

1 THE STATE OF SOUTH CAROLINA
2 IN THE COURT OF APPEALS

3
4 APPEAL # 2016-001379 FROM CHARLESTON COUNTY
5 COURT OF COMMON PLEAS
6 CIVIL ACTION 2015-CP-10-6819
7 ORDER OF DISMISSAL

8 HONORABLE KRISTI LEE HARRINGTON PRESIDING JUDGE
9

10 Tracy Smith, Appellant

11 v.

12 Sarah Gainey SAVE, Inc. Respondent
13

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SC Court of Appeals

14 **BRIEF OF APPELLANT**

15 Pro Se Appellant respectfully requests a new trial. Appellant respectfully asserts that in granting
16 Sarah Gainey SAVE, Inc. (aka SAVEAP) Motion for Summary Judgement the trial Judge erred by
17 relying on an incomplete understanding of the law and was influenced by Defense Counsel's
18 omission of relevant sections of the law and other false statements. It is Pro Se Appellant's
19 understanding that SC Code Section 15-36-100 (2) provides a "Common Knowledge" Exception
20 when the subject matter is comprehensible by Laypersons.

21 Appellant respectfully asserts that correct application of SC Code Section 15-36-100 (2) requires
22 a Judgement as to whether the subject matter lies "within the **ambit** of common knowledge
23 and experience, so that no special learning is needed to evaluate the conduct of the
24 defendant." **The lower court failed to consider relevant facts to make such a judgement.**

25 On Page 6 of the transcript the Presiding Judge states: "And all those *things* could be true, Mr.
26 Smith. The problem is that you may not be able to present *those* because you haven't followed
27 the rules. You *again* have not done what you're supposed to do, but are *alleging* what she –
28 what you believe she has not done." (See Hearing Transcript Exhibit 1)

29 Pro Se Appellant's complaint and factual evidence clearly show illegal, deceptive conduct
30 including acting outside the scope of agreement, acting outside scope of profession, Breach of
31 Confidentiality, Intentional Misrepresentation, Breach of Contract, Breach of Good Faith and
32 Fair Dealing, Breach of basic contractual duties, and intentional deception in contract all of
33 which are comprehensible by laypersons. (See Exhibit 1, 8 and 10)

34 Pro Se Appellant tried repeatedly to present the facts involving intentional deception,
35 misrepresentation, breach of contract, breach of confidentiality, acting outside the scope of
36 agreement, breach of confidentiality among others to the lower court Judge but was
37 consistently interrupted and not allowed to make such statements to the court by the Presiding
38 Judge.

39 Pro Se Appellant respectfully requests a new trial.

40

41 **Patterns of False Statements made by Defense to Tribunal in arguing for dismissal**

42 Pro Se Appellant asserts that Defense has knowingly made material misstatements of fact and
43 law in order to persuade the lower court to dismiss.

44 Indeed, Mr. Jonathon Kessler's (a SAVEEAP contractor named in a separate suit) Defense
45 Counsel Scott Wallinger, in Smith V. Kessler, has made exactly the same misstatements in his
46 Motion for Summary Judgement which was denied.

47 These almost identical misstatements of fact include:

48 **Purposely making misleading statements regarding the dates when appellant was seen by**
49 **personnel of SAVE Inc. in order to argue for dismissal on false grounds.**

50 **Purposely misstating the date when appellant filed his complaint in order to argue for**
51 **dismissal on false grounds.**

52 Indeed the Order Of Dismissal also falsely states: **"These allegations stem from counseling**
53 **sessions plaintiff received from Defendant Sarah Gainey on or around October of 2012."**

54 Yet the **"HIPPA – Approved Designated Record Set"** provided by Sarah Gainey SAVE, Inc. (aka
55 **SAVEEAP**) lists the **"Last Session"** as **12-18-12** the date of Appellant's wrongful Termination by
56 **SAVEEAP's** long term *'client in fact'* Showa Denko.

57 On Page 3 of Defendant's "Amended Notice of Motion and Motion to Dismiss Plaintiff's
58 Complaint" (See Exhibit 3) Defense states:

59 "The allegations contained in Plaintiff's Complaint stem from counseling provided by
60 Defendants in September and October of 2012. As pursuant to South Carolina law, Plaintiff's
61 Complaint must have been filed on or before three years from the last date of treatment,
62 omission or operation giving rise to the cause of action, **or, October 2015**. Plaintiff files his
63 Complaint on **December 18, 2015.**"

64 First, **Plaintiff's complaint was filed and stamped by the court on December 17, 2015.** (see
65 exhibit 8)

66 Second, The court may be interested to note that Jonathon Kessler's attorney Scott Wallinger
67 also falsely alleged that Plaintiff filed a related Complaint on December 18, 2015. Again
68 Plaintiff filed the complaint against Mr. Kessler on December 17, 2015.

