

1 THE STATE OF SOUTH CAROLINA IN THE COURT OF APPEALS

2
3 APPEAL # 2016-001379 FROM CHARLESTON COUNTY

4
5 COURT OF COMMON PLEAS

6
7 CIVIL ACTION 2015-CP-10-6819

8
9 ORDER OF DISMISSAL

RECEIVED

JAN 27 2017

SC Court of Appeals

10
11 HONORABLE KRISTI LEE HARRINGTON PRESIDING JUDGE

12
13 Tracy Smith,

Appellant

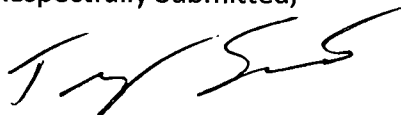
14 v.

15 Sarah Gainey SAVE, Inc.

Respondent

16
17 **APPELLANT'S (PRELIMINARY) RESPONSE TO INITIAL BRIEF OF RESPONDENTS**

18
19
20
21 Respectfully Submitted,

22 

23 Tracy Smith

24 C/O 4351 Park Island Road,

25 Hollywood, SC 29449

1 Ms. Spears and Mr. Gresch have artfully and intentionally omitted relevant facts and law throughout
2 these proceedings. **Defense counsel purposefully misstates dates of services rendered by Defendant,**
3 **purposefully ignores causes of action based on deceptive business practices, and purposefully omits**
4 **relevant law 15.36.100(2) in influencing and misleading Judge Harrington that (in her words) “What**
5 **we are *only* here for today is the law requires that you file an affidavit when you allege medical or**
6 **professional malpractice.” Mr. Gresch continues this pattern of misleading statements and omission**
7 **of relevant facts in his INITIAL BRIEF OF RESPONDENTS.**

8 **■ Regarding Respondent’s Argument 1 A:**

9 On Page 5 of INITIAL BRIEF OF RESPONDENTS Mr. Gresch (who was not present at the motion hearing)
10 falsely states:

11 “During the motion hearing, Appellant was provided ample opportunity to offer arguments he
12 now raises on appeal.”

13 **In his brief Mr. Gresch (on Page 5) intentionally omits Plaintiff’s sentence which was tersely interrupted**
14 **by Judge Harrington. See transcript beginning at the bottom of page 3 through page 4: (the dashes on**
15 **page 4 line 1 of the transcript indicate where Judge Harrington interrupted Plaintiff) .**

16 **PLAINTIFF: First of all, I contend that Ms. Gainey has acted outside the scope of her --**

17 **THE COURT: I understand. What we are *only* here for today is the law requires that**
18 **you file an affidavit when you allege medical or professional malpractice. So it is a simple**
19 **issue. If you do not have an affidavit the law requires that I must dismiss this case. Do you**
20 **have an affidavit?**

21 Plaintiff was ***repeatedly interrupted by Judge Harrington*** who refused to hear plaintiff’s rendition of the
22 case and causes of action and essentially ***tersely threatened to dismiss the case unless Pro Se Plaintiff***
23 ***agreed to obtain an expert affidavit.*** Plaintiff did not and does not believe he needs an expert affidavit
24 to be heard on the facts in this matter as these facts and relevant law are easily understood by
25 laypersons and involve issues related to Ms. Gainey and SAVEEAP’s actions and omissions in her (scope)
26 capacity as a Privately Certified Employee Assistance Professional. **Ms. Gainey has no State Issued**
27 **License to act as an EAP.**

28

1 **■ Regarding Respondent’s Argument I B**

2 Appellant was not allowed to “enable the lower court to rule properly after it has considered all relevant
3 facts, law, and arguments” as Judge Harrington persisted to insist that:

4 **“What we are *only* here for today is the law requires that you file an affidavit when you allege
5 medical or professional malpractice.”**

6 Further, Respondent has not acknowledged or addressed Appellant assertion that Lauren Spears had an
7 obligation to provide a complete rendition of the law she referenced in her Motion To Dismiss:

8 *A Lawyer must not fail to disclose to the tribunal legal authority in the controlling jurisdiction
9 known to the lawyer to be directly adverse to the position of the client and not disclosed by
10 opposing counsel;*

11 And that:

12 *While the adversarial system contemplates that each party will present its case in the most favorable
13 light possible it is not clear that this principle extends so far as to permit a lawyer to distort the truth
14 intentionally by the selective omission of material information.*

15 And that:

16 *Failure to make a disclosure may be the equivalent of an affirmative misrepresentation.*

17 **■ Regarding Respondent’s Argument II**

18 On Page 7 of Respondent’s Initial Brief Mr. Gresch states:

19 “Moreover, Appellant ignores that the lower court’s Order granting Respondents’ Motion to
20 Dismiss was based solely on Appellant’s failure to file an expert affidavit as required by S.C. Code
21 Ann. Sec 15-36-100, and did not even reference Respondents’ statute of limitations argument.”

22 Plaintiff alerted the court that defense intended to influence the Judge by misstating dates in their
23 motion to dismiss in the Hearing. Plaintiff States starting on page 6, line 20:

24 “– and I would also like to point out that she has falsely stated the dates of her service”

25 To which the Judge tersely replied beginning on page 6, line 22:

26 “And all those things could be true, Mr. Smith. The problem is that you may not be able to
27 present those because you haven’t followed the rules. You ***again*** have not done what you are
28 supposed to do, but are alleging what she – what you believe she has not done.”

29 The tribunal should be ALERT that the order of dismissal written by Defense counsel and signed by Judge
30 Harrington deceptively states:

1 "These allegations stem from counseling sessions Plaintiff received from Defendant Sarah
2 Gainey on or around October of 2012."

3 This statement is preceded by and "bootstrapped" from Lauren Spears Esquire knowingly false assertion
4 stated in open court that:

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

10 The oral statement above alludes to and is preceded by the following written statement contained in
11 Defense Motion To Dismiss:

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

17 Again, the Order of Dismissal written by defense counsel states:

18 "These allegations stem from counseling sessions Plaintiff received from Defendant Sarah
19 Gainey on or around October of 2012."

20

21 Further, this order also falsely states:

22 ".....in her capacity as a licensed professional counselor licensed in the State of South
23 Carolina...."

24 Plaintiff repeatedly tried to tell to the court that Sarah Gainey acted outside the scope of her
25 professional and contractual obligations. Sarah Gainey contracted and acted as a **Privately Certified**
26 **Employee Assistance Professional (with standards that differ markedly from those of a licensed**
27 **professional counselor and are clearly understandable by laypersons)**. Among other breaches Ms.
28 Gainey failed to adequately disclose and manage the dual obligations she owed to Employer and
29 Employee as required of a Privately Certified Employee Assistance Professional. She effectively acted on
30 behalf of and advocated for Showa Denko Carbon her long-time Client in Fact as an arm of the HR
31 department to the detriment of Plaintiff. She performed no clinical tests and refused to release records
32 to Plaintiff upon request so that he could obtain a second opinion.

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

34 "Plaintiff filed this professional negligence action" (See Appellant Exhibit 8).

