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SC Court of Appeals

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
7 CIVIL ACTION 2015-CP-10-6819

8
9 ORDER OF DISMISSAL

10
11 HONORABLE KRISTI LEE HARRINGTON PRESIDING JUDGE

12
13 Tracy Smith,

Appellant

14 v.

15 Sarah Gainey SAVE, Inc.

Respondent

16
17 **[INITIAL] BRIEF OF APPELLANT**

18 Tracy Smith
19 Pro Se Appellant
20 1510 SWARTZ FAIRBANKS ROAD
21 MONROE, LA 71203
22 318 233 8572
23

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SC Code Section 15-36-100 (2)

SCRCP Rule 56(c)

Payne v. Western & Atlantic Railroad Co., 81 Tenn. 507, 519-520, 1884 WL 469 at *6 (Sep. term 1884)

Evening Post Pub.Co.. v. Berkely County Sch. Dist. 392 S.C. 76,81,708 S.E. 2d 745, 748(2011)

Baughman v. Am. Tel. & Tel. Co.306 S.C. 101, 115, 410 S.E. 2d 537, 545 (1991)

Celotex Corp. v. Catrett 477 U.S. 317, 106 S. Ct. 2548 (1986)

USAA Property & Cas. Ins. Co. v. Clegg 377 S.C. 643, 653, 661 S.E. 2d 791, 796 (2008)

CANON 2 RULE 2.6 ENSURE RIGHT TO BE HEARD

CANON 2 RULE 2.10 (2) PERSONAL BIAS

FRCP 11 provides that a district court may sanction attorneys or parties who submit pleadings for an improper purpose or that contain frivolous arguments or arguments that have no evidentiary support.

CANDOR TOWARD THE TRIBUNAL (a) A lawyer shall not knowingly:

72 (1) make a false statement of fact or law to a tribunal or fail to correct a false
73 statement of material fact or law previously made to the tribunal by the lawyer;

74 (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction
75 known to the lawyer to be directly adverse to the position of the client and not
76 disclosed by opposing counsel; or

77 (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's
78 client, or a witness called by the lawyer, has offered material evidence and the
79 lawyer comes to know of its falsity, the lawyer shall take reasonable remedial
80 measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse
81 to offer evidence, other than the testimony of a defendant in a criminal matter,
82 that the lawyer reasonably believes is false.

83 (b) A lawyer who represents a client in an adjudicative proceeding and who
84 knows that a person intends to engage, is engaging or has engaged in criminal or
85 fraudulent conduct related to the proceeding shall take reasonable remedial
86 measures, including, if necessary, disclosure to the tribunal.

87

STATEMENT OF ISSUES ON APPEAL

88

89 1. DID TRIAL COURT ERR BY RELYING ON DEFENSE COUNSEL'S INCOMPLETE STATEMENT
90 OF RELEVANT LAW AND PURPOSEFUL OMISSION OF COMMON KNOWLEDGE EXCEPTION
91 CONTAINED IN SC 15-36-100 (2)?

92 2. WAS TRIAL COURT PREJUDICED BY PURPOSELY FALSE AND MISLEADING STATEMENTS
93 REGARDING DATES OF SERVICE BY SAVEEAP, STATUTE OF LIMITATIONS, AND RELEVANT FILING
94 DATES?

95 3. DID JUDGE EXHIBIT BIAS, CONDESCENSION, AND PREJUDICE TOWARDS PRO SE
96 PLAINTIFF WHICH INFLUENCED HER DECISION TO REFUSE TO ADEQUATELY CONSIDER
97 PLAINTIFF'S CLAIMS THAT DEFENDANT ACTED OUTSIDE THE SCOPE OF AGREEMENT AND
98 CONTRACTUAL DUTIES AS A PRIVATELY CERTIFIED EMPLOYEE ASSISTANCE PROFESSIONAL?

