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The Decline of Design Immunity: Impacts of Martinez v. New Mexico Department of Transportation on Traffic Control Device Analysis and Constrictive Notice of a Dangerous Condition of Public Roadways

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THE DECLINE OF DESIGN IMMUNITY: IMPACTS OF *MARTINEZ V. NEW MEXICO DEPARTMENT OF TRANSPORTATION* ON TRAFFIC CONTROL DEVICE ANALYSIS AND CONSTRUCTIVE NOTICE OF A DANGEROUS CONDITION ON PUBLIC ROADWAYS

Matthew A. Zidovsky*

INTRODUCTION

Under the New Mexico Tort Claims Act ("Tort Claims Act"),[1] governmental entities are immune from claims for damages related to design attributes of highways.[2] Conversely, the Act waives governmental immunity from damages caused by negligent construction and maintenance of highways, but retains immunity for highway design.[3] Thus, in public roadway liability cases against governmental entities, the question is where design ends and maintenance begins in determining whether the government should be held liable for injuries that occur on roads it builds. Because the New Mexico legislature has declined to define "maintenance,"[4] New Mexico courts have developed a common law inquiry into whether or not a dangerous condition is caused by design or maintenance of a road. As part of this inquiry, courts in New Mexico have required the plaintiff to show that the government was on notice of a dangerous condition before imposing a maintenance duty on governmental entities.

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* Class of 2015, University of New Mexico School of Law. Thank you to Professor David Stout, for distilling the Tort Claims Act, and to my wife, Danila, for your ongoing support of my academic endeavors.

1. NMSA 1978, §§ 41-4-1–30 (1976, as amended through 1991).

2. NMSA 1978, § 41-4-11(B)(1) ("The liability for which immunity has been waived pursuant to Subsection A of this section shall not include liability for damages caused by: (1) a defect in plan or design of any bridge, culvert, highway, roadway, street, alley, sidewalk or parking area[.]").

3. NMSA 1978, § 41-4-11(A) ("The immunity granted . . . does not apply to liability for damages . . . caused by the negligence of public employees while acting within the scope of their duties during the construction, and in subsequent maintenance of any bridge, culvert, highway, roadway, street, alley, sidewalk or parking area.").

4. *See infra* notes 41–42 and accompanying text.

In *Martinez v. New Mexico Department of Transportation*,[5] the New Mexico Supreme Court dealt with two questions related to negligent maintenance. First, the court revisited the distinction between highway design and highway maintenance within the context of traffic control device placement under the Tort Claims Act. The court also addressed a second question: what constitutes notice of a dangerous condition on New Mexico roadways? With each issue the supreme court addressed a divergence by a lower court from precedent. As such, potential justifications for these deviations (rejected by the supreme court) are offered as part of the analysis.

This note analyzes both issues before the New Mexico Supreme Court in *Martinez*. Part I provides background information related to the facts of the case and procedural history. Part II examines how the court addressed the court of appeals' deviation in *Martinez* from the accepted judicial interpretation of maintenance. Part III examines the New Mexico standard for admissibility of evidence intended to prove actual or constructive notice on the part of a governmental entity.

I. STATEMENT OF THE CASE

On December 9, 2004, Amelia Martinez and Donald Espinoza were driving westbound towards Los Alamos on New Mexico State Road 502 ("NM 502").[6] At that time, Anthony Griego was driving eastbound (away from Los Alamos) on NM 502.[7] At the time of the accident, red crushed cinder, placed on NM 502 by the New Mexico Department of Transportation ("NMDOT") to mitigate snowy or icy conditions on the road, was present in the center turn-only lane.[8] As both vehicles approached mile marker 9, Mr. Griego entered the center turn-only lane between eastbound and westbound traffic, lost control of his vehicle, and collided head-on with decedents' vehicle.[9] All parties involved were killed in the collision.[10] Ms. Martinez was eight and a half months pregnant at the time of the accident.[11] Her unborn child did not survive.[12]

5. 2013-NMSC-005, 296 P.3d 468.
6. Martinez v. New Mexico Dept. of Transp., 2013-NMSC-005, ¶ 2, 296 P.3d 468.
7. *Id.* ¶ 3.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* ¶ 2.
12. *Id.* ¶ 3.

NM 502 is a "winding, mountainous roadway leading to and from Los Alamos."[13] Due to increased traffic flow, NMDOT redesigned NM 502 in the late 1980s.[14] As part of the redesign, NMDOT constructed concrete "jersey barriers"[15] between eastbound and westbound traffic west of mile marker 8.[16] Despite an absence of "developed roadways upon which to turn," NMDOT constructed a center turn lane between mile markers 8 and 10.[17] As a result of NMDOT's decision to provide access to undeveloped roads, no jersey barriers were installed along this two-mile stretch of road.[18]

Personal representatives of decedents ("Plaintiffs") brought a wrongful death suit against NMDOT under the Tort Claims Act, alleging that NMDOT negligently maintained NM 502 at the location of the accident by failing to install traffic control devices (concrete jersey barriers) to prevent crossover collisions, despite having notice of a dangerous condition.[19] In order to demonstrate NMDOT's notice that a dangerous condition existed on the road, Plaintiffs offered evidence of other accidents on NM 502.[20]

The district court considered this evidence,[21] but found "Plaintiffs could not show that [NMDOT] had notice of an ongoing defect of design *in that part of the road*, so as to give rise to a duty . . . to correct it."[22] The district court granted partial summary judgment to NMDOT, holding that "the erection of barriers . . . was a matter of road design and within the

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13. *Id.* ¶ 1.

14. *Id.* ¶ 5.

15. UNITED STATES DEP'T OF TRANSP., FED. HIGHWAY ADMIN., *Concrete Barriers*, http://safety.fhwa.dot.gov/roadway_dept/policy_guide/road_hardware/ctrmeasures/concrete_barriers/concrt_barriers.pdf (last visited Mar. 18, 2014) (stating that Jersey barriers are modular concrete or plastic traffic control devices "designed to redirect, slow, or stop an errant vehicle from causing a more severe crash").

16. *Martinez*, 2013-NMSC-005, ¶ 5.

17. *Id.*

18. *Id.*

19. Martinez v. New Mexico Dept. of Transp., 2011-NMCA-082, ¶ 4, 150 N.M. 204, 258 P.3d 483.

20. *Id.* ("Plaintiffs contended DOT had notice of (1) previous fatal accidents occurring on NM 502, (2) newspaper articles discussing the dangerousness of the road, and (3) two citizens' complaints made to DOT regarding the dangers of NM 502.").

21. *Id.* ¶ 19 ("Their exhibits mentioned accidents over an eleven-and-a-half-mile stretch of road. Yet, their motion for summary judgment asserted fault within a barrier-free, two-mile-long stretch of road.").

22. *Id.* ¶ 5 (emphasis added); *see also id.* ¶ 25 ("[T]he district court determined that the previous accidents occurred too far from the location of decedents' accident to prove that the same defect or dangerous condition was present.").

scope of preserved state immunity under the [Tort Claims Act]."[23] The remaining issue of negligent maintenance of a roadway (for the buildup of red crushed cinder in the center-turn lane) went to trial where the jury returned a verdict for NMDOT.[24]

Plaintiffs appealed, claiming the district court both "improperly granted partial summary judgment on the issue of [NMDOT's] duty to erect concrete barriers"[25] and "abused its discretion in excluding . . . [relevant] evidence."[26] The court of appeals reviewed *de novo* Plaintiffs' claim that NMDOT breached its duty to maintain NM 502[27] and focused its analysis on whether the installation of permanent concrete barriers constitutes roadway design or maintenance.[28] Central to the court's analysis was (1) its definition of maintenance,[29] (2) the physical attributes of "jersey barriers,"[30] and (3) the potential for permanent alteration to the roadway.[31] The court created a bright-line rule that permanent concrete barriers are structural elements that change the design of a road, and their placement is therefore subject to design immunity.[32] The court distinguished the installation of concrete barriers from the installation of other traffic control devices which earlier decisions recognized "under the rubric of maintenance[,]" including temporary barricades placed to halt traffic from entering a flooded arroyo, traffic control signals, "Wrong Way" and "Do Not Enter" signs at highway exit ramps, and animal cross-

