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.

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

Defendants/Appellants/Cross-Appellees.

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

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

The Honorable Nan Nash, presiding

ORAL ARGUMENT REQUESTED

SHAPIRO BETTINGER CHASE LLP
Carl J. Bettinger
Gregory W. Chase
7411 Jefferson Street NE
Albuquerque, New Mexico 87109
Telephone: (505) 888-6463

ROBIN A. GOBLE LLC
Robin A. Goble
P. O. Box 208
Corrales, New Mexico 87048
Telephone: (505) 720-4784

THOMAS E. LILLEY, P.C.
Thomas E. Lilley
330 North Main Street
Roswell, New Mexico 88201
Telephone: (575) 625-2340

MORGAN, LEWIS & BOCKIUS LLP
R. Ted Cruz
Allyson N. Ho
Claire Swift Kugler
1000 Louisiana, Suite 4000
Houston, Texas 77002
Telephone: (713) 890-5000

Counsel for Plaintiff/Appellee/Cross-Appellant Larry Selk

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STATEMENT OF COMPLIANCE

As required by Rule 12-213(G) NMRA, we certify that this response complies with the type-volume limitation of Rule 12-213(F)(3) NMRA. According to Microsoft Office Word 2003, the body of the Answer Brief, as defined by Rule 12-213(F)(1) NMRA, contains 10,965 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 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 RCNM and RCI each, independently of one another, owed a duty to provide a safe and healthy environment for Mr. Selk; RCNM and RCI both breached that duty; and RCNM's and RCI's willful, wanton, or reckless conduct each caused Mr. Selk's injuries. RP8:2717, 2757-59. The jury found RCI, RCNM, and RCI employee Thurman Williams each liable for Mr. Selk's rape. The jury also expressly found that RCI negligently hired Williams (a fact RCI fails to mention in its opening brief), and that this negligence caused Mr. Selk's damages. RP8:2717. The jury found RCI and RCNM's 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 him, feed him, and help him in and out of bed. Tr-6:84; Tr-11:84. 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 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 Defendants' care 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 RCI's group homes in New Mexico had an annual employee turnover rate of 70 percent, compared to average rates of 40-45 percent for similar providers. Tr-10:193, 195.

In spring 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 drug test results were disturbing: nine employees were terminated for either failing or refusing to take the drug test. Tr-7:96-97. College House employees tested positive for methamphetamines and marijuana, and one tested positive for alcohol while on the job. Tr-7:99, 103-04.

Ray testified he was "hiring left and right" and 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.

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 his application stated he had five years of relevant experience, that claim was inconsistent with his job history. Tr-12:74-75. Ray and the 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.

Williams's file contains no evidence of any training. Tr-8:92; Tr-9:62. Instead, his timecard shows that he worked just one single shift: 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 College House employees were supposed to "shadow" another caregiver for one-to-three days before being allowed to work alone with residents (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 Williams's only shift as an RCI employee. Ex.94; Tr-9:86, 115.

The next day, when caregiver Kimberly Janisch came on duty, she noticed Mr. Selk's head was down and he had tears in his eyes. Tr-6:135-36. Mr. Selk did not want to eat his dinner that evening, and he made unusual groaning noises 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. When Janisch was

washing Mr. Selk, she noticed two red marks on his neck that appeared to be hickeys. Tr-6:139-40; *see also* Ex.12. Janisch immediately called in a coworker, 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. He 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 his 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 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 the examination. Ex.12; Tr-7:18. College House staff had "probably" washed his clothes by then, and 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 counseling. Tr-7:34-36, 61-62.

Meanwhile, the morning of the sexual assault, RCNM associate director Manny Martinez had received a call concerning Williams from a College House resident family member. Ex.328. She was concerned because Williams's prior employer, Tobosa (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 had reported Williams to New Mexico Adult Protective Services ("APS"). *Id.*; Tr-9:127; Tr-10:17-18. Martinez placed Williams on administrative leave. 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 fact, 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.

Meanwhile, Human Resources 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 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 records. Tr-14:147-48. There is also no evidence in Mr. Selk's records that he was ever provided with Tylenol or any of the other treatment the SANE nurse recommended. Tr-9:58-59. RCNM sent a Critical Incident Report ("CIR") regarding the event to RCI's headquarters. 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 any 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 abuse who serves on the Boston College faculty—testified that the evidence showed Mr. Selk had symptoms of rape trauma syndrome, a subcategory of posttraumatic stress disorder. Tr-14:8-9, 20, 25-28. Dr. Burgess testified that because sexual assault imprints a 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. Mr. Selk should have received appropriate therapy—but his records show that he was never even assessed for therapy. Tr-14:38-39.

Defendants' expert, Dr. Roll, initially 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:

> 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 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 to Defendants. Tr-10:73. The Res-Care CIR, however, erroneously states that the assault was only alleged, not substantiated. Ex.22; Tr-8:171-72.

Mr. Selk's sister repeatedly asked Defendants for information about the attack on her brother, but they would not answer her questions. Tr-11:113-15. 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"—a characterization at odds with the parties' stipulation 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

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, RCI represented that Williams had been appropriately screened and trained. 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.

Numerous employees in New Mexico, including Williams, received written offers of employment from "Res-Care, Inc." Tr-6:79; Tr-7:71-72; Tr-8:75-78; Exs.58, 365. 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 and quality of care at College House but would predictably improve the profitability of the operation. Tr-10:192-93; Tr-12:54-55. RCI paid caregivers like 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, 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 raises were badly needed and staff turnover rates were high. *Id.*

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 costs for group home operational expenditures over $500. Tr-12:40-41. RCI used a 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. RCNM's Executive State Director 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." *Id.*

Local supervisors, however, lacked the most basic qualifications to run RCI's operations. John Ray 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, staff hiring, and overseeing the Roswell homes. Tr-7:80, 83-84. Ray had no relevant experience. 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' expert admitted, "I was not impressed with the management." Tr-15:167.

Once hired, employees violated numerous policies that caused the negligent hiring of Williams and the resulting rape of Mr. Selk. *See, e.g.*, Tr-6:135; Tr-7:121 (door should be open when one caregiver is with a resident); Tr-9:214 (two caregivers should be in attendance with a resident if door must be closed); Tr-7:158 (drug and alcohol free workplace); Tr-8:47-48 (three work-related references required 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 zero balance in the RCNM account. Tr-12:36; RP5:1639. 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. Tr-17:39.

