12-23-2014

Alexander v. Stibal Appellant's Reply 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' REPLY BRIEF

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

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INTRODUCTION

Nothing in Respondent's Opposition changes Appellants right to the relief requested on this appeal. The errors leading up to the October 26, 2013 verdict were numerous and resulted in reversible error. The award against Appellants was unsupported by evidence, not based on proper legal standards and violated due process of law. The verdict on Count II fraud of $17,000 and $500,000 punitive damages (later reduced to $384,000) (Tr.p.970-971) and on Count III breach of contract of $111,000 were awarded by a confused jury based on passion and/or prejudice.

At the beginning of this case, there were two plaintiffs and four claims. By the end of the case, there was one plaintiff and two claims. The jury heard and considered evidence, however, on four claims and for two plaintiffs (one who failed to show up at trial). The jury was also allowed to consider evidence on fraud allegations that were never pleaded. The jury heard and considered evidence on religious beliefs for which no defense was allowed. The jury based a breach of contract award on numbers not in evidence. The jury based its entire award on evidence that was inadmissible, irrelevant and highly prejudicial.

Fraud Re Healing

The judgment for $17,000 in compensatory and $384,000 (originally $500,000) in punitive damages on Count II against both Appellants was, on its face, resultant from passion and prejudice. Count II was based, in part, on statements written by Vianna in 1998 detailing her belief of how God healed her of cancer, which statements were subsequently heard by Respondents in 2006. It is important to note that THINK was not in existence until 2008 – two years after the alleged fraudulent statements were made.

The judgment on Count II for fraud and punitive damages was also based, in part, on statements made by Vianna in 2008 of her belief that God healed her from a coma in Italy. The judgment also appears to have been based on evidence offered by Respondent to impeach her own witness regarding Vianna's statement that God healed her grandson's lung, which was never pleaded as part of Count II.

The lower court and the jury failed to hold Respondent to the law in awarding the judgment on Count II because the claim for fraud was not based on specifically pleaded claims or proven by clear and convincing evidence. The trial court allowed the Respondent to proceed on a fraud claim and punitive damages without ever defining the precise fraudulent statements. It was and still is a moving target. The award for punitive damages was based solely on the fraud claim in Count II. Respondent did not meet her burden for punitive damages either.

Additionally, the trial court allowed the Respondent to proceed on Count II for fraud on religious beliefs in violation of the law. The trial court also improperly shifted the burden to Appellants throughout trial to disprove the allegations in Count II instead of requiring Respondent to prove her case by clear and convincing evidence. This is particularly problematic when punitive damages were awarded on a claim that was not proven by clear and convincing

evidence. The burden is even higher for punitive damages. Further, the evidentiary mistakes were so highly prejudicial that neither Defendant (Vianna or THINK) were given a fair trial or proper opportunity to defend.

Breach of Contract re Degree

The judgment on Count III for breach of contract for $111,000 was improper because Respondent did not prove all of the elements to establish a breach of an oral contract. The evidence at trial showed the Respondent received the benefit of the bargain. She enrolled in and paid for classes to learn a technique. She received the training for that technique. She received a certificate or degree for that training. It was called a "Masters" instead of a "Doctorate of Ministry." That's it. She was awarded $111,000 for a change in a title on a plaque. She was able to teach and earn money from the minute she finished the training but failed to do so. Those are not compensable damages.

The evidence admitted at trial showed that Respondent agreed to call the degree or certificate a "Doctorate of Ministry," which was later changed to a "Masters" certificate. It was undisputed that THINK was not an accredited university or college and unable to issue PhD's. No meeting of the minds was established as to the definition of "doctorate." RESPONDENT argues, disingenuously, that the term "doctorate" meant to her it was an a PhD from an unaccredited company after a summer of classes totaling $2,300 – making it the easiest and cheapest PhD in the world to earn. She also asks this court to view her damages as comparable to the expectation that she would have received had she received a PhD from an accredited university. She's comparing apples to oranges. A "Doctorate of Ministry" in Theta Healing is not comparable to a "Doctorate in Theology" from say Duke University for example. Respondent

knows that she received the benefit of the bargain regardless of the title of her certificate or plaque and the jury erred.

The $111,000 damages awarded were the result of pure speculation, inadmissible and irrelevant evidence and not based on sound legal principals. No evidence was provided in discovery or to the jury regarding the value of a per se "Doctorate of Ministry" degree from an third party (accredited university or otherwise). Respondent received a certificate of completion called a "Masters" instead of a certificate of completion called a "Doctorate." The evidence offered at trial showed that the title of a "doctorate" in Theta Healing did not change Respondent's ability to take clients for healing services or teach classes in Theta Healing. An honorary "doctorate" provided no other benefits to Respondent from which damages could be based.

The Court's dismissal of Count I re fraud in awarding a "Doctorate of Ministry" degree and refusal to dismiss Count III based on the same facts establishes the impropriety of the jury's award. These claims were identical and pleaded in the alternative – one tort and one contract. There was insufficient evidence on both Counts I and III and both should have been dismissed.

