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)

DEFENDANTS' REPLY BRIEF IN SUPPORT OF DEFENDANTS' BRIEF-IN-CHIEF

YENSON, LYNN, ALLEN &
WOSICK, P.C.
Terrance P. Yenson
Matthew L. Connelly
April D. White
4908 Alameda Blvd NE
Albuquerque, NM 87113-1736
(505) 266-3995

JENNER & BLOCK, LLP
David Bradford
353 N. Clark Street
Chicago, IL 60654-3456
(312) 222-9350

Paul M. Smith
Matthew S. Hellman
1099 New York Avenue, N.W.
Suite 900
Washington, DC 20001-4412
(202) 639-6000

Counsel for Appellants Res-Care New Mexico, Inc. and Res-Care, Inc.

STATEMENT OF ORAL ARGUMENT

This appeal presents important questions regarding the limits of parental liability. It also presents important questions about a record-setting compensatory damage award, and the limits of punitive damages for non-intentional conduct. Accordingly, ResCare respectfully suggests that oral argument would be helpful in the determination of this appeal.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

NEW MEXICO CASES

CASES FOR OTHER JURISDICTIONS

INTRODUCTION

Plaintiff obtained a record-setting judgment against RCI based on a theory of corporate parent liability that is so plainly faulty she does not seriously defend it on appeal. In the trial court, Plaintiff argued that RCI was liable for the actions of its subsidiary's employees so long as RCI had a "right to control" them (even if unexercised), because that right would make them employees of RCI as well. Plaintiff persuaded the trial court that her theory was proper under this Court's decision in *Keith v. ManorCare*, and the liability inquiry at trial accordingly focused on whether RCI had the right to control its subsidiary's employees.

Given this instruction, it is no surprise that the jury found against RCI. *Every* parent has the right to control its subsidiaries' employees. Indeed, if Plaintiff's theory were correct, it would make parents "directly" liable for everything their subsidiaries did. That is not the law in New Mexico (or anywhere else). Put simply, if this Court were to affirm, no parent could confidently allow a subsidiary to do business in New Mexico because of the potential exposure it could face.

Recognizing this problem, Plaintiff now seeks to switch to a different theory. In a passing sentence, she acknowledges that *ManorCare* – the sole authority cited by the trial court – does "not reach the issue" of direct liability. Plaintiff Br. 27. Instead, she relies primarily on cases holding that a parent can be liable only when

it engages in actions through "'an agent of the parent *alone* that are *eccentric* under accepted norms of parental oversight of a subsidiary's facility.'" *Forsythe v. Clark USA, Inc.*, 864 N.E.2d 227, 245 (Ill. 2007) (quoting *United States v. Bestfoods*, 524 U.S. 51 (1998)) (emphasis added). *See* Plaintiff Br. at 23-26. But Plaintiff's new argument is waived, barred by New Mexico law, and factually meritless.

Plaintiff fares no better in defense of the compensatory and punitive awards. The compensatory award is explainable only as the product of the jury learning too soon about RCI's assets. It requires remittitur. Similarly, the punitive award, even after remittitur, remains grossly excessive.

I. PLAINTIFF'S DIRECT LIABILITY THEORY IS ERRONEOUS.

A. RCI Did Not Waive Its Parental Liability Argument.

Plaintiff errs in arguing RCI waived objection to the right-to-control theory of parental liability she advanced below. *See* Plaintiff Br. 19-21. Plaintiff concedes that RCI timely objected to the theory in its motion in limine and a motion for judgment as a matter of law, *id.* at 20, but focuses on RCI's failure to challenge jury instructions that articulated the right-to-control theory. She says those instructions have become "law of the case." *Id.*

