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Stibal v. Fano Appellant's Reply Brief Dckt. 40427

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IN THE SUPREME COURT OF IDAHO

VIANNA STIBAL, individually, d/b/a/
THETAHEALING INSTITUTE OF
KNOWLEDGE, INC., and NATURES
PATH,

Plaintiffs/Respondent

vs.

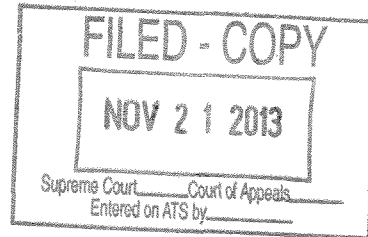
APRIL FANO, RIGHT OF WAY
PUBLISHING, LLC.

Defendants/Appellants

Supreme Court Docket No. 40427-1012

Bonneville County Case No. CV-11-1287

APPELLANT'S REPLY BRIEF



Appeal from the District Court of the Seventh Judicial District for Bonneville County

HONORABLE JON J. SHINDURLING
District Judge Presiding

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III. INTRODUCTION

The decision of the district court should be reversed because no evidence was presented at trial, or cited in Respondent's Reply Brief ("Respondent's Brief"), that Appellant April Fano ("April") breached the Mutual Release, Hold Harmless, Confidentiality, and Settlement Agreement, dated July 30, 2010 ("Release Agreement"). Further, Right Way Publishing, LLC ("Right Way") was not awarded its attorney's fees and costs even though it was the only prevailing party at trial. This argument was not contested by the Respondents.

Respondents' Reply Brief failed to cite any evidence on the record that amounts to a breach. Further, the majority of Respondents' factual assertions in its brief did not cite to the record whatsoever. In this brief, Appellants will clarify the record, give citations to the true facts on record, and show that the decision of the district court should be reversed.

IV. REPLY ARGUMENT

A. Respondents' Reply Brief Failed to Cite the Record.

Appellants' ability to reply to Respondents' Brief is impaired by Respondents failure to cite to the record for most of the factual allegations made in Respondent's Brief, many of which are entirely without basis. Without support from the record, Respondent's defense to this appeal cannot stand. In *Olson v. EG&G*, the appellant appealed the district court's decision to grant the respondent J.N.O.V. on a defamation claim.¹ The appellant appealed, but did not cite "any singular, particular comment" by the respondent to suggest the element of malice.² Because the

¹ *Olson v. EG&G*, 134 Idaho 778, 782, 9 P.3d 1244, 1248 (2000).

² *Id.*

appellant failed to cite the record, the Court was without factual basis to overturn the J.N.O.V., and the district court's ruling was affirmed.³

In this case, Respondents have failed to cite the record for numerous factual assertions in their reply brief. Similarly, Respondents have failed to cite any evidence showing that April breached the Release Agreement. Conversely, Appellants' factual assertions in their initial brief are supported by the transcript and clerk's record. Appellants have cited specific evidence that is not contradicted by any other evidence, that April Fano did not make any "disparaging, defaming, or otherwise negative comment" regarding Vianna Stibal after the Release Agreement was entered.

B. Respondents' Reply Brief Included Several Factual Misstatements From the Record.

Before Appellants can discuss the issues before the Court, it is necessary to rebut the many factual assertions in Respondents' Brief that are either not in the record, inaccurately characterize facts in the record, or are simple misrepresentations of the facts in the record. Respondents' Brief also raises facts and law that are irrelevant to the appeal. In an effort to clarify the record, Appellants desire to correct the following misstatements from the section entitled "III. Statement of the Case" from Respondent's Brief. Misstatements in the Argument section will be discussed later in this brief.

1. Respondents assert, on page 7, under the heading, "Nature of the case" that, "after appellant received the agreed upon compensation, she promptly published a despicable book..."

³ *Olsen*, at 783.

This allegation is not supported by a citation to the record. The record states that April paid for the printing of the book *Shady Healing* on behalf of Right Way July 21, 2010, nine days before she entered the Release Agreement.⁴ All evidence in the record shows that Right Way published the book, not April.

