# 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.**

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## BRIEF-IN-CHIEF OF PLAINTIFF/APPELLEE/CROSS-APPELLANT LARRY SELK

**The Honorable Nan Nash, presiding**

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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 Brief-in-Chief, as defined by Rule 12-213(F)(1) NMRA, contains 10,907 words.

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## SUMMARY OF FACTS AND PROCEEDINGS

### A. Nature Of The Case

Larry Selk is a profoundly mentally and developmentally disabled man who cannot speak or effectively use his limbs. Tr-6:49. While entrusted to the care of the Res-Care College House living facility, he was brutally raped by one of his caregivers, Thurman Williams. Tr-13:103, 116. His sister, Rani Rubio, filed this personal injury action on Mr. Selk's behalf against Res-Care, Inc. ("RCI"), and its New Mexico operation, Res-Care New Mexico, Inc. ("RCNM") (together, "Defendants") for their willful, wanton, and reckless conduct in causing Mr. Selk's injuries. RP1:301-12.

The case was tried to a jury over a three-week period. Tr-5–Tr-18. The jury unanimously found that RCNM and RCI each, independently of one another, owed a duty to provide a safe and healthy environment for Mr. Selk; that they both breached that duty by their negligent hiring and negligent acts; and that they were willful, wanton, or reckless in their misconduct, which in turn caused Mr. Selk's injuries. RP8:2717, 2757-59. The jury found RCI, RCNM, and RCI employee Thurman Williams liable for the rape of Mr. Selk. The jury expressly found that RCI was negligent in hiring Williams (a fact that RCI fails to mention in its opening brief), and that RCI's negligence in hiring him was a cause of injuries and damages to Mr. Selk. RP8:2717. The jury also found Defendants' conduct so

reprehensible that it awarded $49,200,000 in punitive damages in addition to $4,950,000 in compensatory damages. RP8:2758-59.

## B. Summary Of Background Facts

### 1. Larry Selk's Care Is Entrusted To Defendants

Mr. Selk is completely dependent upon others for every aspect of daily living. Caregivers must bathe Mr. Selk, feed him, brush his teeth, and help him in and out of bed. Tr-6:84; Tr-11:84. Mr. Selk has nine brothers and sisters, and also had a severely disabled sister who died several years ago. Tr-11:83, 100. His parents were unable to provide the level of care that he needed, so Mr. Selk has been in an institution or residential care facility for most of his life. Tr-11:103-04.

Despite those serious limitations, Mr. Selk is a generally happy, friendly person, who always made his caregivers smile. Tr-6:84, 170. He communicates through smiles, frowns, and body language, and he makes choices by focusing on pictures of foods or activities shown to him by his caregivers. Tr-6:134-45, 170-71. Mr. Selk enjoys time with his family, books on tape, Spanish music, and outdoor activities. Tr-11:82-83, 119.

Mr. Selk lived at College House, an RCI living facility in Roswell, New Mexico, that provided 24-hour care to severely disabled residents. Tr-6:15; *see also* Tr-7:15. Mr. Selk was entrusted to the care of College House years before the assault. Tr-11:105-06. College House was his home.

## 2. RCI Negligently Hires Thurman Williams

Turnover at RCI's group homes in Roswell was high. Each home routinely lost two to three caregivers per week. Tr-7:90. Mikki Rogers, the Division Director for the New Mexico Department of Health ("DOH"), Developmental Disabilities Support Division, testified that Defendants had an annual employee turnover rate of 70 percent in New Mexico, compared to the turnover rates for similar providers across the entire state, which average 40-45 percent. Tr-10:193, 195.

In the spring of 2004, Defendants' program coordinator John Ray received a report about suspected cocaine abuse at College House. Exs. 434, 435; Tr-7:69, 93-94; Tr-9:98. The DOH recommended employee drug testing. Tr-7:93-94, 158. The results were disturbing: All told, nine employees were terminated for either failing or refusing to take the drug test. Tr-7:96-97. One College House employee tested positive for methamphetamines, two tested positive for marijuana, and one tested positive for alcohol while on the job. Tr-7:99, 103-04. In addition, another College House employee was terminated during that time period for using a resident's Social Security number to arrange for cable and telephone services for the employee. Tr-7:104.

Ray testified that he was "hiring left and right" and that there was "mass confusion" in the efforts to replace the terminated employees—with 12 new

employees hired in 17 days. Tr-7:112-13. One of those new hires was Thurman Williams, who sexually assaulted Mr. Selk.

Williams's employment application listed his last three jobs, but left blank the reasons for leaving two of those jobs. Ex.243; Tr-7:134. Although the application stated that he had five years of relevant experience, that claim was expressly inconsistent with his job history. Tr-12:74-75. There is no evidence that anyone followed up on the blanks or the inconsistency. Tr-8:91-92; Tr-12:75. Ray and the local Human Resources Coordinator admitted they did not check Williams's references. Tr-7:134, 182; Tr-8:91-92. Indeed, Ray testified that someone forged Ray's name on the reference-check form. Tr-7:135. No one called Williams's previous employers to determine if he was suitable for caring for the vulnerable residents of College House. Tr-7:183, 185; Tr-8:91-92; Tr-10:7-8. Even RCI vice president Larry Weishaar admitted those actions were wrong. Tr-8:144-45. Nonetheless, Williams received a written offer of employment from RCI on May 20, 2004. Tr-7:112.

Given that College House caregivers' training is paid and on-the-clock, one would expect it to be documented in an employee's file. Tr-7:116; Tr-8:33. Williams's file, however, contains no evidence of any training. Tr-8:92; Tr-9:62. Instead, his timecard shows that he worked just one single shift for RCI: midnight to 8:00 a.m. on May 24, 2004—the night he raped Mr. Selk. Tr-7:140.

### 3. Larry Selk Is Brutally Raped By An RCI Employee

Although new employees at College House were supposed to "shadow" another caregiver for one to three days before being allowed to work alone with a resident (Tr-6:82-83, 132, 150, 159, 169-70), Williams admitted during RCI's investigation that he was alone with Mr. Selk in his bedroom for 30 minutes during his only shift as an RCI employee. Ex.94; Tr-9:86, 115.

The next day, Mr. Selk went to Dayhab, a facility outside of his home, for most of the day. Tr-6:77, 115-16. Nothing untoward happened at Dayhab. Tr-6:115-17. Back at College House, caregiver Kimberly Janisch came on duty after 4:00 p.m. and noticed that Mr. Selk's head was down. Tr-6:135-36. He had tears in his eyes. *Id.* Mr. Selk did not want to eat his dinner that evening, and he made unusual groaning noises that continued for some time. Tr-6:172. He later tensed up and groaned when she changed his soiled Depends. *Id.*

Usually, Mr. Selk's bath was a relaxing, calming event for him. Tr-6:137-38. That night, however, he pushed Janisch away, and he was "curling up in a ball like to where he didn't want [her] to wash his body." Tr-6:138. She used soap and water to wash his whole body, then noticed two red marks on his neck. Tr-6:139-40; *see also* Ex.12. They appeared to be hickeys. *Id.* Janisch immediately called in a co-worker, and the two women found blood in Mr. Selk's Depends. Tr-6:91-

93. They also discovered "that around his anal, it was bloody, and it appeared to be torn." Ex.110; Tr-6:93, 145-46, 173.

