is necessary to prohibit the Complainant from presenting any expert witnesses at the evidentiary hearing.

30. The Complainant was provided multiple opportunities to identify any expert witnesses and provide their written expert testimony and exhibits.

31. Instead of meeting the ALJ's deadlines, the Complainant waited until November 14, 2019, *i.e.*, approximately a month and a half after the October 1, 2019 deadline, to identify his expert witnesses and provide their exhibits.

32. As a result, PPL Electric and its expert witnesses have been given limited time to review all of the Complainant's voluminous documents, including his expert witnesses' testimony and exhibits, before the evidentiary hearing on December 5, 2019.

33. Therefore, under these circumstances, PPL Electric would be severely prejudiced in its ability to present evidence and testimony in rebuttal if the Complainant is allowed to present these expert witnesses.

34. Thus, to prevent this undue prejudice, fundamental unfairness, and denial of due process, the Complainant should be prohibited from presenting any testimony and exhibits from these purported expert witnesses.

B. THE COMPLAINANT SHOULD BE PROHIBITED FROM PRESENTING MR. ARTHUR FIRSTENBERG AS AN EXPERT WITNESS

35. PPL Electric also respectfully requests that the ALJ bar Mr. Arthur Firstenberg from testifying on behalf of the Complainant because Mr. Firstenberg is simply an advocate against RF fields, not a qualified expert who will provide an unbiased opinion.

36. Upon information and belief, Mr. Firstenberg is the founder and president of the Cellular Phone Task Force.

37. On its website, the Cellular Phone Task Force describes its mission as being "dedicated to halting the expansion of wireless technology because it cannot be made safe."[2]

38. In his testimony before the New Mexico Public Regulation Commission at Case No. 15-00312-UT on February 14, 2017, Mr. Firstenberg stated: "Since 1996 I have devoted myself full time to my work against electromagnetic pollution and on behalf of its victims."[3]

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[2] CELLULAR PHONE TASK FORCE, https://www.cellphonetaskforce.org/ (last visited December 3, 2019).

[3] The Complainant included a copy of Mr. Firstenberg's testimony before the New Mexico Public Regulation Commission in his discovery responses as Exhibit I 6-B. This quote appears on page 3 of that testimony. A copy of pages 2 and 3 of that testimony is attached hereto as **Appendix B**.

39. In addition, Mr. Firstenberg previously filed a complaint in New Mexico against his neighbor and the owner-lessor of his neighbor's property, seeking injunctive relief and monetary damages for nuisance and prima facie tort. *See Firstenberg v. Monribot*, 350 P.3d 1205, 1209 (N.M. Ct. App. 2015) ("*Firstenberg*"),[4] *cert. denied*, 367 P.3d 850 (N.M. 2015).

40. In that case, "Mr. Firstenberg alleged that because he suffers from a condition called electromagnetic sensitivity (EMS) that renders him acutely sensitive to electromagnetic radiation, his health was adversely affected by [his neighbor's] use, within her own residence, of various electronic devices that generate electromagnetic radiation, including a cell phone, a Wi-Fi- modem, dimmer switches, and a microcell." *Firstenberg*, 350 P.3d at 1209.

41. Notably, in that case, Mr. Firstenberg never offered himself as an expert witness. Rather, he only presented Dr. Erica Elliott, M.D., and Dr. Raymond Singer, Ph.D., as expert witnesses. *See id.* at 1211.

42. Ultimately, "[a]fter nearly three years of litigation, having held an evidentiary hearing regarding the admissibility of expert scientific testimony, the district court determined that Mr. Firstenberg lacked admissible evidence of general causation" to support his claims and dismissed his complaint on summary judgment. *Id.*

43. On appeal, the New Mexico Court of Appeals affirmed the district court's findings and rejected Mr. Firstenberg's arguments. *See id.* at 1209-2017.

44. Therefore, by his own admissions and actions, Mr. Firstenberg is an advocate against RF fields, not a qualified expert who will provide an unbiased opinion.

45. Thus, the ALJ should appropriately prohibit Mr. Firstenberg from testifying on behalf of the Complainant as an expert witness.

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[4] A true and correct copy of the *Firstenberg* decision is attached hereto as **Appendix C**.

46. For these reasons, PPL Electric respectfully requests that the ALJ grant the instant Motion in Limine and prohibit any expert witnesses from testifying on behalf of the Complainant at the evidentiary hearing.

III. CONCLUSION

WHEREFORE, PPL Electric Utilities Corporation respectfully requests that Administrative Law Judge Elizabeth H. Barnes grant this Motion in Limine and prohibit any expert witnesses from testifying on behalf of Craig Bowes.

Respectfully submitted,

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Attorneys for PPL Electric Utilities Corporation

Date: December 3, 2019

APPENDIX A

Complainant's Response to PPL to Complainant Set I, No. 6

I-6 Identify each person you plan to call as an expert witness in this proceeding:

a) Arthur Firstenberg: PO Box 6216 Sante Fe, NM 87502 505-471-0129

Mr Firstenberg is a widely recognized expert on the health effects of radio frequency ("RF") radiation. He testified as an expert about the health effects of Smart Meters before the New Mexico Public Regulation Commission ("NMPRC") in Case# 15-00312-UTm which resulted in the denial of the application of Public Service Company of New Mexico to install smart meters in it's service areas in New Mexico.

He is also an American author and activist on the subject of electromagnetic radiation and health. He is the founder of the independent campaign group The Cellular Phone Task Force. His 1997 book Microwaving Our Planet: The Environmental Impact of The Wireless Revolution was published by the group. He is the author of The Invisible Rainbow: a History of Electricity and Life (AGB Press 2017)

Firstenberg was a Westinghouse scholar who received a BA in mathematics from Cornell University in 1971 and continued into medical school from 1978 to 1982. He was unable to complete medical school due to illness, which he attributes to electromagnetic sensitivity brought on by receiving over 40 diagnostic dental x-rays.

b) See rebuttal testimony of Arthur Firstenberg submitted to the NMPRC in Case # 15-00312-UT, attached hereto

c) see Rebuttal Testimony of Arthur Firstenberg attached hereto

addltional Witness to I-6

a) Stephanie McCarter; Environmental Health Center -Dallas, TX 75231 - letter of treatment of Elizabeth with request not to install a meter; references to items to be discussed and personal vitea - *see all attached.

a) Liz Seymour; Environmental Health Center - Dallas, TX 75231 - vitea attached - all listed references included in Dr McCarter's letter (attached)

b) all subject matter to be discussed by witnesses Dr McCarter and/or Seymour are listed on the attached letter from the Environmental Health Center - Dallas, attached and dated November 11, 2019

c) See above referenced letter with all information itemized and listed

d) Attached and included hereto

APPENDIX B

Select Portions of Mr. Arthur Firstenberg's Testimony before the New Mexico Public Regulation Commission

EXHIBIT I-6R

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF NEW MEXICO FOR PRIOR APPROVAL OF THE ADVANCED METERING INFRASTRUCTURE PROJECT, DETERMINATION OF RATEMAKING PRINCIPLES AND TREATMENT, AND ISSUANCE OF RELATED ACCOUNTING ORDERS	)	**Case No. 15-00312-UT**
PUBLIC SERVICE COMPANY OF NEW MEXICO,	)	
Applicant	)	

REBUTTAL TO TESTIMONY OF HEIDI M. PITTS, Ph.D.

BY ARTHUR FIRSTENBERG

ON BEHALF OF

NEW MEXICANS FOR UTILITY SAFETY

February 14, 2017

REBUTTAL TESTIMONY OF
ARTHUR FIRSTENBERG
NMPRC CASE NO. 15-00312-UT

Q. Please state your name and address.

A. Arthur Firstenberg, 247 Barela Street, Santa Fe, NM 87501.

Q. Please state your occupation.

A. I am the founder and president of the Cellular Phone Task Force, the oldest and largest organization in North America dedicated to reducing electromagnetic pollution. From 1997 to 2002 I was the publisher and editor of *No Place To Hide*, a journal, distributed to subscribers worldwide, that documented the changes in public health and the environment that were being caused by wireless technology. I am the author of two books: *Microwaving Our Planet: The Environmental Impact of the Wireless Revolution* (Cellular Phone Task Force 1996, 1997) and *The Invisible Rainbow: A History of Electricity and Life* (forthcoming, 2017).

Since 1996, the Task Force has provided a global clearinghouse for information about wireless technology's injurious effects, and a national support network for people injured by this technology. In 1997 the Task Force was the lead litigant in a challenge brought by over 50 citizens groups against the FCC's limits for human exposure to radio frequency ("RF") radiation.

Articles by me or about my work have appeared in *Mother Jones, The Ecologist, Earth Island Journal, Vegetarian Times, Village Voice, Utne Reader, Santa Fe New Mexican, San Francisco Chronicle*, and other newspapers and

magazines. My work has been translated into Spanish, French, Portuguese, Dutch, Italian, Danish, Norwegian, Japanese, and Chinese.

