

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL # **2016-001379** FROM CHARLESTON COUNTY
COURT OF COMMON PLEAS

CIVIL ACTION 2015-CP-10-6819

ORDER OF DISMISSAL

HONORABLE KRISTI LEE HARRINGTON PRESIDING JUDGE

Tracy Smith,

Appellant

v.

Sarah Gainey SAVE, Inc.

Respondent

REPLY BRIEF OF APPELLANT

Tracy Smith
Pro Se Appellant
1510 SWARTZ FAIRBANKS ROAD
MONROE, LA 71203
318 233 8572

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SC Court of Appeals

TABLE OF CONTENTS

26		
27	TABLE OF AUTHORITIES	PAGE 4
28	STATEMENT OF ISSUES ON APPEAL	PAGE 6
29	STATEMENT OF CASE	PAGE 8
30	ARGUMENTS	
31	1. THE JUDGE ERRED AND ABUSED HER DISCRETION IN DISMISSING WITH	
32	PREJUDICE ALL CLAIMS PURSUANT TO RULE 12(B)(6).	PAGE 12
33	2. APPELLANT WAS NOT PROVIDED AMPLE HEARING OF FACTS AND	
34	ARGUMENT BY THE TRIAL COURT DURING THE MOTION HEARING THAT	
35	WOULD ENTITLE THE PLAINTIFF TO RELIEF UNDER MULTIPLE THEORIES	
36	OF THE CASE.	PAGE 14
37	a. Judged exhibited bias, condescension, and prejudice towards pro se plaintiff	
38	which influenced her decision to refuse to adequately consider plaintiff's claims	
39	that defendant intentionally acted outside the scope of agreement and contractual	
40	duties as a privately certified employee assistance professional.	
41	3. THE COURT ERRED IN DISMISSING WITH PREJUDICE APPELLANT'S CLAIMS	
42	DUE TO APPELLANT'S FAILURE OF AN ALLEGED REQUIREMENT (ALLEGED	
43	BY DEFENSE COUNSEL) THAT APPELLANT MUST PROVIDE AN EXPERT	
44	AFFIDAVIT ALONG WITH HIS COMPLAINT ALLEGING BREACH OF	
45	CONTRACT AND PERSONAL INJURY.	PAGE 18
46	a. The trial court erred by relying on defense counsel's incomplete statement of	
47	relevant law and purposeful omission of common knowledge exception contained	
48	in SC 15-36-100(C)(2).	
49	4. THE COURT ERRED IN SIGNING AN ORDER OF DISMISSAL WITH PREJUDICE	
50	WRITTEN BY DEFENSE COUNSEL RELYING ON A PURPOSELY INCOMPLETE	
51	AND MISLEADING STATEMENT OF LAW AND RELEVANT STATUTE AND	
52	<u>INCLUDING MISLEADING STATEMENTS OF FACTS WITHOUT</u>	
53	<u>EVIDENTIARY SUPPORT</u> STATED BY DEFENSE COUNSEL AND	
54	PREDICATED ON JUDGE HARRINGTON'S ERRONEOUS DETERMINATION	
55	DURING THE HEARING THAT " <i>WHAT WE ARE ONLY HERE FOR TODAY IS</i>	
56	<i>THE LAW REQUIRES THAT YOU FILE AN AFFIDAVIT WHEN YOU ALLEGE</i>	
57	<i>MEDICAL OR PROFESSIONAL MALPRACTICE.</i> " AND " <i>IF YOU DO NOT HAVE</i>	
58	<i>AN AFFIDAVIT THE LAW REQUIRES THAT I MUST DISMISS THIS CASE.</i> "	
59		PAGE 21

5. THE COURT ERRED BY FAILING TO GRANT A HEARING ON PRO SE APPELLANT'S MOTION TO COMPEL SARAH GAINNEY TO RELEASE TREATMENT RECORDS SO THAT PLAINTIFF COULD OBTAIN THE ALLEGEDLY REQUIRED EXPERT AFFIDAVIT. PAC

PAGE 27

CONCLUSION

PAGE 28

TABLE OF AUTHORITIES

68	
69	Rydde v. Morris, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009)
70	Flateau v. Harrelson, 355 S.C. 197, 202, 584 S.E.2d 413, 416 (Ct.App.2003).
71	BROUWER v.SISTERS OF CHARITY PROVIDENCE HOSPITALS 409 S.C. 514 (2014) 763
72	S.E.2d 200
73	SC Code Section 15-36-100(C) (2)
74	Red Cardinal Fifteen, Inc. v. Chang, 954 F. Supp. 1111 (DCSC 1995).
75	Williams-Garret v. Murphy, 106 F. Supp.2d 834 (DCSC 2000) which notes that, “a party is
76	entitled to plead alternative theories of relief, but simply may not recover for both.”
77	SCRCP Rule 56(c)
78	Payne v. Western & Atlantic Railroad Co., 81 Tenn. 507, 519-520, 1884 WL 469 at *6 (Sep.
79	term 1884)
80	Evening Post Pub.Co.. v. Berkely County Sch. Dist. 392 S.C. 76,81,708 S.E. 2d 745, 748(2011)
81	Baughman v. Am. Tel. & Tel. Co.306 S.C. 101, 115, 410 S.E. 2d 537, 545 (1991)
82	Celotex Corp. v. Catrett 477 U.S. 317, 106 S. Ct. 2548 (1986)
83	USAA Property & Cas. Ins. Co. v. Clegg 377 S.C. 643, 653, 661 S.E. 2d 791, 796 (2008)
84	CANON 2 RULE 2.6 ENSURE RIGHT TO BE HEARD
85	CANON 2 RULE 2.10 (2) PERSONAL BIAS
86	FRCP 11 provides that a district court may sanction attorneys or parties who submit pleadings
87	for an improper purpose or that contain frivolous arguments or arguments that have no
88	evidentiary support.
89	CANDOR TOWARD THE TRIBUNAL (a) A lawyer shall not knowingly:

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

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

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

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

Statement of Issues on Appeal

As a cursory matter, Judge Harrington essentially *tersely threatened to dismiss the case unless Pro Se Plaintiff agreed to obtain an expert affidavit*. Plaintiff was *tersely interrupted by Judge Harrington* who refused to hear plaintiff's rendition of the case and causes of action.

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

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

THE COURT: (interrupting Pro Se Plaintiff) I understand. What we are only here for today is the law requires that you file an affidavit when you allege medical or professional malpractice. So it is a simple issue. If you do not have an affidavit the law requires that I must dismiss this case. Do you have an affidavit?

Plaintiff did not and does not believe he needs an expert affidavit to be heard on the facts in this matter as these facts and relevant law are easily understood by laypersons and as stated in the complaint involve Ms. Gainey and SAVEEAP's misrepresentations, actions, and omissions in her capacity (scope of services) as a Privately Certified Employee Assistance Professional. **Ms. Gainey has no State Issued License to act as an EAP** and issues on appeal include:

- 1) Whether Judge Harrington erred in dismissing with prejudice all claims pursuant to Rule 12(b)(6).
- 2) Whether Appellant was provided a hearing of facts and argument to the trial court that would entitle the plaintiff to relief under any theory of the case.
- 3) Whether Judge Harrington erred in dismissing with prejudice Appellant's claims due to Appellant's failure of an alleged requirement (alleged by defense counsel Lauren Spears) that

130 Appellant must provide an expert affidavit along with his complaint alleging breach of contract
131 and personal injury.

132 4) Whether the Court erred in signing an Order of Dismissal with Prejudice written by Defense
133 Counsel relying on a purposely incomplete and misleading statement of law and relevant statute
134 and including misleading statements of facts stated by Defense counsel and predicated on Judge
135 Harrington's erroneous determination during the hearing that "What we are only here for today is
136 the law requires that you file an affidavit when you allege medical or professional malpractice."
137 And "If you do not have an affidavit the law requires that I must dismiss this case."

138

139 5) Whether the court erred by failing to grant a hearing on pro se appellant's motion to compel
140 Sarah Gainey to release treatment records so that plaintiff could obtain the allegedly required
141 expert affidavit.

STATEMENT OF THE CASE

143 On December 17, 2015 Pro Se Plaintiff filed Complaint alleging **Breach of Contract and**
144 **Personal Injury** against Sarah Gainey, SAVE, Inc. also known as SAVEEAP citing specifically
145 Breach Of Duty of Care, Misrepresentation, Breach Of Contract, Breach Of Fiduciary Duty,
146 Intentional Infliction of Emotional Distress basing much of his assertions of defendant's
147 obligations of the duties cited in the Code of Conduct published in laymen's terms by the
148 Private organization that offers certification as an "Employee Assistance Professional". Sarah
149 Gainey, who plaintiff believed to be the owner and president of SAVE Inc. (also known as
150 SAVEEAP) is certified as a CEAP. As a mandate of plaintiff's employment "agreement",
151 plaintiff received "counseling" for "occupational problems" resulting from his employment with
152 Showa Denko by SAVEEAP.

153 Plaintiff initially received "counseling" from Sarah Gainey of SAVE Inc. Despite
154 representations of the importance of confidentiality in printed literature and at SAVEEAP.COM
155 Sarah Gainey requested plaintiff sign a release document to allow her to verbally discuss matters
156 with Plaintiff's coworkers. Plaintiff decided against this agreement at this early stage of
157 "counseling". Sarah Gainey subsequently ceased personal "counseling" and instead referred
158 Plaintiff to Jonathon Kessler who was either a subcontractor or employed by SAVE, Inc. (AKA
159 SAVEEAP) or employed by Sarah Gainey. Pro Se Appellant filed a separate lawsuit against
160 Jonathon Kessler on Dec 17, 2015 (Tracy Smith v. Jonathon Kessler, Civil Action no. 2015-CP-
161 10-06820, Court of Common Pleas, Charleston County) as appellant has reason to believe that
162 SAVEEAP and Sarah Gainey would attempt to argue that Mr. Kessler was not employed or
163 authorized in his actions by SAVEEAP while he acted as an Employee Assistance Professional
164 through December 18, 2012.

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

172 December 18, 2012. Plaintiff cited numerous causes of action in his suit against Sarah Gainey
173 and SAVE inc. AKA SAVEEAP and included specific factual assertions including:

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

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

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

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

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

189 Defendant filed a Motion for Summary Judgement alleging that Plaintiff was barred from
190 proceeding due to SC 15-36-100 on Jan. 15, 2016. Twelve days later on Jan 27, 2016 Defendant
191 file an AMENDED NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFF'S
192 COMPLAINT stating on page 3 that Plaintiff Has Failed to Comply with the Statute of
193 Limitations.