It is clear that the jury's award of $111,000 on Count III was based on clear passion and/or prejudice because the Court limited the actual damages sustained to those incurred after May of 2008 totaling $2,300 in tuition and $22,862.77 in costs. There is simply no basis in law or equity for an award five times the amount of actual damages. The $111,000 award is more akin to punitive damages than contract damages. The judgment on Count III must be reversed.

IV.

ARGUMENT

A. THE JURY'S DAMAGE AWARD FOR BREACH OF CONTRACT SHOULD HAVE BEEN VACATED.

1. There was no basis for damages awarded by the Jury.

Respondent fails to address the fact that damages on Count III are improper in their entirety because Respondent received a "Masters" degree instead of a "Doctorate in Ministry." Tr.p.279,L.7-22. Respondent agreed to accept the designation of "Master" of Theta Healing. Tr. p. 659. Three years after she accepted the "Theta Healing Master" designation, she filed her lawsuit. She never alleged that she received nothing. She acknowledges that she received a degree – it was just named something different. She still received the benefit of her bargain. She signed up for classes. She paid $2,300 for that class. She did not sign up for the class with the expectation of a "doctorate" degree. That decision to award a title to the certificate or plaque being offered by THINK came after the class. There was no reliance. Respondent received the training and a certificate she paid for. There is no basis upon which she can even claim damages in this case.

The sole issue argued by Respondent was the definition of the word "Doctorate of Ministry" as opposed to "Masters" in Theta Healing. Respondent failed to prove what part of the contract she was denied from receiving. Respondent relies on *Corder v. State Farmway*, 133 Idaho 353 in support of her argument that there was a meeting of the minds in the instant case that Respondent would be awarded a PhD doctorate degree. R. Brief p. 18. The *Corder* case is not analogous to the present case. That case dealt with a written lease agreement that was performed but never signed. Id. p. 362. The specific agreed-upon terms of the lease were at issue. There was substantial evidence of a contract given the parties' written document and

course of performance. There is no written agreement in the present case. There was insufficient evidence as to a meeting of the minds on the critical definition of what is a "Doctorate of Ministry" plaque or certificate or degree. There was no credible evidence that it is a PhD from an accredited university. THINK is a private company. Respondent chose the term "Doctorate of Ministry" herself.

Respondent and Appellant clearly had very different understandings of what a per se "doctorate" plaque or award means. Respondent Alexander had two years of classes from 2006-2008 to investigate and understand what kind of "certificates" or "degrees" were being awarded. She is an educated plaintiff and has a master's degree from an accredited university. She even received multiple "certificates" for each of the classes at THINK between 2006-2008. She knew THINK was not offering PhD's.

Respondent's argument on the award of a "Doctorate of Ministry" further supports Appellant's argument regarding religious liberties because the word "ministry" is only used for theology or divinity. It is religious. There is no "Doctorate of Ministry" for scientific degrees. A "Doctorate of Ministry" is awarded after a course of study in religion.

2. **The damage award for $111,000.00 on the Breach of Contract claim was speculative and uncertain.**

The Court limited the actual damages sustained on Count III to those incurred costs incurred after May of 2008 totaling $2,300 in tuition and $22,862.77 in costs. There is simply no basis in law or equity for an award of $111,000 - five times the amount of actual damages. This award is akin to punitive damages and was not based in law or fact.

Expectation damages/lost profits.

Respondent seemingly relies on *Phillips v. Erhart,* 151 Idaho 100 (2011) in support of her argument that the jury's large award was proper expectation damages. R. Brief p.17. She argues that the jury was free to award approximately $85,000.00 in expectation damages. Id. She offers no calculation or evidence in support. The issue is really what value the non-breaching party expected from the contract, i.e., what value did Respondent expect to receive from the change in the title of the certificate from "doctorate" to "masters." Id. These are very different facts than the ones set forth in *Erhart,* which involved a personal injury case with damages for loss of consortium with a large award. This case is only relevant as far as it cites to general principles on damage calculations and is not a proper basis to compare a large loss of consortium award to that of a breach of contract claim with a change in the title of a certificate.

An award for damages may be upheld on appeal only where there is sufficient evidence supporting the award and the damages were proven to a reasonable certainty. *Sells v. Robinson,* 141 Idaho 767, 774, 118 P.3d 99, 106 (2005) (citing *Bumgarner v. Bumgarner*,124 Idaho 629, 641, 862 P.2d 321, 333 (Ct.App.1993)); *Inland Group of Companies v. Providence Washington* Ins. Co., 133 Idaho 249, 257, 985 P.2d 674, 682 (1999)(citing *Hummer v. Evans*, 129 Idaho 274, 280, 923 P.2d 981, 987 (1996)) ("Compensatory damages for lost profits and future earnings must be shown with a reasonable certainty.").

The expectation damages had to be based on admissible evidence on the underlying claim. The claim was a breach of contract claim – an oral contract. The evidence showed that Respondent paid for classes and received a certificate or degree. The title of that degree is the only issue she has with the breach of contract. She does not allege that she did not receive any degree. She does not allege she did not take the training for which she paid $2,300 in tuition.

There was no evidence as to what she could have "expected" to earn with her certificate called a "Doctorate of Ministry" as opposed to a "Masters" in Theta Healing.