100 Pro Se Plaintiff filed Complaint broadly alleging **Breach of Contract and Personal Injury** against
101 Sarah Gainey, SAVE, Inc. also known as SAVEEAP citing specifically Breach Of Duty of Care,
102 Misrepresentation, Breach Of Contract, Breach Of Fiduciary Duty, Intentional Infliction of
103 Emotional Distress basing much of his assertions of defendant's obligations of the duties cited
104 in the Code of Conduct published in laymen's terms by the Private organization that offers
105 certification as an "Employee Assistance Professional". Sarah Gainey, who plaintiff believed to
106 be the owner and president of SAVE Inc. also known as SAVEEAP is certified as a CEAP. As a
107 mandate of plaintiff's employment "agreement", plaintiff received "counseling" for
108 "occupational problems" resulting from his employment with Showa Denko by SAVEEAP.

109 Plaintiff initially received counseling from Sarah Gainey of SAVE Inc. Despite representations of
110 the importance of confidentiality in printed literature and at SAVEEAP.COM Sarah Gainey
111 requested plaintiff sign a release document to allow her to verbally discuss matters with
112 Plaintiff's coworkers. Plaintiff decided against this agreement at this early stage of
113 "counseling". Sarah Gainey subsequently ceased personal counseling and instead referred
114 Plaintiff to Jonathon Kessler who was either a subcontractor or employed by SAVE, Inc. (AKA
115 SAVEEAP) or employed by Sarah Gainey.

116 Plaintiff received "counseling" from Jonathon Kessler at SAVE clinic at 4130 Faber Place up to
117 and including the date John Wing and Clint Lucas of Showa Denko wrongfully terminated
118 Plaintiff's employment in a purposely outrageous, retaliatory, public, defamatory, humiliating,
119 intimidating manner following plaintiff in close proximity for several hundred yards in his pickup
120 truck as plaintiff walked on foot from the Showa Denko Plant. It is worth noting that plaintiff
121 has learned that Clint Lucas was contacted by Jonathon Kessler who disclosed sensitive private
122 information and worked for SAVEEAP as a subcontractor and "counseled" plaintiff until
123 December 18, 2012.

124 Plaintiff cited numerous causes of action in his suit against Sarah Gainey and SAVE inc. AKA
125 SAVEEAP and included specific factual assertions including:

126 Breach of duty to obtain adequate history. Sarah Gainey and SAVE inc. AKA SAVEEAP were
127 grossly negligent by failing to obtain an adequate history and understanding of plaintiff's work
128 environment. (See Exhibit 10 pg 2)

129 Breach of agreement to maintain confidentiality. Sarah Gainey (aka SAVEEAP) shared
130 confidential information regarding Plaintiff among management of Showa Denko without
131 consent. (See Exhibit 10 pg 3)

132 Breach of Duty to obtain Peer Consultation. Sarah Gainey (aka SAVEEAP) failed to obtain Peer
133 Consultation and seek professional consultation with appropriate parties and agencies in her
134 duty to reconcile her dual obligations to Plaintiff and Showa Denko. (see Exhibit 7)

135

136 Defendant denied all wrongdoing and alleged that Plaintiff must file an affidavit from a peer of
137 Sarah Gainey pursuant to SC 15-36-100 citing no factual refutation of Plaintiff's factual
138 assertions.

139 *(Plaintiff will inform the court that his father became very ill and died in February 2016*
140 *impacting Plaintiff's productivity and attention to the case during the first part of 2016. His*
141 *father was recently interned at Arlington National Cemetery with full honors.)*

142 Defendant filed a Motion for Summary Judgement alleging that Plaintiff was outside the Statute
143 of Limitations and was barred from proceeding due to SC 15-36-100. This Motion, the Oral
144 Argument presented by Lauren Spears representing Defendant, and the Order of Dismissal
145 drafted by Defense counsel state or imply that SAVE, Inc. (aka SAVEEAP):

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

151 Plaintiff alerted the court that defense has misstated dates in their motion to dismiss in the
152 Hearing yet the Order of Dismissal written by defense counsel states:

153 *“These allegations stem from counseling sessions stem from counseling sessions Plaintiff*
154 *received from Defendant Sarah Gainey on or around October 2012.”*

155 The Order of Dismissal written by defense counsel also contains the false clause:

156 *“Plaintiff filed this **professional negligence** action”*

157 The order of dismissal written by defense counsel makes no reference to the Breach of Contract
158 claims. The order of dismissal written by defense counsel makes no reference to 15-36-100(2)
159 Common Knowledge exception to requirement for expert affidavit.

