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1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

Court of Appeals of New Mexico

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2 **NICHOLAS D. COVA,**
3 **CAMERON A. COVA,**



Mark Reynolds

4 Plaintiffs-Appellants,

5 v.

No. A-1-CA-41141

6 **ROBERT A. WATT and**
7 **RED TAIL SURVEYING, INC.,**

8 Defendants-Appellees,

9 and

10 **RAYMOND G. ROMERO,**

11 Defendant.

12 **APPEAL FROM THE DISTRICT COURT OF TAOS COUNTY**

13 **Jeffrey A. Shannon, District Court Judge**

14 Nicolas D. Cova
15 Cameron A. Cova
16 Salt Lake City, UT

17 Pro Se Appellants

18 Dennis C. Romero, P.C.
19 Dennis C. Romero
20 Taos, NM

21 for Appellees

1 **MEMORANDUM OPINION**

2 **MEDINA, Chief Judge.**

3 {1} Plaintiffs Nicholas and Cameron Cova sued three defendants in district court.
4 Only two of those defendants are parties to this appeal,¹ Defendants Robert A. Watt
5 and Red Tail Surveying, Inc. (collectively, Red Tail). Defendant Watt is the
6 registered agent, owner, and president of Red Tail. Plaintiffs appeal the district
7 court’s order granting Defendants’ motion for summary judgment and requiring
8 Plaintiffs to pay a portion of Red Tail’s attorney fees as a sanction for excessive and
9 overburdensome discovery requests. Plaintiffs argue that the district court erred by
10 (1) refusing to allow Plaintiffs to amend their complaint to specify the opposing
11 party or parties as to each claim, (2) granting Red Tail’s summary judgment motion,
12 and (3) granting discovery sanctions against them. For the reasons we explain below,
13 we affirm.

14 **DISCUSSION²**

15 **I. Plaintiffs Did Not Adequately Plead Five Claims Against Red Tail in the**
16 **Amended Complaint**

17 {2} Plaintiffs maintain they adequately pleaded six causes of action against Red
18 Tail in the 2020 amended complaint when they named Red Tail as a defendant in

¹Defendant Raymond G. Romero is not a party to this appeal.

²This is a memorandum opinion limited to addressing only the dispute between the parties. Accordingly, we reserve discussion of any relevant facts to the analysis.

1 the case and that the denial of their 2022 motion to file an addendum table of claims
2 in order to clarify which claims were asserted to Red Tail was error. The proposed
3 addendum table identifies the following claims as having been asserted against Red
4 Tail: (1) quiet title, (2) breach of contract, (3) breach of the covenant of good faith
5 and fair dealing, (4) negligent misrepresentation, (5) intentional misrepresentation,
6 and (6) slander of title. With the exception of the slander of title claim added to the
7 original complaint, Plaintiffs again did not amend the causes of action to describe
8 the grounds to assert them against Red Tail, leaving them focused on property-owner
9 Defendant Romero’s conduct. The addendum simply alleges that Plaintiffs intended
10 to assert the very same causes of action against Red Tail.

11 {3} In its determination that the slander of title claim was the only claim pleaded
12 against Red Tail, the district court essentially agreed with Red Tail that the 2020
13 amended complaint did not state claims against Red Tail and then determined that
14 the 2022 proposed addendum did not “match” the amended complaint and was
15 “therefore incorrect and unnecessary.” On appeal, Plaintiffs argue that the 2020
16 amended complaint sufficiently pleaded claims against Red Tail and that in any
17 event, they should have been permitted to file the 2022 proposed addendum to
18 clarify. The theory of pleadings, however, is to give the parties fair notice of the
19 claims and defenses against them, and the grounds upon which they are based.
20 *Seasons, Inc. v. Atwell*, 1974-NMSC-080, ¶ 11, 86 N.M. 751, 527 P.2d 792.

1 {4} We therefore consider whether the six claims that Plaintiffs argue they
2 intended to allege against Red Tail in the 2020 amended complaint gave Red Tail
3 fair notice of those claims “and the grounds upon which they are based.” *See Schmitz*
4 *v. Smentowski*, 1990-NMSC-002, ¶ 9, 109 N.M. 386, 785 P.2d 726. If not, we turn
5 to whether the district court abused its discretion by denying Plaintiffs’ motion to
6 include a table of claims to the amended complaint. *See Amica Mutual Ins. Co. v.*
7 *McRostie*, 2006-NMCA-046, ¶ 18, 139 N.M. 486, 134 P.3d 773 (reviewing a district
8 court’s denial of a motion to amend a complaint for abuse of discretion). We consider
9 each of the six claims in turn and conclude that Plaintiffs only provided fair notice
10 to Red Tail as to the slander of title claim. *See* Rule 1-008(A) NMRA (governing
11 notice of pleading); *see also Derringer v. State*, 2003-NMCA-073, ¶ 5, 133 N.M.
12 721, 68 P.3d 961 (“The pleadings must tell a story from which the essential elements
13 prerequisite to the granting of the relief sought can be found or reasonably inferred.”
14 (omissions, internal quotation marks, and citation omitted)).