69 More importantly, careful reading of the statement of defendant **shows intent to falsely and**
70 **deceptively identify the dates falling in September and October 2012** as "representing the last
71 **date of treatment, omission or operation giving rise to the cause of action"** by SAVE, Inc.

72 Indeed, Jonathon Kessler acted on behalf of SAVE, Inc. by his own statements admits to
73 disclosing detailed information to Showa Denko and states that sessions also occurred on
74 November 13, 2012 and December 4, 2012 and December 18, 2012 in SAVE, Inc. offices.
75 Plaintiff was seen by Mr. Kessler in SAVE offices on December 18, 2012 and was led to believe,
76 that during this period, he was being rendered services by SAVEEAP (aka SAVE, Inc.).

77 Indeed the **"HIPPA – Approved Designated Record Set"** provided by Sarah Gainey SAVE, Inc.
78 **(aka SAVEEAP)** lists the **"Last Session"** as **12-18-12**. (See Exhibit 9)

79 Plaintiff has recently confirmed suspicions that Jonathon Kessler is a Part Time contractor
80 working 4 hours per week for SAVE, Inc. and for “Long Term Client Showa Denko”. (See Exhibit
81 10)

82 Mr. Kessler is not a Certified Employment Assistance Professional, yet falsely purports to
83 “know what is expected” of an EAP while supposedly rendering confidential services to help
84 Plaintiff develop Strategy as a Valued Employee. Further, Plaintiff asserts that Sarah Gainey
85 and SAVE, Inc.(SAVEEAP) Knowingly allowed Mr. Kessler to deceive and misrepresent himself to
86 Plaintiff of SAVE, Inc. while simply furthering the interest of Showa Denko, SAVE, Inc.’s ‘client in
87 fact’.

88 Lastly, Plaintiff believes one of the two Authorizations for Release of Protected Health
89 Information may have been falsified or obtained under false pretenses. Plaintiff discussed
90 confidentiality issues at some length with Ms. Gainey and declined to authorize SAVEEAP/Save,
91 Inc. or Sarah Gainey to share anything other than Dates of Sessions and Compliance. This is
92 clearly evidenced on the SAVE, Inc. Authorization for Release of Protected Health Information.
93 Yet, Jonathon Kessler has produced another Authorization for Release of Protected Health
94 Information with the check box for Progress and Telephone exchange of Information checked.

95 Plaintiff asserts that confidentiality was of utmost importance to him, is describe in SAVE
96 literature that “Confidentiality is the **most important** element in the counseling relationship”
97 and that Plaintiff never agreed to any detailed disclosures by SAVE, Inc. (aka SAVEEAP) to
98 Plaintiff’s Employer.

99

100

101 **Details Regarding 15-36-100 (2) Common Knowledge exception:**

102 Pro Se Plaintiff is a computer programmer and IT Systems Engineer, not a lawyer, and asks the
103 court not to harshly judge his assertions due to any erroneous or incomplete pleading of
104 relevant law.

105 Pro Se Plaintiff respectfully asserts that the lower court erred in its interpretation of SC Code
106 Section 15-36-100 and relied on less than candid assertions made by defense counsel and failed
107 to recognize the “common-knowledge” exception cited below. Pro Se Plaintiff clearly
108 attempted to explain to the court that Ms. Gainey and SAVE, Inc. acted outside the scope of
109 applicable contractual agreements and engaged in intentionally deceptive business practices
110 while violating standards of conduct (such as strict confidentiality) clearly and easily understood
111 by laypersons, but was repeatedly interrupted by the court.

112 **SC Code Section 15-36-100 (2) states: “ The contemporaneous filing requirement of**
113 **subsection (B) is not required to support a pleaded specification of negligence involving**
114 **subject matter that lies within the ambit of common knowledge and experience, so that no**
115 **special learning is needed to evaluate the conduct of the defendant.”**

116 Pro Se Appellant asserts that the SC Code Section 15-36-100 requires a Judgment as to
117 whether the “subject matter that lies within the **ambit** of common knowledge and experience,
118 so that no special learning is needed to evaluate the conduct of the defendant.”

