IN THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

No. 30,319

LARRY SELK, by and through his
Conservator and Co-Guardian, RANI RUBO,
Plaintiff-Appellee/Cross-Appellant,

vs.

RES-CARE NEW MEXICO, INC.,
and RES-CARE, INC.,
Defendants-Appellants/Cross-Appellees.

Appeal from the Second Judicial District
Bernalillo County, New Mexico
Albuquerque, New Mexico
The Honorable Nan Nash, Presiding
(D-202-CV-2007-02379)

RES-CARE NEW MEXICO AND RES-CARE, INC.'S RESPONSE BRIEF IN OPPOSITION TO CROSS-APPELLANT LARRY SELK'S BRIEF-IN-CHIEF

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STATEMENT OF COMPLIANCE

As required by Rule 12-213(G) NMRA, we certify that this Brief complies with the type-volume limitation of Rule 12-213(F)(3) NMRA. According to Microsoft Office Word 2007, the body of Appellants' Opposition to Cross-Appellant's Brief-in-Chief, as defined by Rule 12-213(F)(1) NMRA, contains 9,723 words.

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SUMMARY OF PROCEEDINGS

A. Nature of the Case

Larry Selk was the victim of a sexual assault perpetrated by Thurman Williams. After a trial, a jury initially awarded Plaintiff a record-shattering verdict: $4,702,500 in compensatory damages ($3,217,500 against ResCare, Inc. ("RCI") and $1,485,000 against ResCare New Mexico, Inc. ("RCNM")) and $49,200,000 in punitive damages ($48,000,000 against RCI and $1,200,000 against RCNM). The punitive award against RCI was by far the largest in New Mexico's history.

After post-trial motions and oral argument, the district court judge who presided over the trial found that the punitive damage verdict against RCI was unconstitutionally excessive. Accordingly, she conditionally remitted the punitive damages against RCI to $9,652,500 (still by far the largest award ever awarded in New Mexico in a case not involving death) on the ground that Defendants' conduct was not intentional and that the ratio between the punitive and compensatory awards was not justifiable in light of the substantial compensatory award. The total post-remittitur award against Defendants remains in excess of $15.5 million. Plaintiff accepted the remittitur under protest and now appeals to reinstate the original verdict. Because the initial award has no basis in law or fact, this Court should deny Plaintiff's appeal.

B. Factual History

RCI is the nation's largest private provider of services for individuals with intellectual, cognitive or other developmental disabilities. Ex. 455 at 3. In New Mexico, RCI owned a subsidiary, RCNM, which provided community-based residential care services to developmentally disabled individuals from 1996 until 2006. Tr. 11/10, Vol. 6, at 50. During that period, RCNM operated several facilities in New Mexico and provided care to hundreds of developmentally disabled residents. *Id.* One of the facilities operated by RCNM was College House, located in Roswell.

Larry Selk was a long-time resident of College House. Selk, who at the time of the trial was forty-eight years old, was assessed as having profound mental retardation. Tr. 11/12, Vol. 7, at 198. He also had a long history of severe seizures. Tr. 11/10, Vol. 6, at 49-50; *see also* Complaint, Record at RP0001. For the majority of his life, Selk lived in Los Lunas at a state-run institution for people with disabilities. Tr. 11/10, Vol. 6, at 50. However, in 1996, as a result of the state's renewed focus on "community-based types of programs," Selk was transferred to College House, where he received his daily care for more than ten years. *Id.* According to trial testimony, multiple RCNM employees had more than 100 encounters daily with Selk. *Id.* at 55.

In April 2004, RCNM learned of allegations that a number of care providers at College House had taken illegal substances in clear violation of RCNM's policies. On these grounds, RCNM immediately terminated thirteen employees and began to hire replacement personnel. Tr. 11/10, Vol. 6, at 56; Tr. 11/11, Vol. 7 at 93-94. The individual in charge of hiring new staff, John Ray, testified that he sought out "top quality people" to hire and "continuously" was concerned about what might happen to RCNM's residents if "top quality" individuals were not hired. Tr. 11/11, Vol. 7, at 92.

RCNM had a comprehensive two-week system of training for new employees. *Id.* at 113. The program included training new hires on defensive driving, how to distribute medications to College House residents, and how to complete the required documentation. *Id.* In addition, staff was trained pursuant to a program known as addendum B training, which allowed each staff member to treat each resident in the residence. *Id.* at 114-15.

In addition to the training, RCNM had strict rules regarding how residents were to be changed, fed, and medicated. *Id.* at 120. These rules included the strict rule that no staff was to "be behind closed doors" with a resident. *Id.* at 121. A review of RCNM's "Critical Incident Database" confirmed that from January 2001 to May 2004 there was only one incident of staff abuse, neglect, or exploitation of residents at College House. *See, e.g.,* Tr. 11/16, Vol. 9, at 4.

One of the employees hired to replace the terminated staff, Thurman Williams, began his employment at the College House facility on May 23, 2004. *See* Complaint, Record at RP0002-03. Williams had previously worked at the Tobosa Developmental Services facility, another facility providing care to developmentally disabled individuals. While at Tobosa, Williams had engaged in inappropriate touching of residents. Contrary to policies required by RCI and independently implemented by RCNM, RCNM employees failed to check Williams' references with Tobosa before hiring him.

On the night of his first shift, while Williams was being trained in RCNM protocol by Brinda Ranes, a RCNM employee, he was in Selk's room alone for an indeterminate period of time, in direct violation of RCNM's rules. During the night, Selk suffered injuries that were consistent with rape. The next day, while helping Selk shower, RCNM staff discovered marks and bruises on Selk's neck and injuries to his anal area. Tr. 11/10, Vol. 6, at 58. RCNM staff promptly initiated an investigation to determine whether Selk had been abused or assaulted. *Id.* In addition to taking Selk to the hospital, RCNM staff notified law enforcement authorities and instituted an internal investigation. *Id.* at 58-59. RCNM placed all but three staff members on administrative leave, pending the results of the internal investigation. Ultimately, while no criminal charges were ever brought against Williams, RCNM terminated Williams' employment.

Caretakers at College House continued to care for Selk following the diagnosis of assault.[1] These caretakers uniformly testified that there was little or no change in Selk's behavior from before to after the incident. Tr. 11/23, Vol. 14, at 59, 61-69. No caretaker suggested that Selk exhibited any changed behavior that continued more than six weeks after he was assaulted. Thereafter, it was uncontested by those who took care of Selk that he continued to live happily at College House.