Respondent did not introduce any evidence on lost profits or future earnings as it related to a change in title for her plaque. There simply was no evidence from which the jury could base their award other than pure speculation. Respondent testified she was making $800/day as a technology consultant. She could earn that anywhere, anytime. She chose not to take clients while she was on her "personal healing journey." There is no basis in law to hold Appellant's liable for Respondent's own choices. The argument that the jury was "free to value a doctorate degree" is wrong. There was no testimony, no expert, no statistics, no charts, no evidence whatsoever to establish the "value of a doctorate degree" in Theta Healing as opposed to the "Masters" in Theta Healing that she was awarded.

Respondent points to evidence that a "teacher in Theta Healing would be able to charge $500.00-$1960.00 per student per class." She is a teacher in Theta Healing. She provides no evidence that a "Doctorate of Ministry" would have garnered more money per student than the "Masters" certificate that she received. A teacher is only as good as he/she can teach. An independent contractor is only as good as they can advertise, market and sell her own services. As a Theta Healing instructor, Respondent is an independent contractor and a licensee of the modality. She is responsible for her own business. There was no evidence presented to show that she was denied students or had to take less money per student as a result of the title of her certificate.

Respondent's claim that the contract damages were supported by future lost profits was not proven. Generally, profits which would have been realized if a contract had been performed

may be recovered as damages for its breach, provided they are susceptible of being ascertained with reasonable certainty and their loss may reasonably be supposed to have been within contemplation of defaulting party at time contract was made as a probable result of its breach. *White v. Unigard Mut. Ins. Co.*, 112 Idaho 94, 730 P.2d 1014, Idaho 1986. In this case, the contract was performed because Respondent still received her degree – it was just called something else. Respondent voted on the new name of a "Masters" instead of a "Doctorate." Respondent points to no evidence in support of her argument as to what the Respondent could make if the "Doctorate of Ministry" degree in Theta Healing had been issued.

The only damages from which the jury could base its $111,000.00 award on Count III was from testimony offered, over objection, by Respondent as to what she purportedly made on a daily basis. This evidence was not provided in discovery, it was not provided before trial but was provided after numerous objections as to the credibility and supportability of this evidence. Lost wages must be proven with reasonable certainty, not based on hypothetical or speculative proof, but rather on substantial and competent evidence. *Smith v. Mitton*, 140 Idaho 893, 104 P.3d at 374. The Court improperly ruled that she could testify without having provided information contrary to the Court Order and the Appellant could then argue that the damages were speculative. Tr.p.576 L.21-p. 578 L.25. Respondent's speculation as to her lost wages without any support was highly prejudicial to the jury.

Lack of causation.

The burden is upon the plaintiff to prove not only that she was injured, but that her injury was the result of the defendant's breach; both amount and causation must be proven with reasonable certainty. See *Magic Valley Truck Brokers, Inc. v. Meyer*, 133 Idaho 110, 116, 982 P.2d

945, 951 (Ct.App.1999); cf. *Gillingham Constr. v. Newby–Wiggins Constr., Inc.*,142 Idaho 15, 26, 121 P.3d 946, 957 (2005) (upholding award of damages where plaintiff presented substantial evidence of causation).

Respondent still cannot point to evidence to support her testimony that she had loss of income *resulting from the breach of contract* totaling $96,000.00. Respondent was certified in the Theta Healing energy healing modality in 2006 – two years before any alleged promise of a "doctorate" degree. She took classes for two years and was certified to teach to generate income from her Theta Healing services. She received the training she paid for and received the certificate called a "Masters" instead of a "Doctorate in Ministry." Respondent testified she was earning 1/2 of what she was earning in 2008 by 2013 because she chose her own career path. If a lawyer leaves a big law firm and joins a small one in the hopes of a better quality of life, he can't later sue that big law firm for loss of income based upon his own change of career or firm location.

Respondent did not prove causation. She refused to work. She decided to change careers. She was certified to teach and decided not to teach. She was certified to be a practitioner in 2006 and chose not to take clients. She chose not to work as an independent contractor during her classes in 2008 or between 2008 to trial in 2013. There are no grounds for expectation damages, lost profits or any other damages in this case. There was no calculation presented to the jury as to the $111,000 award. It was purely speculative and clearly erroneous. The Court failed to rectify the mistake made by the jury and the claim should be dismissed on appeal.

B. THE JUDGMENT AWARDING DAMAGES FOR FRAUD AND PUNITIVE DAMAGES MUST BE REVERSED.

1. The Fraud claim should have been dismissed for lack of specificity.

Respondent has no real opposition to the fact that her claims were never pleaded with specificity. Such an argument is impossible to make based on the record. In ruling on Appellant's *Summary Judgment Motion*, the Trial Court held that Respondent had failed to properly plead Count II (Fraudulent misrepresentations – healing) with specificity. Appellant's Brief, p. 7 citing to Tr.p.42 (January 17, 2013 Hearing, p. 80:1-6). The Court cautioned counsel that Respondent must prove the specific fraud and that she relied on the specific representation and would be prohibited from bringing in evidence of any statements that had nothing to do with their claims. Id. at p. 45. A Motion in Limine was filed by Appellants' requesting, once again, that Respondent specify what specific fraudulent misrepresentations were made and the who, what, when, how and where those were made. A. Brief, p. 7, Tr. p. 37.