2. Respondents assert in the last paragraph of page 10, and first paragraph on page 11 in their brief that Appellants were ordered to file a brief by April 14, 2013, and Appellants' brief, which was filed on August 13, 2013, was 150 days late. However, Appellants filed their Motion to Augment and Suspend Briefing Schedule, on April 16, 2013, the Court entered an order suspending the briefing schedule, and thereafter entered an order on July 9, 2013 resetting the due date for Appellant's Brief to August 13, 2013. Appellants' Brief was timely.

3. Respondents assert in the first full paragraph of page 12 of their brief that Respondents offered evidence that Appellant is the publisher of *Shady Healing*. This allegation is not supported by a citation to the record. While Right Way is an Appellant, Respondents seem to be asserting that April was the publisher of the book because Respondents' Brief does not reply to Right Way's claims on appeal. This allegation is not true. The record states that the publisher of the book was Right Way.⁵ This argument is discussed in subsection (1) above.

4. Respondents assert in the first full paragraph of page 13 of their brief that the book *Shady Healing* contained excerpts from Vianna Stibal's medical records provided in the

4 Tr. p. 154, ll. 11-14. *See also* p. 157, ll. 11-15.

5 Tr. p. 168, ll. 7-9.

case she settled with Appellant. However, Respondents ignore the undisputed testimony that the author, Lindsey Stock, obtained the medical records from the internet, not April.

When April Fano was asked if she recognized the medical records, she stated, “I do from her website.”⁶ Later, April Fano was asked:

- Q. Okay. You supplied this medical record to Lindsey Stock to go in this book; didn't you?
- A. Absolutely not.⁷

Similarly, Lindsey Stock, the author of *Shady Healing* testified regarding the medical records referred to in the book as follows:

- Q. Did you get that documentation from April Fano?
- A. No.
- Q. Where did you get that document?
- A. I got it off of YouTube.
- Q. So you have seen it on the internet?
- A. I have.⁸

Lindsey Stock was then shown Exhibit I, which was a copy of Vianna Stibal's Facebook page with the medical record at issue. Lindsey testified about the exhibit:

- A. It is the same document I saw on YouTube, only this one is from Facebook, the same thing.
- Q. Have you seen this document on Vianna Stibal's Facebook account before?
- A. I have.
- Q. And did you get the document from that as well?
- A. I'm sorry, the document from the book?
- Q. No, the document that's in Exhibit I, you said you saw it on Facebook also?

6 Tr. p. 159, ll. 19-21.

7 Tr. p. 160, ll. 11-13.

8 Tr. p. 238, ll. 10-15.

- A. I did, yeah.
- Q. And is this a fair – is Exhibit I a fair representation of what you saw on Vianna’s Facebook page?
- A. Yes.

April similarly testified that the medical record was on the internet, and that she did not give the medical record to any third party.⁹ Thus, the undisputed testimony at trial was that Vianna Stibal put the medical record, cited in *Shady Healing*, on both YouTube and her Facebook page.

Lindsey Stock obtained the same from the internet, not from April.

5. Respondents assert in the second full paragraph of page 13 of their brief that the book *Shady Healing* included excerpts from Vianna Stibal’s deposition in the previous case. While it is true that April Fano provided portions of deposition testimony from the prior lawsuit to Lindsey Stock,¹⁰ April did so, “shortly after the deposition when I received them.”¹¹ The deposition was taken in February of 2009, and April Fano testified that she gave portions to Lindsey Stock within a couple of months of the deposition happening, long before July 30, 2010.¹² Because the Parties released each other of any liability for any actions before July 30, 2010, these facts are irrelevant.

6. Respondents assert in the third paragraph of page 15 that April Fano admitted that she paid Sunrise Press for the printing of *Shady Healing* on July 21, 2010. Again, while April Fano was the person who handled the transaction, the party billed, and the party who paid for the

9 Tr. p. 185, l. 3p. 186, l. 1.

10 Tr. p. 193, ll. 3-18.

11 Tr. p. 194, ll. 2-4.

12 Tr. p. 194, ll. 3-15.

printing was Right Way.¹³ Further, the books were paid for and received on July 21, 2010, nine days before the entry of the Release Agreement.¹⁴ Therefore, this assertion is irrelevant and cannot be construed as a breach of the Release Agreement.