At trial, RCI admitted that the residents in its group homes were completely dependent upon their caregivers for their safety. Tr-9:185. However, RCI was on notice of—and 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. Even though RCI was responsible for providing the resources necessary for its New Mexico group home operations—and 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 or neglect as compared to other New Mexico service providers. Tr-11:52-53, 65; Tr-17:91-93; Tr-10:168; Ct.Ex.-6:42 (Deposition). DHI implemented a disproportionate number of corrective action plans and focus surveys to force RCNM to comply with regulations and to improve staff training. Tr-10:200-02. DOH Division Director 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 to care for developmentally disabled individuals in 2006. Tr-10:206-07; Tr-11:60-61; Tr-13:55.

RCI determined what types of incidents RCNM needed to report to RCI, including alleged sexual assaults, for its CIR database. Tr-8:147. RCI admitted that the database's purpose was to allow RCI to 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 responded adequately to CIRs. Tr-8:172-73.

Through the CIRs, RCI had actual notice of years of chronic service deficiencies and shoddy operations. Tr-10:191, 193, 200, 206-07. The jury heard

that the CIRs sent to Weishaar's group at RCI (and 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 had knowledge of a substantiated incident of financial exploitation at College House, as well as an April 2004 report that Mr. Selk's caregivers were recording on his medical records that care had been provided to him before it really was. Ex.451B; Tr-7:178; Tr-8:152-53. RCI took no action.

C. Course Of Proceedings

Mr. Selk's sister, Rani Rubio, filed this suit on his behalf. RP1:1. Despite Defendants' claim (at 22) that Mr. Selk's direct negligence claim against RCI was "entirely new," the first amended complaint alleged negligence claims against RCI and RCNM *individually*. RP1:301-12. It further alleged that RCNM and RCI each operated College House, each owed a duty to Mr. Selk, and each breached that duty by, among other things, negligently operating College House and negligently hiring and supervising staff. RP1:307-08. The complaint further alleged that, "Res-Care, Inc. has engaged in a systematic pattern of failing to provide adequate staff to care for residents like Larry Selk." RP1:311-12.

Mr. Selk consistently pursued his direct liability claims against RCI throughout this litigation. RP2:505; RP7:2282, 2286-87; Tr-4:16-17 Defendants even referenced the "undisputed fact[]" that "Plaintiff alleges that Selk was

sexually assaulted . . . by employees, agents or apparent agents of RCNM and/or RCI" in summary judgment briefing. RP5:1779.

The jury unanimously found RCI and RCNM each individually liable for its own negligence. RP8:2757-59; Tr-18:2-4. As relevant here, the jury was also instructed that:

> An employer is one who has another perform certain work and who has the right to control the manner in which the details of the work are to be done, even though the right of control may not be exercised.
>
> The person performing the work is the employee.

RP8:2736. This instruction follows *word-for-word* the definition of employer and employee found in UJI 13-403.

The jury was then 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.* All of this is conspicuously absent from Defendants' Brief. Also, contrary to Defendants' statement (at 14), the jury did not find that "Williams and every other actor at the College House facility were RCNM employees." RP8:2717, 2757-59.

The jury determined that RCI, RCNM, and Williams were 65 percent, 30 percent, and 5 percent responsible for Mr. Selk's injuries, respectively. RP8:2758. The jury awarded $4,950,000 in compensatory damages. *Id.* The jury then found

the acts of RCI and RCNM were each willful, wanton, or reckless. RP8:2758-59. The jury awarded punitive damages in the amount of $48,000,000 against RCI, and $1,200,000 against RCNM. *Id.*

During post-trial motion practice, the trial court denied Defendants' motion for new trial and motion for remittitur of compensatory damages. RP8:3059-63. The court 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.

INTRODUCTION TO ARGUMENT

RCI and RCNM cannot escape the tragic facts of this case. Larry Selk was entrusted to their care and dependent on their protection. Rather than honor that trust, they placed profits above the safety and well-being of their residents, and they hired a rapist without even bothering to check his references. They then allowed that rapist to be alone in the bedroom of a profoundly disabled man, who was unspeakably violated.

The jury found RCI *directly* liable for its willful, wanton and reckless behavior. RCI now attempts to escape liability by claiming that Mr. Selk's negligence claim *against RCI directly* was actually a furtive attempt to pierce the

corporate veil. But the facts do not support their theory. The jury did not find RCI liable for the misdeeds of a subsidiary. The jury instead found RCI liable for its *own* actions and omissions under hornbook tort law.

This Court should also affirm the trial court's refusal to remit the compensatory damages award, which "stands in the strongest position known in the law." *Sandoval v. Chrysler Corp.*, 1998-NMCA-085, ¶ 14, 125 N.M. 292, 960 P.2d 834 (citation omitted). The jury's award is supported by sufficient evidence, to say the least, and thus does not shock the conscience. Defendants put forth no evidence that the jury acted out of passion or prejudice—and the trial court expressly concluded that it did not. Nor is there evidence to back up Defendants' claim that either the (1) refusal to bifurcate Mr. Selk's punitive damages claim, or (2) admission of certain CIRs, improperly influenced the jury.

RCI's request for further remittitur of the punitive damages award should be denied because the trial court erred in remitting that award in the first place. Instead, as argued comprehensively in Mr. Selk's brief on cross-appeal, that award should be reinstated in full. The trial court erred by focusing too heavily on the ratio of damages, instead of on RCI's reprehensibility. And RCI's recklessness and willful indifference to Mr. Selk's well-being were more than sufficient to affirm the jury's punitive damages award in full. For all of these reasons, the trial court's award of compensatory damages should be affirmed, the trial court's order

remitting the jury's award of punitive damages should be reversed, and the full amount of punitive damages should be reinstated.

ARGUMENT

A. RCI Was Properly Held Liable For Its Own Torts

Mr. Selk brought straightforward negligence claims against multiple tortfeasors. The fact that RCI and RCNM—two separate corporate entities—are also related corporate entities has no bearing on whether RCI is itself a tortfeasor. *United States v. Bestfoods*, 524 U.S. 51, 65 (1998). Nonetheless, RCI attempts to escape liability by arguing that a parent corporation can never be held liable for its own torts unless the plaintiff first pierces the corporate veil of tortfeasor subsidiaries. That novel rule has no basis in law.