At trial, Plaintiff presented a nursing expert, Dr. Burgess, who tried but was unable to substantiate a different conclusion. Dr. Burgess's theory was that Selk

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[1] Plaintiff baldly mischaracterizes the record in stating that RCNM failed to provide "any of the palliative treatments the SANE nurse had recommended, such as Tylenol or a sitz bath," Plaintiff's Br. at 8, or "even the most basic comforts to assuage the physical and emotional trauma [Selk] endured." *Id.* at 21. While Selk's medical records were missing, Selk's direct caregiver since 2002, Lori Spicer, testified about her care for Selk following his consultation with the SANE nurse. For example, she stated that Selk received all necessary treatment required following his attack, Tr. 11/23, Vol. 14, at 143. She explained that she did not place ice on Selk's anal area because he would have found that "very uncomfortable." *Id.* at 147. Further, as it relates to sitz baths, she testified that Selk was never given a sitz bath since "it would be dangerous to put Larry in a bathtub." *Id.* at 146. The treatments provided by Selk's caregivers were successful as he suffered no swelling or inflammation following the assault. *Id.* at 147.

Even Plaintiff's expert "in the care of the developmentally disabled," Richanne Cunningham, conceded that Selk suffered no infections or swelling following the incident. Tr. 11/16, Vol. 9, at 78. The clear inference is that, while the documentation does not exist, College House staff provided proper palliative treatment to Selk following the assault.

would have a "permanent" imprint on his limbic system that would leave him susceptible to "anxieties." Tr. 11/23, Vol. 14, at 31. Critically, however, she pointed to no evidence that Selk evinced any anxiety, or indeed any change of behavior of any sort, that lasted more than six weeks beyond his assault. Dr. Burgess's assessment was not based on a personal examination, but rather on her review of the depositions of the caregivers, and RCNM's care records from April, May, and June 2004. *Id.* at 24-25, 41. She conceded that those records showed nothing out of the ordinary. *Id.* at 76.[2]

Defendants' medical expert, Dr. Roll, conversely testified that although Selk would have felt pain from the rape, he did not exhibit any signs of lasting trauma or post-traumatic stress disorder ("PTSD"). Tr. 11/24, Vol. 15, at 39 (summarizing conclusions). Dr. Roll testified in particular that Selk did not display any of the

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[2] Even during the initial six-week period, Dr. Burgess could not conclude with any certainty that Selk was suffering from his rape. Dr. Burgess noted that Selk had seizures during that period, but conceded that Selk had seizures before the assault as well; he could not say that the subsequent seizures were caused by his assault. *Id.* at 64-65. Dr. Burgess also noted that Selk exhibited some discomfort around strangers after the assault, but that he had also exhibited discomfort prior to the assault. *Id.* at 61-62.

Dr. Burgess sought to explain the absence of evidence of long-term harm, saying that the caregivers were not trained to observe signs of distress and that ResCare's records were insufficiently detailed. *Id.* at 75. She also said that signs of trauma might be subject to a "delay." *Id.* at 76. If Dr. Burgess believed that she could document harm to Selk by examining him, she was free to do so. Notably, plaintiff's counsel did not ask Dr. Burgess to examine Selk and provided his only three months of care records ending in June 2004. *Id.* at 62-63.

symptoms associated with PTSD. *Id.* at 33. Based on his review of the care records and deposition testimony, Dr. Roll opined that Selk was "essentially the same as he was before the sexual assault," showing no change in the activities he enjoyed, the comfort he felt with strangers, or his sleep patterns. *Id.* at 35.[3]

Selk remained at the College House facility for more than two years following his sexual assault. He was transferred to Esperanza Developmental Services, also in Roswell, in August 2006, shortly after RCNM stopped providing services in-state.

Evidence adduced at trial confirmed that RCI was the parent corporation of RCNM, responsible for setting expenditure limits and using sweeping bank accounts to manage the subsidiary's finances. Tr. 11/20, Vol. 13, at 74-77. Further, RCI set out general procedures for RCNM to follow. Tr. 11/20, Vol. 13, at 67-68. No evidence, however, suggested that RCI ran the day-to-day operations of College House, or supervised the direct hiring of any RCNM employees.

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[3] Plaintiff incorrectly states that "Dr. Roll conceded that Mr. Selk's injuries were permanent, as 'the consequences of this rape would last for the rest of [Mr. Selk's] lifetime." Plaintiff's Brief at 10 (citing Tr. 11/24, Vol. 15, at 48). To the contrary, Dr. Roll noted that "[e]very emotional, visual impression . . . will last forever." Tr. 11/23, Vol. 15, at 48. Continuing, Dr. Roll stated the truism that "everything is recorded at some level in the brain. Everything you eat, everything you look at, every sensation is recorded. The question is how significantly it's recorded or not. . . ." *Id.* at 48-49. Under even the most strained reading of Dr. Roll's testimony, this is not a concession that "Mr. Selk's injuries were permanent."

C. Procedural History

On March 19, 2007, Plaintiff, through her sister and legal guardian, filed suit against RCNM claiming, *inter alia*, that RCNM negligently operated, managed, and supervised College House and that their negligence was the cause of Selk's injuries. Complaint, Record at RP0001. Additionally, Plaintiff claimed that RCNM failed to exercise ordinary care in hiring, training, and supervising Thurman Williams. Following discovery, Plaintiff amended the complaint on May 15, 2008, to include RCI as a party defendant. *See* Plaintiff's First Amended Complaint, Record at RP0301.

The case was scheduled for trial in November, 2009. Prior to trial, Defendants objected to the admission of any New Mexico Department of Health Critical Incident Reports, which purportedly showed instances of other complaints about staff members at other RCNM facilities. *See* Defendants' Motion in Limine to Bar Evidence of Adult Protective Services and Department of Health Reports, Record at RP1819. Defendants objected that the probative value of the reports would be substantially outweighed by the danger of unfair prejudice and confusion of the issues. The court properly excluded much of this "very general" evidence. Tr. 11/17, Vol. 10, 156-57. The court, however, admitted seven Critical Incident Reports from a three-year window. *See* Order on Motions in Limine, Record at

RP2474. These Reports were generated by RCNM and RCI to track incidents of abuse, neglect, or exploitation.

The case proceeded to trial on November 9, 2009. Plaintiff called 23 witnesses, including Dr. Burgess. Despite the scant evidence showing sustained long-term harm, plaintiff's counsel asked for a large verdict in his closing. He repeatedly emphasized RCI's wealth, linking it to his request for a high compensatory award. Tr. 11/30, Vol. 17, at 153 ("Do you think if [RCI's] CEO out in Louisville had had the time to come here and it had happened to his brother, that they would say it's not worth 5 to $10 million?"). Plaintiff's closing argument was riddled with both subtle and explicit messages that a large compensatory verdict would tell RCI that its conduct was inappropriate.

The jury ultimately found both RCI and RCNM liable. The jury awarded $49,200,000 in punitive damages, 97% of which ($48,000,000) was apportioned against RCI, with the remaining 3% ($1,200,000) apportioned against RCNM. *See* Judgment, RP2774-75. With respect to compensatory damages, the jury apportioned only 5% of the fault to Thurman Williams, the person who assaulted Selk, 30% to RCNM, the company that supervised him, and 65% to RCI, which was RCNM's parent and the proverbial "deep pocket." In total, the jury awarded

$4,702,000 in compensatory damages,[4] with $3,217,500 apportioned against RCI, and $1,485,000 apportioned against RCNM.