119 Review of the transcript shows that the lower court failed to review relevant facts to make such
120 a judgement. The judge refused to hear or consider any other issue with respect to questions
121 of fact in the case including plaintiff’s assertions of breach of various contractual duties
122 including duty to maintain confidentiality and failure to avoid and disclose conflicts of interest
123 while maintaining dual obligations to both company and employee. These are basic contractual
124 obligations understood, of necessity, by laypersons as well as stated, in layperson terms, in the
125 EAP Standards of Practice and Client Bill of Rights.

126

127 Indeed, the SAVE EAP literature clearly states: "Confidentiality is the *most important* element in
128 the counseling relationship".

129 Plaintiff asserts that confidentiality was of utmost importance to him and that Plaintiff never
130 agreed to any disclosures by SAVE, Inc. to Plaintiff's Employer. Jonathon Kessler, a
131 subcontractor to SAVE, Inc. has clearly stated that he disclosed information to Showa Denko
132 Management. Plaintiff asserts that he never authorized such disclosure.

133 Standard of Review

134 It is Pro Se Appellant's understanding that Under de novo review, the appellate court acts if it
135 were considering the question for the first time, affording no deference to the decisions below.
136 Legal decisions of a lower court on questions of law are reviewed using this standard. This is
137 sometimes also called plenary review or the "legal error" standard. It allows the appeals court
138 to substitute its own judgment about whether the lower court correctly applied the law.

139

140 It is Pro Se Appellant's understanding that a "common-knowledge" exception is invoked in a
141 situation where the evidence and the circumstances are such that the recognition of the alleged
142 negligence may be presumed to be within the comprehension of laymen. Pro Se Plaintiff is a
143 computer programmer, not a lawyer and has only recently become aware that the governing
144 statutory law cited by Defense counsel includes a "common-knowledge" exception.

145 **Pro Se Plaintiff repeatedly tried to explain to the court that Defendant violated the scope of**
146 **the contractual obligations as defined by the CEAP Code of Conduct and asserts that this code**
147 **of conduct is, of necessity, comprehensible by a layperson.**

148 The CEAP (Certified Employee Assistance Professional) Client Bill of Rights code of conduct and
149 standards clearly state:

150 I. Individual clients have the right: B. To obtain a copy of the CEAP Code of Conduct;

151 Pro Se Plaintiff understands this to mean that the Code of Conduct is applicable to someone
152 certified as an Employee Assistance Professional (or even misrepresenting themselves as an
153 Employee Assistance Professional) and that this code of conduct is indeed within the
154 comprehension of a layperson client. Pro Se Plaintiff asserts that the terms of the CEAP code of
155 conduct simply establish reasonable contractual standards and the scope of engagement and is
156 clearly, and of necessity, within the comprehension of laypersons.

157 Indeed, any reasonable layperson can read the applicable Code of Conduct, emails and other
158 basic documents presented by Plaintiff and with only brief analysis understand that Ms. Gainey
159 and SAVE, Inc. have indeed acted outside the Scope of their expertise and outside the scope of
160 contractual obligations in their purported attempt to assist plaintiff in developing a confidential
161 Strategy to Assist a Valued Employee and SAVE Plaintiff's job and reputation and acted solely in
162 the interests of their Long Time Client-in-Fact Showa Denko.

163 *Plaintiff asserts that Deception is the act of propagating beliefs in things that are not true, or*
164 *not the whole truth. Fraud is deliberate deception to secure unfair or unlawful gain, or to*
165 *deprive a victim of a legal right.*

166 Plaintiff empathizes with SAVE, Inc. and Ms. Gainey (SAVEEAP) and with the challenges of
167 managing the dualities of contractual obligations and avoiding conflicts of interest when a Multi
168 Billion dollar corporation like Showa Denko is paying their fees and is a long term client while
169 the Plaintiff in this case only represents Eight sessions of Revenue.

170 **To accept Dendant's arguments and affirm the lower courts granting of Summary**
171 **Judgement is to say that it is OK for someone to Advertise and Represent themselves as being**
172 **qualified to assist an Employee in forming a confidential Strategy to Assist a Valued**
173 **Employee; To State unequivocally that "Confidentiality is the *most important* element in the**
174 **counseling relationship" while disclosing damaging information to the 'client in fact'**
175 **(Employer Showa Denko) and have no contractual obligation to consider correspondence**
176 **and evidence that the employee is being treated with hostility and indeed with actual malice**
177 **by co-workers and Supervisors.**

178 Ultimately, SAVE, Inc. (aka SAVEEAP) and its personnel have clearly breached the duties of
179 Good Faith and Fair Dealing inherent in every contract (with the notable exception of the so
180 called at-will employment contract).