160 The order of dismissal makes no reference to Sarah Gainey’s or SAVEEAP certification status
161 and representations or contractual obligations as a Certified Employee Assistance Professional
162 and no mention of an Employee Assistance Program and associated obligations.

163 Upon notice of dismissal Pro Se Plaintiff filed a notice to appeal with the South Carolina Court of
164 Appeals citing Ms. Gainey’s refusal to release any “medical treatment records”, causes of
165 actions related to deceptive business practices not addressed by court, and questioning the
166 constitutionality of a statue which, as-applied, denies plaintiff of his civil rights to be heard.

167 Upon receiving transcript plaintiff wrote initial brief that broadly asserts that **Defense counsel**
168 **exhibited a Pattern of Purposely False Statements and Omissions of relevant law to influence**
169 **Tribunal** and more specifically cites purposeful omissions of relevant law 15.36.100(2) ,
170 purposeful misstatement of dates of services rendered by SAVEEAP, and purposeful ignoring
171 causes of action based on deceptive business practices, and cites specific instances of trial
172 court error and bias.

173

174 ARGUMENTS

175

176 **ARGUMENT 1: 1. TRIAL COURT ERRED BY RELYING ON DEFENSE COUNSEL'S INCOMPLETE**
177 **STATEMENT OF RELEVANT LAW AND PURPOSEFUL OMISSION OF COMMON KNOWLEDGE**
178 **EXCEPTION CONTAINED IN SC 15-36-100 (2).**

179 Pro Se Plaintiff asserts that Defense has an obligation of Candor to the Court and that this
180 obligation includes that:

181 *(a) A lawyer shall not knowingly:*

182 *(1) make a false statement of fact or law to a tribunal or fail to correct a false*
183 *statement of material fact or law previously made to the tribunal by the lawyer;*

184 *(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known*
185 *to the lawyer to be directly adverse to the position of the client and not disclosed by*
186 *opposing counsel*

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

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

196 On Page 6 of the transcript the Presiding Judge states:

197 *"And all those things could be true, Mr. Smith. The problem is that you may not be able*
198 *to present those because you haven't followed the rules. **You again have not done what***
199 ***you're supposed to do, but are alleging what she – what you believe she has not done.**"*

200 (See Hearing Transcript Exhibit 1)

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

206 Pro Se Appellant tried repeatedly to present facts involving intentional deception,
207 misrepresentation, breach of contract, breach of confidentiality, acting outside the scope of
208 agreement, breach of confidentiality among others to the lower court Judge but was
209 consistently interrupted and not allowed to make such statements to the court by the Presiding
210 Judge. **Defense counsel provided little if any evidence refuting Pro Se Plaintiff's sworn**
211 **statements. Instead Defense counsel relied on providing the court with an incomplete and**
212 **misleading statement of relevant law (see Exhibit 3: Defense Counsel's AMENDED NOTICE**
213 **OF MOTION AND MOTION TO DISMISS PLAINTIFF'S COMPLAINT).**

214

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

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

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

226 **SC Code Section 15-36-100 (2) states: " The contemporaneous filing requirement of**
227 **subsection (B) is not required to support a pleaded specification of negligence involving**

228 **subject matter that lies within the ambit of common knowledge and experience, so that no**
229 **special learning is needed to evaluate the conduct of the defendant.”**

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

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

240

241 Indeed, the SAVE EAP literature clearly states: “Confidentiality is the **most important** element in
242 the counseling relationship”.

243 Plaintiff asserts that confidentiality was of utmost importance to him and that Plaintiff never
244 agreed to any disclosures by SAVE, Inc. to Plaintiff’s Employer. Jonathon Kessler, a
245 subcontractor to SAVE, Inc. has clearly stated that he disclosed information to Showa Denko
246 Management. Plaintiff asserts that he never authorized such disclosure.