The two women called John Ray and the College House nurse. Tr-6:93. Mr. Selk cried when the nurse examined him. Tr-6:157. The group proceeded to the hospital, where a nurse certified in conducting forensic examinations for sexual assault victims (a "SANE" nurse) examined Mr. Selk. Ex.12; Tr-7:8, 11. Mr. Selk pushed, squirmed, and cried during the examination. Tr-6:146. His caregivers cried, too. *Id.*

In addition to the wounds on Mr. Selk's neck, the nurse documented six lacerations in Mr. Selk's rectum, three of which were bleeding. Ex.12; Tr-7:30-31. The nurse measured the lacerations at between two to five centimeters in length, although she testified that she could only measure as far as she could see, so the lacerations could have been longer. Tr-7:30-32. The nurse further testified that "the rectum is built to stretch a lot, so in order for there to be multiple tears like that, it would have to have been stretched a significant amount." Tr-7:32. The nurse could not tell whether the tears were caused by a penis, a fist, or another object. Tr-7:33. And she was unable to obtain all of the required samples for her examination because Mr. Selk urinated, completed a bowel movement, ate, and showered before he was taken to the hospital for examination. Ex.12; Tr-7:18. College House staff had "probably" washed his clothes by the time of the

examination, and College House did not preserve his Depends. *Id.*

The SANE nurse said there was "no doubt" in her mind that Mr. Selk had been sodomized. Tr-6:147. She prescribed three antibiotics to prevent gonorrhea, trichomonas, and chlamydia. Tr-7:34. She recommended Tylenol, sitz baths, and ice bags for Mr. Selk's comfort; follow-up testing for HIV-AIDS, syphilis, tetanus, and hepatitis B; and follow-up counseling. Tr-7:34-36, 61-62. Mr. Selk did not return home until 3:30 a.m. the next morning. Tr-6:105.

Meanwhile, the morning of the sexual assault, RCNM associate director Manny Martinez had received a call concerning Thurman Williams from the mother of another College House resident. Ex.328. She was concerned because Williams's prior employer, Tobosa (also a provider for the developmentally disabled), had suspected Williams of applying for a credit card in a resident's name. *Id.*; Tr-10:7. Much too late, Martinez called Rosy Rubio (no relation to Rani Rubio) at Tobosa. *Id.* Rubio told Martinez that she suspected Williams of "doing something illegal" and had reported him to New Mexico Adult Protective Services ("APS"). *Id.*; Tr-9:127; Tr-10:7, 17-18. Martinez placed Williams on administrative leave based on the suspicion of financial exploitation. Tr-8:99; Tr-9:127.

Rosy Rubio confirmed in her testimony that no one contacted her *before* RCI hired Williams. If anyone had, she would have stated that Williams was not

suitable for the position—and further explained that he had inappropriately kissed a resident. Tr-10:16. In another incident, Williams violated policy by leaving a Tobosa resident alone in a bathroom, knowing the resident could inflict harm upon himself—and there was evidence that the resident did bang his head against the wall in that bathroom. Tr-10:11, 19-20. After less than two months of employment, Tobosa had discharged Williams for multiple policy violations with instructions not to rehire. Tr-10:11, 15-16, 19-20, 33.

Williams reported for his second shift at College House while Mr. Selk was at the hospital. Tr-6:175. Another staff member told him he could not work and drove him home. Williams said something like, "[w]ell I know what that's all about." Tr-6:177; Tr-11:12. Human Resources initially placed all of the staff working at the time of the assault on administrative leave. Tr-7:124, 161; Tr-8:94-98. Ultimately, only Williams was terminated. Tr-7:161.

The sexual assault was not documented in either Mr. Selk's caregivers' notes or the College House nurse's notes. Ex.60; Tr-6:124-25; Tr-9:65-66. In fact, the College House nursing notes were missing from Mr. Selk's medical records. Tr-14:147-48. There is also no evidence in Mr. Selk's records that he was ever provided with any of the palliative treatments the SANE nurse had recommended, such as Tylenol or a sitz bath. Tr-9:58-59. The local RCNM risk management coordinator sent a Critical Incident Report regarding the event to RCI's

headquarters in Louisville, Kentucky. Ex.3; Tr-9:136-37. RCI never responded to that report. Tr-9:145.

Despite the high rate of sexual victimization among the disabled, no one at College House had been trained to identify or document any trauma symptoms relating to sexual abuse. Still, caregiver and family testimony showed that Mr. Selk was agitated after the rape, shaking his head from side to side. Tr-6:136; Tr-11:112. At times, the staff had difficulty feeding him, changing him, and showering him. Tr-6:96, 159. One caregiver stated:

> Mr. Selk seemed more scared, like he didn't let a lot of people get near him. He wouldn't—he would only let certain people feed him. Like he would push people away. Certain people, whenever they would try to shower him, he would curl up in his ball. He was more like, because Larry's kind of always slept quite often, you know, because, well, he usually slept pretty often, he would like stay awake.

Tr-6:148-49; *see also* Tr-6:179.

Dr. Ann Burgess—an internationally recognized pioneer in the assessment and treatment of victims of trauma and abuse who serves on the faculty of Boston College—testified that the evidence showed Mr. Selk had symptoms of rape trauma syndrome, a subcategory of post-traumatic stress disorder. Tr-14:8-9, 20, 25-28. Dr. Burgess testified that because sexual assault imprints a permanent traumatic injury on the brain's limbic system—the involuntary area of the brain that is the same in Mr. Selk as in individuals having no developmental disabilities—Mr. Selk's injuries are permanent because the "imprinting from a

severe traumatic event is always going to be there." Tr-14:27-31, 33. In Dr. Burgess's professional opinion, Mr. Selk should have received appropriate therapy—but Mr. Selk's records show that he was never assessed for any therapy in response to the rape. Tr-14:38-39.

Defendants' expert, Dr. Roll, testified that not everyone who is sexually assaulted suffers a permanent injury. Tr-15:35. Attempting to minimize Mr. Selk's suffering, Dr. Roll opined:

> [M]ost people recover from most things that happen. People recover from being in concentration camps, people recover from being kidnapped. . . . So most of the people who have had trauma happen, recover. Some with help, some without help, but it does not leave people with permanent injury or almost everybody would be permanently injured because everybody has some trauma in their lives.

*Id.* Dr. Roll went so far as to speculate that Mr. Selk "probably doesn't have memory of any of it." Tr-15:29-30. Eventually, however, Dr. Roll conceded that Mr. Selk's injuries were permanent, as "the consequences of this rape would last for the rest of [Mr. Selk's] lifetime." Tr-15:48.

The Roswell Police Department investigated the rape and identified Williams as the prime suspect. Tr-13:103, 116. Unfortunately, he could not be prosecuted because Mr. Selk is unable to provide testimony, and the SANE nurse did not find Williams's DNA on Mr. Selk. Tr-13:118-19. But the DOH; the New Mexico Children, Youth and Family Department; and New Mexico APS all

substantiated the sexual abuse. Exs.7A, 23, 66; Tr-10:62-63, 69-72, 188-89, 237-38. The APS investigators sent their findings of "institutional abuse and neglect, physical neglect, and sexual abuse" to Defendants. Tr-10:73. The Res-Care Critical Incident Report, however, erroneously states that the assault was only alleged, not substantiated. Ex.22; Tr-8:171-72.

Mr. Selk's sister and guardian, Rani Rubio, repeatedly asked Defendants for information about the attack on her brother. Defendants would not answer her questions. Tr-11:113-15. Indeed, Defendants did not even admit to Rubio that her brother had been assaulted until about three weeks before trial—over five years after the rape. Tr-11:126. Even today, Defendants continue that pattern of denial by asserting in their brief to this Court (at 3) that Mr. Selk's injuries were merely "*consistent with* a sexual assault" (emphasis added)—a characterization at odds with the uncontroverted, stipulated fact that "Larry Selk was sexually assaulted." RP7:2390; Tr-7:6.

#### 4. RCI's Hiring Of Williams, Supervision Of Resident Safety Issues, And Implementation Of Pay Freeze And Budgetary Constraints Proximately Caused Mr. Selk's Injuries

As the jury expressly found, RCI—not RCNM—hired Thurman Williams without exercising the care required for screening employees who will have access to the vulnerable individuals entrusted to RCI's care. RP8:2717. By giving Williams access to Mr. Selk as his caregiver, RCI represented that Williams had

been appropriately screened and trained before being employed. But in reality, he was hired during a time of "mass confusion" after numerous drug and alcohol-impaired College House caregivers had been fired. Tr-7:93-94, 96-97, 99-100, 112-13, 158.