Respondent's testimony at trial was that the fraudulent statements were made in 2006 in a book (first published in 1998) titled "Go Up and Seek God," that contained statements regarding Vianna's personal journey to God and healing cancer. Tr. p. 227. Her testimony was that reading this book induced her to take more classes. Id. The other alleged fraudulent statements were made at some other unspecified time and place and/or she "heard" them from students in class. Tr. p. 218-220. At trial, the actual text of the book containing the statements was introduced. The actual statements made in that book were "[i]n August 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 life, and even then there was no guarantee." Tr. p. 438. The same book further detailed Vianna's prayer to God – hence the title

"Go Up And Seek God" - and how she believes that God healed her leg of cancer. (Exh. 24-25). These specific alleged fraudulent statements were never made a part of Respondent's pleadings but introduced at trial as the exact statements of fraud.

Respondent's failure to specifically amend her complaint to allege that the actual statements in the "Go Up And Seek God" book as the specific fraudulent misrepresentations should be fatal to her claims. This is the moving target approach of Respondent's trial. She was not required to specify what the precise fraud was that she was alleging and never specifically alleged it, even after the opportunity to amend her complaint after trial. She had this information available to her in 2006 – five years before she filed her lawsuit – so she could have put Vianna/THINK on notice that the source of the fraudulent misrepresentations and allowed those claims to actually be subject to the earlier dispositive motions in the trial court.

The trial court erred in denying Appellants' Motion in Limine because Respondent failed to properly plead her fraud claims with specificity. She was allowed to present facts and evidence to the jury that had nothing to do with the specific fraud claims, which was highly prejudicial and confusing to the jury. Appellants' also brought a Motion for Directed Verdict on the same lack of specificity grounds, and a Motion for New Trial/Remittitur and/or JNOV. The Trial Court improperly denied each of those motions.

2. The Fraud claim should be barred by the statute of limitations

Respondent's failure to specifically plead her allegations of fraud make Appellant's claim that her case is barred by the statute of limitations ripe for decision. A. Brief. p. 44. She failed to specify when, where, how and to whom the alleged fraudulent statements were made until her testimony at trial. This defense could not have been raised earlier. It was raised in substance in

Appellant's prior arguments, although not specifically titled Statute of Limitations. A. Brief, p. 44. A defense barring a claim should be considered by this court as it relates to the lower court's jurisdiction to hear the claim in the first place.

3. Respondent's Fraud claim should have been dismissed for lack of evidence.

Respondent's opposition does not change the fact that she failed to meet her burden on Count II. The allegations in Count II that were allowed to go to the jury were that Vianna made representations that: (1) she healed herself of cancer; (2) pulled herself out of a coma in Italy; (3) healed herself from heart disease; and (4) could make liquids appear in containers." R.Vol.1,p.21 paragraphs 25-28. A fifth claim that "Vianna claims to have healed her grandson's lung" was introduced as improper impeachment evidence (for Respondent's own witness), never pleaded as a fraud claim and was improperly argued to the jury as such. Tr.p.235,L.2-7. The Court even used this evidence in denying the motion for a new trial.

Every element of a fraud claim must be proven by clear and convincing evidence. A. Brief p. 23. The elements of fraud are (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; (9) the listener's consequent and proximate injury. *Galaxy Outdoor Advertising, Inc. v. Idaho Transportation Dept.*, (1985) 109 Idaho 692, 696. Fraud cannot be established on religious based beliefs because it is impossible to prove the truth or falsity of religious based beliefs. A. Brief p. 29. Further, Respondent had no right to rely on

statements made from religious beliefs. In matters of faith and religion, it is typical for people to make statements regarding the power of God that are difficult, if not impossible, to prove. They are also protected free speech.

a. Fraud Allegation Re Coma In Italy.

Respondent did not meet her burden at trial to prove all of the elements of fraud with respect to this allegation with clear and convincing evidence. The pleaded allegation was the Vianna stated she pulled herself out of a coma in Italy in 2008. R. Vo. 1, p. 21; Vol. 2, p. 311. The actual statement made was that God with the help of her husband and doctors pulled her out of the coma. Tr. p. 836 ll 7-12; p.428 ll 18-12; p. 429; ll 1-6. Remarkably, the Respondent failed to provide any evidence as to any sort of statement that was made to her or how she relied on it to her detriment. Tr. p. 225 ll 5-21.

The evidence presented at trial via Guy Stibal was that he saw his wife in a coma in Italy. Tr. p., 667. He was at the hospital, he held her limp hands, he saw her still body lying on the bed. Id. The testimony further indicated that Vianna was placed in the infectious disease ward and was in a coma in the hospital for three days. Tr. p. 667. Vianna testified that she believed the doctors, Guy's voice and God brought her out of the coma. Tr. p. 836 and 875.

The Court and jury both confused the respective burdens as to the elements of fraud here because Respondent had the burden to prove every element with clear and convincing evidence. A. Brief, p. 25. Whether Vianna was in a coma or not is not the sole issue. It's whether Vianna believed her statements to be true when she made them. Her statements she was in a coma in Italy and that God helped her out of a coma is true from her perspective. There was no credible evidence to the contrary.

