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)

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A. Nature of the Case

This is an appeal from a record-setting verdict imposed against Res-Care New Mexico, Inc. ("RCNM"), and its parent corporation, Res-Care, Inc. ("RCI") (collectively, "ResCare"). The case arose out of injuries sustained by Larry Selk, a developmentally disabled individual who resided at RCNM's College House assisted living facility. Plaintiff[1] alleged that RCNM negligently managed and operated College House, and that the parent RCI was likewise liable because it had "the right to control" the College House employees who took care of Mr. Selk. The district court allowed the case to proceed on this novel theory of parent liability, and the jury ultimately found both RCI and RCNM liable for Mr. Selk's injuries. The jury awarded $3,217,500 in compensatory damages and $48,000,000 in punitive damages against RCI. It awarded $1,485,000 in compensatory damages and $1,200,000 punitive damages against RCNM. After post-trial motions, the district court judge remitted the punitive damages against RCI to $9,652,500 on the ground that ResCare's conduct was not intentional and that the ratio between the punitive and compensatory awards was not justifiable in light of

[1] Plaintiff's complaint was filed by Larry Selk's guardian and sister, Rani Rubio. Since Ms. Rubio is the plaintiff/appellee/cross-appellant, Defendants refer to her throughout the brief as "Plaintiff."

the substantial compensatory award. This is an appeal from that amended judgment.

B. Factual History

Pursuant to an agreement with the state of New Mexico, RCNM provided community-based residential care services to developmentally disabled individuals from 1996 until 2006. Tr. 11/10, Vol. 6, at 50; *see also* Complaint [RP0002]. Accordingly, RCNM operated several facilities throughout the state and provided care to hundreds of developmentally disabled residents. *Id.* RCI, which is not licensed to provide services in the state, provided management guidelines and fiscal support services to RCNM. *See* Administrative Services Agreement at pp. 1, 4, Ex. C Defendant's Motion in Limine [RP2102-RP2103].

Larry Selk was a long-time resident of one of RCNM's facilities, College House, located in Roswell. Mr. Selk, who at the time of the trial was forty-eight years old, suffered from a long-standing history of severe seizures and developmental disabilities. Tr. 11/10, Vol. 6, at 49-50; *see also* Complaint, [RP0001]. His condition was assessed as one of profound mental impairment. Tr. 11/12, Vol. 7, at 198. For the vast majority of his life, Mr. Selk lived in Los Lunas, in a state-run institution for people with disabilities. *See, e.g.,* Tr. 11/18, Vol. 11, at 102. However, in 1996, as a result of the state's renewed focus on "community-based types of programs," Mr. Selk was transferred to College House, where he

received his daily care for more than ten years. Tr. 11/10, Vol. 6, at 50. According to trial testimony, multiple RCNM employees had more than 100 encounters daily with Mr. Selk. *Id.* at 55.

In mid 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 ten employees and began to hire replacement personnel. Tr. 11/12, Vol. 7, 92-97. One of the employees hired, Thurman Williams, began his employment at the College House facility on May 24, 2004. *See* Complaint, [RP0002]. Williams had previously worked at the Tobosa Developmental Services facility, another institution responsible for providing care to developmentally disabled individuals. *See* Tr. 11/11, Vol. 7, at 134. While at the Tobosa facility, Williams had, at one point, inappropriately kissed a resident on the cheek, although he was not fired from his position there because of this conduct. Tr. 11/17, Vol. 10, at 11. Contrary to company policy, RCNM employees did not check the reason why Williams had left his employment at Tobosa before hiring him. *Id.*

On the night of his first shift, Williams was being trained in RCNM protocol by Brinda Ranes, a RCNM employee. *See, e.g.,* Tr. 11/16, Vol. 9, at 81. Williams was in Mr. Selk's room for an extended period of time. During the night Mr. Selk suffered injuries that were consistent with rape. The next day, while helping Mr.

Selk shower, RCNM staff discovered marks and bruises on his neck and back. Tr. 11/09, Vol. 6, at 91-92. RCNM staff promptly initiated an investigation to determine whether Mr. Selk had been abused or assaulted. Tr. 11/16, Vol. 9, at 115. In addition to taking him to the Emergency Room for treatment of his injuries, RCNM staff notified law enforcement authorities and instituted an internal investigation. Tr. 11/09, Vol. 6, at 94-95 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. Tr. 11/16, Vol. 9, at 115.

Caretakers at College House continued to care for Selk immediately following the diagnoses of assault. These caretakers uniformly testified that there was little or no change in Mr. Selk's behavior from before to after the incident. Some testified that he exhibited no change at all, and Mr. Selk's records showed that he was consistently eating and sleeping normally immediately after the incident. Tr. 11/23, Vol. 14, at 59, 61-69. Others testified that, immediately after the assault, he exhibited some changes in behavior, such as withdrawing from strangers, but that he returned to normal within a few days. *Id.* at 65-66. No caretaker suggested that Mr. Selk exhibited any changed behavior more than six weeks after he was assaulted.

Mr. 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 77-80. Further, RCI set out general procedures for RCNM to follow. Tr. 11/24, Vol. 15, at 117. Additionally, RCI provided form template hiring letters and the offer letters sent to RCNM employees were addressed from "ResCare, Inc.," but signed by RCNM's director of human resources. *See, e.g.,* Tr. 11/12, Vol. 7, at 72; Tr. 11/13, Vol. 8, at 76-78. RCI did not directly supervise the hiring of any RCNM employees, Tr. 11/20, Vol. 13, 83-85.

C. Procedural History

On March 19, 2007, Mr. Selk's 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, [RP0001]. Additionally, Plaintiff claimed that RCNM failed to exercise ordinary care in hiring, training, and supervising Thurman Williams. Following a protracted discovery process, Plaintiff amended the complaint on May

28, 2008, to include RCI as a party defendant. *See* Plaintiff's First Amended Complaint, [RP0301]. In the amended complaint, Plaintiff specifically contended that Selk was sodomized by "employees, agents or apparent agents of RCNM" while living at College House. First Amended Complaint ¶¶ 56-57, [RP0306-307]. Plaintiff further alleged that the three individuals who were working at College House when the assault allegedly occurred were "employed by RCNM." *Id.* ¶¶ 24-26, [RP0303].

The case was scheduled for trial in November, 2009. Just a month before trial (September 25, 2009), in a draft portion of the Pre-Trial Order, Plaintiff alleged, for the first time, that Selk's caregivers were actually employed by both RCNM and RCI. *See* Draft Pre-Trial Order, Ex. B to Defendant's Motion in Limine, [RP2099]. In so doing, Plaintiff sought to assert a new theory of liability against RCI that was not previously pled. [RP2099-RP2100] (noting, first, that "the staff at the College House were employees of Res-Care New Mexico, Inc. and Res-Care, Inc" and then concluding that "Res-Care, Inc. is the alter ego of Res-Care New Mexico, Inc."). Accordingly, on October 1, 2009, ResCare filed a motion in limine to preclude evidence or argument that RCI may be held liable for the acts of RCNM or its employees. *See* Defendant's Motion in Limine, [RP2087].