247

248 **ARGUMENT II: TRIAL COURT WAS PREJUDICED BY PURPOSELY FALSE AND MISLEADING**
249 **STATEMENTS REGARDING DATES OF SERVICE BY SAVEEAP, STATUTE OF LIMITATIONS, AND**
250 **RELEVANT FILING DATES PREJUDICING COURT.**

251
252 **Pro Se Appellant asserts to the Court that Defense counsel exhibited a Pattern of Purposely**
253 **False Statements to influence Tribunal to dismiss with prejudice.**

254 Pro Se Plaintiff asserts that Defense has an obligation of Candor to the Court and that this
255 obligation includes that:

256 *(a) A lawyer shall not knowingly:*

257 *(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness*
258 *called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity,*
259 *the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the*
260 *tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a*
261 *criminal matter, that the lawyer reasonably believes is false.*

262 *(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a*
263 *person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related*
264 *to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to*
265 *the tribunal.*

266 Pro Se Appellant asserts that Defense has knowingly made material misstatements of fact and
267 law in order to persuade the lower court to dismiss. Pro Se Appellant asserts that Defense
268 Counsel Purposely made misleading statements regarding the dates when appellant was seen
269 by personnel of SAVEEAP in order to argue for dismissal on false grounds and Purposely
270 misstated the date when appellant filed his complaint in order to argue for dismissal on false
271 grounds.

272 On Page 2 of the Court Transcript (exhibit 1 page 2 line 1) Lauren Spears, in open court,
273 deceptively echoes October 2012 as the relevant "date of service" alluding to the false
274 statement from Page 3 of Defendant's "Amended Notice of Motion and Motion to Dismiss
275 Plaintiff's Complaint" (See Exhibit 3) Defense states:

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

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

283 *(The court may be interested to note that Jonathon Kessler's (SAVEEAP subcontractor named in*
284 *a separate lawsuit) attorney Scott Wallinger also falsely alleged that Plaintiff filed a related*
285 *Complaint on December 18, 2015. Again Plaintiff filed the complaint against Mr. Kessler on*
286 *December 17, 2015.)*

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

290 The court may wish to consider how these dates were identified by Defense Counsel
291 as "***representing the last date of treatment, omission or operation giving rise to the cause of***
292 ***action*"** and whether Defendant purposely mislead Defense Counsel, whether Defense Counsel
293 performed an adequate investigation prior to making denials in their answer to Plaintiff's
294 Pleading and Motion for Summary Judgement and Oral statements to the court , whether
295 Defense Counsel is acting out of Self Interest or in the Interest of an insuror or for other
296 financial or professional incentive in assessing motive for this purposely deceptive statement.

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

299 Indeed the Order Of Dismissal drafted by Defense counsel and provided to the court for the
300 Judges signature by defense counsel also falsely states: "These allegations stem from
301 counseling sessions plaintiff received from Defendant Sarah Gainey on or around October of
302 2012." a statement made in open court by Lauren Spears and presumably alluding to the **false**

303 **statement identifying the dates falling in September and October 2012 as “representing the**
304 **last date of treatment, omission or operation giving rise to the cause of action” by SAVE, Inc.**

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

310 Yet the “HIPPA – Approved Designated Record Set” provided by Sarah Gainey SAVE, Inc. (aka
311 SAVEEAP) lists the “Last Session” as 12-18-12 the date of Appellant’s wrongful Termination by
312 SAVEEAP’s long term ‘client in fact’ Showa Denko.

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

316 Plaintiff has recently confirmed suspicions that Jonathon Kessler is a Part Time contractor
317 working 4 hours per week for SAVE, Inc. and for “Long Term Client Showa Denko”. (See Exhibit
318 10)

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

325 Lastly, Plaintiff believes one of the two Authorizations for Release of Protected Health
326 Information may have been falsified or was obtained under false pretenses. Plaintiff discussed
327 confidentiality issues at some length with Ms. Gainey and declined to authorize SAVEEAP/Save,
328 Inc. or Sarah Gainey to share anything other than Dates of Sessions and Compliance. This is
329 clearly evidenced on the SAVE, Inc. Authorization for Release of Protected Health Information.

