

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

The Honorable Kristi Lea Harrington, Circuit Court Judge

Lower Court Case No. 2015-CP-10-06819

Court of Appeals Case No. 2016-001379

**RECEIVED**

JAN 19 2017

**SC Court of Appeals**

Tracy Smith,

Appellant,

v.

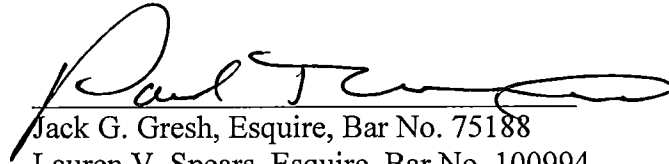
Sarah Gainey and SAVE, Inc.,

Respondents.

INITIAL BRIEF OF RESPONDENTS

*{SIGNATURE TO FOLLOW}*

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Paul Trainor", written over a horizontal line.

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### STATEMENT OF ISSUES ON APPEAL

As a cursory matter, Appellant's brief contains numerous arguments which were not raised to the lower court or ruled upon by Judge Harrington and, therefore, are not preserved for appeal.<sup>1</sup> Given that the only appealable Order in this matter is Judge Harrington's June 10, 2016 Order granting Respondents' Motion to Dismiss, Respondents contends the sole issue on appeal is as follows:

(1) Whether Judge Harrington erred in dismissing *with prejudice* Appellant's claims due to Appellant's failure to comply with S.C. Code Ann. § 15-36-100, despite a gratuitous 30-day grace period provided by the lower court.

### STATEMENT OF THE CASE

On December 17, 2015, *pro se* Plaintiff Tracy Smith ("Appellant") filed a Complaint against Defendants Sarah Gainey and SAVE, Inc. ("Respondents"). See Plt. Compl. (filed Dec. 17, 2015). As alleged in the Complaint, Respondent Gainey is a Licensed Professional Counselor ("LPC"), licensed by the State of South Carolina, and the President of Respondent SAVE, Inc. See Plt. Compl., 1:14-16. Respondent SAVE, Inc. is an "independent counseling and healthcare provider," which provides "healthcare services and training." Plt. Compl., 1:16-19.<sup>2</sup> As a condition of his employment, Appellant sought professional services from Respondent Gainey through SAVE, Inc., including counseling, treatment and therapy. Plt. Compl., 2:3-9. After receiving initial services from Respondents, Appellant was referred to a second provider, Jonathon Kessler, against whom Appellate filed and maintains a separate lawsuit. See Compl. of

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<sup>1</sup> Respondent respectfully directs this Honorable Court to Appellant's Notice of Appeal and two Initial Briefs which lay out Appellant's grounds for appeal, none of which were brought before the lower court.

<sup>2</sup> Respondents qualify as a health care providers under S.C. Code Ann. § 15-36-100(G).

Tracy Smith v. Jonathon Kessler, Civil Action No. 2015-CP-10-06820, Court of Common Pleas, Charleston County (filed Dec. 17, 2015).

In his Complaint, Appellant alleges that he was terminated from his job, although it is unclear whether Appellant alleges that his termination was the fault of Respondents. See generally Plt. Compl. Rather, Appellant alleged Respondent Gainey breached the applicable professional standard of care in the following respects:

- "[F]ailing to obtain an adequate history and understanding of [Appellant's] work environment";
- Breaching the duty of care "to use reasonable care in providing assistance and treatment" to Appellant by "intentionally raising her voice and using accusatory language during counseling";
- Failing to maintain client confidentiality; and
- Failing to "obtain Peer Consultation and seek professional consultation with appropriate parties and agencies in her efforts to reconcile her dual obligations to" Appellant and Appellant's employer.

Plt. Compl., 2:5–3:8. Appellant alleges damages consisting of lost wages, benefits, expenses, and emotional distress. Plt. Compl., 4:15–22.

