

IN THE NEW MEXICO COURT OF APPEALS

LARRY SELK, by and through
his Conservator and Co-Guardian, RANI RUBIO,

Plaintiff/Appellee/Cross-Appellant,

v.

Ct. App. No. 30,319

RES-CARE NEW MEXICO, INC.,
and RES-CARE, INC.,

Defendants/Appellants/Cross-Appellees.

ON APPEAL FROM THE SECOND JUDICIAL DISTRICT COURT,
THE HONORABLE NAN NASH, DISTRICT JUDGE

BRIEF OF THE ARC OF NEW MEXICO,
AMICUS CURIAE

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STATEMENT OF THE CASE

This appeal arises from a personal injury case tried against Res-Care New Mexico, Inc. and Res-Care, Inc. (“RCI”) by Plaintiff Larry Selk, by and through his Conservator and Co-Guardian, Rani Rubio. Plaintiff Larry Selk alleged that he was raped by a caretaker and that the sexual assault was caused by the negligence of Res-Care New Mexico, Inc. and RCI and that their conduct was willful, wanton, and/or reckless entitling Plaintiff to punitive damages.

After a three-week trial, the jury found that Defendants owed a duty to provide a safe and healthy environment for Mr. Selk; that they breached that duty by their negligent hiring and negligent acts; and that their breaches caused Mr. Selk’s injuries. The jury found that Defendants’ conduct was willful, wanton, or reckless, and awarded substantial punitive damages.

INTRODUCTION TO THE ARGUMENT OF *AMICUS*

Arc of New Mexico’s mission (the “Arc”) is to improve the quality of life for individuals with developmental disabilities. Many individuals with developmental disabilities, including Larry Selk, suffer from both mental and physical impairments. Most are unable “to advocate on their own behalf.” Presentation, Georgia Public Health Training Network, *Sexual Assault Against Persons Living with Disabilities* (undated).¹

¹ Available at <http://www2a.cdc.gov/phtn/svprev/disability.pdf> (last visited on Oct. 11, 2010).

The lives of those with developmental disabilities cannot be improved, however, unless their lives are first made safe. Unfortunately, the deck is stacked against those with disabilities. Sexual predators see people with disabilities as powerless and vulnerable. Consequently, people with disabilities suffer abuse and rape at much higher rates than the general population. But “[e]very sexual assault, regardless of who the victim is, must be taken seriously.” Leigh Ann Davis, *People with Intellectual Disabilities and Sexual Violence*, www.thearc.org (2005).²

RCI is “the country’s leading provider of services to people with developmental disabilities,” serving “nearly 29,000 people in 33 states.” ResCare, Inc., Disability Services, http://www.rescare.com/services_Disability_Services.cfm (last visited Sept. 30, 2010); ResCare, Inc., Mission Statement, http://www.rescare.com/aboutus_our_mission.cfm (last visited Sept. 30, 2010). For large-scale providers such as RCI, only substantial punitive damages awards can force them to improve the quality of care they provide to Mr. Selk and others—and thus deter similar injuries in the future. The Arc of New Mexico thus submits this *amicus* brief to offer the Court more information regarding the fairly unknown, yet horrific and significant, problem of sexual abuse in the developmentally disabled community, of which this case is but one example.

² Available at <http://www.thearc.org/page.aspx?pid=2445> (last visited on Oct. 11, 2010).

ARGUMENT

A. Individuals With Disabilities Suffer Significant Sexual Abuse And Assault, Most Often At The Hands Of Their Caregivers, That Frequently Goes Unreported And Unpunished.

“Any time a power imbalance exists, there is a potential for abuse.”

Maureen Crossmaker, *Behind Locked Doors—Institutional Sexual Abuse*, 9 *SEXUALITY AND DISABILITY* 201, 207 (1991). People with developmental disabilities—especially those in institutional settings—are thus particularly vulnerable to sexual assault.