On October 29, 2009, the district court heard oral argument on the motion at which Plaintiff's counsel acknowledged "[w]e are not going to be asserting at trial

a corporate-veil-piercing argument." Tr. 10/29, Vol. 4, at 15-16. Instead, Plaintiff argued that RCI was liable because it "had the right – exercised or not – to control the manner and details of the [RCNM employees'] work." *Id.* at 30; s*ee also Id.* at 16 (arguing that Plaintiff would prove that "the staff in New Mexico were employees of Res-Care, Inc., in addition to being employees of Res-Care New Mexico"). ResCare argued that RCI could not be held liable for the actions of RCNM employees "unless the corporate veil is pierced." because RCNM and RCI were "two separate entities." *Id.* at 19.

In an order issued the same day as the hearing, the district court denied this motion. *See* Opinion and Order Regarding Defendants' Motion in Limine [RP2493]. The district court rejected RCI's position that veil-piercing was the "single" basis upon which RCI could be held liable, and accepted Plaintiff's theory that RCI could be held liable for the acts of its subsidiary's employees if RCI had a right to control them. *Id.* at 2493-94. In so doing, the court relied on this Court's decision in *Keith v. ManorCare, Inc.*, 2009-NMCA-119, 147 N.M. 209, 218 P.3d 1257, which it interpreted to permit Plaintiff to "'bypass the corporate veil entirely.'" Opinion and Order Regarding Defendants' Motion in Limine [RP2493] (quoting *ManorCare*, 2009-NMCA-119 at ¶ 19 n.1.).

Meanwhile, both RCI and RCNM also objected pre-trial 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 [RP1819]. Both RCI and RCNM 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, however, admitted in seven Critical Incident Reports from a three-year window. *See* Order on Motions in Limine [RP2474].

Lastly, prior to trial, on November 5, 2009, both RCI and RCNM moved to bifurcate the punitive damage phase from the liability and compensatory damage phase. *See* Defendants' Motion to Bifurcate Trial, [RP2563]. In the motion for bifurcation, RCI sought to avoid the prejudice that would result from the jury taking into account RCI's financial resources in assessing a compensatory damage verdict. That concern was particularly acute given that Plaintiff's damages were entirely in the nature of pain and suffering, and thus difficult to ascertain objectively. The district court initially denied the motion as untimely. *See* Tr. 11/9, Vol. 5, at 5 ("I received two motions . . . [b]oth of these are beyond the deadlines in the pretrial scheduling order, and therefore they're untimely, and I'm not going to consider untimely motions."). Then, upon RCI's motion for reconsideration, the district court held that the motion should be denied because that Plaintiff had made a prima facie case for punitive damages. *See* Tr. 11/23,

Vol. 14, at 106 ("I can't find that this evidence [of RCI's wealth] is significantly more prejudicial or less relevant evidence[, thus] the motion, which is essentially a motion to – a trial motion to bifurcate is denied").

The case proceeded to trial on November 9, 2009 with jury selection. Upon selection of the jury, Plaintiff presented her case in chief. Plaintiff called 23 witnesses, including a medical expert, Dr. Ann Burgess, who testified about Larry Selk's injuries. Plaintiff also called RCI executive David Rhodes, in an effort to show that RCI controlled RCNM, and could thus be directly liable for the torts of RCNM employees.

In his closing, Plaintiff's counsel repeatedly emphasized RCI's wealth, and he reminded the jury of the point specifically in arguing for a high compensatory award. Tr. 11/30, Vol. 17, at 153 ("Do you think if their 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?").

The jury ultimately found both RCI and RCNM liable for Mr. Selk's injuries. The jury allocated 65 percent of the fault to RCI, 30 percent to RCNM, and 5 percent of the fault to Thurman Williams, the person who caused Mr. Selk's injuries. The jury awarded $4,702,500 in compensatory damages ($3,217,500 apportioned against RCI; $1,485,000 apportioned against RCNM) and $49,200,000 in punitive damages ($48,000,000 apportioned against RCI; $1,200,000

apportioned against RCNM). *See* Judgment [RP2774]. After post-trial motions, the district court Judge remitted the punitive damage award against RCI to $9,652,500, while leaving the other damage awards unchanged. *See* Order on Defendants' Motion for New Trial and/or Remittitur of Damages Award of Judgment as Outline [RP3059]. This is an appeal from that amended judgment.

SUMMARY OF ARGUMENT

This case combines one of the largest individual judgments in New Mexico history with an unprecedented expansion of corporate parent liability. The district court allowed Res-Care, Inc. to be held liable for the actions of its subsidiary, Res-Care New Mexico, Inc. on the ground that it had the "right to control" its subsidiary's employees. Every corporate parent, however, has that right of control, and thus New Mexico law has long recognized that control can *never* be a basis for parent liability, absent a showing that the corporate veil can be pierced. *E.g. Scott v. AZL Res., Inc.*, 107 N.M. 118, 122, 753 P.2d 897, 901 (1988). Plaintiff did not attempt to prove veil-piercing. Instead, she was allowed to bypass that doctrine's strict requirements and hold RCI liable for having the type of control of a subsidiary that is entirely typical in a parent-subsidiary relationship. If allowed to stand, the ruling below will erase the distinction between parent and subsidiary liability that is a cornerstone of New Mexico law. The $12.8 million compensatory and punitive award against RCI must be reversed.

Equally worthy of review is the record-setting $4.7 million compensatory award against RCI and RCNM. While Larry Selk's injuries deserve compensation, no substantial evidence supports an award of that magnitude. Plaintiff presented no evidence that Mr. Selk had on-going pain and suffering from his assault. Indeed, Plaintiff declined to have her expert examine Mr. Selk or even to review his medical records going more than a month beyond the date of injury. Rather than compensating actual injury, the jury's award reflects that the fact that it was improperly allowed to hear testimony about RCI's corporate wealth before determining the amount of compensatory damages. The result was that the jury ascribed 65 percent of the fault to RCI, 30 percent to RCNM, and just 5 percent to the individual who actually intentionally harmed Mr. Selk. This Court has not hesitated to vacate unlawful compensatory awards in the past that are unsupported by "substantial evidence." *E.g., Sandoval v. Chrysler Corp*, 1998-NMCA-085, ¶ 17, 125 N.M. 292, 960 P.2d 834. Vacatur of the compensatory awards against RCI and RCNM is required here, as well.

Finally, the punitive damage award remains unconstitutionally high even after the remittitur. The Supreme Court has repeatedly 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 Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003)

(emphasis added); *accord Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2626 (2008). The compensatory award in this case is highly substantial and already contains a punitive component. Particularly given that RCI's and RCNM's conduct was not intentional, a further reduction of the punitive award is warranted in the event that this Court does not reduce the compensatory award itself.

