

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Tracy Smith,

Smith,

vs.

Jonathon Kessler,

Kessler.

) IN THE COURT OF COMMON PLEAS

) NINTH JUDICIAL CIRCUIT

) Civil Action No.: 2015-CP-10-6820

) ORDER FOR ENTRY OF JUDGMENT
) IN FAVOR OF KESSLER

) **RECEIVED**

) SEP 08 2017

) SC Court of Appeals

BY

JULIE J. ARMSTRONG
CLERK OF COURT

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STATEMENT OF THE CASE

On December 17, 2015, the plaintiff Tracy Smith ("Smith") commenced the instant action against the defendant Jonathon Kessler ("Kessler"), his employee assistance counselor. The Complaint alleges claims for breach of contract, professional negligence, and breach of fiduciary duty.¹ Smith was subsequently granted, in a hearing the day before trial, leave to amend to allege causes of action for tortious interference with business relations, tortious interference with contract, and violation of the South Carolina Unfair Trade Practices Act ("SCUTPA").

This matter came before the Court for a non-jury trial during the June 5, 2017, term of court. Smith appeared *pro se*. Kessler was present and represented by R. Scott Wallinger, Jr., Esquire. To accommodate schedules of various fact and expert witnesses and the Court, certain of Kessler's witnesses were offered by Kessler prior to Smith resting his case. Kessler offered additional evidence and testimony then rested. The Court allowed Smith generous leeway, well beyond what a litigant represented by counsel would normally be given, to question witnesses and present evidence and offer legal arguments. Procedurally, at the close of Smith's case, Kessler

¹ Smith previously dismissed with prejudice his intentional infliction of emotional distress cause of action.

moved for a directed verdict, which is properly construed in a non-jury trial as a motion for dismissal pursuant to Rule 41(b), SCRPC. For the following reasons, the Court grants Kessler's motion for involuntary dismissal pursuant to Rule 41(b), as Smith has shown no right to relief upon the facts and the law. Alternatively, the Court finds Smith has failed to prove each cause of action by a preponderance of the evidence and that judgment should be entered for Kessler.

FINDINGS OF FACT

1. Smith is single, currently a resident of Louisiana, and has resided and worked for much of his adult life in the Charleston area. Smith is a college graduate and has worked in various information technology positions for over 20 years.
2. Kessler is a resident of Charleston, married with children, an experienced Licensed Independent Social Worker with a clinical practice designation, and is licensed by the State of South Carolina. Kessler works full-time for the Veterans Administration Hospital in Charleston, serving military personnel and veterans. For several years, including the period of time relevant to this case between September and December 2012, Kessler has also worked part-time as a contract counselor and independent contractor for SAVE, Inc. ("SAVE") in Charleston. SAVE provides certain professional and counseling services to employees referred by Charleston-area employers. The Court will refer to such professional counseling services by SAVE and Kessler as "employee assistance counseling."
3. Employee assistance counseling differs from other clinical counseling services. Employee assistance counseling generally involves an employer referring its employee to SAVE for counseling of an employee about matters and difficulties an employee is having in the employment setting. The employee is a clinical client of SAVE. The employer is a

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contractual, non-clinical client of SAVE in that dual relationship. The employee is counseled with a goal of resolving issues identified by the employer, the employee, or SAVE for mutual benefit of the employee and employer. The counseling is intended to be short-term with no in-depth psychological or psychiatric diagnosis of the employee. SAVE periodically makes a verbal report to the employer, within the limitations of whatever consent the employee has given, on the employee's attendance and in some instances the progress in the counseling.