After post-trial motions, the trial court remitted the total punitive damages to $10,852,500 ($9,652,500 apportioned against RCI; the $1,200,000 apportioned against RCNM was unchanged) while leaving the compensatory damage award in place. *See* Order on Defendants' Motion for New Trial and/or Remittitur of Damages Award of Judgment as Outline, Record at RP3059.[5] The court explained that it was reviewing the punitive damage award *de novo* pursuant to settled New Mexico law, and was "essentially . . . review[ing] for reasonableness." *Id.* at RP3061.

In conducting this assessment, the court was obligated to respect certain established due process protections that apply to punitive damage awards. Due process compels that these awards must be judicially scrutinized to ensure that they are not arbitrary, capricious, or unreasonable. The trial court applied the three established *BMW* guideposts: (1) the degree of the defendants' reprehensibility; (2)

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[4] The total compensatory award was $4.95 million, with the balance attributed to Thurman Williams. Plaintiff acceded to a judgment of $4.702 million in compensatory damages. RCI thus was charged with 65% of the total $4.95 million compensatory award, and 68% of the $4.7 million compensatory award that Plaintiff collected.

[5] The court also reviewed the compensatory damages to see whether that award was the product of passion or prejudice. Record at RP3060. Noting that it was required to view the evidence "in the light most favorable to Plaintiff," the court did not modify the compensatory award. *Id.*

the disparity between the punitive and compensatory damages; and (3) the difference between the punitive damages awarded and the civil penalties authorized. *Id.* Finding the third factor to be of no assistance, the court focused on the other two guideposts, and noted that the first – the degree of reprehensibility – was the "most important indicium of the reasonableness of a punitive damages award." *Id.* (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003)).

Assessing reprehensibility, the court started by noting that both parties agreed that RCI's conduct was at most reckless, rather than intentional. Given that, the court concluded that it could not find that "ResCare, Inc.'s reckless conduct was as reprehensible as the intentional conduct of the tortfeasors in the cases where both the United States and New Mexico Supreme Courts have considered punitive damages." *Id.* at RP3062.

Assessing the second *BMW* guidepost, the court recognized that, "[t]he compensatory damages awarded Plaintiff in this matter were high. The ratio of punitive damages to compensatory damages awarded against Defendant ResCare Inc. was also high." *Id.*[6] In light of these findings, the court "conclude[d] that the jury's award of $48,000,000 in punitive damages against ResCare, Inc. was

[6] The court also compared the ratio of the compensatory damages awarded against RCI and RCNM (a little over 2:1) and the ratio between the punitive damages awarded against RCI and RCNM (40:1). RP3062-63.

unreasonable." *Id.* The court, accordingly, remitted the damages against RCI to $9,652,500.00 (while leaving the punitive damage award against RCNM unchanged). Plaintiff accepted under protest and this appeal follows.

SUMMARY OF ARGUMENT

The original $48 million punitive judgment against RCI in this case was, but should not have been, the largest award in New Mexico history. It was more than double *any* previous award, including those for wrongful death. And it was nearly 50 times greater than any previous award in a case involving rape or sexual assault. The trial court properly recognized that this award was grossly excessive under basic principles of due process and remitted it to $9.65 million. The remitted award is still the largest punitive award, by far, ever levied in New Mexico in a case not involving death. Moreover, it comes on top of a record-setting $4.7 million compensatory award that, as the trial court recognized, already contains a substantial punitive component.

Plaintiff has now appealed the trial court's order of remittitur. The central premise of Plaintiff's argument is that no punitive award could ever be too high. But that is not the law, and the record does not bear out Plaintiff's one-sided characterization of the facts. To the contrary, the $48 million award presented a clear case of excessiveness under the governing due process guideposts. As the trial court recognized, this was not a case of intentional wrongdoing by

Defendants. Defendants promulgated policies to ensure the safety of residents. As evidenced by the testimony of numerous care providers who had daily contact with him, Selk lived happily and safely at College House for years both prior to and after this incident, and he received immediate and comprehensive care from Defendants when his injuries were discovered. Because Defendants' conduct was obviously not intentional, Plaintiff is forced to rely on irrelevancies, such as the fact that Defendants did not give raises to their employees every year, and that they used a common "zero-balance" account structure for their financial arrangement between the parent and subsidiary companies. Plaintiff also premises a large part of her argument on evidence the trial court properly excluded precisely because it had no discernible connection to the wrongdoing at issue here.

The trial court was also plainly correct to hold that under established constitutional standards, the nearly 15:1 ratio between the punitive and compensatory awards against RCI was excessive. Double-digit ratios are always constitutionally suspect, and here, where the compensatory award was highly substantial, a 1:1 ratio would have reached the "the outermost limit of the due process guarantee." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003). But even that analysis understates excessiveness of the original punitive award because the compensatory award was not only substantial in itself, it contained a punitive component in two different ways. First, as the Supreme

Court has recognized, compensatory awards for pain and suffering always contain a punitive component. *Id.* at 427. And in this case that effect was heightened by the fact that the jury assigned 65 percent of the fault for the compensatory award to RCI, and just 5 percent of that fault to the intentional wrongdoer in the case. That allocation unmistakably carried a punitive component as well. Again, Plaintiff's arguments cannot overcome the blackletter law on this point. Plaintiff seeks to justify the 15:1 ratio by pointing to RCI's wealth, but that is impermissible under governing law. And her claim that the award is justified because of the difficulty of detecting such injuries not only has no support in the record, but is contradicted by the fact that Defendants immediately discovered and treated Selk's injuries.

Finally, a comparison to civil sanctions, which impose a few thousand dollars of fines per day, could not have given Defendants the requisite notice of a $48 million award. Plaintiff's invocation of criminal punishments is improper under the law, and thus this guidepost supports the trial court's decision to remit as well.