Even though RCI was responsible for providing the resources necessary for its New Mexico group home operations—and regularly exercised control to intervene whenever it deemed necessary—RCI did nothing when trends showed that residents at their facilities were far more at risk of abuse, neglect, or exploitation as compared to other service providers in the State. Tr-11:52-53, 65; Tr-17:91-93; Tr-10:168; Ct.Ex.-6:42 (Deposition of Shelley Moriston). Even as resident care was suffering, RCI imposed a pay freeze from 2001 through the end of 2005 or into 2006 (Tr-7:108) that would detrimentally impact staffing, turnover, and quality of care at College House but would predictably improve the profitability of the operation. Tr-7:72; Tr-10:192-93; Tr-12:54-55; Ex.129. RCI paid caregivers like Thurman Williams even less than it paid its maintenance men. Ex.365; Tr-7:72; Tr-12:57.

When RCI surveyed staff at its New Mexico group homes prior to Mr. Selk's assault, they indicated that RCI was more interested in making money than providing quality care for residents or hiring qualified and caring staff. Tr-8:175, 183-84; Ex.129. Staff further reported to RCI that pay raises were badly

needed and staff turnover rates were high. *Id.* One staff member told RCI that "money and profit are priority instead of quality" at the group home operations. Tr-8:184. RCI took no action in response to the survey. Tr-8:185.

RCI itself gathered data regarding the incidents of abuse and neglect at its New Mexico facilities (Tr-8:146-50) but, just as with the employee survey reports, RCI did nothing about the glaring deficiencies in its New Mexico operations apparent in the data collected. Before Mr. Selk's rape, RCI had actual notice of years of chronic service deficiencies and shoddy operations placing resident health and safety at risk—including incidents of sexual abuse and improper screening of front-line caregivers that plagued RCI's group home operations in this state. Tr-10:191, 193, 200, 206-07.

Testimony also showed that RCNM's operations were directly controlled by RCI's policies. RCI set the budget for state operations, and the RCNM executive director qualified for a bonus only if that budget was met. Tr-11:52-53, 65; Tr-17:91-93. RCI had to approve any and all costs for group home operational expenditures over $500. Tr-12:40-41. RCI used its Best in Class quality assurance tool to determine if adequate care was given to its New Mexico residents, and RCI vice president David Rhodes had the authority to force RCNM to follow through on RCI's recommendations. Tr-10:97, 101-02, 105, 117. The Executive State Director for RCNM testified that RCI even dictated that New Mexico operations

must stop using bleach and use a bleach alternative instead. Ct.Ex.-6:42. He agreed that "ResCare, Inc., had the authority to implement whatever changes they thought needed to be implemented that were in the best interests of the residents they were taking care of." *Id.*

Local supervisors, however, lacked the most basic qualifications to run RCI's operations. John Ray, for example, was hired by RCI to work as a maintenance man for $8 an hour in November 2001. Ex.365; Tr-7:72. By February 2003, Ray had been promoted to program coordinator, where he was responsible for resident care, including medication and finances, hiring the staff (including replacing the terminated College House staff after drug testing), and overseeing the houses in the Roswell area. Tr-7:80, 83-84. Ray had no relevant experience or training, and he did not have the required one-year experience working with individuals with developmental disabilities or a degree in a related field as required under New Mexico regulations. Tr-7:80, 85-86. Similarly, the Roswell risk management coordinator's experience consisted of working in Human Resources at a candy factory. Tr-9:137-38. Even Defendants' own expert admitted, "I was not impressed with the management." Tr-15:167.

Once hired, employees violated numerous policies and procedures that caused the negligent hiring of Thurman Williams and the resulting rape of Mr. Selk. *See, e.g.*, Tr-6:135; Tr-7:121 (door should be open when only one caregiver

is with a resident); Tr-9:214 (two caregivers should be in attendance with a resident if the door must be closed); Tr-7:158 (drug and alcohol free workplace); Tr-8:47-48 (requirement of three work-related references for job applicant).

RCI also established a zero-balance bank account for RCNM, "sweeping up" any leftover money on a monthly basis by moving it to an RCI account—and maintaining a constant zero balance in the RCNM account. Tr-12:36; RP5:1639. In this way, RCI rendered its now-defunct New Mexico entity incapable of paying a judgment in this case. Tr-13:6; Tr-17:102. Meanwhile, RCI grossed $966 million in revenues in 2004, and more than $1.5 billion in revenues in 2008 alone. Tr-17:39.

At trial, RCI admitted that the residents in its group homes were completely dependent upon their caregivers for their safety and welfare. Tr-9:185. RCI was on notice of—but did nothing about—the serious risks to its New Mexico residents based upon data provided by the DOH's Division of Health Improvement ("DHI"). Tr-13:49. Among other things, DHI had to implement a disproportionate number of corrective action plans to force Defendants to comply with regulations. Tr-10:200-02. DHI's Quality Management Bureau had to conduct a disproportionate number of focus surveys on RCNM because of specific problems such as staff training. Division Director for the DOH's Developmental Disabilities Support Division Mikki Rogers testified that ResCare's responses were a "[b]and-

aid . . . to cover up the problem to get the state off [its] back." Tr-10:196-97. Ultimately, the State cancelled RCNM's contract in 2006. Tr-10:206-07; Tr-11:60-61; Tr-13:55.

RCI also maintained a critical incident database in Louisville, Kentucky. RCI's policies determined what types of incidents needed to be reported to RCI by RCNM, including alleged sexual assaults. Tr-8:147. RCI admitted that the purpose of the database was to allow RCI to step in and stop foreseeable events. Tr-8:150-51. But RCI vice president Larry Weishaar testified there was no RCI mechanism in place to ensure that subsidiaries were responding adequately to critical incident reports. Tr-8:172-73.

The trial court admitted only a fraction of the critical incident reports proffered by Mr. Selk. Ex.451A; Tr-8:245-46. Still, the jury heard that the critical incident reports sent to Weishaar's group at RCI as well as to RCI vice president Rhodes show that RCI was on notice 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. Ex.451B; Tr-8:153-54. RCI also had knowledge of a substantiated incident of financial exploitation at College House, as well as an April 2004 report that a caseworker had discovered that Mr. Selk's own medical records reflected that his caregivers were recording that care had been provided to him before it really was. Ex.451B; Tr-7:178; Tr-8:152-53. Yet RCI took no action based on

these reports.

## C. Course Of Proceedings

Mr. Selk's sister, Rani Rubio, filed this suit on his behalf as his conservator and co-guardian on March 19, 2007. RP1:1. As relevant here, in her amended complaint, she alleged negligence claims against both RCI and RCNM and sought compensatory and punitive damages. RP1:301-12.

Shortly before trial, the parties stipulated that Mr. Selk was sexually assaulted on or about May 24, 2004. RP7:2390; Tr-7:6. The lawsuit was subsequently tried over a three-week period to a twelve-person jury. The parties presented 25 live witnesses and six witnesses by deposition. Tr-5–Tr-18.

During trial, counsel for Mr. Selk attempted to offer into evidence government statistics regarding (i) the number of substantiated cases of abuse, neglect, and exploitation at RCNM's homes statewide, and (ii) the number of times RCNM allegedly failed to report such cases to the appropriate state agency. *See* Exs.24-28, 360-61; Tr-10:156-57. That evidence (Exs.24-28) consists of DOH/DHI annual reports for the fiscal years July 1, 2000, through June 30, 2005, showing incidents of abuse, neglect, exploitation, environmental hazard and law enforcement statewide, listing data by provider.

The tables were created by the Incident Management Bureau while Mikki Rogers was chief of that division. The charts do not include any "interpretation,"

but rather reflect the reported incidents. They enabled the Bureau to keep track of incidents by provider, as well as allow providers to know what their numbers were. They also provide information to family members and guardians. Tr-10:141. Most importantly, they show whether there is need for quality improvement with a provider. Tr-10:149.