4. By virtue of Kessler's education, training, professional career, and experience as a counselor with SAVE as reflected by his extensive testimony as well as that of two of his witnesses, Ms. Gainey and Mr. Krasilovsky, the Court finds that Kessler was and is abundantly qualified to provide employee assistance counseling to Smith. The testimony showed Kessler was and is familiar with applicable standards of care relating to such counseling as well as to the limitations on communications Kessler could have with third-parties and Smith's employer. During lengthy questioning by Smith, Kessler demonstrated his professionalism, patience, and judgment.
5. The Court finds that Kessler is not a certified employee assistance professional or "CEAP" and as such the standards applicable to CEAP's are inapplicable to assessing the standard of care owed by Kessler in this case. In referring to employee assistance counseling, the Court is not referring to whatever counseling a CEAP may be obligated to undertake by virtue of that designation.
6. In 2012, Smith was employed with Showa Denko, Carbon, Inc. ("Showa Denko"), a Dorchester County manufacturer, in the company's information technology department. Showa Denko's management had experienced significant difficulties with Smith's

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workplace behavior and performance, and concluded that Smith needed to improvement of his interpersonal skills and interaction with other employees. Smith had exhibited hostility to co-workers, used profanity, and expressed his interest in having the company make various changes in its information technology and plant operations that were not deemed necessary or optimal by co-workers or by management.

7. On or about September 4, 2012, Smith was referred to SAVE for employee assistance counseling as a condition of Smith's continued employment at Showa Denko. Smith performed various intake paperwork and had two counseling sessions with Sarah Gainey, LPC, the owner of SAVE. Ms. Gainey then decided the client-counselor relationship was not going well enough and she assigned Kessler, whom she supervised administratively, to take over counseling of Smith. Kessler, as a counselor for SAVE, began providing employee assistance counseling to Smith on September 25, 2012. Kessler was at all relevant times acting as an agent and servant of SAVE, under SAVE's control, and for benefit of SAVE.
8. At the outset of Smith's course of interaction with Kessler, Kessler explained his role, the process, and obtained new written consent for Kessler and SAVE to periodically communicate with Smith's employer and disclose certain information, such as dates of sessions, compliance, progress, and recommendations. (Def. Exhibit 6, Bates page 28). Such disclosures are a common part of employee assistance counseling, since the employer is also a client of SAVE. Smith was given ample opportunity to review the written consent documentation. The Court finds that Smith had the ability to understand and did understand the various documents and disclosures he read and signed willingly and voluntarily, and that there was no deception or malfeasance on the part of Kessler or SAVE in that regard.

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The Court finds that Smith was a clinical client of Kessler and SAVE and that Showa Denko Carbon, Inc. was a non-clinical client of SAVE within the context of employer-referred counseling services.

9. Kessler met with Smith for employee assistance counseling sessions on September 25, October 9, October 23, November 13, December 4, and December 18, 2012. After the session on October 23, 2012, Kessler notified Showa Denka that Kessler and Smith were continuing to work on improving Smith's interpersonal communication skills, the very issue for which Showa Denka had referred Smith to SAVE of which Showa Denko had requested assistance. During the various sessions to that point in time, Smith resisted engaging in the aspects of counseling discussions and strategies which Kessler felt necessary and appropriate to try to assist Smith. The evidence showed that Smith seemed to want to focus on convincing Kessler that he was correct in his disputes with his fellow employees. However, Kessler tried unsuccessfully to explain to Smith that his role was not to mediate the dispute but rather to assist Smith to get along better with his fellow employees.
10. After the October 23, 2012 counseling session, Kessler had no further contact with Showa Denko. Unbeknownst to Kessler, Smith was engaging in various workplace endeavors and projects in direct violation of the orders of Smith's supervisors.
11. Because of Smith's unauthorized actions, and unrelated to any actions of Kessler, the employer decided to terminate Smith's employment, which was an at-will position, for such insubordination, and accordingly the employer terminated Smith on December 18, 2012. The Court finds the testimony and earlier sworn affidavit of John Wing to be the most credible evidence of this fact. Mr. Wing was in management at Showa Denko during



the period Smith was going to counseling at SAVE. Mr. Wing testified that he never had any conversations or communications with Kessler, and was generally unfamiliar with the services and efforts Kessler was undertaking. Mr. Wing testified that Showa Denko decided to terminate Smith's employment in December 2012 due to Smith's insubordination, and that decision had nothing to do with SAVE or Kessler. Mr. Wing testified that when Smith was terminated, Smith was escorted from the premises. Kessler was not there and had no involvement in how such termination occurred. The Court finds his testimony to be credible and true.

