IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

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

Plaintiff/Appellee/Cross-Appellant,

v.

Ct. App. No. 30,319
Bernalillo County
D-202-CV-2007-2379

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

Defendants/Appellants/Cross-Appellees.

REPLY BRIEF OF PLAINTIFF/APPELLEE/CROSS-APPELLANT LARRY SELK

ORAL ARGUMENT REQUESTED

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STATEMENT OF COMPLIANCE

As required by Rule 12-213(G) NMRA, we certify that this brief complies with the type-volume limitation of Rule 12-213(F)(3) NMRA. According to Microsoft Office Word 2003, the body of the Reply Brief, as defined by Rule 12-213(F)(3) NMRA, contains 4395 words.

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ARGUMENT

Restoring the jury's punitive damages award is not only justified to punish RCI's reprehensible behavior for its role in allowing the brutal rape of a disabled man in its care, it is also necessary to deter RCI—which profited handsomely through cost-saving policies that directly caused the rape—and other wrongful caregivers so that no one else must suffer as Mr. Selk and his family have.

RCI professes to be shocked, shocked, that a jury could conclude that a substantial punitive damages award is necessary to punish and deter a billion-dollar company that hired a rapist and turned a blind eye to problems so severe that the State of New Mexico was forced to cancel its contract with RCI's New Mexico facilities. Given the difficulty of detecting and punishing sexual abuse of the disabled, the jury's punitive damages award of $48 million is hardly so grossly excessive as to violate due process.

Allowing the trial court's reduction of that award to stand will undermine the vital role of punitive damages in New Mexico, and will allow the Nation's largest provider of services to the developmentally disabled to receive a mere slap on the wrist for causing the brutal rape of an exceptionally vulnerable individual under its care. Nothing in law or logic requires, much less permits, such a result.

A. RCI Is Not Entitled To A More Lenient Standard Of Review

RCI's attempt (at 14-17) to secure a more lenient standard of review for the trial court's order is meritless. RCI relies on a handful of out-of-state cases to argue for an abuse-of-discretion standard, but in New Mexico it is clear that a *de novo* standard applies where, as here, a court is "passing on a [trial] court's determinations of the constitutionality of punitive damages awards." *Aken v. Plains Elec. Generation & Transmission Coop., Inc.*, 2002-NMSC-021, ¶17, 132 N.M. 401, 49 P.3d 662 (quotations omitted).

A more deferential standard might make sense where the Court is reviewing a remittitur based on common-law grounds of substantial evidence or passion and prejudice. But the only issue on this cross-appeal is the award's constitutionality. Under *Aken*, which controls here, the reviewing standard for that inquiry is *de novo*—with any doubts about the propriety of the award to be resolved in favor of the jury's verdict, not the trial court's judgment. *Allsup's Convenience Stores, Inc. v. N. River Ins. Co.*, 1999-NMSC-006, ¶ 14, 127 N.M. 1, 976 P.2d 1.

B. The Size Of Other Punitive Damages Awards Is Irrelevant

RCI's primary argument is that the jury's award is simply too large in relation to other awards. RCI Br. 1, 12, 20. But a decision issued by this Court after RCI filed its brief confirms the error of RCI's "comparative analysis" approach.

In *Grassie v. Roswell Hospital Corp.*, this Court upheld a $10 million punitive damages award in a wrongful-death case. *Grassie* re-affirmed that the constitutional analysis of a punitive damages award "is *obviously* fact and case dependent." No. 28,050, slip op. ¶¶ 50, 56 (N.M. Ct. App. Nov. 30, 2010) (emphasis added); *see also State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) ("[T]he precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff."); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 457 (1993) ("[N]o two cases are truly identical."). The sizes of awards in other cases are therefore irrelevant to whether the award in this case comports with due process.

Indeed, the punitive damages necessary to punish and deter one defendant may be wholly insufficient as to another. *Atencio v. City of Albuquerque*, 911 F. Supp. 1433, 1446-47 (D.N.M. 1995). Where a "defendant is a billion dollar corporation . . . a punitive damages award of $1,000,000 would be a slap on the wrist and, as such, would be unlikely to act as any deterrence and would be devoid of any meaningful retributive value." *Id.* For that reason, courts regularly uphold substantial punitive damages awards where warranted to deter or punish a particular defendant. Selk Br. 35-36 n.2.