Respondents timely filed an Answer and contemporaneous Motion to Dismiss on January 15, 2016. See generally Defs. Answer (filed Jan 15, 2016); Defs. Mot. to Dismiss (filed Jan. 15, 2016). In their Motion to Dismiss, Respondents argued that (1) Appellant alleged professional negligence in his Complaint, but failed to file an expert affidavit as required by S.C. Code Ann. § 15–36–100, and (2) Appellant's claims were time barred by the applicable three-year statute of

limitations. (See Defs. Answer; see also Defs. Mot. to Dismiss; Defs. Am. Mot. to Dismiss (filed Jan. 29, 2016)).

On April 29, 2016, Respondents' Motion to Dismiss was heard by the Honorable Kristi Lee Harrington, at which time Judge Harrington granted Appellant a gratuitous 30-day extension to obtain and file the expert affidavit as required by S.C. Code Ann. § 15-36-100, and accordingly denied Respondents' Motion to Dismiss by virtue of a Form 4 Order. See Form 4 Denying Defs. Mot. to Dismiss (filed May 6, 2016). However, Appellant failed to comply with Judge Harrington's Order to file the requisite affidavit by May 31, 2016. Based on Appellant's failure to comply with both S.C. Code Ann. § 15-36-100 and Judge Harrington's May 6, 2016 Order, Judge Harrington dismissed *with prejudice* Appellant's claims against Respondents. See Order of Dismissal (filed June 13, 2016).

On June 23, 2016, Appellant served and filed a purported Notice of Appeal. App. Notice of Appeal (filed June 23, 2016). Thereafter, on July 13, 2016, Appellant served what is believed to be Appellant's Initial Brief. App. Initial Brief (served Nov. 17, 2016). In his initial brief, Appellant requested a "new trial" on the grounds that Judge Harrington "erred by relying on an incomplete understanding of the law." App. Initial Brief, p. 1. In support of his argument, Appellant argues that Judge Harrington failed to apply S.C. Code Ann. § 15-36-100(2) which provides, in Appellant's words, a "common knowledge" exception. Subsequently, Appellant filed a second "initial" brief on December 19, 2016.<sup>3</sup>

Pursuant to Rule 220(c), SCACR, Respondents hereby request that this Court affirm Judge Harrington's Order in this regard.

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<sup>3</sup> Respondents argue that Appellant's second brief filed December 19, 2016 was not proper under the South Carolina Appellate Court Rules, and, therefore, should not be considered on appeal.

### RESPONDENTS' LEGAL ARGUMENTS

"To preserve an issue for appellate review, the issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court." Doe v. Doe, 370 S.C. 206, 212, 624 S.E.2d 51, 54 (Ct. App. 2006). "Error preservation requirements are intended to 'enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.'" Id. (quoting Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000)). "In other words, the trial court must be given an opportunity to resolve the issue before it is presented to the appellate court." In re. Michael H., 360 S.C. 540, 602 S.E.2d 729 (S.C. 2004). The rationale for the rule is that until the trial court considers the matter and makes a ruling, an appellate court is unable to find error. Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). "[W]hen an appellant neither raises an issue at trial nor through a Rule 59(e), SCRCP, motion, the issue is not preserved for appellate review." Doe, 370 S.C. at 212, 634 S.E.2d at 54–55.

Appellant appears to assert three bases for reversal of the trial court's Order granting Respondents' Motion to Dismiss, none of which were raised to the lower court. First, Plaintiff claims that the trial court erred in "relying on defense counsel's incomplete statement of relevant law and purposeful omission [sic] of common knowledge exception contained in SC 15-36-100(2)." Second, Appellant contends that the trial court was "prejudiced by purposely false and misleading statements regarding dates of service . . . ." Finally, it appears that Appellant argues that the lower court failed to entertain Appellant's version of the facts prior to dismissing this case.