12. After his termination, Smith went the same day to see Kessler for a final employee counseling session, although the evidence is clear that any services at that point would not have assisted Smith in keeping his position at Showa Denko. Smith advised Kessler that Smith had been terminated. Kessler first learned of the termination at that session, but Kessler did not learn until sometime after filing of this lawsuit why Smith had been terminated.²
13. Kessler offered extensive testimony of a retained expert, Arthur Krasilovsky, who is a Licensed Independent Social Worker and a Certified Employee Assistance Professional ("CEAP"), and introduced his written report. Mr. Krasilovsky offered his opinions on the applicable standards of care, and in particular opined that Kessler was obligated to follow only internal policies of SAVE, the NASW Code of Ethics, and South Carolina statutes and regulations governing the practice of social work. Mr. Krasilovsky testified that because Kessler was not a CEAP, he was not obligated to follow the ethical and

² The Court notes that Smith brought a separate suit against Showa Denko for alleged wrongful termination. That suit was settled under confidential terms and was dismissed. The actions of Showa Denko, whether or not proper in Smith's eyes, are not attributable to or the responsibility of Kessler or SAVE.



professional standards promulgated by the National Employee Assistance Professionals Association, and those standards do not provide the minimum standard of care to be followed by Kessler in his employee counseling services to Smith.

14. Mr. Krasilovsky opined that Kessler provided appropriate counseling to Smith, was not negligent in any aspects of those professional services, and did not deviate from the applicable standards of care. Mr. Krasilovsky testified Kessler owed no duty to obtain any "peer-consultation" or to refer Smith to other professionals, legal counsel, or regulatory agency to assist with his employment difficulties. On cross-examination, Smith elicited further testimony from the expert, to Smith's detriment, that Smith was indeed disruptive in the workplace, despite his counseling, and that the workplace controversy was not the result of the co-workers or supervisors, or to any hostile work environment, but was due to Smith's own behavior. The Court finds his testimony to be credible and persuasive.
15. Kessler testified in his own defense consistently with Mr. Krasilovsky. The Court further finds the testimony of Kessler, including his recitation of his earlier written statement (Pl. Ex. 1) which is incorporated herein by reference, to be credible and true. The Court concludes that Kessler's services to Smith were appropriate and within the applicable standard of care, and that Kessler did not communicate anything improper to any third party or to Showa Denko. The Court finds that Smith's termination from Showa Denko was not done at the behest of, knowledge of, or with any participation by Kessler or SAVE.
16. Sarah Gainey, LPC, the owner of SAVE, is a licensed professional counselor and has had a lengthy and successful career in employee assistance counseling. She is an expert in that field. Ms. Gainey offered no criticisms of Kessler's counseling of Smith and she expressed

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full confidence in Kessler. She further opined that Kessler performed his counseling services appropriately. The Court finds her testimony to be credible and true.

17. Smith presented no expert testimony to establish any standard of care, any breach of any standard of care, or any causal relationship between any supposed breach and any damages alleged to have been incurred.
18. Smith testified that prior to his termination by Showa Denko, he had hoped to eventually become the IT Manager at the plant. Beyond this hope Smith offered no evidence that Smith was hired to assume that role or that he was likely to ever be promoted to that position. The Court finds that Smith had no employment contract with Showa Denko.
19. Smith testified that upon his termination he experienced emotional distress, particularly associated with the manner of his termination by the employer, which Smith alleges was humiliating. Smith offered no testimony or evidence, and notably no expert testimony, of incurring any specific, diagnosable physical, emotional, or psychological injury, or any treatment, at any cost, arising from or because of his termination or arising from his employee assistance counseling with Kessler and SAVE.
20. Smith offered as Exhibit 2 a "Profile XT" report which had been prepared during his employment with Showa Denko and which Smith maintains demonstrates various behavioral and psychological traits. The author of that report did not testify, the methodology and underlying test data is unknown, and the Court finds the report not probative as to proof of liability of Kessler or of any damages alleged by Smith.
21. Smith offered as Exhibit 3 a SAVE marketing brochure about employee assistance counseling services. The Court finds that brochure to be accurate, but that Kessler was not involved in preparing or offering the brochure to the public or to Smith.



