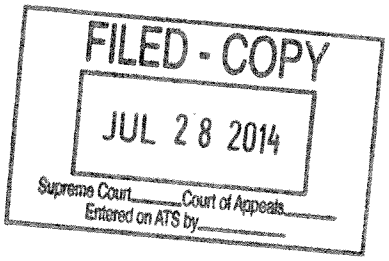
7-28-2014

Alexander v. Stibal Appellant's Brief Dckt. 41604

IN THE SUPREME COURT OF THE STATE OF IDAHO

KARA ALEXANDER and ROBBY ROBINSON, Plaintiff/Respondent, vs. VIANNA STIBAL, an individual, NATURE PATH INC., an Idaho Corporation, and THETA HEALING INSTITUTE OF KNOWLEDGE, Defendant/Appellant.	)	Docket No. 41604



APPELLANTS' BRIEF

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT FOR BONNEVILLE COUNTY

HONORABLE WILLIAM H. WOODLAND
District Judge, presiding

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I.
TABLE OF CONTENTS

II.

TABLE OF CASES AND AUTHORITIES

RULES Page

STATUTES

CASE LAW

III.

STATEMENT OF THE CASE AND FACTUAL BACKGROUND

A. Nature of the Case.

Vianna Stibal ("Vianna") wrote her first book about her personal journey to find God and to heal from cancer in 1998 entitled "Go Up And Seek God" followed by a second book in 2002 entitled "Go Up And Work With God." Tr.p.432,L.9-25-p.435,L.1;p.403,L16-18. A few years later, she started teaching her prayer and meditation technique titled "Theta Healing," to help others connect with God. Tr.p827L16-p.829L.23. She believes that focused prayer and faith in a God or higher spiritual power allows an individual to heal their body if that is their desire. Id. In 2008, she started a school that was operated by her company, Nature's Path *dba* the Theta Healing Institute of Knowledge ("THINK"). Tr.p.408,L.21-23.

Respondents Kara Alexander and Robby Robinson ("Kara and Robby") were students of Theta Healing. Tr.p.231,L13-24;R.Vol.1,p.18-25. They began taking classes in 2006 from licensed Theta Healing instructors in New York/New Jersey, respectively. Id. A year later, they came to Idaho Falls to take classes with Vianna. Tr.p.256,L.4-7. The Complaint in this matter was filed in November of 2011 alleging breach of contract and fraud -- five years after their first class in the Theta Healing meditation technique. See Complaint at R.Vol.1,p.18-25.

The 2011 Complaint involves four claims: Count I: fraudulent misrepresentation-degrees; Count II: fraudulent misrepresentation-healing; Count III: breach of contract-degrees; and Count IV: unjust enrichment. R.Vol.1,p.18-25. Count's I and III are based on the allegation that "Kara and Robby were recruited to become students at THINK based on the representations by Vianna and THINK that the organization would award valid doctorate degrees (or PhD) at the end of a certain amount of coursework . . . from an accredited school." R., Vol. 1, p. 19-20 (Complaint-3). They make this allegation despite a November 2008 email that Kara received from THINK to all practitioners notifying them that the "Doctorate of Ministry" was not a PhD, it was an

honorary degree offered after completion of the coursework and that THINK is not an accredited school. Tr. p. 312 (Exhibit 11).

Count III is based on the allegations that "Kara and Robby took [3 years of] classes at THINK based on the representations from Vianna and THINK that Vianna is a healer, with the ability to heal herself and others, and that she can teach other people to become healers." R. Vol. 1, p. 21 (Complaint-4). They allege that the representations of healing were the "assertion that she healed herself of cancer, that she pulled herself out of a coma in Italy and that she healed herself from heart disease." Id. They further allege that "other students" told them that Vianna did not have the ability to heal others, and that her stories of healing were false." Id. p. 22 (Complaint-5). They alleged that these false statements induced them to take classes. Id. They did not allege what the exact statements were that they heard, where the statements were made, to whom the statements were made - Kara or Robby or both, or when the statements were made.

In ruling on Vianna/THINK's Summary Judgment Motion, the Court held that Kara and Robby had failed to plead Count II with specificity. Tr.p.42 (January 17, 2013 Hearing, p. 80:1-6.). The Court cautioned counsel that Kara and Robby must prove that they relied on each specific representation. Id. The Court also indicated that Kara and Robby would be prohibited from bringing in evidence any statements that had nothing to do with their claims. Id. at p.45.

The case proceeded and Vianna/THINK brought a Motion in Limine on this issue requesting, once again, that Kara and Robby specify what specific fraudulent misrepresentations were made and the who, what, when, how and were those were made. R., Vol. 1, Tr.p. 37. Kara's testimony at trial was that, in 2006, she read the more recent version of Vianna's 1998 book titled "Go Up and Seek God" that contained the statements regarding Vianna's personal journey to God and healing her cancer. Tr. p. 227. It was reading this book -- published 7 years

earlier -- that induced her to take more classes. Id. The other alleged statements re Count II were made at some other unspecified time and place. Tr. p. 218-220.

All claims were tried before the jury - even though Robby Robinson failed to appear. Appellant brought a Motion for Directed Verdict. Tr.p.615,L.5-p.645,L22. The ruling on the Directed Verdict was, inter alia, as follows: (1) Counts I-III for Robby Robinson were dismissed; (2) Kara Alexander's Count I was dismissed. The Court allowed Count's II and III for Kara to be determined by the jury. Tr.p.641,L.12-p.645,L19.

B. Course of Proceedings Below.

Vianna Stibal and THINK appeal the judgment entered on October 26, 2013 and several of the motions leading up to that judgment. R.Vol.3,p.413-421;R.Vol.3,p.422-424. As stated above, the Complaint was filed by Kara and Robby in November of 2011 alleging breach of contract and fraud in connection with classes they took between 2006 and the fall of 2008. See Complaint at R.Vol.1,p.18-25.

The Appellants answered the Complaint on December 7, 2011. R.Vol.1,p.26. The case was originally assigned to the Honorable John J. Shindurling, who disqualified himself on July 10, 2012. R.Vol.1,p.47. The case was then assigned to the Honorable Dane Watkins. On December 18, 2012, the Appellants filed a Motion for Summary Judgment, which was heard by the Court on January 17, 2013 along with the Respondents' Motion to Amend to Include a Prayer for Punitive Damages. R.Vol.1, p.65. On January 22, 2013, Judge Watkins denied the Appellants Motion for Summary Judgment and the Respondents' Motion to Amend to Include Punitive Damages. Tr.(Prepared by Karen Konvalinka) p.72-99.

On July 8, 2013, the Respondents' renewed their Motion to Amend to Include a Prayer for Punitive Damages. R.Vol.2,p.244. The Appellants filed an objection to the Respondents'

renewed motion on July 15, 2013, and filed Motions in Limine to exclude certain evidence on July 16, 2013. R.Vol.2,p.254;R.Vol.2,p.270. The case was then transferred to the Honorable William Woodland.

Arguments on the Respondents' Motion to Amend and on the Appellants' Motions in Limine were heard by Judge Woodland on July 22, 2013, just one (1) day before the scheduled jury trial which began on July 23, 2013. R.Vol.2.,p.281. The first day of jury trial, counsel were informed by Judge Woodland that the Respondents Motion to Amend was granted and a request for punitive damages could be made. Tr.p182,L.16-25;p.183,L1-15. The issue of punitive damages was limited to Count II. Tr.p.638,L.17-25;p.639, L.1-5, 638-641.

At the close of the Respondents' evidence, the Appellants brought a Motion for Directed Verdict. Tr.p.614,L.20-25;p.615-647,L.1. The Court granted the Motion for Directed Verdict as against Mr. Robinson, dismissing Counts I-III. Tr.p.641,L.12-23. The Court took Count IV under advisement and has never issued a ruling thereon. Tr.p.621,L.4-11. The Court also dismissed Count I for Kara Alexander. Tr.p.641, L.12-25-p.642, L.1-21.

The jury trial ended on July 26, 2013. The jury returned a verdict in favor of the Respondent as follows: Count II - Fraud: $17,000.00; Count III - Contract: $111,000.00; Punitive Damages: $500,000.00; Total; $628,000.00 (Tr.p.970-971).

Vianna and THINK filed their post trial Motions for JNOV, Remittitur and New Trial on August 19, 2013. R.Vol.2,p.319. The Trial Court entered its Memorandum Decision and Order on October 18, 2013, reducing the punitive award to $384,000.00, which was presumably achieved by multiplying the damages on both Count II and Count III by three (3). R.Vol.3,p.383. The Court limited the punitive damage claim solely to Count II (award $17,000).

(See Tr.p.638,L.17-25;p.639,L.1-5). Vianna filed her Notice of Appeal in November 2013. R.Vol.3.p.425.

C. STATEMENT OF FACTS.

1. Brief History Of Vianna's Medical Treatment.

In or around 1995, Vianna had a 9-inch tumor in the bone of her leg. Tr.p.785,L.6-20. She began experiencing significant pain, difficulty walking and related medical problems associated with this leg, which landed her in the emergency room. Tr. p.837, L.1-p. 839, L.9. The emergency room doctor at Skyline referred her to a local physician, Dr. Biddulph - a bone specialist, who took an x-ray and told her that she had a malignant tumor. Tr. p.840, L.6-21. Dr. Biddulph, specifically told her, "[y]ou have cancer. And I have only seen two of these like this in my life and the first one was a younger boy and sometimes amputation helps." Id.