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23. *Id.* ¶ 5.
24. *Id.* ¶ 6.
25. *Id.* ¶ 5.
26. *Id.* ¶ 6; *see also id.* ¶ 4.
27. *Id.* ¶ 10.
28. *Id.* ¶ 11 ("[O]ur view [is] that installations of structural elements are matters for which design immunity is conferred. In carrying out the legislative objective of the Act, it has been well established that installing and maintaining traffic controls constitute maintenance under the Act." (internal citations omitted)).
29. *Id.* ("In *Villanueva*, we reaffirmed that '*maintenance*' of a road involves 'upkeep and repair[.]'" (quoting Villanueva v. City of Tucumcari, 1998-NMCA-138, ¶ 7, 125 N.M. 762, 962 P.2d 346)).
30. *Id.* ¶ 18 ("Erected Jersey barriers are concrete, dense structures, the placement of which is not simple[.]").
31. *Id.* ¶ 17 ("Our ruling in *Villanueva* and comment in *Bierner* both hinged on the difference between guiding traffic and designing permanent attributes of a road itself. Though our comment in *Bierner* might have been dicta for that case, we now conclude that erection of permanent barriers as part of a road constitutes a matter of road design.").
32. *Id.* ¶ 18 ("The addition of permanent concrete barriers, as Plaintiffs demand in this particular case, is not a method of traffic control within the meaning of maintenance under the [Tort Claims] Act.").

ing signs.[33] After holding that placement of permanent concrete barriers is outside the scope of road maintenance under the Tort Claims Act, the court declined to evaluate the evidentiary issue raised by Plaintiffs as to NMDOT's notice of a dangerous condition on NM 502.[34]

Plaintiffs petitioned for a writ of certiorari from the New Mexico Supreme Court, which the court granted. On certiorari, the court heard both issues that had been raised at the court of appeals: whether the installation of permanent concrete barriers constitutes maintenance under the Tort Claims Act[35] and whether the court should have submitted Plaintiff's evidence of prior accidents to the jury.[36] The supreme court reversed on both issues and remanded the case to the district court for a new trial.

II. MAINTENANCE LIABILITY UNDER THE NEW MEXICO TORT CLAIMS ACT

The Tort Claims Act grants immunity to "governmental entities and any public employee acting within the scope of duty" from liability for torts except as waived within the Act.[37] As a matter of public policy, governmental entities may not be held liable for defects in the planning or design of highways and streets.[38] However, the Tort Claims Act waives the state's immunity for failure to properly maintain roadways. At the time of enactment, design immunity under the Tort Claims Act was justified by state budgetary considerations.[39] Although the economic justifica-

33. *Id.* ¶ 17 (citing cases).

34. *Id.* ¶ 21 ("[A]ny indication that a notice-based obligation to redesign or reconstruct a road might fall outside the state's immunity from suit is not supported by New Mexico law. . . . We affirm because the lack of permanent barriers in the center turn lane was an attribute of the design of NM 502 and, as a result—and the summary judgment reflects—DOT is immune from suit.").

35. Martinez v. New Mexico Dept. of Transp., 2013-NMSC-005, ¶ 1, 296 P.3d 468.

36. *Id.*

37. NMSA 1978, § 41-4-4(A) (1976).

38. NMSA 1978, § 41-4-2(A) (1976) ("The area within which the government has the power to act for the public good is almost without limit, and therefore government should not have the duty to do everything that might be done.").

39. *See* Ruth L. Kovnat, *Torts: Sovereign and Governmental Immunity in New Mexico*, 6 N.M. L. Rev. 249, 249–50 (1975) ("Whatever the historical basis for the protection of the sovereign from suit, it seems clear that the ready judicial acceptance of the immunity in the United States and its preservation into the twentieth century is substantially based on reluctance to permit invasion of the public coffers from the satisfaction of liability judgments instead of for the public purposes for which they were appropriated.").

tion has less relevance today, New Mexico courts have adopted new rationales for the rule based on evolving public policy considerations.[40]

A. Traffic Control Device Placement as Maintenance Under the Tort Claims Act

Prior to 1991, the Tort Claims Act did not contain any language defining "maintenance,"[41] requiring courts to interpret the term.[42] Courts have interpreted "maintenance" in Section 41-4-11 to "effectuate its remedial purpose of ensuring that highways are made safe and kept safe for the traveling public."[43] In 1987, the supreme court in *Miller v. New Mexico Department of Transportation*,[44] held that the "issuance of oversize vehicle permits [has] a bearing on the proper 'maintenance' of a highway."[45] In 1991, the legislature amended the Tort Claims Act to abrogate *Miller*[46] and limited the definition of "maintenance" under the Tort Claims Act to exclude "conduct involved in the issuance of a permit, driver's license or other official authorization to use the roads or highways of the state in a particular manner."[47] Post-amendment analysis of "maintenance" narrowly construed the amendment, finding that it only "addressed the particular legal conclusion in *Miller*."[48]

In *Rutherford v. Chaves County*, the supreme court emphasized the legislature's decision not to otherwise define or limit maintenance activities in the 1991 amendment[49] and established the post-*Miller* definition of

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40. *See Martinez,* 2013-NMSC-005, ¶ 36 ("The rationale for design immunity is to prevent a jury from second-guessing the decision of a public entity regarding a particular plan or design of a public construction or improvement." (internal quotation omitted)).

41. *Id.* ¶ 13 (citing 1976 N.M. Laws, ch. 58, § 3.).

42. Rutherford v. Chaves Cnty., 2003-NMSC-010, ¶ 11, 133 N.M. 756, 69 P.3d 1199 ("In interpreting the meaning of a statute, our primary purpose is to give effect to the Legislature's intent.").

43. *Id. See also* Fireman's Fund Ins. Co. v. Tucker, 1980-NMCA-082, ¶ 10, 95 N.M. 56, 618 P.2d 894 ("[T]he New Mexico Legislature intended to protect the general public from injury by imposing liability upon governmental agencies when they fail to maintain safe public highways.").

44. Miller v. New Mexico Dep't of Transp., 1987-NMSC-081, 106 N.M. 253, 741 P.2d 1374.

45. *Id*. ¶ 9.

46. *See Rutherford*, 2003-NMSC-010, ¶ 21 ("[T]he 1991 legislative amendment specifically repudiated our decision in *Miller*[.]").

47. NMSA 1978, § 41-4-3(E)(1) (1991).

48. *Rutherford*, 2003-NMSC-010, ¶ 21.

49. *Id.* ("[W]hen considering the definition of 'maintenance,' the Legislature chose not to limit the meaning of the term 'maintenance' to 'upkeep and repair.' Notably, the Legislature also did not define maintenance to exclude traffic control.").

maintenance under the Tort Claims Act. The *Rutherford* court held "procedures for identifying hazards on roadways and the timeliness of minimizing or eliminating the risk of injury to the motoring public from those hazards constitute maintenance activities for which immunity is waived."[50] The court further clarified this definition by concluding, "the identification and remediation of roadway hazards constitutes highway maintenance under Section 41-4-11 of the [Tort Claims Act]."[51]

In *Rutherford*, plaintiff's vehicle was swept away by floodwaters while he attempted to maneuver through a flooded intersection in Chaves County.[52] While the location was a normally dry arroyo, drainage from mountain rains periodically caused high water flow through the arroyo at the intersection.[53] Customarily, the Chaves County Road Department used portable barricades to close the intersection during periods when runoff water was flowing through the arroyo.[54] Thirty minutes before the plaintiff's accident, the Chaves County Sheriff's Department was notified of dangerous flood conditions at the intersection but failed to erect the portable barricades prior to the plaintiff's arrival.[55]

Following the accident, plaintiff filed personal injury and wrongful death claims against the county, alleging a failure to implement a reasonable system for closing the intersection during periods of heavy rain and flooding.[56] The trial court granted summary judgment to defendants based on immunity from suit under the Tort Claims Act.[57] The court of appeals reversed, holding "the County failed to achieve one objective-the timely controlling of traffic [at the intersection] when the water was high. This objective is entirely consistent with the notion of highway maintenance as developed by our appellate courts."[58]

The supreme court affirmed *Rutherford*. The court noted "[t]he placement of portable barricades is a method of traffic control under the Manual of Uniform Traffic Control Devices which must be followed by local authorities. We have repeatedly held and reiterate . . . that traffic controls constitute maintenance activities under the [Tort Claims Act]."[59] Additionally, the *Rutherford* court established the post-amendment defi-

50. *Id.* ¶ 7.
51. *Id.* ¶ 25.
52. *Id.* ¶ 1.
53. *Id.* ¶¶ 2–3.
54. *Id.* ¶ 2.
55. *Id.* ¶ 4.
56. *Id.* ¶ 5.
57. *Id.* ¶ 1.
58. Rutherford v. Chaves Cnty., 2002-NMCA-059, ¶ 19, 132 N.M. 289, 47 P.3d 448.
59. *Rutherford*, 2003-NMSC-010, ¶ 9.