First, RCI has waived that argument by failing to make any objection to the substance or form of the pertinent jury charge. Second, even if not waived, the argument fails on the merits. Mr. Selk alleged—and the jury found—that RCI was liable for its *own* tortious acts. Holding a tortfeasor directly liable for its own torts is hardly a "dramatic change" in New Mexico law, as RCI claims. *See* Res-Care Br. 22.

1. The Standard Of Review: This Court Reviews The Trial Court's Denial Of RCI'S Motion For Judgment As A Matter Of Law De Novo, But May Reverse Only If There Are "No True Fact Issues"

RCI cites a summary-judgment case for its claim that the standard of review for this "pure question of law" is de novo. Res-Care Br. 14 (citing *Juneau v. Intel*

Corp., 2006-NMSC-002, ¶ 8, 139 N.M. 12, 127 P.3d 548). But RCI is appealing from rulings on a motion in limine and a motion for judgment as a matter of law. *Id.* at 13-14. The standard of review for a motion in limine ruling is abuse of discretion, and only the interpretation of the law underlying the ruling is reviewed de novo. *Nelson v. Homier Distrib. Co.*, 2009-NMCA-125, ¶ 29, 147 N.M. 318, 222 P.3d 690 (citation omitted).

Judgment as a matter of law "is a drastic measure that is generally disfavored inasmuch as it may . . . intrude on a litigant's right to a trial by jury." *Torres v. El Paso Elec. Co.*, 1999-NMSC-029, ¶ 26, 127 N.M. 729, 987 P.2d 386, overruled on other grounds, *Herrera v. Quality Pontiac*, 2003-NMSC-018, 134 N.M. 43, 73 P.3d 181. That "drastic" remedy is appropropriate only where there are *no* fact issues for the jury. *Id.* This Court reviews the denial of judgment as a matter of law de novo. *Id.*

2. RCI Failed To Preserve Its Veil-Piercing Argument

New Mexico's rules are clear that "[f]or the preservation of any error in the charge, objection *must* be made to any instruction given . . . or, in case of a failure to instruct on any point of law, a correct instruction *must* be tendered, before retirement of the jury." Rule 1-051(I) NMRA (emphasis added). In other words, where there is no objection to the jury instructions, those instructions become the law of the case. *Sandoval v. Baker Hughes Oilfield Operations, Inc.*, 2009-

NMCA-095, ¶ 43, 146 N.M. 853, 215 P.3d 791. Because RCI failed (1) to object to any of the pertinent jury instructions and special interrogatories, or (2) to file alternative requested jury instructions, its veil-piercing argument is waived. *See* Tr-16:3-5, 8; Tr-17:26.

RCI did make its veil-piercing argument in a motion in limine and a motion for judgment as a matter of law. But where, as here, the trial court has rejected a party's argument regarding the applicable law, the party must additionally challenge the form and the language of the submitted jury charge. *Heath v. La Mariana Apartments*, 2007-NMCA-003, ¶ 26, 141 N.M. 131, 151 P.3d 903. RCI did not do so here.

To the extent RCI maintains it appeals a "question of law," its argument really is that the evidence presented in the trial court was insufficient to hold it liable on (what RCI views as) Mr. Selk's theory of the case. *See, e.g.*, Res-Care Br. 10, 18-20. "The sufficiency of the evidence is measured against the jury instructions, because they become the law of the case." *Sandoval*, 2009-NMCA-095, ¶ 43. Because RCI made no objection to the jury charge, RCI has "waived any argument that there was no evidence to support a verdict." *Id.* ¶¶ 45, 56 (citation omitted). RCI asserts no review point regarding whether the trial court improperly admitted evidence of RCI's liability. For these reasons, the Court should summarily overrule RCI's first review point.

3. The Jury Permissibly Held RCI Liable For Its Own Torts, Not Those Of A Subsidiary

Even if RCI did not waive its veil-piercing argument, that argument fails on its merits. It is axiomatic that every person, including a corporation, is liable for his, her, or its own torts. In New Mexico, "'[*e*]*very* person has a duty to exercise ordinary care for the safety of the person and the property of others.'" *Crespin v. Albuquerque Baseball Club, LLC*, 2009-NMCA-105, ¶¶ 12-13, 147 N.M. 62, 216 P.3d 827, *cert. granted,* 2009-NMCERT-9, 147 N.M. 423, 224 P.3d 650 (quoting UJI 13-1604 NMRA) (other citation omitted). Moreover, a defendant "'who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability . . . for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if . . . his failure to exercise such care increases the risk of such harm.'" *Baer v. Regents of the Univ. of Cal.*, 1999-NMCA-005, ¶ 12, 126 N.M. 508, 972 P.2d 9 (1998) (quoting RESTATEMENT (SECOND) OF TORTS § 323 (1965)).

RCI does not dispute that it owed a duty to Mr. Selk. Rather, RCI attempts to evade responsibility for breaching that duty by contending "that a parent will never be liable *for a subsidiary's actions* absent extraordinary circumstances sufficient to warrant 'piercing the veil.'" Res-Care Br. 15 (emphasis added).

RCI's argument ignores that RCI was *not* held liable for "a subsidiary's actions," but rather for its own actions. *See id.*

The trial court instructed the jury (with no objection from RCI) that it could find RCI negligent if *RCI* hired Williams and failed to exercise ordinary care in hiring, training, or supervising him, or if *RCI* operated, managed, or supervised College House (or had the right to), and failed to exercise ordinary care. RP8:2721. The jury expressly found that RCI *itself* committed these torts. RP8:2757. RCI is therefore liable for its own acts and omissions under New Mexico law. *See Dellaira v. Farmers Ins. Exch.*, 2004-NMCA-132, ¶ 14, 136 N.M. 552, 102 P.3d 111 (insureds may pursue claim against entity related to insurer issuing policy because entity "has control over and makes the ultimate determination regarding the merits of an insured's claim"); *Enriquez v. Cochran*, 1998-NMCA-157, ¶ 110, 126 N.M. 196, 967 P.2d 1136 (national youth organization may be held liable when it controlled local organization and could have issued a policy to ensure safety of local employee); *Kaveny v. MDA Enters., Inc.*, 2005-NMCA-118, ¶ 21, 138 N.M. 432, 120 P.3d 854 (president individually liable for his own fraudulent acts while also holding corporation liable); *Stinson v. Berry*, 1997-NMCA-76, ¶ 18, 123 N.M. 482, 943 P.2d 129 (directors liable for their own torts "regardless of whether the corporation is also liable.").