ARGUMENT

I. THE COURT'S REMITTITUR OF THE PUNITIVE DAMAGE AWARD WAS NOT ERRONEOUS.

A. Standard of Review

New Mexico has never made clear the standard of review for a challenge to a trial court's decision to remit punitive damages. It is undisputed that the *trial*

court was entitled to review the original punitive award *de novo* for excessiveness. Likewise, this Court reviews *de novo* a challenge to a punitive award as excessive (for example, that is the standard that applies to Defendants' claim that remitted award remains excessive). *Aken v. Plains Elec. Generation & Transmission Co-op., Inc.*, 2002-NMSC-021, ¶ 17, 132 N.M. 401, 49 P.3d 662. But in this appeal, the Court is being asked to review not the award itself, but the trial court's decision to remit that award. In the context of the remittitur of *compensatory* damages, New Mexico law gives relatively little deference to a trial court's decision to remit. *See, e.g., Allsup's Convenience Stores, Inc. v. North River Ins. Co.*, 1999-NMSC-006, ¶ 18, 127 N.M. 1, 976 P.2d 1. But that standard is premised on the fact that a jury's compensatory award is entitled to deference. *Id.* Here, the punitive award was properly reviewed *de novo* by the trial court because the *jury's* award was not entitled to deference.[7] In this situation, the remittitur is more akin to a trial court's ruling on a motion for new trial, which is reviewed for abuse of discretion. *E.g., Rios v. Danuser Mach. Co.*, 110 N.M. 87, 792 P.2d 419, (N.M. Ct. App. 1990) (citing authority concerning review of motions under Rule 1-060(B)). Other courts have adopted that approach or a similar one to reviewing remittiturs of punitive awards. *See Callantine v. Staff Builders, Inc.*, 271 F.3d 1124 (8th Cir. 2001)

[7] *Allsup's* reviewed a remittitur of a punitive award, 1999-NMSC-006, ¶ 48, but it did so prior to the *Leatherman* and *Aken* decisions that mandated independent review for excessiveness and thus is not authoritative here.

(applying abuse of discretion standard to plaintiff's challenge to decision to remit punitive damages).

Even if this Court were to review the trial court's decision to remit *de novo*, the Constitution requires an "exacting review" of the original punitive damage award, and not deference to the jury's findings. *State Farm*, 538 U.S. at 417. In this context, *de novo* review means undertaking an "independent assessment" of the record in order to prevent the imposition of constitutionally excessive award. *Aken*, 2002-NMSC-021, ¶ 17 (citing *Leatherman*). And in particular, this Court must ensure that the jury is prevented from using its "verdict[] to express bias[] against big businesses." *State Farm*, 538 U.S. at 417 (quotation marks omitted).

As we explain in greater detail below, *see infra*, a key component of that "exacting review" is ensuring that the award is comparable to those for similar conduct. The cornerstone of due process is that a defendant have "fair notice ... of the severity of the penalty that a State may impose." *BMW of N. Am. v. Gore*, 517 U.S. 559, 574 (1996); *see Aken*, 2002-NMSC-021, ¶ 21. As the New Mexico Supreme Court has recognized, only a court, and not a jury, is capable of ensuring that awards are "unified" from case to case and that like cases are treated alike. *Aken*, 2002-NMSC-021, ¶ 18.

Here, this Court is aided by the fact that the trial court, which heard all of the evidence in the case, has issued its own reasoned opinion as to why the original

judgment was grossly excessive. Thus, even if this Court conducts an independent review, the trial court's reasoned assessment of the issue ought to be given meaningful weight. *Baldwin v. McConnell*, 643 S.E.2d 703, 706 (Va. 2007) (stating that review is *de novo* but that "[i]n doing so, we will give substantial weight to the trial court's action and affirm it, unless, from our view of the record, the trial court acted improperly").

A review of the three punitive damage "guideposts" set out by the U.S. Supreme Court in *BMW*, 517 U.S. at 559, confirms the trial court properly applied those guideposts in remitting the punitive award. In particular, first, RCI's conduct was not intentional or so reprehensible to warrant a record-shattering punitive damage verdict. *See id.* at 575. Second, the court properly focused on the "disparity between the harm . . . suffered by [the plaintiff] and [the] punitive damages award" in reducing the punitive damage award. *Id.* Third, the court properly reviewed the "difference between the punitive damages awarded and the civil penalties authorized or imposed in comparable cases." *Id.*

B. A Review of the First *BMW* Factor Confirms that the Remittitur Was Appropriate.

1. Plaintiffs contend that the trial court failed to recognize the importance of the reprehensibility guidepost, but that is incorrect. As the trial court explained, "'the most important indicium ... is the degree of reprehensibility of the defendant's conduct." RP3061 (quoting *State Farm*, 538 U.S. at 419

(quotation marks omitted); *accord Chavarria v. Fleetwood Retail Corp.*, 2006-NMSC-046, ¶ 38, 140 N.M. 478, 143 P.3d 717. It is uncontested that Defendants' actions in this case were not the product of intentional wrongdoing: Plaintiff's theory of liability was negligent hiring and supervision precisely because Thurman Williams' intentional acts could not be imputed to Defendants. The trial court accordingly found that Defendants' conduct was not "as reprehensible as the intentional conduct of the tortfeasors in the cases where both the United States and New Mexico Supreme Court have considered punitive damages." RP3602. The trial court's conclusion is undoubtedly correct: Defendants never intended any harm come to Selk.

In drawing a distinction between reckless and intentional conduct, the trial court properly followed governing law from the United States Supreme Court and this Court. In the context of punitive damages, "degrees of relative blameworthiness are apparent. Reckless conduct is not intentional or malicious, nor is it necessarily callous toward the risk of harming others, as opposed to unheedful of it." *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2621 (2008) (citing 2 *Restatement (Second) of Torts* § 500, cmt. a, at 587-88 (1964)). *Akins v. United Steelworkers of Local 187*, 2009-NMCA-051, ¶¶ 33-37, 146 N.M. 237, 208 P.3d 457, *aff'd* 2010-NMSC-031, 148 N.M. 442, 237 P.3d 744 (emphasizing that award was justified in light of "intentional discrimination" by plaintiff)

Plaintiff takes issue with the trial court's comparison of the original $48 million punitive award in this case to other cases in which punitive damages were awarded. It is no surprise that Plaintiff seeks to avoid such comparisons because the original judgment in this case far surpasses any punitive award ever upheld in the state. But the law is crystal clear that "gross excessiveness" is a concept, like "reasonable suspicion" or "probable cause," that takes on "an increasingly cogent definition" through repeated application, and that review by a court ensures that awards are "*unified*" from case to case. *Aken*, 2002-NMSC-021, ¶ 18 (emphasis added). A "unified" approach to excessiveness is critical because otherwise outlier awards would be permitted to stand, depriving a defendant of "fair notice" of what penalties may be constitutionally imposed and creating the possibility of massive arbitrary penalties. *Id.* Tellingly, the sole authority Plaintiff cites for the proposition that courts should not compare awards concerns *compensatory* awards, which are governed by a different standard of review, and are irrelevant to the issues raised by Plaintiff's appeal. *Sandoval v. Baker Hughes Oilfield Operations, Inc.*, 2009-NMCA-095, ¶ 51, 146 N.M. 853, 215 P.23d 791 (discussing standard for review of compensatory awards).