194 This Amended Motion, the Oral Argument presented by Lauren Spears representing Defendant,
195 and the Order of Dismissal drafted by Defense counsel state or imply that SAVE, Inc. (aka
196 SAVEEAP):

197 *"The allegations contained in Plaintiff's Complaint stem from counseling provided by*
198 *Defendants in September and October of 2012. As pursuant to South Carolina law,*

199 *Plaintiff's Complaint must have been filed on or before three years from the last date of*
200 *treatment, omission or operation giving rise to the cause of action, or, October 2015.*
201 *Plaintiff files his Complaint on December 18, 2015."*

202 Plaintiff alerted the court that defense has misstated dates in their motion to dismiss in the
203 Hearing yet the Order of Dismissal written by defense counsel and signed by Judge Harrington
204 states:

205 *"These allegations stem from counseling sessions stem from counseling sessions Plaintiff*
206 *received from Defendant Sarah Gainey on or around October 2012."*

207
208 The Order of Dismissal written by defense counsel and signed by Judge Harrington also contains
209 the false clause:

210 *"Plaintiff filed this professional negligence action"*

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

214 The order of dismissal makes no reference to Sarah Gainey's or SAVEEAP certification status
215 and representations or contractual obligations as a Certified Employee Assistance Professional
216 and no mention of an Employee Assistance Program and associated obligations.

217 Pro Se Appellant made a good faith effort to obtain the expert affidavit the court (incorrectly)
218 ruled was required from Julie Risher of Holy City Counseling. Pro Se Appellant met with and
219 paid Julie Risher of Holy City Counseling over three sessions (which Ms. Risher stated were
220 required for her to write an expert affidavit). However, on the third session Ms. Risher stated
221 that she would not write this affidavit unless Pro Se Appellant obtained records from Sarah
222 Gainey aka SAVEEAP for her to review.

223 Pro Se Appellant went by Sarah Gainey's office and asked Ms. Gainey to provide these records.
224 Ms. Gainey refused stating that Pro Se Appellant had signed a release and that she would not
225 provide these records.

226 Appellant then proceed to file the Motion to Compel release of these records as shown in Exhibit
227 5. The court never heard or ruled on this motion.

228

229 Upon notice of dismissal Pro Se Plaintiff filed a notice to appeal with the South Carolina Court
230 of Appeals citing Ms. Gainey's refusal to release any "medical treatment records", causes of
231 actions related to deceptive business practices not addressed by court, and questioning the
232 constitutionality of a statute which, as-applied, denies plaintiff of his constitutional rights to be
233 heard.

234 Upon receiving transcript plaintiff wrote initial brief that broadly asserts that **Defense counsel**
235 **exhibited a Pattern of Purposely False Statements and Omissions of relevant law to**
236 **influence Tribunal** and more specifically cites purposeful omissions of relevant law
237 **15.36.100(C)(2)** , purposeful misstatement of dates of services rendered by SAVEEAP, and
238 purposefully ignoring causes of action including deceptive business practices, and cites
239 specific instances of trial court error and bias.

240

Appellant's Legal Argument 1

Whether Judge Harrington erred in dismissing with prejudice all claims pursuant to Rule 12(b)(6).

Citing Supreme Court of South Carolina in **BROUWER v. SISTERS OF CHARITY PROVIDENCE HOSPITALS:**

Standard of Review

"On appeal from the dismissal of a case pursuant to Rule 12(b)(6), an appellate court applies the same standard of review as the trial court." Rydde v. Morris, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). "That standard requires the Court to construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case." Id. (internal quotations omitted). The Court may sustain the dismissal when "the facts alleged in the complaint do not support relief under any theory of law." Flateau v. Harrelson, 355 S.C. 197, 202, 584 S.E.2d 413, 416 (Ct.App.2003).

Appellant asserts that the facts alleged and the inferences reasonably deducible from the pleadings and the complaint support relief under several legal theories including Breach of Contract, Failing to Maintain Client Confidentiality, Failing to Obtain Peer Consultation, Misrepresentation, and deceptive, unfair trade practices all of which are within the comprehension of laypersons and the subject matter is of common knowledge or experience so that no special learning is needed to evaluate the defendant's conduct.

Citing Supreme Court of South Carolina in **BROUWER v. SISTERS OF CHARITY PROVIDENCE HOSPITALS:**

27 S.C. Jur. Med. & Health Prof'ls § 10 (2014) (footnotes omitted); Smith v. United States, 119 F.Supp.2d 561 (D.S.C. 2000). "A plaintiff in a medical malpractice case must establish by expert testimony both the standard of care and the defendant's failure to conform to the required standard, unless the subject matter is of common

268 *knowledge or experience so that no special learning is needed to evaluate the*
269 *defendant's conduct."*

270

271 **Further, appellant asserts that the court did NOT construe the complaint in a light**
272 **reasonably favorable to the non-moving party and indeed exhibited considerable prejudice**
273 **and contempt for Pro Per Appellant's claims for relief.**

274 As Respondent notes, throughout the motion hearing Plaintiff attempted to explain to Judge
275 Harrington that Defendant acted outside the scope of her professional responsibilities as a
276 Privately Certified Employee Assistance Professional.

277 "Defendant is outside the scope of her professional responsibilities" **(Please see Exhibit**
278 **7 EAP Client Bill of Rights)**

279 To which the Judge tersely replied:

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

284

285

Appellant's Legal Argument 2

Whether Appellant was provided ample opportunity to offer facts and argument to the trial court that would entitle the plaintiff to relief under any theory of the case.

Pro Se [Appellant] Plaintiff asserts that he should not be faulted for advancing alternative theories of relief. See generally, *Red Cardinal Fifteen, Inc. v. Chang*, 954 F. Supp. 1111 (DCSC 1995). See also, *Williams-Garret v. Murphy*, 106 F. Supp.2d 834 (DCSC 2000) which notes that:

“a party is entitled to plead alternative theories of relief, but simply may not recover for both.”

As conceded by Respondent (Defendant) Pro Per Appellant's complaint includes specific allegations of misconduct including Misrepresentation, and Failure to comply with Contractual Obligations and observe Clients Rights by Sarah Gainey and SAVE Inc. (also known as SAVEEAP).

However, when Pro Se Appellant [Plaintiff] began to present facts related to Defendant acting outside the Scope of her Professional Responsibilities judge Harrington interrupted appellant stating:

THE 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 malpractice. So it is a simple issue. If you do not have an affidavit the law requires that I must dismiss this case. Do you have an affidavit?

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

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

315 **THE COURT: (Interrupting Plaintiff) I understand. What we are *only* here**
316 **for today is the law requires that you file an affidavit when you allege medical or**
317 **professional malpractice. So it is a simple issue. If you do not have an affidavit the**
318 **law requires that I must dismiss this case. Do you have an affidavit?**

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

326 **Essentially, Defense Counsel relies on "circular reasoning" and intentionally deceptive**
327 **rendition of events in arguing that this dismissal with prejudice should not be overturned.**
328 **(See Defense Initial Reply page 8 Item III) This "circular reasoning" would prevent the**
329 **Plaintiff from presenting facts to the court because he hasn't filed an expert affidavit and**
330 **then claim that he cannot rely on such facts that would prove no expert affidavit is needed**
331 **in this appeal because such facts have not been presented to the court. Defense argument**
332 **that dismissal should be affirmed before relevant evidence has been heard by a competent**
333 **court is frivolous, a violation of public policy, and a violation of victim's rights guaranteed**
334 **by the Federal Constitution of the United States.**

335 As Respondent notes, throughout the motion hearing Plaintiff attempted to explain to Judge
336 Harrington that Defendant acted outside the scope of her professional responsibilities as a
337 Privately Certified Employee Assistance Professional.

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

340 To which the Judge tersely replied:

341 “We don’t even get to go there. I don’t know how long you have been here, the last
342 gentleman (**referring to an inmate in an orange jumpsuit**) I explained about the rules
343 of basketball. I’m not sure, I’m not very computer savvy so I can’t even make an
344 attempt, I will not even make an attempt to do an IT analogy.”

345 Appellant asserts that even without considering 15-36-100(C)(2) (The Common Knowledge
346 Exception to Affidavit Requirements) **Ms. Gainey and SAVEEAP have no License issued by**
347 **the State to act as a Privately Certified Employee Assistance Professional and should**
348 **therefore not be protected from legal claims based on her actions or omissions that occur**
349 **when she is acting as an EAP or supervising another individual who is not a professional**
350 **counselor but purports to be an Employee Assistance Professional authorized to render**
351 **services by SAVEEAP.**

352 Mr. Gresch states at the bottom of Page 8:

353 “The lower court properly declined to entertain a discussion on the facts of the
354 case, particularly where those facts were not presented with any documents Appellant
355 now seeks to improperly include on the Record of Appeal.”

356 Appellant asserts that Judge Harrington indeed was unwilling to consider any facts or evidence
357 of the case as she was misled by Defense Counsel Lauren Spears purposely prejudicial
358 misstatements of dates and incomplete rendition of relevant law omitting of the common
359 knowledge exception 15-36-100(C)(2) to expert affidavit requirements to apparently believe
360 unequivocally that:

361 *“What we are only here for today is the law requires that you file an affidavit when you*
362 *allege medical or professional malpractice. So it is a simple issue. If you do not have*
363 *an affidavit the law requires that I must dismiss this case. Do you have an affidavit?”*

364 Appellant asserts that the judge cannot make such a legal determination without
365 considering particular facts of the case:

366 *Carver v. Med. Soc’y of S.C., 286 S.C. 347, 350, 334 S.E.2d 125, 127 (Ct.App.1985);*
367 *David v. McLeod Reg’l Med. Ctr., 367 S.C. 242, 248, 626 S.E.2d 1, 4 (2006). “The*

368 *application of the common knowledge exception in proving negligence in a case*
369 *involving medical malpractice depends on the particular facts of the case."*

370

Appellant's Legal Argument 3

Judge Harrington erred in dismissing with prejudice Appellant's claims due to Appellant's failure of an alleged requirement (alleged by defense counsel) that Appellant must provide an expert affidavit while interrupting plaintiff and HEARING NO FACTS OF THE CASE and ignoring claims of breach of contract and misrepresentation regarding the scope of Defendant's services.

Appellant asserts that it is a question of fact whether or not Sarah Gainey intentionally or negligently violated the Scope of her professional responsibilities. Indeed, Pro Se Appellant asserts that Sarah Gainey misrepresented (either intentionally or negligently) her services and organization's skills in her failed attempt to reconcile her dual obligations to Showa Denko (Plaintiff's employer and SAVEEAP's long term client) and Tracy Smith (Employee and Plaintiff seen by SAVEEAP through December 18, 2012). The trial court erred by not hearing and considering facts relevant to such a determination of intentional or negligent breach of agreed upon scope of professional services or contractual responsibilities.

However, (to address Defense assertions) under an alternative theory of relief presuming only a claim for professional negligence:

Citing Supreme Court of South Carolina in **BROUWER v. SISTERS OF CHARITY PROVIDENCE HOSPITALS:**

27 S.C. Jur. Med. & Health Prof'ls § 10 (2014) (footnotes omitted); Smith v. United States, 119 F.Supp.2d 561 (D.S.C. 2000). "A plaintiff in a medical malpractice case must establish by expert testimony both the standard of care and the defendant's failure to conform to the required standard, unless the subject matter is of common knowledge or experience so that no special learning is needed to evaluate the defendant's conduct."

Appellant asserts that the failure to obtain an adequate history and understanding of Plaintiff's [Appellant's] work environment, Breaching the duty of care "to use reasonable care in providing assistance and treatment" by "Intentionally raising her voice and using accusatory language during counseling"; Failing to maintain client confidentiality; and failing to obtain peer

399 consultation and seek professional consultation with appropriate parties and agencies in her
400 efforts to reconcile dual obligations to Appellant and Appellant's employer is clearly within the
401 comprehension of laypersons and that no special learning is needed to evaluate the defendant's
402 conduct. Further, determining the necessity of an expert affidavit requires knowledge of
403 particular facts of the case which the Judge refused to hear.