Q. What is your educational background?

A. After graduating Phi Beta Kappa from Cornell University with a B.A. in mathematics and a minor in physics, I attended the University of California, Irvine School of Medicine, entering in September 1978 and resigning in February 1982. Injury by x-ray overdose ended my medical career after three years of medical school. Although I was in the top half of my class academically the injury made me hypersensitive to electromagnetic fields and I could no longer tolerate the hospital environment. For the past 35 years I have been a researcher, consultant, lecturer, and author on the health and environmental effects of electromagnetic fields. After I left medical school I investigated other healing modalities and became a certified practitioner of the Rubenfeld Synergy and Feldenkrais Methods. Since 1996 I have devoted myself full time to my work against electromagnetic pollution and on behalf of its victims. My curriculum vitae is attached as Exhibit AF-1.

Q. What in the hospital environment affected you so severely?

A. Aside from all the x-ray machines, both fixed and portable, electromagnetic signal emitters in hospitals at that time included diathermy machines, timer units, thermostats, treadle operated switches, neurosurgical stimulators, ultrasound

APPENDIX C

Firstenberg v. Monribot, 350 P.3d 1205 (N.M. Ct. App. 2015)

Firstenberg v. Monribot

Court of Appeals of New Mexico

March 5, 2015, Filed

Docket No. 32,549

Reporter
2015-NMCA-062 *; 350 P.3d 1205 **; 2015 N.M. App. LEXIS 31 ***

ARTHUR FIRSTENBERG, Plaintiff-Appellant/Cross-Appellee, v. RAPHAELA MONRIBOT, Defendant-Appellee/Cross-Appellant and ROBIN LEITH, Defendant.

Subsequent History: Certiorari Denied, June 3, 2015, No. 35,275.
Released for Publication July 7, 2015.

Writ of certiorari denied *Firstenberg v. Monribot, 367 P.3d 850, 2015 N.M. LEXIS 196 (N.M., June 3, 2015)*

Related proceeding at *Firstenberg v. Leith, 2015 N.M. App. Unpub. LEXIS 426 (N.M. Ct. App., Nov. 2, 2015)*

Prior History: [***1] APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY. Sarah M. Singleton, District Judge.

Firstenberg v. City of Santa Fe, 782 F. Supp. 2d 1262, 2011 U.S. Dist. LEXIS 48506 (D.N.M., 2011)

Core Terms

district court, causation, summary judgment, quotation, switch, marks, electrical, easement, cell phone, scientific, costs, implied easement, argues, meter, nuisance, grant summary judgment, expert testimony, prima facie tort, studies, summary judgment order, reversal, symptoms, factors, grounds, electromagnetic radiation, summary judgment motion, scientific testimony, motion to exclude, electromagnetic, inadmissible

Case Summary

Overview
HOLDINGS: [1]-Where the owner sought to establish injury, electromagnetic sensitivity (EMS) symptoms, he was required to prove causation, for purposes of N.M. R. Ann. 13-1631; [2]-For purposes of N.M. R. Ann. 11-702, it was the owner's burden to show that his experts were qualified to present scientific expert testimony as to the cause of his EMS symptoms, and the record supported the district court's conclusion that the witnesses were not so qualified, and the owner's vague arguments to the contrary provided no basis for reversal; [3]-He failed to demonstrate through his experts that the studies and articles upon which they relied were admissible as reliable scientific authority showing causation, and the district court properly granted summary judgment in favor of defendants as to the owner's nuisance and prima facie tort claims.

Outcome
Judgment affirmed, no issues required reversal.

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Evidentiary Considerations > Absence of Essential Element

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

HN1[] **Evidentiary Considerations, Absence of Essential Element**

A defendant seeking summary judgment bears the initial burden of negating at least one of the essential elements upon which the plaintiff's claims are grounded. Once such a

showing is made, the burden shifts to the plaintiff to come forward with admissible evidence to establish each required element of the claim. Where the defendant negates an essential element of the plaintiff's case, and the plaintiff fails to show that admissible evidence creates an issue of fact regarding that element, summary judgment is appropriate. The appellate court reviews the district court's decision to grant summary judgment de novo.

Environmental Law > Hazardous Wastes & Toxic Substances > Toxic Torts

Real Property Law > Torts > Nuisance > Elements

Real Property Law > ... > Nuisance > Types of Nuisances > Private Nuisances

HN2[] **Hazardous Wastes & Toxic Substances, Toxic Torts**

Causation is an essential element of both nuisance and prima facie tort. N.M. R. Ann. 13-1631 states the elements of a prima facie tort, including that the defendant's act or failure to act was a cause of the plaintiff's harm. Liability for private nuisance requires proof that the alleged nuisance is the cause of an invasion of another's interest in the private use and enjoyment of land. In a toxic tort case, where the plaintiff seeks to establish injury as a result of exposure to a harmful substance, including radiation, the plaintiff is required to prove both general and specific causation. To establish cause in a toxic tort case, the evidence must show both general causation and specific causation. A toxic tort is defined as a civil wrong arising from exposure to a toxic substance, such as radiation. General causation is whether a substance is capable of causing a particular injury or condition in the general population and specific causation is whether a substance caused a particular individual's injury.

Torts > ... > Elements > Causation > General Overview

HN3[] **Elements, Causation**

A plaintiff must first demonstrate general causation because without general causation, there can be no specific causation.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Evidence > Burdens of Proof > Allocation

Evidence > Admissibility > Expert Witnesses > Helpfulness

Evidence > ... > Testimony > Expert Witnesses > Qualifications

Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN4[] **Standards of Review, Abuse of Discretion**

The appellate court reviews the district court's decision to admit or exclude scientific expert testimony under N.M. R. Ann. 11-702 for an abuse of discretion. The abuse of discretion standard allows the reviewing court to reverse a district court's discretionary decision when the decision was obviously erroneous, arbitrary, or unwarranted or where it was clearly against the logic and effect of the facts and circumstances before the court. The party seeking to admit expert testimony bears the burden of showing that the expert is qualified, that the expert's testimony will assist the trier of fact, and that the expert will testify only as to scientific, technical, or other specialized knowledge with a reliable basis. N.M. R. Ann. 11-702.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN5[] **Expert Witnesses, Daubert Standard**

In determining whether scientific evidence has a reliable basis, the district court should consider: (1) whether a theory or technique can be (and has been) tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known potential rate of error in using a particular scientific technique and the existence and maintenance of standards controlling the technique's operation; (4) whether the theory or technique has been generally accepted in the particular scientific field; (5) whether the scientific technique is based upon well-recognized scientific principle; and (6) whether it is capable of supporting opinions based upon reasonable probability rather than conjecture.

Civil Procedure > Appeals > Standards of Review > General Overview

HN6[] **Appeals, Standards of Review**

The appellate court will not search the record for facts,

arguments, and rulings in order to support generalized arguments.

Evidence > Burdens of Proof > Allocation

Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN7[] **Burdens of Proof, Allocation**

A treating physician must be qualified pursuant to the Daubert/Alberico factors in order to present scientific expert testimony as to the external causation of the patient's symptoms. It is the proponent's burden to demonstrate the admissibility of expert scientific testimony.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Evidence > ... > Hearsay > Rule Components > Statements

Evidence > ... > Hearsay > Rule Components > Truth of Matter Asserted

HN8[] **Summary Judgment, Evidentiary Considerations**

N.M. R. Ann. 11-802 provides that a written statement that is offered in evidence to prove the truth of the matter asserted in the statement constitutes inadmissible hearsay. The district court may not consider inadmissible hearsay in deciding a summary judgment motion.

Environmental Law > Hazardous Wastes & Toxic Substances > Toxic Torts

Evidence > Admissibility > Expert Witnesses

HN9[] **Hazardous Wastes & Toxic Substances, Toxic Torts**

An expert may rely on an article because it is the expert who determines, based on study and experience, whether the article is reliable. General causation is established by demonstrating (usually by reference to a scientific publication) that exposure to the substance in question causes (or is capable of causing) disease.

Civil Procedure > Appeals > Standards of Review > General Overview

HN10[] **Appeals, Standards of Review**

An appellate court need not decide an issue that will have no practical effect on the current litigation.

Communications Law > ... > Regulated Entities > Telephone Services > Cellular Services

Constitutional Law > Supremacy Clause > Federal Preemption

Communications Law > ... > Rules & Regulations > Regulated Entities > Wireless Services

Communications Law > Federal Acts > Federal Communications Act > Federal Preemption

HN11[] **Telephone Services, Cellular Services**

Lawsuits based on the premise that radio frequency (RF) emissions from cell phones are harmful to human health are preempted under the doctrine of conflict preemption because such claims conflict with the Federal Communications Commission (FCC) determination that wireless phones that do comply with the FCC's RF standards are safe for use by the general public. Conflict preemption precludes laws that under the circumstances of a particular case, stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Constitutional Law > Supremacy Clause > Federal Preemption

HN12[] **Standards of Review, De Novo Review**

The appellate court reviews a federal preemption issue de novo.