He referred to the University of Utah for further treatment. Tr. p.841, L.2-20. She went through rounds of tests, exams and one biopsy of the tumor. Tr.p.791,L.9-23. The biopsy results from the University of Utah were suggestive of a sarcoma (i.e., malignant tumor) diagnosis. Tr.p.792,L.4-22-p.795,L.3. The biopsy slide was sent to the Mayo Clinic for a second opinion because they found "cancer cells." Tr. p.795,L.22-p.796,L.10. The results of the Mayo Clinic were that the cells were suspicious for lymphoma. Tr.p.795,L.22-p.797,L.17. She and her then-husband were told by the doctors that the biopsy showed "cancer cells" and that she had lymphoma or a diagnosed sarcoma. Tr. p.847, L.5-21; Tr.p.588, L.5-18.

Vianna legitimately and sincerely believed that her 9-inch tumor was bone cancer and that ultimately God healed her of it. Tr. p.847, L.24-25;p.849,L.14-16. Dr. Phillip Beron, an oncologist, testified that it is common for patients in Vianna's situation to conclude that they have been diagnosed with cancer. Tr.p.802, L.8-25;p.803,L.1-24. The Respondent's medical

expert concurred with Dr. Beron testifying that it is typical for patients to believe they have cancer given what Vianna was going through. Tr.p.492-494. Vianna had three children and was determined to live for them but didn't have the money for any additional medical treatment. Tr.p.847,L.19-21. So, she turned to prayer and alternative methods to heal her body. Tr.p.849, L.5-16. Through natural homeopathic remedies, meditation and prayer to God, Vianna experienced a miraculous healing. Id. It is her belief that God healed her leg. Id.

2. History of Theta Healing.

Between 1998-2002, Vianna wrote two books titled "Go Up And Seek God" and "Go Up And Work With God." Tr.p825,L.23-p.826,L2;Tr.827 L.4-12. These books detailed a brief part of her personal journey to God through prayer and how God healed her of cancer. Tr.p.431,L.17-p.432,L.25. In these books, she documents her cancer and what she heard the doctors tell her about her condition. Tr.p.850,L15-17. Specifically, she states that "In August of 1995 I was diagnosed with bone cancer; and it was believed I had a tumor in my right femur. Every test the doctors performed showed the tumor, and a local bone specialist told me he had only seen two other cases like mine. He told me that amputation might be my only option if I wanted to live, and even then there was no guarantee." Tr. p. 438. She further details the meditation and prayer technique she used to connect with God. Id. She started to call her meditation technique "Theta Healing" and began teaching others how to do what she had done years before. Tr.p.829,L.5-20.

The primary tenant of ThetaHealing is to focus a person's energy and prayer towards God and command that God perform a healing as requested by that particular person. Tr.p.827, L.16-p.829,L.4-25 Vianna teaches that the only healing that can be conducted is through God and her students are simply witnesses to the healing. Id. Vianna has never claimed that her meditation

technique achieves success every time, rather it depends on each individual. Tr.p.829,L.21-25;p.830,L.1-25;p.831,L.1-5.

Respondent, Kara Alexander has a Bachelor's degree (double-major in art and biology as a medical illustrator) and has taken graduate studies in neuroscience at the University of Texas. Tr.p.232,L.13-15;p.266,L.15-16. Robby Robinson is an airplane pilot. Tr.p.883,L.5-6. Both became Theta Healing students at some point in or around 2006. Tr.p.231,L.13-16. They did not enroll with Vianna, but took classes from other certified Theta Healing instructors. Tr.p.2311,L.17-20. After taking numerous classes from other instructors, Kara and Robby independently chose to take classes from Vianna in Idaho Falls in 2007. Tr.p.359,L.6-9. The Theta Healing Institute of Knowledge was not in existence in 2007. Tr.p.408,L.21-23.

Contrary to the pleaded allegations in Count I, there was no certificate or degree offered by Vianna or THINK prior to May of 2008. Tr.p.360, L.22-25;p.361, L. 1-12. Without any promise of a degree, Kara and Robby took numerous classes throughout 2007 and 2008. Id. In or about July of 2008, Vianna asked her students - including Kara and Robby - to vote on how they wished to be recognized for their achievements. Tr.p. 697, L.5-15; p.756,L 8-14. Kara, Robby and the rest of the class voted to call it a "Doctorate of Ministry" in ThetaHealing in 2008 - just like the "Doctorate of Ministry" in Reiki. Tr.p.656-657,L.4; 316, L.10-20.

For Count III, the only allowable damages were classes taken by Kara for four (4) weeks in the summer of 2008. Tr.p.756,L 8-14. The only compensatory damages that could be considered by the jury when awarding the $111,000 were 4 weeks of classes totaling less than $2,300 in tuition and $22,862.77 in costs. Tr.885p.756,L14-p.886,L.5. Upon completion of their classes, Kara and Robby received an honorary plaque indicating that they had completed the course and recognized them as having a Doctorate in Ministry in ThetaHealing. Tr.p.279,L.7-22.

When Kara and Robby became aware that the Board of Education would not recognize the honorary "doctorate," they agreed to accept the designation of "Master" instead. Tr. p. 659. Three years after they accepted the "Theta Healing Master" designation, they filed their lawsuit.

3. **The Complaint and Jury Trial.**

The jury was ultimately presented with Counts II and III and a request for punitive damages on Count II for Kara Alexander only. Tr.p.621,L.22-25;p.641,L.24-25;p.642, L.1-10.

i. Count II - Fraudulent Misrepresentation-Healing.

Count II is based on the allegations that "Kara and Robby took [3 years of] classes at THINK based on the representations from Vianna and THINK that Vianna is a healer, with the ability to heal herself and others, and that she can teach other people to become healers." R. Vol. 1, p. 21 (Complaint-4). They allege that the representations of healing were the "assertion that she healed herself of cancer, that she pulled herself out of a coma in Italy and that she healed herself from heart disease, and can make liquids appear in containers." Id. They further allege that "other students" told them that Vianna did not have the ability to heal others, and that her stories of healing were false." Id. p. 22 (Complaint-5). They did not allege what the exact statements that where made or to whom or when the statements were made.

The record showed that Vianna did not say what they have alleged. Vianna specifically said that "God healed my cancer, God healed my heart disease, God pulled me out of a coma, and God can make liquids appear." Tr. p. 693, 836, 849, 865. In her 1998 book, she says God healed me. See Exhibits 24, 25. Kara testified that the first representations she heard of Vianna's personal story regarding cancer and God healing her of cancer was when she read the later version of the 1998 book "Go Up and Seek God" where Vianna stated: "[i]n August of 1995 I was diagnosed with bone cancer; and it was believed I had a tumor in my right femur. Every test

the doctors performed showed the tumor, and a local bone specialist told me he had only seen two other cases like mine. He told me that amputation might be my only option if I wanted to live, and even then there was no guarantee." Tr. p. 438. The same books that Kara read further detail Vianna's prayer and meditation technique and how she believes God healed her leg. (Exhibits 24, 25).

ii. **Count III - Breach of Contract - Degree.**

Count III is based on the allegation that "Kara and Robby were recruited to become students at THINK based on the representations by Vianna and THINK that the organization would award valid doctorate degrees (or PhD) at the end of a certain amount of coursework . . . from an accredited school." R., Vol. 1, p. 19-20 (Complaint-3). Both of these claims appear to be based on an expectation of something more than the "Doctorate of Ministry" plaque that both Kara and Robby each received. The November 2008 email that Kara received from THINK is evidence of the false nature of her allegations. Tr. p. 312 (Exhibit 11). That email notified all practitioners that the Doctorate of Ministry was not a PhD, it was an honorary degree offered after completion of the coursework and that THINK is not an accredited school. Id.

The Court ruled that Kara Alexander's damages on the Contract claim would be limited to damages sustained after May of 2008 totaling $2,300 in tuition and $22,862.77 in costs. Tr.p.12,L.12-25;p.48,L1-25;p.49,L.1-10. Exhibit 2 set out the tuition costs associated with the additional classes she took in 2008 based on the alleged promise. Tr.p.236,L.5-25.

1. Diseases and Disorders Course, August 4-15, 2008. Cost of $1200.00.
2. Rainbow Children's, August 18-22, 2008. Cost of $500.00.
3. World Relations, September 22-26, 2008. Cost of $600.00

Total Cost: $2300.00(Tr.p.365;Tr.p.245,L.18-24;Tr.239,L.3-17;p 268, L.20-25; p 389,L 19-23;Plaintiffs' Exhibit 2).

Kara submitted an American Express transaction summary that itemized all expenses she claimed associated with taking courses at $45,725.53, including a golf outing for Robby. Tr.p.885,L14-17 (Plaintiff's Exhibit 10). After Mr. Robinson's claims were dismissed, counsel reduced the costs by half - $22,862.77. Tr.p.929,L.15-25;p.930,L.7, 887-889.