ARGUMENT

I. RCI CANNOT BE HELD LIABLE FOR ACTIONS BY RCNM EMPLOYEES ABSENT VEIL-PIERCING.

A. Introduction and Standard of Review.

The judgment below dramatically and improperly expands the scope of corporate parent liability in New Mexico. Under the theory adopted by the district court, a parent corporation may be held liable for the actions of its subsidiary whenever the parent has the "right to control" its subsidiary's employees. That determination is incorrect. New Mexico, like every other jurisdiction of which we are aware, rejects the notion that "[m]ere control" by the parent is sufficient to impose liability. *Scott*, 107 N.M. at 122, 753 P.2d at 901. Instead, a parent may be held liable for a subsidiary's actions *only* where the stringent requirements of veil-piercing are met. Knowing that she could not demonstrate veil-piercing, Plaintiff sought to hold RCI "vicariously" liable for the actions of RCNM employees on the ground that RCI had the right to control those employees at RCNM facilities. But RCI's "right to control" RCNM's employees is entirely typical of a parent-

subsidiary relationship. If a subsidiary's employees can be treated as a parent's employees simply because the latter has the right to control them, the long-standing distinction between parent and subsidiary liability would be erased because every parent has that right of control. This Court should reverse under well-established New Mexico law.

RCI objected to Plaintiff's "right to control" theory. It initially filed a pre-trial motion in limine, seeking to bar Plaintiff from arguing that RCI could be held liable for RCNM's actions given that Williams and the other College House personnel were employees of RCNM. After hearing oral argument, the district court issued a short opinion denying the motion and relying on this Court's opinion in *Keith v. Manorcare.*[2] *See* Opinion and Order [RP2493]. Following trial, RCI

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[2] RCI argued both that Plaintiff had waived the right to bring a veil-piercing argument by failing to plead it in his complaint, and that Plaintiff could not impose liability on RCI without piercing the corporate veil:

> MR. CONNELLY: You're going to permit them to argue that the employees of Res-Care New Mexico are employees of Res-Care, Inc.?
> THE COURT: I'm going to admit them, yes.
> MR. CONNELLY: Okay. We think that's what everything was about, and including the piercing-the-corporate veil issue in that they can't do that unless that's properly pled and *unless the corporate veil is pierced.* So that's -
> THE COURT: Now you've got me confused. Why can't they attempt to argue that? ...
> MR. CONNELLY: That's the entire purpose on having the case law and the law in place with respect to piercing the corporate veil, is that if you have two separate entities, you have one as a wholly-owned subsidiary, and to essentially say the employees of one are de facto employees of the other pierces the corporate veil.

further preserved the issue by filing ResCare's Motion for Judgment as a Matter of Law. *See* [RP2863]. The question of whether RCI may be held liable for actions of RCNM employees absent veil-piercing is a pure question of law that this Court reviews *de novo*. *Juneau v. Intel Corp.*, 2006-NMSC-002, ¶ 8, 139 N.M. 12, 127 P.3d 548 (2005).

B. New Mexico Law Rejects Plaintiff's "Right To Control" Theory.

There is no dispute in this case that the personnel found negligent were employees of RCNM. Plaintiff expressly argued that Mr. Williams and every other actor at the College House facility were RCNM employees, and the jury found that they were. No other conclusion is possible: the persons who hired and supervised Williams all worked at RCNM's facilities, Tr. 11/20, Vol. 13, at 10:23-25, provided services pursuant to RCNM's contract with New Mexico, and were officers and directors of RCNM. *See, e.g.*, Tr. 11/22, Vol. 13, at 72-73. In the course of their normal employment, RCNM employees conducted background checks, interviews, and reference checks. *See* Tr. 11/13, Vol. 8, at 239:2-16.

MR. BETTINGER: That's not our argument. Our argument is not because --
THE COURT: Right. That's not -- I mean, I think that what they -- no, I don't think that's their argument. I think they have to actually prove up and demonstrate, through the witnesses and the evidence they present, *that, in fact, the employees of RC New Mexico were employees of RCI.*
MR. CONNELLY: *Yes, and I'm saying they can't do that without piercing the corporate veil.*

Tr. 10/29, Vol. 4, at 18-19 (emphasis added).

Plaintiff, however, did not seek to hold RCNM alone negligent. Instead, Plaintiff argued that RCNM's parent, RCI, was also liable for the negligence of those RCNM personnel in supervising Williams while Williams acted in his capacity as an RCNM employee. Her position – which the district court accepted – was that RCI was responsible for the actions of the RCNM employees, so long as RCI had a *right* to control their work – even if it did not exercise that right and even if their conduct was not in their capacity as an RCI employee. Tr. 10/29, Vol. 4, at 16 ("[W]e are going to be asserting ... that the staff in New Mexico were employees of ... Res-Care, Inc., in addition to being employees of Res-Care New Mexico."). Specifically, under Plaintiff's theory, RCI would be liable for the RCNM employees actions if it "had the right – exercised or not – to control the manner and details of the staff's work." *See* Jury Instructions [RP2718].

Plaintiff's "right to control" theory erroneously and drastically expands corporate parent liability under New Mexico law. *Every* parent corporation has the right to control the actions of its subsidiary. But that parental control right does not make the parent liable for the actions of its subsidiary. Far from it, the general rule is that a parent will never be liable for a subsidiary's actions absent extraordinary circumstances sufficient to warrant "piercing the veil" of the corporate structure. *See, e.g., Scott*, 107 N.M. at 122, 753 P.2d at 901. ("Ordinarily, a corporation which chooses to facilitate the operation of its business

by employment of another corporation as a subsidiary will not be penalized by a judicial determination of liability for the legal obligations of the subsidiary.") (internal quotations and citations omitted); *see also Cruttenden v. Mantura,* 97 N.M. 432, 434, 640 P.2d 932, 934 (1982) (same).

In particular, "[m]ere control by the parent corporation is not enough to warrant piercing the corporate veil." *Scott*, 107 N.M. at 122, 753 P.2d at 901. Instead, veil-piercing requires the plaintiff to prove that the parent created the subsidiary for an "improper purpose." *Id.; see also Cruttenden*, 97 N.M. at 435, 640 P.2d at 935; *Scott*, 743 P.2d at 901; *Frank v. U.S. West, Inc.*, 3 F.3d 1357 (10th Cir. 1993); *Quarles v. Fuqua Industries, Inc.*, 504 F.2d 1358 (10th Cir. 1974). It widely recognized that "'the exercise of the 'control' which stock ownership gives to the stockholders ... will not create liability beyond the assets of the subsidiary. That 'control' includes the election of directors, the making of by-laws ... and the doing of all other acts incident to the legal status of stockholders. Nor will a duplication of some or all of the directors or executive officers be fatal.'" *United States v. Bestfoods*, 524 U.S. 51, 61-62 (1988) (quoting William O. Douglas & Carrol M. Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 Yale L.J. 193, 1929) (ellipses in original); *see also* 1 W. Fletcher, *Cyclopedia of Law of Private Corporations* § 33, at 568 (rev. ed. 1990) ("Neither does the mere

fact that there exists a parent-subsidiary relationship between two corporations make the one liable for the torts of its affiliate").