The reports track three types of abuse: exploitation, neglect, and abuse resulting in actual harm. Exploitation refers to financial exploitation of the residents (e.g., stealing money or social security numbers). Neglect refers to physical neglect that does not result in actual harm. And abuse refers to actual harm caused to a resident. Defendants had a disproportionately high incidence of reported abuse. Tr-10:159. Indeed, Defendants were at the top of the list for incidents every year, even when their large size was taken into account.

The trial court excluded those documents on the basis of Rules of Evidence 11-401 and 11-403. The trial court explained: "Having reviewed the cases, I cannot find that these statistics correlate directly to what happened here. They're very general statistics. . . . I find them to be to the extent that they are relevant, I find that they're more prejudicial than probative[.]" Tr-10:156-57. The court later acknowledged that the trends shown in the documents of Defendants' poor care were "relevant to the facts of this case." Tr-10:176.

The trial court excluded the bulk of similar data maintained by RCI for the

same reason, allowing only the critical incident reports discussed above, *supra* at pp. 16-17, into evidence. Ex.451A; Tr-8:245-46. Counsel for Mr. Selk objected that the evidence was admissible as cumulative acts establishing RCI's culpable state of mind for purposes of establishing the reasonableness of punitive damages. *Id.*; Tr-9:7; Tr-10:179-80; *see also* RP6:2022, 2248; RP7:2616.

The jury unanimously found both RCI and RCNM negligent. RP8:2757-59; Tr-18:2-4. The jury determined that RCI was 65 percent responsible for Mr. Selk's injuries, RCNM was responsible for 30 percent, and Thurman Williams was responsible for 5 percent. RP8:2758. The jury awarded Mr. Selk $4,950,000 in compensatory damages. *Id.* The jury then found that the acts of RCI and RCNM were willful, wanton, or reckless. RP8:2758-59. The jury awarded $48,000,000 in punitive damages against RCI, and $1,200,000 in punitive damages against RCNM. *Id.* Finally, the jury was asked the following special interrogatories: (1) "Was Res-Care, Inc. negligent in hiring Thurman Williams?" and (2) "Was Res-Care, Inc.'s negligence in hiring Thurman Williams a cause of injuries and damages to Larry Selk?" RP8:2717. The jury answered "Yes" to both interrogatories. *Id.*

During post-trial motion practice, the trial judge denied both Defendants' motion for a new trial and motion for remittitur of compensatory damages. RP8:3059-63. The trial judge did not "find any indication of passion, prejudice,

partiality, sympathy, undue influence or a mistaken measure of the compensatory damages on the part of the jury." RP8:3060. At the same time, the court granted RCI's motion for remittitur of punitive damages and reduced the jury's award of punitive damages against RCI to $9,652,500. RP8:3063.

The trial court recognized that the reprehensibility of a defendant's conduct is the "'most important indicium of the reasonableness of a punitive damages award.'" RP8:3061. But in the trial court's view, the amount of punitive damages awarded by the jury here was unreasonable because (i) RCI's reckless conduct regarding Mr. Selk's rape was not as reprehensible as intentional conduct in other cases, and (ii) the ratio of punitive to compensatory damages was too high in relation to the jury's findings of comparative liability as to each defendant. RP8:3062-63. The trial court entered an amended judgment on March 10, 2010. RP9:3090. Counsel for Mr. Selk timely filed a notice of cross-appeal.

## INTRODUCTION TO ARGUMENT

The measure of any society is how it treats its most vulnerable members. Larry Selk's loved ones placed their trust in Defendants to protect Mr. Selk and to care for his needs. He was completely dependent upon his caregivers at College House. He was not only completely helpless to defend himself against abuse, but unable even to report it. RCI's betrayal of that trust in allowing Thurman Williams to prey upon Mr. Selk—and then, in the wake of that brutal attack, failing to

provide even the most basic comforts to assuage the physical and emotional trauma he endured, and denying to his family that the rape even took place—truly shocks the conscience. When a large corporation makes billions through cost-saving policies that predictably allow a profoundly disabled man to be violently anally raped, that is the very reason punitive damages are allowed in the first place. They are justified to punish the callous behavior of RCI, and they are necessary so that other innocents will not suffer as Mr. Selk did.

Recognizing that fundamental principle, the New Mexico Supreme Court recently reaffirmed that "[p]unitive damages serve two important policy objectives under our state common law: to punish reprehensible conduct and to deter similar conduct in the future." *Akins v. United Steel Workers of Am., Local 187*, 2010-NMSC-031, ¶ 20, 148 N.M. 442, 237 P.3d 744 (citing *Bogle v. Summit Inv. Co.*, 2005-NMCA-024, ¶ 34, 137 N.M. 80, 107 P.3d 520). The trial court's drastic reduction of the jury's award of punitive damages against RCI contravenes New Mexico law and policy by undermining both objectives.

First, as to punishing the egregious conduct that led to Mr. Selk's brutal rape, the jury's award was fully commensurate with the reprehensibility of that conduct and the magnitude of Mr. Selk's physical injuries and emotional trauma. Second, as to deterring similar conduct, RCI's cavalier attitude toward Mr. Selk and his injuries only underscores the need for the jury's punitive damages award.

The evidence in this case pointed to a pattern and practice by RCI of hiding and ignoring the abuse of those unable to report it themselves. And RCI profited considerably by doing so.

Rape of disabled men and women is very hard to detect. And both the U.S. Supreme Court and the New Mexico Supreme Court have made it clear that where, as here, an injury is difficult to detect and less likely to be discovered, a higher punitive damages award is justified. *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2622 (2008); *Chavarria v. Fleetwood Retail Corp.*, 2006-NMSC-046, ¶ 38, 140 N.M. 478, 143 P.3d 717. The injury suffered by Mr. Selk in this case is just such an injury, and RCI's willful conduct in pursuit of profit justifies the punitive damages awarded by the jury. The Court should therefore reverse the trial court's remittitur, and further hold that it erred in excluding the reports of abuse.

A jury of citizens heard three weeks of evidence documenting RCI's prolonged indifference to the needs of those in its care, and fairly determined the punitive damages award that would best punish and deter that shameful conduct. New Mexico law should respect that award.

## ARGUMENT

**The Trial Court Erred By Reducing The Jury's Punitive Damages Award Despite RCI's Highly Reprehensible Conduct, Which Resulted In The Brutal Rape Of A Helpless Victim Entirely Dependent On Defendants For Protection And Care**

### A. Standard of Review

This Court gives no deference to the trial court's review of a punitive damages award. *Aken v. Plains Elec. Generation & Transmission Coop., Inc.*, 2002-NMSC-021, ¶¶ 18-19, 132 N.M. 401, 49 P.3d 662. In performing its own review of the award, this Court is "limited to determining whether the amount of the award is grossly excessive and therefore within or beyond the outer limits of due process." *Jolley v. Energen Res. Corp.*, 2008-NMCA-164, ¶ 31, 145 N.M. 350, 198 P.3d 376, *cert. denied*, 2008-NMCERT-011, 145 N.M. 531, 202 P.3d 124, *cert. denied*, 129 S. Ct. 1633 (2009) (citations omitted). To determine whether a punitive damages award is grossly excessive, this Court uses the three guideposts set out by the U.S. Supreme Court in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996):

(1) the reprehensibility of the misconduct;

(2) any disparity between the harm (or potential harm) suffered by the plaintiff and the punitive damages award; and

(3) the difference between the punitive damages awarded and the civil penalties authorized or imposed in comparable cases.

*Aken*, 2002-NMSC-021, ¶¶ 21, 23, 25 (citing *BMW*, 517 U.S. at 575, 580, 583).

Although New Mexico courts look to the *BMW* factors in guiding the analysis, they retain "considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case[.]" *Aken*, 2002-NMSC-021, ¶ 20 (citing *BMW*, 517 U.S. at 568). And New Mexico juries "are entirely capable of assessing sensible and appropriate punitive damages." *Id.* at ¶ 21. For these reasons, any doubt must be resolved in favor of the jury's award. *Allsup's Convenience Stores, Inc. v. N. River Ins. Co.*, 1999-NMSC-006, ¶ 14, 127 N.M. 1, 976 P.2d 1 (filed 1998).