Kara Alexander was initially barred from introducing any lost wages testimony during her case in chief. Tr.p.287,L14-20;p.339,L12-19. The second day of trial, Kara produced a tax return showing her income in 2006 and 2007. Tr.p.576,L.4-p.579,L.4. The Court allowed Kara to retake the stand and testify that she made about $750 per day while working as lost wages. Tr.p.609 L.13-25;p.610 L.1-13. No documentation was ever offered before trial and no evidence was admitted to show her daily rate or that she in fact did not make this money while taking classes that summer. No evidence was admitted on Kara Alexander's expectation associated with future wages because she chose to become a full-time Theta Healing practitioner and was already earning income as a practitioner and instructor. No evidence was presented of what Kara Alexander could expect to make as a certified Theta Healing practitioner or what her lost wages were from the alleged breach of contract. Despite the lack of evidence of specific damages and only proven damages of $2,300 for classes taken and approximately $23,000 in costs, the jury erroneously awarded $111,000.00 in contract damages. Tr.p.970,L.9-11.

iii. Punitive Damages- Fraud Claim.

The punitive damage claim was limited by the Court ultimately to Count II as demonstrated below:

> **MR. WILKINSON: I know. I know. One more. I would ask the Court to reconsider it earlier ruling as it relates to punitive damage.**
> **THE COURT: Without getting into that right now extensively, as I have listened to the evidence of the case, I have concluded based on the evidence, that if the fraud—excuse me—if the**

punitive damage issue is to be presented to the jury, it would be presented only in the context of the healing issue, not with regard to anything else. Tr.p.638,L.19-25;p.639,L.1-3.

Despite this limitation, the Court used the damages awarded in Count III in determining the proper amount of punitive damages. R.Vol.3,p.413.

iv. **Post Trial Motions.**

After the jury verdict, Appellants' filed their Motion for New Trial and/or Remittitur and for Judgment Notwithstanding the Verdict pursuant to *I.R.C.P. 59(a)(1)(2)(3)(5)(6) (7) and I.R.C.P 50(b).* With exception of reducing the punitive damage award the Court denied the Appellants motion in full. R.Vol.3,p.413. On appeal Vianna asks this Court to dismiss, in its entirety, the award of punitive damages and to strike the award of compensatory damages for both breach of contract and fraud.

IV.

ISSUES PRESENTED ON APPEAL

1. Whether the Trial Court erred in denying the Appellants' Motion for Directed Verdict, JNOV and New Trial because there was insufficient evidence to prove a valid, enforceable contract.
2. Whether the Trial Court erred in denying the Appellants' Motion for Directed Verdict, JNOV and New Trial/Remittitur on the Respondent's contract damages as there was insufficient evidence supporting the award.
3. Whether the Trial Court erred in denying the Appellants Motion for Directed Verdict, JNOV and New Trial as the Respondent failed to prove the elements of fraud by clear and convincing evidence.
4. Whether the Trial Court erred in granting the Respondent's Renewed Motion to

Amend the Complaint to Include a Prayer for Punitive Damages.

5. Whether the Trial Court erred in denying the Appellants' Motion for New Trial/Remittitur on the issue of punitive damages as they were not proven by clear and convincing evidence.
6. Whether the Trial Court erred in denying the Appellants' Motion for New Trial/Remittitur in failing to properly reduce the amount of punitive damages.
7. Whether the Trial Court erred in denying the Appellants' Motion for New Trial/Remittitur under Idaho Rule of Civil Procedure 59(a)(1) and (7) as numerous errors of law were made which prejudiced the Appellants right to a fair trial.
8. Whether the fraud claim was beyond the statute of limitation.
9. Whether Appellant is entitled to an award of attorney fees and costs on appeal.

V.

STANDARD OF REVIEW

A. JNOV.

The Supreme Court on appeal reviews de novo a district court's decision to deny a motion for a judgment notwithstanding the verdict. *Griff, Inc. v. Curry Bean Co.*, Inc., 138 Idaho 315, 319, 63 P.3d 441, 445 (2003) (citing Polk v. Larrabee, 135 Idaho 303, 311, 17 P.3d 247, 255 (2000)). The standard of review of a grant or denial of a motion for judgment notwithstanding the verdict is the same as that of the trial court when ruling on the motion. *Horner v. Sani-Top, Inc.*, 143 Idaho 230, 233, 141 P.3d 1099, I 102 QA06) (citing *Quick v. Crane*, 111 Idaho 759, 764, 727 P.2d 1187, 1192 (1986). A trial court will deny a motion for judgment notwithstanding the verdict if there is evidence of sufficient quantity and probative value that

reasonable minds could have reached a similar conclusion to that of the jury. *Id.* (citing *Hudson v. Cobbs*, 118 Idaho 474,478,797 P.2d 1322, 1326 (1990). A trial court is not free to weigh the evidence or pass on the credibility of witnesses, making its own independent findings of fact and comparing them to the jury's findings. *Griff, Inc.*, 138 Idaho at 319, 63 P.3d at 445. Trial court reviews the facts as if the moving party admitted any adverse facts and draws all reasonable inferences in favor of the non-moving party. *Ricketts v. E. Idaho Equip., Co., Inc.,* 137 Idaho 578, 580, 51 P.3d 392,394 (2002).

"A motion for judgment n.o.v. based on I.R.C.P. 50(b) is treated as simply a delayed motion for a directed verdict and the standard for both is the same." *Quick v. Crane*, 111 Idaho 759, 763, 727 P.2d 1187, 1191 (1986). A judgment n.o.v. can be used by the district court to correct its error in denying a directed verdict." *Hudson v. Cobbs*, 118 Idaho 474, 478-479, 797 20 P2d 1322, 1327 (1990). The central question on review in a judgment n.o.v. is whether, after viewing the evidence in light most favorable to the non-moving party, the evidence is of sufficient quantity and probative value that reasonable minds could reach the same conclusion as did the jury'" *Smith v. Praegitzer*, 113 Idaho 887, 890, 749 P.2d 1012, 1015 (App. 1988). "A judgment n.o.v. should be granted when there is no substantial competent evidence to support the verdict of the jury'. *Brand S Corp. v. King*, 102 Idaho 731,732-733, 639 P.2d 429, 430 (1981) When there is "but one conclusion as to the verdict that reasonable minds could have reached" *Beco Constr. Co. v. Harper Contr.*, 130 Idaho 4, 8, 936 P.2d 202, 206 (App. 1997). Rule 50(b) is intended to give "the trial court the last opportunity to order the judgment that the law requires." *Quick*, 111 Idaho at 764, 727 P.2d at 1192.

B. MOTION FOR NEW TRIAL.

When considering an appeal from a district court's ruling on a motion for new trial, the appellate Court applies the abuse of discretion standard. The appellate Court must recognize the district court's wide discretion to grant or refuse to grant a new trial, and, on appeal, a court will not disturb a district court ruling, absent a showing of manifest abuse of that discretion. The appellate court's primary focus is on the process by which the district court reached its decision, not on the result of the district court's decision. Thus, the sequence of this Court's inquiry is: (1) whether the district court correctly perceived the issue as one of discretion; (2) whether the district court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the district court reached its decision by an exercise of reason. *Sheridanv. St. Lulce's Reg'l Med. Ctr.*, 135 Idaho 775,780 (2001).

In considering a Motion for a New Trial a trial court must apply a two-pronged test when determining whether to grant a new trial: first, it must consider whether the verdict was against the weight of the evidence, and second, it must consider whether a different result would follow on retrial, which requires more than a mere possibility; there must be a probability that a different result would be obtained in a new trial. *Blizzard v. Lundeby*, 156 Idaho 204, 322 P.3d 286 (2014). When considering a motion for a new trial based on the insufficiency of the evidence, in deciding whether a different result would be obtained at a new trial, the judge must consider whether it is more probable than not that a different or more favorable result, as rendered by the questions the jury answered and only those questions the jury answered, would be obtained by a new trial. *Id.* at 290. Under I.R.C.P. 59(a)(5), a trial court may grant a new trial for "excessive damages or inadequate damages, appearing to have been given under the influence of passion or prejudice." I.R.C.P. 59(a)(5).

Generally, issues not raised in the trial court, may not be raised for the first time on appeal. The exception to this rule is the necessity of presentation as set forth in *State Transp. Dept. v. Kalani-Keegan*, Idaho 297311 P.3d. "To properly raise an issue on appeal there must either be an adverse ruling by the court below or the issue must have been raised in the court below, [sic] an issue cannot be raised for the first time on appeal." *Garner v. Bartschi*,139 Idaho 430, 436, 80 P.3d 1031, 1037 (2003) (citing *McPheters v. Maile*, 138 Idaho 391, 397, 64 P.3d 317, 323 (2003)); *Johannsen v. Utterbeck*, 146 Idaho 423196 P.3d 34. An issue not raised in the trial court or on appeal may be addressed when plain or fundamental error exists. *State v. Doe*, 144 Idaho 534164 P.3d 814 (citing *Crane Creek Country Club v. City of Boise*, 121 Idaho 485, 487, 826 P.2d 446, 448 (1990) (Bakes, C.J., specially concurring) (finding that the magistrate court's error in applying the incorrect standard affects Doe's fundamental right and violates the due process clause of the Fourteenth Amendment). A party need not object to an instruction that is actually given by the trial court in order to preserve the issue for appellate review. *Suitts v. First Security Bank of Idaho*, 110 Idaho 15, 713 P.2d 1374 (1985); *Country Ins. Co. v. Agric. Dev., Inc.*, 107 Idaho 961, 695 P.2d 346 (1984).