Contrary to RCI's assertion (at 12), Mr. Selk's "central premise" is not that "no punitive award could ever be too high." His argument is simply that the jury's

award *in this case* does not violate due process. Selk Br. 23-47. RCI attempts to distract the Court from the egregious facts of *this* case by focusing on awards in *other* cases. But awards in other cases do not guide the analysis and cannot justify remitting an award that otherwise satisfies due process. RCI's approach violates the rule that punitive damages "should not be viewed in the abstract or compared with awards from other cases." *Time Warner Entm't Co. v. Six Flags Over Ga., LLC*, 563 S.E.2d 178, 185 n.9 (Ga. App. 2002) (upholding largest award in state's history of $257 million).

RCI's cited cases prove the point. They are inapposite either because they involve relatively low net-worth defendants and thus raise different issues of punishment and deterrence (*see Eckhardt v. Charter Hosp. of Albuquerque, Inc.*, 1998-NMCA-017, ¶¶ 1, 5, 124 N.M. 549, 953 P.2d 722 (social worker); *Seeley v. Chase*, 443 F.3d 1290, 1291 (10th Cir. 2006) (former police officer)), or because they involve different harms and less vulnerable victims. *Coates v. Wal-Mart Stores, Inc.*, 1999-NMSC-013, ¶¶ 6-8, 19, 127 N.M. 47, 976 P.2d 999 (sexual harassment of adults without disabilities).

RCI also wrenches out of context *Aken*'s mention of "unifying precedent" in arguing for its flawed comparative-analysis approach. *Aken* was not mandating the comparison of awards, but was explaining the importance of *de novo* review in assessing the constitutionality of awards. 2002-NMSC-021, ¶ 18. *Aken* makes

clear that "[g]ross excessiveness" must take its "substantive content from the *particular* contexts in which the standards are being assessed." *Id.* In this "particular" context, the jury properly assessed RCI's reprehensibility. Selk Br. 26-29. Its punitive damages award was not grossly excessive and should be restored.

C. RCI's Attempts To Deny The Reprehensibility Of Its Conduct Only Confirm The Need To Restore The Jury's Award

RCI concedes, as it must, that reprehensibility is the most important factor in the constitutional inquiry. RCI Br. 17. In conducting that inquiry, the Court's role is limited to ensuring the punitive damages are not so grossly excessive as to offend due process. Selk Br. 23. RCI's efforts at downplaying its reprehensible conduct fall far short of showing the jury's award was unconstitutionally excessive, and its continued attempts to evade responsibility only confirm the necessity of restoring the jury's punitive damages award in full.

1. RCI Concedes That Larry Selk Suffered "Serious Physical Harm"

RCI grudgingly concedes that this case involved "serious physical harm." RCI Br. 30. Such injuries rank at the very top of the reprehensibility scale. *State Farm*, 538 U.S. at 419. The injuries here are serious indeed. Mr. Selk was sodomized in his own bedroom by someone RCI negligently hired and entrusted with his care. Tr-13:103, 116. The nurse at the hospital documented six lacerations in Mr. Selk's rectum, three of which were bleeding and one that was

nearly two inches long. Tr-7:30-32. Experts for both sides acknowledged that psychological scarring from the assault would last for Mr. Selk's lifetime. Tr-14:27-31, 33; Tr-15:48. By any reasonable measure, RCI's conduct in inflicting Mr. Selk's injuries ranks at the "high end of the reprehensibility scale[.]" *Jolley v. Energen Res. Corp.*, 2008-NMCA-164, ¶ 38, 145 N.M. 350, 198 P.3d 376.

RCI attempts to minimize the atrocity of the rape by claiming that Mr. Selk suffered only "injuries consistent with rape." RCI Br. 4. RCI downplays the assault's impact—and its own failures that caused the rape—by insisting that Mr. Selk "received *every* recommended service and therapy" and "proper care" *after* the rape. *Id.* at 14, 24, 35 (emphasis added). But RCI's self-serving assertions are belied by the record and do not lessen the severity of Mr. Selk's injuries.

RCI's characterization of Mr. Selk's suffering as short-lived is contrary to the jury verdict and flatly contradicted by the record. RCI accuses Mr. Selk of "incorrectly stat[ing]" defense expert Dr. Roll's testimony (RCI Br. 7 n.3), but its expert's testimony speaks for itself: "[T]he consequences of this rape would last for the rest of [Mr. Selk's] lifetime." Tr-15:48. RCI's reliance on its untrained employees' self-serving testimony that six weeks after the rape they didn't notice any difference in Mr. Selk (RCI Br. 5) ignores that those employees were admittedly unqualified to identify signs of distress. Selk Br. 9. And given the contrary testimony of Mr. Selk's world-renowned expert, Dr. Burgess, that Mr.