1. Individuals With Developmental Disabilities Suffer Sexual Abuse And Assault At Alarming Rates.

Offenders are often aware of the vulnerabilities of the developmentally disabled and “find them attractive targets for sexual abuse.” Deborah Tharinger et al., *Sexual Abuse and Exploitation of Children and Adults with Mental Retardation and Other Handicaps*, 14 *CHILD ABUSE & NEGLECT* 301, 305 (1990); R. Amy Elman, *Confronting the Sexual Abuse of Women with Disabilities*, at 4 (Jan. 2005). Disabled individuals are vulnerable for multiple reasons. “A first and major area that places persons with mental retardation at risk is their often lifelong dependency on caregivers.” Tharinger, *supra*, at 304. “Persons who are mentally retarded and also physically handicapped may not have the strength to fight back or the ability to run to escape.” *Id.* at 305.

In addition, offenders perceive people with disabilities “as those that will not tell or will not be believed.” Elman, *supra*, at 3. Individuals such as Mr. Selk who are nonverbal or have other communication problems are thus especially at risk. Ann Buchanan, *Sexual Abuse of the Mentally Handicapped: Difficulties in Establishing Prevalence*, 15 PSYCHIATRIC BULLETIN 601, 604 (1991). “Any type of disability appears to contribute to higher risk of victimization but intellectual disabilities, communication disorders, and behavioral disorders appear to contribute to very high levels of risk, and having multiple disabilities . . . result[s] in even higher risk levels.” Davis, *supra* (citation omitted); Crossmaker, *supra*, at 208 (people who are severely impaired probably at greatest risk).

For these reasons, developmentally disabled residents, “[t]he people on the lowest rung of the institutional ladder,” are among the most vulnerable. Crossmaker, *supra*, at 205. They are trained from the beginning to be compliant. *Id.* at 208. They are “economically, physically and psychologically dependent, isolated and lacking in credibility.” *Id.* at 205. As the Supreme Court of Alaska recently recognized, a caregiver in an assisted living home has “power” over residents and “is in a position to punish in direct or subtle ways a resident who resists sexual advances.” *Ayuluk v. Red Oaks Assisted Living, Inc.*, 201 P.3d 1183, 1200 (Alaska 2009).

As developmentally disabled individuals are powerless to advocate for themselves, little funding exists for research or survivor support. *Accord R. Balogh et al., Sexual Abuse in Children and Adolescents with Intellectual Disability*, 45 J. OF INTELL. DISABILITY RES. 194, 194 (2001); Tharinger, *supra*, at 302; Buchanan, *supra*, at 602.³ Still, available abuse estimates are staggering. “In the United States, people with disabilities are 4 to 10 times more likely to be victimized than people without them.” CDC, *Victimization of Persons with Traumatic Brain Injury or Other Disabilities: A Fact Sheet for Friends and Families*, at 1 (undated).⁴ Estimates reflect that disabled persons were victims of 47,000 rapes, 79,000 robberies, 114,000 aggravated assaults, and 476,000 simple assaults in 2007 -- *not including* institutionalized people with disabilities. U.S. Department of Justice, *Bureau of Justice Statistics Special Report: Crime Against People with Disabilities, 2007*, at 1 (2009);⁵ *Government Reports Underestimate Rape Rates of Women and People with Disabilities* (Nov. 4, 2009).⁶

³ Because there is so little research on developmentally disabled adult male victims of sexual assault, *amicus* will necessarily refer to analogous studies and reports relating to women, children, and people with other disabilities in this brief.

⁴ *Available at*

http://www.cdc.gov/traumaticbraininjury/pdf/VictimizationPerson_Fact%20Sheet4FrdsFal-a.pdf (last visited Oct. 11, 2010).

⁵ *Available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/capd07.pdf> (last visited Oct. 11, 2010).

⁶ *Available at* <http://feministing.com/2009/11/04/govt-reports-underestimate-rape-rates-of-women-and-people-with-disabilities> (last visited Oct. 11, 2010).