22. Smith offered various e-mails and professional and work documentation as his Exhibits 5, 7, 8, 9, 10 and 11. Although these were reviewed by Kessler in counseling sessions to the extent necessary, they do not establish any liability of Kessler or damages to Smith from any actions of Kessler or SAVE. Kessler's expert, Mr. Krasilovsky, opined that that information suggested that Smith, not others, was the cause of the workplace problems and the evidence on the whole supports that conclusion.
23. Aside from Smith testifying generally that he "lost his job," Smith offered no testimony or evidence of any specific pecuniary or economic loss associated with his job termination. The Court would have to speculate whether or when Smith attempted to or did obtain new or other employment, and whether at a lower, similar, or higher rate of compensation, and whether any economic or pecuniary loss actually occurred, and if so how much. In short, Smith failed to offer any competent evidence as to prove any economic damages recoverable under any of the causes of action asserted.

CONCLUSIONS OF LAW

Giving Smith all benefit of the doubt as to his Complaint's factual and legal pleadings, the Court addresses his causes of action:

Breach of Contract

To recover for a breach of contract, Smith must prove: 1) a binding contract entered into by the parties; 2) breach of unjustifiable failure to perform; and 3) damages suffered as a direct and proximate result of the breach. *Fuller v. Eastern Fire & Casualty Ins. Co.*, 240 S.C. 75, 124 S.E.2d 602, 610 (1962). The Court finds that Smith had no contract with Kessler, but rather Smith had a contract with SAVE for certain counseling services that SAVE agreed to undertake. Accordingly, Kessler himself owed no duty to Smith arising in contract.

Furthermore, regardless of whether a contract existed, as discussed above Smith proved no breach, nor any damages resulting from any breach that would be recoverable under contract law. Smith's claimed damages for "emotional distress" are not recoverable in contract, and, as discussed hereinabove, no evidence was offered of economic damages. *See Whitten v. American Mut. Liability Ins. Co.*, 468 F. Supp. 470, 473 (D.S.C. 1977) ("the law of this state makes no provision for the recovery of damages for emotional distress or mental anguish resulting from breach of contract, no matter what the intent of the breaching party was in failing to fulfill its obligations.").

Finally, Smith fails to show that any such actions by Kessler were the proximate cause of why he was fired by Showa Denko. The Court reiterates the earlier finding of fact that Smith was fired by Showa Denko for his insubordination - actions with which Kessler had nothing to do.

The Court hereby grants Kessler's motion for dismissal pursuant to Rule 41(b), SCRPC on this cause of action. Even if there were any evidence sufficient to deny that motion, the Court finds that by the preponderance of evidence that Kessler shall prevail on this cause of action.

Professional Negligence

Smith asserts a professional negligence claim which requires him to provide evidence showing (1) the generally recognized and accepted practices and procedures that would be followed by average, competent practitioners under the same or similar circumstances; (2) that Kessler departed from the recognized and generally accepted standards; and (3) that Kessler's departure from such generally-recognized practices and procedures was the proximate cause of Smith's alleged injuries and damages. *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 248, 626 S.E.2d 1, 4 (2006). Smith must provide expert testimony to establish both the required standard of care and the Kessler's failure to conform to that standard, unless the subject matter lies within

the ambit of common knowledge so that no special learning is required to evaluate the conduct of Kessler. *Id.*; see also *Gilliland v. Elmwood Props.*, 301 S.C. 295, 301, 391 S.E.2d 577, 580 (1990); *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 351 S.C. 459, 472, 570 S.E.2d 197, 203 (Ct. App. 2002). Smith, as a lay witness, cannot testify as to the standard of care that applies to Kessler or any deviations therefrom. See Rule 701, SCRE.