7. Respondents assert in the same paragraph that April picked up the books from Sunrise Press and delivered them to Lindsey Stock for distribution on August 2, 2010. To clarify, the testimony from April was that she received the books on July 21, 2010 and sent them to Lindsey Stock.¹⁵ Similarly, Lindsey Stock testified that April sent the books to her on July 21, 2010, and she received them on August 2, 2010.¹⁶

8. Respondents cite testimony in the last paragraph on page 15 that April paid for the printing of *Shady Healing* on July 21, 2010, and formed Right Way with Lindsey Stock on July 22, 2010. Respondents observe that payment for the books was made nine days before the entry of the Release Agreement. These facts are irrelevant to this appeal because the Release Agreement released the parties from liability for any action made before the date of the Agreement, **whether known or unknown.**¹⁷ Without evidence of a breach after July 30, 2010. Respondents' argument is irrelevant to the issues in this appeal.

9. Respondents cite testimony in the first full paragraph of page 16 of Respondents' Brief that April knew about the printing of *Shady Healing* and the formation of Right Way when

13 Tr. p. 182, l. 16 – p. 183, l. 184, l. 5.

14 Tr. p. 184, ll. 3-11.

15 Tr. p. 199, ll. 4-9.

16 Tr. 244, l. 23- 245, l. 4.

17 Plaintiffs Exhibit 1, Release Agreement dated July 30, 2010 (emphasis added).

she entered the Release Agreement. However, this does not amount to a breach. The testimony at trial was that April did not think the prior lawsuit would settle, and she did not have any intention of settling the case before trial at mediation.¹⁸ To protect herself, April negotiated language that released all actions by the Parties, whether known or unknown, before the date of settlement. Under the terms of the Release Agreement, April did not have a duty to disclose past actions, such as the publication of *Shady Healing* to Respondents. Her sole duty was to not make any negative statements about Vianna from July 30, 2010 forward. Respondents' Brief did not cite any negative statements by April after July 30, 2010. Thus, no breach of contract was proven.

10. Respondents cite testimony from April in the second full paragraph of page 16 of Respondent's Brief that Vianna Stibal's surgical pathology was included in *Shady Healing*, and was part of the prior lawsuit between the parties. However again, Respondents ignore the undisputed testimony that Lindsey Stock, the author of *Shady Healing*, acquired the medical records off the internet, where Vianna Stibal had posted those medical records. Please refer to No. 4, *supra*.

11. Respondents allege in the third full paragraph on page 17 that April admitted that she provided Lindsey Stock with information, including medical records, for *Shady Healing*. However, referring to the portion of the transcript cited by the Respondent, April Fano specifically said that "**Except for the medical (records),**" she did provide that information to

¹⁸ Tr. p. 272, l. 14 – p. 274, l. 6.

Lindsey Stock.¹⁹ The undisputed testimony at trial was that Lindsey Stock obtained the medical records contained in *Shady Healing* from Vianna Stibal's YouTube channel and Facebook page.²⁰ Regardless, this was before April Fano had entered a contract with Vianna Stibal, and any behavior prior to July 30, 2010 was expressly excused in the Release Agreement.

12. In the same paragraph, Respondents point to testimony that *Shady Healing* was sold after July 30, 2010. This allegation is made again at the paragraph between pages 19 and 20. However, Respondents ignore the uncontradicted testimony that April did not distribute, sell, or promote *Shady Healing* after July 30, 2010.²¹ Regarding her involvement with *Shady Healing* after July 30, 2010, April Fano testified as follows:

- Q. Have you made any public statements about the book since July 30, 2010?
A. No, I have not.
Q. Have you done that in the internet or in person or any other means of communication?
A. No.
Q. Have you sold the book to anyone else?
A. No.
Q. Have you processed any orders for the book?
A. No.
Q. Have you communicated with any distributors for the book such as Amazon.com?
A. No.
Q. What is your role then with Right Way Publishing post July 30th, 2010?
A. I received a bank statement.
Q. Do you do anything else?
A. No.