The Supreme Court of New Mexico squarely rejected this "law of the case" argument in *Gerety v. Demers*, 86 N.M. 141, 142-43, 520 P.2d 869, 870-71 (1974). In *Gerety*, the defendant timely moved for judgment as a matter of law, but did not

challenge the jury instructions. The plaintiff persuaded the Court of Appeals that "the instructions given thereupon became the law of the case" and barred review of the denial of a motion for a directed verdict. *Id.* at 142, 520 P.2d at 870. The Supreme Court reversed, explaining that "[t]he correct rule" is that although an "appellant may not challenge on review the correctness of instructions to which he took no exception ... [a] proper motion for a directed verdict ... *will always preserve for review* the question whether *under the law truly applicable to the case* there was an adequate evidentiary basis for the submission of the case to the jury." *Id.* at 142-43, 520 P.2d at 870-71 (emphasis added). In other words, "[t]his Court *must ascertain for itself* what the applicable law is, *whether the instructions were excepted to or not.*" *Id.* at 143, 520 P.2d at 871 (emphasis added). If an appellant is entitled to judgment as a matter of law under the legal theory it advanced in the trial court, it is immaterial that the appellee obtained a jury verdict under an erroneous theory.[1] *Id.*

Thus, because RCI made a timely motion for judgment arguing against Plaintiff's right-to-control theory and in favor of application of veil-piercing requirements, it is entitled to ask this Court to determine "the law truly applicable

[1] The sole case Plaintiff cites for the "law of the case" argument, *Sandoval v. Baker Hughes Oilfield Operations, Inc.*, 2009-NMCA-791, 146 N.W. 853, 215 P.3d 791, is inapposite. It concerned a waived objection to whether there was sufficient evidence of future damages to let the jury consider the issue, and not a dispute about the applicable legal standards, as was the case in *Gerety* and here.

to the case," *Gerety*, 86 N.M. at 143, 520 P.2d at 871 (quotation marks omitted), and to assess the sufficiency of Plaintiff's evidence in light of that law. And because Plaintiff has unequivocally abandoned a veil-piercing argument, Tr. 4:14, if Plaintiff's right-to-control theory is wrong, RCI is entitled to judgment.

B. The Direct Liability Theory That Plaintiff Argued Is Legally Erroneous.

Plaintiff claims she need not make out a veil-piercing claim because the jury expressly found that RCI, in addition to RCNM, had acted negligently. But Plaintiff's direct liability theory is simply a matter of semantics. What Plaintiff contended is that the jury could find RCI "directly" liable because it had a right to control RCNM personnel, thereby making those personnel RCI "employees" as well. As Plaintiff's counsel explained: "[w]hat I want to be very clear about, however, is that we are going to be asserting ... that the staff in New Mexico were employees of [RCI], in addition to being employees of [RCNM]." Tr. 4:16. The trial court accepted this argument, holding Plaintiff could prevail if the jury found that "RCNM's employees were also RCI's employees." RP2493. And the jury instructions reflected Plaintiff's right-to-control theory. RP2718.

The argument that a parent can be liable by virtue of its right to jointly control the employees of its subsidiaries is foreclosed by New Mexico law, and indeed the law of every other jurisdiction. Parents own their subsidiaries, and with ownership comes the right to control. *Scott v. AZL Res., Inc.*, 107 N.M. 118, 121-

22, 753 P.2d 897, 900-901 (1988). Consequently, under Plaintiff's theory, *every* subsidiary employee would be an employee of the parent, particularly given that she claims that a parent need not even exercise its control in order to be treated as a co-employer. But as our opening brief explained, even assuming that the right to control can make RCNM's employees also the employees of RCI, the actions of such dual-status employees do not make the parent liable. Instead, 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) (quotation marks omitted). All of the actions at issue – the operation, hiring, and supervision of College House – concern RCNM, the entity licensed by the state to run College House. Thus, whether one calls RCI's control over RCNM "direct" control or anything else, the fact is that "[m]ere control ... is not enough." *Scott*, 107 N.M. at 122, 753 P.2d at 901.