15 **A. Five of Six Claims Against Red Tail Were Not Sufficiently Pleaded in The**
16 **Amended Complaint**

17 {5} In briefing to this Court, Plaintiffs concede that the amended complaint “did
18 not explicitly state which claim applied to which party defendant.” Nevertheless,
19 excluding the slander of title claim, Plaintiffs maintain that each of the remaining
20 five claims—advanced in general terms and not specific to any one defendant—were
21 properly pleaded by including the following language in each count of the amended

1 complaint: “Plaintiffs repeat and reallege the allegations to each of the [p]aragraphs
2 above as if set forth fully herein.”

3 {6} We disagree on grounds entirely distinct from the amended complaint’s
4 organizational structure. We conclude the district court properly dismissed these five
5 claims because the amended complaint did not provide a short plain statement that
6 put Red Tail on notice of them. *See* Rule 1-008(A)(2) (stating that claims for relief
7 shall contain “a short and plain statement of the claim showing that the pleader is
8 entitled to relief”); *cf. Las Luminarias of N.M. Council of the Blind v. Isengard*,
9 1978-NMCA-117, ¶ 19, 92 N.M. 297, 587 P.2d 444 (“The function of
10 pleadings . . . is to give fair notice of the claim[s] asserted so as to enable the adverse
11 party to answer and prepare for trial.” (Sutin, J., specially concurring)); *see also*
12 *Honaker v. Ralph Pool’s Albuquerque Auto Sales, Inc.*, 1964-NMSC-142, ¶ 20, 74
13 N.M. 458, 394 P.2d 978 (“A new cause of action may be alleged in an amended
14 complaint, provided it is founded on facts not wholly foreign to the facts originally
15 pleaded.” (internal quotation marks and citation omitted)).

16 **1. Quiet Title**

17 {7} We begin with the quiet title claim. Quiet title actions may be brought by
18 anyone having or claiming an interest in a property against any person adversely
19 claiming title to the property. *See* NMSA 1978, § 42-6-1 (1945). Plaintiffs requested
20 the district court to require Red Tail to correct the survey and record it, but Plaintiffs’

1 amended complaint did not state any facts asserting Red Tail was adversely claiming
2 title to the property in this case. *Cf. Currier v. Gonzales*, 1967-NMSC-259, ¶ 5, 78
3 N.M. 541, 434 P.2d 66 (explaining that to quiet title, the party of interest must
4 demonstrate color of title, which is “supported by a writing or a conveyance of some
5 kind purporting to convey land”). Therefore, we conclude that the amended
6 complaint, without any facts to constitute a quiet title cause of action, did not provide
7 Red Tail with fair notice of the grounds for this claim.

8 **2. Breach of Contract**

9 {8} Plaintiffs next argue Red Tail breached the contract by not preparing a survey
10 that reflected the deeds and by preparing a survey that did not meet the minimum
11 standards of surveying in New Mexico. It is undisputed that Defendant Romero
12 entered into the contract with Red Tail to divide the property owned by the three
13 identified property owners into three parcels as described in deeds and that the
14 affected property owners included Plaintiffs. Assuming that, as third-party
15 beneficiaries, Plaintiffs may assert a breach of contract claim against Red Tail, *see*
16 UJI 13-820 NMRA, the 2020 amended complaint does not assert that the recorded
17 survey (Option A) failed to reflect the deeds. The amended complaint alleged that
18 Option A included a proposed easement, and Red Tail was informed that the
19 property owners disagreed as to the proposed easement. Further, the allegations
20 listed in the breach of contract claim portion of the amended complaint refer

1 specifically to Defendant Romero and an agreement between him and the other
2 owners, and not the surveying contract. Our review of the allegations in the amended
3 complaint regarding Option A and the allegations specific to breach of contract,
4 reveal that Red Tail could not reasonably infer a breach of contract claim was
5 asserted against him. *See Cottonwood Enters. v. McAlpin*, 1991-NMSC-044, ¶ 8,
6 111 N.M. 793, 810 P.2d 812; *Schmitz*, 1990-NMSC-002, ¶ 9.

7 {9} To the extent Plaintiffs sought relief from the district court to enforce
8 minimum standards of surveying in New Mexico, we decline to address the merits
9 of this argument. The New Mexico Engineering and Surveying Practice Act (the
10 Act) grants authority to the Licensing Board to certify qualifications of professional
11 engineers and professional surveyors and promulgate rules regarding professional
12 responsibility. NMSA 1978, §§ 61-23-1 to -36 (1987, as amended through 2025).
13 The Licensing Board's scope of statutory authority includes conducting disciplinary
14 hearings for violations of the Act or the rules of professional responsibility. *See*
15 §§ 61-23-10(F), -27.11. District courts do not have original jurisdiction over a
16 surveyor's licenses or discipline for violations of surveying standards. *See* § 61-23-
17 23.1(D) (allowing persons aggrieved by the Act's decisions to file an appeal in
18 district court).