Similarly, Lindsey Stock testified,

¹⁹ Tr. p. 165, ll. 3-7, emphasis added.

²⁰ See No. 4, *supra*.

²¹ Tr. p. 198, l. 1 – 199, l. 3.

- Q. To your knowledge, since July 30th, of 2010, has April Fano processed any orders for the book for Right Way Publishing?
- A. No.
- Q. To your knowledge, has she promoted the book in any way since July 30th of 2010?
- A. No.
- Q. Have you seen any statements that she's made promoting the book on the internet since July 30th of 2010?
- A. No.
- Q. Are you aware of any public appearance that she has made to promote the book since July 30th of 2010?
- A. No.²²

Lindsey Stock later testified,

- Q. Are you aware of what April Fano's role is with Right Way Publishing since July 30th of 2010?
- A. I am.
- Q. And what is that role?
- A. To get the bank statement every month.
- Q. Do you know of anything else that she does?
- A. No, there's nothing else.²³

Lindsey Stock knew April Fano had not processed any orders, distributed the book, or promoted the book because Lindsey Stock did all of that work for Right Way.²⁴

13. Respondents quote testimony from April at the end of page 18, through the beginning of page 19. This testimony is misquoted. When April Fano was asked if she knew that the deposition in the previous lawsuit was intended to be confidential, April did not reply, "yes," as quoted, but replied "After July 3rd [sic 30th], yes."²⁵ Further, April did admit that the

22 Tr. p. 246, l. 14 – p. 247, l. 3.

23 Tr. p. 247, ll. 9-16.

24 Tr. p. 245, ll. 10-21.

25 Tr. p. 174, ll. 15.

book was still available, but all testimony at trial stated that April did not distribute the book herself after July 30, 2010. Because April stopped all involvement with distributing the book on July 30, 2010, she has not engaged in any actionable conduct.

14. The second full paragraph of page 19 of Respondents' Brief states that April testified that the allegations in *Shady Healing* were expressions of April Fano's opinion. Again, this is a misquote of the testimony. When asked if the book contained April Fano's opinions, April responded, "They were Lindsey's opinion." Later, April read from her Answer, an affirmative defense that any statement made by April Fano was an expression of her opinion. To clarify; prior to the dismissal of Respondents' claim of defamation, April Fano and Right Way made the affirmative defense that any statement made was opinion.²⁶ The uncontradicted testimony at trial was that *Shady Healing* was written entirely by Lindsey Stock, and she took sole responsibility for its contents.²⁷

15. Respondents' Brief points out that April Fano is a 50% owner of Right Way. However, April and Lindsey Stock started doing business as Right Way long before July 30, 2010, and registered the company with the State of Utah on July 22, 2010. April's ownership in Right Way is not a violation of the Release Agreement. These facts are irrelevant.

16. Respondents' Brief states in the carryover paragraph on page 25 and 26 that April supplied emails, deposition testimony and discovery from the prior lawsuit to Lindsey Stock.

²⁶ R. p. 7, Answer

²⁷ Tr. p. 235, ll. 7-15.

While this is true, the uncontradicted testimony is that April Fano did so long before July 30, 2010. Therefore, this behavior cannot be considered a breach. Please see No. 5, *supra*.

C. Respondents Failed to Cite Any Evidence in the Record That Amounts to a Breach of the Contract.

Respondents' Brief fails to cite any fact in the record that amounts to a breach of the Release Agreement between the parties. Without any such evidence, the district court's decision must be reversed. In order for Respondents to have proven breach of contract, they were required to prove evidence of a "disparaging, defaming, or otherwise negative comment" made by April about Vianna Stibal after July 30, 2010. Respondent's Brief makes several allegations, most of which are not supported by the record, in their attempt to argue a breach. However, none of the allegations are disparaging, defaming, or otherwise negative comments made by April about Vianna Stibal after July 30, 2010. Therefore, Respondents have failed to raise any fact in the record that amounts to a breach.