Plaintiff has no answer. She contends that cases like *Scott* are irrelevant because they do not expressly reject Plaintiff's direct liability theory. Plaintiff Br. 23. But *Scott* and the entire corporate veil doctrine would be a dead letter if Plaintiff's theory were sound because every action by the subsidiary could be imputed "directly" to the parent by virtue of its right to control. Plaintiff observes that New Mexico cases have recognized that a corporation can be held

independently liable along with another defendant, and that every person in New Mexico has the duty to exercise ordinary care. Plaintiff Br. 21-22. Tellingly, not one of the cases she cites involves a parent and its subsidiary, and thus none presents the veil-piercing issue that is central here. Similarly misplaced is Plaintiff's argument that it would be unfair not to hold a parent liable for its "own" actions. Like every other jurisdiction, New Mexico has recognized that it is unfair to hold parent automatically liable, by virtue of its inherent right to control, for the actions of a subsidiary's employees or of dual employees operating a subsidiary's facility. *Scott*, 107 N.M. at 122, 753 P.2d at 901. Relabeling the actions as those of the parent does not justify departing from this rule.

Plaintiff also emphasizes that some of the personnel who operated or worked at College House had letters of employment from RCI. But that celebrates form over substance. Plaintiff does not dispute (indeed, she affirmatively argued) that whatever the nominal status of their employment, these personnel were also RCNM employees. The personnel who hired Thurman Williams, checked his background, and supervised his work were located in New Mexico, had positions with RCNM (which had its own payroll) and operated *RCNM's* College House facility, *See, e.g.*, Tr. 7:69-70, 193; Tr. 8:24-25; Tr. 9:228-29. Accordingly, even assuming these personnel were also RCI employees, they wore both subsidiary and

parent "hats," and there is no basis for attributing their actions operating College House to RCI.

C. Plaintiff's Belated Reliance On The *Bestfoods* Doctrine Cannot Justify Affirming The Verdict Below.

In addition to defending the right-to-control theory, Plaintiff now implicitly offers a different theory: that this case falls within an exception authorizing direct liability for parent companies that have *bypassed* their subsidiary to exercise unusually close control over their subsidiary's facility. She now claims not to rely on the leading case -- *United States v. Bestfoods*, 524 U.S. 51 (1998) – saying it "does not control here." Plaintiff's Br. at 25. But she cited *Bestfoods* prominently in her post-trial brief, RP2906-2907, and now cites other out-of-state cases articulating much the same standard. This effort to provide a new legal basis for the judgment comes too late, ignores New Mexico law, and ignores the facts proved at trial.

1. Plaintiff never actually articulates the elements of her new theory, but under *Bestfoods*, a parent may be directly liable in those limited circumstances where the parent has a "pervasive" level of control of the operations of a subsidiary's facility such that "actions directed to the facility by [1] an *agent of the parent alone* are [2] *eccentric under accepted norms* of parental oversight of a subsidiary's facility." 524 U.S. at 72 (emphasis added). The *Bestfoods* analysis thus imposes two barriers to finding a parent directly liable. First, the actions must

be taken by "an agent of the parent alone." Personnel who are employees of both corporations cannot give rise to parental liability unless the plaintiff overcomes the strong presumption that the actions were taken in regard to the subsidiary. *Id.* at 69-70 ("[I]t cannot be enough to establish liability ... that dual officers and directors made policy decisions and supervised activities."); *see Forsythe*, 864 N.E.2d at 245 (adopting and quoting this holding from *Bestfoods*), cited in Plaintiff's Br. at 25-26.

In addition, the actions taken by agents of the parent must be "eccentric" in the sense that they exceed the control parents usually exercise over their subsidiaries. *See Forsythe*, 864 N.E.2d at 245 (limiting direct liability to cases where the parent "so pervasively interfere[s] with the operations of the subsidiary that it can be viewed as directly inflicting harm on ... third parties doing business with the subsidiary"); *Spires v. Hosp. Corp. of Am.*, 289 F. App'x. 269, 272 (10th Cir. 2008) (limiting direct liability to where parent exerts "a level of control beyond the ordinary involvement of a parent corporation in the affairs of its subsidiaries"), cited in Plaintiff's Br. at 26. *Bestfoods* described the type of parental activities that would *not* be sufficient: "monitoring of the subsidiary's performance, supervision of the subsidiary's finance and capital budget decisions, and articulation of general policies and procedures." 524 U.S. at 72. Countless cases have rejected a plaintiff's assertion of Bestfoods-type liability on the ground