**I. THE TRIAL COURT PROPERLY GRANTED RESPONDENTS' MOTION TO DISMISS**

**A. Appellant was aware of the expert affidavit requirement under S.C. Code Ann. § 15-36-100 in January 2016, and failed to comply with a court order requiring Appellant to file an affidavit by May 29, 2016.**

During the motion hearing, Appellant was provided ample opportunity to offer the arguments he now raises on appeal. When asked by Judge Harrington why Appellant's case should not be dismissed, Appellant responded twice that he believed Respondent Gainey was "outside the scope of her professional responsibilities." Trans. of Record, 5:19-6:3 (Apr. 29, 2016). Nowhere in the Transcript of Record does Appellant raise the issue of whether his Complaint contained claims outside of professional negligence, nor does his Complaint support such an argument. To the contrary, Appellant repeatedly acknowledged that he needed an affidavit to support his Complaint, but failed to obtain and file one:

Court: I understand. What we are only here for today is the law requires that you file an affidavit when you allege medical or professional negligence. So it is a simple issue. If you do not have that affidavit the law requires that I must dismiss this case. Do you have an affidavit.

Mr. Smith: No. I am willing to get one though.

...

Court: The law requires that when you file this case you must file it with the affidavit. Did you do that?

Mr. Smith: No, I did not.

...

Court: And so you would have been on notice not only did you need to file [the expert affidavit] when you filed this case in 2015, but you were on notice as of the filing of this the service on or about January 29 of 2016. So the statute would allow me to give you once you had notice, but you again have failed to do so; is that correct?

Mr. Smith: Failed to seek an affidavit? Yes, I have not sought an affidavit.

...

Court: Every attorney that's appeared in front of me today has told me why I need to make sure that the rules are followed and I need to know why I shouldn't follow the rules for you here today.

Mr. Smith: Again, I did not realize I needed to file an affidavit . . . .

...

Court: Mr. Smith, I'm going to give you 30 days to get an affidavit. If you do not comply with the affidavit requirement this case will be dismissed with prejudice which means that you cannot file.

At this point, sir, you have – you are on notice that this affidavit is required . . .

Trans. of Record, 4:2–10; 4:14–17; 5:10–18; 6:12–18 (Apr. 29, 2016).

**B. Appellant never raised the purported "common knowledge" exception under S.C. Code Ann. § 15–36–100(2) and, therefore, failed to preserve this argument on appeal.**

On appeal, Appellant contends in both "initial" briefs that the lower court "requires a Judgement [sic] as to whether the 'subject matter that lies within the ambit of common knowledge and experience, so that no special learning is needed to evaluate the conduct of the defendant." See, e.g., Appl. Initial Brief, p. 11 (filed Dec. 19, 2016). The Transcript of Record, and, indeed, the entire record on appeal, is absent of any indication that Appellant raised this argument to the lower court. Appellant failed to "enable the lower court to rule properly after it has considered all relevant facts, law, and arguments" and, therefore, did not preserve this issue for appellate review. Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000); Doe v. Doe, 370 S.C. 206, 212, 624 S.E.2d 51, 54–55 (Ct. App. 2006).<sup>4</sup>

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<sup>4</sup> Respondent respectfully contends that, even if Appellant's argument was preserved, S.C. Code Ann. § 15–36–100(2) does not carry the day. Section (2) operates as an exception to only "pleaded specification[s] of negligence"—that is, an expert affidavit is not required to support specific allegations of ordinary negligence in a plaintiff's complaint, but still requires an expert affidavit specifying at least one act or omission constituting professional negligence in an action for damages against a licensed professional.

**II. APPELLANT HAS FAILED TO DEMONSTRATE THAT THE TRIAL COURT'S DECISION WAS BASED ON ANY ALLEGATIONS CONTAINED IN APPELLANT'S INITIAL BRIEFS**

Appellant seems to contend that the trial court improperly considered statements regarding the timeframe of healthcare treatment in question and the date of service for the present action, and strenuously argues that Mr. Kessler (not a party to the present action) has some bearing on the lower court's decision. First and foremost, Appellant failed to raise any similar contention to the lower court, and provided nothing properly in the Record on Appeal to support his contentions. Moreover, Appellant ignores that the lower court's Order granting Respondents' Motion to Dismiss was based solely on Appellant's failure to file an expert affidavit as required by S.C. Code Ann. § 15-36-100, and did not even reference Respondents' statute of limitations argument. See generally Order of Dismissal (filed June 13, 2016).<sup>5</sup> Therefore, Appellant has failed to preserve the issue for appeal, and failed to demonstrate that the issue was actually ruled on by the lower court. Doe v. Doe, 370 S.C. 206, 212, 624 S.E.2d 51, 54 (Ct. App. 2006).<sup>6</sup>