The Court finds that the subject matter herein is beyond the ambit of “common knowledge.” As discussed above, Smith presented no testimony or evidence, and most notably presented no expert testimony, of any unprofessional, improper, or negligent act or omission by Kessler, nor any deviation from the standard of care. Such expert testimony is necessary in this case, as the matter of employee assistance counselling is not within the ambit of common knowledge. To the contrary, Kessler and two other experts demonstrated Kessler complied with the standard of care in his provision of employee assistance counseling to Smith. Kessler’s communications with the employer, the last of which occurred around October 23, 2012, were all well within the parameters to which Smith previously had given his express consent, and were made with Smith’s consent. The Court finds Kessler owed no duty to obtain a “peer consultation” as alleged by Smith. The Court further finds Kessler owed no duty to refer Smith to other clinicians, legal counsel, or government agencies for further assistance. Finally, regardless of whether Smith could prove a breach of duty, no act or omission on the part of Kessler caused Showa Denko to terminate Smith’s employment. In short, the Court finds that none of Kessler’s communications with, services to, or advice to Smith were in any way inadequate, improper, unprofessional, negligent, or fraudulent, and that there was no breach of any professional duty or deviation from the applicable standard of care.

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For the same reasons discussed hereinabove, the Court finds that Smith has failed to prove any damages recoverable under this cause of action.

Again, Smith fails to show that any such actions by Kessler were the proximate cause of why he was fired by Showa Denko. The Court reiterates the earlier finding of fact that Smith was fired by Showa Denko for his insubordination - actions with which Kessler had nothing to do.

Therefore, the Court grants Kessler's motion for dismissal pursuant to Rule 41(b) on this cause of action. In the alternative, even if there were any evidence sufficient to deny that motion, the Court finds that by the preponderance of evidence that Kessler shall prevail on this cause of action.

Breach of Fiduciary Duty

"To establish a claim for breach of fiduciary duty, [Smith] must prove (1) the existence of a fiduciary duty, (2) a breach of that duty, and (3) damages proximately resulting from the wrongful conduct of Kessler." *Turpin v. Lowther*, 404 S.C. 581, 745 S.E.2d 397, 401 (Ct. App. 2013). The Court finds that Smith failed to prove any breach of fiduciary duty or that such breach caused any damages to Smith recoverable under such a cause of action.

Again, Smith fails to show that any such actions by Kessler were the proximate cause of why he was fired by Showa Denko. The Court reiterates the earlier finding of fact that Smith was fired by Showa Denko for his insubordination - actions with which Kessler had nothing to do.

The Court hereby grants Kessler's motion for dismissal of this claim pursuant to Rule 41(b), SCRPC. Even if there were any evidence sufficient to deny that motion, the Court finds that by the preponderance of evidence that Kessler shall prevail on this cause of action.

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Tortious Interference with Business Relations

The elements of this cause of action are (1) intentional interference with prospective contractual relations, (2) for an improper purpose or by improper methods, and (3) resulting injury. *Crandall Corp. v. Navistar Int'l Transp. Corp.*, 302 S.C. 265, 266, 395 S.E.2d 179, 180 (1990). The Court finds that Smith has failed to prove any of the elements of this cause of action and has failed to prove any damages recoverable thereunder.

Again, Smith fails to show that any such actions by Kessler were the proximate cause of why he was fired by Showa Denko. The Court reiterates the earlier finding of fact that Smith was fired by Showa Denko for his insubordination - actions with which Kessler had nothing to do.

The Court hereby grants Kessler's motion for dismissal pursuant to Rule 41(b) on this cause of action. Alternatively, even if there were any evidence sufficient to deny that motion, the Court finds that by the preponderance of evidence that Kessler shall prevail on this cause of action.

Tortious Interference with Contract

To establish intentional interference with a contract, Smith must prove: (1) a contract; (2) the wrongdoer's knowledge thereof; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) the damage resulting therefrom. *Camp v. Springs Mortgage Co.*, 310 S.C. 514, 426 S.E.2d 304 (1992); *DeBerry v. McCain*, 275 S.C. 569, 274 S.E.2d 293 (1981). The Court finds that Smith has failed to prove any of the elements of this cause of action and has failed to prove any damages recoverable thereunder.

Again, Smith fails to show that any such actions by Kessler were the proximate cause of why he was fired by Showa Denko. The Court reiterates the earlier finding of fact that Smith was fired by Showa Denko for his insubordination - actions with which Kessler had nothing to do.