Selk suffered permanent psychological injury (not to mention RCI's own expert's admission of the same), the jury was free to reject the employees' testimony altogether.

2. RCI Ignores Its Victim's Extreme Vulnerability

In arguing that its conduct was insufficiently reprehensible, RCI ignores that Larry Selk was exceptionally vulnerable—a key factor in the reprehensibility analysis. Selk Br. 31. RCI's own expert acknowledged that *up to 70 percent* of disabled people suffer abuse at some point in their lifetime. Tr-15:131; *see also* Br. of *Amicus* ARC 7-8 (about half of developmentally disabled persons surveyed had been sexually abused or assaulted *more than ten times*). As this Court has warned, "[d]efendants cannot claim to be surprised by a large award of punitive damages, especially when the result of [their actions were] so tragically predictable." *Atler v. Murphy Enters., Inc.*, 2005-NMCA-006, ¶ 24, 136 N.M. 701, 104 P.3d 1092.

3. RCI's Conduct Involved Repeated Bad Acts

RCI also attempts to diminish the reprehensibility of its conduct by insisting that this is "not a case of repeated bad acts." RCI Br. 24. But RCI does not dispute that its own compliance audit showed a complete "system breakdown" in human resources and, even though it indisputably had the authority to implement any necessary changes, it repeatedly ignored reports from both its own employees

and the New Mexico Department of Health that its residents were at a disproportionately higher risk for abuse and neglect than residents of other service providers. Selk Br. 32.

The jury was instructed without objection not only that it could find that RCI negligently hired the man who raped Mr. Selk, but also that RCI negligently operated, managed, or supervised College House. RP8:2721. RCI is thus mistaken that the jury could only have based its liability finding on negligent hiring. And RCI cannot avoid the conclusion that its conduct was highly reprehensible because its conduct involved repeated acts of neglect and abuse directed at individuals RCI knew were extremely vulnerable and completely dependent on RCI for their safety and well-being. *See* Selk Br. 31-33.

4. RCI's "Intentionality" Argument Is Baseless

RCI maintains that substantial punitive damages are not justified because its actions "were not the product of intentional wrongdoing." RCI Br. 18. RCI is wrong. It is not "uncontested" that RCI did not act intentionally, and Mr. Selk has never conceded the point. Selk Br. 33-35. The jury may well have found RCI's conduct intentional, wanton, or reckless. RP8:2747. In any event, New Mexico courts define recklessness as "the *intentional* doing of an act with utter indifference to the consequences." *Clay v. Ferrellgas, Inc.,* 118 N.M. 266, 270, 881 P.2d 11 (1994) (emphasis added). As demonstrated in Mr. Selk's Brief-in-Chief (at 33-39),

no basis exists for RCI's argument that because (in RCI's view) its conduct was not "intentional" (in the sense that RCI did not affirmatively desire that Mr. Selk be raped), the jury's punitive damages award was *de facto* grossly excessive. *See Grassie*, No. 28,050, slip op. ¶¶ 52, 57 (holding that $10 million punitive damages based on indifference to or reckless disregard of the health of others involved sufficiently reprehensible conduct). Instead, RCI was simply "utterly indifferent" to that risk.

Moreover, RCI ignores the U.S. Supreme Court's teaching that "[a]ction taken *or omitted in order to augment profit* represents an *enhanced* degree of punishable culpability" no less than "willful or malicious action, taken with a purpose to injure." *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2621 (2008) (emphasis added). That is precisely the case here. RCI took no corrective action when confronted with data demonstrating that its New Mexico residents were at far greater risk of abuse and neglect than those of other service providers. Tr-10:191, 193-200, 206-07.

Instead, RCI focused on profits, implemented a pay freeze, and repeatedly cut corners on proper employee hiring, training and supervising procedures—leading to extraordinarily high staff turnover rates that were highly detrimental to the quality of services provided to its residents. Selk Br. 11-15; Tr-12:56. Although RCI professes not to understand how those actions are relevant to the

reprehensibility analysis, those actions—taken "in order to augment profit"—evince an "enhanced degree" of culpability just as if RCI had taken them "with a purpose to injure" Mr. Selk. *See Exxon*, 128 S. Ct. at 2621.