Consequently, New Mexico courts have refused to impose liability on parent corporations for actions taken by their subsidiaries – even where the parent exercises highly substantial control – absent an improper purpose. The Supreme Court's decision in *Scott* is highly instructive. *Scott* concerned an improper termination claim by an employee of a subsidiary of the parent AZL corporation. The plaintiff had successfully argued in the district court that it was proper to impose liability on AZL because of the pervasive control AZL exercised over its subsidiary. Among other things, the district court had found that the parent "exercised total control over the bank balances" of the subsidiary, maintained the subsidiary's financial records, and shared assets in common with it. 107 N.M. at 121, 53 P.2d at 900. The district court had also found AZL and its subsidiary "shared common directors and officers," that plaintiff was recruited by AZL, that his employment contract, although with the subsidiary, was signed by executives acting in their capacity as AZL officers, and that AZL paid his employee benefits and insurance. *Id.* at 121-22, 753 P.2d at 900-01.

In spite of this evidence of control, the Supreme Court reversed, holding that AZL was not liable. It explained that "ownership by corporation of all ... of the stock of another" or the fact that the "corporations have common officers and

directors, or both, is not sufficient by itself to render a parent liable." *Id.* The extent of a parent's control, no matter how extensive, is not sufficient by itself to impose liability on a parent. Instead, parental liability also requires that the subsidiary have been created by the parent for an "improper purpose," such that it would be inequitable not to impose liability on the parent as well. Numerous other New Mexico cases have reached the same conclusion, which is consistent with case law from around the country. *See, e.g., Cruttenden,* 97 N.M. at 434, 640 P.2d at 934 ("To find that a subsidiary is the alter ego of the parent corporation, it must be established that the parent control is so complete as to render the subsidiary an instrumentality of the parent"); *Cole v. City of Las Cruces*, 99 N.M. 302, 305, 657 P.2d 629, 632 (1983) ("Generally, it is acknowledged that a subsidiary and its parent corporation are viewed as independent corporations").

This case falls squarely into the rule announced by *Scott*. Plaintiff did not attempt to show that RCNM was created for an improper purpose, or that she could otherwise demonstrate that veil-piercing was warranted. Plaintiff's counsel expressly disclaimed that theory of liability. *See, e.g.,* Tr. 10/29, Vol. 4, at 15 ("We are not going to be asserting at trial a corporate veil-piercing argument."). Instead, Plaintiff argued that RCI's right of control over RCNM warranted holding RCI directly liable for actions of RCNM employees that took place in New Mexico. In arguing for direct control, Plaintiff pointed to the very indicia that

Scott found inadequate. She emphasized the fact that RCNM and RCI had common directors and officers, Tr. 11/20, Vol. 13, at 5, that RCI had control over RCNM finances, Tr. 11/19, Vol. 12, at 37, and that RCNM employees were recruited and hired by RCI. Tr. 11/19, Vol. 12, at 33.

Plaintiff's attempt to evade the stringent requirements for veil-piercing must be rejected. The parent-subsidiary relationship between RCNM and RCI is a typical one. Common leadership, ownership, and finances are normal and expected between a parent and subsidiary. Veil-piercing, in contrast, is an "extraordinary" remedy limited to those "special circumstances" where the subsidiary "was set up for fraudulent purposes or where recogniz[ing] the corporation would result in injustice." *Morrow v. Cooper*, 113 N.M. 246, 249, 824 P.2d 1048, 1051 (Ct. App. 1991). If the right to control a subsidiary, by itself, were sufficient to hold a parent liable for the actions of a subsidiary's employees when acting in their capacity as subsidiary employees, then corporate legal status would be meaningless. *See Johnson v. Flowers Indus., Inc.*, 814 F.2d 978, 980-81 (4th Cir.1987) ("if stockholders were liable whenever they exercised their rightful control, limited liability would be a meaningless fiction because few individuals establish a corporation and then ignore it."). Plaintiff's "right to control" test is particularly ill-founded because it does not even require the parent to have *exercised* its control in order to be held liable. Instead, it is the "right – exercised

or not – to control" that matters. Tr. 10/29, Vol. 4, at 30:7-8 (emphasis added). That capacious standard would merge the liability of parent and subsidiary in every instance, and must be rejected.

Plaintiff argued below that she did not need to pierce the corporate veil because she was simply seeking to hold RCI's "own" employees liable for their actions. But that masks the problem rather than solves it because Plaintiff acknowledged (and indeed argued) that the personnel in question were also RCNM employees acting in their RCNM capacity. It may be common for the same personnel to be employees of both the parent and the subsidiary. *Scott*, 107 N.M. at 122-23, 753 P.2d at 901-02. But that does not mean that the employees' actions on behalf of the subsidiary always create liability for the parent. To the contrary, the "time-honored common-law rule" is that employees presumptively "are wearing their 'subsidiary hats' and not their 'parent hats' when acting for the subsidiary." *United States v. Bestfoods*, 524 U.S. 51, 69 (1998) (quoting P. Blumberg, Law of Corporate Groups: Procedural Problems in the Law of Parent and Subsidiary Corporations § 1.02.1, p. 12 (1983)); *United States v. Jon-T Chemicals, Inc.*, 768 F.2d 686, 691 (5th Cir. 1985) (same). Here, there is no question that the employees were acting for the subsidiary. Plaintiff's theory of liability was that RCNM was negligently managed and operated, that Thurman Williams was negligently hired for his position at RCNM, and that he was

negligently trained and supervised in his RCNM duties. Those are quintessential issues of *subsidiary* operations that were carried out on RCNM's behalf. *See, e.g.* Tr. 11/23, Vol. 8, at 239 (hiring interviews and background checks carried out "locally" by RCNM staffers); Tr. 11/16, Vol. 9, at 81 (Williams' shift overseen by Brinda Ranes, a RCNM staffer). As *Scott* held, employees "in common" with the parent and the subsidiary cannot create liability for the parent for activities concerning the subsidiary simply because the parent has control over them. *Scott*, 107 N.M. at 122-23, 753 P.2d at 901-02. That "time-honored" rule applies in full force here.