A comparison of the original $48 million award entered against RCI to other judgments shows that it is grossly excessive and that RCI could not possibly have had the fair notice that due process requires. No reported New Mexico decision

involving rape or sexual assault has yielded punitive damages anywhere close to $48 million, even where an intentional tortfeasor was the defendant. *Seeley v. Chase*, 443 F.3d 1290, 1292 (10th Cir. 2006) ($873,500 punitive award where police officer raped a woman and intimidated her into recanting her original testimony); *Eckhardt v. Charter Hosp. of Albuquerque, Inc.*, 1998-NMCA-017, ¶¶ 1, 5, 11, 124 N.M. 549, 953 P.2d 722 ($500,000 punitive default award against social worker who sexually assaulted woman he was treating); *Coates v. Wal-Mart Stores, Inc.*, 1999-NMSC-013, 127 N.M. 47, 976 P.2d 999 ($1.2 million and $550,000 punitive awards where defendant company refused to take action after notice that a co-worker repeatedly groped and verbally harassed plaintiffs).

Plaintiff repeatedly acknowledges that intentional or reckless killing is the most serious offense of all, *e.g.*, Plaintiff's Br. at 28, yet New Mexico courts *never* have awarded more than $20 million in punitive damages in such a case, and often have awarded far less. *E.g.*, *Grassie v. Roswell Hosp. Corp.*, No. CV-2006-00286, 2007 WL 5112813 (N.M. Dist. Ct. Aug. 15, 2007) ($19.98 million for wrongful death); *Jolley v. Energen Res. Corp.*, 2008-NMCA-164, 145 N.M. 350, 198 P.3d 376 ($13 million for wrongful death); *Abeita v. N. Rio Arriba Elec. Coop.*, 1997-NMCA-097, 1244 N.M. 97, 946 P.2d 1108 ($75,000 for wrongful death); *Saiz v. Belen Sch. Dist.*, 113 N.M. 387, 827 P.2d 102 (1992) ($1.25 million for wrongful

death). These awards, orders of magnitude lower than $48 million, could not have provided RCI with the requisite fair notice.

When Plaintiff does discuss awards in other cases, her analysis is unpersuasive. She asserts that although Defendants were not intentional wrongdoers, "recklessness" underlies the "three leading New Mexico cases involving serious physical harm." Plaintiff's Br. at 34. But again, those cases imposed punitive awards that are dramatically less than the one at issue here. In *Jolley*, recklessness by a defendant energy company led to an explosion that caused a young man to burn to death. The defendant in *Jolley* "knew that there was a hazard of someone colliding with the wellhead, knew that [could cause death], knew that the well site was in a highly trafficked area, knew that erecting a barricade ... would prevent the hazard, and still chose not to barricade the well site." *Jolley*, 2008-NMCA-164, ¶ 33. The $13 million wrongful death award in that case cannot justify the $48 million award Plaintiff seeks here. *See also Atler v. Murphy Enters., Inc.*, 2005-NMCA-006, 136 N.M. 701, 104 P.3d 1092 ($1 million punitive award where plaintiff was thrown from an amusement park ride and suffered serious injuries to her neck and head); *Aken*, 2002-NMSC-021 (remitting

$1 million punitive award to $300,000 where plaintiff suffered stroke from harassment by employer).[8]

Plaintiff also cites a series of cases involving intentional misconduct, but it is equally unclear why Plaintiff believes that they are helpful. In several of those cases the reviewing court found that the punitive award was unconstitutionally high (*BMW*, *State Farm*, *Exxon*), and in the rest the award was a mere fraction of the $48 million she seeks from RCI. *Albuquerque Concrete Coring Co. v. Pan Am World Servs., Inc.*, 118 N.M. 140, 879 P.2d 772 (1994) ($133,000 award); *Chavarria* ($300,000 award); *Allsup's*, 1999-NMSC-006 ($4.5 million award) *Akins*, 2009-NMCA-051 ($30,000 award).[9]

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[8] The amicus brief for the ARC of New Mexico asserts that RCI relies "primarily on cases involving only economic damages." ARC Br. at 12. That contention is plainly incorrect: cases like *Jolley*, *Atler*, *Aken*, *Abeita*, *Saiz*, *Grassie*, *Seeley*, *Eckhardt*, and *Coates* all involved physical harm and non-economic damages, and none of them affirmed an award like the $48 million judgment that Plaintiff seeks here.

[9] Plaintiff also invokes a smattering of large punitive awards from other jurisdictions in an effort to justify the $48 million award at issue here. Those cases are not remotely comparable to this one. *See In re New Orleans Train Car Leakage Fire Litig.*, 795 So. 2d 364, 384 (La. Ct. App. 2001) ($850 million award for class of more than *8,000* plaintiffs exposed to dangerous chemicals); *Time Warner Entm't Co. v. Six Flags Over Ga., LLC*, 563 S.E.2d 178, 186 (Ga. App. 2002) (affirming $257 million award for intentional and deceitful business conduct where ratio of punitive to compensatory award was 1.25:1, and state law specifically provided for double or treble awards for similar conduct); *Boeken v. Phillip Morris Inc.*, 26 Cal. Rptr. 3d 638, 686, (2005) ($50 million punitive award for intentional conduct leading to death of smoker); *Motorola Credit Corp v. Uzan*, 509 F.3d 74, 81 (2d Cir. 2007) (affirming $1 billion punitive damages award for intentional fraud where ratio to compensatory damages was 1:2).

The jury knew none of this, but that is why the trial court and this Court have a "grave responsibility" to ensure that like cases are treated alike so that the punitive award comports with due process. *Aken*, 2002-NMSC-021, ¶ 19. Prior awards in New Mexico could not possibly have given Defendants "fair notice" of the penalty they would face, and thus the trial court correctly exercised that responsibility in finding that the $48 million award could not be justified on reprehensibility grounds.

2. Because Plaintiff cannot show that Defendants intentionally caused Selk's injuries, she devotes a devotes a large portion of her cross-appeal brief to asserting that Defendants acted reprehensibly by making "deliberate budgetary decisions" (such as imposing salary freezes that allegedly caused high employee turnover) that, in turn, fostered a culture of recklessness. These are the same arguments that Plaintiff made to the trial court, and even if true, they could not justify a $48 million award in light of New Mexico's previous precedents and the

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Plaintiff provides no sound argument for this Court to look beyond the numerous comparable cases within New Mexico for review of the trial court's remittitur. Nonetheless, to the extent that this Court looks to awards in other jurisdictions, the proper comparison is to awards like those in *Stogsdill v. Healthmark Partners, LLC*, 377 F.3d 827, 832 (8th Cir. 2004). In *Stogsdill*, a nursing home exhibited "conscious indifference" to a life threatening condition, resulting in "the worst case of abdominal contamination the [plaintiffs'] surgeon had seen" and subsequent death. *Id.* The court reduced the jury's $5 million punitive award to $2 million, finding that was the "appropriate due process maximum" for the wrongful death. *Id.*

fact that Defendants did not act intentionally. But the fact is that a fair reading of the facts and the law shows that Defendants' actions were not of the reprehensible nature that Plaintiff contends: this was not a case of repeated bad acts or indifference to Selk's well-being.