Regarding sexual assault, one study suggests that “more than 70% of women with a wide variety of disabilities have been victims of violent sexual encounters at some point in their lives.” Elman, *supra*, at 3. “Researchers have found that men with disabilities are twice as likely to become a victim of sexual violence compared to men without disabilities.” Davis, *supra*.

It is estimated that over 3,000 developmentally disabled individuals are enrolled in community programs in New Mexico. Luke E. Calhoun and Mikki Rogers, *Incident Management Across the U.S.*, at 48 (2005). The Department of Health reported an overwhelming 1,986 on-site investigations into allegations of abuse, neglect, or exploitation of these individuals in 2004, the year that Mr. Selk was assaulted. *Id.* Approximately 800 of these reports were substantiated. *Id.*

New Mexico law enforcement, service provider, and Sexual Assault Nurse Examiner (SANE) unit reports show that “[f]rom 2006-2009, one-quarter of victims who sought assistance for a sexual assault had some type of disability before the sexual assault. Most of these victims were mentally/emotionally disabled.” Betty Caponera, *Sex Crime Trends in New Mexico: An Analysis of Data from the New Mexico Interpersonal Violence Data Central Repository 2005-2009*, at 60 (2010).⁷ New Mexico SANE units, for example, reported 275 patients with a

⁷*Available at*

http://www.nmcsap.org/Betty_Caponera_Sex_Crimes_2009_Report_Aug2010_web.pdf (last visited on Oct. 11, 2010).

disability in 2009 alone. *Id.*; see also Dick Sobsey and Tanis Doe, *Patterns of Sexual Abuse and Assault*, 9 SEXUALITY & DISABILITY 243, 244 (1991) (suggesting the sexual abuse rate for deaf boys is 54%—five times the rate for boys who are not deaf); Margaret A. Nosek and Carol A. Howland, *Abuse and Women with Disabilities*, at 2 (Feb. 1998) (citing study that 36% of multi-handicapped children admitted to a psychiatric hospital have a history of sexual abuse).⁸

The rate of sexual victimization of people with cognitive disabilities is estimated at four to ten times higher than for those without them. Elman, *supra*, at 2; Presentation, Nancy Smith, *Sexual Violence Against Women with Disabilities and Deaf Women: Needs and Remedies*, at 14 (Jan. 2009);⁹ Nora J. Baladerian, *Sexual Abuse of People with Developmental Disabilities*, 9 SEXUALITY AND DISABILITY 323, 328 (1991) (same for children with disabilities). “The Seattle Rape Relief Project, for example, found that 75% of those studied with mental disabilities [including mental retardation] had been sexually assaulted at least once, and 99% of these assaults were committed by someone the victim knew.” Elizabeth J. Reed, *Criminal Law and the Capacity of Mentally Retarded Persons to Consent to Sexual Activity*, 83 VA. L. REV. 799, 803 (1997). One study found that

⁸ Available at <http://www.taasa.org/library/pdfs/TAASALibrary4.pdf> (last visited Oct. 11, 2010).

⁹ Available at <http://www.nsvrc.org/publications/powerpoints/sexual-violence-against-women-disabilities-and-deaf-women-needs-and-remedies> (last visited Oct. 11, 2010).

approximately half of the developmentally disabled men and women surveyed had suffered sexual abuse or sexual assault more than ten times. Davis, *supra* (citing Sobsey & Doe, *supra*, at 247).

2. Offenders Often Become Caregivers To Target The Disabled.

Societal attitudes towards the developmentally disabled are well-documented in the literature. “Pervasive myths exist, suggesting that people with disabilities are not vulnerable to sexual abuse because they are objects of pity, are asexual, or are undesirable.” Tharinger, *supra*, at 302 (citations omitted). People may view disabled adults as children who do not need to be educated about sexual issues and who do not have sexual rights. Such attitudes make the proper training and supervision of caregivers all the more crucial. People with disabilities “face negative social values of being inferior or disposable which can lead offenders to think [sexual abuse] is permissible.” Seattle Rape Relief Project Action: Sexual Assault and People with Disabilities, *The Dynamics of Sexual Assault and People with Disabilities*, 5 RESEARCH & ADVOCACY DIGEST 3 (May 2003).