This point gives the lie to one of Plaintiff's primary arguments in the district court. Plaintiff repeatedly contended that it was highly relevant that at least some of the RCNM staff received letters of employment from RCI, rather than RCNM. *See, e.g.,* Tr. 11/12, Vol. 7, at 72; Tr. 11/13, Vol. 8, at 78. That argument misses the mark because even if one assumes that those letters demonstrated that RCI also hired these RCNM employees and had a *right* to control those personnel, Plaintiff also argued that RCNM had that right as well and the employees were acting solely as RCNM employees in operating College House and caring for Mr. Selk.[3]

[3] In any event, an employment letter carries very little weight under New Mexico law for purposes of determining liability. For example, the wording of an employment contract is not even sufficient to establish whether the person hired is an employee or independent contractor. *Blea v. Fields*, 2005-NMSC-029, ¶ 12, 138 N.M. 348, 120 P.3d 430. If an employment letter is insufficient to establish

Finally, in its brief discussion of this issue, the district court found that this Court's decision in *Keith v. Manorcare* permitted Plaintiff's alternative theory of liability. *See* Opinion and Order [RP2493]. That determination was incorrect. In *Keith*, the plaintiff (represented by the same trial counsel as in the case at bar) sought to hold another parent corporation directly liable under the same "right-to-control," non-veil-piercing argument offered here. This Court reversed the judgment in the favor of the plaintiff on a different ground, but expressly noted that "piercing the corporate veil is the normal method by which a parent corporation is held liable for the acts of its subsidiary." *Keith*, 2009-NMCA-119 ¶ 19 n.1, 147 N.M. 209, 218 P.3d 1257 (citing *Scott*). The Court went on to state that "[w]e express no opinion on the soundness of Plaintiff's theory." Thus, this Court did not endorse plaintiff's theory in *Keith*, and the district court erred in ruling that *Keith* effected the dramatic change in New Mexico corporate law that Plaintiff urged.

C. Plaintiff's Belated Reliance on the *Bestfoods* Case Cannot Save the Judgment Below.

In post-trial briefing, Plaintiff advanced an entirely new argument to support RCI's liability based on a line of cases typified by *Bestfoods*, 524 U.S. at 72

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whether the employer has the right of control sufficient to establish an employment, rather than independent contractor, relationship, it is surely insufficient to establish whether a parent can be held liable for the personnel's actions.

(applying federal common law). Under *Bestfoods*, a parent corporation may be held liable for actions that take place at a subsidiary's facilities in the rare instance where the parent has of a pervasive level of control of the operations of the facility that is "eccentric under accepted norms of parental oversight of a subsidiary's facility." *Id.* Plaintiff's invocation of *Bestfoods* not only fails on its own terms, but is waived and irreconcilable with governing New Mexico law. *First*, Plaintiff never argued at trial (and the jury was never asked to find) that RCI exercised an "eccentric" level of control. Instead, RCI was held liable because the jury found that culpable employees were also RCI employees and that RCI merely had the *right* to control RCNM's employees. Far from being "eccentric," the right to control is inherent in the parent-subsidiary relationship. Plaintiff has thus waived the argument, having waited until post-trial briefing to raise it. *Cf. Village of Angel Fire v. Board of County Com'rs of Colfax County*, 2010-NMCA-038, ¶ 17, --- P.3d --- ("Issues not called to the attention of the [district] court . . . cannot be raised for the first time on appeal.") (citation and omitted, alteration in original). *Second*, the *Bestfoods* doctrine is not New Mexico law. New Mexico's Supreme Court has never held that a parent may be liable for a subsidiary's employees' actions absent grounds for veil-piercing. New Mexico has never held any party may be liable for the intentional tort of an employee absent actual control. *Bestfoods* is inconsistent

with *Scott*'s strict pronouncement that "mere control is not enough" and that an improper purpose is required before parental liability may be imposed.

Third, even if this Court were to consider the argument, Plaintiff has not come close to satisfying the *Bestfoods* standard. *Bestfoods* heavily emphasized that "eccentric" control is a stringent standard as it would otherwise turn veil-piercing into an easily bypassed "academic" doctrine. 524 U.S. at 72. *Bestfoods* thus held that "eccentric" control is *not* shown where the parent controls the finances of the subsidiary or set policies for the subsidiary to follow. And it held that where action is taken by personnel who are employees of both the subsidiary and the parent (e.g., officers of both corporations), there is a heavy presumption that the personnel acted to further the subsidiary's interests, and not to further the parent's control. It was precisely on these improper grounds that Plaintiff sought to hold RCI liable. *See supra*. Thus, even if this Court were to apply the *Bestfoods* standard (and it should not), Plaintiff has failed to satisfy it.

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RCI was wrongly held liable for the acts of its subsidiary. Plaintiff's right to control theory is impermissible under New Mexico law (and to our knowledge has been accepted by no other court in the country). The decision below greatly expands parent liability in New Mexico by allowing the plaintiff to simply bypass the normal test and show that the parent retains a right to control its subsidiary and

has common employees. That determination and the judgment against RCI should be reversed.

II. THE $4.7 MLILION COMPENSATORY DAMAGE AWARD IS UNLAWFUL AND THE PRODUCT OF PASSION AND PREJUDICE.

A. Introduction and Standard of Review.

RCI and RCNM do not dispute that Mr. Selk was a victim, and that he deserves to be compensated for his pain and suffering. The record-setting $4.7 million compensatory damages in this case, however, cannot be said to reflect the extent of Mr. Selk's injury. They instead are a product of the jury's improper passion and prejudice.[4]

First, the evidence supporting Plaintiff's compensatory damages is insufficient to justify the $4.7 million compensatory award. Mr. Selk's injuries were all in the nature of pain and suffering, yet Plaintiff presented no evidence that Mr. Selk suffered any ongoing injury, as New Mexico law requires. *See, e.g., Rael v. F.&S. Co.*, 94 N.M. 507, 512, 612 P.2d 1318, 1323 (Ct. App. 1979) (plaintiff bears the burden of coming forward with expert testimony showing "reasonably certain proof as to the severity and duration" of future injuries). Mr. Selk's caretakers uniformly testified that he exhibited no lasting injuries. And Plaintiff's

[4] To the extent the judgment against RCI is reversed in light of Plaintiff's impermissible "right to control" theory, the argument in this section is made on behalf of RCNM alone.

expert tellingly never examined Mr. Selk nor reviewed any of his records dating from more than a single month after the assault.

Second, the jury's award was wrongfully biased, over objection, by the district court's refusal to bifurcate the compensatory damage and punitive damage stages of the trial. Plaintiff was thus allowed to present evidence about ResCare's finances *before* the jury determined the compensatory award.

Third, the jury's award was further prejudiced by the district court's decision to allow plaintiff to introduce unrelated Critical Incident Reports at RCNM facilities. Plaintiff introduced seven such Reports without making any showing that the incidents contained therein were the result of ResCare's negligent hiring or operation. As a result, these Reports simply operated to create a free-floating sense of recklessness by RCI and RCNM when there was no proof that RCI and RCNM was in fact reckless at all concerning the incidents, let alone reckless in a way that was probative of the particular recklessness that Plaintiff alleged regarding Thurman Williams.