Communications Law > ... > Regulated Entities > Telephone Services > Cellular Services

Constitutional Law > Supremacy Clause > Federal Preemption

Torts > Procedural Matters > Preemption > General Overview

Communications Law > ... > Rules & Regulations > Regulated Entities > Wireless Services

Communications Law > Federal Acts > Telecommunications Act > Federal Preemption

HN13[] **Telephone Services, Cellular Services**

Congress has expressly mandated that the Federal Communications Commission (FCC) shall prescribe and make effective rules regarding the environmental effects of radio frequency (RF) emissions. In effecting its congressional mandate, the FCC set limits on the RF emissions for cell phones and other devices that provide a proper balance between the need to protect the public and workers from exposure to excessive RF electromagnetic fields and the need to allow communications services to readily address growing marketplace demands. In order to prevail in a lawsuit based on an alleged injury caused by RF emissions from cell phones, a jury would have to accept the premise that FCC's regulations are inadequate to ensure the safe use of cell phones. This would allow cell phone providers to be held liable even though they indisputably complied with FCC regulatory requirements, thereby imposing a legal duty that would directly conflict with federal mandates. Such lawsuits are therefore conflict preempted. Conflict preemption prohjbits states from establishing tort law liability for claimed injuries resulting from federally permitted cell phone RF emissions.

Constitutional Law > Equal Protection > Nature & Scope of Protection

Education Law > ... > Disability Discrimination > Americans With Disabilities Act > ADA Coverage

HN14[] **Equal Protection, Nature & Scope of Protection**

The Americans with Disabilities Act provides a remedy when a state violates the Fourteenth Amendment by depriving an individual of equal protection. An equal protection claim requires the plaintiff to allege or otherwise demonstrate that the at-issue conduct constituted impermissible state action.

Constitutional Law > Equal Protection > Nature & Scope of Protection

HN15[] **Equal Protection, Nature & Scope of Protection**

A state court's adjudication of private rights is not sufficient state action in the sense necessary to implicate constitutional protections. Insofar as the United States Supreme Court in Shelley v. Kraemer stated a contrary position, the Supreme Court has since modified its position. The Court has stated in Shelley that the actions of state courts and their judicial officers is to be regarded as an action of the state within the meaning of the Fourteenth Amendment, and the Court has recognized that the party charged with the deprivation of a federal right must be a person who may fairly be said to be a state actor and the Court has rejected the notion that a private party's mere invocation of state legal procedures" satisfies the state-actor requirement. The United States Supreme Court has pulled back the reach of Shelley, if not overruling it sub silentio, by requiring something more than the reliance on a judicial proceeding.

Civil Procedure > ... > Justiciability > Mootness > General Overview

HN16[] **Justiciability, Mootness**

A reviewing court generally does not decide academic or moot questions.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Real Property Law > ... > Limited Use Rights > Easements > General Overview

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN17[] **Standards of Review, De Novo Review**

The appellate court reviews de novo legal questions arising from a district court's application of law to the facts involving the existence of an easement.

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

HN18[] **Summary Judgment Review, Standards of Review**

The appellate court reviews de novo the district court's decision to grant summary judgment.

Real Property Law > ... > Easements > Easement Creation > Easement by Necessity

HN19[] **Easement Creation, Easement by Necessity**

In considering the nature of implied easements by necessity, New Mexico courts rely on the Restatement. An implied easement by necessity arises out of a conveyance that would otherwise deprive the land conveyed to the grantee of rights necessary to reasonable enjoyment of the land unless the language or circumstances of the conveyance clearly indicate that the parties intended to deprive the property of those rights. The phrase "rights necessary to reasonable enjoyment of property" is not limited to access rights; it applies to whatever is reasonably necessary for the enjoyment of property, if the conveyance would otherwise eliminate the property owner's right to do those things. This includes the delivery of electricity. To find an implied easement by necessity, the necessity must have arisen as a result of a severance of rights held by a single owner, for example, where a single parcel of land is divided into two parcels. The easement by necessity rests heavily upon the intent of the" grantor, and unless there is a clear indication to the contrary, the grantor is presumed to have intended to have conveyed to his grantees, a means of access to the property in question, so that the land may be beneficially utilized.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Legal Entitlement

HN20[] **Entitlement as Matter of Law, Genuine Disputes**

Once a movant for summary judgment makes a prima facie showing that summary judgment is appropriate as a matter of law, the burden shifts to the opponent to show at least a reasonable doubt as to the existence of a genuine issue of fact.

Real Property Law > ... > Easements > Easement Creation > Easement by Necessity

HN21[] **Easement Creation, Easement by Necessity**

Under the strict necessity test, where any alternative was available to an easement claimant, no easement would be found. New Mexico does not follow the strict necessity test; rather, the test of necessity in New Mexico is whether the party claiming the easement could, through the reasonable expenditure of labor or money, create an alternative to the easement on his own estate.

Real Property Law > ... > Easements > Easement Creation > General Overview

HN22[] **Easements, Easement Creation**

In determining whether the expense of creating an alternative to an easement is reasonable, the court may consider the cost of creating the alternative as compared with the values of the servient and the dominant estates and the extent to which the easement will affect their respective values.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN23[] **Entitlement as Matter of Law, Appropriateness**

Summary judgment is appropriate where reasonable minds will not differ as to an issue of material fact.

Contracts Law > Contract Interpretation > Parol Evidence > General Overview

HN24[] **Contract Interpretation, Parol Evidence**

Parol evidence is inadmissible to the extent that it varies or explains the terms or contradicts the legal effect of an unambiguous written instrument.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > ... > Costs & Attorney Fees > Costs > General Overview

HN25[] **Standards of Review, Abuse of Discretion**

Pursuant to N.M. R. Ann. 1-054(D)(1), costs shall be allowed to the prevailing party unless the court otherwise directs. Rule 1-054 vests the district court with wide discretion in determining whether to award costs. The appellate court reviews the trial court's order granting or denying an award of costs for abuse of discretion.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > ... > Costs & Attorney Fees > Costs > General Overview

HN26[] **Standards of Review, Abuse of Discretion**

In order to demonstrate that the district court abused its discretion in awarding costs, the appellant must demonstrate that the court's ruling was contrary to logic or reason.

Civil Procedure > Appeals > Standards of Review > General Overview

HN27[] **Appeals, Standards of Review**

An appellate court will not review unclear arguments or guess at what a party's arguments might be.

Civil Procedure > ... > Costs & Attorney Fees > Costs > General Overview

Evidence > Burdens of Proof > Allocation

Civil Procedure > Appeals > Standards of Review > General Overview

Civil Procedure > Preliminary Considerations > Equity > General Overview

Evidence > Inferences & Presumptions > Presumptions

HN28[] **Costs & Attorney Fees, Costs**

In exercising its discretion to deny or to award costs under N.M. R. Ann. 1-054(D), the district court is permitted to disallow costs based upon equitable grounds, including a losing party's inability to pay. Equitable considerations are appropriate in determining whether to award costs. The losing party's ability to pay is a proper factor to consider in determining whether to award costs. Further, in reviewing an issue on appeal, the appellate court presumes that the district court is correct and the burden is on the appellant to clearly demonstrate the district court's error.

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Judges: JONATHAN B. SUTIN, Judge. WE CONCUR: MICHAEL D. BUSTAMANTE, Judge, CYNTHIA A. FRY, Judge.

Opinion by: JONATHAN B. SUTIN

Opinion

[1209] SUTIN, Judge.**

[*1] Arthur Firstenberg sued his neighbor, Raphaela Monribot, and Robin Leith, the owner-lessor of Ms. Monribot's residence,[1] for injunctive relief and monetary damages under the theories of nuisance and prima facie tort. In his complaint, Mr. Firstenberg alleged that because he suffers from a condition called electromagnetic sensitivity (EMS)[2] that renders him acutely sensitive to electromagnetic radiation, his health was adversely affected by Ms. Monribot's

[1] Throughout this Opinion, we refer to the house and property owned by Ms. Leith and leased by Ms. Monribot as "Defendants' property."

[2] The parties, the witnesses, and the district court variously refer to Mr. Firstenberg's condition as electromagnetic hypersensitivity, electromagnetic sensitivity, and idiopathic environmental intolerance attributed to electromagnetic fields. For ease of reference, we use the acronym EMS throughout this Opinion in reference to Mr. Firstenberg's condition.

use, within her own residence, of various electronic devices that generate electromagnetic radiation, including a cell phone, a Wi-Fi modem, dimmer switches, and a microcell. After nearly three years of litigation, having held an evidentiary hearing regarding the admissibility of expert scientific testimony, the district court determined that [***2] Mr. Firstenberg lacked admissible evidence of general causation and, therefore, granted summary judgment in favor of Ms. Monribot and Ms. Leith (Defendants). Mr. Firstenberg appeals from the court's summary judgment order. As will be discussed in this Opinion, Mr. Firstenberg raises several points of error related to the district court's summary judgment order and to various district court orders that preceded the court's summary judgment.