**B. Preservation Of Error**

Mr. Selk preserved his objections relating to the trial court's remittitur through oral argument and by filing his response opposing Defendants' motion for a new trial or remittitur of damages. Tr-20:35-41; RP8:2955-80.

**C. The Trial Court Erred in Reducing The Punitive Damages Awarded By The Jury In This Case, Which Involved Highly Reprehensible Conduct Against Vulnerable Persons That Frequently Goes Unpunished**

Punitive damages serve the "important public policy" in New Mexico's common-law jurisprudence of punishing "outrageous conduct and deter[ring] similar conduct in the future." *Akins*, 2010-NMSC-031, ¶ 1. RCI's conduct easily meets that threshold, and there can hardly be a greater need to deter similarly reprehensible conduct in the future to protect society's most vulnerable members. In nonetheless reducing the jury's award of punitive damages against RCI, the trial

court erred in two fundamental ways.

First, in assessing the reprehensibility of RCI's actions, the trial court conducted a deeply flawed comparison of the facts of this case to those of others—contravening New Mexico law that cases must be evaluated on their own facts because (as this case unfortunately demonstrates) comparison with other cases can be a subterfuge for impermissibly reweighing the evidence. *See Sandoval v. Baker Hughes Oilfield Operations, Inc.*, 2009-NMCA-095, ¶ 51, 146 N.M. 853, 215 P.3d 791 (explaining that there is "no need . . . to engage in comparisons with the circumstances in other cases" and to do so "invites unhelpful if not inappropriate reweighing and comparing of evidence.").

Second, the trial court compounded that error by focusing too much on the ratio—contravening New Mexico law making clear that *reprehensibility*, not ratio, is the touchstone of the reasonableness analysis. *Chavarria*, 2006-NMSC-046, ¶ 36. Without citing any basis in the law, the court based its ruling in part on the ratio of comparative fault between RCNM and RCI. RP8:3062. The New Mexico Supreme Court has not hesitated to reverse courts that have impermissibly "focus[ed] on the ratio" in reviewing punitive damages awards, as the trial court did here. *Id.* What's more, even where, as here, compensatory damages are relatively high, a large punitive damages award is nonetheless justified by the need to deter conduct that is hard to detect (and thus often goes unpunished). RCI's

willfulness and recklessness in endangering the physical safety of individuals who are unable to report their own abuse is just the type of reprehensible conduct that warrants the jury's substantial award of punitive damages in this case.

### 1. First *BMW* Factor: RCI's Highly Reprehensible Conduct

Bearing in mind the presumption of correctness accorded a jury's award of punitive damages, courts look first and foremost to the reprehensibility of the defendant's conduct in assessing whether an award of punitive damages is grossly excessive. *Chavarria*, 2006-NMSC-046, ¶ 37 (citing *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003)). Reprehensibility, in turn, is determined by considering five categories of conduct, including whether:

> [1] the harm caused was physical as opposed to economic; [2] the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; [3] the target of the conduct had financial vulnerability; [4] the conduct involved repeated actions or was an isolated incident; and [5] the harm was the result of intentional malice, trickery, or deceit, or mere accident.

*State Farm*, 538 U.S. at 419; *Jolley*, 2008-NMCA-164, ¶31. Here, RCI made deliberate budgetary decisions that negatively impacted resident safety, disregarded its own longstanding high rates of abuse and neglect, ignored a sea of red flags on Williams's employment application, put Williams to work without training, and allowed Williams to be alone with Mr. Selk on his very first shift. Ex.243; Tr-7:134; Tr-8:92; Tr-9:62; Ex.94; Tr-9:86, 115.

The consequences of RCI's recklessness were among the worst imaginable.

*See, e.g., Coker v. Georgia*, 433 U.S. 584, 597-98 (1977) ("Short of homicide, [rape] is the ultimate violation of self" and "highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the . . . victim."); *id.* at 603 (opinion of Powell, J.) ("Some [rape] victims are so grievously injured physically or psychologically that life is beyond repair."). As detailed below, the facts of this case amply demonstrate that RCI's conduct was highly reprehensible.

***The harm to Larry Selk was physical, not merely economic.*** This case involves serious physical injury—the type of conduct both the U.S. Supreme Court and the New Mexico Supreme Court have identified as particularly reprehensible and deserving of punitive damages. *State Farm*, 538 U.S. at 419; *Aken*, 2002-NMSC-021, ¶ 23. Because of RCI's willful, wanton and reckless behavior, Mr. Selk suffered harm that included six lacerations in his rectum (three of which were bleeding when discovered). Ex.12; Tr-7:30-31. His wounds were so severe that the hospital nurse thought they could have been caused by a fist. Tr-7:33.

Mr. Selk suffered a physical violation of such magnitude that it constitutes a first-degree felony under New Mexico law. *See* NMSA 1978, §§ 30-9-10, 30-9-11 (2005) (criminal sexual penetration causing great bodily harm or great mental anguish when the victim is "physically helpless"). Even after the rape, both Defendants disregarded the hospital nurse's instructions and failed to do anything

to ease Mr. Selk's injuries even by providing Tylenol, let alone therapy. Tr-9:58-59; Tr-14:148. By any reasonable standard, RCI "conduct was on the high end of the reprehensibility scale[.]" *Jolley*, 2008-NMCA-164, ¶ 38.

***RCI's tortious conduct evinced an indifference to and reckless disregard for the health and safety of Larry Selk.*** Rape is "highly reprehensible, both in a moral sense and its almost total contempt for the personal integrity and autonomy of the [] victim. . . . Short of homicide, it is the 'ultimate violation of self.'" *Coker*, 433 U.S. at 597. Despite Mr. Selk's total dependence on Defendants and their employees, RCI exhibited near-total disregard for his health and safety by ignoring problems in its New Mexico operations to the point where the State of New Mexico was forced to cancel its contract with RCNM. Tr-10:206-07; Tr-11:60-61; Tr-13:55.

RCI failed to do even minimal screening to avoid hiring sexual predators like Thurman Williams. Tr-7:134-36, 182-83, 185; Tr-8:86-87, 91-92; Tr-12:72-73. Neither Defendant bothered to pick up the phone to learn whether Williams was fit to care for someone who could not cry out for help, let alone report any abuse. *Id.* Had they done so, they would have learned that Mr. Williams had a history of inappropriate conduct with developmentally disabled residents at his previous employment, including failing to respect appropriate physical boundaries. Tr-10:15-16. The fact that this information was at RCI's fingertips—but that it

waited to act until the morning after the rape, when a third party volunteered information regarding Williams's alleged financial exploitation of another vulnerable individual—shows RCI's disregard for the helpless individuals entrusted to its care.

On a systemic level, the Critical Incident Reports sent from RCNM to RCI further demonstrate RCI's knowledge of serious wrongdoing in New Mexico and its failure to take any action to correct it. As Mr. Selk's expert testified, "[t]hese documents have no value if . . . the end result is not intervention and correction." Tr-12:51. And there is no serious question that "consciousness of wrongdoing" is relevant to the issue of punitive damages. *See Littell v. Allstate Ins. Co.*, 2008-NMCA-0012, ¶ 64, 143 N.M. 506, 177 P.3d 1080 (filed 2007) (explaining that "evidence of repeated engagement in prohibited conduct knowing or suspecting it is unlawful is relevant support for a substantial award") (citation omitted).