RCI's claim (at 33) that Mr. Selk somehow "waived" his right to hold RCI

directly liable fails because Mr. Selk does not need to preserve error on RCI's appellate point. Also, as discussed above (at 14), Mr. Selk specifically pleaded his claim against *RCI*. RP1:301-12. The trial court found that Mr. Selk "sufficiently gave RCI notice of the general basis of the claims against it." RP7:2495. RCI cannot now legitimately claim unfair surprise.

RCI's cited cases (at 16-18) do not require a different conclusion. None involves direct negligence claims against parent corporations for their own acts and omissions. And *Morrow v. Cooper*, 113 N.M. 246, 249, 824 P.2d 1048, 1051 (Ct. App. 1991), supports the jury's finding of liability against RCI because that case expressly distinguishes the situation where, as here, liability is based solely upon a corporation's own acts and omissions.

4. The Trial Court Properly Denied RCI's Motion For Judgment As A Matter Of Law Because There Were Issues Of Fact For The Jury

The trial court's refusal to grant judgment as a matter of law to RCI can be reversed only if there were "no true issues of fact" relating to liability. *Torres*, 1999-NMSC-029, ¶ 26. Here, overwhelming evidence supports the jury's findings that RCI negligently hired Williams, RCI's negligence caused Mr. Selk's injuries, and RCI's acts were willful, wanton, or reckless. RP8:2757-59. And ample evidence supports the jury's finding that RCI itself was responsible for 65 percent of Mr. Selk's damages. RP8:2758.

First, the trial court correctly instructed the jury that it could find RCI *directly* liable if it hired Williams, and failed to exercise ordinary care in hiring, training, or supervising him. RP8:2721. Williams, along with numerous other employees, received a written offer of employment from RCI—not RCNM. Tr-6:79; Tr-7:71; Tr-8:75-78. Other RCI employees, such as Ray and Ranes, were responsible for hiring, training, and supervising Williams. Tr-7:82, 83, 85; Tr-9:81; Exs.58, 365. Based on the overwhelming evidence, and "resolving any conflicts or contradictions in the evidence in a light most favorable to" Mr. Selk, there were, at a minimum, true fact issues that must be resolved in favor of the jury's verdict as to RCI's negligent hiring of Williams. *See Torres*, 1999-NMSC-029, ¶ 26.

The jury's finding that RCI negligently hired Williams is alone enough to support the jury's verdict. But there is more. The trial court instructed the jury that it could find RCI liable if it found that RCI operated, managed, or supervised College House (or had the right to), and failed to exercise ordinary care. RP8:2721. This Court "presume[s] that the jurors followed the instructions given by the court." *Kilgore v. Fuji Heavy Indus. Ltd.*, 2009-NMCA-078, ¶ 26, 146 N.M. 698, 213 P.3d 1127, *cert. granted*, 2009-NMCERT-7, 147 N.M. 363, 223 P.3d 360. As discussed in more detail above (at 10-14), RCI—not RCNM—imposed a nearly four-year-long pay freeze, even though RCI's extraordinary

turnover rate directly impacted residents' quality of care. RCI gathered reports regarding incidents of abuse and neglect, but did nothing in the face of glaring deficiencies in its New Mexico operations. RCI set the budget for state operations and had to approve all costs over $500. And RCI "had the authority to implement whatever changes they thought needed to be implemented that were in the best interests of the residents." Ct.Ex.-6:42.

RCI objects that a corporation cannot be held directly liable for its own torts unless it exercises control over a subsidiary above and beyond supervising budget decisions and articulating general policies and procedures. Res-Care Br. 23-24 (citing *Bestfoods*, 524 U.S. at 72). But *Bestfoods* is a CERCLA case—and CERCLA imposes liability upon *operators* of polluting facilities. *Id.* at 65. The *Bestfoods* analysis thus does not control here.

In more analogous circumstances, numerous courts have allowed precisely the type of direct liability the jury found here. The Illinois Supreme Court has held that "budgetary mismanagement, accompanied by the parent's negligent direction or authorization of the manner in which the subsidiary accomplishes that budget, can lead to a valid cause of action under the direct participant theory of liability." *Forsythe v. Clark USA, Inc.*, 864 N.E.2d 227, 237 (Ill. 2007). "[I]f a parent company mandates an overall course of action and then authorizes the manner in which specific activities contributing to that course of action are undertaken, it can

be liable for foreseeable injuries." *Id.*

Similarly, in *Spires v. Hospital Corp. of America*, 289 Fed. Appx. 269, 271-72 (10th Cir. 2008), the Tenth Circuit held under Kansas law that a parent corporation may be held liable for negligently implementing a software system in its subsidiaries' hospitals that caused the subsidiaries to provide inadequate staffing levels. And in *Canavan v. National Healthcare Corp.*, 889 So. 2d 825, 826 (Fla. Dist. Ct. App. 2004), the court rejected a similar veil-piercing argument, holding that the plaintiff had presented sufficient evidence of the nursing home owner's own negligence to hold it directly liable. *Id.* at 826-27 (owner approved home's budget and ignored inadequate staffing).

5. The Jury Properly Found RCI Liable For Negligent Hiring

RCI concedes that "staff" of its New Mexico operations "received letters of employment from RCI, rather than RCNM." Res-Care Br. 21. Nonetheless, RCI seeks to evade responsibility by claiming that the employees who interviewed, hired, and supervised Williams were RCNM staffers. Res-Care Br. 14, 21. But that does not change the fact that they *all* received written offers of employment from RCI—not RCNM. Ex.58; Ex.365. And that was more than sufficient evidence to submit to the jury whether RCI negligently hired Williams, just as the trial court did—without any objection from Defendants.

RCI's contention that it was impermissibly held liable because it had the

"right to control" the employees at issue (at 23) is foreclosed by the express terms of the jury instruction—UJI 13-403—which defines an employer in part as one "who has the right to control the manner in which the details of the work are to be done, *even though the right of control may not be exercised.*" RP8:2736 (emphasis added). Having failed to object to the use of UJI 13-403, RCI cannot be heard to complain because that instruction is now the law of this case. *Sandoval*, 2009-NMCA-095, ¶ 43.