330 Yet, Jonathon Kessler has produced another Authorization for Release of Protected Health
331 Information with the check box for Progress and Telephone exchange of Information checked.

332 Plaintiff asserts that confidentiality was of utmost importance to him, is describe in SAVE
333 literature that "Confidentiality is the **most important** element in the counseling relationship"
334 and that Plaintiff never agreed to any detailed disclosures by SAVE, Inc. (aka SAVEEAP) to
335 Plaintiff's Employer.

336

337 **ARGUMENT III: JUDGE EXHIBITED BIAS, CONDESCENSION, AND PREJUDICE TOWARDS PRO SE**
338 **PLAINTIFF WHICH INFLUENCED HER DECISION TO REFUSE TO ADEQUATELY CONSIDER**
339 **PLAINTIFF'S CLAIMS THAT DEFENDANT ACTED OUTSIDE THE SCOPE OF AGREEMENT AND**
340 **CONTRACTUAL DUTIES AS A PRIVATELY CERTIFIED EMPLOYEE ASSISTANCE PROFESSIONAL.**

341 On Page 6 of the Hearing Transcript Plaintiff Clearly asserts that

342 *"Defendant is outside the scope of her professional responsibilities"* (Please see Exhibit 7
343 EAP Client Bill of Rights)

344 To which the Judge tersely replied:

345 *"We don't even get to go there. I don't know how long you have been here, the last*
346 *gentleman (**referring to an inmate in an orange jumpsuit**) I explained about the rules of*
347 *basketball. I'm not sure, I'm not very computer savvy so I can't even make an attempt, I*
348 *will not even make an attempt to do an IT analogy.*

349 *But you haven't followed the rules (**Plaintiff asserts this statement is demonstrably***
350 ***false and represents incorrect interpretation of relevant law specifically 15-36-100(2)).***
351 *And the rules are set up for a very particular reason the way they are set up (**plaintiff***
352 ***asserts that the reason is presumably not to deny civil rights of victim**). Every attorney*
353 *that's appeared in front of me today has told me why I need to make sure that the rules*
354 *are followed and I need to know why I shouldn't follow the rules for you here today."*

355 Plaintiff States starting on line 9:

356 *"Again, I did not realize I needed to file an affidavit. I suggest that she acted outside the*
357 *scope of her (**alluding to EAP Client Bill of Rights**) – and I would also like to point out*
358 *that she has falsely stated the dates of her service"*

359 To which the Judge tersely replied:

360 *"And all those things could be true, Mr. Smith. The problem is that you may not be able*
361 *to present those because you haven't followed the rules. You again have not done what*
362 *you are supposed to do, but are alleging what she – what you believe she has not done."*

363 Pro Se Plaintiff later replies:

364 *"She has made false statements (Pro Se Plaintiff acknowledges that including the*
365 *words Under Oath might have been more persuasive and asks the appellate court to*
366 *consider false statements made under oath by defense and consider relevance of false*
367 *statements in such a proceeding) and I contend she acted outside the scope of her*
368 *professional responsibility." (see EAP Client Bill of Rights comprehensible by layperson)*

369 On Page 8 of the Hearing Transcript the trial Judge states tersely and unequivocally:

370 *"As of this ooint, sir, you have – you are on notice that this affidavit is required. And as I*
371 *indicated to you, and to several of the other people who have appeared in front of me,*
372 *you are entitled to represent yourself. Most of us can read the law and get a basic*
373 *understanding of it. You may have had really good instructors who taught you business*
374 *law. But just as I can turn my computer on or off, but when I really have trouble I call the*
375 *professional IT guy up in Columbia to help me."*

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

381 Pro Se Appellant tried repeatedly to present the facts involving intentional deception,
382 misrepresentation, breach of contract, breach of confidentiality, acting outside the scope of
383 agreement among others to the lower court Judge but was consistently interrupted and not
384 allowed to make such statements to the court by the Presiding Judge. **Defense counsel**
385 **provided little if any evidence refuting Pro Se Plaintiff's sworn statements.** Instead **Defense**
386 **counsel relied on providing the court with an incomplete and misleading statement of**

387 **relevant law** (see Exhibit 3: Defenses Counsel's AMENDED NOTICE OF MOTION AND MOTION
388 TO DISMISS PLAINTIFF'S COMPLAINT).