[*2] The electric lines and meter serving Mr. Firstenberg's property were located on Defendants' property. In an effort to force Mr. Firstenberg to relocate and cease using the electric lines and meter on Defendants' property, Ms. Monribot filed counterclaims against Mr. Firstenberg, [***3] seeking declaratory and injunctive relief and trespass damages. The court, having determined that Mr. Firstenberg had an implied easement by necessity that permitted him to access the equipment, granted partial summary judgment in favor of Mr. Firstenberg as to all of Ms. Monribot's counterclaims. Ms. Monribot cross-appeals from this and other district court rulings. Ms. Leith is not a party in this appeal.

[*3] As to Mr. Firstenberg's appeal, we conclude that his arguments do not demonstrate that the district court's summary judgment in favor of Ms. Monribot as to his claims of prima facie tort and nuisance was in error. We hold that Mr. Firstenberg's remaining arguments provide no basis for reversal, and we affirm the district court's summary judgment in favor of Ms. Monribot. As to Ms. Monribot's cross-appeal, we conclude that the issues raised therein provide no basis for reversal.

[**1210] BACKGROUND

[*4] This case comes to us with a lengthy and complicated factual and procedural history. As background, we provide only those facts that are necessary to illuminate the appellate issues. Further facts are provided, as necessary, in the body of this Opinion.

[*5] Mr. Firstenberg claims that he suffers from EMS, [***4] the numerous symptoms of which are triggered by electromagnetic radiation, such as radio waves emitted from cell phones, computers, electrical transmission lines, and similar devices. Mr. Firstenberg claims, further, that owing to "chemical" and electromagnetic sensitivities, he has been declared totally and permanently disabled by the United States Social Security Administration and that since 1992 Mr. Firstenberg has been collecting social security disability benefits on that basis.

[*6] Mr. Firstenberg and Ms. Monribot met in 2008 when Ms. Monribot responded to his Craigslist ad seeking a personal cook. Mr. Firstenberg hired Ms. Monribot to cook his meals, and he ate his meals in her house; this arrangement lasted approximately one month until Ms. Monribot went to Europe for four months. While she was in Europe, Ms. Monribot sublet her house to Mr. Firstenberg, and later, Mr. Firstenberg purchased the house. Approximately one year later, Ms. Monribot returned to Santa Fe and moved into a house (owned by Ms. Leith) that was next door to Mr. Firstenberg's house. The day after Ms. Monribot moved in next door to him, Mr. Firstenberg became so ill that he thought he "could die[,]" and his [***5] symptoms recurred every time he returned to his house.

[*7] Mr. Firstenberg attributed his illness to Ms. Monribot's use, within her own home, of a cell phone and a number of dimmer switches, and later, to her Wi-Fi and microcell. Ms. Monribot refused Mr. Firstenberg's requests to replace her dimmer switches with regular switches, use a land-line instead of a cell phone, to turn off her Wi-Fi, and to unplug her computer at night; she later refused Mr. Firstenberg's offer of $10,000 to comply with his requests. Mr. Firstenberg stated that because Ms. Monribot would not comply with these requests, he was unable to use his house for more than a few minutes at a time without suffering EMS symptoms that were caused by radiation from Ms. Monribot's electronic devices "entering" and "leak[ing]" into his house. Accordingly, Mr. Firstenberg filed the present lawsuit.

[*8] Mr. Firstenberg's original complaint, filed on January 4, 2010, for nuisance and prima facie tort named only Ms. Monribot as a Defendant. He later filed a first amended complaint, in which Ms. Leith was added as a defendant and indispensable party, and a second and third amended complaint.[3] His complaint for prima facie tort was founded on allegations [***6] that, in summary, Ms. Monribot, who knew of Mr. Firstenberg's EMS, "bombard[ed Mr. Firstenberg's] residence with electromagnetic radiation, which she knew would injure [him]"; that she did so intentionally, with the certainty that injury would necessarily result to Mr. Firstenberg; that her use of electronic devices "rendered [Mr. Firstenberg's] home extremely difficult to inhabit and have caused him years of inconvenience and acute and chronic pain and suffering"; and that Ms. Monribot's conduct "had no valid

[3] References to Mr. Firstenberg's "complaint" throughout this Opinion are to his third amended complaint, with references to earlier iterations delineated accordingly.

purpose and was unjustifiable" because she could use a land-line, cable instead of Wi-Fi, and engage in "other simple practices that would not cause her undue expense or inconvenience." Mr. Firstenberg's claim of nuisance was based, in summary, on his allegations that Ms. Monribot's use of electronic devices interfered with his normal residential activities and his private use and enjoyment of his home and his land; Ms. Monribot's actions were intentional and unreasonable; that she knew or should have known that "bombarding [Mr. Firstenberg's] home with electromagnetic radiation interfered with [his] use and enjoyment of his land"; and that her actions caused Mr. Firstenberg **[***7]** "years of inconvenience and acute and chronic pain and suffering." Mr. Firstenberg's complaint sought damages totaling 1.43 million dollars and injunctive relief prohibiting Ms. Monribot from operating **[**1211]** equipment that emits electromagnetic radiation.

[*9] Ms. Monribot filed counterclaims, seeking a declaratory judgment, injunctive relief, and damages for trespass, seeking to force Mr. Firstenberg to cease using and to relocate the electric lines and meter that are on Defendants' property. Further details related to the factual bases of Ms. Monribot's counterclaims and the district court's disposition of those claims are provided later in this Opinion.

[*10] Owing to the nature of Mr. Firstenberg's claims in this case, both Defendants and Mr. Firstenberg obtained experts on the issue of the cause of Mr. Firstenberg's symptoms. Mr. Firstenberg sought to prove that his EMS symptoms were caused by Ms. Monribot's use of electronic devices by relying on the expert testimony of Dr. Erica Elliott, M.D., Mr. Firstenberg's treating physician, **[***8]** and Dr. Raymond Singer, Ph.D, a neurotoxicologist. Defendants sought to prove, through the testimony of psychologist, Dr. Herman Staudenmayer, Ph.D, that Mr. Firstenberg's EMS symptoms were psychological, caused by an undifferentiated somatoform disorder. Each party filed motions seeking to exclude the other's expert on the ground that the proffered expert testimony was inadmissible pursuant to the standards by which the admissibility of scientific expert testimony is measured. Defendants filed an amended version of their motion to exclude the testimony of Drs. Elliott and Singer, and relying on their memorandum in support thereof, Defendants simultaneously filed a motion for summary judgment on the ground that, because Mr. Firstenberg's proffered experts as to causation were not qualified to provide expert scientific testimony, Mr. Firstenberg could not prove causation.

[*11] Mr. Firstenberg appeals from the district court's order granting summary judgment in favor of Defendants as to all "allegations, counts[,] and causes of action asserted against Defendants in [Mr. Firstenberg's t]hird [a]mended [c]omplaint for [n]uisance and [p]rima [f]acie [t]ort." The basis for the district court's summary judgment order was Mr. Firstenberg's failure **[***9]** to demonstrate that admissible scientific evidence supported his theory of general causation, that is, that exposure to electromagnetic fields causes, or is capable of causing, the injuries that Mr. Firstenberg complains of, namely, adverse health affects from EMS. The crux of this appeal, therefore, is the propriety of the district court's summary judgment.

[*12] Although Mr. Firstenberg raises numerous contentions of error related to various district court rulings and actions that preceded the summary judgment order and that, in his view, warrant reversal of particular rulings, many of Mr. Firstenberg's contentions of error were rendered moot by the district court's summary judgment order. Because we conclude that the district court did not err in granting summary judgment based on Mr. Firstenberg's failure to demonstrate that admissible evidence supported his theory of general causation, we do not consider the moot issues, including issues related to the district court's early partial summary judgment orders or its denial of Mr. Firstenberg's request for a preliminary injunction. Further, because the district court's summary judgment order was based upon Mr. Firstenberg's lack of evidence **[***10]** of general causation, we limit our discussion to that issue and do not consider issues related to specific causation.