For all of the reasons discussed above, offenders “self-select” to become caregivers of the disabled. Sobsey & Doe, *supra*, at 253. In a study of women and men with intellectual disabilities, research showed that “44 percent [of abusers] had a relationship with the victim specifically related to the person’s disability (such as residential care staff, transportation providers and personal care

attendants).” Davis, *supra*. In a study involving women with disabilities, the largest perpetrator group was not family or strangers—it was male caregivers. Elman, *supra*, at 4.

Courts have recognized that “residents of group homes are more vulnerable to abuse by staff than by visitors or other third parties.” *Stauss v. Oconomowoc Residential Programs*, 621 N.W.2d 917, 921 (Wis. App. 2000) (quoting *Niece v. Elmview Group Home*, 929 P.2d 420, 425 (Wash. 1997)). The *Stauss* court “recognize[d] that a group home has a duty to protect its residents from the harm against which they are least able to protect themselves—abuse at the hands of the staff.” *Stauss*, 621 N.W.2d at 922. In *Spencer v. Health Force, Inc.*, 2005-NMSC-002, ¶ 19, 137 N.M. 64, 107 P.3d 504 (2005), the New Mexico Supreme Court held that a services provider “owes a duty, based on statute and common law, to [disabled] clients or patients who receive care from [its] employees.” The *Spencer* Court reversed a summary judgment for a services provider when the plaintiff claimed the provider did not perform a criminal background check on an employee, and the employee, a multiple felon, later allegedly caused the death of a quadriplegic patient through a heroin overdose. *Id.* ¶¶ 2-5. As a self-proclaimed “leading” caregiver for developmentally disabled individuals, RCI cannot be heard to argue that its failure to check references and take other safeguards to protect Mr. Selk was anything other than highly reprehensible.

B. The Sexual Assault Of A Developmentally Disabled Person Must Rank As Highly Reprehensible In The Punitive Damage Calculus.

The “sexual assault” of a group home resident by a “staff member is not a legally unforeseeable harm.” *Niece*, 929 P.2d at 422; *Stauss*, 621 N.W.2d at 922. As shown above, literature explaining these risks and exhorting caregivers to protect residents was available years before Mr. Selk’s rape. If a provider is on notice of problems within its operation that increase the risk to developmentally disabled people for whom the provider is responsible, the provider’s conduct is even more egregious.

“[I]t is widely acknowledged that all people who experience sexual violence are affected and do require therapeutic counseling, even if they are non-verbal.” *Davis, supra*. Moreover, the long-term psychological effects of sexual abuse may be even *more* severe for people with disabilities, including mental retardation. *Tharinger, supra*, at 307; *Buchanan, supra*, at 601. Often, additional disabilities are generated from the trauma of an assault but go unrecognized by caregivers. Nora J. Baladerian, *Sexual Maltreatment of Children and Adults with Developmental Disabilities*, 5 RESEARCH & ADVOCACY DIGEST 7 (May 2003).

To compound the problem, “[s]exual assault services are inaccessible to survivors with disabilities.” Joelle Brouner, *Focusing on Survivors Rather than Barriers: Fear, Disability and Sexual Assault Services*, 5 RESEARCH & ADVOCACY

DIGEST 2 (May 2003). The most profoundly disabled people have no ability to access survivor support services on their own. *See, e.g.,* Smith, *supra*, at 19.

Service providers breach their duty to disabled residents when they fail to provide ordinary care to keep residents safe. This breach is particularly reprehensible when repeated actions, rather than one isolated event, cause the harm. *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003); *Jolley v. Energen Res. Corp.*, 2008-NMCA-164, ¶ 31, 145 N.M. 350, 198 P.3d 376, *cert. denied*, 2008-NMCERT-011, 145 N.M. 531, 202 P.3d 124, *cert. denied*, *Energen Res. Corp. v. Jolley*, 129 S. Ct. 1633 (2009).