First, Plaintiff concedes that Defendants adopted policies intended to *prevent* the type of harm that occurred in this case. Defendants' regulations required background checks, forbade staffers to be alone with residents with the door closed, and required substantial additional steps to be taken for the safety and health of residents. *E.g.*, Tr. 11/16, Vol. 9, at 214 (two caregivers should be in attendance with a resident if the door must be closed); Tr. 11/10, Vol. 6, at 135 (door should be open when one caregiver is with a resident). Plaintiff also concedes that when RCNM learned that members of the College House staff had failed a drug test, it immediately moved to replace them, rather than tolerate violations that could have compromised the safety of College House's residents. It is also uncontested that Selk lived happily and safely at College House for many years prior to this incident, where he was cared for by College House employees 24 hours a day, and in fact remained at College House for two years after he was assaulted. According to his caregiver who cared for him from 2002 to 2008 (at both College House and Esperanza), Selk has been doing well since the incident, has received *every* recommended service and therapy, and is currently having as

good a quality of life as possible. Tr. 11/23, Vol. 14, at 148-149. Far from showing an "indifference to the safety" of Selk, these actions demonstrate that Defendants intended to ensure his safety, even though they were ultimately unsuccessful in doing so.

Second, in an attempt to get around the fact that Defendants took steps that evinced concern for, and not indifference to, Selk, Plaintiff contends that RCI's conduct was nonetheless reprehensible because RCI instituted a pay freeze for personnel several years before Selk's injury and utilized a zero-account balance system "to sweep up" balances left in RCNM's accounts. Plaintiff's Br. at 36-38. This is not negligence, let alone negligence that warrants punitive sanctions. Zero-account balances are a common feature of parent-subsidiary relationships. *Scott v. AZL Resources, Inc.*, 107 N.M. 118, 121, 753 P.2d 897, 900 (1988). And Plaintiff is unable to explain how a freeze on pay increases – a budgeting measure employed by business and government employers in difficult economic times to avoid layoffs – supports the imposition of a $48 million punitive award. Plaintiff also contends College House's relatively high turnover rate evinces a disregard for Selk's safety, but even leaving aside the fact that turnover rates approaching 50 percent were the norm in New Mexico for residential care facilities, *see* Tr. 11/17, Vol. 10, at 193-95, high turnover does not indicate reprehensibility.

Third, Plaintiff contends that Defendants stood idly by despite knowing that violations of policy were taking place at College House. But the record tells a different story. The record contains a total of seven critical incident reports over a period of years from RCNM facilities that cared for hundreds of people. That is *per se* not substantial evidence of repeated conduct. *Cf. Gasiorowski v. Hose*, 897 P.2d 678, 682 (Ariz. Ct. App. 1994) ("[E]stablishing habit requires more than a sparse selection of isolated episodes"). The record further shows that in the single episode involving College House, Defendants terminated the offending employee, as they generally did when the allegations were substantiated.[10] And even more important, the record does not show that any of the incidents were the result of negligent hiring or supervision, which was Plaintiff's theory of RCI's liability here. *State Farm*, 538 U.S. at 422 ("A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages).

Plaintiff apparently recognizes that the record in this case does not support the assertion that Defendants engaged in repeated bad acts, so she repeatedly and at great length invokes evidence that the trial court *excluded* as prejudicial and too unrelated to the conduct at issue here to be admitted. *See, e.g.*, Plaintiff's Br. at

[10] The single prior incident at College House involved an employee who stole the social security number of a resident and used it to obtain cable television service. Tr. 11/16, Vol. 9 at 141. The employee was investigated and terminated. *Id.* at 142.

17-19, 28-31. The trial court's decision to exclude this evidence is reviewed for abuse of discretion and can be overturned only where the ruling is "clearly against the logic and effect of the facts and circumstances of the case." *See, e.g., State v. Riley*, 2010-NMSC-005, ¶ 28, 147 N.M. 557, 226 P.3d 656 (quotation marks omitted). Where, as here, a trial court considers whether the probative effect of evidence is outweighed by the prejudice it would create, it has a "great deal of discretion" in carrying out that analysis. *Id.* (quotation marks omitted) Plaintiff does not make a serious attempt to satisfy this demanding standard.

First, the trial court found that charts that tabulated complaints at RCNM facilities without any interpretation or explanation were too "general" to be useful because they did not "correlate directly to what happened here," and therefore were more prejudicial that probative. Tr-10:156-157. That determination was undoubtedly correct, let alone not an abuse of discretion: the statistics did not reveal whether an incident was the product of negligent hiring or supervision (or indeed *any* form of negligence), did not reveal the seriousness of the harm, did not reveal whether the incident took place at College House, and did not reveal the remedial action that Defendants took.

The Supreme Court has strongly cautioned that the "reprehensibility guidepost does not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance [over a multi-year] period." *State*

Farm, 538 U.S. at 424. The statistics in question here did not necessarily show *any* negligence, let alone negligence related to the negligence at issue at trial. Had the testimony been admitted, it would have wrongly "invit[ed] the jury to speculate on other unproved acts, [and] invited the jury to punish [Defendants] for injuring non-party victims." *Holdgrafer v. Unocal Corp.*, 73 Cal. Rptr. 3d 216, 239 (Ct. App.2008) (improper to allow evidence concerning unproven allegations of harm) (citing *Philip Morris USA v. Williams*, 549 U.S. 346, 353-54 (2007)). The trial court plainly did not abuse its discretion in excluding them.

Likewise, Plaintiff's attempt to second-guess the trial court's decisions about which critical incident reports should have been admitted fails. The trial court gave ample consideration to this issue, at first concluding that none of the critical incident reports had any connection to the wrongdoing at issue here. Tr. 11/13, Vol. 8, 246. Upon reconsideration *sua sponte* over a weekend break, the trial court admitted seven of the reports that it determined involved events sufficiently analogous to the negligence at issue. The trial court excluded those that she found did not involve conduct that could plausibly be connected to a claim of negligent hiring or supervision. The trial court did not abuse its considered discretion in excluding the remaining reports. To the contrary, in excluding them the court properly followed the law and guarded against the danger of imposing punitive damages on the basis of unrelated conduct. *E.g., Stogsdill v. Healthmark Partners,*

LLC, 377 F.3d 827, 832 (8th Cir. 2004) (finding punitive award excessive against nursing home defendant where trial court wrongly allowed jury to consider "evidence concern[ing] alleged general conditions at [defendant's facility] that were not relevant to the nurse's failure to treat [plaintiff's condition]") (emphasis added); *Holdgrafer*, 73 Cal. Rptr. 3d at 238 (punitive damages against gas company were excessive when predicated upon evidence of leaks involving different pipelines and different facilities).[11] Like the tabulated statistics the critical incident reports would not have demonstrated whether Defendants acted negligently, let alone negligently in a way that was comparable to the negligence at issue in this case.