DISCUSSION

I. Summary Judgment on General Causation Grounds Was Proper

[*13] *HN1*[↑] "A defendant seeking summary judgment bears the initial burden of negating at least one of the essential elements upon which the plaintiff['s] claims are grounded." *Snow v. Warren Power & Mach., Inc., 2014-NMCA-054, ¶ 5, 326 P.3d 33* (omission, internal quotation marks, and citation omitted), *cert. granted, 2014-NMCERT-005, 326 P.3d 1112.* "Once such a showing is made, the burden shifts to the plaintiff to come forward with admissible evidence to establish each required element of the claim." *Id.* (internal quotation marks and citation omitted). Where the defendant negates an essential element of the plaintiff's case, and the plaintiff fails to show that admissible evidence creates an issue of fact regarding that element, summary judgment **[**1212]** is appropriate. *Estate of Haar v. Ulwelling, 2007-NMCA-032, ¶ 10, 141 N.M. 252, 154 P.3d 67*. We review the district court's decision to grant summary judgment de novo. *Id.*

[*14] *HN2*[↑] Causation is an essential element of both nuisance and prima facie tort. *See UJI 13-1631 NMRA* (stating the elements of prima facie tort, including that the defendant's act or failure to act was a cause of the plaintiff's harm); *Scott v. Jordan, 1983-NMCA-022, ¶ 12, 99 N.M. 567, 661 P.2d 59* (stating that liability for private **[***11]** nuisance requires proof that the alleged nuisance is the cause of an "invasion of another's interest in the private use and enjoyment of land" (internal quotation marks and citation omitted)). In a toxic tort case, where the plaintiff seeks to establish injury as a result of exposure to a harmful substance, including radiation, the plaintiff is required to prove both general and specific causation. *See Andrews v. United States Steel Corp., 2011-NMCA-032, ¶ 9, 149 N.M. 461, 250 P.3d 887* ("[T]o establish cause in a toxic tort case, the evidence must show both general causation and specific causation." (internal quotation marks omitted)); *Black's Law Dictionary* 1718 (10th ed. 2014) (defining a "toxic tort" as "[a] civil wrong arising from exposure to a toxic substance, such as . . . radiation"). "General causation is whether a substance is capable of causing a particular injury or condition in the general population and specific causation is whether a substance caused a particular individual's injury." *Andrews*, 2011-NMCA-032, ¶ 9 (internal quotation marks and citation omitted).

[*15] In the present case, where Mr. Firstenberg sought to establish injury, specifically, EMS symptoms, as a result of exposure to electromagnetic radiation, he was required to prove both general and specific causation. As noted **[***12]** earlier, the district court granted summary judgment on the ground that Mr. Firstenberg failed to present admissible evidence of general causation. Because we affirm the district court's summary judgment order on general causation grounds, we need not and therefore do not address specific causation. *See Farris v. Intel Corp., 493 F. Supp. 2d 1174, 1180 (D.N.M. 2007)* (stating that *HN3*[↑] a "[p]laintiff must first demonstrate general causation because without general causation, there can be no specific causation" (internal quotation marks and citation omitted)); *Acosta v. Shell W. Exploration & Prod., Inc., 2013-NMCA-009, ¶¶ 9, 12, 26, 293 P.3d 917* (affirming the district court's grant of summary judgment owing to the plaintiff's failure to produce admissible scientific evidence showing general causation).

[*16] In relevant part, in their motion to exclude Mr. Firstenberg's experts, Defendants argued that "EMS [attributed to electromagnetic radiation] has not been established," nor has it "withstood scrutiny in either the scientific or medical communities." Further, Defendants argued that Mr. Firstenberg's proffered experts on the issue of general causation were not qualified, under *Rule 11-702 NMRA*, to provide scientific expert testimony as to the existence of EMS.

[*17] In response to Defendants' amended motion for summary judgment, Mr. Firstenberg argued, in relevant part, that **[***13]** because the district court had yet to rule upon Defendants' motion to exclude his proffered experts, Defendants' claim that he could not prove causation was baseless. Also pending at that time was Mr. Firstenberg's motion to exclude Dr. Staudenmayer's testimony on the ground that Dr. Staudenmayer did not meet the qualifications of an expert witness under Rule 11-702.

[*18] Over the course of three days, the district court held an evidentiary hearing on the issues raised in Mr. Firstenberg's and Defendants' respective motions to exclude expert witnesses and on Defendants' amended motion for summary judgment. All three proposed experts, Drs. Staudenmayer, Elliott, and Singer, testified at the evidentiary hearing. Following the hearing, the parties filed written arguments.

[*19] Having heard the testimony and considered the parties' written arguments, the district court concluded that the testimony of Drs. Elliott and Singer on the issue of general causation was inadmissible under the standard set forth in *State v. Alberico, 1993-NMSC-047, 116 N.M. 156, 861 P.2d 192*, for **[**1213]** evaluating the admissibility of scientific expert testimony. *See id. ¶ 51* (relying on *Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*, to enumerate some of the factors that courts should consider in assessing the admissibility of expert scientific **[***14]** testimony under Rule 11-702). Mr. Firstenberg's failure to demonstrate that admissible scientific evidence supported his theory of general causation led the court to grant summary judgment in Defendants' favor on the ground that, in the absence of admissible evidence of general causation, Mr. Firstenberg could not prevail in his claims of nuisance and prima facie tort. Additionally, in light of its summary judgment order, the district court concluded that it was "unnecessary to consider [Mr. Firstenberg's] motion to exclude Dr. Staudenmayer."

[*20] Mr. Firstenberg argues on appeal that the district court made a number of errors in regard to his and Defendants' respective proffered experts. We address Mr. Firstenberg's arguments in turn but first we discuss our standard of review and the standards by which the admissibility of expert testimony is to be determined in the district court.

[*21] *HN4*[↑] We review the district court's decision to admit or exclude scientific expert testimony under Rule 11-702 for an abuse of discretion. *Alberico, 1993-NMSC-047, ¶ 58, 116 N.M. 156, 861 P.2d 192*The abuse of discretion standard allows the reviewing court to reverse a district court's discretionary decision when the decision was

"obviously erroneous, arbitrary, or unwarranted" or where it **[***15]** was "clearly against the logic and effect of the facts and circumstances before the court." *Id. ¶ 63*. The party seeking to admit expert testimony bears the burden of showing that the expert is qualified, that the expert's testimony will assist the trier of fact, and that the expert will "testify only as to scientific, technical[,] or other specialized knowledge with a reliable basis." Rule 11-702; *State v. Anderson, 1994-NMSC-089, ¶ 14, 118 N.M. 284, 881 P.2d 29* (internal quotation marks and citation omitted); *Parkhill v. Alderman-Cave Milling & Grain Co. of N.M., 2010-NMCA-110, ¶ 54, 149 N.M. 140, 245 P.3d 585* (Vigil, J., specially concurring).

[*22] *HN5*[↑] In determining whether scientific evidence has a reliable basis, the district court should consider:

> (1) whether a theory or technique can be (and has been) tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known potential rate of error in using a particular scientific technique and the existence and maintenance of standards controlling the technique's operation; . . . (4) whether the theory or technique has been generally accepted in the particular scientific field[;] . . . [(5)] whether the scientific technique is based upon well-recognized scientific principle[;] and [(6)] whether it is capable of supporting opinions based upon reasonable probability rather than **[***16]** conjecture.

Anderson, 1994-NMSC-089, ¶ 15 (internal quotation marks and citations omitted). Because the foregoing factors were derived from the United States Supreme Court's opinion in *Daubert* and adopted by the New Mexico Supreme Court in *Alberico*, New Mexico cases often refer to them as the "*Daubert/Alberico* factors." *See Alberico, 1993-NMSC-047, ¶ 51, 116 N.M. 156, 861 P.2d 192* (relying on *Daubert* to enumerate some of the factors that courts should consider in assessing the admissibility of scientific evidence under Rule 11-702); *see, e.g., Loper v. JMAR, 2013-NMCA-098, ¶ 38, 311 P.3d 1184* (referencing the "*Daubert-Alberico* factors"). In this Opinion, for ease of reference, we refer simply to the "*Alberico* factors." We turn now to Mr. Firstenberg's expert witness issues.

Mr. Firstenberg's Arguments Regarding Dr. Staudenmayer

[*23] On appeal, Mr. Firstenberg argues that by failing to rule on his motion to exclude Dr. Staudenmayer's testimony, which he continues to assert was inadmissible under Rule 11-702, the court failed to perform its gate-keeping function. We disagree. Insofar as the purpose of Mr. Firstenberg's motion to exclude Dr. Staudenmayer's testimony was to exclude him from testifying at trial, we agree with the district court's ruling **[**1214]** that its summary judgment disposition, which eliminated the possibility of this case going to trial, **[***17]** rendered a ruling on Mr. Firstenberg's motion unnecessary.

Mr. Firstenberg's Arguments Regarding Drs. Elliott and Singer

[*24] Mr. Firstenberg also argues that the district court erred in excluding the testimony of his proffered experts on a number of grounds. Namely, he argues that the court erroneously ruled on the proffered experts' conclusions, not their methodologies, and thereby failed to apply the appropriate standard in evaluating the admissibility of the experts' testimony; the court's findings were "clearly erroneous" insofar as its order contained various typographical and semantic errors; and the court erred in excluding the testimony of his treating physician. Additionally, Mr. Firstenberg contends that the district court failed to review and to understand the ninety-three studies that his experts relied upon for their conclusions and were admitted as exhibits and that had the district court familiarized itself with these studies, it would have permitted his experts to testify regarding EMS. We address these arguments summarily.

[*25] As an initial matter, we do not consider Mr. Firstenberg's arguments concerning the district court's typographical and semantic errors. To the extent that **[***18]** Mr. Firstenberg believed that these errors warranted further consideration, pursuant to the district court's order he could have timely filed objections to the form of the court's order. Having failed to file such objections in the district court, Mr. Firstenberg has waived the opportunity to challenge the form of the court's order.