RCI contends (at 18) that the rape of Mr. Selk cannot be "imputed" to RCI. But that argument seriously misunderstands Mr. Selk's claims and the jury's findings. The jury found that RCI's *own* negligent hiring of Mr. Selk's rapist and its *own* appalling record of poor facility management proximately caused Mr. Selk's injuries. RP8:2717. The jury properly found RCI liable for its *own* torts. It did not "impute" anything to RCI and was never instructed to do so.

D. The Record Refutes RCI's Claim That It Lacked Sufficient "Notice"

RCI complains that the jury's punitive damages award violates due process because RCI lacked sufficient "notice" of any problems. RCI Br. 26. Given that those problems were so serious, pervasive, and chronic—and the resulting danger so great that the State ultimately cancelled its contract with Res-Care New Mexico—RCI's "notice" argument strains credulity. Indeed, RCI's own expert testified that the State *should have* cancelled the contract long before it did so. Tr-15:166.

RCI claims it received only one critical incident report involving College House, where Mr. Selk lived. RCI Br. 26. That is not so. RCI received *three* other critical incident reports (created in the month before the rape) involving

College House. Exs. 101, 434, 435. Moreover, the jury heard that the critical incident reports sent to RCI showed RCI knew of at least two alleged incidents of sexual abuse and four incidents of physical abuse or neglect in New Mexico before Mr. Selk's rape. Selk Br. 16-17. RCI took no action in response to any of those reports. Tr:12-55.

Contrary to RCI's claims (at 13, 26), Mr. Selk's argument does not depend "in large part" on other compelling evidence Mr. Selk has shown the trial court erroneously excluded. In addition to the cancelled contract and critical incident reports noted above, the jury also considered abundant other evidence of notice, such as employee surveys, human resources surveys, state warning letters, and state fines. Selk Br. 16.

RCI complains (at 29 n.11) that not even those seven critical incident reports should have been admitted, but that argument is foreclosed by this Court's recent decision in *Grassie*. There, the Court confirmed that a jury can properly consider "background or contextual evidence," such as the reports, and that such evidence "need not be about acts which are a proximate cause of the plaintiff's damages" or "constitute a completed tort." *Grassie*, No. 28,050, slip. op. ¶ 45. The critical incident reports are not only relevant to causation, but also demonstrate RCI's callous disregard for the health and safety of Mr. Selk and the other disabled residents under its care.

RCI's cited authorities (at 27-29) do not alter that conclusion. In *Philip Morris USA v. Williams*, the U.S. Supreme Court specifically approved such "[e]vidence of *actual* harm to nonparties," because it "can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, *and so was particularly reprehensible*." 549 U.S. 346, 355 (2007) (emphasis added). *State Farm* is not to the contrary, because plaintiffs there (unlike Mr. Selk) "identified scant evidence of repeated misconduct of the sort that injured them." 538 U.S. at 422-24. RCI's other cases are similarly inapposite. *See* RCI Br. 26, 28-29 (citing two cases approving the exclusion of evidence "radically different from the conduct at issue" and one where the trial court improperly *excluded* evidence).

E. The Ratio Raises No Constitutional Concerns

Courts examine ratios merely to confirm that the punitives are not "so unrelated to the injury and actual damages proven as to plainly manifest passion and prejudice rather than reason or justice." *Aken*, 2002-NMSC-021, ¶ 23. Properly analyzed, the single-digit ratio here confirms that the jury's award satisfies that standard and should be restored. If the ratio approved in *Grassie* "just slightly greater than 10 to 1 . . . is not so large as to raise concerns of constitutional dimension" (No. 28,050, slip op. ¶ 57), then the ratio here—just slightly *less* than 10 to 1—is similarly permissible.

RCI attempts to manufacture constitutional concerns by artificially inflating the ratio to 15:1, arguing that the denominator should reflect only the compensatory damages attributable to RCI. RCI Br. 31. That is incorrect. As this Court made clear in *Eckhardt*, "[p]unitive damages are *personal to the wrongdoer.*" 1998-NMCA-017, ¶ 33 (emphasis added). And the New Mexico and U.S. Supreme Courts have held that the proper ratio is between the punitive damages awarded and the "actual harm inflicted on the plaintiff." *Aken*, 2002-NMSC-021, ¶ 23 (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 580 (1996)). RCI's contrary approach—which the trial court erroneously accepted—violates that rule and would be in serious tension with *Allsup's*, which refused to remit a punitive damages award even though the compensatory damages against the defendant were offset by an award of compensatory damages against the plaintiff on the defendant's counterclaim. 1999-NMSC-006, ¶ 54.