While the standards of review for a compensatory award and evidentiary errors are demanding, this is one of those cases where the standard is met. *See, e.g., Central Sec. and Alarm Co. v. Mehler,* 1996-NMCA-060, 121 N.M. 840, 918 P.2d 1340 (remanding a damage award as lacking "substantial evidence"); *Sandoval v. Chrysler Corp*, 1998-NMCA-085, ¶ 17, 125 N.M. 292, 960 P.2d 834

(viewing a jury's award of $995,000 in damages for pain and suffering, when the plaintiff had sustained only $5,000 in economic damages, as "shock[ing] the conscience" and excessive as a matter of law). Accordingly, given the scant evidence introduced at trial and the court's evidentiary errors, Defendants respectfully request that the court either vacate the damage award and remand for a new trial on damages, or, in the alternative, remit the damage award.

B. The Minimal Evidence Plaintiff Presented in Support of Compensatory Damages Does Not Come Close to Supporting the $4.7 Million Award.

As an initial matter, the $4.7 million compensatory award is not supported by the evidence adduced at trial. Plaintiff's damages were limited to pain and suffering. This is not a case in which lost earnings, medical expenses, or loss of consortium damages are at issue. At the same time, Plaintiff presented *no* evidence regarding Mr. Selk's condition going beyond six weeks after the assault. Plaintiff's expert never examined Mr. Selk, nor looked at his care records going a month beyond the assault. And Mr. Selk's caretakers all testified that he exhibited no signs of on-going pain and suffering. Put simply, this is not a case where a $4.7 million award can be justified.

The evidence speaking to the existence of pain and suffering was limited and straightforward. First, the caretakers at College House uniformly testified that Mr. Selk showed little or no change in his behavior after he was assaulted. Some caretakers testified that Mr. Selk exhibited no change at all, and Mr. Selk's records

showed that he was consistently eating and sleeping normally immediately after the incident. Tr. 11/23, Vol. 14, at 59, 61-69. Others said he exhibited some changes in behavior such as withdrawing from strangers immediately after the assault but returned to normal within a few days. *Id.* at 65-66. Still others testified that these changes lasted for a couple weeks. *Id* at 65. A single caretaker gave deposition testimony that the effects lasted six weeks. *Id.* No caretaker suggested that Mr. Selk exhibited changed behavior more than six weeks after he was assaulted. Plaintiff's medical expert, Dr. Burgess, conceded this point. *Id.*

Second, Defendant's medical expert, Dr. Roll, testified that although Mr. 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 Mr. Selk did not display any of the symptoms associated with PTSD. *Id.* at 33. Based on his review of the care records and deposition testimony, Dr. Roll opined that Mr. 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.

Third, Plaintiff's medical expert, Dr. Burgess, did not provide testimony to substantiate a different conclusion. Dr. Burgess's theory was that Mr. Selk would have a "permanent" imprint on his limbic system that would leave him susceptible

to "anxieties." Tr. 11/23, Vol. 14, at 31. She said these anxieties typically manifest themselves through behavior and actions such as fitful sleeping, discomfort with strangers, and seizures. *Id.* at 32-34. Critically, however, she pointed to *no evidence* that Mr. 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 ResCare's care records from April, May, and June 2004 (*i.e.*, the month of the assault, and one month before and after). *Id.* at 24-25, 76. Neither source of information supported any claim of lasting harm to Mr. Selk. As noted above, Dr. Burgess acknowledged the caregivers' uniform testimony that any changes Mr. Selk exhibited soon evaporated. *Id.* at 65. And she conceded that those records showed nothing out of the ordinary. *Id.* at 76.

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

was impossible to know whether any interruptions in Mr. Selk's sleep pattern resulted from trauma from his assault. *Id.* at 62. She further conceded that she could not say with certainty that Mr. Selk understood that he was being sexually assaulted, as opposed to being hurt and injured. *Id.* at 42-44.

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. But speculations are not evidence that Mr. Selk actually suffered continuing injury. Future harm is never presumed under New Mexico law; the plaintiff bears the burden of coming forward with expert testimony showing "reasonably certain proof as to the severity and duration" of future injuries. *See, e.g., Rael*, 94 N.M. at 512, 612 P.2d at 1323. Moreover, if Dr. Burgess believed that she could document harm to Mr. Selk by examining him, she was free to do so. Notably, plaintiff's counsel did not ask Dr. Burgess to examine Mr. Selk and provided her only three months of care records ending in June 2004. Tr. 11/23, Vol. 14, at 62-63. The plain inference is that an examination and additional records would have documented no lasting pain and suffering on Mr. Selk's part, just as the earlier records did.

In sum, there was not an iota of evidence presented to the jury that Mr. Selk exhibited any sign of pain and suffering more than six weeks after he was attacked,

and Dr. Burgess largely conceded that the evidence even from those initial six weeks was inconclusive. Even if $4.7 million in damages could be supported in another case of sexual assault, *this* record cannot possibly provide the requisite substantial evidence. *See, e.g., Sandoval*, 1998-NMCA-085, ¶ 17 (finding a jury's award of $995,000 in damages for pain and suffering, when the plaintiff had sustained only $5,000 in economic damages as "shock[ing] the conscience" and excessive as a matter of law); *Rael*, 94 N.M. at 511, 612 P.2d at 1322 ("Damages must be proved with reasonable certainty. There is no exception to the . . . rule for future damages. The ultimate fact which the plaintiff has the burden of proving is future damages reasonably certain to occur as a result of the original injury.") (citations omitted); *see also Central Sec. and Alarm Co.*, 1996-NMCA-060, 121 N.M. 840, 918 P.2d 1340 (remanding a damage award as lacking "substantial evidence").

C. RCNM and RCI are Entitled to a Reduction of the Compensatory Damages as a Result of the District Court's Refusal to Bifurcate the Issue of Punitive Damages From Compensatory Damages.

Further evidence that the compensatory award is the product of passion and prejudice is that the jury assigned 65 percent of the fault to RCI, 30 percent to RCNM, and just 5 percent to Thurman Williams, the intentional wrongdoer in the case. Over objection, Plaintiff was allowed to present evidence of RCI's corporate wealth for the purposes of punitive damages before the jury had made its

compensatory award. RCI and RCNM argued that the compensatory and punitive phases of the trial needed to be bifurcated, lest the jury base its compensatory award on its knowledge of RCI's finances, rather than the extent of Mr. Selk's injuries and the degree of RCI's culpability. *See, e.g., State Farm,* 538 U.S. at 417 ([T]he presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses). This concern was particularly acute given that Plaintiff's damages were entirely in the nature of pain and suffering, and, thus, difficult to ascertain objectively. The record-shattering $4.7 million compensatory award confirms that these fears were warranted.