1 **3. Breach of Covenant of Good Faith and Fair Dealing**

2 {10} Plaintiffs contend Red Tail breached the covenant of good faith and fair
3 dealing “[b]y creating and filing a defective survey, then agreeing to correct or
4 amend it” but failing to doing so. “Whether express or not, every contract in New
5 Mexico imposes the duty of good faith and fair dealing upon the parties [with regard
6 to] the performance and enforcement [of the terms] of the contract.” *Continental*
7 *Potash, Inc. v. Freeport-McMoran, Inc.*, 1993-NMSC-039, ¶ 64, 115 N.M. 690, 858
8 P.2d 66. Breach of the implied covenant of good faith and fair dealing “requires a
9 showing of bad faith or that one party wrongfully and intentionally used the contract
10 to the detriment of the other party.” *Sanders v. FedEx Ground Package Sys., Inc.*,
11 2008-NMSC-040, ¶ 7, 144 N.M. 449, 188 P.3d 1200 (internal quotation marks and
12 citation omitted). Bad faith requires “deliberate disregard for[] the potential of harm
13 to the other party.” *Paiz v. State Farm Fire & Cas. Co.*, 1994-NMSC-079, ¶ 31, 118
14 N.M. 203, 880 P.2d 300.

15 {11} In the amended complaint, Plaintiffs allege that Defendant Romero directed
16 Red Tail to continue working on Option A, that Plaintiffs notified Red Tail of the
17 lack of agreement as to the easements in Option A before it was recorded, and that,
18 according to Red Tail, Option A was nevertheless filed at Defendant Romero’s
19 request. We are unpersuaded that these pleaded facts demonstrated that Red Tail
20 intentionally or deliberately disregarded potential harm to the property owners by

1 recording the plat. *See id.* (stating that the covenant of good faith and fair dealing
2 has not “been extended to . . . negligent conduct—no matter how grossly so”). We
3 are also unpersuaded that it would be reasonable for Red Tail to read these facts and
4 determine Plaintiff was asserting a claim for breach of good faith and fair dealing
5 against it.

6 {12} To the contrary, the record reveals that Red Tail recorded an affidavit in
7 October 2018 prior to the commencement of this case, explaining the proposed
8 boundaries and proposed easements in the survey. Red Tail attested in relevant part,
9 “[d]ue to the unusual conformation of the subject property, the division of the same
10 into tracts by percentage presented discontinuous parcels that would require
11 easements to permit access to and across these parcels; accordingly, proposed
12 easements are also shown on the [p]lat.” Additionally, Red Tail acknowledges that
13 a caveat was omitted from the plat to indicate that the boundary lines are “to be
14 regarded as conceptual” until the owners agree and acknowledge their agreement
15 with the boundary lines on the plat. As of the filing of Red Tail’s affidavit, the
16 owners had not agreed on the property boundaries. The easements on the plat (40
17 feet wide and 20 feet wide) illustrated along the river were proposed and had not
18 been acknowledged by the owners and these easements were not granted by the
19 survey. We determine Red Tail’s affidavit shows an intentional effort to *avoid* harm

1 to the property owners by creating inaccessible parcels and that Plaintiffs point to no
2 evidence to establish bad faith.

3 **4. Negligent Misrepresentation**

4 {13} We next address whether the amended complaint sufficiently pleaded a cause
5 of action for negligent misrepresentation against Red Tail. Plaintiffs argue they
6 sufficiently pleaded Red Tail negligently misrepresented the deeds when it recorded
7 the survey and certified it was true and correct to the best of its knowledge. “To
8 recover under a theory of negligent misrepresentation, a plaintiff must show that: (1)
9 the defendant made a material misrepresentation to [the] plaintiff, (2) the plaintiff
10 relied upon the representation, (3) the defendant knew the representation was false
11 or made it recklessly, and (4) the defendant intended to induce reliance by the
12 plaintiff.” *Robey v. Parnell*, 2017-NMCA-038, ¶ 31, 392 P.3d 642. Here, Plaintiffs
13 did not allege any reliance upon the representation nor did they allege Red Tail
14 intended to induce reliance. Without alleging facts to support all elements of
15 negligent misrepresentation, it is not reasonable to conclude Red Tail was on notice
16 of this claim.

17 **5. Intentional Misrepresentation**

18 {14} In a similar claim, Plaintiffs assert Red Tail intentionally misrepresented the
19 deeds and recorded the survey despite being notified that the property owners were
20 not in agreement on Option A. *See Robertson v. Carmel Builders Real Est.*, 2004-

1 NMCA-056, ¶ 26, 135 N.M. 641, 92 P.3d 653 (“The elements of fraud are a false
2 representation, knowingly or recklessly made, with the intent to deceive, on which
3 the other party acted to [their] detriment.”). Plaintiffs fail to allege any intent by Red
4 Tail to deceive the property owners on which they acted to their detriment. As we
5 previously determined, without factual allegations addressing all elements of the
6 claim, it is not reasonable for Red Tail to read into the allegations and determine
7 Plaintiffs asserted a claim of intentional misrepresentation or fraud.