VI.

ARGUMENT

A. The Trial Court should have granted Appellants Motion for Directed Verdict/JNOV/Motion for New Trial as the Respondent failed to prove all of the elements required to establish a valid and enforceable oral contract.

In an oral breach of contract action, the terms of a valid contract must first be established. A valid contract must be "complete, definite and certain in all its material terms, or contain provisions which are capable in themselves of being reduced to certainty." *Lawrence v. Jones*, 124 Idaho 748, 750-751, 864 P.2d 194, 196 - 197 (Idaho App.,1993) (citing *Giacobbi Square v.*

PEK Corp., 105 Idaho 346, 348, 670 P.2d 51, 53 (1983). Once a valid contract is established, the court can determine what acts are to be performed by the contracting parties. *Dale's Serv. Co., Inc. v. Jones,* 96 Idaho 662, 664, 534 P.2d 1102, 1104 (1975).

A fundamental principles of contract law requires that the plaintiff establish the parties "meeting of the minds" on all the pertinent and material terms. *Dursteler v. Dursteler*, 108 Idaho 230, 697 P.2d 1244 (Ct. App. 1985). "Proof of a meeting of the minds requires evidence that the parties had a mutual understanding of all the terms of their agreement, and that they mutually assented to be bound by those terms." *Thomas v. Schmelzer*, 118 Idaho 353, 356, 796 P.2d 1026 (Ct. App. 1990).

1. Kara did not establish sufficient evidence to show a meeting of the minds of or mutual assent by THINK to offer a per se "PhD" doctorate degree from an accredited school.

To establish a meeting of the minds, Kara must have proven that both Kara and THINK were in agreement to offer the alleged degree as set forth in her Complaint. She did not have any evidence of a meeting of the minds on the term "doctorate" degree. As set forth in the Statement of Facts, the Complaint alleges, *inter alia*, that Kara believed she was contracting for a "doctorate (PhD) degree" from an accredited school. R.Vol.1;p.18. At the time she took her class in May 2008, Kara did not believe THINK was an accredited school nor were they offering PhD degrees. There is ample evidence in the record showing that Kara knew that the program was not accredited. Kara's own admission to this fact is sufficient evidence. Tr.p.370,L8-23. In fact, a November 2008 email from THINK to Kara (and other practitioners) indicated that THINK was not accredited, the degree was honorary and they were asking their members to vote on the new designation, a "Theta Healing Master."

The evidence showed that Kara clearly knew that THINK was not like The University of

Texas in offering different levels of study, i.e., BS, MS, PhD. It is highly implausible to believe that the "promise of degree" meant that she understood that by taking a couple of additional classes, she could earn her PhD in ThetaHealing, i.e., without any exams or dissertation. Tr.p.272,L.4-12. She is very educated and has gone through accredited universities. She knows what is required. No reasonable jury could conclude there was a valid contract.

Kara also had taken two years worth of classes in 2006 and 2007 before the promise by THINK of any plaque called a "Doctorate of Ministry" in 2008. Tr.p.360, L.22-25;p.361, L. 1-12. She knew those classes were not on some "doctorate" track. Despite knowing that THINK was not accredited, she stayed enrolled, completed and paid for additional classes. Kara has not presented any evidence of what "doctorate" actually meant to THINK. Kara never spoke with anyone regarding the validity of a doctorate degree. (Tr.p.373,L13-25;p.374,L.1-25;p.375,L1-15)

The evidence at the close of Respondent's case clearly indicated no meeting of the minds or existence of a valid oral contract. Tr.p.375 L.6-9, 345,L.9-21. There was no evidence of mutual assent to be bound by Kara's version of the terms by THINK. A mutual mistake of fact is not a contract. Kara also received the benefit of her bargain - she got an honorary plaque, first called "Doctorate of Ministry" and next renamed "Theta Healing Master." By obtaining the doctorate plaque, she received nothing more than what she already had—the ability to teach ThetaHealing. This "degree" does not further anyone's economic prospects. It is not a marketable degree. It only has some validation in the world of ThetaHealing. She received what she paid for. The Trial Court should have granted the defendants post trial jnov motion on these grounds.

2. The contract damage award was excessive and should have been reduced by the Trial Court.

Kara presented no evidence at trial entitling her to an award of $111,000 in contract

damages. The evidence presented at trial was that she received what she paid for a plaque certifying the coursework. The title of the plaque as "doctorate" or "masters" was irrelevant. Although "[d]amages need not be proved with mathematical exactitude," *Gillingham Const., Inc. v. Newby–Wiggins Const., Inc.*, 142 Idaho 15, 26, 121 P.3d 946, 957 (2005), the burden is still upon a plaintiff in a breach of contract case to "prove not only that it was injured, but that its injury was the result of the defendant's breach; both amount and causation must be proven with reasonable certainty," *Griffith v. Clear Lakes Trout Co.*, 143 Idaho 733, 740, 152 P.3d 604, 611 (2007). The Respondent in this case failed to prove any contractual damages except for the costs of tuition.

The Court and counsel agreed that the breach of contract damages would be for "damages" incurred after the alleged oral promise in May of 2008 Tr.p.47,L.8-p.49,L.9. This was the subject of a Motion in Limine brought by Vianna and THINK prior to trial and was the ruling of the Trial Court. Id. The evidence submitted by the Kara Alexander in support of the breach of contract claim was contained in Plaintiff's Exhibit 2 (totaling $2,300), which was admitted into evidence and set out the tuition costs associated with the classes Kara took at THINK. Tr.p.365;Tr.p.245,L.18-24;Tr.239,L.3-17;p.268,L.20-25;p.389,L.19-23;Exhibit 2.

Kara also submitted her Exhibit 10 to the jury containing a summary of expenses on an American Express for Robby Robinson's credit card. The transaction sheet itemized all expenses both Kara and Robby claimed (Robby's claims were dismissed on Directed Verdict) were associated with the post May 2008 courses totaling $45,725.53, except the golf outing by Robby. Id. Kara then reduced these by half, $22,862.77, because Robby did not show up for trial. Kara also presented insufficient evidence on lost wages, expectation damages and future wages. There was no testimony on how, if at all, her wages or income would have changed with

"doctorate" versus the "Theta Healing Master" she received. No comparatives were presented at all.

The Trial Court initially excluded all evidence of lost wages on Count III, but allowed Kara to testify -- over objection -- at the close of her case in chief because she presented tax returns not produced in discovery. Tr.p.576,L.4-p.579,L.4. The Trial Court then allowed testimony on her daily wages for 2006 and in 2007 -- an error of law. The damages were limited to post May 2008 but her lost wages prior to 2008 were used by jury in awarding $111,000.

In the Court's Memorandum Decision & Order Denying Defendants' Post-Trial Motions and Order Granting Cost, it notes that based on Jury Instruction 18, the award was higher than what he may have expected, but supported by the evidence. R.Vol.3,p.410. Not only did the Kara fail to provide evidence that she had lost wages post May 2008, she also failed to put on any evidence as to what one could expect to make as a "doctorate of ministry" in Theta Healing. The testimony regarding her per day rate in 2006 and 2007 -- before the offering of any doctorate of ministry in May 2008 -- was irrelevant and prejudicial as it confused the jury. Contrary to the Court's finding, there was no evidence to support $111,000.00 in contract damages.

B. The Trial Court should have granted Appellants' Motion for Directed Verdict and Judgment Notwithstanding the Verdict because Respondent failed to prove the elements of fraud by clear and convincing evidence.

A party seeking to establish fraud has the burden of proving by clear and convincing evidence: 1) a representation of fact; 2) its falsity; 3) its materiality; 4) the speaker's knowledge of its falsity; 5) the speaker's intent that the representation will be acted upon in a reasonably contemplated manner; 6) the listener's ignorance of its falsity; 7) the listener's reliance on the truth of the representation; 8) the listener's right to rely on the truth of the representation; and 9) the listener's consequent and proximate injury. *Galaxy Outdoor Advertising, Inc. v. Idaho*

Transportation Dept., 109 Idaho 692, 696, 710 P.2d 602, 606 (1985).

The Respondent had the burden of proof on *all* of these elements but did not present sufficient evidence on all elements. The first five elements are from the speaker's point of view (Vianna) and the last four elements are from the listener's point of view (Kara).

The Court limited Kara's claims to those alleged in her Complaint, and then allowed her to present different representations without ever identifying when or where the representations were made or how they were made with any specificity. (See Statement of Facts above). She was supposed to be limited to her claims in Count II. Nonetheless, Respondent did not meet her burden on any of the elements of fraud as a matter of law. The jury based their ruling on errors of law as they failed to follow the jury instructions. The Court also erred in denying JNOV/Appellant's Motion for New Trial for the same reasons.

1. **The Coma in Italy**.