404 *Carver v. Med. Soc'y of S.C.*, 286 S.C. 347, 350, 334 S.E.2d 125, 127 (Ct.App.1985);
405 *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 248, 626 S.E.2d 1, 4 (2006). "The
406 application of the common knowledge exception in proving negligence in a case
407 involving medical malpractice depends on the particular facts of the case."

408 Appellant asserts that Judge Harrington ruled erroneously that an expert affidavit was
409 required without hearing or considering the text of the complaint or facts of the case
410 stating.

411 "What we are *only* here for today is the law requires that you file an affidavit when
412 you allege medical or professional malpractice. So it is a simple issue. If you do not
413 have an affidavit the law requires that I must dismiss this case."

414 Appellant would direct the court to review page 8 of the Hearing Transcript:

415 The court: As of this point, sir, you have—you are on notice that this affidavit is
416 required. And as I indicated to you, and to several of the other people who have
417 appeared in front of me, you are entitled to represent yourself. Most of us can read
418 the law and get a basic understanding of it. You may have had really good
419 instructors who taught you business law. But just as I can turn my computer on or
420 off, but when I really have trouble I call the professional IT guy up in Columbia to
421 help me.

422 Mr. Smith: I'm a professional IT guy.

423 The court: "So I can -- I would take that however you take it and it may be that you
424 need to hire somebody with a little more savvy in the legal world who has had a few
425 more classes than a couple of business law"

426 APPELLANT CONTENDS THAT THIS STATEMENT BY JUDGE HARRINGTON IS DE
427 FACTO PROOF THAT THE RESULT OF THE JUDGES INTERPRETATION OF
428 STATUTORY LAW IS SIMPLY TO MAKES ACCESS TO THE LEGAL SYSTEM MORE
429 EXPENSIVE AND MORE DIFFICULT AND THAT HER RESULTANT RULING IS THUS A
430 VIOLATION OF PUBLIC POLICY AND, AS-APPLIED, A VIOLATION OF PRO SE
431 APPELLANT'S CONSTITUTIONAL RIGHTS.

432 Pro Se Appellant asserts that the principle of CANON 2 RULE 2.6 ENSURE RIGHT TO BE
433 HEARD is also relevant and applicable in this matter.

434

435

436

437

Appellant's Legal Argument 4

The Court erred in signing an Order of Dismissal with Prejudice written by Defense Counsel relying on a purposely incomplete and misleading statement of law and relevant statute and including misleading statements of facts stated by Defense counsel and predicated on Judge Harrington's erroneous determination during the hearing that:

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

Appellant provides the relevant text of 15-36-100 below and highlights 15-36-100(C)(2):

(B) Except as provided in Section 15-79-125, in an action for damages alleging professional negligence against a professional licensed by or registered with the State of South Carolina and listed in subsection (G) or against any licensed health care facility alleged to be liable based upon the action or inaction of a health care professional licensed by the State of South Carolina and listed in subsection (G), the plaintiff must file as part of the complaint an affidavit of an expert witness which must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit.

(C)(1) The contemporaneous filing requirement of subsection (B) does not apply to any case in which the period of limitation will expire, or there is a good faith basis to believe it will expire on a claim stated in the complaint, within ten days of the date of filing and, because of the time constraints, the plaintiff alleges that an affidavit of an expert could not be prepared. In such a case, the plaintiff has forty-five days after the filing of the complaint to supplement the pleadings with the affidavit. Upon motion, the trial court, after hearing and for good cause, may extend the time as the court determines justice requires. If an affidavit is not filed within the period specified in this subsection or as extended by the trial court and the defendant against whom an affidavit should have been filed alleges, by motion to dismiss filed contemporaneously with its initial responsive pleading that the plaintiff has failed to file the requisite affidavit, the complaint is subject to dismissal for failure to state a claim. The filing of a motion to dismiss

pursuant to this section, shall alter the period for filing an answer to the complaint in accordance with Rule 12(a), South Carolina Rules of Civil Procedure.

(2) The contemporaneous filing requirement of subsection (B) is not required to support a pleaded specification of negligence involving 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.

Appellant asserts that the application of the common knowledge exception in proving negligence in a case involving medical malpractice depends on particular facts of the case which were not heard or considered by the trial judge.

Carver v. Med. Soc'y of S.C., 286 S.C. 347, 350, 334 S.E.2d 125, 127 (Ct.App.1985); David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 248, 626 S.E.2d 1, 4 (2006). "The application of the common knowledge exception in proving negligence in a case involving medical malpractice depends on the particular facts of the case."

Furthermore, Pro Se Appellant asserts to the Court that Defense counsel exhibited a Pattern of Purposely False Statements and material omissions to influence Tribunal to dismiss with prejudice.

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

(a) A lawyer shall not knowingly:

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

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

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary,

494 *disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony*
495 *of a defendant in a criminal matter, that the lawyer reasonably believes is false.*

496 Pro Se Appellant asserts that Defense has knowingly made material misstatements of fact and
497 law in order to persuade the lower court to dismiss with prejudice. Pro Se Appellant asserts that
498 Defense Counsel Purposely made misleading statements regarding the dates when appellant was
499 seen by personnel of SAVEEAP in order to argue for dismissal on false grounds and Purposely
500 misstated the date when appellant filed his complaint in order to argue for dismissal on false
501 grounds.

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

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

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

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

517 **More importantly, careful reading of the statement of defendant shows intent to falsely and**
518 **deceptively establish the dates falling in September and October 2012 as "representing the**
519 **last date of treatment, omission or operation giving rise to the cause of action" by SAVE, Inc.**
520 **Indeed these dates appear in the Judges Order written by defense counsel with no basis in**
521 **fact or evidentiary support.**

It is noteworthy that Defense initially filed (on January 15, 2016) a Motion To Dismiss citing only that Plaintiff was required to file an expert affidavit. Then, presumably after reasonable investigation, Defense amended the Motion to Dismiss (on January 27, 2016) stating that "Plaintiff has Failed to Comply with the Statute of Limitations" and falsely states that "The allegations contained in Plaintiff's Complaint stem from counseling provided by Defendants in September and October of 2012. As pursuant to South Carolina Law, Plaintiff's complaint must have been filed on or before three years from the last date of treatment, omission or operation giving rise to the cause of action, or, October 2015.

Yet the "HIPPA – Approved Designated Record Set" provided by Defense counsel (only after Kessler Attorney obtained a court order) lists the "Last Session" as 12-18-12. (See Exhibit 9).

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

Indeed the Order Of Dismissal drafted by Defense counsel and provided to the court for the Judges signature by defense counsel also falsely and baselessly states: "These allegations stem from counseling sessions plaintiff received from Defendant Sarah Gainey on or around October of 2012." a statement made in open court by Lauren Spears and presumably alluding to the **false statement identifying the dates falling in September and October 2012 as "representing the last date of treatment, omission or operation giving rise to the cause of action"** by SAVE, Inc.

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

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

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

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

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

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

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

578 In addition to relying on a purposely incomplete statement of law and relevant statute, Judge
579 Harrington was influenced by baseless, misleading statements of fact by Defense counsel and
580 included these in the Order of Dismissal.

581

582

583 **APPELLANT'S LEGAL ARGUMENT 5**

584

585 The court erred by failing to grant a hearing on pro se appellant's motion to compel Sarah
586 Gainey and SAVEEAP to release treatment records so that plaintiff could obtain the allegedly
587 required expert affidavit.

588 Exhibit 5 is a copy of the motion Appellant filed with the court in order to obtain records his
589 expert witness to comply with the courts insistence that Pro Se Appellant provide an expert
590 affidavit as was allegedly required for Pro Se Appellant's complaint to be heard in a South
591 Carolina Court of Law.

592 Pro Se Appellant met with and paid Julie Risher of Holy City Counseling over three sessions
593 (which Ms. Risher stated were required for her to write an expert affidavit). However, on the
594 third session Ms. Risher stated that she would not write this affidavit unless Pro Se Appellant
595 obtained records from Sarah Gainey aka SAVEEAP for her to review.

596 Pro Se Appellant went by Sarah Gainey's office and asked Ms. Gainey to provide these records.
597 **Ms. Gainey refused stating that Pro Se Appellant had signed a release and that she would**
598 **not provide these records.**

599 Appellant then proceed to file the Motion to Compel release of these records as shown in Exhibit
600 **5. The court never heard or ruled on this Motion to Compel.**

Conclusion

It is Pro Se Appellant's understanding that Under de novo review, the appellate court acts if it were considering the question for the first time, affording no deference to the decisions of the lower court. Legal decisions of a lower court on questions of law are reviewed using this standard. It allows the appeals court to substitute its own judgment about whether the lower court correctly applied the law.

The lower court erred dismissing with prejudice all claims pursuant to Rule 12(b)(6) including Appellant's complaint for Breach of Contract and Personal Injury among other specific allegations. THE LOWER COURT CLEARLY MADE INCORRECT APPLICATION OF RULE 12(B)(6) AND SC CODE 15-36-100 IGNORING 15-36-100(C)(2) COMMON KNOWLEDGE EXCEPTION AND SIGNED AN ORDER CONTAINING FACTUAL ASSERTIONS WITH NO EVIDENTIARY BASIS ASSERTED BY AND WRITTEN BY DEFENSE COUNSEL IN AN ATTEMPT TO LIMIT LIABILITY FOR THE ACTIONS OF JONATHON KESSLER WHO PROVIDED SERVICES TO APPELLANT THROUGH DECEMBER 18, 2012.

Pro Per Appellant was not allowed at motion hearing to give facts and argument to the trial court that would entitle the plaintiff to relief under multiple theories of the case exclusive of so called "malpractice" and would nonetheless show that the conduct of the defendant and subject matter of the claims are clearly within the "ambit of common knowledge" aka the Common Knowledge Exception to Expert Affidavit requirement. A significant question of fact to be determined by a trial judge is whether Ms. Gainey's misconduct as stated in the Appellant's complaint was merely negligent or actually intentional to curry approval from Showa Denko Carbon her long time "client in fact" .

Judge Harrington erred in dismissing with prejudice Appellant's claims referring solely to Appellant's failure of an alleged requirement (alleged by defense counsel) that Appellant must provide an expert affidavit along with his complaint filed for breach of contract and personal injury before any facts could be presented.

Judge Harrington erred by relying on a purposely misleading statements of fact, purposely incomplete statement of statute and law by Defense counsel leading to Judge Harrington's incorrect determination that **"What we are only here for today is the law requires that you file an affidavit when you allege medical or professional malpractice. So it is a simple issue. If you do not have an affidavit the law requires that I must dismiss this case. Do you have an affidavit?"**

To uphold this summary dismissal is to say that it is the law in South Carolina that a claim for damages can be summarily dismissed with prejudice relying on an incorrect recitation of statutory law by the trial judge, a purposely misleading statement of statutory law by defense counsel, no hearing of any facts of the case while faulting pro per plaintiff for supposedly failing to preserve issues on appeal while misapplying rule 12(b)(6) in the court's failure to consider the issues in the light most favorable to the non-moving party, and for the court to refuse to hear a Motion to Compel records so that an allegedly required expert affidavit can be provided to the court.