8 {15} We conclude five of the claims in the addendum—not including the slander
9 of title claim addressed later—did not provide Red Tail with fair notice of the claims.
10 Plaintiffs assert there are not specific requirements as to how claims are to be
11 addressed to each party. Rule 1-008(E)(1); *Birido v. Rodriguez*, 1972-NMSC-062,
12 ¶ 6, 84 N.M. 207, 501 P.2d 195 (“[L]ooking to substance rather than form, the
13 essential elements prerequisite to the granting of the relief sought can be found or
14 reasonably inferred.”). Thus, we agree with the district court’s implicit finding that
15 Plaintiffs did not state a claim against Red Tail for five of the claims, excluding
16 slander of title, and we also agree with the district court’s finding that the assignment
17 of claims in the 2022 proposed addendum do not match the claims in Plaintiffs’
18 amended complaint, or provide additional factual allegations that would satisfy the
19 notice pleading standard. Our notice of pleading standard permits general allegations
20 “but we will not read into a complaint matters which it does not contain.” *Anderson*

1 v. *State*, 2022-NMSC-019, ¶ 44, 518 P.3d 503; *see also Schmitz*, 1990-NMSC-002,
2 ¶ 9 (“[N]otice pleading does not require that every theory be denominated in the
3 pleadings—general allegations of conduct are sufficient, as long as they show that
4 the party is entitled to relief and the averments are set forth with sufficient detail so
5 that the parties and the court will have a fair idea of the action about which the party
6 is complaining and can see the basis for relief.”). Simply checking a box in a table
7 without any supporting claims, facts, or evidence does not provide any additional
8 fair notice to Red Tail for five of the claims asserted in their proposed addendum.

9 **B. The 2020 Amended Complaint Provided Red Tail With Adequate Notice**
10 **of the Slander of Title Claim**

11 {16} Finally, we agree with the district court that Plaintiffs’ allegations of slander
12 of title in the amended complaint provided adequate notice to Red Tail of that claim.
13 In New Mexico, “[t]he tort of slander of title occurs when one who, without the
14 privilege to do so, willfully records or publishes [in a] matter which is untrue and
15 disparaging to another’s property rights in land, as would lead a reasonable [person]
16 to foresee that the conduct of a third purchaser might be determined thereby.” *Den-*
17 *Gar Enters. v. Romero*, 1980-NMCA-021, ¶ 16, 94 N.M. 425, 611 P.2d 1119.
18 Plaintiffs’ allegations against Red Tail arise from the recording of the Option A
19 survey with a proposed easement. Plaintiffs allege the subject property owners were
20 not in agreement about the easement before the survey was recorded.

1 **II. The District Court Did Not Dismiss the Claims Without Discovery**

2 {17} Plaintiffs additionally argue that the district court erred by granting summary
3 judgment before the completion of discovery. Plaintiffs served Red Tail with
4 discovery on October 30, 2020, shortly after Red Tail filed its answer to the amended
5 complaint. The interrogatories consisted of eleven questions with multiple subparts
6 resulting in sixty-four responses. Parties are limited to fifty interrogatories
7 “including all discrete subparts” under Rule 1-033(A) NMRA. In addition,
8 Appellants provided 103 requests for admission, pursuant to Rule 1-036 NMRA.
9 The parties litigated discovery issues for over a year until the district court ordered
10 Red Tail to produce documents electronically. The record reflects that there was
11 extensive discovery and related litigation prior to the district court granting summary
12 judgment. Having so determined, we examine whether the district court erred by
13 awarding sanctions against Plaintiffs for discovery abuse.

14 **III. The District Court Did Not Err by Ordering Plaintiffs to Pay the**
15 **Attorney Fees Incurred by Red Tail for Excessive Discovery Requests**

16 {18} Plaintiffs maintain the district court abused its discretion by ordering them to
17 pay Red Tail’s attorney fees incurred from responding to “any discovery [request]
18 in excess of that permitted by Rule 1-033(A).” In support, Plaintiffs raise the
19 following arguments: (1) as unrepresented litigants, they may not understand the
20 discovery process but made a good faith effort; (2) subparts to interrogatories should
21 be considered as one interrogatory; and (3) attorney fees should be determined by

1 “the number of adequately documented hours . . . multiplied by a reasonable hourly
2 rate.”

3 {19} “If [a] motion [for order compelling discovery] is granted in part and denied
4 in part, the court may apportion the reasonable expenses incurred in relation to the
5 motion among the parties and persons in a just manner.” Rule 1-037(A)(4) NMRA.

6 “We have long held that a court’s power is broader than merely the statutory
7 authority to impose sanctions to cover a prejudiced party’s costs when the offending
8 party has violated a rule or statute.” *Khalsa Tr. of Yogi Bhajan Admin. Tr. v. Puri*,
9 2023-NMCA-018, ¶ 30, 525 P.3d 394 (internal quotation marks and citation
10 omitted).

11 {20} “It is well-settled that the choice of sanctions under Rule [1-0]37 lies within
12 the sound discretion of the trial court. Only an abuse of that discretion will warrant
13 reversal.” *United Nuclear Corp. v. Gen. Atomic Co.*, 1980-NMSC-094, ¶ 385, 96
14 N.M. 155, 629 P.2d 231. “An abuse of discretion occurs when a ruling is clearly
15 contrary to the logical conclusions demanded by the facts and circumstances of the
16 case.” *Benz v. Town Ctr. Land, LLC*, 2013-NMCA-111, ¶ 11, 314 P.3d 688 (internal
17 quotation marks and citation omitted).