Indeed, reported "misconduct many times over a period of years" *demonstrates* "consciousness of wrongdoing." *Id.* at ¶ 65. In this case, the jury's "substantial award" was "necessary to meet the goal of punishing [a defendant] for its conduct and deterring it, and others similarly situated in the future, from engaging in such conduct." *Id.* (citation and quotation marks omitted). What's more, it is not only the actions directly related to Mr. Selk that are relevant, but also "the policy and procedures of [a defendant] in training its employees[.]" *Clay*

*v. Ferrellgas, Inc.*, 118 N.M. 266, 270, 881 P.2d 11, 15 (1994) (citation and quotation marks omitted). The lack of training and correction in the face of the abuse reports goes directly to "a finding of 'utter indifference to the consequences'" of RCI's conduct. *Id.* at 271, 16; *see also Gonzales v. Surgidev Corp.*, 120 N.M. 133, 144, 899 P.2d 576, 587 (1995) ("Such prior acts are relevant to the issue of punitive damages because they demonstrate a reckless disregard for the safety of others."); *Enriquez v. Cochran*, 1998-NMCA-157, ¶ 126, 126 N.M. 196, 967 P.2d 1136 (noting that prior similar incidents go to defendant's state of knowledge and attitude to dangers); *accord Smith v. Ingersoll-Rand Co.*, 214 F.2d 1235, 1249 (10th Cir. 2000).

As noted above, *supra* 17-19, the trial court not only erroneously excluded the bulk of the Critical Incident Reports, but also erroneously excluded government statistics that tracked Defendants' continued poor performance in caring for the developmentally disabled. Specifically, the reports show that Defendants had a disproportionately high incidence of abuse and neglect, which they never corrected. Those documents are relevant—as the trial court acknowledged—for a number of reasons. But they are especially relevant to the issues of reprehensibility and punitive damages. *State Farm*, 538 U.S. at 419; *Jolley*, 2008-NMCA-164, ¶ 34. The purpose of the incident reports was to provide notice to providers of problems with their services. And notice goes to

foreseeability. *Spencer v. Health Force, Inc.*, 2005-NMSC-002, ¶ 23, 137 N.M. 64, 107 P.3d 504 (2005) (citing with approval case holding that "notice of an employee's alcoholism and tendency toward violent behavior may make sexual assault by that employee foreseeable" (citation omitted)). They further show the trend of continuing poor performance by the most incident-prone provider in the State of New Mexico. Tr-10:168.

The trial court determined that the proffered exhibits relating to RCI's knowledge would be more prejudicial than probative, but offered no reason why. Nor could it. Although the evidence admitted at trial was more than sufficient to support the jury's award, the trial court was wrong to first exclude evidence of RCI's indifference to and reckless disregard for Mr. Selk and to then find that Mr. Selk did not introduce sufficient evidence of RCI's "intentional" wrongdoing to support the jury's punitive damages award. RP8:3062-63.

***The target of Defendants' conduct was exceptionally vulnerable, and the conduct itself involved repeated actions.*** Mr. Selk is vulnerable in every way it is possible for a human being to be. He cannot move his body well enough to defend himself against a predator. He cannot tell his family if the staff neglects him. He cannot testify in criminal court to put the RCI employee who raped him behind bars. Mr. Selk is totally dependent on his caregivers to provide for his most basic human needs, including his safety from physical harm.

RCI was fully aware of that vulnerability, as its explicit own policies reflect. *See, e.g.*, Tr-6:135, Tr-7:121 (door should be open when only one caregiver is with a resident); Tr-9:214 (two caregivers should be in attendance with a resident if the door must be closed); Tr-8:47-48, (requirement of three work-related references for job applicant). Yet RCI made no effort to abide by those policies.

RCI received critical incident reports from RCNM demonstrating that staff abused and neglected their New Mexico residents. Mr. Selk himself was the subject of a report one month *before* the rape, when staff documented (falsely) that he had received care before he really had.

RCI's conduct also involved repeated actions. Its employee turnover rate was higher than other providers, yet RCI instituted a pay freeze instead of attempting to recruit higher-quality staff. RCI was forced to terminate nine employees at Mr. Selk's home after they failed or refused to take drug tests. RCI vice-president Rhodes admitted that a compliance audit of employee awareness and documentation showed a "system breakdown" in human resources in the Roswell region. Tr-13:50-51, 54. Nonetheless, RCI turned a blind eye to the repeated reports that its residents were at risk and as a result negligently hired a rapist. RCI's repeated neglect and abuse directed at the financially—and physically—vulnerable is highly reprehensible and warranted the jury's full award of substantial punitive damages, which will deter other New Mexico providers

from engaging in similar conduct.

***The harm inflicted on Larry Selk was not "mere accident."*** Notwithstanding RCI's extreme recklessness, the trial court erroneously trained its reprehensibility analysis on the lack of "intentional" conduct in this case. RP8:3062-63. But intentional conduct is only one factor to be considered in the reprehensibility analysis. Given RCI's manifest disregard for Mr. Selk's safety as an initial matter and its indifference to his physical and emotional recovery after the rape, it is difficult to understand the trial court's view that RCI's conduct was not as reprehensible "as the *intentional* conduct of the tortfeasors in the cases where both the United States and New Mexico Supreme Courts have considered punitive damages" (*id.* at 3063) (emphasis added)—particularly given that the conduct in some of those cases was not "intentional" either, and involved such things as:

- Decreasing the value of a car's paintjob (*BMW*);
- Contesting liability for a car accident (*State Farm*);
- Causing widespread economic losses (*Exxon*);
- Exhibiting bad faith on construction projects (*Pan Am*);[1]
- Violating consumer protection statutes (*Chavarria*);
- Mishandling insurance claims (*Allsup's*); and

[1] *Albuquerque Concrete Coring Co. v. Pan Am World Servs., Inc.*, 118 N.M. 140, 143, 879 P.2d 772, 775 (1994).

- Violating the duty of fair representation (*Akins*).

In most of those cases, the magnitude of the harm does not approach the harm that Mr. Selk suffered. Indeed, a rational person might well choose to buy a BMW with a dinged up paintjob—if that person could receive a large punitive damages award—but no rational person would choose to be brutally raped, and to be left with a bleeding, lacerated rectum.

As to the three leading New Mexico cases which involved serious physical injury (*Aken*, *Atler*, *Jolley)*, none involved premeditated conduct specifically intended to cause physical harm. In *Jolley*, for example, the defendant company's recklessness in leaving a natural gas wellhead unfenced and unprotected resulted in a young man being burned to death after fleeing his car, which had struck the wellhead. There is no suggestion in this Court's review of that substantial punitive damages award ($13 million) that the company's conduct was any less reprehensible for not being "intentional."

RCI's conduct in this case was no "mere accident" either. *See State Farm*, 538 U.S. at 419. It, too, like the company in *Jolley*, was, at a minimum, reckless. RCI may not have actually raped Mr. Selk, just like the company in *Jolley* may not have set fire to the young man. But, under New Mexico law, that does not control. In this case, the jury heard extensive evidence that RCI made intentional decisions to ignore previous allegations of abuse (Tr-9:30), to forego established screening

methods and training for new employees (Tr-7:134-36, 182-83, 185; Tr-8:86-87, 90-92; Tr-9:62; Tr-12:72), to fail to supervise new workers (Ex.94: Tr-9:85-86), and to implement cost-saving measures even while resident care suffered (Tr-7:72, 108; Ex.129). The jury found RCI's conduct to be "willful, wanton, or reckless." RP8:2758-59. "Willful conduct is the intentional doing of an act with knowledge that harm may result." UJI 13-827. Recklessness is "the intentional doing of an act with utter indifference to the consequences." *Clay,* 118 N.M. at 270. That perfectly sums up RCI's attitude towards its vulnerable residents' health and safety. Just like the substantial award upheld in *Jolley*, the jury's award of punitive damages here was not "grossly excessive" merely because RCI, as a corporation, did not rape Mr. Selk.