Respondent admitted that she did not rely on the statement that Vianna pulled herself out of a coma in Italy because she testified that: "the coma came at the end. That was not as strong because I was -- that happened to Vianna in the midst of the period of time that I was taking classes." Tr. p. 225. Respondent's allegation fails on this element alone because, by her own admission, the statement did not induce her to take classes or to otherwise act. The evidence presented at trial showed that Respondent did not prove each element of this claim by clear and convincing evidence. In addition, there was no evidence presented as to the consequent and proximate injury relating to how this statement induced Respondent to take any further classes.

The Trial Court's ruling on Appellant's *Motion for New Trial* shows that Respondent failed to meet its burden on this claim: "the evidence regarding the coma in Italy is conflicting and the extent of the coma and how she recovered is also unclear." Respondent cannot meet its burden to prove this claim by clear and convincing evidence if the "evidence is conflicting and unclear." R. Vo. III, p. 416. The Court erred and the jury erred.

b. <u>Fraud Allegation Re Heart Disease.</u>

Respondent alleged that part of her Count II fraud claim involves a statement by Vianna that she healed herself from heart disease. R. Vo. 1, p. 21; Vol. 2, p. 311. The actual statement Vianna made was that "God healed my heart disease." Tr. p. 693, 836, 849, 865.

The evidence presented at trial showed that Vianna was diagnosed in 2006 with "congestive heart failure and diastolic dysfunction according to Dr. Gorman's records" and that she understood that people can die from this condition. Tr. p. 865. Vianna testified that she believed the medication and God healed her heart condition. Tr. p. 863-865.

In support of this claim, Respondent relies on the testimony of an oncologist interpreting

medical records from Vianna's cardiologist from 2006. Dr. Shull did not speak to Vianna's cardiologist, examine Vianna nor speak to her about her health. Tr. p. 491. The sum total of evidence provided is as follows:

> Q: (BY MR. JOHNSTON): So the last report from Dr. Gorman you saw, she was still suffering from congestive heart failure?
>
> A: (BY DR. SHULL): Yes.

Tr. p. 487 ll 16-18.

That last report was in 2006. The trial was in 2013. If Vianna was still suffering from congestive heart failure in 2013, she would be dead. The actual evidence was that Vianna had congestive heart failure and took medication. She testified that she believed her heart corrected itself. She said that "the medication became too much for me. It actually shut down my kidneys and I ended up in the hospital and that's when they realized my heart was completely better. . . I have a clean bill of health from Dr. Gorman." Tr. p. 854. There was no evidence to rebut Vianna's belief that her heart is healed or that God healed it.

Respondent's claim fails for lack of evidence on these elements: (2) there was no false statement of fact – Vianna had congestive heart failure and she believes it was healed; (4) Vianna did not know the statement to be false – she was told her heart is in perfect condition now by Dr. Gorman; (5) Vianna did not contemplate reliance by Respondent on this specific statement to continue her classes at THINK because she did not make the statement directly to Respondent; (9) Respondent was not injured as a result of this statement. The Trial Court erred in denying this claim on all of the motions brought by Appellants, including the Directed Verdict and the Motion for New Trial/Remittitur/JNOV. This claim should have never been presented to the jury for

damages because Respondent did not and cannot prove this claim by clear and convincing evidence.

c. Fraud Allegation Re Cancer.

Respondent's Brief does not cite to clear and convincing evidence sufficient to prove each element of on Count II regarding the allegation that Vianna believes God healed her cancer. The specific allegation made by Respondent in the Complaint was the statement by Vianna that she healed herself of cancer. R. Vo. 1, p. 21; Vol. 2, p. 311. The actual statement Vianna made was that God healed her cancer. Tr. p. 693 ll 9-11; Tr. p. 836 ll 3-6; Tr. p. 849 ll 14-16, Ex. 24-25. Vianna testified she wrote her book "Go Up And Seek God" in 1998 which detailed her personal journey and medical history from her own *personal journal* that she wrote at the time she was going through her cancer ordeal. Tr. 869-870. In essence, she wrote the book from her diary and was sued for fraud because someone read that diary. Id. At the time she wrote the book, there was no THINK and there were no classes offered to anyone. It was just a book.

Respondent's Brief does not offer any dispute of what the medical records established at trial: Vianna had a 9-inch tumor in the bone in her leg with "cancer cells" in the tumor. Tr. p. 492, L11-24; Tr. 496, ll 15-23. The medical records contained words like "sarcoma," "lymphoma," "malignant." The evidence established that Vianna was told that she needed chemotherapy, radiation and/or amputation to save her life. 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. Both experts testified that her belief that she had cancer was reasonable. Tr. p. 492, ll 11-24; Tr. 496, ll 15-23. The statement that "In August 1995, I was diagnosed with bone cancer" was true from Vianna's perspective. She lived through a terrible ordeal. Tr. p. 593 ll 1-4. The

statement that "I had cancer" and/or "I was diagnosed with cancer" is the same statement to a lay person. These facts cause Respondent's fraud claim fail as a matter of law.