Appellant has failed to demonstrate that he raised, at the trial court level, "relevant facts" that Judge Harrington failed to consider; that he "tried repeatedly to present the facts involving intentional deception, misrepresentation, breach of contract, breach of confidentiality, acting outside the scope of agreement, [and] breach of confidentiality among others"; or that he raised any purported exception to the affidavit requirement under S.C. Code Ann. § 15-36-100(2).

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<sup>5</sup> Appellant references numerous documents and materials, including a "Strategies to Assist Valued Employees" manual, a "Standards of Practice" purportedly created by the Employee Assistance Certification Commission, a purported HIPAA Release, and a purported statement by Jonathon Kessler. See generally Appl. Initial Brief, Exs. 6, 7, 9, 10 (served Nov. 17, 2016). Rule 210 SCACR states that the Record on Appeal "shall not [] include matter[s] which [were] not presented to the lower court or tribunal." None of these documents or materials referenced by Appellant on appeal were filed with the lower court or presented during the motion hearing and, therefore, must not be part of the Record on Appeal.

<sup>6</sup> Respondent maintains its contention that Appellant failed to timely file the present action, and all claims were barred by the three-year statute of limitations, even if this Honorable Court applied the "tolling" provisions under S.C. Code Ann. § 15-36-100.

Appl. Initial Brief, p. 10 (filed Dec. 19, 2016). Since Appellant did not raise these issues to the trial court, he failed to preserve them on appeal, and this Honorable Court should affirm the lower court's dismissal with prejudice.

**III. APPELLANT'S ARGUMENTS THAT THE TRIAL COURT FAILED TO CONSIDER PURPORTED FACTUAL EVIDENCE IS WITHOUT MERIT BECAUSE APPELLANT FAILED TO SATISFY THE EXPERT AFFIDAVIT REQUIREMENT CONTAINED IN S.C. CODE ANN. § 15-36-100**

In his Complaint, Appellant alleged, in part, breach of duty to obtain adequate history; breach of agreement to maintain confidentiality; and breach of duty to obtain peer consultation. Throughout the motion hearing, Appellant repeatedly claimed that Respondents were outside the scope of their respective "professional responsibilities" and similarly claimed that he was unaware that he had to file an expert affidavit. See generally Trans. of Record (Apr. 29, 2016). On appeal, Appellant now contends (for the first time) that the trial court did not consider relevant facts when granting Respondents' Motion to Dismiss.

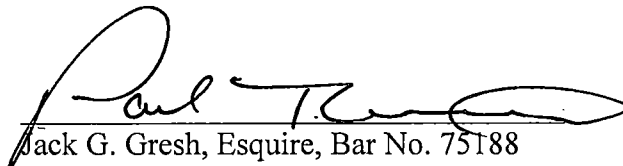
As Judge Harrington correctly stated, "[w]e don't even get there." Trans. of Record, 6:4 (Apr. 29, 2016). Appellant's Complaint fails, as a matter of law, under S.C. Code Ann. § 15-36-100 because it alleges professional negligence without a supporting expert affidavit. Appellant was made aware of this deficiency when Respondents filed their initial Motion to Dismiss on January 15, 2016. Subsequently, Appellant was told in no uncertain terms by the lower court that he needed to file an expert affidavit within 30 days of the hearing, yet failed to do so. Appellant's recitation of numerous, unsupported facts, do not correct his otherwise defective filing. The lower court properly declined to entertain a discussion on the facts of the case, particularly where those facts were not presented along with any documents Appellant now seeks to improperly include in the Record on Appeal.