Kara has alleged in Count II that Vianna's statement that she was in a coma in Italy and the doctors and God pulled her out of it (as well as her husband's crying voice) was a fraudulent misrepresentation. R.Vol.1,p.21; Tr. p. 428-429. The testimony elicited from Vianna at trial was that she was in a coma in Italy at the end of 2007 due to meningitis from a sinus infection. Tr.p.408,L1-4;p.436,L.7-12. She came out of the coma as noted above. The alleged fraudulent misrepresentation - that Vianna was in a coma in Italy and her belief as to what healed her - was only tangentially mentioned by Kara in her case in chief. She did not present any evidence at all:

- Vianna represented that fact to the Respondent;
  (a thorough search of the record shows that the Respondent failed to testify or put on evidence that a specific representation was made to her from Vianna related to being in a coma. The only testimony regarding a coma from the Respondent is that she heard about the coma at a class. Tr.p.225,L5-14);
- That it was a false statement;

- That it was material to any decision she made;
- Vianna knew it was false;
- It was contemplated the statement would induce reliance;
- The Respondent was ignorant of the falsity of the statement;
- That she had any right to rely on the statement; or
- The Respondent was injured as a result of the statement.

Respondent introduced no evidence on the other elements. Respondent had been taking classes for two (2) years prior to the alleged statement being made. Id. She did not rely on the statement in a decision to take ThetaHealing classes as she was already taking them. The more troubling issue is that she never testified that Vianna made the statement to her, that the statement was false, that Vianna knew it was false or that she was injured as a result—given that she was already engaged in the study. There is no showing of reliance and fundamentally no showing that one would have any right to rely on such a statement. The jury and the Court both failed to follow the law.

2. **Heart Disease**.

Kara alleged in Count II that Vianna's claims to have healed from heart disease via her connection with God was a fraudulent misrepresentation. In support of her claim, Kara testified as follows:

Q. (BY MR. JOHNSON) And what, if anything, else?

A. (BY MS. ALEXANDER) That she was diagnosed with heart -- congestive heart failure and that she also, using her ThetaHealing technique, healed herself instantly and that her heart was perfect. Tr.p.224, L19-22.

The alleged false representation offered by the Respondent is vague. She does not identify when the statement was made and she also fails to provide any evidence or testimony that:

- That it was a false statement;
- That it was material to any decision she made;
- Vianna knew it was false;
- It was contemplated the statement would induce reliance of some sort;
- The Respondent was ignorant of the falsity of the statement; or

- The Respondent was injured as a result of the statement.

No evidence was presented on the other elements for proving fraud. The one piece of evidence offered was through Dr. Shull who testified that he reviewed records from 2006 indicating that Vianna suffered from congestive heart failure. Tr.p.487 16-18;490,p.18-21. These records were seven (7) years old at the time of trial. They proved that there was at one time a diagnosis, but failed to put on evidence that she did not recover from it. There was no foundation establishing when the statement was made, that Vianna knew it was false or that it specifically induced the Respondent to do anything. Again, as above the course of study began well before any such statement could have been made to the Respondent, thus she did not rely on it to her detriment. Again, the jury and the Court both failed to follow the law.

3. **Cancer**.

Kara failed to prove the following elements by clear and convincing evidence

> Vianna represented that fact to the Respondent;
> That it was a false statement;
> That it was material to any decision she made;
> Vianna knew it was false;
> It was contemplated the statement would induce reliance;
> The Respondent was ignorant of the falsity of the statement;
> That she had any right to rely on the statement;
> The Respondent was injured as a result of the statement.

As to the element that Vianna knew her statements to be false, Kara testified that Vianna's statements in her books where she details her personal journey to God and healing from cancer was a fraudulent misrepresentation made by Vianna to induce Kara to take classes in 2006 (after she had already read the book). It is a past representation made somehow to induce her to continue taking classes. As set forth in Paragraph C. 1 above, Vianna had a 9-inch tumor in the bone of her leg that they believed was bone cancer and used the words "lymphoma," "maliginant," "sarcoma," "cancer cells" and then told her she needed chemotherapy, radiation

and amputation. Tr.p.785,L.6-20.; 837, L.1-p. 839, L.9. 840, L.6-21; 841, L.2-20, 795,L.22-p.796,L.10; 795,L.22-p.797,L.17; 847, L.5-21; Tr.p.588, L.5-18. Vianna's then-husband told her three children that she was "terminally ill." Tr. p. 608. How can a person be "terminally ill" and not be diagnosed with cancer? There was no evidence presented of any other such "terminal illness." The first five elements of fraud relating to the speaker's point of view clearly indicated that Vianna believed the statements made in her book (based upon her personal journey and recordings back in 1995) is an accurate representation of her personal journey through cancer and to God. Tr.p431,L.19-20.

Vianna has very consistently stated, since 1998, that she believes that she had cancer and that God healed her. Id. The experts in the case testified that her belief that she had cancer was reasonable and certainly not unusual given the circumstances. The Respondent called Dr. Christian Shull who testified that when lay people hear the word "tumor" they often believe that they have cancer. Tr.p.492,L11-24. Dr. Shull stated very definitively that Vianna's doctors were concerned that she had cancer and the pathology report indicated cancer could not be excluded. Tr.p.496, L.4-7. A reasonable layperson would believe that they had cancer. Tr.p.496,L.15-23.

Dr. Beron, an oncologist called by the defense, testified that a reasonable oncologist would presume that Vianna had cancer based on the medical findings. Tr.p.799, L.2-20. The medical records relied on by both oncologists simply do not prove that Vianna *did not* have cancer. In fact, Dr. Beron testified that she had cancer until proven otherwise. Tr.p.803, L.25-p.804, L1-8. This evidence negates element two for fraud requiring a false statement. It certainly does not satisfy the burden of clear and convincing evidence. The record was clear that the first five elements for fraud were not established by clear and convincing evidence.

As to the last four elements of fraud from the listener's point of view, Kara presented no

evidence to establish these elements by clear and convincing evidence. She had no right to rely on the statements by Vianna made in her 1998 and 2002 books, particularly since she had taken three years of classes with *other instructors* and "intelligent" people from all over the world, and had sufficient time to assess for herself whether she could rely on such a statement. Tr. p. 262. In matters of faith and religion, it is typical for statements to be made about the power of God that are difficult if not impossible to prove. One must take certain ideas as a matter of faith. As a matter of law, a reasonable person cannot justifiably rely on faith-based statements. They are simply an expression of the power of one's own belief or opinion.

The question in this case is whether a reasonable person would just blindly believe the alleged statements. The answer is no. A reasonable person must put the statements in context and weight them accordingly. One person's miracle of faith may be explained by another in a completely different way. The 9-inch tumor disappearing could have been a spontaneous healing as the experts opined. Vianna believes it was God. These sorts of statement require a leap of faith—investigation and personal involvement. The jury failed to follow the law because Kara did not prove each element by clear and convincing evidence.

The Trial Court should have dismissed the fraud claim at the motion for directed verdict. Instead the Trial Court in its Memorandum Decision relies on a story where Vianna allegedly failed to cure her grandson of lung problems. Tr.p.235,L.2-7. This was not part of the plead fraud claim. No evidence was presented to show she *did not* help heal her grandson with God. The Court even misstated the law when it said Vianna's belief, truthful or not, is not the issue. (*cite). That is one element of fraud. The "other" statements that the Court relied upon were not part of Count II and outside the scope of what is proper in determining whether to grant the Appellant's motion for jnov/new trial.

C. The Trial Court made a fundamental error of law in allowing the punitive damages to go to the jury.

1. Theta Healing is based on prayer and one's belief in God and is protected by the U.S. and Idaho Code: the District Court erred in allowing punitive damages

At trial, the proverbial pink elephant in the courtroom was the issue of "religion." The law of the case prior to the day of trial was as follows:

> "This Court believes that going into the program, everyone admits that [Theta Healing] is a religion and with elements of personal faith . . . so the Court is uncomfortable in granting leave to amend to include punitive damages." (Judge Watkins, Hearing on SMJ/Status Conference, p. 99:11-14).

Judge Watkins also properly ruled that "[i]f faith is a part of the program or teachings, *and the Plaintiff's concede that*, then it makes the task of establishing an extremely harmful state of mind extremely difficult." Tr. p. 98:1-19. Idaho Code Section 73-401 (2) provides that "exercise of religion" means the ability to act or refusal to act in a manner substantially motivated by a religious belief, whether or not the exercise is compulsory or central to a larger system of religious belief.

Sincerity of religious belief pursuant to the Idaho Free Exercise of Religion Protected Act (FERPA) is a factual matter and, as with historical and other underlying factual determinations, appellate court defers to the lower court's findings, reversing only if those findings are clearly erroneous; also, determining whether a person's act is substantially motivated by a religious belief requires determinations of fact. *State v. Cordingley* (Idaho 2013) 302 P. 3d 730. In *Cordingley*, this Court explained that in the *United States v. Ballard* (1944) 322 U.S. 78, 86-88, the United States Supreme Court declared that courts may not consider whether the party's purportedly religious beliefs are true or false. Id. The *Ballard* case dealt with the "I Am" movement. The promoters of "I Am" claimed to have been appointed by the Divine Messengers

and given the power to cure all diseases. By virtue of these claims, they obtained money from the public and were tried for mail fraud. Id. at 322 U.S. 78 (1944). That case was reversed as indicated above.