Further, to uphold this "order of dismissal" is also to say that a Judge in South Carolina can sign an Order of Dismissal with Prejudice written by defense counsel containing material false statements of fact with no evidentiary support without any recourse by Pro Se Appellant.

Appellant respectfully requests a new trial or just remedy.

Respectfully Submitted



Tracy Smith, Pro Se Appellant
1510 Swartz Fairbanks, RD
Monroe, LA 71203
318 233 8572

Exhibit 1

1 STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

2 COUNTY OF CHARLESTON

CASE NO. 2015-CP-10-6819

3
4 **RECEIVED**

5 OCT 19 2016

6 SC Court of Appeals

7 TRACY SMITH,)

8 PLAINTIFF,)

TRANSCRIPT OF RECORD

9 VS.)

10 APRIL 29, 2016

11 SARAH GAINNEY AND)

12 SAVE, INC.,)

CHARLESTON, SC

13 DEFENDANTS.)

14 B E F O R E:

15 HONORABLE KRISTI HARRINGTON, JUDGE

16 A P P E A R A N C E S:

17 TRACY SMITH, Pro Se
For the Plaintiff

18 LAUREN SPEARS, ESQUIRE
Attorney for the Defendant

19
20 * * * * *

21
22 Ruth C. Weese, RDR
23 Official Court Reporter
24 Ninth Judicial Circuit
25

1 (The following proceedings were held
2 April 29, 2016, Charleston County, South Carolina,
3 @ 11:12 a.m.)

4 THE CLERK: Smith versus Gainey.

5 THE COURT: Counsel, state your name
6 for the record and the party you represent.

7 MR. SMITH: Tracy Smith, pro se
8 Plaintiff.

9 THE COURT: Are you an attorney?

10 MR. SMITH: No, ma'am.

11 MS. SPEARS: Lauren Spears for the
12 Defendant Sarah Gainey and Save, Inc.

13 THE COURT: We are here on your motion
14 to dismiss?

15 MS. SPEARS: Yes, Your Honor.

16 THE COURT: Are you prepared to go
17 forward on that matter?

18 MR. SMITH: Yes, Your Honor.

19 THE COURT: Happy to hear from you, Ms.
20 Gainey, I am sorry, Ms. Spears.

21 MS. SPEARS: May it please the Court,
22 Your Honor, we are here today on a fairly
23 straightforward motion to dismiss. Plaintiff has
24 filed a complaint alleging professional negligence
25 against Defendants Sarah Gainey and Save, Inc. for

1 care and treatment around October 2012, some
2 counseling sessions that Plaintiff received through
3 his employer contract with Defendants. South
4 Carolina statute 15-36-100 states, "In an action
5 for damages alleging professional negligence
6 against a professional licensed by or registered
7 with the State of South Carolina listed in
8 subsection (G) or against any licensed health care
9 facility alleged to be liable based upon the action
10 or inaction of the health care professional, the
11 Plaintiff must file as part of the complaint an
12 affidavit of an expert witness."

13 Plaintiff has failed to file an
14 affidavit of an expert witness pursuant to
15 15-36-100 (G)16, Sarah Gainey, the licensed
16 professional counselor; therefore, Plaintiff has
17 failed to comply with the statute and we would move
18 for dismissal of the Plaintiff's claim.

19 MR. SMITH: Your Honor, may I provide
20 this brief to the Court at this time?

21 THE COURT: That's fine. Thank you.

22 MR. SMITH: Your Honor, I'm not an
23 attorney. I'm a software engineer. I have had a
24 couple business law courses earning my college
25 degree. First of all, I contend that Ms. Gainey

1 has acted outside the scope of her --

2 THE COURT: I understand. What we are
3 only here for today is the law requires that you
4 file an affidavit when you allege medical or
5 professional malpractice. So it is a simple issue.
6 If you do not have that affidavit the law requires
7 that I must dismiss this case. Do you have an
8 affidavit?

9 MR. SMITH: No. I am willing to get
10 one though.

11 THE COURT: And so when -- you filed
12 this case 2015?

13 MR. SMITH: Yes.

14 THE COURT: The law requires that when
15 you file this case you must file it with the
16 affidavit. Did you do that?

17 MR. SMITH: No, I did not.

18 THE COURT: And when did you have
19 notice that there was -- that you had failed to
20 file this affidavit?

21 MR. SMITH: I received their motion --
22 actually I just received it about a week ago. I
23 have changed residences. I have been out of town.
24 I have to look at the date if you are relying on
25 the date when they sent that. So only recently did

1 I realize I needed that affidavit.

2 THE COURT: So it was filed January
3 29th of 2016. I am assuming that you received
4 service fairly close to that time. Would that be
5 an accurate statement?

6 MR. SMITH: I was probably out of town.
7 Probably not in town. My mother may have received
8 it. I apologize for the oversight, but I have not
9 seen it until recently.

10 THE COURT: And so you have been on
11 notice not only did you need to file it when you
12 filed this case in 2015, but you were on notice as
13 of the filing of this the service on or about
14 January 29th of 2016. So the statute would allow
15 me to give you once you had notice, but you again
16 have failed to do so; is that correct?

17 MR. SMITH: Failed to seek an
18 affidavit? Yes, I have not sought an affidavit.

19 THE COURT: Is there any reason that
20 you know that I should not dismiss this case based
21 upon your failure to follow the law?

22 MR. SMITH: First of all, I believe
23 that she is outside the scope of her professional
24 responsibility in her counseling sessions with me.

25 THE COURT: I am sorry. You are

1 pointing at?

2 MR. SMITH: The Defendant is outside
3 the scope of her professional responsibilities.

4 THE COURT: We don't even get to there.
5 I don't know how long you have been here, the last
6 gentleman I explained about the rules of
7 basketball. I'm not sure, I'm not very computer
8 savvy so I can't even make an attempt, I will not
9 even make an attempt to do an IT analogy.

10 But you haven't followed the rules.
11 And the rules are set up for a very particular
12 reason the way that they are set up. Every
13 attorney that's appeared in front of me today has
14 told me why I need to make sure that the rules are
15 followed and I need to know why I shouldn't follow
16 the rules for you here today.

17 MR. SMITH: Again, I did not realize I
18 needed to file an affidavit. I suggest that she
19 acted outside the scope of her -- and I would also
20 like to point out to the Court that she has falsely
21 stated the dates of her service.

22 THE COURT: And all those things could
23 be true, Mr. Smith. The problem is that you may
24 not be able to present those because you haven't
25 followed the rules. You again have not done what

1 you're supposed to do, but are alleging what she --
2 what you believe she has not done.

3 MR. SMITH: Your Honor, I have acted to
4 the best of my ability.

5 THE COURT: And unfortunately that is
6 not going to save the day here today. Is there any
7 other reason why this case should not be dismissed
8 based upon the failure to follow the rules?

9 MR. SMITH: She has made false
10 statements and I contend she acted outside the
11 scope of her professional responsibility.

12 THE COURT: And again, Mr. Smith, we
13 just -- if you don't give me the legal basis to
14 move this case forward, those things may be true,
15 but you will not be able to present those because
16 you have not followed the rules. All right?
17 Anything further?

18 MS. SPEARS: No, Your Honor.

19 THE COURT: At this point would you
20 object if I gave him 30 days to file an affidavit?

21 MS. SPEARS: Dismissal without
22 prejudice?

23 THE COURT: I am sorry?

24 MS. SPEARS: Are you dismissing without
25 prejudice or for a chance to refile or just giving

1 an additional 30 days?

2 THE COURT: Either one.

3 MS. SPEARS: No objection.

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

9 As of this point, sir, you have -- you
10 are on notice that this affidavit is required. And
11 as I indicated to you, and to several of the other
12 people who have appeared in front of me, you are
13 entitled to represent yourself. Most of us can
14 read the law and get a basic understanding of it.
15 You may have had really good instructors who taught
16 you business law. But just as I can turn my
17 computer on or off, but when I really have trouble
18 I call the professional IT guy up in Columbia to
19 help me.

20 MR. SMITH: I'm a professional IT guy.

21 THE COURT: So I can -- I would take
22 that however you take it and it may be that you
23 need to hire somebody with a little more savvy in
24 the legal world who has had a few more classes than
25 a couple of business law.

1 MR. SMITH: Yes.

2 THE COURT: Thirty days or it is
3 dismissed with prejudice. I will do a Form 4. So
4 then what I would ask from you is if he doesn't
5 comply with it that you send an order dismissing it
6 so that the file is clean. Good luck to you, sir.

7 MR. SMITH: May I ask a quick question?
8 Is there a way to review this information on line?
9 I was --

10 THE COURT: I'm not sure what
11 information you mean.

12 MR. SMITH: Just the motions in case I
13 have trouble being served at my new address.

14 THE COURT: What is your address?

15 MR. SMITH: 1510 Fairbanks Road.

16 THE COURT: Is that what you have,
17 James?

18 THE CLERK: I am looking at it right
19 now.

20 THE COURT: The clerk of court is going
21 to update your address, but that's about all I can
22 do for you right here today.

23 MR. SMITH: Thank you, Your Honor.

24 (These proceedings were concluded at
25 11:40 a.m., April 29, 2016, Charleston County,

South Carolina.)

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CERTIFICATE OF REPORTER

I, Ruth C. Weese, Registered Diplomat
Reporter for the State of South Carolina at Large,
do hereby certify that the foregoing transcript is
a true, accurate, and complete record.

I further certify that I am neither related
to nor counsel for any party to the cause pending
or interested in the events thereof.

Witness my hand, I have hereunto affixed my
official seal this 19th day of September, 2016 at
Charleston, Charleston County, South Carolina.

Ruth C. Weese

Ruth C. Weese

Registered Diplomat

Reporter

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OCT 19 2016

SC Court of Appeals

Exhibit 2

H|B|S HALL BOOTH SMITH, P.C.

Jack G. Gresh
P: (843) 720-3474
E: JGresh@hallboothsmith.com
40 Calhoun Street, Suite 550
Charleston, SC 29401
W: www.hallboothsmith.com
P: (843) 720-3460 F: (843) 720-3475

June 6, 2016

VIA U.S. MAIL

The Honorable Kristi Lea Harrington
300B California Ave.
Moncks Corner, SC 29461

RE: Tracy Smith v. Sarah Gainey and SAVE, Inc.
Civil Action No.: 2015-CP-10-6819

Dear Judge Harrington:

With regard to the above-referenced matter, please find enclosed an Order of Dismissal. If this order meets your approval, we would appreciate you signing and returning to our office in the enclosed self-addressed stamped envelope.

Should you have any questions or concerns, or need anything, please don't hesitate to contact our office.

Very Truly Yours,

Jack G. Gresh

JGG/csj

Enclosure as stated.

✓ cc: Tracy Smith (with enclosure)

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Tracy Smith,

Plaintiff,

v.

Sarah Gainey and SAVE, Inc.,

Defendants.

) IN THE COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT
) CIVIL ACTION NO.: 2015-CP-10-6819

ORDER OF DISMISSAL

THIS MATTER appeared before me on April 29, 2016 on Defendants' Motion to Dismiss. Plaintiff Tracy Smith appeared *pro se* and Lauren Spears, Esquire, appeared on behalf of Defendants Sarah Gainey and SAVE, Inc.