The Court hereby grants Kessler's motion for dismissal pursuant to Rule 41(b) on this cause of action. Furthermore, even assuming sufficient evidence existed to deny that motion, the Court finds that by the preponderance of evidence that Kessler shall prevail on this cause of action.

Unfair Trade Practices Act

To recover in an action under the SCUTPA, Smith must show: (1) Kessler engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) unfair or deceptive act affected the public interest; and (3) Smith suffered monetary or property loss as a result of the Kessler's unfair or deceptive act. S.C. Code Ann. § 39-5-10 *et seq.*; *Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry*, 403 S.C. 623, 743 S.E.2d 808 (2013). "An act is 'unfair' when it is offensive to public policy or when it is immoral, unethical, or oppressive." *Id.* The Court finds that Smith has failed to prove any of the elements of this cause of action and has failed to prove any damages recoverable thereunder.

Again, Smith fails to show that any such actions by Kessler were the proximate cause of why he was fired by Showa Denko. The Court reiterates the earlier finding of fact that Smith was fired by Showa Denko for his insubordination - actions with which Kessler had nothing to do.

Accordingly, Kessler's motion for dismissal of Smith's SCUTPA claim is granted pursuant to Rule 41(b). In the alternative, considering the evidence presented, the Court finds that by the preponderance of evidence that Kessler shall prevail on this cause of action.

Application of S.C. Code Ann. § 19-11-95

Kessler asserts Smith's claims are barred by S.C. Code Ann. § 19-11-95(C)(1) and (H). This statute provides that "a provider may reveal: (1) confidences with the written authorization of the patient or patients affected, but only after disclosure to them of what confidences are to be

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revealed and to whom they will be revealed.” S.C. Code Ann. § 19-11-95(C)(1). The statute further provides:

A provider releasing a confidence under the written authorization of the patient or under the provisions of this section is not liable to the patient or other person for release of the confidence to the person authorized to receive it; provided, however, a patient has a cause of action for damages against a provider, associate, agent, employee, or any other person who intentionally, wilfully, or with gross negligence violates the provisions of this section.

S.C. Code Ann. § 19-11-95(H).

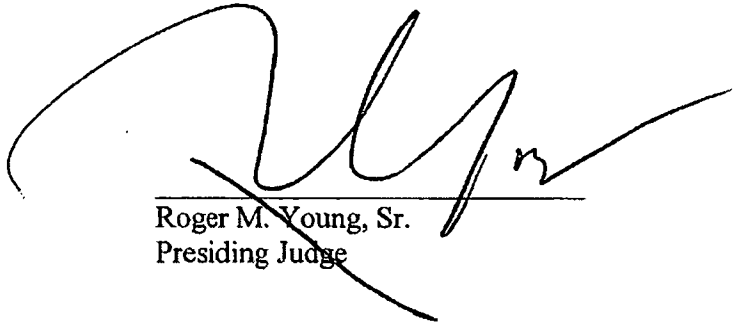
As previously outlined, Kessler fully explained the employee assistance counseling concept to Smith prior to beginning counseling and obtained written consent for Kessler and SAVE to periodically communicate with Smith’s employer and disclose certain information, such as dates of sessions, compliance, progress, and recommendations. Smith knowingly and voluntarily executed this authorization. There was no evidence of fraud or other deception by Kessler in obtaining the requisite authorization, nor that Kessler intentionally, wilfully, or with gross negligence violated S.C. Code Ann. § 19-11-95. Therefore, the Court finds Kessler’s communications with Showa Denko complied with S.C. Code Ann. § 19-11-95 and all Smith’s claims are barred.

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CONCLUSION

For the reasons set forth hereinabove, IT IS ORDERED, ADJUDGED AND DECREED that Kessler's motion for dismissal pursuant to Rule 41(b), SCRCP is hereby GRANTED. Alternatively, upon a review of all evidence presented and considered under the preponderance of evidence standard, IT IS ORDERED, ADJUDGED AND DECREED that a verdict shall be and is hereby entered in favor of Kessler; that Smith shall take nothing; and that judgment shall be and is hereby entered in favor of Kessler.

AND IT IS SO ORDERED.



Roger M. Young, Sr.
Presiding Judge

8/7, 2017
Charleston, South Carolina