In the present case on appeal, the jury was asked to do precisely that - determine whether Vianna's religious beliefs are true or false. "The First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in that position." Id. at 87, 64 S.Ct. at 886–87, 88 L.Ed. at 1154.) The United States Supreme Court held that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." Id. If there is any doubt about whether a particular set of beliefs constitutes a religion, the court will err on the side of freedom and find the beliefs are a religion. *State v. Cordingley* (Idaho 2013) 302 P. 3d 730 (citing United States v. Meyers, 906 F.Supp. 1494, 1499 (D.Wyo.1995)).

Although the FERPA defines the "exercise of religion" as "the ability to act or refusal to act in a manner substantially motivated by a religious belief," I.C. § 73–401(2), the statute does not define "religion" or "religious belief," and this issue has not been addressed by Idaho appellate courts. Id. Nor does the RFRA include such a definition. Without definitive guidance from the Supreme Court, various circuit courts of appeals, as well as state courts, have attempted to apply these principles by creating a variety of tests that generally, but not completely, overlap. *Cordingley*, 302 P. 3d at 735.

This Court found that to help determine whether a particular set of beliefs qualifies as "religious" under the RFRA or its state equivalent, a court examines the extent to which a party's asserted "religion" (1) addresses "deeper and more imponderable questions" of the meaning of life, man's role in the universe, moral issues of right and wrong, and other "ultimate concerns";

(2) contains an "element of comprehensiveness"; and (3) the "formal, external, or surface signs that may be analogized to accepted religions." Id. at 208–09 (Adams, J., concurring). It does not state that one has to incorporate as a church or non-profit to qualify as protected exercise of religious beliefs.

The two claims at trial, Counts II and III, deal with religious beliefs: breach of contract regarding the awarding of a "Doctorate of Ministry" and fraud regrading claims that Viana believes God healed her of various maladies. The trial record is replete with facts that satisfy the test above. Kara Alexander's own witnesses even testified to these facts:

- Lindsay Stock - "Theta Healing enhanced my relationship with God. I pray and I get answers." Tr.p. 570.
- Blake McDaniel - "Vianna believes she has a calling to teach the world unconditional love." Tr. p. 583.

Vianna teaches organized classes in the Theta Healing meditation technique, which involves focused prayer to connect with God. Tr. p. 442. She teaches that unconditional love is the strongest force from God. Tr. p. 442. Her beginning and ending prayer start with "Father, Mother, God, Creator (or other diety)." Tr. p. 442. She teaches peace and love and believes she witnesses miracles every day from God. Tr. p. 445. She has practitioners, students and instructors worldwide - in Japan, Italy, New Zealand, etc. who believe the same thing. Tr. p. 262. It is an organized system of prayer and worship based on the basic tenant that a command to and a belief in God can allow a person to heal. Id.

2. The Court should have denied the Renewed Motion to Amend and the fraud claim because the truth or falsity of Vianna's religious beliefs cannot be tried by the courts.

The Court completely disregarded the proverbial pink elephant and failed to properly consider the free exercise of religious beliefs in granting the Renewed Motion to Amend For Punitive Damages. The Court even stated that it didn't have the benefit of reading Judge

Watkins prior ruling that all parties agreed Theta Healing was religious. The Court's main inquiry was solely "what if she believed it?" Tr. p. 18. The "it" being cancer and God healing her. The Court improperly stated in that the jury can consider for punitive damages "whether she's a fake or not." (Hearing on Summary Judgment/MIL *cite). That statement means the jury gets to decide the truth or falsity of her religious beliefs. This was an error of law.

The Court allowed punitive damages on the grounds that, although faith based, Theta Healing is more commercial in nature apparently because it's not a church or non-profit. That was a complete abrogation of the law. The "commercial" argument was based solely on hearsay by Kara Alexander's counsel that the only reason Theta Healing wasn't religious was because she was allegedly "making millions of dollars" in her business (i.e., he wanted a piece of it). He did not have her tax returns at the time. He had no evidence of what she was earning. It was inadmissible hearsay and the wrong legal standard.

Judge Woodland's reversal of the "law of the case" in allowing punitive damages to go to the jury deprived Appellant's of their fundamental rights - right of due process, rights of free exercise of religion and free speech. The Court also erred when it allowed Respondent's in closing argument to tell the jury that "Theta Healing is not a religion. We know that. Religions are charitable. Theta Healing is a business . . . the money Kara paid were not tithings to a church or donations. They were paid in exchange for classes." Tr. p. 954. Appellant was not allowed to argue the issue of religion because of the Court's prior ruling that it was "commercial." Counsel attempted to argue this in defense and was denied any such arguments. This Court must with dismiss the punitive damages and fraud claims entirely or reverse and remand for a factual hearing on the multi-factor test of religion as set forth by this Court in *Cordingly*.

D. The Trial Court should have granted the Appellants' JNOV/Motion for New Trial on the issue of punitive damages.

Idaho does not favor punitive damages and Idaho courts award them cautiously and under the most compelling and unusual circumstances. *Manning v. Twin Falls Clinic and Hospital*, 122 Idaho 47 (Idaho 1992). Punitive damages are disfavored in Idaho because punitive damages emphasize "punishment and deterrence rather than compensation ... which is the normal role for civil litigation." *O'Neil v. Vasseur,* 118 Idaho 257, 264, 796 P.2d 134, 141 (Idaho App. 1990).

In addition to limiting the amount which can be recovered in punitive damages, the burden of proof is now "clear and convincing" and the trial court is required to weigh the evidence, i.e. "court shall allow the motion to amend the pleadings if, after weighing the evidence presented, the court concludes that, the moving party has established at such hearing a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages." *Bach v. Bagley,* 229 P.3d 1146, 1159 (Idaho 2010); *Todd v. Sullivan Constr. LLC*, 146 Idaho 118, 123 (Idaho 2008) (district court must conduct the weighing process required by the statute). The standard established in I.C. §6-1604 is more demanding than the standard for amendments pursuant to IRCP 15. *Vaught v. Dairyland Ins. Co.,* 131 Idaho 357, 362 (Idaho 1998); see also *Myers v. Workmen's Auto Ins. Co.,* 140 Idaho 495, 501 (Idaho2004) (party seeking punitive damages must adhere to the requirements of I.C. §6-1604). The proper inquiry at the close of evidence is whether the Plaintiff has presented sufficient evidence for any reasonable jury to conclude the Plaintiff is entitled to punitive damages by clear and convincing evidence. *Garnett v. Transamerica Ins. Servc.,*118 Idaho 769 (Idaho 1990). In considering abuse of discretion, Idaho focuses on the sufficiency of evidence. *Id.*

1. The initial Motion to Amend Complaint Seeking Punitive Damages was properly denied.

As set forth above, Respondent's initial motion to amend the complaint for punitive

damages was properly denied. Judge Watkins in denying the Respondents motion stated:

> The Court has not been exposed to all of the facts that will be proven at trial, but enough to make the determination whether punitive damages should or should not be awarded. One thing is also clear to the Court, that is that *faith remains an element of ThetaHealing*. And I don't think there's anything that this Court has been exposed to of sufficient facts, if proven at trial to suggest that faith is not an element of ThetaHealing. *If faith is a part of the program or teachings, and the plaintiffs concede that, then it makes the task of establishing an extremely harmful state of mind very difficult.* Even if she misrepresented her own illness and feeling and faith is required, the Court can't state that an extreme deviation from reasonable standards of conduct were performed with malice of pressure, fraud and gross wantonness. Misrepresentations for fraud perhaps as will be determined by the jury, but not to the degree of punitive damages....*this Court believes that going into the program everyone admits that it is a religion and with elements of personal faith.* Tr.(Konvalinka Transcript)p.97-99. Emphasis added.

It is imperative to note that Judge Watkins' decision focused on the issue of *faith* that is at the core of this case. He rules that even if the Kara and Robby can show fraudulent misrepresentations, punitive damages still are not warranted because there can be no bad intent or harmful state of mind with faith. Id. The addition of the punitive damage amendment on the first day of trial and reversal of the law of the case regarding Theta Healing as faith-based and religious and not subject to punitive damages was extremely prejudicial to the Appellants. There was no time to prepare for such an amendment or consider it prior to trial or even brief the issues for Judge Woodland. No apparent credence was given to Judge Watkins' previous decision. The information submitted in the first Motion to Amend versus the Renewed Motion located respectively at R.Vol.2,p.209; R.Vol.2,p.212;R.Vol.2,p.244; R.Vol.2,p.254 was identical. The ruling was an error of law.

2. The Trial Court erred when it allowed punitive damages to go to the Jury and when it denied Appellants' Motion For New Trial and/or JNOV.

Punitive damages will be sustained on appeal only when it is shown that the defendant acted in a manner that was an "extreme deviation from reasonable standards of conduct, and that

the act was performed by the defendant with an understanding of or disregard for its likely consequences." *Vendelin v. Costco Wholesale Corp.* 140 Idaho 416, 431 (2004); *Seiniger Law Office, P.A. v. North Pacific Ins. Co.*, 145 Idaho 241, 250 (Idaho 2008) (plaintiff must show intersection of bad act and bad state of mind for punitive damages).