389

390 CONCLUSION

391 THE TRIAL JUDGE INCORRECTLY DISMISSED ALL CLAIMS WITH PREJUDICE
392 INCLUDING BREACH OF CONTRACT AND CONTRACTUAL DUTY CLAIMS WITH NO
393 REFERENCE TO CLAIMS OF CONTRACTUAL DUTIES OWED BY DEFENDANT **ACTING**
394 **IN THE CAPACITY OF A PRIVATELY CERTIFIED EMPLOYEE ASSISTANCE**
395 **PROFESSIONAL (CEAP)** IN ORDER OF DISMISSAL DRAFTED BY DEFENSE COUNSEL.

396 THE ORDER OF DISMISSAL WRITTEN BY DEFENSE COUNSEL CONTAINS MATERIAL
397 FACTUAL ERRORS , FALSE CHARACTERIZTIONS, AND ERRONEOUS CONCLUSIONS
398 BASED ON INTENTIONALLY INCOMPLETE INTERPRETAION OF THE LAW. THE
399 ORDER OF DISMISSAL CONTAINS PREJUDICIAL STATEMENTS WHICH IF ALLOWED
400 TO STAND COULD INFLUENCE OTHER LEGAL PRECEDIINGS, SPECIFICALLY THE
401 CASE AGAINST JONATHON KESSLER THE PART TIME SELF DESCRIBED EMPLOYEE
402 ASSISTANCE PROFESSIONAL WHO ON BEHALF OF SAVEEAP (AKA SARAH GAINEY,
403 SAVE INC.) MADE DETAILED TO ERRONEOUS DISCLOSURES TO PLAINTIFF'S
404 EMPLOYER WITHOUT PLAINTIFF'S KNOWLEDGE OR CONSENT.

405 SEVERAL OF THE ERRORS INCLUDED IN THE JUDGES ORDER OF DISMISSAL
406 WRITTEN BY DEFENSE COUNSEL WITH NO EDITS BY THE JUDGE INCLUDE:

- 407 - INTENTIONALLY DECEPTIVE STATEMENT OF DATE **“representing the last**
408 **date of treatment, omission or operation giving rise to the cause of**
409 **action”**
- 410 - INCORRECT CHARACTERIZATION OF PLAINTIFF'S LEGAL ACTION AS SIMPLY
411 “PROFESSIONAL NEGLIGENCE”
- 412 - FALSE AND DECEPTIVE STATEMENT OF SARAH GAINEY “ACTING IN THE
413 CAPACITY AS A LICENSED PROFESSIONAL COUNSELOR WHEN SHE

414 REPRESENTED HERSELF AND HER COMPANY AS EMPLOYEE ASSISTANCE
415 PROFESSIONALS AND PLAINTIFF RELIED ON THIS REPRESENTATION
416 - INCORRECT APPLICATION OF RULE 12(B)(6) AND SC CODE 15-36-100

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

423
424 It is Pro Se Appellant's understanding that a "common-knowledge" exception is
425 invoked in a situation where the evidence and the circumstances are such that
426 the recognition of the alleged negligence may be presumed to be within the
427 comprehension of laymen. Pro Se Plaintiff is a computer programmer, not a
428 lawyer and has only recently become aware that the governing statutory law
429 cited by Defense counsel includes a "common-knowledge" exception.

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

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

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

438 Pro Se Plaintiff understands this to mean that the Code of Conduct is applicable to
439 someone certified as an Employee Assistance Professional (or even
440 misrepresenting themselves as an Employee Assistance Professional) and that this
441 code of conduct is indeed within the comprehension of a layperson client. Pro Se
442 Plaintiff asserts that the terms of the CEAP code of conduct simply establish
443 reasonable contractual standards and the scope of engagement and is clearly, and
444 of necessity, within the comprehension of laypersons.