The trial court's contrary conclusion was driven, in large part, by its faulty comparative analysis of the facts of this case to others. RP8:3061-62. Precisely to avoid that result, the New Mexico Supreme Court has mandated that punitive damages awards should instead be evaluated on the each case's facts, bearing in mind that the jury's verdict is "presumed to be correct."[2] *Allsup's*, 1999-NMSC-

[2] Indeed, RCI's view toward punitive damages awards generally does not square with the national trend. Other courts have permitted much larger awards. *See, e.g., In re New Orleans Train Car Leakage Fire Litig.*, 795 So. 2d 364, 384 (La. Ct. App. 2001) (permitting $850 million punitive damages award for class of plaintiffs); *Time Warner Entm't Co. v. Six Flags Over Ga., LLC*, 563 S.E.2d 178, 186 (Ga. App. 2002) (affirming $257 million punitive damages award in addition to compensatory damages award exceeding $197 million in commercial dispute);

006, ¶ 16. Viewing the egregious facts of this case through that prism confirms that the jury came to a reasonable decision that furthers New Mexico's important interests in punishment and deterrence.

The U.S. Supreme Court has made clear that "[a]ction taken or omitted *in order to augment profit* represents an enhanced degree of punishable culpability" no different than "willful or malicious action, taken with a purpose to injure." *Exxon*, 128 S. Ct. at 2621 (emphasis added). That is precisely the case here. Under RCI's watch, a maintenance man was quickly promoted to Program Coordinator for its Roswell group homes without having the experience or training for such an important position. RCI was responsible for providing the resources necessary for the group home operations and retained control to intervene when it deemed necessary—yet sat idly by while the data demonstrated that residents at RCI's facilities were far more at risk of abuse and neglect as compared to other service providers in the State. Tr-10:191, 193-200, 206-07.

Even as resident care was suffering, RCI imposed a pay freeze from 2001 through the end of 2005 or into 2006 (Tr-7:107-08), which predictably improved

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*Boeken v. Philip Morris Inc.*, 127 Cal. App. 4th 1640, 1703 (2005) (remitting $3 billion punitive damages award to $50 million based on single plaintiff's $5.5 million compensatory damages award in smoker's products liability case); *Motorola Credit Corp. v. Uzan*, 503 F.3d 71, 81 (2d Cir. 2007) (affirming $1 billion punitive damages award in addition to $2 billion compensatory damages award in commercial fraud dispute.

the profitability of the operation and continued the dramatic decline in quality of care. Then, RCI would automatically "sweep up" any money in the RCNM account, maintaining a constant zero balance in that account. Tr-12:36; Tr-17:20. While that was good for RCI's profits, it left no resources for adequate care of its New Mexico residents.

When RCI surveyed its New Mexico staff, the staff reported that RCI was more interested in making money than providing quality care for residents or hiring qualified and caring staff. Tr-11:78; Tr-8:174-80, 183; Ex.129. Employees at the group home reported to RCI that raises were badly needed and staff turnover rates were high. Ex.129. RCI did not care. It "filed" the survey reports but took no action in response to them. Tr-7:79-80; Tr-8:182, Ex.129.

RCI also gathered data regarding the incidents of abuse and neglect at its New Mexico facilities. Tr-8:146-50. But just as with the employee surveys, RCI did not do anything about the data showing years of chronic service deficiencies and shoddy operations placing resident health and safety at risk—including multiple incidents of sexual abuse and improper screening of front-line caregivers that plagued RCI's group home operations. Tr-10:191, 193-195, 197-206. When confronted by DOH with data trends showing that Defendants' residents were at much higher risk of abuse and neglect than residents of other providers, RCI's

New Mexico operations put a "band-aid" on the problems and simply went back to business as usual. Tr-10: 197-206.

Moreover, the jury found that RCI hired Thurman Williams without exercising the care required for screening employees who will have access to the vulnerable individuals entrusted to RCI's care. Tr-12:78. By giving Williams access to Mr. Selk alone in his bedroom, RCI represented that Williams had been appropriately screened and trained before being employed. In reality, he was hired during a time when caregivers were being hired "left and right" after numerous drug and alcohol-impaired College House caregivers had been fired. Tr-7:91-105, 111, 112. RCI's conduct in this regard was dishonest and a profound breach of trust with Mr. Selk, who suffered life-altering physical and emotional injuries when Williams brutally sodomized him at RCI's College House facility—a traumatic assault that the U.S. Supreme Court has described as "the ultimate violation of self" short of homicide. *Coker*, 433 U.S. at 597.

When a corporation ignores safety measures designed "to prevent the type of harm that occurred in this case"—and that are its responsibility to enforce—it "cannot claim to be surprised by a large award of punitive damages, especially when the result of such a failure was so tragically predictable." *Atler v. Murphy Enters., Inc.*, 2005-NMCA-006, ¶ 24, 136 N.M. 701, 104 P.3d 1092; *see also Clay*, 118 N.M. at 269, 881 P.2d at 14 (holding that when there is a high risk of danger, a

"cavalier attitude" toward that situation is more likely to demonstrate a culpable mental state). Recruiting employees who will not harm residents should be RCI's "first line of defense." Tr-12:63. Even RCI's own expert, Dr. Darvin Hirsch, admitted that in the absence of background checks, it is foreseeable that someone could be hired who would abuse its vulnerable residents. Tr-15:139-40. The jury's punitive damages award was not "grossly excessive" by any reasonable measure, and it should be reinstated in its entirety.

### 2. Second *BMW* Factor: The Ratio Of Punitive To Compensatory Damages Fits Comfortably Within Constitutional Standards And Is Necessary To Deter Conduct That Frequently Goes Unpunished

In considering the second factor of the *BMW* analysis, the purpose is simply to confirm that the amount of punitive damages "not be *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 (emphasis added, citation and quotation marks omitted). Thus, only "where there is '*no rational relationship* between the alleged acts [of the defendant] and the amount . . . sought in punitive damages' may [a punitive damages] award be found excessive." *Id.* (citation omitted).

There is no "absolute limit on the ratio for a punitive damages award." *Akins*, 2009-NMCA-051, ¶¶ 36-38 (affirming award with **18:1** ratio). Thus the U.S. Supreme Court has "consistently rejected the notion that the constitutional

line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award." *BMW*, 517 U.S. at 582 (emphasis in original); *State Farm*, 538 U.S. at 419 ("We decline again to impose a bright-line ratio which a punitive damages award cannot exceed."). Here, the jury awarded $48,000,000 in punitive damages against RCI and $4,950,000 in compensatory damages. RP8:2758-59. When the trial court reduced this 9.7:1 ratio to 2:1 by reducing the punitive damages award against RCI to $9,652,500, it reversibly erred because the jury's punitive damages award undoubtedly rationally related to the egregious conduct of RCI—particularly considering the difficulty of detecting the rape of the disabled and the need to deter other wrongdoers from engaging in similarly egregious conduct. RP8:3063.[3]

As demonstrated above, RCI's egregious conduct in this case was highly reprehensible. The reprehensibility of that conduct alone would warrant a substantial punitive damages award. But there was more. Injuries to developmentally disabled individuals like Mr. Selk—although easily foreseeable by providers like RCI—are notoriously difficult to detect and woefully underreported. Only 3 percent of sexual abuse cases involving people with developmental disabilities are ever reported. Denise C. Valenti-Hein & Linda D.

[3] The trial court based its remittitur in part on the ratio of comparative fault between RCI and RCNM, but it cited no authority in support of this reasoning, and Appellee/Cross-Appellant has found none. RP8:3062.

Schwartz, THE SEXUAL ABUSE INTERVIEW FOR THOSE WITH DEVELOPMENTAL DISABILITIES (1995). Thus for every assault of a developmentally disabled person like Mr. Selk that *is* reported, an untold number will go undetected, unreported, and unpunished. All too aware of the extremely low odds of ever being detected—and the even lower odds of any punishment if they are—the perpetrators of these unspeakable abuses see the developmentally disabled as easy prey.