Under 6-1604(2), the issue is the exercise of the court's discretion whether to instruct on punitive damages at the close of the evidence. *Fitzgerald v. Walker* 121 Idaho 589 (Idaho 1992). An abuse of discretion will be found where there is not substantial evidence to support the trial court's decision. Id. 826 P2d at 1305; see also, *General Auto Parts Co. v. Genuine Parts Co,* 132 Idaho 849 (Idaho 1999). The proper inquiry at the close of evidence is whether the Plaintiff has presented sufficient evidence for any reasonable jury to conclude the Plaintiff is entitled to punitive damages by clear and convincing evidence. *Garnett v. Transamerica Ins. Servc.* 118 Idaho 769 (Idaho 1990). In considering abuse of discretion, Idaho focuses on the sufficiency of evidence. *Id.*

The appellate court must consider the sufficiency of evidence on the fraud claim and whether the facts at trial showed evidence of an "extreme deviation from reasonable standards of conduct, and that the act was performed by the defendant with an understanding of or disregard for its likely consequences." *Vendelin, supra,* 140 Idaho at 431. As set forth in Section B(1)-(3) above, Kara failed to meet that burden as there was insufficient evidence to establish fraud by clear and convincing evidence.

The action required to support an award of punitive damages is that the defendant "acted in a manner that was 'an extreme deviation from reasonable standards of conduct, and that the act was performed by the defendant with an understanding of or disregard for its likely consequences.'" *Vendelin, supra,* 140 Idaho at 431. Vianna's alleged "act" was that she made a

statement in her 1998 book "Go Up and Seek God" that was told to the students in her 2006 class ***after*** Kara was already enrolled in the class. R.Vol.1, p.18-25;Tr.p.256,L.20-p.257,L.7;Tr.p.347,L.4-7. It was never told before the class or as and inducement to Kara to take a class. Kara alleged that telling the story in class apparently induced her to take additional classes with Vianna almost a year later. Tr.p.206,L.13-21. Nonsense. Vianna wrote her story to inspire others to connect with God. It is a memoir.

The facts at trial showed that she did, in fact, reasonably believe she had bone cancer and that her body was healed of the 9-inch tumor without further medical intervention. No evidence was presented as to what the precise "extreme deviation from reasonable standards of conduct" was or that Vianna performed this "act" with an understanding of or disregard for its likely consequences." There is simply nothing in the record to support this or even to allege this.

Further, Judge Watkins' prior ruling was that the evidence and claims would never support the requirement that Vianna "act[ed] in a manner that was 'an extreme deviation from reasonable standards of conduct, and that the act was performed by the defendant with an understanding of or disregard for its likely consequences." This is because she is exercising her religious beliefs. She does not have to be a church or non-profit company to exercise her religious beliefs. She first tested her beliefs on herself. She experienced a miracle. She wrote a book to tell others about her miracle. She was not teaching classes when she wrote the book, so there is no inducement to take any classes. She accurately recounts what the doctors told her. The undisputed facts were that she had a 9-inch tumor and it is gone without medical intervention. All of these were ignored by the Trial Court.

Kara testified that she was skeptical, that the practice wasn't working for her, but that she continued to take class after class. Tr.p.351,L.23-363,L.8. The primary basis for the fraud

claim is the statement made in a book published years before she began her study. By her own admission she was skeptical of the Theta Healing meditation technique, yet she continued to take classes for an additional two (2) years. The allegation that was crafted at trial (it was not alleged in the Complaint) was that it was fraudulent to state that Vianna had been "diagnosed with bone cancer." The experts agreed it was reasonable for her to believe she was diagnosed. She testified the doctors told her she had "bone cancer." The front cover of the book title "Go Up and Seek God" states that it's written from the "personal recordings of Vianna."

Even if Vianna misunderstood the different definitions of the word "diagnosed" as it relates to cancer or as specifically written in a medical record versus just plain "diagnosed" to a lay person, her conduct does not rise to the level of fraud. A mistaken belief is not fraud nor does it give rise to punitive damages. Vianna tells her personal journey of cancer and how she connected with God to heal her body. There was insufficient evidence presented by Kara to support the jury verdict and the Court's denial of Appellants' JNOV/Motion for New Trial. The Trial Court abused its discretion in allowing the jury to consider punitive damages because Kara did not meet her burden on the fraud claim and thus could not meet her burden on the punitive damages claim. The judgment should be reversed and punitive damages stricken.

3. The Trial Court erred in failing to properly reduce the amount of the punitive damage award by the jury.

The punitive damage award of $500,000 was both unconstitutional and illegal in accordance with *Idaho Code §6-1604(3)*. The Trial Court reduced the punitive award to $384,000.00 based upon the wrong calculation of damages and an error of law.

The Trial Court limited punitive damages to Kara's Count III fraud claim regarding healing. The jury awarded $17,000 in compensatory damages for this claim. Based on Idaho law, the maximum allowable punitive damage claim would be three (3) times compensatory

damage or $250,000.00, whichever is greater. Idaho Code *§16-1604*. Rather than analyze the punitive damage award given by the jury, the Court merely multiplied the damages for Count II and III by three (3). R.Vol.3 p.410. The Trial Court failed to correctly apply the law when analyzing the punitive award, which award is inconsistent with the standards set out by the Supreme Court.

i. Punitive Damage Analysis.

When reviewing an award of punitive damages the Court must consider three guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the Respondent and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *Weinstein v. Prudential Property and Casualty Insurance Company*, 149 Idaho 299, 233 P.3d 1221. These guideposts were brought to the attention of the Trial Court in the defendants post trial motions, but the Court did not go through the analysis in the Memorandum Decision.

a. Reprehensible Conduct.

The most important of the factors is the reprehensibility of the defendant's conduct. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575, 116 S.Ct. 1589, 1599, 134 L.Ed.2d 809, 826 (1996). The Supreme Court has directed Courts to consider whether:

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

Weinstein at 338. In this case the harm, if any, was economic as opposed to physical. The allegation was that Vianna made material representations regarding God's ability to heal through

her meditation technique. R.Vol.1,p.18-25. The Respondents presented ample evidence that Vianna had a bona fide belief that she had cancer and that her belief was reasonable. Blake McDaniel testified that Vianna believes she is put on the earth to teach unconditional love. Vianna testified she believes God healed her and can heal anyone.

Kara's claim is purely economic; there are no allegations that the conduct was harmful to the health or safety of anybody. In fact, the testimony on the record was the opposite. Vianna teaches her Theta Healing meditation technique all over the world to a wide variety of people. Kara testified there are "a lot of very intelligent professional people -- attorneys, senior people in IT company, MBA's -- I mean, not everyone but a lot of smart, interesting people" in her classes. Tr. p. 262. There is a Japanese Theta Healing Medical Association that is run by Japanese doctors. Tr. p. 262, 832. The "target" was not vulnerable. By her own admission, she was a college graduate and successful business person with doctorate classes in neuroscience. Tr.p.374,L.12-p.375,L.15. Kara had a three (3) year period of study and opportunity to investigate the methodology. By her own admission she was "skeptical" from the beginning and had doubts as it was just not working for her. Tr.p.351,L.23-363,L.8. Despite this skepticism, she continued to take classes.

A reasonable "intelligent" person such as Kara -- who studied biology and medicine and neuroscience -- cannot prove reckless disregard for the safety or health of others. The concept of hands on healing through a higher power has been around for thousands of years. In ancient Egypt, would call forth the spirits and ask for a healing. In Ancient Greece, there was Hippocrates - the Father of Modern Medicine - and Asclepieia, who was known to have people enter a meditative or trance like state to receive a healing from a diety in a "dream like" manner. The Rod of Asclepius is a universal symbol for medicine to this very day. The factors that the

Supreme Court looks to in determining whether the conduct of the defendants was reprehensible are not present in this case.

b. Ratio.

The second factor the Supreme Court looks at in determining whether a punitive award was excessive is the ratio of punitive damages to the actual harm inflicted on the plaintiff. Punitive damages must bear some reasonable relationship to compensatory damages. *Weinstein at 339.* The harm issue is the harm to the plaintiff not to others similarly situated. *Id.* The legislature in Idaho has addressed this issue in a manner that generally comports with Supreme Court guidelines in *Idaho Code §6-1604(3),* discussed above. The authority calls for single digit multipliers of compensatory damages as support for a finding of punitive damages.

The problem in this case is that the contract damages are not supported by the evidence and should not have been used in the Trial Court's analysis as a variable in determining punitive damage as argued below. If one were to use the proper amount of $17,000.00 for the fraud damage and the Court's finding of $384,000.00 then the ration would be 22.5 to 1. This is unconstitutional on its face.

E. The Trial Court abused its discretion preventing the Appellants from receiving a fair trial and on that basis should have granted the Appellants' Motion for a New Trial under Idaho Rule of Civil Procedure 59(a)(1) and (7).