CONCLUSION

The record unquestionably demonstrates that Appellant was provided ample opportunity and time to file an expert affidavit supporting his claims for professional negligence, as required by S.C. Code Ann. § 15-36-100. Appellant failed to obtain an expert affidavit after Respondents served their Motion to Dismiss on this basis in January 2016. Moreover, Appellant failed to comply with the lower court's Order requiring him to file an expert affidavit within 30 days of the hearing. Appellant never raised any arguments that his Complaint did not require an accompanying affidavit (in fact, he acknowledged that he simply did not know an affidavit was required), or any of the other arguments espoused in his initial briefs. As a result, Appellant failed to properly preserve these issues and arguments for appeal.

Based on the foregoing, Respondents respectfully request this Honorable Court to affirm the lower court's Order of Dismissal, dismissing all claims against Respondents with prejudice.

Respectfully submitted,



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*Attorneys for Respondents Sarah Gainey and SAVE Inc.*

Dated: January 18, 2017

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

The Honorable Kristi Lea Harrington, Circuit Court Judge

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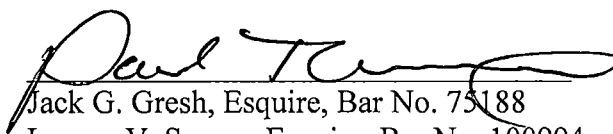
Respondents.

**PROOF OF SERVICE**

I certify that I have served the Initial Brief of Respondents and Respondents' Designation of Matters to be Included in the Record on Appeal upon Appellant by mailing a copy of the same via FedEx Overnight on January 18, 2017, addressed to Tracy Smith, Pro Se Appellant, to 1510 Swartz Fairbanks Road, Monroe, LA 71203 (Appellant's last known address contained on Appellant's Initial Brief).

**{SIGNATURE TO FOLLOW}**

Respectfully submitted,



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January 18, 2017

**VIA FEDEX OVERNIGHT DELIVERY**

The Honorable Jenny Abbott Kitchings  
Clerk of Court  
South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, South Carolina 29211

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JAN 19 2017

**SC Court of Appeals**

Re: Tracy Smith v. Sarah Gainey and SAVE, Inc.  
Court of Appeals Case No.: 2016-001379  
Lower Court Case No.: 2015-CP-10-6819

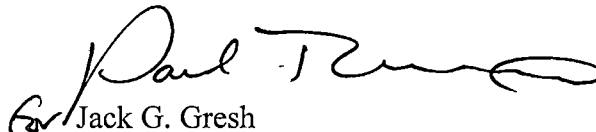
Dear Ms. Kitchings:

Enclosed please find the original and one copy of Respondents' Initial Brief with the Proof of Service in the above-referenced matter.

We have enclosed an additional copy of the Respondents' Initial Brief, and would appreciate your returning the filed copy to our office in the enclosed self-addressed stamped envelope.

Thank you for your assistance in this matter. If you have any questions or concerns, please do not hesitate to contact our office.

Sincerely yours,

  
for Jack G. Gresh

JGG/PT/tca

cc: Tracy Smith, *pro se* Appellant

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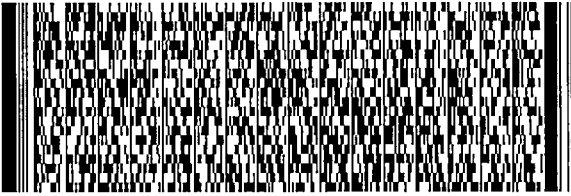
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TO **HON. JENNY ABBOTT KITCHINGS**  
**THE SOUTH CAROLINA COURT OF APPEALS**  
**1220 SENATE STREET**

**COLUMBIA SC 29201**

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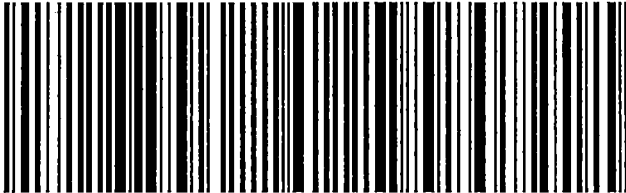
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