– fully applicable here – that a plaintiff has shown no more than typical corporate control.[2]

2. A *Bestfoods*-type theory is no help to plaintiff for multiple reasons. In the first place, the argument is barred by waiver. Plaintiff made no *Bestfoods* argument in the trial court. Instead, she relied solely on her right-to-control theory, which is flatly incompatible with *Bestfoods*, claiming it was supported by this Court's decision in *ManorCare*. And it was on the basis of that "dual-status" theory that the court ruled she could pursue her claims against RCI. RP2493-94 (citing *ManorCare* as its sole authority). Plaintiff asserts that, as an appellee, she can defend the judgment based on another theory. Plaintiff Br. at 22-23. But this Court will not affirm on a ground not raised below where "it would be unfair to [the] appellant to do so." *Eldin v. Farmers Alliance Mut. Ins. Co.*, 119 N.M. 370, 376, 890 P.2d 823, 829 (Ct. App. 1994). Here, there would be unfairness, because had Plaintiff articulated a *Bestfoods* theory at trial, RCI would have focused its

[2] *See, e.g., Waste Mgmt. Inc. v. Superior Court*, 13 Cal. Rptr. 3d 910, 915 (App. Ct. 2004) (no direct liability for "[n]egligently controlling or intentionally mismanaging a subsidiary's budget"); *Bright v. Hill's Pet Nutrition, Inc.*, 510 F.3d 766, 771 (7th Cir. 2007) (no direct liability for parent who promulgated hiring polices for subsidiary and knew of hiring malfeasance by subsidiary); *New York v. Solvent Chem. Inc.*, 685 F. Supp. 2d 357, 441-42 (W.D.N.Y. 2010) (no direct liability for giving "supervisory advice and direction regarding general operational policies and procedures, especially with respect to employee health and safety, which impacted financial and capital budget decisions"); *Yankee Gas Servs. Co. v. UGI Utils., Inc.*, 616 F. Supp. 2d 228, 233 (D. Conn. 2009) (no direct liability for conducting "detailed – yet not eccentric – oversight of the operations of ... subsidiaries")

defense on showing that RCI's control over RCNM was not atypical. There is no way to reconstruct now how the record would have been developed and how the jury would have responded. *See Pinnell v. Board of County Com'rs*, 1999-NMCA-074, ¶ 14, 127 N.M. 452, 982 P.2d 503 ("On appeal, this Court will not assume the role of the trial court and delve into such a fact-dependant inquiry ... especially [because] the Board never explicitly raised the issue below."). *See also Keith v. ManorCare*, 2009-NMCA-119, 147 N.M. 209, 218 P.3d 1257 at ¶ 39 (judicial estoppel applies to party that plays "fast and loose with the court by successfully arguing one position and then later adopting a position inconsistent with the first").

3. Even beyond waiver, *Bestfoods* is not New Mexico law. The Supreme Court has categorically held that mere control is insufficient to create parental liability. *See supra*. Moreover, it has done so in circumstances where the parent had pervasive control of its subsidiary. *Scott* involved a parent that controlled every aspect of its subsidiaries' activities, such that the parent and subsidiaries were "alter egos." *Scott*, 107 N.M. at 122, 753 P.2d at 901. Even that level of control was "insufficient" to impose liability on the parent. *Id.* It would effectively overrule *Scott* for this Court to hold that a parent's pervasive control of a subsidiary's operations is sufficient to impose parental liability.