RCI cites only a single case in support of its position—*Romo v. Ford Motor Co.*, 6 Cal. Rptr. 3d 793, 812 n. 14 (Cal. App. 2003)—but that out-of-state case is unhelpful as it did not specifically analyze the issue. Other courts have expressly rejected RCI's approach. *See Hayes Sight & Sound, Inc. v. ONEOK, Inc.*, 136 P.3d 428 (Kan. 2006) (refusing to reduce punitive damages based on defendant's share of compensatory damages); *I-Gotcha, Inc. v. McInnis*, 903 S.W.2d 829, 840 (Tex. App. 1995) ("[T]he public policy interests of using punitive damages as

punishment rather than as compensation . . . are best served by having the punitive damages related to the total amount of harm[.]").

As RCI concedes, this Court has previously upheld an award that resulted in an 18:1 ratio (*Akins v. United Steelworkers of Am. Local 187*, 2009-NMCA-051, ¶¶ 36-38, 146 N.M. 237, 208 P.3d 457, *aff'd*, 2010-NMSC-031, 148 N.M. 442, 237 P.3d 744), and recognized that "single-digit multipliers might not be appropriate in egregious cases." *Grassie*, No. 28,050, slip op. ¶ 56 (citing *State Farm*, 538 U.S. at 410). By any reasonable metric, this qualifies as an "egregious" case, justifying even the 15:1 ratio RCI (wrongly) claims. The U.S. Supreme Court decisions RCI cites (at 31) are not to the contrary, as they provide no hard-and-fast rule against double-digit multipliers, and critically dealt with economic (not physical) harms and exponentially higher ratios. *Exxon*, 128 S. Ct. at 2626-27; *State Farm*, 538 U.S. at 412 (145:1 ratio); *BMW*, 517 U.S. at 583 (500:1 ratio).

F. RCI Does Not Dispute That Substantial Punitive Damages Awards Can Be Justified Where The Injury Is Difficult To Detect And Likely To Go Unpunished

The U.S. and New Mexico Supreme Courts have held that where, as here, an injury is difficult to detect and less likely to be discovered, a higher punitive damages award is justified. *Exxon*, 128 S. Ct. at 2622; *Chavarria v. Fleetwood Retail Corp.*, 2006-NMSC-046, ¶ 38, 140 N.M. 478, 143 P.3d 717. Where, as here, the defendant's conduct results in injuries likely to go undetected, punitive

damages awards "serve the additional purpose of limiting the defendant's ability to profit from its fraud by escaping detection and (private) prosecution." *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 677 (7th Cir. 2003) (Posner, J.) ("If a tortfeasor is 'caught' only half the time he commits torts, then when he is caught he should be punished twice as heavily in order to make up for the times he gets away.")

Significantly, RCI does not take issue with *any* of the statistical information proffered by Mr. Selk and *amicus* demonstrating that the sexual abuse of the disabled—particularly those like Mr. Selk who live in care facilities—is rarely detected and even more rarely punished. *See* Selk Br. 40-41; Br. of *Amicus* ARC 14 (citing New Mexico survey finding that "[o]nly one-third (32%) of sex crimes [involving disabled victims] that came to the attention of service providers were reported to law enforcement").

Instead, RCI weakly claims no "evidence" exists in the record to that effect. That argument is meritless. The jury heard ample evidence that the State was unable to prosecute Thurman Williams because any DNA evidence was destroyed at College House, and because Mr. Selk cannot speak (and thus cannot testify). Tr-13:118-19. And it is this Court—not the jury—that decides whether a punitive damages award comports with due process. *Akins*, 2010-NMSC-031, ¶ 30.

RCI cites no case, and we know of none, limiting this Court's due-process analysis to the specific evidence before the jury. Such a rule would make no sense. If that were the law, then this Court would also be prohibited from considering "evidence" concerning comparable criminal and civil penalties unless that "evidence" was before the jury. But that is not the law. Although RCI claims (at 35) that the U.S. Supreme Court's decision in *TXO* is "outdated," that Court has expressly re-affirmed *TXO*'s teaching that "'the harm likely to result from the defendant's conduct as well as the harm that has actually occurred'" is a proper factor to consider in assessing the constitutionality of a substantial punitive damages award. *BMW*, 517 U.S. at 581 (quoting *TXO*, 509 U.S. at 453). Nor have "public safety aspects of a defendant's conduct" been somehow "precluded by *Philip Morris*, 549 U.S. at 350." *Grassie*, No. 28,050, slip op. ¶ 54; *Jolley*, 2008-NMCA-164, ¶ 34. The jury's award should be reinstated.