[*26] Mr. Firstenberg's remaining arguments, founded upon a litany of errors that he alleges were committed by the district court in excluding his experts, are unpersuasive. His arguments in this regard are presented without any attempt to demonstrate that applying the *Alberico* factors to the testimony provided by his experts leads to a conclusion that their testimony constituted admissible scientific testimony. We will not do for Mr. Firstenberg what he has failed to do on his own behalf—that is, search the record in an attempt to demonstrate that his experts meet the standard of reliability required of expert scientific testimony pursuant to the *Alberico* factors. *See Muse v. Muse, 2009-NMCA-003, ¶ 72, 145 N.M. 451, 200 P.3d 104* *HN6*[↑] ("We will not search the record for facts, arguments, and rulings in order to support

generalized arguments.").

[*27] It was Mr. Firstenberg's burden, in the district court, to show that his experts, **[***19]** including his treating physician, Dr. Elliott, were qualified to present scientific expert testimony as to the cause of his EMS symptoms. *See Parkhill*, 2010-NMCA-110, ¶ 20 (stating that *HN7*[↑] a treating physician must be qualified pursuant to the *Alberico* factors in order to present scientific expert testimony as to the external causation of the patient's symptoms); *id.* ¶ 54 (Vigil, J., specially concurring) (recognizing that it is the proponent's burden to demonstrate the admissibility of expert scientific testimony). The district court, having reviewed the parties' briefs, authorities, exhibits, reports, expert affidavits, and testimony, concluded that Mr. Firstenberg did not meet that burden. Having reviewed the testimony of Drs. Elliott and Singer, we conclude that the record fully supports the district court's conclusion that they were not qualified to present expert scientific testimony on the issue of general causation. Mr. Firstenberg's vague and generalized arguments to the contrary provide no basis for reversal. *See* Muse, 2009-NMCA-003, ¶ 72, 145 N.M. 451, 200 P.3d 104 (recognizing that an appellant seeking to establish that the district court abused its discretion must do so by a discussion of facts, arguments, and rulings that appear in the record).

[*28] Finally, **[***20]** Mr. Firstenberg's repeated references to the ninety-three studies upon which his experts relied in forming their conclusions and his argument that the district court erred by failing to familiarize itself with those studies demonstrate a misunderstanding of the law. The studies and articles, standing alone, do not constitute admissible evidence; rather, they constitute inadmissible hearsay. *See* Rule 11-801(A), **[**1215]** (C)(2) NMRA; *HN8*[↑] *Rule 11-802 NMRA* (providing that a written statement that is offered in evidence to prove the truth of the matter asserted in the statement constitutes inadmissible hearsay). Therefore, the district court was under no obligation to independently evaluate the articles and studies upon which Mr. Firstenberg's experts relied in reaching their conclusions. *See* Wilde v. Westland Dev. Co., 2010-NMCA-085, ¶ 28, 148 N.M. 627, 241 P.3d 628 (stating that the district court may not consider inadmissible hearsay in deciding a summary judgment motion).

[*29] Rather, to the extent that Mr. Firstenberg wished to rely upon the contents of the articles and studies to demonstrate general causation, it was incumbent upon him to establish, via his experts, that the articles constituted reliable scientific authority. *See* Baerwald v. Flores, 1997-NMCA-002, ¶ 18, 122 N.M. 679, 930 P.2d 816 (recognizing that *HN9*[↑] an "expert may rely on an article because it is the expert who determines, **[***21]** based on study and experience, whether the article is reliable"); *see also Andrews*, 2011-NMCA-032, ¶ 9 (recognizing that "general causation is established by demonstrating (usually by reference to a scientific publication) that exposure to the substance in question causes (or is capable of causing) disease" (alteration, internal quotation marks, and citation omitted)). Had Mr. Firstenberg established that his experts relied on the articles and studies in forming their opinions and that these items were reliable scientific authority, the content of the articles and studies may have been admissible pursuant to a hearsay exception. *See* Rule 11-803(18)(b) NMRA (governing the hearsay exception related to statements in learned treatises, periodicals, or pamphlets). Having failed to demonstrate through his experts that the studies and articles upon which they relied were admissible as reliable scientific authority showing causation, Mr. Firstenberg cannot argue that the district court erred by failing to consider them.

[*30] In sum, we conclude that Mr. Firstenberg has not demonstrated that the district court abused its discretion in concluding that his proffered experts were not qualified to present expert scientific testimony on the issue of **[***22]** general causation or in failing to consider the articles and studies upon which they relied. Having concluded that Mr. Firstenberg's arguments regarding the court's expert witness rulings provide no basis for reversal, we further conclude that the court properly granted summary judgment in favor of Defendants as to Mr. Firstenberg's nuisance and prima facie tort claims. In light of this holding, we do not address his contentions of error regarding the court's denial of a preliminary injunction, its order granting partial summary judgment on prima facie tort, and its order granting summary judgment as to nuisance on grounds other than causation, all of which preceded the court's summary judgment order. Consideration of these issues would have no effect on the outcome of this appeal. *See* Stennis v. City of Santa Fe, 2006-NMCA-125, ¶ 28, 140 N.M. 517, 143 P.3d 756 *HN10*[↑] ("[A]n appellate court need not decide an issue that will have no practical effect on the current litigation[.]"), *rev'd on other grounds by* 2008-NMSC-008, 143 N.M. 320, 176 P.3d 309.

II. Mr. Firstenberg's Remaining Arguments

A. Mr. Firstenberg's Argument Regarding Federal Preemption

[*31] At a hearing on a motion filed by Ms. Monribot[4]

[4] Ms. Monribot filed this motion prior to Mr. Firstenberg having amended his complaint to add Robin Leith as a Defendant.

seeking to dismiss Mr. Firstenberg's complaint on federal preemption grounds, the district court concluded that to the **[***23]** extent that Mr. Firstenberg's claims related to Ms. Monribot's use of her cell phone, the claims were preempted by federal law. In so holding, the district court relied on *Murray v. Motorola, Inc.*, in which the District of Columbia Court of Appeals held that *HN11*[↑] lawsuits based on the premise that radio frequency (RF) emissions from cell phones are harmful to human health are preempted under the doctrine of conflict preemption because **[**1216]** "[s]uch claims conflict with the [Federal Communications Commission (FCC)] determination that wireless phones that do comply with the FCC's RF standards are safe for use by the general public[.]" *982 A.2d 764, 768-69, 777-78 (D.C. 2009)* (alteration omitted); *see id. at 772* (recognizing that conflict preemption precludes laws that "under the circumstances of a particular case, stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (omission, alteration, internal quotation marks, and citation omitted)).

[*32] Mr. Firstenberg argues that the district court erred in finding federal preemption with respect to cell phones because, he claims, permitting states **[***24]** to entertain tort law actions premised on the harmful effects of RF emissions would not stand as an obstacle to any congressional objectives. In support of his argument, Mr. Firstenberg cites *Pinney v. Nokia, Inc., 402 F.3d 430, 457 (4th Cir. 2005)*, for the proposition that the Federal Communications Act provided no evidence of an objective "of ensuring that all equipment used in connection with wireless telecommunications be subject to exclusive national RF radiation standards that have the effect of precluding state regulation on the subject." *HN12*[↑] We review this issue de novo. *Humphries v. Pay & Save, Inc., 2011-NMCA-035, ¶ 6, 150 N.M. 444, 261 P.3d 592* (stating the standard of review applicable to federal preemption issues).

[*33] As was the district court, we are persuaded by the reasoning in *Murray*. The *Murray* court considered and rejected the reasoning in *Pinney* because, among other things, the *Pinney* court failed to consider the fact that *HN13*[↑] Congress had expressly mandated that the FCC "shall prescribe and make effective rules regarding the environmental effects of [RF] emissions," a fact that the *Murray* court considered "critical" in considering whether states may permit lawsuits that are premised on the notion that cell phones cause injury. *Murray, 982 A.2d at 778 n.19, 780-81* (omission, internal quotation marks, and citation omitted). As the *Murray* court **[***25]** explained, in effecting its congressional mandate, the FCC set limits on the RF emissions for cell phones and other devices that "provide a proper balance between the need to protect the public and workers from exposure to excessive RF electromagnetic fields and the need to allow communications services to readily address growing marketplace demands." *Id. at 776* (internal quotation marks and citation omitted). In order to prevail in a lawsuit based on an alleged injury caused by RF emissions from cell phones, a jury would have to accept the premise that FCC's regulations are inadequate to ensure the safe use of cell phones. *Id. at 781*. This would allow cell phone providers to "be held liable even though they indisputably complied with" FCC regulatory requirements, thereby imposing a legal duty that would directly conflict with federal mandates. *Id.* Such lawsuits are therefore conflict preempted. *Id.*

[*34] The *Murray* court's reasoning persuasively demonstrates that conflict preemption prohibits states from establishing tort law liability for claimed injuries resulting from federally permitted cell phone RF emissions. Because the *Pinney* court failed to consider the FCC's regulatory authority or its established **[***26]** regulations concerning RF emissions from cell phones, Mr. Firstenberg's reliance on that case is not persuasive. *See Murray, 982 A.2d at 778 n.19* (discussing *Pinney*). We conclude that the district court appropriately dismissed Mr. Firstenberg's claims of injury resulting from Ms. Monribot's cell phone usage.