18 {21} As a preliminary matter, to the extent Plaintiffs contend that as unrepresented
19 litigants, they may not have understood the discovery process and made a good faith
20 effort and for that reason request that we reverse the discovery sanctions, we are not

1 persuaded. “Although pro se pleadings are viewed with tolerance, a pro se litigant is
2 held to the same standard of conduct and compliance with court rules, procedures,
3 and orders as are members of the bar.” *Camino Real Env’t Ctr., Inc. v. N.M. Dep’t*
4 *of Env’t*, 2010-NMCA-057, ¶ 21, 148 N.M. 776, 242 P.3d 343 (omission, internal
5 quotation marks, and citation omitted). As such, we reject Plaintiffs’ argument that
6 their unrepresented status warrants reversal of the district court’s discretionary
7 decision to hold Plaintiffs accountable to the rules of discovery.

8 {22} Next, to the extent Plaintiffs argue that subparts to interrogatories should be
9 considered as one interrogatory, we disagree. Rule 1-033(A) states that “[w]ithout
10 leave of court” parties are limited to fifty interrogatories, “including all discrete
11 subparts.”

12 {23} Plaintiffs’ interrogatory No. 2 asked Red Tail to explain any denial or
13 objections to any of the allegations in the 464 paragraphs of the complaint, or the
14 103 requests for admissions. Considering the limits on interrogatories in Rule 1-
15 033(A), Plaintiffs’ interrogatories were burdensome given the length of the
16 complaint. Red Tail’s responses solely to interrogatory No. 2 included forty-three
17 responses. In total, Red Tail provided over sixty responses to Plaintiffs’
18 interrogatories, addressing all subparts. Therefore, we determine the district court
19 did not abuse its discretion to award attorney fees to Red Tail for the time it took to
20 prepare these responses.

1 {24} Having determined the Plaintiffs are held to the same discovery rules as
2 attorneys and that the district court did not err in concluding the discovery requests
3 were excessive and properly limited, we turn to the district court’s order for
4 sanctions in the form of attorney fees. Rule 1-037(A)(4) allows the district court to
5 order a party to pay for “reasonable expenses incurred in relation to [a] motion [to
6 compel discovery].”

7 {25} Here, the district court’s sanction orders the award of attorney fees associated
8 with any request for interrogatories in excess of fifty, as permitted by Rule 1-033(A).
9 The order was not contrary to the logic or facts of the case and we conclude that the
10 district court did not abuse its discretion by ordering these sanctions. “It is not our
11 responsibility as a reviewing court to say whether we would have chosen a more
12 moderate sanction.” *United Nuclear Corp.*, 1980-NMSC-094, ¶ 385 (internal
13 quotation marks and citation omitted). We turn then to the district court’s grant of
14 summary judgment on Plaintiff’s slander of title claim based on the statute of
15 limitations.

16 **IV. The District Court Did Not Err in Granting Summary Judgment Against**
17 **Plaintiffs Based on the Statute of Limitations for the Slander of Title**
18 **Claim**

19 {26} We review the grant of summary judgment de novo. *Romero v. Philip Morris*
20 *Inc.*, 2010-NMSC-035, ¶ 7, 148 N.M. 713, 242 P.3d 280. “[S]ummary judgment is
21 a drastic remedial tool which demands the exercise of caution in its application, and

1 we review the record in the light most favorable to support a trial on the merits.”
2 *Woodhull v. Meinel*, 2009-NMCA-015, ¶ 7, 145 N.M. 533, 202 P.3d 126 (internal
3 quotation marks and citation omitted). “Summary judgment is appropriate where
4 there are no genuine issues of material fact and the movant is entitled to judgment
5 as a matter of law.” *Bank of N.Y. Mellon v. Lopes*, 2014-NMCA-097, ¶ 6, 336 P.3d
6 443 (internal quotation marks and citation omitted). “On appeal from the grant of
7 summary judgment, we ordinarily review the whole record in the light most
8 favorable to the party opposing summary judgment to determine if there is any
9 evidence that places a genuine issue of material fact in dispute.” *City of Albuquerque*
10 *v. BPLW Architects & Eng’rs, Inc.*, 2009-NMCA-081, ¶ 7, 146 N.M. 717, 213 P.3d
11 1146. “However, if no material issues of fact are in dispute and an appeal presents
12 only a question of law, we apply de novo review and are not required to view the
13 appeal in the light most favorable to the party opposing summary judgment.” *Id.*

14 {27} The movant has the initial burden of making a prima facie showing that they
15 are entitled to summary judgment, which constitutes “such evidence as is sufficient
16 in law to raise a presumption of fact or establish the fact in question unless rebutted.”
17 *Romero*, 2010-NMSC-035, ¶ 10 (internal quotation marks and citation omitted).
18 Once the movant establishes a prima facie case for summary judgment, “the burden
19 shifts to the non[]movant to demonstrate the existence of specific evidentiary facts
20 that would require trial on the merits.” *Kreutzer v. Aldo Leopold High Sch.*, 2018-

1 NMCA-005, ¶ 27, 409 P.3d 930 (internal quotation marks and citation omitted). “If
2 the non[]movant fails to do so, summary judgment, if appropriate, shall be entered
3 against [them].” *Id.* (internal quotation marks and citation omitted).