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Taken together, the above considerations show that the trial court was plainly correct to find that the reprehensibility guidepost required remittitur of the

[11] In the trial court, Plaintiff argued that the admission of the critical incident reports was proper under *Clay v. Ferrellgas*, 118 N.M. 266, 881 P.2d 11 (1994), but that case does not demonstrate that the trial court abused its discretion. To the contrary, *Clay* did not even involve a question of admissibility; instead the question in *Clay* was whether evidence of prior bad acts that had been admitted *without* challenge supported a punitive award of $375,000. Even more important, the prior bad acts in *Clay* were the same as the conduct at issue in the case. *Id.* at 270, 881 P.2d at 15. *Clay* concerned a defendant's negligent failure to inspect a propane tank that ultimately exploded. The record contained evidence showing that the defendant had failed undertake that inspection in more than 100 prior cases. *Id.* That is entirely different than the evidence excluded in this case, which involved different facilities, different personnel, different allegations, and which did not even necessarily indicate negligence on the part of Defendants.

original $48 million award. The $48 million award could not have been appropriate under *any* circumstances given that even the most culpable conduct in New Mexico has never led to an award half as large as the original judgment. *E.g. Jolley*, 2008-NMCA-164 ($13 million award for recklessness leading to wrongful death). Here, the surrounding circumstances show that the trial court was correct to require remittitur. While Selk suffered serious physical harm, this was not a case of intentional wrongdoing or indifference to injury; to the contrary, Defendants implemented policies intended to prevent this very kind of harm. Nor does the record support Plaintiff's assertion that Defendants engaged in repeated bad acts that could have possibly justified a $48 million award. In sum, the trial court was correct to conclude on the basis of the governing precedents and record that considerations of reprehensibility could not justify a $48 million award.

C. The District Court Acted Within its Discretion in Recognizing That the Initial 15:1 Ratio Between Compensatory and Punitive Damages was Grossly Disproportionate.

The second guidepost is the "ratio [of punitive damages] to the actual harm inflicted." *Aken*, 2002-NMSC-021, ¶ 23 (quoting *Gore*, 517 U.S. at 580) (alteration in original). The ratio speaks to whether "the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." *State Farm*, 538 U.S. at 426. A review of this

guidepost confirms that the initial punitive damage verdict was impermissible and the district court properly reduced the award.

1. In the initial punitive damage award, the ratio for RCI was just shy of 15:1 ($48,000,000/$3,217,500 = 14.9).[12] The 15:1 ratio was plainly disproportionate under governing precedent. Although the Supreme Court has never fashioned a bright-line limit on how much punitive damages may exceed compensatory damages, the Court has consistently said that double-digit multipliers, or even awards approaching them, are suspect. *State Farm*, 538 U.S. at 425 ("[F]ew awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."); *Gore*, 517 U.S. at 580-81 (reviewing case law and observing that ratios in excess of "10 to 1" would likely be unreasonable). Recently, the Court has refined its guidance on ratios and held that "[w]hen compensatory damages are substantial, *then a lesser ratio, perhaps only equal to compensatory damages*, can reach the outermost limit of the due process guarantee." *State Farm*, 538 U.S. at 425 (emphasis added); *accord Exxon Shipping*, 128 S. Ct. at 2626.[13]

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[12] The jury awarded a total of $4.95 million in compensatory damages, but only the $3.2 million of damages attributed to RCI are relevant to the ratio of RCI's punitive and compensatory damages. *See e.g., Romo v. Ford Motor Co.*, 6 Cal. Rptr. 3d 793, 812 n.14 (Ct. App. 2003).

[13] For precisely the reasons stated in *State Farm*, RCI contends that the remitted punitive damage award is still too high. Here, the compensatory damage verdict of

In remitting the initial award, the trial court judge recognized the disproportionality of the jury's verdict. In her remittitur order, the judge noted the initial award was "unreasonable" and stated that "[t]he ratio of punitive damages to compensatory damages awarded against Defendant ResCare, Inc. was also high.... While logic would support some larger percentage of punitive damages applied to ResCare, Inc., the Court can only find that the percentage awarded was excessive." Record at RP3063.

This determination was correct. The 15:1 ratio of the original award would have been presumptively excessive under any circumstances, but where, as here, the compensatory award was so substantial, a lower ratio is required. And while those considerations by themselves are more than enough to justify the remittitur, there is more. The compensatory damages in this case were entirely in the nature of pain and suffering, a category of injury that the Supreme Court recognizes necessarily "already contain[s] [a] punitive element." *State Farm*, 538 U.S. at 426. As the Supreme Court has explained, "[i]n many cases in which compensatory damages include an amount for emotional distress, such as humiliation or indignation aroused by the defendant's act, there is no clear line of demarcation

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$4.95 million is more than "substantial." *State Farm*, 538 U.S. at 425. This verdict is particularly substantial given that Selk never presented *any* evidence of permanent harm. *See supra*. Since the compensatories are already so substantial, the punitive damage award should correspondingly be reduced. *See* ResCare's Brief-in-Chief in the associated appeal.

between punishment and compensation and a verdict for a specified amount frequently includes elements of both." *Id.* (quoting Restatement (Second) of Torts § 908, cmt. c, at 466 (1977))

Moreover, as the trial court recognized, the fact that the jury assigned 65 percent of compensatory damages to RCI, and just 30 percent to RCNM, and a stunningly low 5 percent to the intentional tortfeasor, reveals another layer to the punitive component of the compensatory award. Plaintiff now professes not to understand the relevance of the allocation of the compensatory damages, but at trial, her counsel expressly urged the jury to assign only a minimal percentage of fault to Thurman Williams because the police "could deal with him." That was a bald attempt to convince the jury to punish Defendants for the crime that Williams committed. The jury proceeded to find that the person who intentionally assaulted Selk was only $1/16^{th}$ as responsible for his injuries as RCI That allocation clearly already embodies a punitive component (indeed inappropriately so as we have explained in our challenge to the compensatory award in Defendants' companion appeal), and accordingly demands that the 15:1 ratio be reduced.

2. Plaintiff's arguments in support of the 15:1 ratio are meritless. Plaintiff suggests that New Mexico cases welcome double-digits ratios, but this Court has followed (as it must) the law set down by the United States Supreme Court. For example, in *Aken*, the case where the New Mexico Supreme Court

recognized and applied the *Gore* guideposts, the court reduced a $1 million punitive award to $300,000, changing a 10:1 ratio to 3:1. *Aken*, 2002-NMSC-021, ¶ 22.

Plaintiff observes that in *Akins*, this Court upheld a ratio of 18:1. But Plaintiff omits the key fact that the compensatory award in that case was $1,661, or roughly .0035% of the $4.7 million awarded here. That "[in]substantial" compensatory award does not provide guidance about the appropriate ratio for the record-setting compensatory award at issue in this case.[14] And tellingly, *Akins* is the *sole* post-*BMW* case from New Mexico to have upheld a ratio higher than the original one in this case.