Researchers recognize that high turnover among the staff increases the risk of sexual assault. People with disabilities “may have many caregivers, which increases the possibility of one being an offender. This can happen in a living situation where there are multiple staff and a high staff turnover rate.” Seattle Rape Relief Project Action, *supra*, at 3; Sobsey & Doe, *supra*, at 253. Here, RCI’s turnover rate in New Mexico was much higher than that of other service providers in the state and it was aware of the problem before Mr. Selk’s assault.

As became clear in this case, “[c]areful screening of caregivers” would reduce abuse. Sobsey & Doe, *supra*, at 255. When service providers fail to provide adequate staff and supervision, it also increases the risk of sexual violence. Caregivers interviewed for a study involving male and female victims reported,

“there are many opportunities for abuse, *particularly with staff shortages at night.*”
Buchanan, *supra*, at 602-03 (emphasis added).

Profoundly disabled individuals are wholly dependent upon their service providers. The families of developmentally disabled people often have no option except to place their trust in these service providers. RCI attracted residents to its facilities by representing to the public that “ResCare’s name is derived from two words: Respect and Care. These core values are the bedrock of the ResCare philosophy . . . [and] provide the foundation for the development and implementation of ResCare services, systems and procedures.” Res-Care, Inc., Mission Statement, *supra*. If a provider is on notice of but fails to correct systemic problems, this demonstrates a fundamental lack of respect for the rights of its residents. The reprehensibility of RCI’s actions in this case is of the highest order.

The U.S. Supreme Court has made clear a punitive damages award “must be based upon the facts and circumstances of the defendant’s conduct and the harm to the plaintiff.” *State Farm*, 538 U.S. at 425. The U.S. and New Mexico Courts have stressed that evaluating constitutional challenges to punitive damages must remain context-specific. *Id.*; *Chavarria*, 2006-NMSC-046, ¶ 38, 140 N.M. 478, 143 P.3d 717. Here, RCI’s arguments for a low punitive to compensatory damages ratio, based primarily on cases involving only economic damages, cannot fairly be applied in the context of sexual abuse of developmentally disabled individuals.

New Mexico public policy mandates that both the government and private service providers act to ensure the safety of the state's most vulnerable citizens.

Spencer, 2005-NMSC-002, ¶ 19. The Adult Protective Services Act provides:

The legislature recognizes that many adults in the state are unable to manage their own affairs or protect themselves from abuse, neglect or exploitation. The legislature further recognizes that the state should protect adults by providing for the detection, correction and elimination of abuse, neglect or exploitation through a program of short-term services for adults in need of protective services or protective placement.

NMSA 1978, § 27-7-15 (2007); *see also* NMSA 1978, § 27-7A-3 (2005) (Employee Abuse Registry Act). In this way, New Mexico seeks to protect disabled individuals from sexual predators like Thurman Williams.

When reviewing a punitive damages award, courts consider “the harm likely to result from the defendant’s conduct as well as the harm that has actually occurred.” *BMW of North American, Inc. v. Gore*, 517 U.S. 559, 581 (1996); *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 453 (1993). Thus, “[i]t is appropriate to consider . . . the possible harm to other victims that might have resulted if similar future behavior were not deterred.” *TXO Prod.*, 509 U.S. at 460-61. That consideration is critical here because sexual abuse of institutionalized developmentally disabled persons is a “significant social problem.” *Niece*, 929 P.2d at 430; Elman, *supra*, at 3 (citing Crossmaker, *supra*, at 205).

While the estimates of sexual abuse of developmentally disabled people are staggering, it may only be the tip of the iceberg. As one New Mexico survey found, “[r]ape is significantly under-reported to law enforcement.” Calhoun and Rogers, *supra*, at 93. Perhaps because of the stigma associated with male rape victims, the New Mexico survey found that “[o]nly 6% of male rape victims reported their rapes to the police.” *Id.* at 94. Importantly, “[o]nly one-third (32%) of sex crimes [involving disabled victims] that came to the attention of service providers were reported to law enforcement.” Caponera, *supra*, at 76.