4. Finally, Plaintiff has not remotely made out a claim under *Bestfoods*. Having asserted that the staff in New Mexico were controlled by *both* RCI and

RCNM, she has no basis for saying they were"agents of [RCI] alone." Plaintiff endeavors to gloss over the issue by repeatedly referring to the staff involved as "RCI employees." But it is undisputed that all of them were employees of the subsidiary RCNM (including, for example, RCI and RCNM Vice-President David Rhodes, as well as all of the relevant College House staff). *See, e.g.,* Tr. 13:4-5; Tr. 7:69-70, 193; Tr. 8:24-25.

Similarly, RCI did not engage in any form of "eccentric" control. Plaintiff contends that RCNM was governed by "RCI's policies," that RCI set RCNM's "budget," and that it controlled RCNM salaries. But these are precisely the traditional parental undertakings that *Bestfoods* recognizes as not supporting liability. *See supra* note 2 (citing cases in which detailed control over hiring, safety, and budget practices does not give rise to parental liability). Plaintiff has not shown RCI did more than this, let alone through its own agents.

Plaintiff's theory of liability is also contradictory. It is undisputed that RCI policies strictly prohibit harming residents, require background checks and restrict employees from having extended time alone with residents. Tr. 8:47-48; Tr. 7:121; Tr. 8:214; Ex. D-3, 0007. Even if these policies were not followed on one occasion at College House, the fact that RCI exerted control through policymaking cannot be a basis for holding it liable. As one court put it: "That a parent

corporation has tried to prevent violations of law ... hardly makes it directly responsible *for* those violations!" *Bright*, 510 F.3d at 771.

Certainly, the specific cases cited by Plaintiff fail to support her assertions. As noted above, *Forsythe* fully embraced the *Bestfoods* standard that is fatal to Plaintiff's claims. 864 N.E. 2d at 238-39. And while the court did hold that the plaintiff could proceed to trial on a direct liability theory, it made clear that the parent could be liable *only* if the personnel in question acted as an agent of the parent *alone*. *Id.* at 239. *Spires* similarly required extraordinary control and involvement by the parent company. And *Canavan v. National Healthcare Corp.*, 889 So. 2d 825, 827 (Fla. Dist. Ct. App. 2004), concerned the liability of a corporate officer for his own actions, not the liability of a parent for its subsidiary. *Id.* In short, even if Plaintiff were now able to make a *Bestfoods* claim (and she cannot), it would fail on the merits.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN NOT REMITTING THE $4.7 MILLION COMPENSATORY AWARD.

A. The Award Was Not Supported By Substantial Evidence.

The jury's record-setting $4.7 million award of compensatory damages is presumptively entitled to deference. But as this Court has recognized, an award that is not supported by "substantial evidence" cannot stand. *Sandoval v. Chrysler Corp.*, 1998-NMCA-085, ¶ 17, 125 N.M. 292, 960 P.2d 834. Consequently, the trial court abused its discretion in refusing to remit the compensatory damages. *Id.*

The injuries claimed here were entirely in the nature of pain and suffering, primarily *future* pain and suffering, which Plaintiff had the burden of proving. The centerpiece of Plaintiff's evidence was the assertion by Dr. Burgess that sexual assault imprints a permanent injury on the brain's limbic system. Plaintiff Br. 30. According to Dr. Burgess, the effect of this change to the limbic system is that it would make Selk more fearful of strangers and new situations. Tr. 14:31. As we explained in our opening brief, despite having made this statement, Dr. Burgess acknowledged that Selk did not evince any such signs of fearfulness more than six weeks after the incident.

On appeal, Plaintiff contends that this evidentiary gap is excusable because Defendants allegedly did not keep adequate records and because Defendants' staff were not "trained to observe signs of distress." It is Plaintiff's burden, however, to document future harm. Moreover, Plaintiff's evidentiary gap was not accidental but strategic. The testimony of Selk's caregivers was unequivocal: no one saw any sign of distress going more than six weeks after the assault. Nonetheless, Plaintiff's expert never examined Selk and never asked for records going more than six weeks beyond the assault. If – contrary to the unrebutted testimony of those who took care of him every day – Selk were actually exhibiting on-going pain and suffering, Plaintiff's expert should have documented it. Instead,

Plaintiff's counsel tactically decided to avoid having her even attempt to do so. As a result, evidence to support the verdict is missing, and a remittitur was required.