Much of the remainder of Plaintiff's argument about ratio repeats the same flawed arguments she makes concerning the reprehensibility guidepost. Plaintiff's Br. 40-42. Again, she paradoxically argues that the fact that Defendants developed policies to prevent harm to residents somehow means that a higher punitive damage award is warranted because the policies were not followed. *Id.* at 41 (citing Defendants' policies barring care providers from being alone in a room with a resident with the door closed). No authority supports that proposition, which if

[14] *Akins* is also highly distinguishable from this case because the court in *Akins* emphasized that the president of the defendant Union had displayed severe racial animus in discriminating against a union member. 2009-NMCA-051 ¶ 33 (recounting that when plaintiff complained of racial slurs by co-workers, the union president refused to address his grievance and instead told him he "was the wrong color"). No such intentional conduct is at issue here by RCI.

credited, would place enormous pressure on businesses *not* to develop policies to ensure the safety of employees and customers.

Plaintiff also engages in an extended argument that a higher ratio is warranted because injuries of this type are allegedly difficult to detect. The record evidence contains nothing to support that assertion, however, and in fact contradicts it. The record shows Defendants discovered and treated Selk's injuries within 24 hours.[15] Plaintiff's contention that a 15:1 ratio is warranted because, in general, "an untold number [of injuries] will go undetected," *id.*, is not only unsupported by any record evidence, but a brazen attempt to hold Defendants responsible for speculative injuries. Plaintiff is forced to cite to outdated Supreme Court doctrine in an effort to defend its position. *See id.* at 43 (citing the Supreme Court's 1993 *TXO* decision). The Supreme Court's latest cases have clarified that a state cannot "use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation." *Philip Morris*, 549 U.S. at 353. *See also State Farm*, 538 U.S. at 423 ("Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of

[15] A word must also be said about Plaintiff's spiteful allegation that RCI failed to provide proper treatment to Selk after his injury. As we explained, supra note 1, the record shows that Defendants did provide proper care to Selk, and Plaintiff's expert acknowledged that Selk's recovery after the assault was consistent with having received proper care. Tr. 11/23, Vol. 14, at 143-47.

other parties' hypothetical claims against a defendant under the guise of the reprehensibility"). Unknown and unproven victims are quintessential "strangers" to this litigation, and the award against RCI cannot be inflated on that ground.[16]

Moreover, Plaintiff's argument on this score is entirely *post hoc*. Plaintiff never presented any evidence on this score to the jury, or indeed, even to the trial court in post-judgment briefing. Consequently, Plaintiff's invocation of "undetected, unreported, and unpunished" rapes cannot call into question the trial court's determination that a 15:1 ratio was not supported by the record.

Plaintiff also argues that a 15:1 ratio is appropriate because of RCI's alleged wealth. Plaintiff's Br. at 43-45. That too is incorrect. The Supreme Court has emphasized that corporate wealth is an inappropriate basis for imposing punitive damages. *Gore*, 517 U.S. at 585 ("The fact that BMW is a large corporation rather than an impecunious individual" does not change the punitive inquiry.); *State Farm*, 538 U.S. at 427 (stating that reliance on State Farm's "enormous wealth" constituted "a departure from well-established constraints on punitive damages," and that "[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award"). Corporate wealth played a particularly inappropriate

[16] In making her argument, Plaintiff draws upon the amicus brief submitted by the ARC of New Mexico. The statistics in that brief regarding the reported rate of incidents of abuse were not presented to the jury and were not part of the record below. Moreover, they are generalized and not tied to any conduct by Defendants. The judgment against Defendants cannot be inflated on the basis of data that has not been shown to apply to them. *See supra*.

role in this case because plaintiff's counsel urged the jury to assess 93% of the punitive damages against RCI precisely because of its size. Tr. 11/30, Vol., at 157-58. Thus, not only did inflammatory assertions about RCI's wealth improperly raise the total amount of punitive damages awarded, it also led to an indefensible allocation of those damages. The jury assigned RCI *96 percent* of the punitive damages, even though its conduct was no more reprehensible than RCNM's conduct, and was far less reprehensible than that of Mr. Williams. At a minimum, there was no basis to assign RCI a greater percentage of the punitive award then was assigned to RCNM.

Moreover, although Plaintiff characterizes the original $48 million award as being "only" 11 percent of RCI's net worth, even that figure substantially understates the effect it would have. The $48 million award is more than RCI's net income for an *entire year*. *See* Ex. 455, ResCare Inc., Annual Report (Form 10-K) at 30 (Mar. 13, 2009) (showing net income of $36.5 million in 2008, $43.9 million in 2007, and $36.7 million in 2006). Plaintiff also emphasizes that the original award amounted to only 3 percent of RCI revenues, but that figure confuses revenues and income. Plaintiff's argument is analogous to saying that a business that incurs $97,000 in costs to sell $100,000 of product has a net income of $100,000, rather than $3,000, and therefore can easily satisfy a judgment that is less than $100,000. Testimony from RCI's chief financial officer shows that RCI

spends most of its revenues – as would be expected given the costs of caring for residents. Its financial future is dependent upon expenditures for patients that permit revenues to keep pace with increasing expenses, and a $48 million award would have a crippling effect.

D. The Civil Sanctions Available Under State and Federal Law Further Confirm The Excessiveness of the Award.

The final guidepost is "the disparity between the punitive damages award and the civil penalties authorized or imposed in comparable cases." *State Farm*, 538 U.S. at 428 (internal quotation marks omitted). Although less important than the other two guideposts, this guidepost confirms that the original $48 million award is grossly excessive. "The most relevant civil sanction under [New Mexico] law for the wrong done to [Plaintiff]" are the penalties that New Mexico imposes on a residence facility for the neglect of a resident. *Id.* Penalties of that nature are capped at $5,000 per day under state law. N.M. Code R. 7.1.8. In *Gore*, the Court explained "a reviewing court engaged in determining whether an award of punitive damages is excessive should 'accord "substantial deference" to legislative judgments concerning appropriate sanctions for the conduct at issue.'" 517 U.S. at 583. Here, the potential civil fines are a tiny fraction of the punitive award. Those sanctions could hardly have provided RCI with "fair notice not only of the conduct that will subject [it] to punishment, but also of the severity of the penalty that a State may impose." *Id.* at 560.

Plaintiff contends that the civil fines are irrelevant because New Mexico law also provides for criminal sanctions. The Supreme Court however has expressly held that criminal sanctions are not a reliable gauge of excessiveness because they require greater procedural protections before they can be imposed. *State Farm*, 538 U.S. at 428 ("Great care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed, including, of course, its higher standards of proof.").

CONCLUSION

For the foregoing reasons, Defendants respectfully submit that this Court should not reverse the trial court's order remitting the jury's award of punitive damages against RCI.

Respectfully submitted,

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