While other estimates of under-reporting vary, all show that under-reporting is a serious problem. *See, e.g.*, Balogh, *supra*, at 200. “Some estimates suggest that only 1 in 30 cases of sexual abuse/assault of persons with disabilities is reported, compared to 1 in 5 cases with the nondisabled.” Tharinger, *supra*, at 304. A Seattle study showed that less than one-third of women with physical or cognitive disabilities reported their abuse to authorities. Elman, *supra*, at 1 (citing study).

As service providers know, individuals with a greater degree of disability will have more difficulty disclosing the abuse, likely leading to “significant under-reporting” in this group. Balogh, *supra*, at 198; Tharinger, *supra*, at 305. In one survey, caregivers reported they could only spot symptoms of sexual exploitation because they had attended training courses in personal relationships and sexuality.

Buchanan, *supra*, at 604. Thus, the problem is probably bigger than suspected, the victims even more numerous. And yet, in part because the crimes are not reported, offenders go unpunished, free to commit more crimes—while service providers entrusted with the individuals’ care and safety know little risk exists of being held accountable even though their own failures provided opportunity for the crime.

Even when victims or their loved ones report sexual assault, the perpetrator usually is not punished. Sobsey and Doe found that “[a]lthough the offender was known in 95.6% of cases, only 22.2% of the offenders described in these reports were charged with the offense, and only 8.0% of them were convicted.” Sobsey & Doe, *supra*, at 249. Moreover, “[m]any prosecutors question the credibility of someone with developmental disabilities and choose not to prosecute crimes because they perceive the survivor as lacking credibility.” Melissa Hook, *How and Why the System is Failing Victims with Disabilities*, 5 RESEARCH & ADVOCACY DIGEST 5 (May 2003).

One researcher noted, “[w]ithout police prosecutions, there are no criminal statistics, . . . in effect no offence has been committed.” Buchanan, *supra*, at 603-04. Developmentally disabled sexual assault victims have been called “invisible victims.” Reed, *supra*, at 803. Mr. Selk’s rapist, as well, could not be prosecuted because Mr. Selk is nonverbal and Defendants washed away any DNA evidence.

When society’s response to sexual assault is devoid of serious penalties, it

increases the perception that people with developmental disabilities are unequal in the eyes of the law. Baladerian, *Sexual Maltreatment, supra*, at 7. It is a vicious cycle: As society further diminishes the value it assigns to the developmentally disabled, perpetrators commit additional crimes against these victims. Unless they are significant, punitive damages awards will not deter “leading” providers such as RCI, whose gross revenues for 2008 topped \$1.5 billion, from negligently hiring and supervising caregivers for society’s most vulnerable. *See DeMatteo v. Simon*, 112 N.M. 112, 115, 812 P.2d 361, 364 (Ct. App. 1991) (“Evidence of a defendant’s wealth is relevant for determining the proper amount of punitive damages.”) (citing cases).

“[S]tigma will be reduced when people perceived as disabled are afforded respect and equal participation in services and communities.” Crossmaker, *supra*, at 216. Civil lawsuits against services providers who injure their residents, rather than care for them, play a crucial role in ensuring equal rights and the safety of individuals with disabilities. If we can encourage these providers to fulfill their duty to their residents—or at least deter them from breaching that duty—sexual violence against vulnerable individuals will be reduced. That will be a victory for all people in New Mexico living with disability.

CONCLUSION

As this Court engages in its critical *de novo* evaluation of the factors which must govern its review of a jury's award of punitive damages, *Amicus* urges that it give special attention to the high degree of reprehensibility that must apply with respect to the willful, wanton and reckless breaches of duty by resident service providers to individuals with disabilities.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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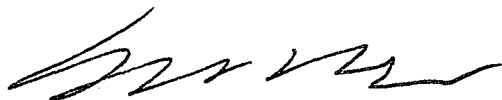
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