Plaintiff filed this professional negligence action in Charleston County Court of Common Pleas on December 17, 2015 alleging breach of duty of care, breach of agreement of confidentiality, breach of duty to obtain adequate history, breach of fiduciary duty, intentional infliction of emotional distress, and breach of duty to obtain peer consultation against Defendant Sarah Gainey in her capacity as a licensed professional counselor licensed in the State of South Carolina, and Defendant SAVE, Inc. as her employer. These allegations stem from counseling sessions Plaintiff received from Defendant Sarah Gainey on or around October of 2012. Plaintiff claimed damages in an undisclosed amount in the form of lost wages and pain and suffering. In response, Defendants filed a Motion to Dismiss pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, S.C. Code Ann. § 15-36-100 and S.C. Code Ann. § 15-3-545, stating Plaintiff's Complaint must be dismissed with prejudice because Plaintiff failed to file the required expert affidavit along with his Complaint, and as required by S.C. Code Ann. § 15-36-

100(B), based on allegations professional negligence against Sarah Gainey, a licensed professional counselor.

The parties appeared before me on April 29, 2016. After a full hearing and reviewing the pleadings and motion, I adjudged that Plaintiff be allowed thirty (30) days in which to provide an expert affidavit alleging at least one negligent act or omission of Defendants, or Plaintiff's Complaint be dismissed with prejudice. A Form 4 Order denying Defendants' Motion was entered on May 6, 2016. As of May 31, 2016, thirty (30) days from the date of the hearing on this matter, Defendants have not been served with any affidavit from any expert on behalf of Plaintiff alleging any negligence on the part of Defendant Sarah Gainey and SAVE, Inc. As such, I hereby adjudge and decree that this matter be DISMISSED WITH PREJUDICE pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure and S.C. Code Ann. § 15-36-100.

The Honorable Kristi Lee Harrington
Presiding Judge

_____, 2016
Charleston County, South Carolina

Exhibit 3

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Tracy Smith,

Plaintiff,

v.

Sarah Gainey and SAVE, Inc.,

Defendants.

) IN THE COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT
) CIVIL ACTION NO.: 2015-CP-10-6819

)
)
) **AMENDED NOTICE OF MOTION AND**
) **MOTION TO DISMISS PLAINTIFF'S**
) **COMPLAINT**
)
)
)

TO: TRACY SMITH, *PRO SE* PLAINTIFF

YOU WILL PLEASE TAKE NOTICE that Defendants Stacy Gainey, LPC and SAVE, Inc. (collectively "Defendants"), by and through their undersigned counsel, will move before the Presiding Judge of the Ninth Judicial Circuit at the Charleston County Courthouse on the tenth (10th) day after service hereof, or as soon thereafter as counsel may be heard, for an Order dismissing all causes of action contained in Plaintiff's Complaint, with prejudice, pursuant to Rules 8(a) and 12(b)(6) of the South Carolina Rules of Civil Procedure ("SCRCP") for failure to state facts sufficient to constitute a legal cause of action and for failing to comply with S.C. Code Ann. § 15-36-100, which governs all actions alleging professional negligence.

Motion to Dismiss

Plaintiff's Complaint fails to state facts sufficient to constitute a cause of action and the Complaint should be dismissed pursuant to the provisions of SCRCP Rule 12(b)(6). Plaintiff is required to set forth a short and plain statement of the facts showing he is entitled to relief pursuant to SCRCP Rule 8(a), and he has failed to do so. A Complaint that fails to state facts sufficient to state a claim should be dismissed pursuant to SCRCP Rule 12(b)(6). Defendant's Motion to Dismiss is predicated on well-established South Carolina law governing professional

negligence actions, specifically S.C. Code Ann. § 15-36-100 *et. seq.* These statutory provisions apply to this case and control its disposition.

A. **Plaintiff Failed to Attach an Expert Affidavit Pursuant to S.C. Code Ann. § 15-36-100**

Plaintiff's Complaint alleges professional negligence against Defendants. Plaintiff states Defendant "Sarah L. Gainey, LPC, CEAP is President of SAVE, Inc. and personally counseled Plaintiff. SAVE, Inc. provides behavioral healthcare services and training for personal and Supervisory development." See Complaint, p. 1, lines 14-19. Plaintiff's Complaint further states that "as part of plaintiff's employment agreement, plaintiff sought services including assistance, counseling, treatment, therapy for occupational problems resulting from his employment with Showa Denko." See Complaint, p. 2, lines 3-7. Plaintiff's Complaint further alleges breach of duty of care, breach of agreement to maintain confidentiality, breach of fiduciary duty and intentional infliction of emotional distress by Defendant Sarah Gainey. See Complaint, *generally*. S.C. Code Ann. § 15-36-100 states:

"in an action for damages alleging professional negligence against a professional licensed by or registered with the State of South Carolina and listed in subsection (G) or against any licensed health care facility alleged to be liable based upon the action or inaction of a health care professional licensed by the State of South Carolina and listed in subsection (G), the plaintiff must file as part of the complaint an affidavit of an expert witness which must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit.

S.C. Code Ann. § 15-36-100(B)

Pursuant to S.C. Code Ann. § 15-36-100(G)(17), licensed professional counselors are health care providers subject to the statutory requirements of a contemporaneously filed expert affidavit with Plaintiff's Complaint. At all times relevant hereto, Sarah Gainey was a licensed professional counselor licensed by the State of South Carolina. See Complaint, p.1, ln. 14.

Gross Warton Gross Negligence

Plaintiff's Complaint criticizes the Defendants for the negligent and improper counseling sessions. See Complaint, generally. However, Plaintiff fails to attach an affidavit from a competent expert specifying at least one negligent act of omission claimed to exist as the basis for his Complaint. Therefore, Plaintiff has failed to comply with South Carolina law controlling actions for professional negligence.

B. Plaintiff Has Failed to Comply with the Statute of Limitations

The statute of limitations for an action for medical malpractice/professional negligence is three (3) years after the alleged incident. South Carolina law states: "(A) In any action, other than actions controlled by subsection (B), to recover damages for injury to the person arising out of any medical, surgical, or dental treatment, omission, or operation by any licensed health care provider as defined in Article 5, Chapter 79, Title 38 acting ~~within the scope of his profession~~ must be commenced within three years from the date of the treatment, omission, or operation giving rise to the cause of action or three years from date of discovery or when it reasonably ought to have been discovered, not to exceed six years from date of occurrence, or as tolled by this section." S.C. Code Ann. § 15-3-545. "The statute of limitations begins to run at the time the individual has constructive or inquiry notice." Kelly v. Logan, Jolley, & Smith, LLP, 383 S.C. 626, 634 (2009). ~~The allegations contained in Plaintiff's Complaint stem from counseling provided by Defendants in September and October of 2012.~~ As pursuant to South Carolina law, Plaintiff's Complaint must have been filed on or before three years from the last date of treatment, omission or operation giving rise to the cause of action, or, October 2015. Plaintiff filed his Complaint on December 18, 2015. See Complaint, generally. Plaintiff has failed to comply with the applicable statute of limitations; and as such, is time barred from bringing his claims. Therefore, Plaintiff's Complaint should be dismissed.

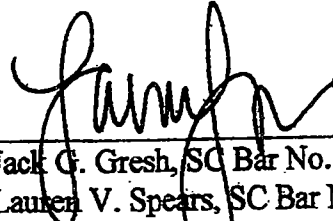
Not within Scope of Profession

False

WHEREFORE, Defendants respectfully move this Court for an Order dismissing Plaintiff's Complaint, with prejudice, pursuant to SCRPC Rule 12(b)(6), and to award Defendants such other and further relief as this Court deems just and proper.

Respectfully submitted this 21 day of January, 2016, in Charleston, South Carolina.

HALL BOOTH SMITH, P.C.



Jack G. Gresh, SC Bar No. 75188
Lauren V. Spears, SC Bar No. 100994
40 Calhoun Street, Suite 550
Charleston, SC 29401
Phone: 843.720.3460
Fax: 843.720.3475
Email: jgresh@hallboothsmith.com
lspears@hallboothsmith.com

Counsel for Defendants

Exhibit 4

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Tracy Smith, Pro Se Plaintiff

APPELLANT(S)

VS.

SAVE, Inc. Sarah Gainey

RESPONDENT(S)

CASE NO:2015CP1006819

NOTICE OF CIVIL APPEAL
TO CURE IN 30 DAYS

The plaintiff hereby gives notice of appeal from the judgment of the court in the above action, to the Circuit Court of Common Pleas, in the county of CHARLESTON.

This notice of appeal is made subsequent to personal notice of the judgment which was received on the 22nd day of June, 2016.

The appellant's exceptions to the judgment of are set forth as follows:

- 1) Plaintiff has repeatedly asked Ms. Gainey to release medical treatment records so that I Plaintiff can obtain Expert Affidavit. Ms. Gainey has repeatedly refused and court has failed to order release of said records.
- 2) There are causes of action having to do with Ms. Gainey's deceptive business practices, have nothing to do with Ms. Gainey's Profession, and are easily recognized by Lay People of the Jury without expert testimony.
- 3) The Statue requiring expert testimony on which the court relies is not constitutional as applied as it effectively denies Plaintiff his civil right to trial by Jury of his peers.

Tracy Smith, Pro Se Plaintiff

Exhibit 5

Tracy Smith

2015-CP-10-6819

V

SAVE Inc. Sarah Goins

Motion to Compel
Release of Medical Records

FILED
2016 MAY 27 PM 2:36
JULIE A. ARMSTRONG
CLERK OF COURT
BY [initials]

Pro Se Plaintiff respectfully requests
the court to order Sarah Goins of
SAVE Inc. to release Plaintiff's medical
records related to treatment/counseling.
Defendant Sarah Goins, owner/president of
SAVE Inc. refuses to release these records.

Respectfully Submitted

Tracy Smith

Tracy Smith Pro Se Plaintiff

Exhibit 6



SAVE

Strategies to Assist Valued Employees

*your employee
assistance program*

A confidential consultation,
counseling and referral program
for employees and their dependents.

CONFIDENTIAL

SAVE complies with all state and federal laws governing privacy. Information about a client's problem cannot be released without the individual's written consent.

Confidentiality is the **most important** element in the counseling relationship.

PROGRAM COST

There is NO COST to you and your dependents. The fee for EAP has already been paid by your company. If you and your counselor decide additional services are needed, you will be responsible for any costs your insurance does not cover.

SHORT TERM COUNSELING

Most problems can be managed by short-term counseling. Throughout the entire process, your counselor maintains a system of support and follow-up with you. If an outside resource is required, your exact need, financial situation, and geographic location are all considered before a referral is made.

www.saveeap.com

HOW CAN WE HELP YOU?

Easy as picking up the phone. Call 1.843.747.5327

Exhibit 7

EMPLOYEE ASSISTANCE CERTIFICATION COMMISSION
4350 North Fairfax Drive, Suite 410
Arlington, VA 22203 USA
(703) 387-1000 X 311

STANDARDS OF PRACTICE

SUMMARY: This document outlines the standards of practice for Certified Employee Assistance Professionals (CEAPs) which include: 1) the Client Bill of Rights, and 2) the CEAP Code of Conduct.