Moreover, that instruction was correct—and none of RCI's cited cases says otherwise. In *Keith*, the Court did not reach the issue. *See Keith v. ManorCare, Inc.*, 2009-NMCA-119, ¶ 19, 147 N.M. 209, 218 P.3d 1257, *cert. granted,* 2009-NMCERT-10, 147 N.M. 452, 224 P.3d 1257. And in *Johnson v. Flowers Industries, Inc.*, 814 F.2d 978, 980-81 (4th Cir. 1987), the court noted that plaintiff employees could pursue claims against the employer's parent corporation if they could show that the parent corporation controlled the decisions at issue. *Id.*

In sum, RCI's veil-piercing argument rests entirely on the false premise that Mr. Selk is seeking to hold RCI liable for the tortious acts of RCNM. But the jury found RCI liable for its own torts, and Defendants' novel argument that corporate parents are *per se* immune from liability for their own torts—if those torts happen to have been committed alongside their subsidiaries—finds no support in New Mexico law.

B. The Trial Court Properly Refused To Remit The Compensatory Damages Award

Where, as here, the trial court has approved the jury's compensatory damages award, it "stands in the strongest position known in the law." *Chrysler Corp.*, 1998-NMCA-085, ¶ 14. Only in rare and "extreme" cases, where there are "unmistakable" indications of passion or prejudice, will such an award be set aside. *Sandoval*, 2009-NMCA-095, ¶¶ 20, 41. This is not such a case. The trial court correctly determined that the compensatory damages awarded to Mr. Selk—who has suffered grievous physical injuries that are both permanent and difficult to quantify with mathematical precision—neither shocked the conscience nor was motivated by passion or prejudice. That determination was amply supported by the evidence.

1. The Proper Standard Of Review Is Abuse Of Discretion

This Court will not reverse the denial of remittitur unless the trial court abused its discretion. *Sandoval*, 2009-NMCA-095, ¶ 13-14. The trial court does not abuse its discretion so long as the award is supported by evidence, is not "clearly out of proportion" to the injury, and does not shock the conscience. *Id.* ¶ 15. The reviewing court cannot substitute its judgment for that of the jury, and "the mere fact that a jury's award is possibly larger than the court would have given is not sufficient to disturb a verdict." *Id.* ¶ 17 (citation omitted).

It is no help to compare awards in different cases for pain and suffering. The proper amount to award "necessarily rests with the good sense and deliberate judgment of the tribunal assigned by law to ascertain what is just compensation, and in the final analysis, each case must be decided on its own facts and circumstances." *Id.* ¶ 18 (quotation marks and citation omitted). Indeed, "what other juries have done in cases involving similar injuries 'is of no consequence.'" *Id.* (citation omitted).

In assessing the sufficiency of the evidence, this Court simply examines the plaintiff's evidence to determine whether it could justify the award. *Id.* ¶ 22. It is the jury's role to assess witness credibility and reconcile contradictory evidence. *Littell v. Allstate Ins. Co.*, 2008-NMCA-012, ¶ 13, 143 N.M. 506, 177 P.3d 1080.

2. The Trial Court Did Not Abuse Its Discretion In Refusing To Remit The Jury's Compensatory Damages Award

This case contains no "unmistakable" indications of passion or prejudice. *Sandoval*, 2009-NMCA-095, ¶ 20. Nor does the award of damages "shock the conscience." *Id.* Tacitly conceding as much, Defendants ignore the standard of review and ask this Court instead to impermissibly (1) re-weigh the evidence, and (2) compare jury awards. This Court should reject Defendants' argument.

Defendants primarily object to the damages award on the ground that no evidence supports Mr. Selk's future damages. Res-Care Br. 25. But that argument fails because the verdict form—to which Defendants did not object—asked the

jury to award a single amount for *both* past and future damages. Defendants failed to request that the the verdict form separate past and future damages. Accordingly, Defendants failed to preserve any objection on this basis. *See Atler v. Murphy Enters., Inc.*, 2005-NMCA-006, ¶ 11, 136 N.M. 701, 104 P.3d 1092; *see also Littell*, 2008-NMCA-012, ¶ 33. What's more, Defendants' argument presumes an error not manifested in the verdict. And Defendants do not even attempt to argue how Mr. Selk's *past* injuries lack support in the evidence (and so have waived that argument, as well).

Regardless of what portion of the compensatory damages may have been for future pain and suffering, they are amply supported. Defendants concede (at 25) that "Selk was a victim, and that he deserves to be compensated for his pain and suffering." But they contend there was "*no evidence* that Mr. Selk suffered any ongoing injury." *Id.* (emphasis added). That statement is flatly contradicted by the record.

Even Defendants' own expert admitted that "the consequences of this rape would last for the rest of [Mr. Selk's] lifetime." Tr-15:48. Thus, Defendants' assertion that there was "no evidence that Mr. Selk suffered any ongoing injury" is directly contrary to the testimony *of their very own expert.*

Furthermore, one of most respected experts on rape trauma and injury testified that 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. Tr-14:28-31. In light of that compelling testimony (which the Court is obliged to assume the jury credited fully), Defendants' assertion that "no evidence" supports future pain and suffering is hard to explain. Their invitation for this Court to re-weigh the evidence and substitute its own judgment for that of the jury (and the trial court) should be rejected. *See* Res-Care Br. 27-31.

For example, Defendants contend that Mr. Selk's caregivers testified to certain behavioral changes only as to the six weeks following the rape. *Id.* at 27-28. That argument ignores the uncontroverted testimony that Defendants' employees were not trained to observe signs of distress, and also the insufficiency of Defendants' own records concerning Mr. Selk's care. And it is simply a rehash of their jury argument regarding the weight to be given to the testimony. Under well-established law, it was well within the jury's province to credit Mr. Selk's expert testimony while rejecting the self-serving testimony of Defendants' employees and expert.

Defendants' cited cases (at 31) do not require a different conclusion. In *Rael v. F&S Co.*, 94 N.M. 507, 511, 612 P.2d 1318, 1322 (Ct. App. 1979), this Court addressed whether the jury should have been instructed on future pain and suffering—but that is not an issue here. What's more, *Rael* expressly

acknowledged that expert testimony on future pain and suffering *would* overcome an objection regarding no evidence. *Id.* at 511-12, 1322-23. Because such testimony was present here, *Rael* supports the damages award in this case.