1. All behavior by April Fano that included negative comments about Vianna Stibal occurred before July 30, 2010.

Regardless of April's involvement with *Shady Healing* before July 30, 2010, all evidence at trial showed that April did not make any negative statements about Vianna, and did not sell, promote, or distribute *Shady Healing* after July 30, 2010. Respondents allege that April Fano was "substantially involved" in disseminating negative statements about Vianna Stibal, without any citation of such evidence to the record. Again, all allegations made by the Respondents in their brief are either not supported by the record, or are irrelevant to the issue of breach of contract.

First, Respondents allege that April Fano supplied emails, deposition testimony and discovery from the prior lawsuit to Lindsey Stock. While this is true, the uncontradicted testimony is that April Fano did so long before July 30, 2010.²⁸ This conduct was released from liability by the terms of the Release Agreement, and therefore cannot be construed as a breach.

Second, Respondents allege that April Fano personally paid the printing costs for *Shady Healing*. While April Fano was the individual who oversaw the transaction, the printing of the books was billed to Right Way, and April paid for the books on behalf of Right Way.²⁹ Regardless, the printing was paid for on July 21, 2010, nine days before the Release Agreement was entered, and is therefore not actionable for breach. Respondents again argue that the book contained medical records for Vianna Stibal. However, as set forth above, the uncontradicted testimony at trial was that the author, Lindsey Stock obtained the medical records contained in the book from the internet after Vianna Stibal posted the records on her YouTube channel and Facebook page.³⁰

Third, Respondents allege that April Fano “hand delivered the five hundred (500) printed copies of the book to Lindsey Stock” after they were printed. The Respondents do not cite the record for this allegation. The testimony at trial was that April Fano, who lives in Saratoga Springs, Utah³¹ sent the books to Lindsey Stock, who lives in Las Vegas, Nevada³² shortly after

28 Tr. p. 194, ll. 2-15.

29 Tr. p. 182, l. 16 – p. 183, l. 184, l. 5.

30 *See*, section III(b)(4) above.

31 Tr. p. 149, ll. 21-24.

32 Tr. p. 233, ll. 14-17.

she received them on July 21, 2010, and Lindsey Stock received them on August 2, 2010.³³ Respondents have no support for the allegation that the books were hand delivered, or that shipment happened after July 30, 2010. The record shows that the books were out of April Fano's possession before July 30, 2013, and in transit until August 2, 2013 when Lindsey Stock received them.

Fourth, Respondents allege that April Fano, "disguised herself in the book as the woman named "Tyra." However, April Fano did not write the book, Lindsey Stock did. In fact, Lindsey Stock testified that no one else helped her write the book.³⁴ April Fano testified that she asked Lindsey to omit April's name from the book because, "I absolutely did not want my name associated with them."³⁵ April did not have any reason to disguise herself in the book, because when the book was finished in June, 2010³⁶, and when the printing was finished on July 21, 2010, April was not under any contractual limitation preventing her from printing the book. Regardless, the identity of "Tyra" from the book as being April does not constitute a breach of the contract. Tyra being April does not constitute a negative statement about Vianna Stibal after July 30, 2010. Moreover, the evidence at trial clearly shows that Lindsey Stock, the book's author, made decisions regarding characters in the book and April did not.

Fifth, Respondents allege that April created Right Way to hide her involvement in publishing *Shady Healing*, and April is entitled to proceeds from the book. Neither allegation

33 Tr. p. 244, l. 23 – p. 245, l. 4.

34 Tr. p. 235, ll. 4-15.

35 Tr. p. 132, ll. 16-22.

36 Tr. p. 241, ll. 8-10.

references the record and no evidence suggesting the same came from trial. The uncontradicted testimony at trial was that April advanced approximately \$5,000.00 to Right Way for the printing of *Shady Healing*.³⁷ Further, as of the time of trial, there was a small amount of money in Right Way's bank account.³⁸ Even if April received all of that money, (which she did not), she would not have even recouped her initial advance.