SECTION 1 – CLIENT BILL OF RIGHTS

CEAPs are encouraged to display the Client Bill of Rights in their office and must make a copy available upon request. The following principles comprise the Client Bill of Rights:

- I. Individual clients have the right:
 - A. To expect a CEAP has met the minimal qualifications as required by EACC;
 - B. To obtain a copy of the CEAP Code of Conduct;
 - C. To report complaints regarding CEAP conduct to the EACC;
 - D. To be informed of all costs of professional services before receiving such services;
 - E. To obtain copies of their own case records and to have the information therein explained clearly, subject to applicable laws;
 - F. To expect the CEAP to maintain confidentiality of personal information as required by law;
 - G. To be informed of any relevant policies regarding confidentiality, to decline any recommended services, and to be fully apprised of the potential consequences of such a decline.

II. Organizational clients have the right:

- A. To expect a CEAP has met the minimal qualifications as required by EACC;
- B. To obtain a copy of the CEAP Code of Conduct;
- C. To report complaints regarding CEAP conduct to the EACC;
- D. To be informed of all costs of professional services before receiving such services;
- E. To full and open disclosure of any potential conflicts of interest, organizational impacts, or similar negative effects from services rendered.

SECTION 2 – CODE OF CONDUCT

PREAMBLE

Certified Employee Assistance Professionals are dedicated to enhancing the worth, dignity, potential, productivity and uniqueness of their clients, be they individuals or organizations. They are committed to increasing knowledge of human behavior and organizational effectiveness through continuous efforts to improve their professional and personal growth and to recognize the need for continued training and education to prepare themselves to serve work organizations and persons of all ages and cultural backgrounds. They are accountable for their activities and to recognize the boundaries of their competence and limitations of their techniques. A CEAP's concerns are for the best interest of his/her clients, colleagues, and for society in general. The CEAP respects the rights and responsibilities of professional colleagues and remains accountable for upholding the ethical principles of the EACC. The CEAP treats colleagues with respect and good faith and extends full professional consideration to them.

In pursuit of these ideals, individuals who are awarded the CEAP certification shall abide by the following code of conduct:

A. RESPONSIBILITY:

A CEAP's primary responsibility is to the client's welfare. To this end, the CEAP often has multiple clients including employees, family members, employers, unions, and representatives of an organization, etc. The CEAP is responsible for maintaining professional standards and ethics in all exchanges with such clients, be they via face-to-face, telephone, electronic, or any other means by which services are provided and client information is transmitted or received.

Unprofessional conduct includes, but is not limited to, the following:

1. Exploiting relationships with clients for the CEAP's personal gain or financial advantage;
2. Failing to maintain a professional relationship with all clients; where a dual relationship is unavoidable, the CEAP must maintain appropriate professional boundaries. The CEAP must avoid initiating or maintaining any

activities or relationships which may impair or diminish the CEAP's professional judgment, objectivity, and effectiveness or increase the risk of client exploitation. Examples of such dual relationships include engaging in close personal relationships with clients, providing services to friends or family members, and advocating against the interests of sponsoring organizations;

3. Failing to safeguard the rights of any client, as explained in Section 1 *Client Bill of Rights* above;
4. Failing to assist the client in seeking services appropriate to and consistent with the client's needs, insurance, financial resources and preferences;
5. Referring a client to another professional or community resource when the CEAP knows or has reason to know that such person or organization is not qualified by training, experience, or licensure to perform the services;
6. Failing to clarify to the client that all decisions are the right and responsibility of the client;
7. Failing to maintain sufficient case records (written, electronic, or otherwise) in a confidential, secure and professional manner in accordance with state and federal legislation as well as accepted EAP standards;
8. Failing to report EA program activities to the work organization without incorporating and adhering to guidelines regarding client confidentiality;
9. Failing to respect confidential business communications and proprietary organizational client information and disclosing such information without a client's prior informed consent (unless required by applicable law).

B. COMPETENCE:

The CEAP shall act in accordance with the highest standards of professional integrity and competence. CEAPs will seek only those positions in the delivery of service to clients for which they are professionally qualified.

Unprofessional conduct includes, but is not limited to, the following:

1. Practicing in an EAP content area in which the CEAP has not obtained adequate professional training;
2. Failing to recognize potential or actual harm to the client when assessing, treating, or advising or consulting with clients;

3. Failing to seek appropriate professional consultation for clients whose problems are outside the CEAP's competence;
4. Engaging in dishonesty, fraud, deceit, or misrepresentation while performing professional activities;
5. Failing to obtain continuing professional education, training, knowledge, personal awareness and relevant techniques necessary to assist clients;
6. Failing to seek appropriate professional assistance for the CEAP's own personal problems or conflicts when they are likely to contribute to inadequate services to the client.

C. ETHICAL AND LEGAL STANDARDS:

The CEAP's professional relationship with clients, students, trainees, colleagues, and the public is based upon honesty, mutual trust, confidence, and respect. The CEAP must avoid any action that would violate or diminish the legal and civil rights of these individuals.

Unprofessional conduct includes, but is not limited to, the following:

1. Failing to make full disclosure of the functions, purposes, range of services, and limitations of any services or activities;
2. Failing to recognize his/her professional limitations and to act outside the scope of his/her established professional competence;
3. Failing to inform clients of the innovative nature and possible risks associated with new services or techniques in order to allow clients to exercise freedom of choice regarding such services;
4. Failing to make or recommend referral to other professional, technical or administrative resources when such referral is in the best interest of the client(s);
5. Failing to uphold the welfare of the client. This includes failing to place the interests of clients ahead of those of the CEAP by declining non-contractual benefits from the client relationship, even if such benefits in no way harm the client, and failing to disclose potential or existing conflicts of interests. Unprofessional conduct results when a CEAP does not inform the client of a conflict and does not refer to another CEAP or appropriate professional;
6. Practicing inhumane or discriminatory treatment toward any person or group of persons on the basis of age, race, gender, religion, sexual orientation, national origin or disability;

7. Failing to have sensitive regard for the moral, social, and religious beliefs of clients and communities, or trying to impose the CEAP's beliefs on clients;
8. Engaging in romantic or sexual activities with any clients during the professional client relationship and for a period of five years beyond the last date on which the member and the client interacted professionally;
9. Acting in any manner that may possibly compromise the professional relationship;
10. Practicing under the influence of alcohol or other mind and/or mood altering drugs that are not prescribed by a licensed physician and/or those which may affect their ability to practice in a competent manner.

D. CONFIDENTIALITY:

Prior to commencement of professional services, the CEAP will fully disclose, preferably via a client statement of understanding or disclosure statement, the relevant parameters of confidentiality as required by accrediting bodies, applicable laws, existing regulations, and program guidelines. In the absence of such waivers of confidentiality, the CEAP holds in confidence all client information obtained in the course of professional service.

Unprofessional conduct includes, but is not limited to, the following:

1. Failing to fully disclose the full parameters of confidentiality, in writing when possible, prior to the commencement of professional services;
2. Revealing a confidence of a client except:
 - a. as required by law or valid court order;
 - b. where the CEAP is a defendant in a civil, criminal, or disciplinary action arising from the services provided, in which case only the relevant client information may be disclosed in the course of that action; where there is clear and imminent danger to the client or others, the CEAP will take action as required by law or previously disclosed program guidelines;
 - c. when discussing case material with another professional for the specific purpose of professional consultation;
3. Failing to maintain confidentiality for all information about the client which is obtained from tests or other means;

4. Failing to obtain written informed consent from each client before electronically recording sessions with that client or before permitting third party observation of their sessions;
5. Failing to maintain, store or dispose of client records in a manner which ensures security and confidentiality;
6. Failing to insure that the content of disclosed confidential information is accurate and unbiased when releasing requested information from client records;
7. Failing to protect the confidences of the client from disclosure by employees, associates, family members and others;
8. Failing to fully disguise the identity of a client(s) when using material derived from EA services for purposes of training, research or reporting;
9. Failing to obtain a waiver of consent from each family member when disclosing the client's information in family sessions.

E. RESPONSIBILITY TO COLLEAGUES:

The CEAP respects the rights and responsibilities of professional colleagues and remains accountable for upholding the ethical principles of the EACC. The CEAP treats colleagues with respect and good faith and extends to them full professional consideration.

Unprofessional conduct includes, but is not limited to, the following:

1. Failing to maintain the security and non-disclosure of confidential information shared by colleagues in the course of professional relationships and transactions with those colleagues;
2. Failing to take appropriate action when it is apparent that another CEAP has violated the CEAP Code of Conduct. Discussion of the violation with the CEAP in question is encouraged. If this action is not undertaken and the issue satisfactorily resolved, then the CEAP must file a complaint with the Employee Assistance Certification Commission via the process defined in the EACC Code of Professional Conduct;
3. Maligning and/or harassing another professional;
4. Failing to understand areas of competence of related professionals and/or not making full use of other professional, technical, and organizational resources that best serve the interest of the client(s).

F. RESEARCH, MEASUREMENT AND EVALUATION:

When using assessment instruments, evaluation measurements or conducting research activities, the CEAP shall make every effort to promote the welfare and best interests of the client. The CEAP guards against the misuse of all collected data and respects the client's rights to know the results, interpretations, and any conclusions or recommendations. The CEAP recognizes that research activities must be conducted with full respect for the rights and dignity of participants and with full concern for their welfare. Client participation in evaluation, measurement and research activities must be voluntary unless it can be demonstrated that involuntary participation will have no harmful effects on the subjects and is essential to the investigation. The ultimate responsibility for ethical activity lies with the principal researcher.

Unprofessional conduct includes, but is not limited to, the following:

1. Failing to provide the client with complete information, through an informed consent mechanism, regarding the purpose of the proposed activity and its risks and benefits prior to its initiation and in language that the client can understand;
2. Failing to evaluate carefully the specific theoretical bases, validity, reliability, and appropriateness of activities in a given situation or with a particular client, and to carefully consider the possible consequences for clients participating in these activities;
3. Failing to protect each participant from unwarranted physical, emotional and mental harm;
4. Failing to inform the client that he/she is free to withdraw at any time during the activity;
5. Using activities or instruments beyond the CEAP's competence;
6. Using measures, instruments or techniques that have become obsolete, discredited or which lack a sufficient evidentiary basis;
7. Knowingly reporting distorted, erroneous, or misleading information;
8. Failing to give recognition to previous work or colleagues when conducting and reporting research;
9. Failing to ensure that all research data is secure and is destroyed when the information is no longer of value for its original purpose.

G. PROFESSIONAL REPRESENTATION:

The CEAP must adhere to the Professional Code of Conduct established by the EACC. CEAPs must provide those services and represent themselves as competent only within the boundaries of their professional services, education, training, license, certifications, consultation received, supervised experience, advisement services, or other relevant professional experience. The CEAP is responsible for conveying accurate information regarding his/her professional capabilities that is necessary for the client or potential client to make appropriate selection of services.

Unprofessional conduct includes, but is not limited to, the following:

1. Providing or inaccurately representing the CEAP's professional competence, education, training, credentials, experience and services or knowingly failing to correct any misrepresentations provided by others;
2. Making claims, promises, or guarantees, which promise more than the CEAP can realistically provide;
3. Failing to ensure that advertisements and publications, whether in directories, brochures, newspapers, web sites, or other literature, are formulated to convey accurate information as is necessary for clients or potential clients to make informed decisions and appropriate selection of services.