RCI was fully aware of that danger, too, as its own policies reflect. *See, e.g.*, Tr-6:135, Tr-7:121 (door should be open when only one caregiver is with a resident); Tr-9:214; Ex.D-3, 007 (two caregivers should be in attendance with a resident if the door must be closed); Tr-8:47-48 (requirement of three work-related references for job applicant). But were it not for the sheer brutality of Mr. Selk's rape—so violent that it left physical injuries behind—the rape would likely never have come to light. Indeed, even afterward, RCI adopted a strategy of avoidance and concealment, refusing to admit to Mr. Selk's sister that he had been raped until shortly before trial. Tr-11:126.

As Division Director for DOH Mikki Rogers testified, it is "unfortunately" left to providers "as an honor system to actually report all those incidents." Tr-10:153. During an offer of proof, Ms. Rogers noted that the State had real concerns over whether Defendants were reporting incidents properly, and whether it indicated that there was a lack of awareness of "what's going on" at Res-Care.

Tr-10:163-64. Worse, she explained, that behavior indicates "that a provider is not reporting incidents that they know should be reported, and that are required to be reported." Tr-10:164. (As explained *supra*, 30-31, that testimony was improperly excluded.) Given the State's exclusive reliance on the voluntary reporting of providers, restoring the punitive damages awarded by the jury in this case is crucial if there is to be any hope of deterring companies like RCI from engaging in future reckless conduct against vulnerable individuals.

RCI's callous attitude toward Mr. Selk's rape proves the point. Mr. Selk should have received proper treatment after the rape, but, without explanation, RCI provided none. RCI never even followed up on the critical incident report relating to the assault—and a state investigator described Defendants as having a "chronic" problem with reporting incidents. Tr-10:197-98. RCI's response has consistently been to downplay Mr. Selk's injuries because (in the words of its expert witness) it views Mr. Selk as "essentially the same as he was before the sexual assault." Tr-15:35 (emphasis added); *see also* Res-Care Br. at 28 (quoting same).

Counsel for Defendants even asked a witness at trial whether "animals understand the concept of rape." Tr-14:56. That question speaks volumes about RCI's view of the developmentally disabled for whom it purports to care. RCI's attempt to deny Mr. Selk's basic humanity only reinforces the need for substantial punitive damages to punish and deter its willful and egregious misconduct.

The U.S. Supreme Court has made clear that one of the relevant considerations in the ratio analysis is "the harm likely to result from the defendant's conduct as well as the harm that has actually occurred." *BMW*, 517 U.S. at 581; *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 453 (1993) (appropriate to consider "the potential harm that [the defendant's] actions could have caused"). Thus, the Supreme Court has "eschewed an approach that concentrates entirely on the relationship between actual and punitive damages. It is appropriate to consider . . . *the possible harm to other victims* that might have resulted if similar future behavior were not deterred." *Id.* at 460-61 (emphasis added). One need only pause to think of the other disabled individuals who might also have been raped on RCI's watch—and whose rapes were not reported—to understand why the jury awarded the punitive damages that it did.

Moreover, it is proper to consider in reviewing the ratio of punitive to compensatory damages that "punitives are aimed . . . principally at retribution and *deterring* harmful conduct." *Exxon*, 128 S. Ct. at 2621 (emphasis added); *see also State Farm*, 538 U.S. at 415; *BMW*, 517 U.S. at 568 ("Punitive damages may properly be imposed to further a State's legitimate interest in punishing unlawful conduct *and deterring its repetition*") (emphasis added). In making that determination, New Mexico law expressly takes into account the defendant's wealth. *See* UJI 13-1827 ("The property or wealth of the defendant is a legitimate

factor" for the jury's consideration when setting the amount of punitive damages.); *DeMatteo v. Simon*, 112 N.M. 112, 115, 812 P.2d 361, 364 (Ct. App. 1991) ("Evidence of a defendant's wealth is relevant for determining the proper amount of punitive damages.") (citing cases).

To be sure, "[t]he wealth of a defendant cannot justify an *otherwise* unconstitutional punitive damages award." *State Farm*, 538 U.S. at 420 (emphasis added). But that "does not make its use unlawful or inappropriate"—it "simply means that this factor 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." *Id.* at 591 (Breyer, J. concurring). That is not the case here, where RCI's conduct was highly reprehensible and the "other factors" also support the jury's punitive damages award. Under those circumstances, it is entirely appropriate, in determining whether the punitive damages award is "reasonably related to the goals of deterrence and retribution," to consider "the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss." *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). Here, a punitive damages award of less than $48 million will do little, if anything, to deter RCI from engaging in similar conduct in the future—particularly given how likely that conduct is to evade future detection.

Caring for the disabled is a profitable business. RCI's gross revenues for

2008 totaled over $1.5 billion, up from $1 billion only 4 years earlier. Ex.455; Tr-17:102. As of December 31, 2008, RCI's total assets were $914,143,000, and the company's net worth was $436,800,000. Ex.455; Tr-17:105-06. The punitive damages awarded by the jury thus represent only 3.1 percent of RCI's gross revenues, 5.3 percent of RCI's total assets, and 11 percent of the company's net worth as of December 31, 2008. Indeed, RCI's Chief Financial Officer admitted that the jury's original $48 million punitive damages award in this case would not inflict a loss, but merely cause RCI's "profitability to decline." RP8:2578.

To put those figures in perspective, the following hypothetical may be helpful: If punitive damages had been awarded against the owner-operator of a childcare center who failed to protect a child from being raped by a negligently hired employee, the punitive damages awarded against RCI would be equivalent to assessing $3,100 against the owner-operator if he had a gross income of $100,000; $5,300 if he had assets totaling $100,000, or $11,000 if the owner-operator's total net worth was $100,000. Seen in that light, the trial court's reduction of the jury's award to only $9 million (only 0.6 percent of RCI's 2008 revenue) is facially insufficient to sanction RCI and deter comparable conduct in the future.

### 3. Third *BMW* Factor: The Civil Penalties Factor Also Supports The Jury's Award Of Punitive Damages

"[T]he comparable sanctions factor is the least important indicium," *Aken*, 2002-NMSC-021, ¶ 25, and, in fact, it has been criticized by New Mexico courts as

"as ineffective and very difficult to employ." *Akins*, 2009-NMCA-051, ¶ 38 (quoting *Aken*, 2002-NMSC-021, ¶ 25). To the extent this factor is relevant, it too supports the jury's punitive damages award by confirming that RCI was fully on notice that it could be subjected to a substantial punitive damages award for its malfeasance.

RCNM sought and obtained a contract with the State to provide services to the developmentally disabled and receive payment from the State in return. New Mexico has several options when addressing the poor care of residents by providers such as Defendants. Tr-10:198-99. It can impose a monetary sanction, impose a moratorium on new residents until problems are resolved, or terminate a company's contract. *Id.* Here, the State eventually terminated Defendants' contract—an action one state official described as long "overdue." Tr-10:207. Even RCI's own testifying expert, Dr. Darvin Hirsch, testified that if he had control over state contracts, he would have terminated the contract two years earlier. Tr-15:166.

Moreover, along the lines of criminal sanctions, RCI's actions are analogous to violations of the Resident Abuse and Neglect Act, which are punishable as felonies as well as by fines. NMSA 1978, §§ 30-47-3, 30-47-4, 30-47-6 (1990). RCI's actions are also analogous to child endangerment. NMSA 1978, § 30-6-1 (2009). In New Mexico, a person who places a child in a dangerous situation

resulting in great bodily harm to that child is guilty of a first-degree felony, even if that person does not "intend" harm but instead acts "with a reckless disregard for the safety or health of the child." *Id.* For these reasons as well, the trial court erred in remitting the jury's award, which should be reinstated in full.

## CONCLUSION

For the foregoing reasons, the trial court's order remitting the jury's award of punitive damages against RCI should be reversed, and the full amount of those damages reinstated.

## STATEMENT REGARDING ORAL ARGUMENT

This cross-appeal presents important questions regarding the sanctity of a jury's damages award, and a trial court's ability to remit punitive damages when the award does not exceed Constitutional boundaries. Mr. Selk respectfully suggests that oral argument would be helpful in the determination of this appeal.

Respectfully submitted,

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