Regardless, April Fano could not have formed Right Way with the intent to hide her involvement with *Shady Healing* because she had not negotiated or settled the prior lawsuit until after Right Way had been formed. Before July 19, 2010, April Fano did not intend to settle the previous lawsuit, and was not under any contractual obligation preventing her from helping *Shady Healing* be published. Right Way was not formed to hide the publishing of *Shady Healing*, but to foster the publishing. The existence of Right Way is inconsequential to the lawsuit because April Fano's involvement with Right Way was not a breach of the Release Agreement. All evidence at trial showed that the limit of April's involvement with Right Way after July 30, 2010 was collecting its bank statements, which is not a breach of the Release Agreement.

2. Right Way Publishing, LLC paid for the printing of the book *Shady Healing* before July 30, 2010.

Plaintiffs' Exhibit F, the invoice for payment for the printing of *Shady Healing*, showed that April, on behalf of Right Way, paid for the printing on July 21, 2010, nine days before she

³⁷ Tr. p. 166, ll. 4-9.

³⁸ Tr. p. 166, l. 24 – p. 167, l. 2.

entered the Release Agreement. April Fano was not under any contractual limitation preventing this action. These facts are irrelevant to the issue of breach.

The next day, July 22, 2010, after operating as Right Way Publishing for some time, April Fano and Lindsey Stock filed Right Way with the State of Utah. Again, April was not under any contractual obligation preventing her from doing so. These facts are similarly irrelevant to the issue of breach.

3. April Fano's only role with Right Way after July 30, 2010 was receiving bank statements.

The uncontradicted evidence at trial was that after July 30, 2010, Lindsey Stock handled all the sales, promotions, and operations for Right Way.³⁹ April received bank statements, and kept the bank account active by making a small deposit. Again, none of this behavior amounts to a negative comment about Vianna Stibal after July 30, 2010. Therefore, April's limited involvement with Right Way does not rise to a breach of the Release Agreement.

In Respondent's Brief, a significant amount of argument is made on the theory of piercing the corporate veil and alter egos, apparently arguing that April should be liable for the actions of Right Way. This argument is irrelevant both to the lawsuit and the issues raised on appeal. By the time trial was held in this matter, the issues for trial had been reduced to Respondents' claims against April Fano for breach of contract and intentional infliction of emotional distress.⁴⁰ When the district court entered its Findings of Fact, Conclusions of Law, and Order Following Bench Trial ("Findings"), Right Way was not found liable on any count,

³⁹ See subsection III(b)(12) above.

⁴⁰ R. p. 34-38, Amended Complaint, *see also*, Tr. p. 13, l. 16 – p. 15, l. 13,

and no judgment was ever entered against Right Way.⁴¹ Without Right Way being liable for any damages, there is no reason to pierce its corporate veil.

Regardless, piercing the corporate veil was not pled as a cause of action, and the district court did not rule on this issue in its Findings. To determine if April breached the contract, the Court does not need to look at Right Way's behavior, but at April's behavior.

Further, the evidence at trial does not support the idea that Right Way was April's alter ego. There is no unity of ownership, because 50% of Right Way is owned by Lindsey Stock. There is a clear distinction between the actions of Right Way and April. In addition, all operations of Right Way after July 30, 2010 were handled by Lindsey Stock. April's involvement in the LLC was very limited, only receiving bank statements. The company's only asset, the books, were sent to Lindsey Stock immediately after receiving them, on July 21, 2010. The only means of contacting the company via telephone, through the company's cell phone, was in Lindsey Stock's possession.⁴² The issue of alter ego is irrelevant and baseless.

April and Lindsey Stock formed Right Way before April entered the Release Agreement, and when April had no intention of settling with Vianna Stibal in the prior lawsuit. Therefore, the allegation that April Fano formed Right Way to perpetuate a fraud against Vianna Stibal is illogical. Respondents argue on these lines because they are without any evidence of a breach of the Release Agreement after July 30, 2010.

41 R. p. 46-57.

42 Tr. 213, l. 14 – p. 214, l. 3.

4. The record is void of any evidence that April Fano profited from the sale of *Shady Healing*, and if she did, that does not amount to a breach of the Release Agreement.