Revised and adopted: 4/15/10
Section II, A & C revised: 10/2011

Exhibit 8

STATE OF SOUTH CAROLINA

COUNTY OF Charleston

IN THE COURT OF COMMON PLEAS

Tracy Smith

Plaintiff(s)

CIVIL ACTION COVERSHEET

2015 -CP-10 -6819

vs.

Save Inc. Sarah Gaining

Defendant(s)

Submitted By: Tracy Smith
Address: 4351 Park Island Road
Hollywood, SC 29449

SC Bar #:

Telephone #: 843 709 7346

Fax #:

Other:

E-mail: Trace @ OLASPC.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- | | | | |
|--|---|---|---|
| ☐ Contracts | ☐ Torts - Professional Malpractice | ☐ Torts - Personal Injury | ☐ Real Property |
| ☐ Constructions (100) | ☐ Dental Malpractice (200) | ☐ Conversion (310) | ☐ Claim & Delivery (400) |
| ☐ Debt Collection (110) | ☐ Legal Malpractice (210) | ☐ Motor Vehicle Accident (320) | ☐ Condemnation (410) |
| ☐ General (130) | ☐ Medical Malpractice (220) | ☐ Premises Liability (330) | ☐ Foreclosure (420) |
| ☒ Breach of Contract (140) | Previous Notice of Intent Case # | ☐ Products Liability (340) | ☐ Mechanic's Lien (430) |
| ☐ Fraud/Bad Faith (150) | 20 - <u>NI</u> | ☒ Personal Injury (350) | ☐ Partition (440) |
| ☐ Failure to Deliver/
Warranty (160) | ☐ Notice/ File Med Mal (230) | ☐ Wrongful Death (360) | ☐ Possession (450) |
| ☐ Employment Discrim (170) | ☐ Other (299) | ☐ Assault/Battery (370) | ☐ Building Code Violation (460) |
| ☐ Employment (180) | | ☐ Slander/Libel (380) | ☐ Other (499) |
| ☐ Other (199) | | ☐ Other (399) | |
| ☐ Inmate Petitions | ☐ Administrative Law/Relief | ☐ Judgments/Settlements | ☐ Appeals |
| ☐ PCR (500) | ☐ Reinstate Drv. License (800) | ☐ Death Settlement (700) | ☐ Arbitration (900) |
| ☐ Mandamus (520) | ☐ Judicial Review (810) | ☐ Foreign Judgment (710) | ☐ Magistrate-Civil (910) |
| ☐ Habeas Corpus (530) | ☐ Relief (820) | ☐ Magistrate's Judgment (720) | ☐ Magistrate-Criminal (920) |
| ☐ Other (599) | ☐ Permanent Injunction (830) | ☐ Minor Settlement (730) | ☐ Municipal (930) |
| | ☐ Forfeiture-Petition (840) | ☐ Transcript Judgment (740) | ☐ Probate Court (940) |
| | ☐ Forfeiture-Consent Order (850) | ☐ Lis Pendens (750) | ☐ SCDOT (950) |
| | ☐ Other (899) | ☐ Transfer of Structured
Settlement Payment Rights
Application (760) | ☐ Worker's Comp (960) |
| ☐ Special/Complex/Other | | ☐ Confession of Judgment (770) | ☐ Zoning Board (970) |
| ☐ Environmental (600) | ☐ Pharmaceuticals (630) | ☐ Petition for Workers
Compensation Settlement
Approval (780) | ☐ Public Service Comm. (990) |
| ☐ Automobile Arb. (610) | ☐ Unfair Trade Practices (640) | ☐ Other (799) | ☐ Employment Security Comm (991) |
| ☐ Medical (620) | ☐ Out-of State Depositions (650) | | |
| ☐ Other (699) | ☐ Motion to Quash Subpoena in
an Out-of-County Action (660) | | |
| ☐ Sexual Predator (510) | ☐ Pre-Suit Discovery (670) | | |

Submitting Party Signature: Tracy SmithDate: 12-17-2015

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCF, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

CHARLESTON COUNTY COURT OF COMMON PLEAS

Tracy Smith,

Plaintiff,

vs.

Sarah Gainey, SAVE, INC.

Defendant

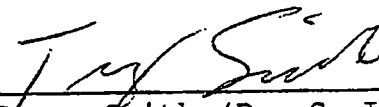
) Case No.: 2015-CP-10-6819
)
) SUMMONS
)
)
)
)
)

FILED
2015 DEC 17 PM 3:17
CLERK OF COURT

TO DEFENDANT SARAH GAINNEY, SAVE INC.

YOU ARE HEREBY SUMMONED and required to answer the complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint upon the subscriber, at the address shown below, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the complaint, judgment by default will be rendered against you for the relief demanded in the complaint.

Dated this Seventeenth day of
December, 2015


Tracy Smith (Pro Se Litigant)
4351 PARK ISLAND ROAD
HOLLYWOOD, SC 29449

CHARLESTON COUNTY COURT OF COMMON PLEAS

Tracy Smith,

Plaintiff,

vs.

Sarah Gainey, Save Inc.

Defendant

) Case No.: [Number] 2015-CP-10-6819

) Complaint:

) Breach Of Duty of Care,

) Misrepresentation,

) Breach Of Contract,

) Breach Of Fiduciary Duty,

) Intentional Infliction of Emotional

) Distress

Parties

Sarah L. Gainey, LPC, CEAP is President of SAVE, Inc. and personally counseled Plaintiff. SAVE, Inc. provides behavioral healthcare services and training for personal and Supervisory development. SAVE is an independent counseling and healthcare provider.

Venue

Venue is proper as Counseling was rendered in Charleston County at SAVE clinic at 4130 Faber Place.

1 Facts

2
3 As part of plaintiff's employment agreement, plaintiff
4 sought services including assistance, counseling, treatment,
5 therapy for occupational problems resulting from his employment
6 with Showa Denko.
7

8 Plaintiff initially received counseling treatment from
9 Sarah Gainey of SAVE Inc. Early during this treatment Sarah

10 Gainey requested plaintiff sign a release document to allow her
11 to verbally discuss matters with Plaintiff's coworkers.

12 Plaintiff decided against this agreement at this early stage of
13 treatment. Sarah Gainey subsequently ceased personal counseling
14 and instead referred Plaintiff to Jonathon Kessler who was
15 either a subcontractor or employed by SAVE, Inc. or employed by
16 Sarah Gainey.
17

18 Plaintiff received assistance, counseling, and treatment
19 from Jonathon Kessler at SAVE clinic at 4130 Faber Place up to
20 and including the date John Wing of Showa Denko wrongfully
21 terminated Plaintiff's employment.
22
23
24
25
26
27
28

1 Cause Of Action

2
3 Plaintiff incorporates the facts and allegations of
4 previous paragraphs as if stated verbatim.

5 Breach of duty to obtain adequate history. Sarah Gainey
6 and SAVE inc. were grossly negligent by failing to obtain an
7 adequate history and understanding of plaintiff's work
8 environment causing severe emotional distress and damage to
9 plaintiff.
10

11 Breach of Duty of Care. Sarah Gainey breached her duty to
12 use reasonable care in providing assistance and treatment of
13 plaintiff by intentionally raising her voice and using
14 accusatory language during counseling of plaintiff causing
15 severe emotional distress and damage to plaintiff.
16

17 Breach of agreement to maintain confidentiality. Sarah
18 Gainey shared confidential information regarding Plaintiff among
19 management of Showa Denko causing severe emotional distress and
20 damage to plaintiff.
21

22 Breach of Fiduciary Duty. Sarah Gainey acted with Gross
23 negligence and through her irresponsible actions, statements,
24 and disclosures financially damaged plaintiff.
25

26 Intentional Infliction of Emotional Distress. Sarah Gainey
27 acted with Gross negligence and through her irresponsible
28

1 actions, statements, and disclosures emotionally harmed,
2 severely distressed, and severely damaged plaintiff.

3 Breach of Duty to obtain Peer Consultation. Sarah Gainey
4 failed to obtain Peer Consultation and seek professional
5 consultation with appropriate parties and agencies in her
6 efforts to reconcile her dual obligations to Plaintiff and Showa
7 Denko causing severe emotional distress and damage to plaintiff.
8
9

10 Relief
11
12

13 Wherefore, Plaintiff prays for the following relief.
14

- 15 1) Lost wages, benefits, and expenses expended
16 seeking to rectify this matter.
17
18 2) Compensation for severe, pervasive, persistent
19 emotional distress.
20
21 3) Such other and further relief as the Court deems
22 appropriate.
23

24 Dated this Tenth day of
25 December, 2015

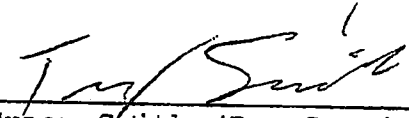
26 
27 Tracy Smith (Pro Se Litigant)
28

Exhibit 9

Release of HIPPA-Approved Designated Record Set (DRS)

Client: Tracy Smith SSN: not given

First Session: 9-7-12 Last Session: 12-18-12 Total Sessions to Date: 8

CPT Code for treatment modality: 90801 ☒ 90806 ☒ 90808 ☐ 90847 ☐ 99354 ☐

Frequency of treatment: 1 x week ☐ 2 x week ☐ 1 x month ☐ 2 x month ☐ varied

Results of Clinical Testing: No tests given ☒ Tests: _____

Symptoms: anxiety ☐ mood problems ☐ anger ☐ alcohol/drugs ☐ psychosis ☐ suicide ☐
homicide ☐ academic stress ☐ social stress ☐ traumatic stress ☐ marital stress ☐
work stress ☐ somatic complaints ☐ adjustment problems ☐ sexual problems ☐
personality problems ☐ cognitive problems ☐ sleep problems ☐ impulse-
control problems ☐ relational problems ☐ other problems ☒ occupational

Functionality: normal ☐ abnormal ☒ occupational problem

Diagnosis: Axis I V62.2 occupational problem
Axis II V71.09 no diagnosis on Axis II
Axis III —

Axis IV occupational problem

Axis V GAF as of the last session 70

Progress as of the last session: getting better ☐ getting worse ☐ about the same ☒

Prognosis as of the last session: good ☐ poor ☐ guarded ☒ unsure at this time ☐

Exhibit 10

Confidential Work Product In Response to Litigation

My name is Jonathan N. Kessler. I reside at 1820 Gun Club Road, Charleston, SC 29414. I give this written statement for consideration by any forensic expert witness who may review this matter for my attorney.

Attached to this statement is my *Curriculum Vitae*. I am an experienced Licensed Independent Social Worker. I work full-time for the Veterans Administration at its hospital in Charleston, South Carolina. There, I provide daily services to veterans, such as discharge planning, dialysis coordination and supervision of nine social work clinicians. Other than the instant lawsuit commenced by Tracy Smith, I have never been sued. I have never had an ethical complaint made against me. I have never had my license suspended or revoked. Since 2004, I also have worked part-time (about four hours a week) as an independent contractor for *Strategies to Assist Valuable Employees, Inc.* also known as "SAVE" in Charleston, South Carolina. SAVE is an Employment Assistant Program sometimes referred to as an "EAP." EAP services differ markedly from other clinical counseling services.