Contrary to Respondent's incomplete recitation of the record regarding the testimony of Blake McDaniel (R. Brief p. 26), Vianna's ex-husband, Blake McDaniel, actually testified that Vianna's doctors told both of them that they found "dead cancer cells" in her biopsy. Tr. p. 588 ll 16-18. Blake McDaniel testified that the doctor's told Vianna it was "some type of cancer based on what they think is going on." Tr. p. 588 ll 23-25. He told the jury that a second biopsy was recommended. Tr. p. 588 ll 16-18. The jury is required to draw all reasonable inferences from the evidence. There is only one answer as to why doctor's who find dead cancer cells recommend a second biopsy, or chemotherapy, or suggest amputation or radiation – the patient has cancer.

Common sense dictates that the finding of dead cancer cells in a 9-inch tumor means there are live ones elsewhere in the tumor or body. Those are the reasonable inferences required of the jury. Common sense further dictates that no husband in his right mind would tell a child their mom will die based on a "cancer scare" but an actual diagnosis. The key point here is the effect on the listeners—laypeople hearing that there are dead cancer cells, sarcoma, lymphoma, malignant clearly would lead one to believe that they had cancer or were "diagnosed" with cancer. Tr. p. 691 ll 7-9. The evidence established that Vianna, Blake and their children believed she would die from her cancer. Id.

Nothing in Respondent's Brief changes the fact that Vianna had a 9-inch tumor and it was healed without significant medical treatment. The evidence at trial showed that Vianna believed that God healed her leg when she prayed to him and went into her meditation. That is a belief protected under the U.S. Constitution and cannot be tried in a court of law by a judge or jury (as

set forth in Appellant's Opening Brief). No judge or jury can prove the existence of God or of a miracle. Vianna's beliefs in God cannot be the basis for a fraud claim. A. Brief p. 31. This is part and parcel the reason for the protections on freedom of religion and freedom of speech.

In sum, Respondent's Brief does not cite to clear and convincing evidence on the allegations of fraud that "Vianna healed herself of cancer, i.e., God healed her cancer" and this claim still fails as a matter of law because there was insufficient evidence on elements: (2) no false statement of fact because Vianna believed she was diagnosed with cancer; (3) not material to Respondent's decisions to take classes because the statement was made in 1998 and again in 2006 after Respondent was already in class; (4) Vianna did not know the statement was false because she believed it was true; (5) Vianna did not contemplate reliance by Respondent on the statement to continue her classes at THINK because Vianna did not make the statement directly to Respondent; (8) Respondent did not have a right to rely on the statement because she is an educated person and had three years during her classes to see decide for herself whether to continue to take classes based on the statements; (8A) Respondent did not have a right to rely on the statements because they are based in faith and a believe that God can heal others; and (9) Respondent was not injured as a result of this statement because she failed to prove damages and causation.

d. Fraud Allegation Re Liquids.

This claim should have been dismissed on Directed Verdict. The allegation in the Complaint was the statement that Vianna can make liquids appear in containers. R. Vo. 1, p. 21; Vol. 2, p. 311. The actual statement was that God can make liquids appear. She could have just said that she believes God parted the Red Sea for Jesus. It's a similar belief and it's religious.

Evidence was excluded on both sides. There was no evidence presented on this claim. This was highly prejudicial to the jury because it was not stricken and the jury could have very well made the entire decision on fraud based on this as Respondent even points out in her brief.

e. Evidence regarding Grandson's lung was improperly characterized and relied upon as a separate Fraud claim.

Neither the Complaint nor the Amended Complaint contained the allegation that Vianna represented that she healed her grandson's lung problem. (See, e.g., R. Vo. 1, p. 21; Vol. 2, p. 311). This allegation also was not mentioned as part of the Complaint or having anything to do with it at any point prior to trial. The Court specifically stated "what you can't do is bring in claims that you have learned that had absolutely nothing to do with your client's claims." Tr. p. 45 ll 11-13.

This evidence was inappropriately allowed in evidence as "impeachment" evidence only and not a claim for fraud – Mr. Johnson: "it is offered to impeach that testimony that she never actually treated him." Tr. p. 520 ll 9-16. This was not even proper impeachment evidence because Vianna never made this statement or claim in her testimony. He was introducing this evidence to bolster his own witness (which is not impeachment). Respondent's Brief alleges that this issue was not previously raised by the Appellant. This issue was argued, however, on p. 29 of the Appellant's Appeal Brief, so Respondent's argument is simply false.

The entirety of evidence on this claim was referenced vaguely in Respondent Alexander testimony: "Vianna's grandson was hospitalized with a serious pulmonary issue and Vianna said she worked on him and his lungs were perfect." Tr. p. 235 ll 2-7. Lindsay Stock, Vianna's ex-

daughter in law, then testified as to the efficacy of theta healing for her grandson, which was excluded in the Court's order but considered by the jury. Tr. p. 559 ll 2-25; 560; 561 ll 1-11.

There was no evidence submitted that the statement was made directly to Respondent, no evidence was made that the statement was made with the intent to induce Respondent to take classes at THINK. The Trial Court was confused as to this evidence as well because the Court erroneously considered it as a "fraud allegation" in denying Appellant's Motion for New Trial. R. Vol. 3, p. 416. The Trial Court actually relied on an unpleaded allegation that it allowed in as only impeachment evidence as another whole entire fraud claim. This illustrates the confusion by the judge and jury as to what the scope of the actual claims brought by Respondent.