181 Relevant contract law (independent from any special professional code of conduct) as well as
182 EAP standards), require that great care should be used in managing and disclosing dual
183 obligations to employer and employee. Plaintiff can empathize with the difficulty of
184 maintaining objectivity when the employer is paying the bill and when virtually all employment
185 laws currently presume the truthfulness of statements made by an employer and the right of an
186 employer to act in Bad Faith and to terminate an employee even for a morally reprehensible
187 reason.

188 However, while an Employer currently tenuously relies on special exception to Public Policy
189 requirements of Good Faith and Fair Dealing that exists in all other contracts and agreements to
190 defend their bad acts towards employees generally predicated on *Payne v. Western & Atlantic*
191 *Railroad Co.*, 81 Tenn. 507, 519-520, 1884 WL 469 at *6 (Sep. term 1884):

192 ***All may dismiss their employees at will, be they many or few, for good cause, for no cause[,]***
193 ***or even for cause morally wrong, without being thereby guilty of legal wrong.***

194 **Such a right to act in Bad Faith does not extend to an Employee Assistance Professional,**
195 **Contracted Counselor, advisor, insurer, or anyone else purporting to offer contractual**
196 **services and assuming dual obligations to both parties.**

197 SAVE EAP and it's personnel have shown reckless disregard for the rights of Plaintiff and
198 contractual duties owed to Plaintiff. Indeed Pro Se Plaintiff asserts that the SAVE, Inc.
199 (SAVEEAP) long standing relationship with their 'client in fact', Showa Denko has influenced
200 SAVEEAP personnel to believe that they also have the right to treat employees with Bad Faith
201 and in a callous, reprehensible, and illegal manner.

202

203 Appellant attests that evidence clearly shows that:

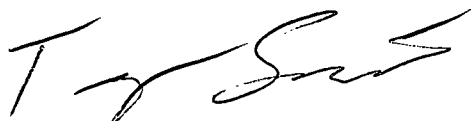
- 204 • SAVVEAP relied on false and incomplete information from its 'client in fact' Showa
205 Denko and reinforced these false perceptions in conversation with Showa Denko
206 Management.
- 207 • SAVVEAP failed to maintain confidentiality despite stating: "Confidentiality is the *most*
208 *important* element in the counseling relationship"
- 209 • SAVVEAP repeatedly refused to consider the correspondence Plaintiff presented him.
- 210 • SAVVEAP conduct resulted in placing plaintiff in physical danger, severe damage to
211 professional reputation, severe emotional distress, and severe financial loss by plaintiff.
- 212 • SAVVEAP failed to take an adequate history from plaintiff or form a reasonably accurate
213 understanding of Plaintiff's work environment.
- 214 • SAVVEAP failed to obtain peer consultation and failed to refer Plaintiff to professionals,
215 in other professions, who could have actually helped him.
- 216 • SAVVEAP conduct was callous, outrageous, reckless, self-serving, deceptive, unfair, and
217 their conduct exhibits lack of Good Faith and Fair Dealing and contempt for the
218 Employee they purport to assist. (See Exhibit 10)

219 Appellant respectfully requests a new Trial.

220

221 Respectfully Submitted,

222



223 Tracy Smith, Pro Se Appellant

224

225

PROOF OF SERVICE OF APPEAL BRIEF

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY COURT OF COMMON PLEAS

Tracy Smith v. Sarah Gainey and SAVE, Inc.

CIVIL ACTION 2015-CP-10-6819

ORDER OF DISMISSAL

HONORABLE KRISTI LEE HARRINGTON PRESIDING JUDGE

Appellate Case No. 2016-001379

Tracy Smith Appellant.

V.

Sarah Gainey and SAVE Inc.
Respondent
Represented by Lauren Spears
40 Calhoun Street, Suite 550
Charleston, SC 29401

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SC Court of Appeals

PROOF OF SERVICE

*Hand Delivered Tracy Smith
11-17-16*

I certify that I have served the Brief and Transcript related to Appeal on Sarah Gainey and SAVE Inc. by ~~depositing a copy of it in the United States Mail, postage prepaid on November 17, 2016 addressed to his attorneys of record, Jack G. Gresh and Lauren Spears of Hall Booth and Smith at 40 Calhoun Street, Suite 550, Charleston, SC 29401.~~

November 17, 2016

Tracy Smith Pro Se Plaintiff/Appellant
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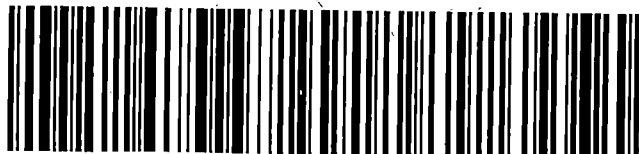
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