Similarly unhelpful to Defendants is *Central Security & Alarm Co. v. Mehler*, 1996-NMCA-060, 121 N.M. 840, 918 P.2d 1340, which addressed the legal accuracy of a profit calculation and is thus irrelevant here. 1996-NMCA-060, ¶¶ 22-23. And in *Chrysler*, this Court determined that the trial court's refusal to grant remittitur given its finding that the award "shocked the conscience" was an abuse of discretion. *Id.* ¶¶ 1, 11, 18. This Court expressed no view as to that finding and explained that it is not a reviewing court's duty to determine the value of pain and suffering. *Id.* ¶ 13, 18. If anything, *Chrysler* confirms that this Court must reject Defendants' invitation to substitute its own judgment for that of the trial court.

It is true that Mr. Selk, given his disabilities, could not verbally explain to the jury his level of pain and suffering. Defendants would exploit that limitation by seeking a legal ruling that witness and expert testimony is not enough to permit Mr. Selk to recover for the harm he suffered. Needless to say, that is not the law.

3. The Trial Court Did Not Abuse Its Discretion In Denying Defendants' Bifurcation Motion

The trial court properly denied Defendants' bifurcation motion because it was untimely—filed Thursday before a Monday trial. Moreover, unlike the law in

other jurisdictions relied upon by Defendants, New Mexico law does not require trial courts to bifurcate punitive damages issues. Defendants also point to no evidence that the jury's compensatory award was prejudiced by evidence related to RCI's wealth.

a. Defendants' Motion Was Untimely

Defendants filed their motion on November 5, 2009, and the trial court denied the motion as untimely four days later, on the first day of trial. RP7:2563; Tr-5:5, 7. As Defendants' trial counsel conceded, "[d]enying bifurcation as untimely as a pretrial motion was certainly within [the trial court's] discretion." Tr-14:105. *See Aspen Landscaping, Inc. v. Longford Homes of New Mexico, Inc.*, 2004-NMCA-063, ¶¶ 11-12, 135 N.M. 607, 92 P.3d 53 (no abuse of discretion for trial court to deny untimely request for jury trial). Defendants fail to explain how the trial court did not act within its discretion when it denied their motion.

b. New Mexico Law Does Not Require Bifurcation Of Punitive Damages Issues

In New Mexico, bifurcation is "entrusted to the sound discretion of the court." *Bolton v. Bd. of Cnty. Comm'rs of Valencia Cnty.*, 119 N.M. 355, 361, 890 P.2d 808, 814 (Ct. App. 1994). The "court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, *may* order a separate trial." Rule 1-042(b) NMRA (emphasis added).

Defendants cite no case in which this Court has ever reversed a trial court's denial of a bifurcation motion.

In arguing that the trial court nonetheless abused its discretion in not ordering bifurcation here, Defendants point only to the jury's finding that RCI was 65 percent liable for Mr. Selk's damages. Res-Care Br. 14. As discussed above, ample evidence supports that jury finding. And "the mere fact that a jury's award is possibly larger than the court would have given is not sufficient to disturb a verdict." *Richardson v. Rutherford*, 109 N.M. 495, 503, 787 P.2d 414, 422 (Ct. App. 1990) (citation omitted). Defendants' cited cases do not say otherwise. The insurance cases rely upon Rule 11-411 NMRA, which provides that evidence of insurance is completely inadmissible—unlike wealth evidence, which is admissible for punitive damages purposes. *See Martinez v. Reid*, 2002-NMSC-015, ¶ 1, 132 N.M. 237, 46 P.3d 1237; *Safeco Ins. Co. of Am. v. U.S. Fid. & Guar. Co.*, 101 N.M. 148, 679 P.2d 816 (1984); *Sena v. N.M. State Police*, 119 N.M. 471, 892 P.2d 604 (Ct. App. 1995).

The decision in *Sloan v. State Farm Mutual Auto Insurance Co.* has nothing to do with bifurcation. 2004-NMSC-004, ¶ 1, 135 N.M. 106, 85 P.3d 230; *see also Couch v. Astec Industries, Inc.*, 2002-NMCA-084, ¶ 56, 132 N.M. 631, 53 P.3d 398 (bifurcation not at issue). In *Miller v. Connecticut General Life Insurance Co.*, 84 N.M. 321, 324, 502 P.2d 1011, 1014 (Ct. App. 1972), the parties *agreed* on a

bifurcated trial—and the concurring opinion pointed out that "[a] bifurcated trial should be requested or ordered only when there are highly persuasive reasons therefor." Here, the trial court acted well within its discretion when it declined to remit the compensatory damages award because there is no evidence that RCI's wealth improperly influenced the jury.

4. Defendants Waived Any Objection To The Proper Admission Of CIRs Demonstrating RCI's Knowledge Of Serious Wrongdoing In New Mexico

Defendants claim that the admission of seven CIRs artificially inflated the compensatory damages award. Res-Care Br. 35. Mr. Selk's counsel argued at trial that the reports were admissible to demonstrate RCI's knowledge of serious wrongdoing in New Mexico and its failure to take any action to correct it. Tr-9:6-7. The reports also show that Mr. Selk's injuries were foreseeable and thus admissible as to liability. Tr-8:150-51; *Spencer v. Health Force, Inc.*, 2005-NMSC-002, ¶ 23, 137 N.M. 64, 107 P.3d 504 (citing with approval case holding that notice of an employee's alcoholism and possible violent behavior "may make sexual assault by that employee foreseeable" (citation omitted)). The trial court did not abuse its discretion in admitting these reports. *Nelson*, 2009-NMCA-125, ¶ 29.

"Consciousness of wrongdoing" is unquestionably relevant to the issue of punitive damages. *See Littell*, 2008-NMCA-0012, ¶ 64 ("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.* ¶ 65; *see also Gonzales v. Surgidev Corp.*, 120 N.M. 133, 144, 899 P.2d 576, 587 (1995); *Enriquez*, 1998-NMCA-157, ¶ 126; *accord Smith v. Ingersoll-Rand Co.*, 214 F.2d 1235, 1249 (10th Cir. 2000). Even *Ruiz v. Southern Pacific Transportation Co.*, cited by Defendants at 36, holds that evidence that tends "to make the existence of defendants' allegedly negligent omissions . . . after notice and knowledge of danger, more or less probable" is admissible. 97 N.M. 194, 202, 638 P.2d 406, 414 (Ct. App. 1981). The reports were thus properly admissible in relation to punitive damages as well as to foreseeability.