B. Mr. Firstenberg's Argument Regarding the Americans With Disabilities Act

[*35] Mr. Firstenberg argues that because the district court entered summary judgment in favor of Defendants in regard to his nuisance claim and because the district court dismissed his claims to the extent that they related to Ms. Monribot's use of her cell phone, the court violated his constitutional right to equal protection under the *Fourteenth Amendment* and the Americans with Disabilities Act (ADA)[5] and "adopted a new **[**1217]** legal doctrine denying access to the courts by a class of individuals." Further, Mr. Firstenberg argues that because the court is a public entity, it is subject to the ADA. Mr. Firstenberg's argument in this regard boils down to a contention that by denying the relief requested in his complaint, the district court violated the ADA and the *Fourteenth Amendment*. Mr. Firstenberg's arguments in this regard are founded on a misunderstanding of the law, and they provide **[***27]** no basis for reversal.

[*36] As an initial matter, Mr. Firstenberg's complaint, having failed to allege that Defendants' conduct amounted to a constitutionally impermissible state action, does not state an

[5] Mr. Firstenberg alleged in his complaint that he is a "qualified individual with a disability as defined [by] the [ADA]."

actionable claim for a deprivation of equal protection under the ADA. *See* Manning v. N.M. Energy, Minerals & Natural Res. Dep't, 2006-NMSC-027, ¶ 45, 140 N.M. 528, 144 P.3d 87 HN14[↑] ("The ADA provides [a] remedy . . . when a state violates the Fourteenth Amendment by depriving an individual of . . . equal protection[.]"); Foley v. Horton, 1989-NMSC-061, ¶ 8, 108 N.M. 812, 780 P.2d 638 (stating that an equal protection claim requires the plaintiff to allege or otherwise demonstrate that the at-issue conduct constituted impermissible state action).

[*37] Furthermore, the district court's mere adjudication of Mr. Firstenberg's lawsuit does not constitute "state action" within the meaning of the Equal Protection Clause. *See* King v. King, 162 Wn.2d 378, 174 P.3d 659, 671 (Wash. 2007) (en banc) (recognizing that HN15[↑] a state court's "[a]djudication . . . of private rights is not sufficient state action in the sense necessary to implicate constitutional protections"). Insofar as the United States Supreme Court in Shelley v. Kraemer, 334 U.S. 1, 14, 68 S. Ct. 836, 92 L. Ed. 1161 (1948), stated a contrary position, the Supreme Court has since modified its position. *Compare id.* (stating that the actions of state courts and their judicial officers **[***28]** "is to be regarded as [an] action of the [s]tate within the meaning of the Fourteenth Amendment"), *with* Lugar v. Edmondson Oil Co., 457 U.S. 922, 928, 937, 939 n.21, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982) (recognizing that "the party charged with the deprivation [of a federal right] must be a person who may fairly be said to be a state actor" and rejecting the notion "that a private party's mere invocation of state legal procedures" satisfies the state-actor requirement (internal quotation marks and citation omitted)). *See* King, 174 P.3d at 671 (recognizing that "the United States Supreme Court has . . . pulled back the reach of *Shelley*, if not overruling it sub silentio, by requiring something more than the reliance on a . . . judicial proceeding" (internal quotation marks omitted)).

[*38] In sum, we reject the notion that Mr. Firstenberg's lawsuit against two private individuals was somehow transformed, by virtue of the district court's adjudication of the matter, into an equal protection lawsuit under the ADA. We will not consider this issue further.

III. Summary Regarding Mr. Firstenberg's Appeal

[*39] In sum, regarding Mr. Firstenberg's appeal, we conclude that the district court did not err in granting summary judgment in Defendants' favor on the ground that Mr. Firstenberg failed to demonstrate that admissible scientific evidence supported **[***29]** his theory of general causation, that is, that electromagnetic fields are capable of causing the types of harm from which he suffers. Because we conclude that Mr. Firstenberg has not demonstrated reversible error on that or any other ground, we affirm the district court's summary judgment. We turn now to the issues raised by Ms. Monribot in her cross-appeal.

IV. Ms. Monribot's Cross-Appeal

[*40] In her cross-appeal, Ms. Monribot raises four contentions of error, of which we address only two. Ms. Monribot argues that the district court erred in failing to dismiss Mr. Firstenberg's complaint in its entirety on the ground that federal preemption barred Mr. Firstenberg's claims of injury resulting from any of her electronic devices. She argues, further, that the district court erred in **[**1218]** denying, in part, Defendants' amended motion for partial summary judgment on Mr. Firstenberg's prima facie tort claim. Having affirmed, on direct appeal, the district court's summary judgment as to all of Mr. Firstenberg's claims, the foregoing cross-appeal arguments are moot, and we do not address them. *See* Crutchfield v. Dep't of Taxation & Revenue, 2005-NMCA-022, ¶ 36, 137 N.M. 26, 106 P.3d 1273 HN16[↑] ("A reviewing court generally does not decide academic or moot questions.").

[*41] Additionally, Ms. Monribot argues **[***30]** that the district court erred in finding that Mr. Firstenberg had an implied easement by necessity to access the electrical meter on Defendants' property. Finally, she argues that the district court erred in denying Defendants' motion to recover costs. We address each of these arguments in turn.

A. The Easement Issue

[*42] The electric meter and switch that provided electricity to Mr. Firstenberg's house were located on the exterior wall of Defendants' house. In response to Ms. Monribot's counterclaims by which she sought to exclude Mr. Firstenberg from using Defendants' property to access his electric meter and switch and to force him to remove his electrical meter and switch from the property, Mr. Firstenberg filed a motion for summary judgment on the ground that, in relevant part, he had an implied easement by necessity that permitted the location of and his access to the electrical meter and switch.

[*43] The district court granted Mr. Firstenberg's partial summary judgment motion. In its summary judgment order, the court stated that Mr. Firstenberg had an implied easement by necessity to access his electric meter on Defendants' property that "permits all reasonable uses, including but not necessarily **[***31]** limited to turning on and off the electrical switch, accessing the meter, [and] access for maintaining and repairing this switch[.]" The court further

stated that Mr. Firstenberg's right of access "does not permit abusive use of the easement" for which "the Landowner" (Ms. Leith) would have "all remedies afforded by law for the over-burdening [of] the [servient] estate."

[*44] Ms. Monribot contends that the court erred in determining that Mr. Firstenberg had an implied easement by necessity. *HN17*[↑] "We review de novo legal questions arising from a district court's application of law to the facts involving the existence of an easement." *Los Vigiles Land Grant v. Rebar Haygood Ranch, LLC, 2014-NMCA-017, ¶ 25, 317 P.3d 842*. Likewise, *HN18*[↑] we review de novo the district court's decision to grant summary judgment. *Estate of Haar*, 2007-NMCA-032, ¶ 10.

[*45] *HN19*[↑] In considering the nature of implied easements by necessity, New Mexico courts rely on the *Restatement (Third) of Property: Servitudes § 2.15* (2000). *Kysar v. Amoco Prod. Co., 2004-NMSC-025, ¶ 25, 135 N.M. 767, 93 P.3d 1272* (relying on the Restatement (Third) of Property *§ 2.15* to discern the nature of an implied easement by necessity). According to the Restatement, an implied easement by necessity arises out of "[a] conveyance that would otherwise deprive the land conveyed to the grantee . . . of rights necessary to reasonable enjoyment of the land . . . unless the language or circumstances of the conveyance **[***32]** clearly indicate that the parties intended to deprive the property of those rights." Restatement (Third) of Property *§ 2.15*. The phrase "[r]ights necessary to reasonable enjoyment of property" is not limited to access rights; it applies to "whatever is reasonably necessary for the enjoyment of property, if the conveyance would otherwise eliminate the property owner's right to do those things." *Id. cmt. b*. This includes the delivery of electricity. *Id. cmt. d*. To find an implied easement by necessity, the necessity must have arisen as a result of a severance of rights held by a single owner, for example, where a single parcel of land is divided into two parcels. *Id. cmt. c*. "The easement by necessity rests . . . heavily upon the intent of the" grantor, and unless there is "a clear indication to the contrary, the grantor is presumed to have intended to have . . . conveyed to his grantees, a means of access to the property in question, so that the land may be beneficially utilized." *Los Vigiles Land Grant, 2014-NMCA-017, ¶ 28, 317 P.3d 842* (alteration, **[**1219]** internal quotation marks, and citations omitted).