nition of maintenance under the Tort Claims Act,[60] and specified that highway maintenance should not be solely equated with upkeep and repair.[61]

Martinez is the most recent in a line of cases (subject to exceptions discussed below) where either the supreme court or the court of appeals have defined "maintenance" to include placement of traffic control devices.[62]

The supreme court has not reviewed the few exceptions where the court of appeals excluded a traffic control device from the definition of maintenance. In *Villanueva v. City of Tucumcari*, the court of appeals upheld a grant of summary judgment based in part on a finding that structural changes to the sidewalk would constitute installation rather than maintenance under the Tort Claims Act.[63] The plaintiffs did not ask the supreme court to review the court of appeals' holding.[64] In *Bernier v. City of Truth or Consequences*, the court of appeals addressed plaintiffs' allegation that the city had a duty to "erect barriers or curbs on either side of the street to prevent vehicles from leaving the parking lot and entering the propane business,"[65] by stating in dicta that the erection of barriers or curbs "appear[s] to involve design."[66] As in *Villanueva*, plaintiffs did not file a petition for certiorari, leaving open the question as to whether the

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60. *See supra* note 48 and accompanying text.

61. *Rutherford*, 2003-NMSC-010, ¶ 22 ("Chaves County argues that since 1991 the Court of Appeals has limited the definition of 'maintenance' to 'upkeep and repair[.]'. . . The Court of Appeals holding should not be construed as limiting the definition of maintenance to upkeep and repair.").

62. *See, e.g.*, Rickerson v. State, 1980-NMCA-050, ¶ 10, 94 N.M. 473, 612 P.2d 703 (design immunity waived when City had knowledge of a dangerous condition and failed to replace stop signs with traffic signal); *Rutherford*, 2003-NMSC-010, ¶ 9 (placement of portable barricades is road maintenance within the scope of the Tort Claims Act); Pollock v. State Highway & Transp. Dep't, 1999-NMCA-083, ¶ 11, 127 N.M. 521, 984 P.2d 768 (placement of "Wrong Way" and "Do Not Enter" warning signs is road maintenance within the scope of the Tort Claims Act); Ryan v. New Mexico State Highway & Transp. Dep't, 1998-NMCA-116, ¶ 8, 125 N.M. 588, 964 P.2d 149 (placement of signage warning of wild animals crossing the road is road maintenance within the scope of the Tort Claims Act); Lerma v. State Highway Dep't, 1994-NMSC-069, ¶ 8, 117 N.M. 782, 877 P.2d 1085 (failure to erect or repair fences along highway is maintenance within the scope of the Tort Claims Act).

63. Villanueva v. City of Tucumcari, 1998-NMCA-138, ¶ 8, 125 N.M. 762, 965 P.2d 346 ("The addition of ramps is a structural change in the sidewalk," and "such installation would not constitute 'maintenance' under *Section 41-4-11(A)* [but] would be a 'reconstruct[ion]' under Section 41-4-11(B)(2).").

64. *Id.*

65. *Bierner*, 2004-NMCA-093, ¶ 21.

66. *Id.*

supreme court would have affirmed the interpretation of this activity as design.[67]

B. The Martinez *Definition of Maintenance Includes Traffic Control Device Placement*

In *Martinez*, the supreme court held that the court of appeals had deviated from *Rutherford*, reaffirming its interpretation of the word "maintenance" in the Tort Claims Act.[68] In doing so, the supreme court provided guidance to trial courts and practitioners with respect to governmental entities' maintenance responsibilities in the placement of traffic control devices to remedy known dangerous conditions on roadways. *Martinez* held the placement of traffic control devices constitutes maintenance, regardless of the physical or temporal characteristics of the devices,[69] and repudiated the court of appeal's bright-line rule that excluded permanent concrete barriers from a maintenance duty analysis under the Tort Claims Act.[70]

1. Rationale

The New Mexico Supreme Court began its analysis by identifying a divergence in the definition of maintenance between the court of appeals' holding in *Martinez* and the previously articulated rule of *Rutherford*.[71] In *Martinez*, the court of appeals followed *Villanueva*, defining maintenance as "upkeep and repair" and holding that "installation[ ] of structural elements are matters for which design immunity is conferred."[72] The supreme court disagreed, stating that the court of appeals had misapplied

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67. *Id.* (no denial of certiorari by the New Mexico Supreme Court noted).

68. Martinez v. New Mexico Dept. of Transp., 2013-NMSC-005, ¶ 26, 296 P.3d 468 ("The duty to maintain a roadway subsumes within it a duty to remediate a known dangerous condition, regardless of whether the source of danger can be traced back to a design feature. If not our specific holding in *Rutherford*, it is at the very least a strong inference from what we said in that opinion.").

69. *Id.* ¶ 21 ("[T]he term maintenance requires a reasonable response to a known dangerous condition on a roadway. When the reasonableness of that response pertains to traffic controls, it is not measured just by size or weight, permanence or mobility, whether the defect is a structural element or more transitory in nature.").

70. Martinez v. New Mexico Dept. of Transp., 2011-NMCA-082, ¶ 21, 150 N.M. 204, 258 P.3d 483 ("The addition of permanent concrete barriers, as Plaintiffs demand in this particular case, is not a method of traffic control within the meaning of maintenance under the Act.").

71. *Martinez*, 2013-NMSC-005, ¶ 20 ("Despite what we said in *Rutherford*, the Court of Appeals' opinion in the present case closely aligned the meaning of maintenance with upkeep and repair.").

72. *Martinez*, 2011-NMCA-082, ¶ 11 (quoting Villanueva v. City of Tucumcari, 1998-NMCA-138, ¶ 8, 125 N.M. 762, 965 P.2d 346).

the holding from *Rutherford*.[73] Instead, the supreme court characterized *Rutherford* as holding that "[t]he duty to maintain a roadway subsumes within it a duty to remediate a known dangerous condition, regardless of whether the source of danger can be traced back to a design feature."[74]

The court then turned its analysis to a discussion of traffic control devices. With respect to the size and weight of concrete barriers, the court dismissed the idea that physical characteristics of traffic control devices play any role in a maintenance analysis.[75] Regarding the permanence of the installed devices and the potential alteration to the original design of the roadway, the court analogized to stop lights—which the court of appeals previously classified as maintenance features under the Tort Claims Act.[76]

In rejecting the physical characteristics and permanence of traffic control devices as part of a maintenance analysis,[77] the court clarified the analytic framework for determining maintenance responsibilities:

> Notice of a dangerous condition—whether based on the original design or some other intervening characteristic—triggers a maintenance obligation for which DOT can be held legally responsible under the Act. Whether this obligation requires a permanent solution, such as a traffic control signal or a center barrier, or a temporary one, such as the moveable barriers in *Rutherford*, the maintenance obligation of reasonable care remains the same. And the reasonableness of that response to a known danger—whether

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73. *Martinez*, 2013-NMSC-005, ¶ 20 ("The proper scope of the term maintenance in a case such as this was previously articulated by the Court of Appeals in *Jacobo v. City of Albuquerque*, . . . where the Court accurately quoted our specific holding from *Rutherford*—New Mexico cases have held that the term maintenance is not limited to upkeep and repair but that the identification and remediation of roadway hazards constitutes highway maintenance under Section 41-4-11 of the [Act]." (internal citations and quotation marks omitted)).

74. *Martinez*, 2013-NMSC-005, ¶ 26.

75. *Id.* ¶ 25 ("Rather than focusing on what DOT was being asked to do—remedy a dangerous condition—the Court of Appeals was distracted by the sheer size or weight of the proposed remedy, a distinction absent from the text of the Act.").

76. *Id.* ¶ 23 ("A traffic signal is also a permanent and substantial feature of a roadway. Once placed, a traffic signal is generally not removed and becomes a permanent fixture of the intersection. . . . Yet the Court of Appeals acknowledged that installing a traffic signal constitutes maintenance under the Act." (citations omitted)).

77. *Id.* ¶ 21 ("[M]aintenance requires a reasonable response to a known dangerous condition on a roadway. When the reasonableness of that response pertains to traffic controls, it is not measured just by size or weight, permanence or mobility, whether the defect is a structural element or more transitory in nature.").