4 **A. Statute of Limitations**

5 {28} Plaintiffs argue slander of title claims are similar to other torts where the
6 statute of limitations begins to run four years from the time of injury, not the time of
7 the tortious act. *See* NMSA 1978, § 37-1-4 (1880). Plaintiffs contend they realized
8 material loss in 2019, and the four-year statute of limitations for the slander of title
9 count began to run at that time. *See* § 37-1-4. Conversely, Red Tail argues slander
10 of title is a tort of defamation subject to a three-year statute of limitations from the
11 date of publication or recording with the county clerk’s office. *See* NMSA 1978,
12 § 37-1-8 (1975); *Woodhull*, 2009-NMCA-015, ¶ 8.

13 {29} New Mexico does not have a specified statute of limitations period for slander
14 of title claims. Further, New Mexico courts have not determined whether the statute
15 for personal injury or the statute for damages to property applies to such claims. *See*
16 *Romero v. U.S. Life Ins. Co. of Dallas*, 1986-NMCA-044, ¶ 10, 104 N.M. 241, 719
17 P.2d 819 (“We need not decide whether the statute of limitations for slander of title
18 suits in New Mexico is the three-year limitation for personal injury, . . . Section 37-
19 1-8, or the four-year limitation for damages to property or for no unspecified actions,
20 . . . Section 37-1-4.”). However, we need not decide which statute of limitation

1 applies because applying either the three- or four-year limitation period, the slander
2 of title claim at issue here is time barred based on when the claim accrued.

3 {30} Plaintiffs cite *Ruiz v. Varan*, among other cases, to support the proposition
4 that slander of title claims require “realized loss” to become ripe. 1990-NMSC-081,
5 ¶ 8, 110 N.M. 478, 797 P.2d 267. Following from this, because Plaintiff Nicolas
6 Cova’s affidavit attested to having incurred \$1000 of costs as of April 2019,
7 Plaintiffs contend that the statute began to run in 2019.

8 {31} We find Plaintiffs’ reliance on *Ruiz* misplaced. In *Ruiz*, our Supreme Court
9 considered “the measure of damages awarded to a property owner due to interference
10 with [their] ability to use or dispose of a tract of undeveloped land.” *Id.* ¶ 1. There,
11 the Court analogized this tort to slander of title and included the following
12 discussion, a portion of which Plaintiffs cite to in their briefing, emphasized here:

13 [t]he gist of [slander of title referred to as “injurious falsehood”] is the
14 interference with the prospect of sale or some other advantageous
15 relation. To establish the existence of the tort of injurious falsehood,
16 among other things, the plaintiff must prove special damages in the
17 form of pecuniary loss. The special damage rule *requires the plaintiff*
18 *to establish pecuniary loss that has been realized or liquidated*, as in
19 the case of specific lost sales.

20 *See id.* ¶ 8 (emphasis added) (alteration, internal quotation marks, and citations
21 omitted); *see also* W. Page Keeton, Dan B. Dobbs, Robert E. Keeton, David G.
22 Owen, *Prosser & Keeton on the Law of Torts* § 128 at 965-71 (5th ed. 1984)
23 (discussing claims for damages resulting from injurious falsehood). The Court

1 continued to observe that the “impaired vendibility” of “land is sometimes stated as
2 the special damage for which recovery is permitted.” *Ruiz*, 1990-NMSC-081, ¶ 8
3 (internal quotation marks and citation omitted). The Court specified that this
4 “impaired vendibility” may mean:

- 5 (1) the plaintiff sold the land at a lower price because of the falsehood;
- 6 (2) the plaintiff sold the land at greater effort, expense or time because
- 7 of the falsehood; or (3) the land’s value has dropped on the market. The
- 8 chief characteristic of special damages is a realized loss. Thus loss of
- 9 specific contracts to purchase may be required proof.

10 *Id.* (internal quotation marks and citation omitted).

11 {32} Plaintiffs’ reliance on *Ruiz* is misplaced because *Ruiz* is not informative. The
12 Court’s analysis does not make a determination as to the running of a statute of
13 limitations; it merely considers what may qualify as special damages.³ This analysis
14 does not assist with determining the accrual of the claim, because, as this Court has
15 explained, the statute of limitations accrues “when the plaintiff acquires knowledge
16 of facts, conditions, or circumstances which would cause a reasonable person to
17 make an inquiry leading to the discovery of the concealed cause of action.” *Gerke v.*
18 *Romero*, 2010-NMCA-060, ¶ 10, 148 N.M. 367, 237 P.3d 111 (internal quotation

³Plaintiffs also cite to *Den-Gar Enterprises* while addressing what begins the running of the statute of limitations. 1980-NMCA-021. However, like *Ruiz*, *Den-Gar Enterprises* does not consider what begins the accrual of the statute of limitations. Related to damages in a slander of title claim, it supports the proposition that attorney fees are “a measure of damages itself,” not merely “an extra expense of the suit.” *Id.* ¶¶ 16-17.