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

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

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

460 To accept Defendant's arguments and affirm the lower courts granting of
461 Summary Judgement is to say that it is OK for someone to Advertise and
462 Represent themselves as being qualified to assist an Employee in forming a
463 confidential Strategy to Assist a Valued Employee; To State unequivocally that
464 "Confidentiality is the most important element in the counseling relationship"
465 while disclosing damaging information to the 'client in fact' (Employer Showa
466 Denko) and have no contractual obligation to consider correspondence and
467 evidence that the employee is being treated with hostility and indeed with actual
468 malice by co-workers and Supervisors.

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

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

480 However, while an Employer currently tenuously relies on special exception to
481 Public Policy requirements of Good Faith and Fair Dealing that exists in all other
482 contracts and agreements to defend their bad acts towards employees generally

483 predicated on Payne v. Western & Atlantic Railroad Co., 81 Tenn. 507, 519-520,
484 1884 WL 469 at *6 (Sep. term 1884):

485 ***“All may dismiss their employees at will, be they many or few, for good***
486 ***cause, for no cause[,] or even for cause morally wrong, without being***
487 ***thereby guilty of legal wrong.)”***

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

491 SAVE EAP and it’s personnel have shown reckless disregard for the rights of
492 Plaintiff and contractual duties owed to Plaintiff. Indeed Pro Se Plaintiff asserts
493 that the SAVE, Inc. (SAVEEAP) long standing relationship with their ‘client in fact’,
494 Showa Denko has influenced SAVEEAP personnel to believe that they also have
495 the right to treat employees with Bad Faith and in a callous, reprehensible, and
496 illegal manner.

497

498 Appellant attests that evidence clearly shows that:

- 499 • SAVEEAP relied on false and incomplete information from its ‘client in fact’
500 Showa Denko and reinforced these false perceptions in conversation with Showa
501 Denko Management.
- 502 • SAVEEAP failed to maintain confidentiality despite stating: “Confidentiality
503 is the most important element in the counseling relationship”

504 • SAVVEAP repeatedly refused to consider the correspondence Plaintiff
505 presented him.

506 • SAVVEAP conduct resulted in placing plaintiff in physical danger, severe
507 damage to professional reputation, severe emotional distress, and severe
508 financial loss by plaintiff.

509 • SAVVEAP failed to take an adequate history from plaintiff or form a
510 reasonably accurate understanding of Plaintiff's work environment.

511 • SAVVEAP failed to obtain peer consultation and failed to refer Plaintiff to
512 professionals, in other professions, who could have actually helped him.

513 • SAVVEAP conduct was callous, outrageous, reckless, self-serving, deceptive,
514 unfair, and their conduct exhibits lack of Good Faith and Fair Dealing and
515 contempt for the Employee they purport to assist. (See Exhibit 10)

516 To accept the lower court's ruling dismissing Pro Se Plaintiff's entire complaint is
517 to say that it is acceptable in the State of South Carolina for defense counsel to
518 violate duties of candor to the court, knowingly omit relevant law favorable to
519 opposing litigant, make material false statements regarding defendant's dates of
520 service, include these false statements in an order of dismissal while representing
521 a defendant that Advertises and misrepresent themselves as being qualified as a
522 Privately Certified Employee Assistance Professional to Confidentially assist an
523 Employee in forming a Strategy to Assist a Valued Employee while claiming they
524 have no contractual obligation to consider correspondence and evidence that the
525 employee is being treated with hostility and indeed with actual malice by co-
526 workers and Supervisors of defendant's long term client who is a multi-billion

527 dollar foreign owned entity. Pro Se Plaintiff has a right to be heard on this matter
528 and respectfully requests a new trial or other remedy deemed just by the court.

529

530 RESPECTFULLY SUBMITTED

531

532

A handwritten signature in black ink, appearing to read "Tracy Smith", is written over the line number 532.

533 TRACY SMITH, PRO SE APPELLANT

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