> with a temporary barrier or a permanent one—remains in the good hands of the jury to resolve.[78]

In sum, the *Martinez* holding rejects a bright-line standard related to physical or temporal characteristics of traffic control devices under the Tort Claims Act. However, questions remain as to exactly why district courts and the court of appeals deviated from the *Rutherford* standard in *Villanueva*, *Bernier*, and *Martinez*, and what impact the supreme court's holding in *Martinez* will have on New Mexico jurisprudence.

2. Analysis

Despite the holding in *Rutherford*, the court of appeals held that concrete barriers were outside the scope of traffic control in *Martinez*.[79] The supreme court highlighted in *Martinez* the court of appeals' correct application of the *Rutherford* analysis in *Jacobo v. City of Albuquerque* among other cases.[80] Underlying the court of appeals' ruling in *Martinez* was the holding of *Villanueva* and dicta from *Bernier*. In *Martinez*, the court of appeals followed the reasoning of these cases,[81] distinguished the temporary barricades erected in *Rutherford*, and created a bright-line rule that excluded concrete barricades because they were more akin to "permanent attributes of the road itself[,]" and not temporary measures designed to guide traffic.[82]

Analysis of the cases above offers one possible explanation for this deviation. In *Rutherford*, the supreme court specifically noted that the "placement of portable barricades is a method of traffic control under the Manual of Uniform Traffic Control Devices which must be followed by local authorities."[83] The Manual of Uniform Traffic Control Devices ("Manual") does not refer to concrete barriers as a method of permanent traffic control.[84] The Manual makes only a single reference to "jersey bar-

78. *Id.* ¶ 34.

79. *See supra* note 70 and accompanying text.

80. *See supra* note 73 and accompanying text.

81. *See* Martinez v. New Mexico Dept. of Transp., 2011-NMCA-082, ¶ 17, 150 N.M. 204, 258 P.3d 483 (citing Bierner v. City of Truth or Consequences, 2004-NMCA-093, ¶ 21).

82. *Id.* ¶ 17.

83. Rutherford v. Chaves Cnty., 2003-NMSC-010, ¶ 9, 133 N.M. 756, 69 P.3d 1199.

84. UNITED STATES DEP'T OF TRANSP., FED. HIGHWAY ADMIN., MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES FOR STREETS AND HIGHWAYS 628 (2009) ("When two-lane, two-way traffic must be maintained on one roadway of a normally divided highway, opposing vehicular traffic shall be separated with . . . temporary traffic barriers (concrete safety-shape or approved alternate).").

riers" in a separate context.[85] Additionally, a distinction between the temporary barriers in *Rutherford* and permanent barriers requested by appellants in *Martinez* is supported by numerous references to temporary barriers in the Manual.[86] Given factual distinctions in cases decided by the court of appeals post-*Rutherford*, it is possible those courts believed that the Manual determined whether traffic control devices were maintenance or design features.

Notably, the supreme court makes no reference to the Manual in the *Martinez* opinion. Instead, it focused on the shortcomings of the court of appeals' bright-line rule:

> The Court [of Appeals] focused more on the distinguishing characteristics of a center barrier versus a stoplight versus a sign warning of animals crossing, rather than the overarching principle enunciated in both the [Tort Claims] Act and in our case law—the need for action to remedy a dangerous condition on a roadway.[87]

The supreme court's language clearly indicates that whether a roadway feature is part of the maintenance or design of the road turns on whether the feature was installed to remedy a dangerous condition, not whether the feature is part of maintenance or design by definition.

Section 41-4-11 does not distinguish between temporary and permanent traffic control devices in the context of design, construction, or reconstruction and provides no language limiting the size or other physical characteristics of traffic control devices in the context of road maintenance.[88] The only statutory limitation on roadway maintenance activity in the Tort Claims Act is "conduct involved with the issuance of a permit, driver's license or other official authorization to use the roads or highways of the State in a particular manner."[89] Given the vested power of the legislature to limit the definition of maintenance in response to shifts in public opinion or judicial action,[90] its decision not to do so indicates a

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85. *Id.* at 563 ("[J]ersey barriers . . . can satisfactorily delineate a pedestrian path.").

86. The phrase "temporary traffic barrier" appears in the Manual on Uniform Traffic Control sixty-five different times whereas the phrase "permanent traffic barrier" does not appear.

87. Martinez v. New Mexico Dept. of Transp., 2013-NMSC-005, ¶ 25, 296 P.3d 468.

88. *See* NMSA 1978, § 41-4-11.

89. NMSA 1978, § 41-4-3(E)(1).

90. *E.g.*, NMSA 1978, § 41-4-3(E) (§ 41-4-3(E) was adopted by the legislature in 1991 following the Supreme Court's holding in *Miller v. New Mexico Department of Transportation.*); *see also* Rio Grande Chapter of Sierra Club v. New Mexico Mining Commn., 2003-NMSC-005, ¶ 27, 133 N.M. 97, 61 P.3d 806 ("If the legislature intended

tacit acceptance of the *Rutherford* standard. In other words, accepted principles of statutory construction support *Martinez*'s holding, as the plain language of the statute fails to provide a clear standard for determining what a traffic control device is under the Tort Claims Act.[91]

C. Impacts of the Martinez *Holding on a Governmental Entity's Maintenance Responsibility as Related to Traffic Control Device Placement*

Martinez clarifies New Mexico jurisprudence on the duty of governmental entities to remediate dangerous conditions on public roadways.[92] In essence, the supreme court rejected an attempt by the court of appeals to essentially equate what is or is not a traffic control device under the Tort Claims Act in New Mexico to Justice Stewart's oft quoted "I know it when I see it" standard regarding obscenity.[93] Novel issues could, of course, arise in New Mexico.[94] However, by providing guidance with respect to the definition of a traffic control device, the *Martinez* court has articulated the appropriate analytical process for trial courts deciding similar cases.

Common law jurisprudence is replete with examples of appellate courts providing guidance to trial courts in similar situations.[95] While other contexts may also lead a court to provide guidance in an opinion, these roadmaps are periodically necessitated by trial courts distinguishing

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to prohibit the expansion of a permit area, it certainly could have expressly stated so.").

91. *See* State v. Willie, 2009-NMSC-037, ¶ 9, 146 N.M. 481, 212 P.3d 369 ("The principal command of statutory construction is that the court should determine and effectuate the intent of the legislature, using the plain language of the statute as the primary indicator of legislative intent[.]").

92. *Martinez*, 2013-NMSC-005, ¶ 26 (reaffirming holding from *Rutherford*) ("If not our specific holding in *Rutherford*, it is at least the very strong inference from what we said in that opinion.").

93. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

94. *See*, *e.g.*, Smith v. City of Chester, 842 F.Supp. 147, 149 (E.D. Pa. 1994) (plaintiffs alleged that a school crossing guard constituted a traffic control device for the purposes of the Pennsylvania Political Subdivision Tort Claims Act).

95. *E.g.*, State v. Juan, 2010-NMSC-041, ¶ 20, 148 N.M. 747, 242 P.3d 314 ("[T]o provide guidance to the trial court, we reach the merits of Defendant's remaining three claims, which may arise on remand."); Pincheira v. Allstate Ins. Co., 2008-NMSC-049, ¶ 65, 144 N.M. 601, 190 P.3d 322 ("We therefore provide guidance for future protective orders."); *In re Convisser*, 2010-NMSC-037, ¶ 1, 148 N.M. 732, 242 P.3d 299 ("We now issue this Opinion to further explain our decision and provide guidance for future cases."); State v. Leslie, 2004-NMCA-106, ¶ 4, 136 N.M. 244, 96 P.3d 805 ("[R]ather than enter a simple order reversing with no discussion of the merits, we issue this opinion in order to provide guidance in future cases.").

the facts of one case from those of another leading to a misapplication of controlling precedent. For example, in *State v. Silago*, the New Mexico Court of Appeals faced a similar issue.[96] The defendant faced trial on charges of vehicular homicide, great bodily harm by motor vehicle, and aggravated DWI.[97] During the course of the investigation, a six hour and twenty minute delay occurred between the time of the accident and the blood test to determine the level of intoxication.[98] Defendant's blood alcohol content at the time of the test was 0.02.[99] The State moved for admission of expert testimony on retrograde extrapolation.[100]

New Mexico courts accept retrograde extrapolation as an evidentiary practice as interpreted in the BAC nexus cases.[101] In *Silago*, the trial court excluded the State's proffered expert testimony after distinguishing the facts of the case at bar.[102] Because in *State v. Baldwin*, a defendant's DWI conviction was overturned "when the delay was two hours and fifteen minutes,"[103] the trial court in *Silago* used the two hours and fifteen minute delay between arrest and blood alcohol content testing as a threshold inquiry beyond which "retrograde extrapolation evidence would be inadmissible[.]"[104]

By imposing a two hour and fifteen minute bright-line standard for admissibility of retrograde analysis, the trial court departed from the balancing test articulated by the BAC nexus cases.[105] In reversing the trial court's holding, the court of appeals noted, "the BAC nexus cases do not establish a bright-line rule circumscribing a trial court's decision to admit or exclude relation-back evidence. Instead, they *provide guidance* to a trial court in determining when relation-back evidence is necessary."[106]

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96. State v. Silago, 2005-NMCA-100, ¶ 20, 138 N.M. 301, 119 P.3d 181 ("The trial court's analysis of the BAC nexus cases was flawed.").