1 marks and citation omitted). Plaintiffs alleged that they learned in May 2014 that the
2 contested Option A survey, with the proposed easements, had been recorded.
3 Plaintiffs alleged that they objected to the Option A survey, at least in part based on
4 the proposed easements, before it was recorded. As a result, the present facts,
5 conditions, and circumstances would have caused a reasonable person to investigate
6 whether the recorded Option A survey would have a negative financial impact on
7 the sale and the statute of limitations began to accrue at that time. *See id.*

8 {33} We therefore disagree with Plaintiffs’ argument that the statute only began to
9 run in 2019—the point at which Plaintiff Nicholas Cova attested to have “realized”
10 \$1000 of unspecified damages. Not only is that argument contrary to our existing
11 case law on accrual, but none of the cases Plaintiffs cited stand for the proposition
12 that the statute begins to run once unspecified damages not related to a particular
13 transaction arise. *See, e.g., Jemez Properties, Inc. v. Lucero*, 1979-NMCA-162, ¶ 18,
14 94 N.M. 181, 608 P.2d 157 (stating that “the allegations of damages in the amended
15 complaint failed to meet the requirement that special damages must be specifically
16 stated” and that the complaint did not assert a slander of title action); *Arthur v. Davis*,
17 126 Cal. App. 3d 684, 692 (Ct. App. 1981) (supporting the proposition that the
18 statute of limitations for slander of title begins to run at the time the cloud on the
19 title is discovered by the plaintiff); *Rosenbaum v. City of N.Y.*, 861 N.E.2d 43, 49
20 (N.Y. 2006) (“[T]he period of limitations begins to run, not from the date of the

1 recording, but from the time when pecuniary loss is incurred” and “[t]he most usual
2 manner in which a third person’s reliance upon disparaging matter causes pecuniary
3 loss is by preventing a sale to a particular purchaser,” so a letter that did not
4 “adequately describe special damages or when they were allegedly incurred” was
5 not valid notice of a claim); *Valley Colour, Inc. v. Beuchert Builders, Inc.*, 944 P.2d
6 361, 364 (Utah 1997) (explaining that the statute of limitations began to accrue after
7 the plaintiff sold the property at issue because that was the point at which the plaintiff
8 “could have first maintained the action to a successful conclusion” (internal
9 quotation marks and citation omitted)); *Kidd v. Hoggett*, 331 S.W.2d 515, 517-18,
10 520 (Tex. Civ. App. 1959) (rejecting an argument that the statute of limitations had
11 expired when the plaintiffs brought a slander of title action seeking damages for the
12 loss of a specific sale of an oil and gas lease resulting from disparagement of their
13 title). Without authority demonstrating otherwise, we are unpersuaded to adopt a
14 rule where the accrual only begins at the point that pecuniary loss has been realized
15 in the form of unspecified damages not resulting from an attempted sale.

16 {34} For purposes of the present case, we also need not, as some jurisdictions have,
17 hold that the statute of limitations always or only accrues at the point that an
18 attempted sale of the property at issue is implicated by the alleged clouded title
19 resulting in pecuniary loss. *See, e.g., Rosenbaum*, 861 N.E.2d at 49 (citing to
20 “pecuniary loss” in Restatement (Second) of the Law of Torts § 633 (1977), defined,

1 in part, as the “impairment of vendibility or value caused by disparagement” and
2 “the expense . . . reasonably necessary to counteract [the injurious falsehood],
3 including litigation to remove the doubt cast upon vendibility or value”); *see also id.*
4 (stating that “the period of limitations begins to run, not from the date of the
5 recording, but from the time when pecuniary loss is incurred”). It is common in such
6 a jurisdiction for a thwarted sale to be a necessary component of bringing a claim
7 for damages in a slander of title claim. *See, e.g., Fountain v. Mojo*, 687 P.2d 496,
8 500 (Colo. App. 1984) (“Although Colorado case law indicates that legal causation
9 in slander of title cases requires that a pending sale be prevented by publication of
10 the injurious falsehoods,” the court determined that a cause of action also may accrue
11 “where[] (1) the property is on the market for sale; (2) a notice of lis pendens is
12 improperly filed; and (3) such filing is accompanied by malice.”); *Valley Colour,*
13 *Inc.*, 944 P.2d 361, 364 (accruing the statute of limitations after the plaintiff sold the
14 property at issue because that was the point at which the plaintiff “could have first
15 maintained the action to a successful conclusion.” (internal quotation marks and
16 citation omitted)).

17 {35} A majority of jurisdictions that have considered the accrual issue either begin
18 to run the statute at the publication of the document that allegedly clouds the title or
19 at the point that the plaintiff discovers the alleged cloud exists. *See, e.g., Hosey v.*
20 *Cent. Bank of Birmingham, Inc.*, 528 So. 2d 843, 844-45 (Ala. 1988) (accruing the

1 cause of action for slander of title purposes at the time of the recording of the
2 “allegedly malicious matter” where a cloud was created on the plaintiffs’ title “which
3 they claim[ed] lowered the value of their property and rendered it unmarketable[,]”
4 where “no specific sale of the property was lost[,]” and where “the full measure of
5 damages was unknown to the [plaintiffs]”); *Arthur*, 126 Cal. App. 3d at 692
6 (supporting the proposition that the statute of limitations begins to run at the time
7 the cloud on the title is discovered by the plaintiff). As to this dispute, if we were to
8 adopt either of these rules, the statute began to run as early as the publication of the
9 survey in April 2014 or no later than the date Plaintiffs discovered the alleged cloud
10 on the title and filing a complaint with the Licensing Board in September 2014.⁴ As
11 this accrual date is in line with the analysis in *Gerke*, we reject Plaintiffs’ argument
12 that the statute of limitations began to run in April 2019 when Plaintiff Nicolas Cova
13 attests to having incurred unspecified damages. In so doing based on the unusual
14 circumstances of this case, we adopt no categorical rule about how damages

⁴Plaintiffs also contend that the slander of title here is a “continuing wrong” and point to a number of other alleged slanderous statements by Red Tail. However, Plaintiffs do not point to the evidence in the record that supported “discrete continued slanderous events” or a different “continuing injury” resulting from the recording of the deeds. As a result, these assertions are not grounds to defeat summary judgment here. *See* Rule 1-056(C) NMRA (stating that the district court determines based on the “pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits” whether there is “no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law”).