G. The Jury Properly Considered RCI's Wealth In Assessing The Punitive Damages Necessary To Punish And Deter RCI

RCI's claim (at 36) that it was "inappropriate" for the jury to consider evidence of its wealth when assessing punitive damages is directly contrary to New Mexico law. *See* UJI 13-1827; *DeMatteo v. Simon*, 112 N.M. 112, 115, 812 P.2d 361, 364 (Ct. App. 1991) ("Evidence of a defendant's wealth is relevant for determining the proper amount of punitive damages.").

State Farm does not say otherwise. It merely states that a defendant's wealth, *without more*, "cannot make up for the failure of other factors, such as 'reprehensibility,' to constrain significantly an award that purports to punish a defendant's conduct." *State Farm*, 538 U.S. at 428 (quoting *BMW*, 517 U.S. at 591 (Breyer, J., concurring)). No such "failure" exists in this case, where RCI's conduct is highly reprehensible.

RCI claims (at 38) that restoring the jury's punitive damages award would "have a crippling effect" on its business, but that assertion is flatly contradicted by RCI's Chief Financial Officer's testimony that a $48 million award would merely impact RCI's ability to increase its revenues, which would cause RCI's "*profitability* to decline." RP8:2858 (emphasis added). The jury's punitive damages award comprises only 3.1 percent of RCI's gross revenues and 11 percent of its net worth. Selk Br. 44-45; *contrast Stogsdill v. Healthmark Partners, LLC*, 377 F.3d 827, 833 (8th Cir. 2004) (reducing award more than eight times nursing home's net worth). Restoring the jury's award will hardly "cripple" RCI's business.

RCI's cited cases (at 21-22) are inapposite. RCI focuses on their smaller awards, but does not analyze whether they were sufficient to punish and deter the particular defendants, or whether the facts and circumstances in those cases are even analogous to this one. *See, e.g., Abeita v. N. Rio Arriba Elec. Coop.*, 1997-

NMCA-097, 1244 N.M. 97, 946 P.2d 1108, ¶ 11 (finding plaintiff 30 percent at fault); *Saiz v. Belen Sch. Dist.*, 113 N.M. 387, 393, 827 P.2d 102, 108 (1992) (dealing with compensatory, not punitive, damages).

RCI contends that the jury's punitive damages award is grossly excessive because a punitive element was "necessarily" contained in the compensatory damages. RCI Br. 32. RCI's sole authority for that proposition is a statement in *State Farm*, but there the Court emphasized that plaintiffs suffered "harm . . . in the economic realm, not from some physical assault or trauma." 538 U.S. at 426. And on remand, the Utah Supreme Court emphasized that the emotional harm to the plaintiffs was "more closely akin to physical assault or trauma." *Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409, 415 (Utah 2004) (awarding damages in 9:1 ratio); *see also Wackenhut Corrections Corp. v. De la Rosa*, 305 S.W.3d 594, 660 n.62 (Tex. App. 2009) (*State Farm* did not "intend[] to imply that a plaintiff's recovery for mental anguish damages always includes a punitive element.")

In any event, there is no way to know how much of the jury's compensatory award in this case was for such damages (as opposed to the physical injuries Mr. Selk suffered). *See Little v. Allstate Ins. Co.*, 2008-NMCA-012, ¶ 53, 143 N.M. 506, 177 P.3d 1080 ("Allstate may be wrong about the amount the jury attributed to" certain compensatory damages). Such doubts must be resolved in favor of the jury's award. *Allsup's*, 1999-NMSC-006, ¶ 14.

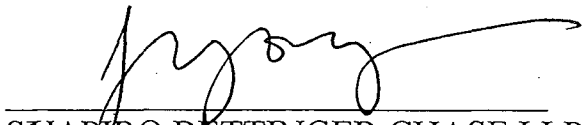
H. RCI's Focus On "Comparable" Civil Penalties Is Unhelpful To The Analysis

RCI points to a $5,000 a day civil penalty and argues that it could not possibly have been on notice about a punitive damages award as substantial as the jury's in this case. RCI Br. 38. But as this Court held in *Grassie*, where, as here, comparable civil penalties such as a $5,000 fine are "too low to have a reasonable deterrent effect," they are "not helpful to the analysis or resolution of the case." No. 28,050, slip op. ¶¶ 58, 61.

CONCLUSION

For the foregoing reasons, the trial court's remittitur order should be reversed and the jury's punitive damages award reinstated.

Respectfully submitted,



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