Even if a verdict is supported by substantial and competent evidence a Trial Court has a duty to grant a new trial in a civil action where prejudicial errors of law have occurred. *Schaefer v. Ready, 134 Idaho 378, 3 P.3d 56.* In part the Appellants' Motion for New Trial was made on Idaho Rule of Civil Procedure 59(a)(1) and (7) based on errors of law made during the trial. The Trial Court failed to address the errors of law complained of the in the Appellants' motion and thus this Court must order a new trial. It is suggested above in Schaefer that the Court must

address each of the claims on the Motion for New Trial.

1. **Calculation of Damages.**

The Court failed to apply the appropriate standard as it relates to the computation of contract both contract and punitive damages.

2. **Over objection the Respondents were allowed to present irrelevant videos without laying proper foundation.**

During the trial the Respondent was allowed to present a number of videos where the Vianna made many statements, most of which are not at issue in this case. The representations related to the offer of degrees and healing and were admitted via a CD as Exhibit 23. Tr.p.9. Kara failed to specifically identify when those videos were made or who made them. The entirety of the statements made in the videos were not relied on by Kara in determining whether to study the ThetaHealing technique. The audio/video was as follows:

> An audio recording of a radio program containing statements "like" the statements the Respondent claims to have relied on, though not the statement she did rely on at Tr.p.209-223. The lodged objection was to foundation and relevance;
> Videos containing representations from Vianna regarding cancer. Tr.p.219-223. The information was not relied on prior to the Respondent taking classes. Counsel for Respondent argued that they needed to prove falsity, but videos made years later have no tendency to prove falsity at the time of the alleged statement. The Court allowed these videos after the fact into evidence. Tr.p.219-223;p.323 L.9-325,L.1. One of the videos was posted in 2010, two (2) years after the Respondent stopped taking classes. Id.

Rule 901 of the *Idaho Rules of Evidence* set out the requirements for authentication and identification. The rules specifically require that the offering party set out a proper foundation as a condition precedent to the admission of certain items of evidence. The offering witnesses in this case could not identify when the recordings were made, how they were made or who made them. On that basis they should not have been admitted for the jury's consideration. Rule 401 of the *Idaho Rules of Evidence* sets out the requirement that all evidence be relevant. That the

evidence has a tendency to prove some issue presented in the case. Although the witness could never identify when precisely the videos were made, it was made clear that the videos were made after the Plaintiff had made her decision to enroll in classes. They were not considered by her in either entering into a contract or relied on her as part of her fraud claim and were thus irrelevant.

A fraud claim is based on a specific discreet event. To allow video evidence that was not relied upon by the Plaintiff is highly prejudicial and confusing to the jury. Kara had the burden to show that some fraudulent statement was made prior to her making decisions to attend classes. All statements made after she was already in the class have no relevant bearing to her decision to taking that class, i.e., she was not induced by that statement made after the fact. These videos and statements should have been excluded and were unfairly prejudicial to the defense.

3. **The Appellants were precluded from offering evidence as to the healing impacts of Theta Healing.**

In Kara's case in chief, she was allowed to present evidence that "Theta Healing" did not work and she saw no "instantaneous healings" during the three (3) years she kept on taking classes. In Vianna's case in chief, Vianna attempted to put on evidence that the Theta Healing meditation technique had in fact helped people overcome various maladies. Tr.p648-652. This evidence was to address Count II specifically. The Court allowed Kara and her witnesses to present evidence that the Theta Healing meditation technique didn't work and even relied on it in his Memorandum Decision in denying a retrial. R.Vol.3p.410. The Court also denied the retrial based on evidence that Kara presented relating to Vianna's grandson, but refused to allow Vianna to present evidence that he was, in fact, healed. Vianna was denied her opportunity to defend against these allegations with her witnesses at the courthouse that day.

One of these witnesses included the testimony of Shawn Campbell who began discussing his healing from diabetes. Tr.p648-652. Plaintiff's counsel objected and it was sustained. The

Court would not allow the defense to present evidence related to these healing even though the evidence was in defense of Count II. The Court ruled that the evidence would not be admitted unless these were healings that Kara Alexander relied on. Tr.p648-652. This was an improper ruling because the testimony elicited from other witnesses that the technique doesn't work were not relied upon by Kara Alexander. This ruling, despite the Court allowing the Plaintiff to put on evidence of videos that the Plaintiff admittedly did not rely on, results in a clear injustice to the defense. The Court's refusal to allow Appellant to present a case to defend against Count II was a violation of law, an abuse of discretion and confused the jury.

4. **Over objection the Court allowed the Appellant's ex-husband to testify as to her veracity for truthfulness.**

Idaho Rule of Evidence 608 governs evidence of character of witnesses. During trial the Defendant's ex-husband was called to the stand. He was asked by Plaintiff's counsel as to her veracity to tell the truth during the time that he was married to her. Tr.p.594,L.14-p.597 L.7. It is undisputed that the marriage ended in the mid 1990s. Tr.p.580,L.13-25. Generally, whether a witness, in this case the Defendant, was truthful at any particular time is for the jury to determine. *State v. Raudenbaugh, 124 Idaho 758, 864 P.2d 596(1993).* The evidence was presented to impugn Vianna's reputation for truthfulness.

Whether the evidence presented is too remote to have a probative value on the question for veracity at the time of trial is left to the discretion of the court. *State v. Goodrich, 33 Idaho 654, 196 P.1043 (1921).* The testimony of an ex-husband regarding events happening fifteen (15) years prior to trial and several years prior to the alleged statements made to the Plaintiff is far too remote to be considered relevant. The rule of law surrounding this particular issue is more often dealt with in a criminal context. The impeachment of a defendant with evidence of

lack of truthfulness is improper without the defendant first putting his reputation therefore in issue. *State v. Branch, 66 Idaho 528, 164 P.2d 182 (1945).* It was improper for the Plaintiff to offer evidence that the Defendant is not truthful. In this particular case the evidence was far too old to be probative and was thus irrelevant.

5. Medical records offered by the plaintiff through Dr. Christian Shull should not have been admitted and were highly prejudicial to the Appellants.

Idaho Rule of Evidence 703 sets out what an expert witness can rely on in forming opinions and providing testimony to the trier of fact. The rule allows an expert to rely on otherwise inadmissible evidence but precludes that same evidence from being submitted to the jury unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

In this case, the Court admitted the entirety of Vianna Stibal's medical records -- even her current health records -- through the testimony of Dr. Shull. Tr.p.460 ,L.13-p.461, L.20. These records were admitted over objection and was improper. The Trial Court allowed her entire medical history in front of the jury based on the ruling that Dr. Shull had reviewed them, when he never commented on them and testified he only reviewed 4 pages. Tr.p.461, L.18-20. The records were well beyond the scope of Ms. Stibal's cancer diagnosis and included her medical history for the past several years. Tr.p.460,L.13-p.461,L.20. Dr. Shull testified that he reviewed those records and relied on them but could not lay the appropriate foundation for any of them. The rule of evidence authorizes the admission of expert opinions that are based on hearsay and inadmissible information if the information is of a type reasonably relied on by experts in the field, but it does not provide that the hearsay information itself is automatically, independently admissible in evidence. *State v. Scovell*, 136 Idaho 587, 38 P.3d 625 (Ct.App.2001).

The defendants do not challenge Dr. Shull's ability to rely on the medical information. What is challenged is that the entire medical file was admitted into evidence for the jury's consideration when Vianna's current medical condition was not at issue in Count II - it was just the three allegations relating to coma, heart disease and cancer. This same medical file was relied on by the plaintiff in closing argument and went way beyond the scope of the pleaded allegations and Court's exclusion of same. It is hearsay, prejudicial and inadmissible.

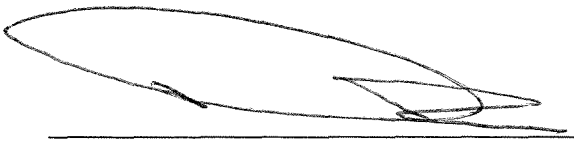
6. Count II was barred by the statute of limitations.

The statute of limitations on fraud in Idaho is 3 years. Idaho Code Section 5-218(4). Kara testified at trial she first heard Vianna's fraudulent misrepresentation in Count II in 2006. She does not testify as to the date she "discovered" the fraud, so she is bound by her testimony as to when she first read the alleged fraudulent statement. Kara also did not amend her Complaint until the end of trial, so Appellant did not have the benefit of any specific date as to when she claimed the representation was made. Appellant could not make this argument until Kara specified when she heard the fraud and when she relied on it. She filed the lawsuit in November 2011 - five years after the start of the statute of limitations. The Court did not have jurisdiction to hear the fraud claim or the punitive damage claim.

F. The Appelllants should be awarded attorneys fees and costs on Appeal.

Based upon the issues raised in this appeal, the Trial Court should have granted JNOV and/or a New Trial., and Vianna should be awarded her attorney fees pursuant to I.C. §12-121.

RESPECTFULLY SUBMITTED this 28 day of July, 2014.



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CERTIFICATE OF SERVICE BY MAIL, HAND DELIVERY OR FACSIMILE TRANSMISSION

I hereby certify that a true and correct copy of the foregoing document was on this date served upon the person named below, at the addresses set out below his name, either by mailing, hand delivery or by telecopying to him a true and correct copy of said document in a properly addressed envelope in the United States mail, postage prepaid; by hand delivery to him; or by facsimile transmission.

DATED this 28 day of July, 2014.

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