1 resulting from an attempted sale of a property with a purportedly clouded title
2 implicate the accrual of the statute of limitations for a slander of title action in New
3 Mexico.

4 {36} Under either theory of the statute of limitations accrual (publication or
5 discovery) and under the application of either the three-year (personal injury) or
6 four-year (damages to property) statute of limitations, Plaintiffs slander of title claim
7 against Red Tail was untimely as of September 2018 at the latest. Plaintiffs filed
8 their initial complaint on November 15, 2018. Accordingly, we affirm the district
9 court’s granting of summary judgment as to the slander of title claim because it was
10 barred by the statute of limitations.

11 **B. Equitable Tolling**

12 {37} Next, Appellants argue that, if their claim is barred by the statute of
13 limitations, the doctrine of equitable tolling should apply in this case. “Equitable
14 tolling is a non[]statutory tolling principal that provides relief in cases when
15 exceptional circumstances beyond the plaintiff’s control preclude filing suit within
16 the statute of limitations.” *Little v. Baigas*, 2017-NMCA-027, ¶ 12, 390 P.3d 201. A
17 party seeking equitable tolling generally has the burden to establish: “(1) that [they
18 have] been pursuing [their] rights diligently, and (2) that some extraordinary
19 circumstance stood in [their] way.” *Id.* (internal quotation marks and citation
20 omitted). “Exceptional circumstances require that a plaintiff demonstrate an

1 extraordinary event beyond [their] control.” *Id.* (internal quotation marks and
2 citation omitted). “Where a plaintiff fails to produce sufficient facts showing that
3 either element has been met, equitable tolling should not be applied.” *Id.*

4 {38} Plaintiffs argue they acted in good faith by filing a complaint with the
5 Licensing Board within a month after Red Tail recorded the survey. Yet, the
6 Licensing Board and district courts have different jurisdiction and scopes of
7 authority. Given this difference in jurisdiction, we are unpersuaded Plaintiffs
8 pursued their rights under a slander of title claim diligently. Plaintiffs contend that
9 they believed the Licensing Board would resolve the survey dispute. Plaintiffs did
10 not file the original complaint against Defendant Romero until November 15, 2018,
11 four years and six months after the survey was recorded and four years and five
12 months after they discovered the recording. Plaintiffs did not amend the complaint
13 to include Red Tail until June 8, 2020. Plaintiffs did not point to anything in the
14 record to demonstrate there was some extraordinary circumstance preventing them
15 from filing this complaint with the district court sooner.

16 {39} Additionally, the record demonstrates that in 2019, before Plaintiffs included
17 claims against Red Tail, the Licensing Board ultimately held any action against Red
18 Tail in abeyance until this civil action is resolved because the outcome of this case
19 will affect the property rights of the subject properties and determine the ultimate
20 configuration of the final plat. *See Acosta v. Castle Constr., Inc.*, 1994-NMCA-002,

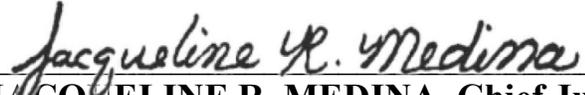
1 ¶ 2, 117 N.M. 28, 868 P.2d 673 (explaining that this Court conducts a full record
2 review when summary judgment is at issue on appeal). Neither Red Tail nor the
3 Licensing Board could move forward with finalizing the plat until the dispute
4 between the property owners about the easements was resolved. On appeal, Plaintiffs
5 do not dispute or point to contrary evidence in the record.

6 {40} Plaintiffs fail to demonstrate that they pursued their rights under a slander of
7 title claim in district court diligently. Plaintiffs also fail to meet their burden to
8 demonstrate that there were extraordinary circumstances out of their control for not
9 having timely pursued their rights in court. Therefore, we conclude Plaintiffs’
10 slander of title claim is barred by the statute of limitations, under either the three- or
11 four-year periods, and does not meet the standard to equitably toll this claim.

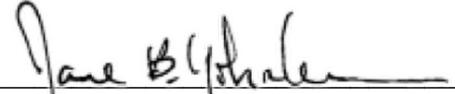
12 **CONCLUSION**

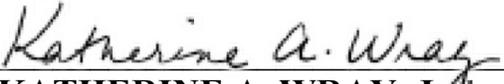
13 {41} For these reasons, we affirm.

14 {42} **IT IS SO ORDERED.**

15 
16 **JACQUELINE R. MEDINA, Chief Judge**

17 **WE CONCUR:**

18 
19 **JANE B. YOHALEM, Judge**

20 
21 **KATHERINE A. WRAY, Judge**