The record is void of any evidence that April Fano profited from the sale of *Shady Healing*. Respondents make this allegation based upon pure speculation. April testified that when copies of *Shady Healing* were sold by Lindsey Stock, the proceeds were deposited into a bank account.⁴³ Those funds sat in the bank account, and had not been distributed as of the time of trial.⁴⁴ Respondents' assumption that April had profited off the proceeds is without evidentiary basis. If assumptions are to be made, Right Way had to defend itself in this litigation, and incurred attorney's fees. There is no reason to assume April received any proceeds when Right Way had expenses beyond its receipts.

The uncontradicted testimony at trial was that April advanced approximately \$5,000.00 to Right Way for the printing of the book *Shady Healing*.⁴⁵ Even if all the money Right Way had was paid to April, her initial investment would still not be paid, as such, any money paid to April Fano cannot be considered profit until her initial investment was repaid.⁴⁶

Regardless, even if April received profits from Right Way, this does not amount to a negative statement about Vianna Stibal made after July 30, 2010.

43 Tr. p. 166, l. 24 – p. 167, l. 2.

44 Tr. p. 208, l. p. 209, l. 1.

45 Tr. p. 166, ll. 4-9.

46 Tr. p. 210, l. 6 – 16.

D. The Damages Awarded on Breach of Contract were Arbitrary and Uncertain.

The district court erroneously approximated Respondents' damages at \$6,250, or one-half of the \$12,500 Respondents paid to settle the previous lawsuit. However, no proof of actual damages as a result of the alleged breach was presented at trial. The correct measure of damages are those that are a direct consequence of a breach.⁴⁷

If the Respondents suffered any damages as a result of *Shady Healing*, the same would require proof of damages that resulted from the book. For example, if Vianna Stibal suffered a loss in business because of the book, such evidence would be appropriate to measure damages. However, no such evidence was presented at trial.

During the prior lawsuit, the parties had multiple claims against each other, including April's two fraud claims. Vianna Stibal paid April \$12,500 to settle all claims. No dollar amount was put on the promise to not make any negative statements about each other. To assume that half of the settlement money paid was for the promise not to make negative statements about each other is speculative, and illogical in light of April's two fraud claims. The district court's award of \$6,250 was arbitrary, did not result from the breach, and was not reasonably certain. Therefore, the damages award must be reversed.

E. Punitive damages were improper.

Punitive Damages were improper because all conduct on which the award is based occurred before April entered the Release Agreement, before April had a duty not to perform

⁴⁷ *J. B. Traylor v. Henkels & McCoy, Inc.*, 99 Idaho 560, 561, 585 P.2d 970, 571 (1978).

such conduct. In their brief, Respondents do not raise any behavior by April after July 30, 2010 to support their contention that punitive damages are proper. Respondents do assert that April was working on a way to breach the contract before she negotiated or entered the contract. This argument is illogical because April could not have predicted the settlement terms before they were negotiated, and April had no intention of settling before attending mediation on July 29, 2010. No evidence to support such a conclusion is cited in Respondent's brief. Simply put, April cannot plan to breach a contract that did not exist, and had not even been comprehended.

At worst, this case is a simple breach of contract that had no financial consequences. \$50,000.00 is an excessive penalty, especially in light of the fact that the district court had no evidence regarding April's ability to pay.⁴⁸ The intent behind punitive damages is not to bankrupt the Defendant, but to deter such behavior in the future. Again, without evidence that April breached the Release Agreement after it was entered, what wrongful conduct could such an award deter? Respondent's Brief made no response, and raised no facts against this argument.

The district court was obligated to hold Respondents to a standard of "clear and convincing evidence" to find punitive damages. However, the district court did not apply this high standard, and did not cite adequately reprehensible conduct to support such an award. As Appellants argued in section V(E) of their initial brief, punitive damages were not appropriate because the district court did not have any knowledge of April's income, and the award violated the due process clause of the constitution. Respondent's Brief makes no argument against either one of these propositions.