[*46] In support of his summary judgment motion, Mr. Firstenberg provided, among other things, an affidavit of Yolette Catanach, the former owner of Defendants' and **[***33]** Mr. Firstenberg's properties. Ms. Catanach stated that the two properties originally constituted a single lot upon which two houses (now occupied by Mr. Firstenberg and Ms. Monribot) were located. When Ms. Catanach purchased the lot, both houses were served by a single overhead power line, with the electric meters and switches for both houses attached to the house now occupied by Ms. Monribot. In 1991 Ms. Catanach and her husband split the single lot into two lots, and in so doing, they granted an express easement "as shown and for all existing utilities[.]" Ms. Catanach's affidavit attached, as an exhibit, the deed that indicated the parameters of the express easement. The express easement did not refer to or include the electric meter or switch for the house now occupied by Mr. Firstenberg; however, Ms. Catanach stated that at the time the lot was split, she and her husband intended that the location of and access to the switch and the meter would continue unchanged and unimpaired. Additionally, Mr. Firstenberg stated in an affidavit that there was no electric utility pole on his street from which he could receive electricity service.

[*47] Based on the foregoing facts, we conclude that **[***34]** Mr. Firstenberg made a prima facie showing that he had an implied easement by necessity for the transmission of electricity and for access to the switch and meter attached to Defendants' property that entitled him to summary judgment as to Ms. Monribot's counterclaims. To counter Mr. Firstenberg's prima facie showing, Ms. Monribot was required to demonstrate that disputed issues of material fact precluded summary judgment. *See Spencer v. Health Force, Inc., 2005-NMSC-002, ¶ 7, 137 N.M. 64, 107 P.3d 504* (stating that *HN20*[↑] once a movant for summary judgment makes a prima facie showing that summary judgment is appropriate as a matter of law, the burden shifts to the opponent to show at least a reasonable doubt as to the existence of a genuine issue of fact).

[*48] In response to Mr. Firstenberg's summary judgment motion, Ms. Monribot argued, in relevant part, as admitted to by Mr. Firstenberg, that because he could have an electric utility pole installed on his street and have his electric meter and switch relocated to his own property, Mr. Firstenberg failed to establish the requisite element of "necessity" for an implied easement by necessity. Ms. Monribot reiterates this argument on appeal, claiming that the question whether it would be unreasonable for Mr. Firstenberg **[***35]** to access utilities through his own street was an issue of fact that should have precluded summary judgment. We disagree.

[*49] Ms. Monribot's argument evokes the notion of strict, instead of reasonable, necessity. *HN21*[↑] Under the strict necessity test, where "any alternative was available to an easement claimant, no easement would be found." *Martinez v. Martinez, 1979-NMSC-104, ¶ 29, 93 N.M. 673, 604 P.2d 366*. This state does not follow the strict necessity test; rather, "[t]he test of necessity in New Mexico is whether the party claiming the easement could, through the reasonable

expenditure of labor or money, create an alternative [to the easement] on his own estate." *Id.*

[*50] The only evidence in the record pertaining to the cost of installing a utility pole on Mr. Firstenberg's property and relocating his meter and switch was Mr. Firstenberg's statement that the cost of doing so would not be reasonable, specifically, that it would be "in excess of $12,000." Ms. Monribot failed to provide any evidence to refute that cost, nor did she attempt to show that the cost was reasonable, for example, by providing evidence of the relative values of the properties or the effect, if any, of the easement on those values. *See Jackson v. Nash, 109 Nev. 1202, 866 P.2d 262, 269-70 (Nev. 1993)* (stating that *HN22*[↑] in determining whether the expense of creating **[***36]** an alternative to an easement is reasonable, the court may consider the cost of creating the alternative as compared with the values of the servient and the dominant estates and the extent to which the easement will affect their respective values).

[*51] **[**1220]** Implicit in the district court's determination that Mr. Firstenberg had an implied easement by necessity was its conclusion that the cost of creating a substitute source of electricity was not reasonable under these circumstances and that reasonable minds would not differ as to that issue. *See Beggs v. City of Portales, 2013-NMCA-068, ¶ 11, 305 P.3d 75* (stating that *HN23*[↑] summary judgment is appropriate "[w]here reasonable minds will not differ as to an issue of material fact" (internal quotation marks and citation omitted)). Ms. Monribot, having failed to present evidence that would support a contrary conclusion to Mr. Firstenberg's summary judgment motion, has therefore failed to raise an issue of material fact in that regard.

[*52] Ms. Monribot further argues that the district court relied on inadmissible parol evidence in granting summary judgment. *See Amethyst Land Co. v. Terhune, 2014-NMSC-015, ¶ 24, 326 P.3d 12* (stating that *HN24*[↑] parol evidence is inadmissible to the extent that it varies "or explain[s] the terms or contradict[s] the legal effect of an unambiguous written instrument" (internal quotation **[***37]** marks and citation omitted)). Specifically, Ms. Monribot argues that the district court relied on Ms. Catanach's affidavit to conclude that the electrical meter and switch serving Mr. Firstenberg's property "was really part of the declared utility easement[.]" The district court's legal conclusion that Mr. Firstenberg had an implied easement by necessity is an obvious indication that the court did not conclude that the express easement encompassed the electrical meter and switch. Ms. Monribot's argument is, therefore, unavailing.

[*53] For the foregoing reasons, we affirm the district court's grant of summary judgment in favor of Mr. Firstenberg on the ground of an implied easement by necessity, which permits his reasonable, non-abusive use of the easement for the purpose of accessing his electrical meter and switch.

B. The Costs Issue

[*54] *HN25*[↑] Pursuant to Rule 1-054(D)(1) NMRA, "costs . . . shall be allowed to the prevailing party unless the court otherwise directs[.]" Rule 1-054 vests the district court with wide discretion in determining whether to award costs. *Martinez v. Martinez, 1997-NMCA-096, ¶ 20, 123 N.M. 816, 945 P.2d 1034*. Ms. Monribot argues that because Defendants prevailed on summary judgment, they were entitled to recover their costs totaling $84,857.60 and that the district court erred **[***38]** in refusing to award that sum. "[W]e review the trial court's order granting or denying an award of costs for abuse of discretion." *Id.* ¶ 17.

[*55] At a hearing on Defendants' motion to recover costs, the district court ruled that a number of the costs Defendants sought to recover were not recoverable. *See* Rule 1-054(D)(2) (enumerating the costs that "generally are recoverable"). The district court denied Defendants' remaining costs on equitable grounds, including Mr. Firstenberg's inability to pay and the disparity of income between him and Ms. Leith's insurance company, which had paid for nearly all of Defendants' costs.

[*56] On appeal, Ms. Monribot does not specifically identify the costs to which her claims of error are directed, nor does she persuasively demonstrate why, based on the record in this case, the court's discretionary decision to deny Defendants' costs was "contrary to logic or reason." *Marshall v. Providence Wash. Ins. Co., 1997-NMCA-121, ¶ 28, 124 N.M. 381, 951 P.2d 76* (stating that *HN26*[↑] in order to demonstrate that the district court abused its discretion in awarding costs, the appellant must demonstrate that the "court's ruling [was] contrary to logic or reason"). Rather, Ms. Monribot's argument regarding costs is comprised of a series of quotations from various authorities with no **[***39]** coherent attempt to demonstrate how those authorities relate to the circumstances of this case or why reversal is warranted. We will not attempt to decipher this unclear argument. *See Elane Photography, LLC v. Willock, 2013-NMSC-040, ¶ 70, 309 P.3d 53* (stating that *HN27*[↑] an appellate court "will not review unclear arguments[] or guess at what a party's arguments might be" (alteration, internal quotation marks, and citation omitted)).

[*57] **[**1221]** *HN28*[↑] In exercising its discretion to deny or to award costs under Rule 1-054(D), the district court is permitted to disallow costs based upon equitable grounds, including a losing party's inability to pay. *See Martinez*, 1997-NMCA-096, ¶ 20 (stating that equitable considerations are

appropriate in determining whether to award costs); *Gallegos ex rel. Gallegos v. Sw. Cmty. Health Servs., 1994-NMCA-037, ¶ 30, 117 N.M. 481, 872 P.2d 899* ("[T]he losing party's ability to pay is a proper factor to consider in determining whether to award costs."). Further, in reviewing an issue on appeal, this Court presumes that "the district court is correct and . . . the burden is on the appellant to clearly demonstrate the district court's error." *Wilde*, 2010-NMCA-085, ¶ 30 (internal quotation marks and citation omitted). Because Ms. Monribot has failed to demonstrate error as to costs, we cannot say that the district court abused its discretion in that regard, and therefore, her argument provides no basis for reversal. **[***40]**

CONCLUSION

[*58] We affirm the district court's summary judgment in favor of Defendants as to Mr. Firstenberg's claims of prima facie tort and nuisance. We affirm the district court's summary judgment in favor of Mr. Firstenberg as to Ms. Monribot's counterclaims. And we affirm the district court's decision to deny Defendants' motion for costs. As to the remaining issues raised by either party, we conclude that they do not require reversal.

[*59] IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

CYNTHIA A. FRY, Judge

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VERIFICATION

I, KEVIN DURKIN, being the Project Manager on the Meter Replacement Project at PPL Electric Utilities Corporation, hereby state that the facts above set forth are true and correct to the best of my knowledge, information and belief and that I expect PPL Electric Utilities Corporation to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

Date: December 3, 2019

Kevin Durkin