97. *Id.* ¶ 2.

98. *Id.*

99. *Id.* ¶ 4.

100. *Id.* ("[R]etrograde extrapolation is used to calculate a given BAC back to a prior time using generally accepted rates of alcohol burn-off.").

101. *See* State v. Christmas, 2002-NMCA-020, ¶¶ 24, 28, 131 N.M. 591, 40 P.3d 1035; State v. Martinez, 2002-NMCA-043, ¶ 11, 132 N.M. 101, 45 P.3d 41; State v. Baldwin, 2001-NMCA-063, ¶ 13, 130 N.M. 705, 30 P.3d 394.

102. *Silago*, 2005-NMCA-100, ¶ 10.

103. *Id.* ¶ 18 (citing *Baldwin*, 2001-NMCA-063, ¶ 4).

104. *Id.* ¶ 19.

105. *Id.* ¶ 20 ("The trial court's analysis of the BAC nexus cases was flawed. The cases do not place an outer limit on the delay between the time of driving and testing. At most, they explain that a delay of any significance necessitates the introduction of some evidence providing a nexus between BAC and the time of driving. This is true whether the delay is two hours or six hours.").

106. *Id.* ¶ 23 (emphasis added).

In *Martinez*, the supreme court's holding advances the same proposition—that distinguishable facts should not subsume general legal rules. To emphasize this point, the court stated that "the term maintenance requires a reasonable response to a known dangerous condition. When the reasonableness of that response pertains to traffic controls, it is not measured just by size or weight, permanence or mobility, whether the defect is a structural element or is more transitory in nature."[107] This guidance should prevent future deviation or the application of a bright-line standard with respect to traffic control device analysis by lower courts.

The supreme court in *Martinez* reminds trial courts and practitioners that no bright-line rule is utilized to limit claims of negligent maintenance under the Tort Claims Act. This guidance may prove beneficial to parties injured on New Mexico roadways in the future. This author can imagine scenarios where potential plaintiffs are turned away by litigators, or are subjected to summary judgment by trial courts, given uncertainty as to the relationship between traffic control devices and "maintenance." Post-*Martinez*, two things are clear: (1) plaintiffs have an ongoing burden to provide evidence that requested traffic control devices would remedy a known dangerous condition that exists on a roadway in order to avoid summary judgment, and (2) the debate over the physical or temporal characteristics of those devices appears settled by the supreme court's holding in *Martinez*.

III. ACTUAL OR CONSTRUCTIVE NOTICE OF A DANGEROUS CONDITION ON A ROADWAY

In *Martinez*, the district court "determined that the previous accidents occurred too far from the location of decedents' accident to prove that the same defect or dangerous condition was present."[108] While determinations as to the relevance, and therefore admissibility, of evidence are generally a discretionary function of the presiding court,[109] the supreme court held "the district court took an unnecessarily narrow view of what might reasonably persuade a jury on the question of notice."[110] The *Martinez* court reversed because "[t]aking a static, rigid view of the 'location' of the accident takes from the jury the opportunity to decide whether

107. Martinez v. New Mexico Dept. of Transp., 2013-NMSC-005, ¶ 21, 296 P.3d 468.

108. Martinez v. New Mexico Dept. of Transp., 2011-NMCA-082, ¶ 25, 150 N.M. 204, 258 P.3d 483.

109. State v. Lujan, 1980-NMSC-036, ¶ 13, 94 N.M. 232, 608 P.2d 1114.

110. *Martinez*, 2013-NMSC-005, ¶ 41.

[NM]DOT acted reasonably under the circumstances."[111] But what information is sufficient to put a governmental entity on notice of a dangerous condition? *Martinez* suggests that a governmental entity need not actually be aware of a dangerous condition in order to have a maintenance responsibility; instead, the state may have a duty to maintain if it has addressed similar dangerous conditions elsewhere in its jurisdiction (*i.e.*, constructive notice).[112]

A. Evidence of Actual or Constructive Notice

In addition to defining highway maintenance responsibilities related to placement of traffic control devices, New Mexico appellate courts have also defined when a governmental entity has sufficient notice of a dangerous condition under the Tort Claims Act.[113] Precedent has made clear that notice is a question of fact to be determined by the jury[114] and is inextricably intertwined with the admissibility of probative evidence.[115]

Under the New Mexico Tort Claims Act, a governmental entity's duty to maintain a roadway is triggered by actual or constructive notice of a dangerous condition.[116] Express government recognition of a dangerous condition at a specific location constitutes actual notice.[117] Actual notice is also demonstrated by government acknowledgement of a dangerous

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111. *Id.* ¶ 43.

112. *Id.* (emphasis added) ("Depending on the particular characteristics of the road, evidence of other collisions occurring in the general area of the particular collision *or in other areas with similar characteristics*, may be relevant to notice.").

113. Ryan v. New Mexico State Highway & Transp. Dep't, 1998-NMCA-116, ¶ 10, 125 N.M. 588, 964 P.2d 149 ("Whether Defendant had notice of the dangerous condition created by wild animals on the road is disputed by the parties. Plaintiffs presented affidavit evidence that a series of accidents occurred on that particular stretch of highway as a result of animal crossings. . . . When evidence as to an issue of material fact is disputed, summary judgment is improper.").

114. *Id.* ¶ 8.

115. Ambassador E. Apts. Investors v. Ambassador E. Invs., 1987-NMCA-135, ¶ 18, 106 N.M. 534, 746 P.2d 163 ("Whether or not there remains a 'viable issue of fact,' however, depends on the material presented to the trial courts by the parties.").

116. Blackburn v. State, 1982-NMCA-073, ¶¶ 30, 32, 98 N.M. 34, 644 P.2d 548, 553 ("Plaintiff was required . . . to prove *either* that the State created the dangerous condition *or* if they didn't create it, then they had actual or constructive knowledge. . . . The converse . . . is that where the State has not created the dangerous condition, no duty to remedy the dangerous condition arises until actual or constructive notice is present.").

117. *See* Rutherford v. Chaves Cnty., 2003-NMSC-010, ¶ 15, 133 N.M. 756, 69 P.3d 1199 ("Chaves County does not dispute that it was aware that floodwaters at the Spence Road Crossing would occasionally run at dangerously high levels.").

condition through its internal planning process.[118] Constructive notice, by contrast, is "notice arising by presumption of law from the existence of facts and circumstances that a party had a duty to take notice of,"[119] or "notice presumed by law to have been acquired by a person and thus imputed to that person."[120] New Mexico jurisprudence applies constructive notice to duty analysis in the context of maintenance responsibilities under the Tort Claims Act.[121]

In *Romero v. State*, the plaintiff alleged the state negligently maintained Rio Arriba County Road 41, causing a single vehicle accident.[122] Plaintiff offered expert testimony "that the accident site was dangerous because there was insufficient banking or superelevation on the curve, the curve was sharp, the curve was compound, and the roadway had an insufficient shoulder."[123] In response, defendant claimed plaintiff's evidence characterized elements of design for which immunity is not waived under section 41-4-11(B) of the Act.[124] The district court admitted plaintiff's expert testimony and the jury returned a verdict for the plaintiff.[125] The court of appeals reversed the judgment, holding that the expert's testimony should have been excluded because the state could not be held liable for the defects the expert testified about.[126] The supreme court reinstated the judgment[127] and held that the trial court did not abuse its discretion in admitting the expert testimony because "[the expert's testimony] tended to establish negligent maintenance, especially absent any evidence of design[.]"[128] Significantly, the supreme court rejected the

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118. *See* Rickerson v. State, 1980-NMCA-050, ¶ 5, 94 N.M. 473, 612 P.2d 703 ("[A] need for installation of traffic signals at that intersection, 'for the general safety of the citizens of the City,' was recognized by the City and that need conveyed to the State Highway Department seven months before the fatal accident . . . occurred.").