B. The Trial Court's Failure To Bifurcate Prejudiced Defendants.

Compounding the excessiveness of the award is the fact that the jury ascribed just five percent of the fault to the absent intentional tortfeasor. This lopsided ratio reflects not the relative culpability of the parties, but the trial court's decision to deny Defendant's motion to bifurcate and allow the jury to hear the evidence of Defendants' wealth before it determined the compensatory award.

On appeal, Plaintiff contends that Defendants' motion to bifurcate was untimely, coming the Thursday (November 5) before a Monday trial. But the trial court had set no deadline for such motions, and issued rulings that had a far greater effect on the structure of the trial right up until that time. RP2493 (October 29 order authorizing right-to-control theory); RP2524 (October 30 order dismissing counts from action). The court also ultimately addressed the motion on the merits when Defendants sought reconsideration.

Under these circumstances, the denial of bifurcation was an abuse of discretion. While New Mexico law does not mandate bifurcation, the bias created by the corporate wealth evidence provided "highly persuasive" reasons for doing so here. *Miller v. Conn. Gen. Life Ins. Co.*, 84 N.M. 321, 324, 502 P.2d 1011, 1014 (Ct. App. 1972) (concurring opinion). Tellingly, Plaintiff does not point to

any prejudice she would have suffered because of bifurcation. Nor does she attempt to defend the trial court's erroneous reasoning on the merits.

At bottom, Plaintiff contends there could not have been an abuse of discretion here because "there is no evidence that RCI's wealth improperly influenced the jury." Plaintiff Br. 35. But that is plainly incorrect. The jury's allocation of damages – in which it found that an intentional rapist was responsible for only 5 percent of Selk's pain and suffering – is unsupportable. Plaintiff's counsel expressly urged the jury to punish Defendants because of their wealth. Tr. 17:153. Likewise, he urged the jury to assign just 10 percent of the fault to Thurman Williams, telling them to "[l]et Detective Brisco deal with Thurman Williams." *Id.* at 147. This was a bald request to the jury to make Defendants pay for an injury resulting from the criminal act of a third party.

C. The Trial Court's Admission of Seven Critical Incident Reports Improperly Inflated the Compensatory Damage Award.

Plaintiff fails in her effort to justify the admission of the Critical Incident Reports.

First, contrary to Plaintiff's passing suggestion, Plaintiff's Br. at 36, there was no waiver here. Defendants repeatedly objected to the introduction of the Critical Incident Reports, even going so far as to submit a bench brief in support of the trial judge's initial ruling denying the admissibility of the Reports. RP2608-11.

No more was necessary to preserve the objection. *Harbison v. Johnston,* 2001-NMCA-051, ¶ 7, 130 N.M. 595, 28 P.3d 1136.

Second, Plaintiff also suggests the reports were admissible to show "[c]onsciousness of wrongdoing" and because they were "relevant to 'the policy and procedures of [a defendant] in training its employees." Plaintiff's Br. at 35, 37. Yet Plaintiff never attempted to show how these incidents were the product of inadequate training. The only purpose these reports served was to inflame the juror's passions. The result was a compensatory award that improperly reflected prior unrelated conduct.

III. THE REMITTED PUNITIVE AWARD REMAINS UNCONSTITUTIONALLY HIGH.

Even after remittitur, the punitive award against RCI is the largest award, by far, that New Mexico has ever imposed in a non-fatal case, and it warrants further reduction under three guideposts that govern the review of punitive awards. *First*, Plaintiff misconstrues the governing case law concerning the proper ratio of punitive damages to compensatory damages. While there is no fixed constitutional limit, the Supreme Court has held that where 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 for

pain and suffering in this case was unprecedentedly high and – particularly in light of the jury's decision to assign just 5 percent of the fault to Thurman Williams – must be understood as already containing a substantial punitive component. *State Farm*, 538 U.S. at 426-27.