The right to a bifurcated trial is set forth in New Mexico Rule of Civil Procedure 1-042(B), which permits "a separate trial ... of any separate issue." Rule 1-042(B) NMRA 2010. New Mexico courts have previously applied these provisions to bifurcate issues of defendants' wealth in punitive damages cases. *See, e.g., Miller v. Conn. Gen. Life Ins. Co.,* 84 N.M. 321, 502 P.2d 1011 (Ct. App. 1972); *Couch v. Astec Industries, Inc.,* 2002-NMCA-084, 132 N.M. 631, 53 P.3d 398. These cases are consistent with a nationwide movement towards requiring bifurcation for purposes of punitive damages. *See e.g., Transportation Ins. Co. v. Moriel,* 879 S.W.2d 10, 30 (Tex. 1994) (adopting rule that punitive damage

arguments should be bifurcated from the liability assessment and listing thirteen states that require bifurcation of trials in which punitive damages are sought).[5]

Absent bifurcation, there is a substantial risk that jurors, upon hearing defendants' wealth and other evidence related to wantonness or willfulness, will improperly find liability or improperly inflate compensatory damages. The prejudice inherent in that risk is akin to the prejudice from the jury knowing of a defendant's insurance, which, under New Mexico law, requires bifurcation. *See, e.g., Safeco Ins. Co. of Am. v. U.S. Fid. & Guar. Co.,* 101 N.M. 148, 150. 679 P.2d 816, 818 (1984); *see also Martinez v. Reid,* 2002-NMSC-015, ¶ 23, 132 N.M. 237, 46 P.3d 1237 ("Because the presence of absence of insurance is not relevant to the issues of liability or damages in the ordinary negligence case, any prejudice or confusion of the issues, no matter how slight, would require exclusion under ordinary concepts of relevancy").

It was error for the Court to deny Defendants' motion for bifurcation. When Defendants moved for bifurcation on November 5, 2009, the court initially denied the motion as untimely. Then, upon Defendants' motion for reconsideration, the court held that the motion should be denied because that Plaintiff had made a

[5] *Campen v. Stone*, 635 P.2d 1121, 1128 (Wyo. 1981) ("Evidence of a defendant's wealth must be provided to the jury in such a manner so as not to interfere in the deliberations on whether willful and wanton conduct is present"); *see also Rupert v. Sellers*, 368 N.Y.S.2d 904, 912 (N.Y. App. Div. 1975) ("Not until plaintiff obtains such a special verdict that he is entitled to punitive damages is it necessary or important for him to know defendant's wealth").

prima facie case for punitive damages. *See, e.g., Sloan v. State Farm Mut. Auto. Ins. Co.*, 2004-NMSC-004, ¶ 16 135 N.M. 106, 85 P.3d 230 (noting the "general proposition" that once a plaintiff has made a prima facie case for punitive damages, a jury may decide whether damages are warranted). Both grounds were erroneous.

As to the question of timeliness, New Mexico's rules of procedure do not specify a date by which a party had to request a bifurcated trial. Nor did the Pretrial Scheduling Order require Defendants to move for bifurcation by a certain date. Moreover, Plaintiff identified no prejudice that would have resulted from bifurcation.

Likewise, the existence of a prima facie case for imposing punitive damages also did not justify denying the motion. The question was not *whether* Plaintiff was entitled to prove her punitive damages, but *when* such proof could be offered without prejudicing the determination of compensatory damages. Put another way, there is a need for bifurcation only in those situations where the plaintiff *is* entitled to prove a claim for punitive damages. The failure to bifurcate resulted in a compensatory damage award that improperly reflected the jury's knowledge of ResCare's finances.

D. The Introduction of Highly Prejudicial Critical Incident Reports Further Improperly Inflated the Compensatory Damage Award.

Plaintiff's admission of seven prejudicial Critical Incident Reports further compounded the errors in the damage assessment, and ultimately resulted in an improper inflation of the compensatory damages. While Plaintiff attempted to defend the admission of these Reports as probative and useful to demonstrate a culpable corporate mental state, the Reports, in actuality, had only limited probative value and did not actually show that RCI had acted negligently in hiring, supervising, training, and/or operating care facilities. Nonetheless, the Reports were highly prejudicial, and the inclusion was erroneous in that it likely confused the jury. *See, e.g., State v. Lamure*, 115 N.M. 61, 71, 846 P.2d 1070, 1080 (Ct. App. 1992) ("One cannot ignore the long tradition of courts and commentators expressing fear that jurors are likely to give undue weight to evidence of a defendant's prior misconduct and perhaps even convict the defendant solely because of a belief that the defendant is a bad person").

At trial, over Defendants' repeated objections, Plaintiff introduced seven Reports, dating back to 2001. Plaintiff offered two theories as to how these Reports were admissible. First, Plaintiff contended that the Reports demonstrated that RCI had a culpable corporate mental state so as to warrant punitive damages, pursuant to *Clay v. Ferrellgas, Inc.*, 118 N.M. 266, 270, 881 P.2d 11, 15 (1994). In the alternative, Plaintiff argued that the Reports were probative evidence under

the New Mexico Rules of Evidence. Neither ground was a sufficient basis for the Court allowing these Reports to be introduced.

As it relates to Plaintiff's contention that these Reports showed RCI's culpable corporate mental state, it is telling that only three of the incidents involved physical abuse, and none of the incidents occurred at the location (College House) where Plaintiff was injured. Plaintiff did not explain how the four non-abuse bad acts by ResCare New Mexico's employees could support a finding of wantonness, willfulness, or maliciousness on the part of RCI. As the United States Supreme Court has cautioned, "[a] defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages." *State Farm,* 538 U.S. at 422-23. Indeed, the prior transgressions must "replicate" the conduct in question. *Id.* Plaintiff has not shown the requisite similarity to merit the Reports' inclusion, and, thus, the Defendants incurred prejudicial error. *See, e.g., Ruiz v. Southern Pac. Transp. Co.,* 97 N.M. 194, 202, 638 P.2d 406, 414 (Ct. App. 1981).

Moreover, Plaintiff made no attempt with *any* of the reports to show that the incidents contained therein were the result of RCI's negligent hiring or operation. Plaintiff never alleged any of the incidents caused in the reports were precipitated by RCI's negligence. As such, these Reports simply operated to create a free-floating theory of recklessness by RCI when there was no proof that RCI was in

fact reckless at all concerning the incidents, let alone reckless in a way that was probative of the particular recklessness that Plaintiff alleged regarding Thurman Williams.

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Whether taken together or separately, the three errors described above demonstrate that $4.7 million compensatory award is unlawful and cannot be said to reflect Mr. Selk's actual injuries. Like other cases in which this Court has found a compensatory award to be unsupported by substantial evidence, vacatur of the compensatory damages is appropriate. *Central Sec. & Alarm Co.*, 1996-NMCA-060, 121 N.M. 840, 918 P.2d 1340; *Sandoval*, 1998-NMCA-085, ¶ 17, 125 N.M. 292, 960 P.2d 834. If the compensatory damage verdict is vacated, then a corresponding vacatur of the punitive damage verdict is appropriate. *See, e.g., City of Sunland Park v. Harris News, Inc.*, 2005-NMCA-128, 138 N.M. 588, 124 P.3d 566 (where a compensatory damage is vacated as a matter of law, then any punitive damages based on that theory of law must too be vacated). Alternatively, should this Court reduce the compensatory damage verdict without vacatur, *see, e.g., Robison v. Campbell*, 101 N.M. 393, 397, 683 P.2d 519, 514 (Ct. App. 1984), then this Court should either correspondingly reduce the punitive award, or instruct the lower court to "reset punitive damages" in accordance with the reduced damage award. *Id.* at 397-39, 683 P.2d at 514-15.