119. BLACK'S LAW DICTIONARY 1164 (9th ed. 2009).

120. *Id.*

121. *E.g.*, Ryan v. New Mexico State Highway & Transp. Dep't, 1998-NMCA-116, ¶ 8, 125 N.M. 588, 964 P.2d 149 ("Defendant may still have had a duty to remedy the dangerous condition by placing warning signs along the roadway if Defendant had actual or constructive notice of wild animals crossing the road and causing driving accidents."); *Rutherford*, 2003-NMSC-010, ¶ 14 ("It is not enough for a plaintiff to simply prove that the hazard exists; the plaintiff must prove that the governmental entity had actual or constructive notice of the hazard.").

122. Romero v. State, 1991-NMCA-042, ¶ 1, 112 N.M. 291, 814 P.2d 1019.

123. *Id.* ¶ 14.

124. *Id.*

125. *Id.* ¶ 1.

126. *Id.* ¶ 20.

127. Romero v. State, 1991-NMSC-071, ¶ 1, 112 N.M. 332, 815 P.2d 628.

128. *Id.* ¶ 5–6.

court of appeals' "unduly restrictive interpretation both on admissibility of relevant evidence and . . . the term 'maintenance.'"[129]

In *Ryan v. New Mexico State Highway and Transportation Department*, the court addressed whether the state had notice of a dangerous condition sufficient to trigger a duty to install animal warning signs.[130] In *Ryan*, the plaintiff struck an elk while driving eastbound on New Mexico State Road 12 ("NM 12") three miles west of Reserve.[131] No signs warning of animal activity were posted on NM 12 west of Reserve.[132] The plaintiffs alleged negligence on the part of the State Highway and Transportation Department, given the Department's failure to post warning signs.[133] Supporting this claim, plaintiffs offered evidence of (1) a series of accidents reported on this stretch of road;[134] and (2) the installation of six animal crossing signs over a forty-mile stretch *east* of Reserve, indicating defendant's belief that the signs could prevent accidents.[135] The district court found the State owed no duty to plaintiffs and granted summary judgment.[136] The court of appeals reversed, holding "[w]hether Defendant had a duty to warn drivers of wild-animal crossings on the seven-mile stretch of road west of Reserve where this accident occurred turns on whether or not Defendant had actual or constructive notice that wild-animal crossings created a dangerous condition in that location."[137] This holding implies that plaintiff's evidence was admissible to prove the State breached its duty to maintain the road.[138] The supreme court approvingly cited *Ryan*'s analysis of notice in its discussion of notice in *Martinez*.[139]

B. Notice and Evidence in Martinez

1. Rationale

After articulating its traffic control device holding in *Martinez*, the supreme court offered support for the proposition that a maintenance

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129. *Id.* ¶ 6.

130. Ryan v. New Mexico State Highway & Transp. Dep't, 1998-NMCA-116, ¶ 6, 125 N.M. 588, 964 P.2d 149.

131. *Id.* ¶ 2.

132. *Id.* ¶ 3.

133. *Id.* ¶¶ 1, 4.

134. *Id.* ¶ 10.

135. *Id.* ¶ 15 (emphasis added).

136. *Id.* ¶¶ 1, 4.

137. *Id.* ¶ 7.

138. *Id.* ¶ 15 ("Because breach of duty is a factual question, and because there are material facts at issue, we hold that summary judgment was improper.").

139. Martinez v. New Mexico Dept. of Transp., 2013-NMSC-005, ¶ 44, 296 P.3d 468 (citing *Ryan*, 1998-NMCA-116, ¶¶ 9–10).

responsibility is triggered by "notice of a dangerous condition."[140] Referring to the legislative intent of the Tort Claims Act, the court noted a logical disconnect between allowing perpetual design immunity and protecting drivers on New Mexico's roadways.[141] Drawing on out-of-state opinions, the court recognized that "initial roadway design decisions may be based on weighing *potential* risks . . . without the benefit of an accident history or other empirical evidence demonstrating how the design works in practice."[142] With this understanding in place, the court opined that once the government has empirical data as to the functionality of a road design, ongoing design immunity would frustrate the Tort Claims Act's purpose.[143]

The supreme court then shifted its attention to the issue of whether NMDOT was on notice of a dangerous condition on NM 502. The district court concluded that Plaintiffs' evidence of accidents on NM 502 was not relevant to whether NMDOT had notice of a dangerous condition at the location of the accident.[144] The court of appeals deferred to this ruling, though its analysis only considered whether evidence of previous accidents was relevant to Plaintiff's remaining claim of negligent maintenance of a roadway as related to red crushed cinder present in the center turn lane at the time of the accident.[145]

The supreme court, having determined that NMDOT had a duty to maintain if it had notice of a dangerous condition, reevaluated Plaintiffs' evidence in this context.[146] Instead of focusing only on evidence pertain-

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140. *Id.* ¶ 34.

141. *Id.* ¶ 35 ("Allowing design immunity to continue into perpetuity would not further the purpose of design immunity, while frustrating the overall purpose of encouraging safe highway maintenance.").

142. *Id.* ¶ 37 (citing Baldwin v. State of California, 6 Cal.3d 424, 434, 491 P.2d 1121, 1128 (1972)).

143. *Id.* ¶ 39 ("The sole purpose of waiver in Section 41-4-11(A) is to ensure that highways are made and kept safe for the traveling public. This 'sole purpose' would be frustrated if DOT could simply throw its hands up and claim immunity based on design, despite knowing, based on empirical evidence, that what was designed in theory proved fatal in fact." (internal citations and quotation marks omitted)).

144. *Id.* ¶ 40 (quoting Martinez v. New Mexico Dept. of Transp., 2011-NMCA-082, ¶ 25, 150 N.M. 204, 258 P.3d 483) ("[T]he district court determined that the previous accidents occurred too far from the location of decedents' accident to prove that the same defect or dangerous condition was present.").

145. *Martinez*, 2011-NMCA-082, ¶ 27 ("In view of DOT's immunity for the design and construction of the center turn lane, and the absence of a direct connection between the evidence of previous complaints and accidents to DOT's duty to sweep gravel in the center turn lane, Plaintiffs' evidence has little, if any, probative value.").

146. *Martinez*, 2013-NMSC-005, ¶ 41 ("With this evidence, Plaintiffs intended to show that DOT had notice—that it knew or should have known—of a dangerous

ing to the exact location of the accident,[147] the court cited *Ryan*, which held that "evidence that a series of accidents occurred on that particular *stretch* of highway as a result of wild-animal crossings," was relevant to a duty analysis.[148]

The court also cited *Hull v. South Coast Catamarans, L.P.*, which held that notice "becomes a question of law only if no room for ordinary minds to differ exists."[149] Based both on the question as to whether "reasonable minds could differ on whether such facts were sufficient to provide [NMDOT] with adequate notice[,]"[150] as well as conflicting expert testimony related to operational characteristics along NM 502,[151] the court held "the district court took an unnecessarily narrow view of what might reasonably persuade a jury on the question of notice."[152] Consequently, the court found reversible error in the exclusion of Plaintiffs' offered evidence of previous accidents on NM 502.[153]

A careful reading of *Ryan* demonstrates one possible justification for the district court's decision to exclude the Plaintiffs' evidence in *Martinez*. However, the supreme court's opinion in *Martinez* indicates a broad, and potentially expanding, scope of inquiry from which relevant evidence may be drawn to demonstrate a governmental entity's notice of a dangerous condition on a roadway.

2. Analysis

In *Martinez*, the supreme court affirmed the *Ryan* methodology of location analysis.[154] In doing so, the court noted that "[t]aking a static, rigid view of the 'location' of the accident takes from the jury the opportunity to decide whether DOT acted reasonably under the circumstances,"[155] rejecting the trial court's "unnecessarily narrow view of what

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condition along NM 502, including the collision site, sufficient to trigger a duty to take remedial measures.")

147. *Id.* ¶ 42.

148. *Id.* (quoting *Ryan v. New Mexico State Highway & Transp. Dep't*, 1998-NMCA-116, ¶ 10, 125 N.M. 588, 964 P.2d 149 (emphasis original)).

149. Hull v. S. Coast Catamarans, L.P., 365 S.W.3d 35, 44 (Tex. App. 2011).

150. *Martinez*, 2013-NMSC-005, ¶ 44.