4. Punitive Damages were improper.

A fundamental error of law was made when the trial court granted the second motion for punitive damages and allowed the jury to make such an award. The Appellants' initial brief sets forth the standards for allowing punitive damages. The Appellant argued in that initial brief that the motion for a punitive amendment should have been denied as it was months earlier, that the Trial Court should have granted the Motion for New Trial on the issue of punitive damages and; the Trial Court failed to properly reduce the amount. The Respondent raises no new issues to address except on the issue of punitive calculation.

In the Response Brief at page 45, the Respondent says that "$384,000.00 is a modest sum to protect this interest." The interest referred to is the State of Idaho's interest. The issue most concerning to the Appellant is how the Trial Court determined that $384,000.00 was the proper amount to award. The Court merely multiplied the award of economic damages on all claims by three (3) and came up with the number. R. Vo. 3, p. 419. This was a statutory adjustment without

any analysis into what the proper award should be.

As stated—punitive damages should never have been considered but, assuming arguendo, there was a basis for punitive damages, it was still erroneously awarded:

- The Court did not analyze the amount versus the conduct. He merely multiplied special damages by three (3). A Brief p. 32-34;
- The Court relied on contract damages. It was the Court's previous order that punitive damages would only be heard with respect to the fraud claim. Tr. p. 13 ll 7-11. Both the Court and counsel agree that punitive damages are only being considered with respect to the fraud allegations not the contract claim. As this is the case, the contract damage cannot be used as a variable in determining the punitive damage amount. The fraud damages were $17,000. The award of $384,000 was an error of law.

The Respondent fails to analyze or address these fundamental mistakes made by the trial court and instead relies on general arguments on contract damages. The law governing damages is ignored by the Respondent and unfortunately it was ignored by the trial court as well.

C. THE TRIAL COURT IMPROPERLY EXCLUDED EVIDENCE CAUSING UNFAIR PREJUDICE TO THE APPELLANTS.

The Court very clearly held that:

"it has never been my position in trying this case that the believability in the general sense of the Defendant, Ms. Stibal, whether or not she is a successful healer or not, is the issue of this case. That she is or is not is not the issue of this case." The specific statements that she has made upon which your client has claimed reliance and now claims damage are an issue in the case as to whether or not those statements were made and whether or not those statements were

true. But whether or not she may or may not have healed others and whether or not she could perform a healing here in the courtroom, I had already indicated, I would not allow." Tr. p. 650 ll 1-11.

The judge stated in his order that "the efficacy of Theta Healing was not on trial in this case." However, the story about the grandson's lung put on trial the "efficacy of theta healing." The claims of fraud involved the "efficacy of theta healing," i.e., Vianna healed herself of cancer, Vianna healed herself of heart disease, Vianna brought herself out of a coma. All of those allegations directly involve the efficacy of Theta Healing because that is how she claims to have healed herself in conjunction with the doctors and her faith and prayers to God. Respondents were allowed to present evidence (as noted above) on the "efficacy of theta healing" and yet Appellant's were not allowed to present any evidence in defense of these claims re the "efficacy of theta healing." Appellant had witnesses lined up to testify that they were healed by Vianna's Theta Healing techniques but the Court disallowed this testimony. This refusal to allow Vianna/THINK to defend against the allegations was highly prejudicial and confusing to the jury. The confusion is further evidenced in the Trial Court's ruling on the Motion for New Trial and motion for JNOV. R. Vol. 3, p. 416.

In paragraph 31 of the Complaint, Respondent alleges that Vianna did not heal herself, did not have the ability to heal others, and that her stories were false. R. Vol. 1, p. 22. Respondent was allowed to introduce evidence to support this claim, but Appellant was not allowed to have any witnesses to testify on her behalf that Theta Healing was a good effective practice. The Trial Court's refusal to allow this testimony was extremely prejudicial.

D. A FUNDAMENTAL ERROR OF LAW WAS MADE IN ALLOWING THE

ISSUE OF PUNITIVE DAMAGES TO GO TO THE JURY.

Respondent's brief fails to accurately oppose the issue of religious beliefs. The issue of religious beliefs was adequately raised in the lower court. Count II for fraud was based on the statements that "God healed me." Count III for breach of contract involves a claim over a "Doctorate of Ministry" plaque. The entire case is based on Vianna's religious beliefs and her religious teachings. Theta Healing is a meditation technique developed by Vianna to allow others to connect with God. Her books are titled "Go Up and Seek God." The word "God" was mentioned on at least 49 pages of the record. Tr. pp. 10, 21, 22, 31, 44, 65, 115, 160, 162, 164, 166, 197, 226, 230, 403, 429, 431, 432, 434, 435, 438, 439, 440, 441, 443, 444, 445, 570, 693, 724, 829, 830, 831, 833, 836, 839, 844, 849, 850, 861, 865, 866, 874, 875, 922, 944, 948, 949, 950. Appellant properly raised the issue of religious liberty in the court below multiple times and was denied consideration of this issue. In fact, her religious beliefs were put on trial and erroneously decided by the jury. Punitive damages were awarded due to her free exercise of her right to free speech and free exercise of religious beliefs. This issue is ripe and timely and should properly be decided on appeal.