If Defendants believed the reports could prejudice the jury's finding on compensatory damages, Defendants could have asked for a limiting instruction. Their failure to do so waived any error. *Chavez v. Bd. of Cnty. Comm'rs of Curry Cnty.*, 2001-NMCA-065, ¶ 43, 130 N.M. 753, 31 P.3d 1027; *Norwest Bank N.M., N.A. v. Chrysler Corp.*, 1999-NMCA-070, ¶ 40, 127 N.M. 397, 981 P.2d 1215.

Defendants cite no fact or law showing the jury's award of compensatory damages was improperly influenced by the admission of these reports. Contrary to Defendants' unsupported assertion at 36, the trial court did admit a report regarding an incident at College House. Tr-9:25-26. Despite Defendants'

conclusory claim that the reports are too dissimilar, reports related to other New Mexico facilities were admissible because they are directly relevant to "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). In addition, *State v. Lamure*, 115 N.M. 61, 71, 846 P.2d 1070, 1080 (Ct. App. 1992), cited by Defendants at 35, does not support their argument because prosecutors in criminal cases generally cannot use evidence of prior misconduct to show that the criminal had knowledge of wrongdoing.

Defendants have not shown that there was insufficient evidence to support the compensatory damages award, or that the trial court's refusal to bifurcate or its admission of the CIRs improperly influenced the jury. Their argument that the trial court abused its discretion in refusing to remit the compensatory damages award thus fails.

C. The Jury's Punitive Damages Award Does Not Offend Due Process

Defendants do not dispute that Mr. Selk is entitled to punitive damages. Instead, Defendants argue that the jury's punitive damages award should be reduced further to only a 1:1 ratio. Res-Care Br. 39-42. As demonstrated in Mr. Selk's Brief-In-Chief, the trial court erred in reducing at all the jury's punitive damages award, which should be reinstated in full. It necessarily follows that RCI's request for further remittitur should be denied.

1. The Standard Of Review Limits The Court To Determining Whether The Award Is Grossly Excessive And Beyond The Outer Limits Of Due Process

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 jury's 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 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).

New Mexico juries "are entirely capable of assessing sensible and appropriate punitive damages." *Akins v. United Steel Workers of Am., Local 187*, 2010-NMSC-031, ¶ 21, 148 N.M.442, 237 P.3d 744. 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 (1998).

2. The Jury's Punitive Damages Award Was Not Grossly Excessive

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. RCI advances three primary arguments to the contrary, but none has merit.

a. Due Process Does Not Require A 1:1 Ratio In This Case

First, RCI argues that only a 1:1 ratio of compensatory to punitive damages would pass muster in this case. Res-Care Br. 40-41. But New Mexico case law does not support that result. RCI relies heavily on *State Farm*, but, critically, that case involved economic injury—not physical injury. In affirming a recent award with an **18:1** ratio, this Court re-affirmed that there is no "absolute limit on the ratio for a punitive damages award." *Akins v. United Steel Workers of Am., Local 187*, 2009-NMCA-051, ¶¶ 36-37, 146 N.M. 237, 208 P.3d 457, *affirmed*, 2010-NMSC-0031, 148 N.M. 442, 237 P.3d 744. Similarly, the U.S. Supreme Court has

"consistently rejected the notion that the constitutional line is marked by a simple mathematical formula" (*BMW*, 517 U.S. at 582) and declined "to impose a bright-line ratio which a punitive damages award cannot exceed." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003).

In New Mexico, 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." *Aken*, 2002-NMSC-021, ¶ 23 (emphasis added, citation omitted). 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 as the jury's punitive damages award was rationally related to the egregious conduct of RCI—particularly considering the difficulty of detecting rapes of the disabled and the need to deter other wrongdoers from engaging in similarly egregious conduct. RP8:3063.

As demonstrated in Mr. Selk's Brief-In-Chief, RCI's conduct in this case was highly reprehensible, and that reprehensibility alone would warrant the jury's substantial award of punitive damages. But there was more. Punitive damages "are aimed . . . principally at retribution and *deterring* harmful conduct." *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2621 (2008) (emphasis added); *State*

Farm, 538 U.S. at 415; *BMW*, 517 U.S. at 568. Injuries to developmentally disabled individuals like Larry Selk are notoriously difficult to detect and woefully underreported. Denise C. Valenti-Hein & Linda D. Schwartz, THE SEXUAL ABUSE INTERVIEW FOR THOSE WITH DEVELOPMENTAL DISABILITIES (1995) (only 3 percent of sexual abuse cases involving developmentally disabled individuals are ever reported). Thus for every assault of a developmentally disabled person that *is* reported, an untold number will go undetected, unreported, and unpunished.

Even where, as here, compensatory damages are relatively substantial, a large punitive damages award is justified by the need to deter conduct that is hard to detect and often goes unpunished. *Chavarria v. Fleetwood Retail Corp.*, 2006-NMSC-046, ¶ 38, 140 N.M. 478, 143 P.3d 717; *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"). The U.S. 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 (emphasis added). 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 reckless conduct against vulnerable individuals.

Relatedly, it is appropriate for the Court 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, 21-22 (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 detection. In fact, RCI's Chief Financial Officer testified that the jury's verdict in this case would simply cause RCI's "profitability to decline." RP8:2858. RCI's gross revenues for 2008 totaled over $1.5 billion, up from $1 billion only 4 years earlier. Ex.455; Tr-17:157. 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. That award is not "grossly excessive," and RCI's remittitur argument must therefore be rejected.

b. In The Face Of RCI's Extreme Recklessness, RCI's Focus On "Intentionality" Is Misplaced

RCI mistakenly trains its argument for further remittitur on the purported lack of "intentional" conduct in this case. Res-Care Br. 41. But intentional conduct is only one factor to be considered in the reprehensibility analysis. Given RCI's manifest disregard for Mr. Selk's physical safety and well-being, its conduct in essentially turning a rapist loose among its vulnerable charges (among other

tortious acts and omissions) is just 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" (RP8:3062)—particularly given that the conduct in some of those cases 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 Shipping*);
- Exhibiting bad faith on construction projects (*Pan Am*);[1]
- Violating consumer protection statutes (*Chavarria*);
- Mishandling insurance claims (*Allsup's*); and
- Violating the duty of fair representation (*Akins*).

In most of those cases, the magnitude of the harm does not begin to approach the harm Mr. Selk suffered. 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 ever choose to be brutally raped.