151. *Id.* ¶ 45–46.

152. *Id.* ¶ 41.

153. *Id.* ¶ 50.

154. *Id.* ¶ 42 ("In *Ryan*, the Court of Appeals noted that the plaintiffs 'presented affidavit evidence that a series of accidents occurred on that particular *stretch* of highway as a result of wild-animal crossings.' This is a more appropriate view of relevancy when determining whether DOT had notice of a dangerous condition along a highway." (internal citations omitted)).

155. *Id.* ¶ 43.

might reasonably persuade a jury on the question of notice."[156] In *Martinez*, the district court chose one of three viable readings of *Ryan* to evaluate the admissibility of the plaintiff's evidence of a dangerous condition. The district court's analysis was as follows: (1) acknowledge potential duty on part of NMDOT to maintain; (2) evaluate evidence of previous accidents on NM 502; (3) find the *Martinez* accident distinguishable from previous accidents based on the accident's location; (4) exclude evidence of previous accidents; (5) determine NMDOT lacked actual or constructive knowledge of a dangerous condition; and (6) find no duty to maintain existed at the location of the accident.[157]

Why did the district court focus specifically on notice of a dangerous condition at the location of the accident? In *Ryan*, the court of appeals failed to clarify which of three distinct recitations of its holding must be followed by trial courts. Paragraph seven states, "Whether Defendant had a duty to warn . . . turns on whether Defendant had actual or constructive notice that wild-animal crossings created a dangerous condition *in that location*."[158] Paragraph eight states, "Defendant may still have had a duty to remedy the dangerous condition . . . if Defendant had actual or constructive notice of wild animals *crossing the road and causing driving accidents*."[159] Finally, paragraph twelve states, "Whether this duty required the posting of warning signs depends on whether Defendant had actual or constructive notice of a dangerous condition *existing on this road*."[160]

A literal reading of paragraph seven could lead to the conclusion that under *Ryan*, actual or constructive notice must be applied to "a dangerous condition *in that location*."[161] This reading of *Ryan* would explain the district court's exclusion of evidence in *Martinez* after finding "[p]laintiffs could not show that DOT had notice of an ongoing defect of design *in that part of the road.*"[162] However, location was not so narrowly construed in *Ryan*. Instead, the court of appeals considered plaintiff's evidence of previous accidents and state action to limit accidents not just at the scene of this accident, but from the surrounding area.[163]

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156. *Id.* ¶ 41.

157. Martinez v. New Mexico Dept. of Transp., 2011-NMCA-082, ¶ 5, 150 N.M. 204, 258 P.3d 483.

158. Ryan v. New Mexico State Highway & Transp. Dep't, 1998-NMCA-116, ¶ 7, 125 N.M. 588, 964 P.2d 149 (emphasis added).

159. *Id.* ¶ 8 (emphasis added).

160. *Id.* ¶ 12 (emphasis added).

161. *Id.* ¶ 7 (emphasis added).

162. *Martinez*, 2011-NMCA-082, ¶ 5 (emphasis added).

163. *Ryan*, 1998-NMCA-116, ¶¶ 10, 15.

a. Historical Context for a Broad Interpretation of "Location of an Accident"

History and decisions from other state courts show that the more expansive view of location is correct. For example, in *Shaw v. President of Sun Prairie*, decided by the Wisconsin Supreme Court in 1889, the plaintiff was injured after falling through a rotten board of a raised wooden sidewalk within the village.[164] At trial, plaintiff introduced evidence showing the generally bad condition of the sidewalk both north and south of the location of her accident.[165] The jury returned a verdict for plaintiff.[166] The village appealed, claiming that admitted testimony as to the condition of the sidewalk should have been limited to the precise location of the accident.[167] The court held the evidence admissible on the grounds that it showed constructive notice of the defect at the precise location of the accident.[168] *Shaw* and its progeny demonstrate that courts have long refused to limit evidence that establishes notice to the specific location of a given accident. Population and infrastructure of the late 1800s necessarily limited the language used in denoting the scope of admissible evidence to municipalities. However, the New Mexico Supreme Court in *Martinez* applies these same principles in holding Plaintiffs' evidence "of a history of cross-median collisions on NM 502" admissible as against NMDOT; an entity with a considerably larger jurisdiction.[169]

b. Expansion of Admissible Evidence of Constructive Notice

In *Martinez*, the supreme court held that "[t]he question of notice is not a technical one. Simply put, it requires the fact-finder to decide whether the evidence presented would alert a reasonable person of a particular fact."[170] Given this standard, a question arises as to the outer geographical limits of relevant evidence introduced for the purposes of establishing constructive notice on the part of a governmental entity when dealing with similar conditions: NMDOT has jurisdiction over thousands of miles of roadways in New Mexico.[171]

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164. Shaw v. Pres. of Village of Sun Prairie, 42 N.W. 271, 272 (Wis. 1889).

165. *Id.*

166. *Id.* at 271.

167. *Id.* at 272.

168. *Id.*

169. Martinez v. New Mexico Dept. of Transp., 2013-NMSC-005, ¶ 40, 296 P.3d 468.

170. *Id.* ¶ 49.

171. New Mexico Department of Transportation District 1 maintains 5,322 lane miles of roadway in Socorro, Catron, Grant, Hidalgo, Sierra, Dona Ana, and Luna Counties. The New Mexico Department of Transportation is comprised of six districts.

On this issue, the *Martinez* court held, "Depending on the particular characteristics of the road, evidence of other collisions occurring in the general area of the particular collision *or in other areas with similar characteristics*, may be relevant to [whether the state has] notice."[172] While reasonable minds could differ as to whether this statement constitutes the new standard for evidentiary analysis or dicta, the court undoubtedly expressed interest in expanding the scope of constructive notice by adopting a "similar characteristics" analysis to determine the relevancy of evidence.

The admission of evidence of similar characteristics has been implemented prior to *Martinez*. In New Mexico criminal cases, "[e]vidence of other crimes has a strong probative value when there is sufficient evidence of *similar characteristics* of conduct in each crime to show the perpetrator of the other crime and the perpetrator of the crime for which defendant has been charged is one and the same person."[173]

Though rare, other jurisdictions have applied a "similar characteristics" analysis to the issue of constructive notice of a dangerous condition. In *Morrison v. Ted Wilkerson, Inc.*, the plaintiff suffered personal injuries in Clay County, Missouri, after colliding with traffic control devices at a construction site.[174] The defendant moved to set aside the jury verdict, asserting that the trial court erred in admitting plaintiff's evidence that demonstrated that the construction company had constructive notice of a dangerous condition based on previous accidents under similar conditions miles away at a construction site in Jackson County, Missouri.[175] The United States District Court for the Western District of Missouri denied the motion:

> [a] reasonable construction of the evidence, however, shows that the two locations were substantially similar in that both involved the placing of lane barrels so that they might not be seen until it was too late to avoid an unanticipated danger. The bridges constructed on both projects were similar. So were the methods of construction. The width of the roadways were nearly the same. The terrain and physical characteristics of the roadway and sur-

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See NEW MEXICO DEPT. OF TRANSP., http://dot.state.nm.us/en/D1.html (last visited Mar. 18, 2014).

172. *Martinez*, 2013-NMSC-005, ¶ 43 (emphasis added).

173. State v. Tafoya, 1986-NMCA-104, ¶ 30, 105 N.M. 117, 729 P.2d 1371 *cert. granted, judgment vacated on other grounds*, 487 U.S. 1229 (1998) (emphasis added).

174. Morrison v. Ted Wilkerson, Inc., 343 F.Supp. 1319, 1322 (W.D. Mo. 1971).

175. *Id.* at 1322, 1325.

> roundings were similar. . . . The admission of this evidence was within the discretion of the Court.[176]

The *Martinez* court's introduction of a similar characteristics analysis into questions of constructive notice is not creating a new evidentiary standard from whole cloth, but is instead applying an accepted standard to an additional area of substantive law.

C. Potential Impacts of Allowing Evidence of Dangerous Condition with Similar Characteristics for Constructive Notice

While the introduction of a similar characteristics analysis may only be dicta for this case, the court's choice of language indicates an interest in expanding the doctrine of constructive notice to include not just a "'stretch' of highway"[177] in relative proximity to the site of an accident where negligence is alleged, but to geographically distinct roadways within a jurisdiction that possess similar characteristics to a roadway where the government already has notice of a dangerous condition.