⁴⁸ Tr. p. 202, l. 20 – 205, l. 20.

April's behavior, all of which predated the Release Agreement, has a low level of reprehensibility. This coupled with the high 8 to 1 ratio between damages and the punitive damages award make the award unconstitutional pursuant to the due process clause as set forth in *Walston*.⁴⁹ Thus, the award of punitive damages must be reversed.

F. Respondents Were Not the Prevailing Party, and Should Not Have Been Awarded Their Attorney's Fees and Costs.

Respondents cannot be the prevailing party because they failed on four of the five issues they brought in their complaint. In addition, as set forth above, they should not have prevailed on breach of contract. Respondents wrongfully assert that they sought an award of \$72,500.00, and received a total judgment of \$84,436.70. In reality, Respondents sought an award of \$68,010.00 on just the issue of breach of contract, independent of punitive damages and attorney's fees.⁵⁰ Respondents were awarded \$6,250.00 on their breach of contract claim, which is 11% of the amount they sought. April successfully defended 80% of the Respondents' claims, and 89% of the damages Respondents sought for breach of contract. Respondents' single victory is insufficient to support their claim to be the prevailing party.

G. Respondents did not argue against the proposition that Right Way Publishing was the prevailing party.

In Appellant's opening brief, Appellants argued that Right Way was the prevailing party because it came away from the litigation without any liability, having prevailed on all claims against it. However, the district court failed to award Right Way its attorney's fees and costs.

⁴⁹ *Walston v. Monumental Life Ins. Co.*, 129 Idaho 211, 222, 923 P.2d 456, 467 (1996), citing *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589, 1595 (1996).

⁵⁰ R. p. 48, Findings, last paragraph.

This perfect defense cannot be overlooked, and Right Way should be awarded its attorney's fees and costs. Without any argument to the contrary, Appellants assume Respondents agree.

H. Attorney's fees on appeal.

As set forth in Appellant's brief, Appellants should be awarded their attorney's fees and costs on appeal by the terms of the Settlement agreement, as well as Idaho Code §§12-120 and 12-121.

V. CONCLUSION

The key problem with Respondents' Brief is its failure to cite the record for its factual assertions. The brief lacked citations because many of the facts upon which the brief relies are absent from the record. It was Respondents' obligation in its brief to cite facts in the record that constitute a breach. Only evidence of disparaging, defaming, or negative comments about Vianna Stibal made after July 30, 2010 would suffice. However, all actions referred to by Respondents occurred before July 30, 2010. April did not breach the Release Agreement.

In reality, April's conduct was exactly what we would want a person in her position to do. After she contracted not to make any negative comments about Vianna Stibal, she removed herself from all day to day operations of Right Way. She did not process any orders, she did not sell the book, she did not promote the book. In sum, April did not breach the contract.

Without a breach, and even if a breach were constructed from the facts, no damages resulted from the breach. The idea that \$6,250.00, or one-half of the settlement amount in the prior lawsuit resulted from the breach is arbitrary and uncertain. In addition, the punitive

damages award is similarly arbitrary, and unconstitutional because of the high award and lack of reprehensible conduct. No damages were proper.

The only prevailing party, Right Way, should have been awarded its attorney's fees and costs. However, the district court awarded fees and costs to Respondents, who prevailed on only one of five issues brought in the litigation, and were awarded a fraction of the damages they sought. Therefore, the finding of breach of contract and punitive damages, and the Judgment in favor of the Respondents should be reversed. The Appellants should be awarded their attorneys fees and costs on appeal.

DATED this 19 day of November, 2013,



Alan Johnston
Pike Herndon Stosich & Johnston, P.A.
Attorneys for the Defendants

VI. CERTIFICATE OF SERVICE

I hereby certify that on this 19 day of November, 2013, I caused a true and correct copy of the foregoing document to be served by first class U.S. mail, postage prepaid to the following:

Stephen A. Meikle
P.O. Box 51137
Idaho Falls, ID 83405-1137
Facsimile: (208)524-6199

U.S. Mail
 Fax
 Hand Delivered