Plaintiff acknowledges that the compensatory award here was "relatively substantial," but contends that a ratio in excess of 1:1 is appropriate because of RCI's wealth. But wealth does not make an unconstitutional award constitutional, and the Supreme Court announced its 1:1 guidance in cases involving Exxon and State Farm, two large corporations. Plaintiff also contends that a higher ratio is justified because injuries of the type at issue are hard to detect. But there is no evidence to support this contention. College House employees detected Selk's injury within 24 hours and immediately reported it. *See, e.g.*, Tr. 14:141. Plaintiff cannot invoke the specter of other injuries that it has failed to prove to justify this award. Finally, Plaintiff notes that this Court once approved a punitive award that had a ratio of 18:1. *See Akins v. United Steel Workers of Am. Local 187*, 2009-NMCA-051, ¶¶ 36-37, 146 N.M. 237, 208 P.3d 457. What Plaintiff neglects to mention is that the compensatory award in *Akins* was $1,661, or roughly .0035% of the $4.7 million awarded here. *Id.*

Second, Plaintiff erroneously argues that the fact that RCI's conduct was not intentional does not support a lower award. Even "[r]eckless conduct is not

intentional or malicious." *Exxon Shipping*, 128 S. Ct. at 2621. Plaintiff cites a host of cases in an effort to argue that RCI was equally culpable, but in several of those cases the court found that the punitive award was unconstitutionally high (*BMW*, *State Farm*, *Exxon*), and in the rest the award was a bare fraction of the one at issue here. *Albuquerque Concrete Coring Co. v. Pan Am World Servs., Inc.*, 118 N.M. 140, 879 P.2d 772 (1994) ($133,000 award); *Chavarria v. Fleetwood Retail Corp.*, 2007-NMSC-046, 143 P.3d 717, ($300,000 award); *Akins*, 2009-NMCA-051 ($30,000 award).

Third, it is impossible to say that RCI had "fair notice" of the penalties it could face. Plaintiff acknowledges that the civil penalties imposed by law would not have given Defendants notice, but contends that the possibility of criminal penalties was sufficient. Plaintiff Br. at 46. Criminal penalties, however, are an improper comparison because they cannot be imposed without substantial additional protections for the defendant. *State Farm*, 538 U.S. at 428.

CONCLUSION

For the foregoing reasons, this Court should award Defendants their requested relief.

STATEMENT OF COMPLIANCE

This Reply Brief was prepared using a proportionally-spaced typeface and complies with Rule 12-213(F)(3) NMRA 2010. This Reply Brief consists of 4,397 words according to the Microsoft Word 2007 word processing program on which it was prepared.

Respectfully submitted,

YENSON, LYNN, ALLEN & WOSICK, P.C.

Terrance P. Yenson
Matthew L. Connelly
April D. White
4908 Alameda Blvd NE
Albuquerque, NM 87113-1736
(505) 266-3995

JENNER & BLOCK, LLP

David Bradford
353 N. Clark Street
Chicago, IL 60654-3456
(312) 222-9350

Paul M. Smith
Matthew S. Hellman
1099 New York Avenue, N.W.
Suite 900
Washington, DC 20001-4412
(202) 639-6000

Counsel for Appellants

I hereby certify that a true and correct copy of the foregoing was forwarded to:

SHAPIRO, BETTINGER, CHASE, LLP
Gregory W. Chase, Esq.
Carl Bettinger
7411 Jefferson NE
Albuquerque, NM 87109

Thomas E. Lilley, Esq.
330 North Main
Roswell, NM 88201

Robin A. Goble, Esq.
P.O. Box 208
Corrales, NM 87048-0208

R. Ted Cruz
Claire Swift Kugler
1000 Louisiana, Ste. 4000
Houston, TX 77002

Attorneys for Plaintiff

this 2nd day of December, 2010.

Matthew L. Connelly