Dicta periodically evolve into law.[178] The persuasive force of dicta depends upon its nature as either obiter dicta[179] or judicial dicta.[180] In *Martinez*, the court's similar characteristics language is not so attenuated

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176. *Id.* at 1326; *see also* State v. Willian, 423 N.E.2d 668, 672 (Ind. Ct. App. 1981) ("Generally, evidence of conditions at a place other than the one in question is not admissible to establish that a condition at the place in question is dangerous, unless there is a showing of some connection between the places. Evidence of the condition of the highway and the existence of similar defects at other places has been held competent where the places are so close and the conditions so similar they can be considered as substantially the same. However, in order to permit evidence of condition at other places, a proper basis must be laid for admission of such proof." (citations omitted)).

177. *Martinez*, 2013-NMSC-005, ¶ 44.

178. Michael Sean Quinn, *Argument and Authority in Common Law Advocacy and Adjudication: An Irreducible Pluralism of Principles*, 74 CHI.-KENT L. REV. 655, 767 (1998) ("[C]ourts frequently lay down broader rules than they need to, and then subsequent courts interpret those rules as binding precedent. In this way, over time, dicta can evolve into holdings. This means that what was obiter dicta in a first case might become judicial dicta in a second case and holdings in yet a third case.").

179. *Id.* at 713 ("Obiter dicta are sometimes called *mere* dicta or *pure* dicta, and they include 'a mere remark made in passing, [which is] quite unnecessary to the issue upon which the [court]' is writing." (quoting *Ex parte Harrision*, 741 S.W.2d 607, 609 (Tex. App. 1987)) (alteration in original).

180. *Id.* (quoting in part Palestine Contractors, Inc. v. Taylor, 386 S.W.2d 868, 871 (Tex. Civ. App. 1956)) (internal quotations omitted) ("[J]udicial dictum [is] a formulation of the law deliberately made for the purpose of being followed by the trial court. It is not simply 'obiter dictum.' It is at least persuasive and should be followed unless found to be erroneous.").

from the evidentiary principle addressed as to render it obiter dicta. Instead, the indicated expansion (areas with similar characteristics) is linked by *or* to the existing standard (the general area of the particular collision).[181] The court emphasized the force of the language noting, "when the Legislature has spoken in such broad terms, courts should be wary of preempting the role of the jury."[182]

Given this understanding, trial courts and practitioners must carefully evaluate the potential scope of a similar characteristics test in this context. The court made a specific choice to expand its language to include a similar characteristics analysis.[183] One potential reason for the supreme court's expressed interest in an expansion of constructive notice under highway maintenance provisions of the Tort Claims Act is outlined in the hypothetical below:

> NMDOT, through its normal planning and design process, builds a new road, NM 999, between Truth or Consequences and Reserve. The road is designed and constructed to increase efficiency of travel between two communities. To achieve the goal of reducing actual miles traveled, NM 999 winds through the forest between the two communities and includes steep inclines and declines due to topographical conditions and elevation changes. Concrete center barriers are installed between mile markers 40 and 50 given the winding nature of the road and the acknowledged potential for crossover collisions. NMDOT does not install center barriers between mile markers 44 and 45 so that logging trucks can access forest roads that previously passed through the forest at this location from either direction. Instead of center barriers, a turn-only lane is installed to separate eastbound and westbound traffic and to facilitate turning from the road without disrupting the flow of traffic.
>
> On the day NM 999 opens, parties depart from both Truth or Consequences and Reserve heading to the other community. Between mile markers 44 and 45 the first two vehicles meet. Unfortunately one of the drivers is distracted by the scenery, crosses through the center turn-only lane, and hits the other vehicle head on. All parties involved in the accident are killed. The New Mex-

181. *Martinez*, 2013-NMSC-005, ¶ 43 ("[E]vidence of other collisions in the general area of the particular collision or in other areas with similar characteristics, may be relevant to notice.").

182. *Id.*

183. Quinn, *supra* note 179, at 714 ("[T]here is a convention that high courts do not talk about things either favorably or unfavorably simply for the hell of it. The existence of that convention suggests that if a high court writes about something, then it means to guide other courts and lawyers by what it has said.").

> ico State Police investigate the accident and report their findings to NMDOT.
>
> Over the next few months, two additional crossover collisions occur between mile markers 44 and 45. The State Police notify NMDOT on each occasion. After the third collision, NMDOT installs concrete barriers between mile markers 44 and 45 in conformance with those previously installed between mile markers 40 to 44 and 45 to 50.
>
> After exhausting insurance remedies, each not-at-fault party files a separate lawsuit against NMDOT. As a result of the design immunity provisions of the New Mexico Tort Claims Act, the cause of action in each lawsuit alleges negligent maintenance of a roadway under NMSA 1978, Section 41-4-11(A). For purposes of this analysis, we will denote the plaintiffs chronologically as Plaintiff 1, Plaintiff 2, and Plaintiff 3.

Under *Martinez*, the state has a duty to install traffic control devices (including concrete barriers) when it has sufficient notice of a dangerous condition exists on a roadway. Therefore, a duty to remedy the dangerous condition on NM 999 exists once NMDOT is on notice of that dangerous condition. How does this affect each of the three plaintiffs' cause of action against NMDOT? To answer this question, we apply the evidentiary standards from *Ryan* ("on that particular stretch of highway")[184] and *Martinez* ("in other areas with similar characteristics").[185]

Under the *Ryan* standard for determining relevancy of evidence, no evidence exists indicating that NMDOT had actual or constructive notice of a dangerous condition between mile markers 44 and 45 at the time of Plaintiff 1's accident. Intuitively, evidence of notice will increase with each subsequent accident. Plaintiff 2 will cite NMDOT's knowledge of Plaintiff 1's accident. Plaintiff 3 will cite NMDOT's knowledge of both previous accidents. Under *Ryan*, Plaintiff 3's claim that NMDOT breached its duty to maintain the highway is strengthened by evidence that NMDOT was on notice of a dangerous condition "on that particular stretch of highway."[186] Plaintiff 2's claim is marginally weaker, but may survive summary judgment. Plaintiff 1, however, has no hope of surviving summary judgment under the *Ryan* standard. No evidence exists to demonstrate that NMDOT had notice of a dangerous condition on the first day that NM 999 opened.

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184. Ryan v. New Mexico State Highway & Transp. Dep't, 1998-NMCA-116, ¶ 10, 125 N.M. 588, 964 P.2d 149.

185. *Martinez*, 2013-NMSC-005, ¶ 43.

186. *Ryan*, 1998-NMCA-116, ¶ 10.

Under the holding from *Martinez*, a viable cause of action potentially becomes available to Plaintiff 1. The fatal accident involving Martinez, Espinoza, and Griego[187] inarguably establishes that NMDOT is on actual notice that the absence of concrete center barriers on NM 502 created a dangerous condition within NMDOT's jurisdiction. Just like NM 502, NM 999 winds and traverses similar topographical features and elevation changes. Simply put, NM 999 in the hypothetical problem has "similar characteristics" to NM 502.[188] Therefore, under *Martinez*, Plaintiff 1 can argue that NMDOT had constructive notice of a dangerous condition on NM 999 based on its actual knowledge of the dangerous condition on NM 502.

It is worth noting that under *Martinez*, roadways do not have to be newly constructed to satisfy notice requirements. Numerous accident locations may (1) have similar characteristics to other known dangerous locations (remedied or not) on a roadway within the jurisdiction; and (2) be the first reported accident at a specific location.

Martinez held that evidence of a governmental entity's notice of a dangerous condition on a roadway is admissible regardless of whether the evidence presented relates directly to the precise location of an accident. It may, however, do more. The supreme court's language in *Martinez* is an invitation for advocates to explore what evidence might be relevant to establishing a governmental entity's constructive notice of a dangerous condition on a roadway throughout its jurisdiction.

IV. CONCLUSION

With respect to a governmental entity's duty to remediate a known dangerous condition through the placement of traffic control devices, the *Martinez* court rejected a bright-line rule that excludes safety features based on their physical or temporal characteristics. This holding will allow litigants to pursue previously questionable causes of action and avoid summary judgment. With respect to a potential expansion of a governmental entity's constructive notice of a dangerous condition, the supreme court's *Martinez* holding must be interpreted in future proceedings. If the holding is interpreted as above, governmental entities would be advised to evaluate safety considerations throughout their jurisdictions with a reduced dependence on design immunity provisions in the Tort Claims Act.

187. *Martinez*, 2013-NMSC-005, ¶¶ 2–3 (decedents in *Martinez*).
188. *Id.* ¶ 43.