This written statement by me addresses some of my professional services (at SAVE) to Plaintiff Tracy Smith ("Smith") and to his employer, Showa Denko Carbon, Inc. ("Employer"). SAVE has a longstanding professional relationship with Employer and has received and handled many EAP referrals from Employer. I am experienced in providing EAP counseling services to hundreds of employees and their employers. I am familiar with the standards of care expected of an EAP counselor.

Employer referred Smith, its employee, to SAVE for EAP counseling on or about September 4, 2012. Smith was seen by SAVE's Director, Sarah Gainey, LPC, and who provided the initial EAP services to Smith and Employer. Ms. Gainey met with Smith twice at SAVE's office. Ms. Gainey then referred Smith to me, in an effort to try to establish a better rapport with Smith and to attempt further EAP services, and notably to try to salvage the working relationship between Smith and Employer. I did not review Ms. Gainey's progress notes prior to that point, so that my assessment of Smith might remain independent.

I saw Smith for a total of six sessions between September 25, 2012, and December 18, 2012.

I understood that Smith had been referred to SAVE by Employer's human resources director, Clint Lucas, as part of disciplinary action by Employer against Smith.

On September 25, 2012, Smith arrived for his session with me. I went over with Smith and had him execute a Employee Statement of Understanding which is self-explanatory. I also went over with Smith and had him execute an Authorization for Release of Protected Health Information. That agreement states that Smith expressly consented to my communicating (in

person or telephonically) certain information to Employer, such as: dates of my sessions with Smith, progress in my sessions with Smith, Smith's compliance and attendance and participation in the sessions, and my recommendations as to Mr. Smith's ability to engage in the therapeutic process. That signed agreement was faxed to Employer's HR director, as I understand it. On that date, Smith in his session reported to me that he was on administrative leave. He understood that he was there as a result of disciplinary action. Smith stated that an IT department employee had overheard Smith yelling and cursing at another IT team member- which Smith denied doing. Smith stated that he believed that some of his team members resented him because he 'plays the course, not the people'. Smith explained that he was brought in by Employer's IT manager to eventually take on the role as IT manager. Smith stated when he started with Employer, Smith wanted to integrate the Employer's network as a personal goal but he came to conclude that he was only there for data management and not for systems improvement. Through anecdotes Smith shared 'evidence' of his value to Employer and Smith presented a file folder of alleged evidence (e-mails, spreadsheets, etc.). Smith came across in that session as somewhat self-deprecating ("I tend to ramble") but also as grandiose ("I'm the most qualified to act as the IT manager"). Smith stated that his 'outburst' at work was reported by a 'spiteful' co-worker, and Smith minimized that incident. Smith admitted to job dissatisfaction and not receiving validation for his ideas and technical mastery. Our next session goal was to work on his interpersonal relationship and communication skills. On September 26th, I called Employer and reported that Smith had attended EAP counseling the day prior. Again, before seeing this client I understood from my coworker, Ms. Gainey, that Mr. Smith was on administrative leave and that the referral to SAVE was supervisor-mandated.

The next session was on October 9, 2012. Smith arrived thirty minutes late to his session and reported that his 'car was on fire'. Smith brought with him a folder containing more evidence/data. Smith was difficult to redirect during the session, and I asked him not to bring data folders to future sessions in order to let us focus on interpersonal skills. Smith stated that he thought Employer was 'squeezing out' the older work force. Smith stated that his aspiration was to complete a working product (networking goal as I previously stated) as a 'direct link' to upper management. He also stated that in the two years of employment there, the company was always "contentious" as it was in 'recovery' from an earlier incident. I asked Smith about his prior work experience and he reported some consultant work, and work at Allstate, Brooks Hill and some accounting. Smith mentioned that he scored low on "assertiveness." He reported that he 'side-steps' that issue, but that Smith was still perceived as aggressive. I offered to role play, at our next session, the part of his employer or coworker in order to facilitate identification of a positive communication style while alerting Mr. Smith to ineffective, or condescending speech. I was unable to initiate interpersonal or communication skill-building this session due to Smith's late arrival and his insistence on speaking to his evidence and data. Later, I notified Employer (HR) of Smith's attendance at that session.

The next session was on October 23, 2012. I recall that Smith did not intend to propose to management his ideas then to help improve the company and that Smith declined to participate in role play. The session focused on Smith's personal background and family. Smith reported that he had a "survivor mentality" and a "nurturing solitude." He described some traits of his parents and siblings. Smith indicated he had dated someone for seven years, but he believed marriage was for having kids and for financial benefit. Smith's personal goals included developing a professional accounting system, maintaining health, having a 'cash cushion,' and growing fruit trees on a farm in Louisiana. Smith indicated his parents wanted him to settle down and buy a house. At some point that day I spoke with Clint Lucas, the Human Resources Director at Employer. Lucas indicated that Smith still was not forming constructive relationships at Employer, Smith was offending people, Smith was talking down to supervisors and co-workers, and Smith was trying to change their system. I indicated to Lucas my continuing EAP goal of improving Smith's interpersonal skills. We discussed nothing that went beyond that, nothing that went beyond the proper scope of such an EAP plan and/or any employer feedback, and we discussed nothing outside the categories of and limitations on information Smith had authorized me and SAVE to disclose to Employer. Again, Employer's stated goal for Mr. Smith was to assist him with developing better interpersonal skills, more specifically to be able to better articulate his ideas in a manner less "offensive" and more "palatable" in order to form more constructive working relationships.

The next session was on November 13, 2012. Smith arrived on time and brought along a 'professional profile' (Profile XT, Grenell Consulting Group LLC). Smith indicated the profile (test) was completed on him and some other colleagues. The profile was dated 8/28/11. Profile documents showed many positive traits but also that Smith was rigid and judgmental - which he has been of his employer and colleagues. Smith stated, "I know my failures". We then focused on Smith's interpersonal skills but also explored his job culture/dynamics. Smith reported that Employer was like the TV show "Survivor" and people there were getting pushed out. Smith believed that it would be best for Employer to have a better company culture, but that "now, the best defense is offense." Smith viewed his job as a career stepping stone. Smith was not open to the concept of having more willingness to admit mistakes in order to gain trust with his colleagues and to help build a better work culture for increased productivity. Smith indicated that he felt he 'inherited' Employer's problems. Interpersonal skill training begins with a robust education on interpersonal dynamics, identification of his interactive style and communication pattern, which Smith would only superficially explore with me. I did not, to the best of my recollection, inform Employer of this session, and Employer did not contact SAVE to inquire about whether Smith had attended this session. There was no requirement I contact Employer.

The next session was on December 4, 2012. Smith arrived on time for the session and was cooperative and fully-participatory in process. He reported that he initially resented EAP sessions, but no longer did. He expressed frustration with Employer and immediate supervisors regarding implementing change. Smith wanted to remain employed for his 'resume' but he

hoped to 'make an impact' that would be noticed (i.e. system networking as I previously mentioned). We reviewed the ProfileXT again together. The profile suggested inflexibility and inability to accommodate. Smith considered asking Employer more directly for its 'recommendations' and specifically whether Smith should leave employment as part of a growth opportunity. We discussed Smith finding a mentor in his profession and he stated that he has one in mind. I did not, to the best of my recollection, inform Employer of this session, and his employer did not contact SAVE to inquire about whether Smith had attended.

The last session was on December 18, 2012. Smith arrived early to session, joined by his mother. I required his mother to execute the same confidentiality agreements and authorizations that Smith had previously executed. Smith appeared agitated and defensive. He indicated his mother was present as a "witness." Smith asked me to explain my role, my professional background, and to describe EAP services and my relationship with Smith's employer, which I did. I explained that EAP is neutral and my goal is to promote employer/employee satisfaction and productivity. Smith then reported that he was 'fired' that morning. Smith stated his intention to retain an attorney. The remainder of our session was not particularly productive.

I have had no further sessions with Smith.

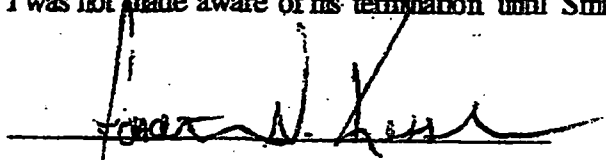
I did not speak with Smith's employer after October 23, 2012. Until this week, I was unaware of the reasons for Smith's termination. Employer recently produced Smith's employment file to my counsel, and which I have reviewed this week. Employer stated in those documents, and in a court affidavit, that Smith was terminated in December 2012 for disobeying certain directives relating to Smith's unauthorized involvement in hardware procurement. That particular issue was never mentioned to me by Employer or by Smith as a concern in the period of time I provided professional services. Nothing I did or said, or failed to do or say, had anything to do with Smith's termination.

Overall, I conclude that Smith had difficulty with interpersonal interaction, and had poor insight into that problem, and he instead focused on his sense of technical superiority and his need to leave a 'legacy' at Showa Denko Carbon, Inc. Smith received no such validation and upon his termination, he experienced abandonment. He perceived others to be the root cause of his problems. That attitude and behavior, in my opinion, similarly is what Smith is engaging in by suing me and blaming me and SAVE for his job termination.

Smith commenced a separate lawsuit against SAVE and Sarah Gainey, LPC with the similar allegations asserted as in the lawsuit he brought against me. That lawsuit against SAVE and Gainey was recently dismissed by the Court.

Smith commenced another separate lawsuit against Showa Denko Carbon, Inc. with allegations of wrongful termination, among others. That lawsuit was recently dismissed by the Court.

In my opinion, I have not deviated from any standard of care applicable to my professional EAP services, nor have I done anything improper or unethical. My limited communications with Smith's employer were proper in scope and were with Smith's express permission. My services to them appear to have no nexus to the reasons that Smith was terminated from his employment. I was not made aware of his termination until Smith told me, after that termination occurred.


Jonathan N. Kessler, LISW

7 28 16

Date

PROOF OF SERVICE OF APPEAL

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 Jack Gresh
40 Calhoun Street, Suite 550
Charleston, SC 29401

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FEB 23 2017

SC Court of Appeals

PROOF OF SERVICE

I certify that I have served the Reply Brief of Appellant on Sarah Gainey and SAVE Inc. by FEDEX on February 22, 2017 addressed to his attorney of record, Jack G. Gresh, 40 Calhoun Street, Suite 550, Charleston, SC 29401.

February 22, 2017


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Pro Se Appellant

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SHIP DATE: 22FEB17
ACTWGT: 1.10 LB
CAD: 6990916/SSF01722

BILL CREDIT CARD

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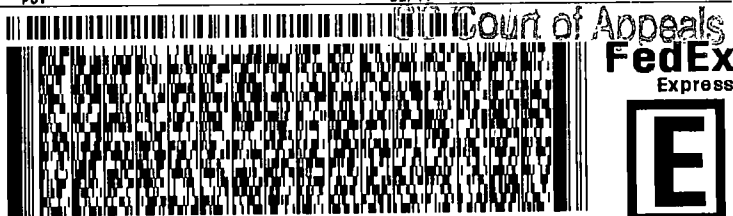
FEB 23 2017

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