III. IF THE COMPENSATORY AWARD IS AFFIRMED, THE PUNITIVE DAMAGE AWARD AGAINST RCI MUST BE FURTHER REDUCED.

A. Introduction and Standard of Review.

Finally, should this Court elect not to reduce the compensatory damages, the punitive damage award against RCI must be reduced further. Even after remittitur, the $9.7 million punitive damage award is one of the very highest in the history of the state.[6] Given the highly substantial nature of the jury's compensatory award, and the lack of intentional conduct on RCI's part, punitive damages approaching than compensatory award are required.[7]

This Court has an obligation to assess independently the punitive award. *Aken v. Plains Elec. Generation & Transmission Co-op., Inc.*, 2002-NMSC-021, ¶ 17, 132 N.M. 401, 49 P.3d 66. This review is required for the protection of the defendant in order to minimize the "acute danger of an arbitrary deprivation of property," particularly with respect to "big businesses." *State Farm Mut.,* 538 U.S. at 417 (internal quotation marks omitted). RCI preserved this issue by seeking

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[6] Counsel is aware of only two cases in New Mexico history that have affirmed punitive damage verdicts in excess of the verdict in this case. *See Grassie v. Roswell Hosp. Corp.*, No. CV-2006-00286, 2007 WL 5112813 (N.M. Dist. Ct. Aug. 15, 2007) ($19.98 million) and *Jolley v. Energen Res. Corp.*, 2008-NMCA-164, ¶ 8, 145 N.M. 350, 198 P.3d 376 ($13 million), cert. denied, 129 S. Ct. 1633 (2009). Both were wrongful death cases.

[7] If the Court reverses the judgment against RCI, this Court need not address punitive damages because the ratio of punitive to compensatory damages against RCNM is already less than 1:1.

review of the jury's punitive damage assessment in the district court in post-trial briefing.

B. The Due Process Guideposts Require a Lower Punitive Damage Award Approaching the Amount of the Compensatory Award.

This Court reviews punitive damage awards with reference to three "guideposts": (1) the reprehensibility of the conduct, (2) the ratio between the compensatory and punitive awards, and (3) the civil penalties imposed by the state for the conduct at issue. *State Farm Mut.,* 538 U.S. at 418. The district court properly recognized that the original $49 million punitive award in this case was grossly excessive. As the district court explained, this was not a case of intentional misconduct, and that it could not find that ResCare's conduct was "as reprehensible as the intentional conduct" of tortfeasors in other punitive damages cases. *See* Order on Defendants' Motion for New Trial and/or Remittitur of Damages Award of Judgment as Outline [RP3059]. The district court also recognized that the jury's compensatory award was "high," and that a disproportionate share of that compensatory award was assigned to RCI. *Id.* On this basis, it reduced the punitive award against RCI from $48 million to $9.65 million, creating a ratio of 3:1 with respect to the compensatory award.[8]

It was appropriate to reduce the punitive award against RCI, but due process requires a lower award in light of the "high" compensatory damages and their

[8] The remitted ratio for the ResCare defendants as a whole is 2.3:1.

skewed allocation against RCI. While punitive damages are not subject to a strict formula, the Supreme Court has advised 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.

In this case, the compensatory award was more than "substantial," it was unprecedentedly high. Indeed, the award was so large that it can only be understood as already carrying a punitive component itself. 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 between punishment and compensation and a verdict for a specified amount frequently includes elements of both." *State Farm*, 538 U.S. at 426 (quoting *Restatement (Second) of Torts* § 908, cmt. c, at 466 (1977)). The compensatory award, given entirely on the basis of pain and suffering, clearly "includes elements of both" compensation and punishment. Moreover, the jury assigned 65 percent of the fault to RCI, and just 5 percent to Thurman Williams, the intentional wrongdoer. The jury's determination that RCI was 13 times more responsible for Mr. Selk's injuries than the person who intentionally harmed him reflects a desire to punish RCI rather than a defensible accounting of the cause of his injuries. In light of the size and nature of

the compensatory award, punitive damages in excess of that award are unwarranted.

Consideration of the other guideposts confirms the conclusion. As noted, RCI was not an intentional wrongdoer, and the law emphasizes that difference in determining reprehensibility. "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*, 128 S. Ct. at 2621 (citing 2 *Restatement (Second) of Torts* § 500, cmt. a, at 587-88 (1964). It is also highly relevant that the punitive award against RCI dwarfs any other punitive award in New Mexico for other forms of sexual assault and harassment. *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). These awards, orders of magnitude lower than even the remitted punitive award, could not have provided RCI with the requisite "fair

notice ... of the severity of the penalty that a State may impose." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996); *see Aken*, 2002-NMSC-021, ¶ 21, 132 N.M. 401, 49 P.3d 662 (agreeing that "core holding" of *Gore* is that "large punitive damage awards are constitutional when a defendant *has notice* that his conduct may result in such awards") (emphasis added) (citing 113 *Harv. L. Rev.* 627, 627 (1999).

Finally, comparable civil penalties also indicate that a $9.7 million punitive award is unreasonable. The most relevant civil sanction under New Mexico law for the wrong done to Mr. Selk is the penalty that New Mexico imposes on a residence facility for the neglect of a resident. Penalties of that nature are capped at $5,000 per day under state law. 7.1.8 NMAC. Those sanctions could hardly have provided RCI with the fair notice that due process requires. *Gore*, 517 U.S. at 574.

In sum, this is not a case in which punitive damages in excess of the compensatory damages can be sustained. If the compensatory damages against RCI are upheld, the punitive damage award should be reduced accordingly.

CONCLUSION

For the foregoing reasons, Defendants respectfully submit that this Court should reverse the judgment against RCI and/or vacate the compensatory damage awards against RCI and RCNM. In the alternative, the Court should vacate the

punitive damage award against RCI and remand with instructions to impose a punitive damage award that is no greater the amount of compensatory damages awarded against RCI.

STATEMENT OF COMPLIANCE

This Brief was prepared using a proportionally-spaced typeface and complies with Rule 12-213(F)(3) NMRA 2010. This Brief in Chief consists of 10,355 words according to the Microsoft Word 2007 word processing program on which it was prepared.

Respectfully submitted,

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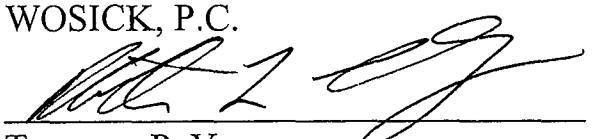

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