In denying the initial motion for punitive damages, Judge Watkins stated that "[t]he Court believes that going into the program, everyone admits that Theta Healing is a religion and with the 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 ruled that "if faith is 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." Appellants Brief, p. 30.

Respondent's contention that this Court cannot consider the issue of religious liberty is misplaced. The cases cited by Respondent in support of her argument are not persuasive. First, the court in *Gardner v. Bartshi*, 139 Idaho 430, 436 found that "Bartschi also contends that the Court should not address this issue [i.e. statute of frauds defense] as it was not raised before the district court. However, after a review of the record, it appears that Garner and Flinders Realty did raise this issue arguing that either estoppel or quasi-estoppel should be used to avoid the unjust results of the statute of frauds in their supplemental briefing before the district court." The issue was argued in principle and raised adequately just like the present case. A. Brief ___.

Respondent's argument that the "exception of fundamental error only applies to criminal and quasi-criminal cases" is simply wrong. R. Brief, p. 12. If the Court accepted Respondent's own misinterpretation of the law, it would mean that no constitutional rights would exist for any civil litigants. The U.S. constitution covers all litigants - whether civil or criminal. The definition of "fundamental error" was taken from criminal cases but the case does not state that it "only applies to criminal cases" or that it cannot be used in civil cases where religious liberties are at issue. In fact, the Court in *State v. Doe,* 144 Idaho 534, found that the exceptions to the rule that "[g]enerally the Court will not consider on appeal any issues that are not raised by the parties" may be applied for "certain issues in certain types of cases." Id. at *536;*Crane Creek Country Club v. City of Boise*, 121 Idaho 485, 487, 826 P.2d 446, 448 (1990)(Bakes, C.J., specially concurring) (an issue not raised in the trial court or on appeal may be addressed when plain or fundamental error exists). Crane Creek Country Club is a civil case and not a criminal one.

Fundamental error is error which "so profoundly distorts the trial that it produces manifest injustice and deprives the accused of his constitutional right to due process." *State v. Sheahan*,

139 Idaho 267, 281, 77 P.3d 956, 970 (2003). The Court in *State v. Doe, supra,* found that "[w]hile this is not a criminal case, the magistrate court's error in applying the incorrect standard affects Doe's fundamental right to raise his own child and violates the due process clause of the Fourteenth Amendment." The same is true in Appellant's case – she was denied her fundamental rights to her own free exercise of religious beliefs and free speech and denied the opportunity to defend the claims made against her. Respondent further claims that "the ruling from In Re Doe, 330 P.3d 1040, appears to overturn the Court's ruling in *State v. Doe* upon which Appellant's rely." R. Brief p. 12. When cite checking this case at the time of this Reply, there is no "negative history" for *State v. Doe*, 144 Idaho 534 and the *In Re Doe* case is not reported on Westlaw.

As stated in Appellant's Brief, forcing a person to prove or disprove the existence of God and/or that God heals people violated Appellant's constitutional rights and rights of due process of law. This certainly rises to the level of error in *State v. Doe* that "so profoundly distort the trial that it produces manifest injustice and deprives the accused of his constitutional right to due process." It also sets a dangerous legal precedent in Idaho if allowed to remain.
The Courts may not consider whether the party's purportedly religious beliefs are true or false. *State v. Cordingly* (Idaho 2013) 302 P. 3d 730.

Contrary to Respondent's arguments, the Idaho Code does not require Theta Healing to be a 501(c)(3) for tax purposes in order to obtain protection under the FERPA. Idaho Code Section 73-401(2). In addition, Respondent's argument that Theta Healing cannot be a religion because it's also based in science is equally flawed. There are a number of per se religions that are based in scientific principles without any deity at all. A. Brief p. 29.

Respondent attempts to argue the *Meyer's* factors is misplaced. All of the evidence cited

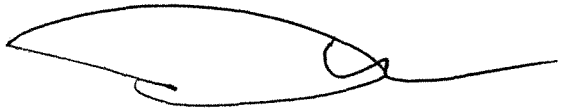
by Respondent on P. 32 of its brief were evidenced in Vianna's book "Go Up and Seek God" and her subsequent books that are part of the evidence. The videos and other brochures that were admitted into evidence establish a prayer before and after each class session and meet the *Meyers* test. The meditation technique itself is focused prayer to God. The problem with the argument under the *Meyers* test is that Appellant was denied the opportunity to have a fair hearing under *Meyers*. The second punitive damages motion was granted the day before trial. The Court denied Appellant's any further argument on religious grounds.

Accordingly, the issue of religious beliefs was properly raised in the trial court. "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)). 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). Clearly an award of $500,000 by the jury (later reduced to $384,000) in punitive damages was excessive and awarded under the influence of passion or prejudice. There is absolutely no correlation between $17,000 and $500,000. The award was unconstitutional, erroneous and must be reversed.

V. CONCLUSION

For the foregoing reasons, the case should be dismissed for the reasons cited in Appellant's Opening Brief and herein and the requested relief granted to Appellants or as this court deems just and proper.

RESPECTFULLY SUBMITTED this 22 day of December, 2014.



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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 22 day of December, 2014.

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