None of three leading New Mexico cases involving serious physical injury (*Aken*, *Atler*, *Jolley*) involved premeditated conduct specifically intended to cause physical harm either. In *Jolley*, the company's recklessness in leaving a natural gas wellhead unfenced and unprotected resulted in a young man being burned to death after his car struck the wellhead. There is no suggestion in this Court's

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

review of that substantial punitive damages award ($13 million) that the company's conduct was any less reprehensible for not being "intentional."

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 for employees (Tr-7:134-36, 182-83, 185; Tr-8:86-87, 91-92; Tr-12:72), to skip new employee training (Tr-8:92; Tr-9:62), and to fail to supervise new workers (Ex.94; Tr-9:85-86). The jury found RCI's conduct to be willful, wanton, or reckless. Under New Mexico law, "[w]illful conduct is the intentional doing of an act with knowledge that harm may result," UJI 13-1827, and recklessness is "the intentional doing of an act with utter indifference to the consequences." *Clay*, 118 N.M. at 270, 881 P.2d at 15. Thus, the jury found RCI's conduct was sufficiently reprehensible to support the jury's substantial award of punitive damages.

RCI's callous attitude toward Selk's rape proves the point. Selk should have received proper treatment after the rape, but RCI provided none. RCI never followed up on the critical incident report of 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. 28 (quoting same).

Defendants' counsel 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 Lary Selk's basic humanity only reinforces the need for substantial punitive damages to punish and deter its willful conduct.

In arguing to the contrary, RCI relies heavily on comparisons to other cases. But New Mexico law is clear that there is "no need . . . to engage in comparisons with the circumstances in other cases" and that to do so only "invites unhelpful if not inappropriate reweighing and comparing of evidence." *See Sandoval*, 2009-NMCA-095, ¶ 51. Moreover, RCI's selective reference to other punitive damages awards (at 38 and 41) does not reveal that other courts have permitted much larger awards.[2] RCI's comparisons are thus not only improper, but also unpersuasive.

c. RCI Had Sufficient Notice Of A Substantial Punitive Damages Award

RCI argues that remittitur is required because it had no notice it could be liable for a significant punitive damages award. Res-Care Br. 41-42. But New

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[2] *See, e.g., In re New Orleans Train Car Leakage Fire Litig.*, 795 So. 2d 364 (La. Ct. App. 2001) ($850 million punitive damages award for plaintiff class); *Time Warner Entm't Co. v. Six Flags Over Ga., LLC*, 563 S.E.2d 178 (Ga. Ct. App. 2002) ($257 million punitive damages award and compensatory damages award exceeding $197 million in commercial dispute); *Motorola Credit Corp. v. Uzan*, 503 F.3d 74, 81 (2d Cir. 2007) ($1 billion punitive damages award and $2 billion compensatory damages award in commercial fraud dispute).

Mexico law is clear that when companies like RCI ignore safety measures designed "to prevent the type of harm that occurred in this case" and that are its responsibility to enforce, they "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*, 2005-NMCA-006, ¶ 24.

RCI resists that conclusion, equating its conduct with violations of the Resident Abuse and Neglect Act (punishable with a $5,000 fine). But RCI fails to mention that violations of the Act are also punishable as felonies. NMSA 1978, §§ 30-47-3, 30-47-4, 30-47-6 (1990); *see also* NMSA 1978, § 30-6-1 (1990) (placing a child in a dangerous situation resulting in great bodily harm is a first-degree felony, even if actions are reckless). In any event, "the comparable sanctions factor is the least important indicium" of the punitive damages analysis, *Aken*, 2002-NMSC-021, ¶ 25, and, in fact, has been criticized by New Mexico courts "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 here, it does not support the trial court's remittitur given the reprehensibility of RCI's conduct and the need to deter similar conduct going forward.

Throughout this litigation, Defendants have maintained that Mr. Selk's profound disabilities make his injuries less worthy of compensation. Defendants recklessly hired a rapist pursuant to policies designed to maximize corporate

profits. And after the predictable result—a violent rape that left Mr. Selk bleeding and scared—Defendants ignored the medical advice and failed to provide him any physical or emotional treatment. At trial, they analogized him to an animal, and they told the jury he was "essentially the same" as before the rape. Mr. Selk is not the same, and the jury found that the multi-billion dollar corporation that caused, belittled, and ignored his suffering is properly liable under New Mexico law.

CONCLUSION

For the foregoing reasons, as well as those contained in Mr. Selk's Brief-In-Chief, the trial court's award of compensatory damages should be affirmed, the trial court's order remitting the jury's award of punitive damages should be reversed, and the full amount of punitive damages against RCI should be reinstated.

STATEMENT REGARDING ORAL ARGUMENT

This case presents the opportunity to confirm that corporations should be held liable for their own wrongful acts. It also 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,

SHAPIRO BETTINGER CHASE LLP
Carl J. Bettinger
Gregory W. Chase
7411 Jefferson Street NE
Albuquerque, New Mexico 87109
Telephone: (505) 888-6463

ROBIN A. GOBLE LLC
Robin A. Goble
P. O. Box 208
Corrales, New Mexico 87048
Telephone: (505) 720-4784

THOMAS E. LILLEY, P.C.
Thomas E. Lilley
330 North Main Street
Roswell, New Mexico 88201
Telephone: (575) 625-2340

MORGAN, LEWIS & BOCKIUS LLP
R. Ted Cruz
Allyson N. Ho
Claire Swift Kugler
1000 Louisiana, Suite 4000
Houston, Texas 77002
Telephone: (713) 890-5000

Counsel for Plaintiff/Appellee/Cross-Appellant Larry Selk

CERTIFICATE OF SERVICE

Answer Brief of Plaintiff/Appellee/Cross-Appellant Larry Selk was hand delivered on the 18th day of October, 2010, to the following counsel:

YENSON, LYNN, ALLEN & WOSICK, P.C.
Terrance Yenson
Matthew L. Connelly
Trisha Walker
April White
4908 Alameda Blvd. NE
Albuquerque, NM 87113-1736

and copies mailed to:

JENNER & BLOCK, LLP
David J. Bradford
353 N. Clark Street
Chicago, IL 60654-3456

JENNER & BLOCK, LLP
Paul Smith
Matthew S. Hellman
1099 New York Avenue, N.W.
Suite 900
Washington DC 20001-4412

GREGORY W. CHASE