

N.M. jury awards \$54 million in group home rape case

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Attorney Carl Bettinger stood in a New Mexico courtroom, and in a soft voice sang to jurors:

"I'm so tired but I can't sleep

Standin' on the edge of something much too deep

It's funny how we feel so much but we cannot say a word

We are screaming inside but we cannot be heard."

Bettinger, who had never sung before in public, said he was "terrified" as he sang Sarah McLachlan's song, "I Will Remember You."

But he decided that it was the most effective way to describe the anguish of Larry Selk - a developmentally disabled adult who is unable to speak - who was raped in a group home in Roswell, N.M. in May 2004.

"Perhaps Larry screamed inside," Bettinger said. He suggested that officials of ResCare, Inc., a Louisville, Ky.-based healthcare conglomerate that operated the group home, had failed to hear Selk's inner cries.

"But they can hear it from you," Bettinger told the jury.

The 12 jurors agreed, unanimously awarding \$54.15 million in damages, including more than \$49 million in punitives.

The money will be used by Selk's sister, Rani Rubio, to provide lifelong care for Selk, 48.

The verdict, which followed a three-and-a-half-week trial, was a "great acknowledgment by the community of jurors as to the horror of rape, particularly [for] the disabled," Bettinger said in an e-mail.

The company plans to pursue post-trial motions, including an appeal.

ResCare's chief executive Ralph G. Gronefield said in a statement: "Our first concern is, and always will be, the well-being of the people in our care. Our standard procedure has always been to investigate any reported misconduct. When this incident was reported in 2004, we took immediate action, notifying the proper authorities and investigating internally. We have extensive quality assurance and compliance systems in place, and we know that our employees take great pride in the important work they do."

History of problems

A caregiver discovered bruising and rectal bleeding while bathing Selk on the evening of May 24, 2004. He was examined at a local hospital by a nurse specializing in sexual assaults, who concluded that he had been raped.

The case was investigated by police, as well as by state protective services and health officials. Although no charges were filed, Bettinger said evidence pointed to a male caregiver who had been

hired only four days before the assault.

Employment documents and testimony at trial showed management failed to check references or call a previous employer who fired the man after he was observed kissing a male resident at another group home.

In addition, Bettinger said, the man was assigned to the graveyard shift without undergoing any training, and allowed behind closed doors with Selk for about 45 minutes - a violation of the group home's policy.

ResCare asserted during the trial that it was not liable for what it contended was an unforeseeable criminal act.

Testimony by former managers and staffers, as well as Department of Health records, however, showed the home had chronic problems with understaffing, insufficient staff, inadequately trained staff and inadequate documentation.

"Abuse of such vulnerable adults is predictable if you hire the wrong person," Bettinger said.

ResCare, Inc. claimed it was not liable for the actions of the New Mexico home. But Bettinger pointed to letters from the parent company extending employment offers. In addition, state Department of Health records listed the parent company as having final authority over the New Mexico operation.

During his closing, Bettinger told jurors they had the opportunity to become "heroes, because it vests in you the power to save the day, and that's what heroes do."

He also quoted from Dr. Martin Luther King's sermon about the Good Samaritan.

And he sang to the jurors.

Bettinger said his work with the [Trial Lawyers College](#), as well as classes in improvisational theater, gave him the idea to sing during his closing.

"I think what inspired me was that when words are not enough to convey the truth of the moment, that a song is a good way to do it," Bettinger said.

Still, he said, "It was the most frightening thing I have ever done in a court."

Settlement offers rebuffed

New Mexico's health department cancelled its contract with ResCare in 2006, without explanation. The company no longer operates any group homes in the state.

Bettinger said the plaintiff's attorneys offered to settle the case for \$1 million two years ago, but received no response from ResCare. A week before trial, he said, the company offered \$1.5 million; after the second day of the trial, the offer was increased to \$2.5 million.

The plaintiffs responded with a high-low offer of \$5 million to \$15 million, and warned in a letter that ResCare was facing a verdict of \$50 million to \$100 million. ResCare did not respond.

A few days later, Bettinger said, when defense lawyers attacked Rubio during cross-examination, Bettinger upped the high-low offer to a range of \$10 million to \$20 million. Once again, ResCare did not respond.

The jury deliberated seven hours before finding ResCare negligent and voting to award \$4.95 million in compensatory damages. The jury held ResCare New Mexico 30 percent liable; the parent company in Kentucky 65 percent liable; and the male employee - who has since disappeared - 5 percent liable.

The jury found ResCare New Mexico responsible for \$1.2 million in punitive damages, and ResCare Inc. liable for \$48 million in punitives.

ResCare, which was self-insured at the time of the incident, said it is in discussions with its lenders regarding the implications of the judgment on its compliance with debt covenants.

Plaintiff's attorneys: Carl Bettinger and Greg Chase of Shapiro Bettinger Chase in Albuquerque, N.M.; Thomas E. Lilley of Roswell, N.M.

Defense attorneys: Terrence Yenson, Matthew Connelly and Tricia Walker of Yenson, Lynn, Allen & Wosick in Albuquerque, N.M.

The case: *Selk v. Res-Care*; Dec. 2, 2009; 2nd Judicial District, Bernalillo County, Albuquerque, N.M., Judge Nan G. Nash.

Questions or comments can be directed to the writer at: nora.tooher@lawyersusaonline.com